Terms of Employment (Information) Act – Technical Notes and Overview for Employers

The Terms of Employment (Information) Act 1994 as amended was an Act introduced to provide for the implementation of Directive no. 91/533/EEC of 14 October 1991. An employer who fails to comply may have to pay an employee up to 4 weeks wages as compensation.

The scope of the Directive and in particular Article 2 thereof was considered by the Court of Justice in case C-35099 Lang –v- George Schuenemann GmbH [2001] E.C.R. 1-1061 the Court said that the obligation to notify employees concerned "all the aspects of the contract of employment relationship, which are, by virtue of their nature, essential elements" Article 2 (2) did not reduce the scope of that general requirement and the elements listed therein did not constitute "an exhaustive list of the essential elements referred to in Article 2 (1)". Apart from the elements mentioned in Article 2(2) of the Directive, any element, which in view of its importance, must be considered an essential element of the contract of which it forms part must be notified to the employee.

The Act has been amended a number of times.

(fa) was inserted by Section 18 of the Industrial Relations (Amendment) Act 2012

(g) and (ga) of subsection (1) were inserted by Section 44 of the National Minimum Wage Act 2000.

Section 10 (2) of the Protection of Employees (Temporary Agency Work) Act 2012 empowers the Minister, for the purposes of the 1994 Act, to make regulations to make provision in relation to the giving of information by persons to an agency workers carries out work (hirers) to employment agencies for the purposes of enabling such agencies to comply with the 2012 Act.

Pursuant to the Terms of Employment (Information) Act 1994 (Section 3 (6)) Order 1977 SI No 4 of 1977 an employer of a child or young person within the meaning of the Protection of Young Persons (Employment) Act 1996 must give or cause to be given not later than one month later after the commencement of the employment a copy of the abstract of 1996 Act prescribed by Section 12 of that Act.

Pursuant to the Terms of Employment (Additional Information) Order 1998 SI No 49 of 1998 Article 3 (1) an employer must give or cause to be given, within two months of the commencement of employment a statement in writing containing particulars of the terms and duration of the rest periods and breaks referred to in Sections 11, 12 and 13 of the Organisation of Working Time Act 1997 that are being allowed to the employee and any other terms and conditions relating to these periods and breaks. We would point out that the records required to be kept under Section 25 (1) of the Organisation of Working Time Act 1997 includes a copy of the Statement of Particulars provided under this Act.

Where an employee is employed on a fixed term contract Section 8 (1) of the Protection of Employees (Fixed-Term Work) Act 2003 requires the employer to inform the employee, as soon as "practicable" of the objective conditions determining the contract.

Under the provisions of Section 14 of the Unfair Dismissals Act 1977 (as amended) an employer is obliged to give employees a notice in writing setting out the procedures which the employer will observe before and for the purposes of dismissal. Clause 3.3 of the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 SI No 146 of 2000 provides that a copy of the grievance and disciplinary procedure should be given to all employees (at the commencement of employment).

The provisions of Section 3 (1) of the Act provides that an employer shall not later than two months after the commencement of an employee's employment with the employer, give or cause to given to the employee a statement in writing containing the particulars set out in Section 3 of the terms of the employee's employment.

By the use of the word "shall" this is a mandatory requirement.

Section 3 (4) provides that a statement furnished by an employer under subsection (1) shall be signed and dated by or on behalf of the employer.

Again the word "Shall" is used. This is mandatory.

Section 3 (5) provides that copy of the said statement shall be retained by the employer during the employees employment and for a period of one year thereafter.

There is no requirement under Section 3 for the employee to sign anything. The obligation is on the employer to provide a copy to the employee signed and dated for or on behalf of the employer and to maintain a copy of same. The Act provides that a document is given to the employee. There is no obligation on the employee to sign and return it. They can simply take the document and keep. It is a matter for the employer to keep a copy.

Article 27 of the Charter of Fundamental Rights of the European Union states,

"Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good timing in the cases and under the conditions provided for by Community Law and National Law and practices."

Directive 91/533/EEC of 14 October 1991 states,

"whereas it is necessary to establish at Community level the general requirements that every employee must be provided with a document containing information of the essential elements of his contract or employment relationship."

Article 1 of the Directive sets out whom an employee is with certain exceptions. By virtue of Section 8 of the Protection of Employees (Part-Time Work) Act 2001 the Act applies being the Terms of Employment (Information) Act to all Part Time employees regardless of the number of hours worked. Therefore effectively all employees are covered by this provision under Section 3.

The European Court has held that a National Court, which would include a Tribunal, when hearing a case between individuals is required, when applying the provisions of Domestic Law adopted for the purposes of transposing obligations laid down by a Directive, to consider the whole body of rules of National Law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve the outcome consistent with the objectives pursued by the Directive. In case C-212/04 and Adeneler and others 2006 ECR 1/6057 in respect of the Charter of Fundamental Social Rights it is settled European Case Law that the fundamental rights guaranteed by the Legal Order of the European Union apply in all situations governed by European Law. This was confirmed in Case C-617/10 Akerberg Fransson 2013 ERC1/0000 paragraph 19.

On that basis since the Terms of Employment (Information) Act was adopted to implement the Directive, referred to previously Article 27 of the Charter is applicable to cases brought under this Act.

To the extent that a matter is covered by the Directive and is set out in Irish Legislation no deviation from same can be permitted by a Court or by a Tribunal as the provisions covered in the Directive are fundamental social rights.

Compensation

In assessing compensation the Judgement of the European Court of the 10th of April 1984 Sabina Von Colson & Elisabeth Kamann –v- Land Nordrhein Westfealen has been held by the European Court of Justice held that if a Member State chooses to penalise breaches by an award of compensation, which is what the Irish Government has chosen, then in order to ensure that it is effective the compensation must have a deterrent effect. The European Court has held that it is for the National Court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community Law in so far as it given discretion to do so under National Law. Irish law provides for up to 4 weeks compensation. If an employee is paid €500 per week this can be €2000. The cost of putting in place a contract which complies with the Act would never be €2000 from this firm.

Conclusion

The provisions of Section 3 of the Terms of Employment (Information) Act are now old law. The Act implements a fundamental social right by virtue of the Directive and therefore the matters covered under the Directive are fundamental social rights and must be protected.

In a claim under the Act the Act sets out minimum requirements. Either a document complies with Section 3 or it does not comply with Section 3 of the Act as amended.

It is vitally important for employers to put in place contracts which set out the minimum requirements. We find many contracts omit important information.

We would be pleased to draft or review your contracts to ensure they are compliant.

You may also wish to read our "Guide to Employment Contracts".

In 2012 the Employment Appeals Tribunal disposed of 229 appeals from the Rights Commissioners under the legislation. The Rights Commissioner Service in the same period dealt with 957 referrals.

No employer should get caught with a claim under the legislation. This is one of the easiest pieces of legislation to comply with. Unfortunately many employers do not use employment Solicitors to draft their contracts and this is how employers get caught out.