New traps and not so new traps in Unfair Dismissal Cases *

Whether acting for an employee or an employer in an Unfair Dismissal cases the provisions of Section 14 of Unfair Dismissal Act 1977-1993 should never be underestimated.

Section 14 (1) provides that an employer shall not later than 28 days after an employee enters to a Contract of Employment give the employee a notice in writing setting out the procedures which the employer will observe for the purposes of dismissing the employee. If this is not done it is important, before any disciplinary process takes place that the disciplinary procedures are set out. Failure to provide the employee with disciplinary procedures may now result in the dismissal being deemed unfair. The employee should have a right to an initial investigation, and appeal, a right to representation and most definitely a right to all documentation and witness statements that the employer will be relying upon as part of the disciplinary process.

One issue which is constantly catching out representatives of employer is Section 14 (4) as inserted by the Unfair Dismissal (Amendment) Act 1993. Where an employee is dismissed the employer shall, and it is prescriptive, if so requested furnish to the employee within 14 days of a request particulars in writing of the principle grounds for dismissal. In an Unfair Dismissal case subsequently other grounds can, if they are substantial grounds, be taken into account. There is no penalty for an employer failing to respond. However, where an employer does not respond an inference can be, and most probable will be, drawn from the failure of the employer to respond.

In Unfair Dismissal cases the provisions of Section 14 are often overlooked. It is a very useful procedure by an employee to utilise before proceedings issue. Because of the fact that, under the new procedures, an employee must set out particulars as to their claim, this Section may be used more often. If an employee furnishes a request and no response is furnished within 14 days then the employee has an important option. The employee can simply lodge a claim which states:

"I was unfairly dismissed. I made a request under Section 14 Unfair Dismissals Act 1977-1993 which the employer has refused to respond to. I therefore have not been advised, in accordance with law, of the grounds of my dismissal".

That will be more the sufficient for the employee to claim that they have made a valid complaint. In cases where the employer will be contending that the employee abandoned the job or resigned a failure to respond to Section 14 request, particularly where the employee claims that he/she was dismissed may well be treated on the basis that any reasonable employer would, in those circumstances, have responded immediately setting out that it was a resignation or an abandonment of the position. For colleagues who go through the Workplace Relations Commission and have a matter dealt with by an Adjudicator and wish to appeal it should be noted that the Labour Court requires the party appealing to lodge a detailed submission relating to their claim within three weeks of lodging the appeal. It is not three weeks form the request. It is three weeks from lodging the appeal. Therefore colleagues lodging appeals need to carefully consider getting all documentation in place for furnishing to the Labour Court. This would include an outline of all the relevant facts. It would include particulars as to the names of witnesses and the evidence that those witnesses are going to give. It would not be sufficient to simply lodge an appeal in broad terms. Detailed submissions will be required. The party responding to the appeal must also be given a copy and evidence must be furnished, to the Labour Court, that a copy of the appeal has been served on them or their representative. The party responding to the appeal will be written to by the Labour Court and given three weeks to lodge their paper work. Once appeal documentation is received by the party who is not appealing immediate step should be put in place for detailed submissions to be prepared along with lists of witnesses and the evidence of those witnesses are going give.

It should be noted that it would not be sufficient to simply set out matters in general terms and to state that further and better particulars will be furnished at a later stage. You are required to set out your full case.

The Labour Court made it very clear that there will be no ambushing. Evidence to mitigate loss will be required from the employee. Employers would be required to set out all documentation relating to disciplinary procedures, how they were applied in practice and all documentation relating to the disciplinary process.

For colleagues dealing with Unfair Dismissal cases there is a significant front loading of work to be done. Cases will be dealt with before the Workplace Relations Commission hopefully within twelve weeks of claims being lodged. Decisions will issue in future within eight to ten weeks. Appeal will be heard by the Labour Court very quickly. The days of either lodging a claim or simply responding and waiting until the case comes on for hearing and then looking to start preparing your documentation for exchange on the day is no longer an option. Front loading of work on cases will require significant amount of work to be done well in advance of the hearing and furnished to the other side. Colleagues acting for employers will now need to consider, because of the cost involved in preparation of cases for hearing, the issue of an early settlement. Employers will need to aware, as well as employees, that the option for reinstatement, which was not really an option when an employee have been out of work for two years waiting for their case to come on for hearing, will now be a realistic option for an Adjudicator or the Labour Court. If an employee opts for reinstatement as a tactical move on the claim form they may well find themselves in a situation of getting reengagement with no back pay rather than compensation. The converse is that if the employer opts for compensation as to preferred option where an Adjudicator or the Labour Court determine that the actions of the employer were unreasonable and that the employee should get their position back, employers may well find that they end up with a reinstatement decision requiring the back payment of wages to the date of the dismissal and having to take the employee back. If taking the employee back is a realistic option the employer should be notifying the employee through their representative if they have one or directly if they do not that the employer is prepared to reengage the employee. If the employee has opted for reinstatement they will need to consider very carefully taking up the positon under protest and letting an Adjudicator/the Labour Court determine whether it should have been reinstatement. If the employee has opted for compensation they may find it more difficult unless an Adjudicator or the Labour Court confirms that trust and confidence have been completely lost to justify

not accepting reengagement and therefore that their loss would crystalize when the offer was made to reengage them.

We are now in a completely new environment relating to Unfair Dismissal cases. Employers are going to need to react very quickly and particularly to Section 14 requests. Equally employees are going to have to know that cases are going to come on quickly and that hard choices may have to be made at relatively short notice.

Because matters are now so front ended there is going to be a cost issue. There is going to be a considerable amount of work which is going to have to be undertaken virtually immediately whether acting for an employer or an employee. Detailed and comprehensive instructions will need to be taken on whichever side you are representing. Once a claim is lodged immediate action and work is going to have to be undertaken. This will be a cost issue which those wishing to have legal representation will have to address at the start. I would caution colleagues who are undertaking Unfair Dismissal work to read the Labour Court guidelines on the Workplace Relations Commission website along with the Workplace Relations Commission guidelines. Failure to comply with these could have a negative impact on your client. This is therefore a risk issue which colleagues must be conversant with.

There are traps there for an unwary and I hope this article will help colleagues avoid the traps.

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***Before acting or refraining from acting on anything in this update legal advice from a Solicitor should be obtained.**

In contentious cases a Solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.