



March 2012

Introduction

It was great to meet many of you at our recent breakfast briefing on the use of social media by companies and employees. Presentations were given by Catherine O'Flynn, an associate in the Employment and Benefits Group here at William Fry, and our guest speaker, Peter Cosgrave, a director of CPL Recruitment. For those of you who unfortunately could not make it, keep an eye on our website (www.williamfry.ie) where we will shortly be posting a webinar of the event.

As no doubt you all know, the last number of months has been busy in the area of employment law. Two new Bills were introduced by the Government; a draft outline of proposed legislation on whistleblowing has been published; and the first steps have been taken in the reform of the employment law enforcement bodies. Indeed so much seems to be happening, that it can be quite challenging to keep up! We have tried to make matters that little bit easier for you by reporting on the key legal developments in recent months and likely developments in the near future.

We hope you find this e-zine informative. If you require any further information, please contact me or any member of the Employment and Benefits Group.

Boyce Shubotham

Employer Pays for Victimisation and Discrimination

The Equality Tribunal has awarded a former marketing manager €315,000 for discrimination and victimisation which occurred while she was employed by a well known hotel group.

The complainant alleged a series of events starting with her earlier pregnancies and culminating in the employer's efforts to terminate her employment shortly after she informed her manager that she was pregnant with her third child. Immense pressure was placed on her to resign and this resulted in her taking leave due to work-related stress. The Tribunal found that the complainant was discriminatorily dismissed by way of a letter which stated that her P45 would issue on the same day that her maternity leave was due to commence. However, the Tribunal stated that had this not been the case, then the complainant's claim for constructive dismissal would have succeeded.

The Equality Tribunal accepted that a number of the employer's actions constituted harassment, victimisation and discrimination based on gender and family status within the meaning of the Employment Equality Acts, including:

- the pressure put on the complainant to take redundancy
- disingenuously repackaging her termination as "early maternity leave"
- the refusal to pay the complainant her full maternity pay while she was on her third maternity leave, having been paid during her first and second pregnancies
- blocking access to her fuel card and mobile phone without warning
- the unnecessary delay in reactivating her mobile phone following a request from her solicitors to do so.

The scale of this award is partly due to the high salary which the complainant had enjoyed (€126,000 per annum), but should nevertheless serve to deter employers from engaging in unlawful discrimination.

The Agency Workers Bill

The Protection of Employees (Temporary Agency Work) Bill 2011, which is the legislation required to transpose the Temporary Agency Work Directive into Irish law, was published, albeit behind schedule, on 16 December 2011. The Bill has completed its passage through the Dáil and is currently before the Seanad where it has completed the Committee stage. It will then be returned to the Dáil and the intention is that these final stages will be scheduled for the week commencing 26 March 2012. Accordingly, it is likely to be enacted some time next month.

The purpose of the Bill is to give equal treatment in terms of basic working and employment conditions for temporary agency workers, i.e., such workers must be treated as if they were recruited directly by the hirer to do the same job. The definition of “*basic working and employment conditions*” includes pay, working time, annual leave, public holidays, and access to canteen and childcare facilities. The definition of “*pay*” includes basic pay, shift premium, piece rates, overtime, unsocial hours premium, and Sunday premium. The Minister previously indicated that this is an exhaustive list and so bonus payments, pension schemes, sick pay schemes and benefits in kind are not within the scope of the Bill.

As the Bill is stated to come into effect on 5 December 2011 certain of its provisions will have retrospective effect. Once the finalised legislation comes into force, it is likely that the obligation to provide equal pay will be backdated to 5 December 2011. The retrospective provisions will not, however, apply to the sections of the Bill that create offences.

The Bill’s provisions apply only to those who work under the supervision and direction of hirers. Consequently, self-employed persons, contractors and those working on managed service contracts are excluded from its scope.

The so-called Swedish Derogation or “*permanent contract exclusion*” has been included in the Bill. Therefore, agency workers who are employed by an employment agency under a permanent contract of employment are not affected, provided that the employee is paid, in between assignments, a minimum of half the sum he/she was paid on his/her last assignment.

Unlike the situation in the UK, there is no qualifying period for equal treatment included in the Irish Bill and so agency workers must receive equal treatment from day one.

As the employer, the employment agency has primary responsibility for ensuring that equal treatment applies to the agency worker. However, this is dependent on the employment agency being provided with sufficient up-to-date information by the hirer. There is a duty on the hirer to provide the employment agency with all reasonable information necessary for it to comply with its obligations under the Bill. If an agency worker brings a case against the employment agency and wins because the hirer failed to give the employment agency the information it required under the Bill, the hirer will have to indemnify the employment agency.

However, the hirer is responsible for:

- informing the agency workers of any vacant position of employment where such information would be given to a comparable employee; and
- ensuring that an agency worker is treated the same as a comparable employee of the hirer in respect of “collective facilities” such as canteens, child care facilities and transport services.

The redress provisions are modelled on the provisions in other employee protection legislation, such as in respect of fixed term work. As currently drafted, the Bill provides that complaints are to be brought to a Rights Commissioner with a right of appeal to the Labour Court. However, by the time the Bill is enacted it is envisaged that reference will be made to the newly established Workplace Relations Customer Service.

Whistleblowing

In February, the Minister for Public Expenditure and Reform, Brendan Howlin T.D., announced his intention to enact whistleblowing legislation. To show the Government’s resolve in this regard, the

Minister published draft heads (an outline) of what is officially named the Protected Disclosures in the Public Interest Bill 2012.

As the proposed legislation is at a very early stage, we can only give you an idea or flavour of what the Government has in mind.

The objects of the proposed legislation are:

- a) to promote, in the public interest, the disclosure of information in appropriate circumstances relating to the unlawful conduct or other misconduct of an employer;
- b) to provide procedures in terms of which a worker can in a responsible manner disclose such information;
- c) to protect a worker, whether in the private or public sector, from being subjected to an occupational detriment on account of disclosing in a prescribed manner information relating to unlawful or other misconduct by an employer; and
- d) to make available remedies providing redress for workers who suffer detriment as a consequence of having made a protected disclosure.

Some interesting matters that can be gleaned from the draft heads of Bill:

- anonymous disclosures will not be protected;
- the legislation will apply to disclosures relating to impropriety which occurred before the passing of the Act; and
- the worker must have a “*reasonable belief*” that the information concerned shows or tends to show that certain conduct has occurred and has been concealed or is likely to occur and to be concealed. The draft heads specifies a list of conduct which comes within the scope of the legislation, including:-
 - (a) the commission of a criminal offence;
 - (b) a failure to comply with any legal obligation;
 - (c) a miscarriage of justice;
 - (d) the health and safety of an individual has been, is being or is likely to be endangered.
- it is sufficient that the impropriety happened in another country and breached the laws of Ireland or of the other country.

The full Bill is expected to be published in the second quarter of this year.

Employment Law Reforms

In January 2012, the Minister for Jobs, Enterprise and Innovation, Richard Bruton TD, announced the commencement of some of the initiatives that form part of his overall plan to reform and consolidate the five existing employment rights institutions.

A single point of contact, called the Workplace Relations Customer Service (WRCS), has been established to process all first instance complaints and to determine whether they are suitable for early resolution, a hearing or inspection. All first instance complaints currently referred to the Labour Relations Commission, the National Employment Rights Authority, the Employment Appeals Tribunal (EAT), the Labour Court and the Equality Tribunal will now be submitted to the WRCS. The WRCS will also process queries relating to the status of complaints, referrals and investigations and will act as the principal provider of information in relation to employment, equality and industrial relations rights and obligations. An expanded Labour Court will act as the appellate body and will integrate the appellate functions of the EAT into its current appellate role. It is expected that this two tier structure will be in place by the Autumn.

As and from 3 January 2012, a single form (the complaint form) must be used to initiate all employment complaints. The complaint form, which replaces the 30 or more forms previously in use, must be completed electronically and, depending on what options are selected, further relevant questions may appear on screen. Currently, all complaint forms must be completed online and then posted to the WRCS.

In relation to certain types of claims, the complaint form requires significantly more detail to be provided by the claimant than was required by the pre-existing forms. The complaint form

automatically sets out the redress options available to the claimant on the basis of the information provided and it also gives the option of making multiple complaints in the one form.

The time limits that currently apply to the lodging of claims under the various employment Acts will continue to apply to the lodging of the complaint form with the WRCS.

The aim of the reforms is to make the operation of the employment dispute resolution system more effective and efficient. However, concerns have been expressed that the new complaint form is not quite as user friendly as one might have hoped and specialist knowledge is required in respect of making certain claims. For example, one year's service is not required for an unfair dismissal claim where the dismissal was by reason of pregnancy, but this is not reflected in the form.

An interim website providing information on the various redress and resolution mechanisms has been launched to support the phased replacement of the current workplace relations websites. It is the Minister's intention that the official workplace relations website will be up and running, and the phased replacement of existing websites completed, towards the end of 2012. The consolidation of the existing employment legislation is expected to start in 2013.

In appropriate cases, an officer of the Workplace Relations Early Resolution Unit (ERU) may contact the claimant and the respondent to suggest and offer to facilitate an informal resolution of the dispute as an alternative to a formal hearing as part of a pilot scheme. It is not yet known how the ERU will assess the suitability of a dispute for early resolution. If both parties refuse to participate in early resolution or if attempts at early resolution are unsuccessful, the complaint will be referred to the relevant workplace relations body.

Reform of Wage Setting Mechanisms

What are Joint Labour Committees (JLCs), Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs)?

Prior to the decision in *John Grace Fried Chicken Ltd & Ors v Catering JLC & Ors*, thirteen JLCs were responsible for regulating terms and conditions of employment, and setting minimum rates of pay in certain industries. The industries covered by JLCs included catering, contract cleaning, hairdressing, hotel and retail, among others. JLCs comprised of equal numbers of worker and employer representatives together with an independent chairperson appointed by the Minister for Enterprise, Trade and Employment. In carrying out its function, a JLC formulated proposals to be considered by the Labour Court which decided whether to give effect to the proposal by making an ERO. An ERO set certain legally enforceable minimum rates of pay and terms and conditions of employment which were automatically applicable to all workers covered by it.

REAs are agreements made between worker and employer representatives, related to the pay and conditions of employment in a certain industry. There are approximately 70 REAs registered with the Labour Court, including five sector wide REAs covering industries such as construction, electrical and printing. As with EROs, once registered, an REA becomes legally binding on all employers and workers in the industry to which it is expressed to apply.

The *John Grace Fried Chicken* Decision

On 7 July 2011, the High Court delivered its judgment in the case of *John Grace Fried Chicken Ltd & Ors v Catering JLC & Ors*. The High Court found the JLC wage setting mechanisms to be unconstitutional.

As a result of the decision, all seventeen EROs in place at the time ceased to have statutory effect and could not be enforced. Where prosecutions for non-compliance with an ERO had commenced, these had to be withdrawn and no further prosecutions could be initiated in relation to compliance with EROs that were in place prior to 7 July 2011.

While the decision is good news for employers, it does not mean that existing terms and conditions of employment can be unilaterally changed without an employee's consent. Any contractual entitlements

of workers enjoyed prior to 7 July 2011 remain protected by law. The pay and conditions of employees who commenced work after that date are now governed by existing employment legislation such as the National Minimum Wage Act 2000, as well as by contracts of employment.

While REAs were not directly affected by the *John Grace Fried Chicken* decision, they are the subject of separate court proceedings in which their constitutionality will be challenged on a similar basis. Minister Bruton has pre-empted the outcome of this case by addressing REAs in his proposals for reform.

Proposals for Reform

Minister for Jobs, Enterprise and Innovation, Richard Bruton, published the Industrial Relations (Amendment) (No. 3) Bill 2011 on 22 December 2011. The main purpose of the Bill is to reform the existing system for the making of EROs and REAs, and to provide for their continued effective operation.

In relation to JLCs and their power to make EROs, the Bill proposes the following measures:

- JLCs will have the power to set a basic adult rate and two additional higher rates, based on length of service as well as the standards and skills recognised in the sector.
- JLCs will no longer set Sunday premium rates. Instead, a statutory Code of Practice will be prepared by the Labour Relations Commission (LRC). Of course employers will also have to remain mindful of their obligations under the Organisation of Working Time Act.
- A review of the scope of each JLC will be undertaken every five years.
- JLCs will have to take into account a series of economic and industrial relations factors in the setting of wage rates.
- There will be ministerial involvement in the supervision of JLCs and the making of orders to vary or revoke EROs.
- The burden of compliance and record keeping requirements for employers in these sectors will be reduced. Again obligations under the Organisation of Working Time Act will remain.

The following provisions are proposed in relation to REAs:

- Establishment of a time-bound process by which the terms of an REA may be varied by the Labour Court without obtaining the consent of all parties to the REA.
- Introduction of more flexible mechanisms to enable REAs to be reviewed, challenged or cancelled.
- Introduction of a clearer definition of “substantially representative parties” in the context of being entitled to make and maintain REAs.
- Clarification as to the circumstances in which an REA may be cancelled.

The proposed measures also permit companies to derogate from EROs and REAs in the event of financial difficulty. However, the Labour Court must satisfy itself that specified criteria have been met. The derogation will be granted for a limited period only and following consultation with employees.

Recent Collective Redundancy Case

A recent decision of the UK Employment Tribunal serves as a reminder to advisors in the corporate restructuring process (such as liquidators, receivers and examiners) of the obligation to consult with employees when faced with a potential collective redundancy situation.

The Employment Tribunal in *USDAW, Unite the Union, Wilson v WW Realisation 1 Limited (In Liquidation)* made protective awards to the value of £67 million in favour of employees made redundant following the demise of Woolworths. Essentially, the Tribunal held that the administrators failed to adequately consult with employees’ representatives regarding collective redundancies.

According to the Tribunal, a genuine and open-minded consultation should::

- occur when the collective redundancy proposals are still at a formative stage;
- provide adequate information to which to respond and adequate time in which to do so; and
- involve a conscientious consideration of the response received from the employees’ representatives.

The single one hour meeting held with the employees' representatives was found by the UK Tribunal not to be sufficient consultation. The Tribunal took the view that the approach of the administrators was more of an announcement of what would happen rather than of genuine and meaningful consultation. The administrators had already come to the view that, in the absence of sales of any stores as going concerns, closures were inevitable. In this regard, the Tribunal emphasised that the fact that an employer may consider consultation to be futile does not excuse a failure to consult. In addition, the perilous financial situation in which the company found itself, and the fact of administration, did not excuse the administrators' failure to fully comply with the obligation to consult.

While the decision is not binding in this jurisdiction, it is likely to be persuasive before the tribunals here. Accordingly, advisors in the corporate restructuring process should be mindful of the obligation under the Protection of Employment Act 1977 to hold genuine and meaningful consultations with employees at the earliest opportunity and in any event at least 30 days before the first notice of redundancy is given in a collective redundancy scenario.

Consultations must include a discussion of the following:

- the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or mitigating their consequences; and
- the basis on which it will be decided which particular employees will be made redundant.

The employer must supply the employees or their representatives with all the relevant information relating to the proposed redundancies such as:

- the reasons for the proposed redundancies;
- the number and descriptions or categories of employees whom it is proposed to make redundant;
- the number of employees and description of categories normally employed;
- the period during which it is proposed to effect the proposed redundancies;
- the criteria proposed for the selection of the workers to be made redundant; and
- the method of calculating any redundancy payments other than statutory redundancy payments.