

WELCOME

To the latest edition of the employment law bulletin which will highlight some recent developments in employment law. We hope you find this bulletin of interest and, as always, if you have any queries on this or any other employment matter please do not hesitate to contact a member of our employment team.

AN UPDATE ON RECENT EMPLOYMENT DEVELOPMENTS

Jennifer Cashman of our Employment Unit recently presented at the Legal Island Annual Review Conferences in Dublin. Jennifer's presentation was on recent developments in relation to fixed term and agency workers. We thought it would be helpful if we set out here briefly some of the interesting points that were raised at the Legal Island Conference, in Jennifer's presentation, and in other presentations:

- (i) All employers must take note of the penalisation clause in the Safety, Health and Welfare at Work Act, 2005. Penalisation is defined at Section 27 of the Act and the definition is quite broad. It must involve an act or omission by an employer or person on their behalf affecting the employee to their detriment with respect to any term and condition of their employment. The penalisation clause is quite significant in the context of bullying and harassment and the significant provision is that an employee shall not be penalised for making a complaint to their employer as regards any matter relating to safety, health or welfare at work. Given that the 2005 Act does seem to bring bullying within its ambit, it is now open to an employee who makes a complaint of bullying and suffers a detriment (within the meaning of Section 27) as a result, to claim that they have suffered penalisation within the meaning of this section. This gives rise to a very significant new cause of action for victims of bullying who can show that their complaint has been dealt with an inappropriate manner (such as a delay) and can show that they have suffered penalisation as a result. There is no

limit on the amount of compensation that can be awarded by a Rights Commissioner for such a claim. One of the early successful claims under the Act resulted in an award of €20,000 against a hospital who had delayed in dealing with a complaint of bullying made by one of its employees. Furthermore, along with compensation, the Rights Commissioner obliged the employer to engage an external third party to investigate the complaint.

- (ii) A recent decision of the Equality Tribunal in the case of *Vincent Kavanagh -v- Aviance* (a disability discrimination case), the employee was awarded €125,000 which represented approximately four years remuneration. The award was made up of €65,000 loss of earnings and €60,000 for stress suffered as a result of the dismissal. Therefore, Equality Officers are now showing a huge willingness to award compensation under two heads – for discriminatory dismissal and for the effects of the discrimination on the individual. Therefore, in employment equality claims, employers may not be looking at a maximum exposure of two years remuneration but may in fact be looking at a maximum exposure of four years remuneration as a result of this development.
- (iii) There has been a lot of activity in the area of fixed term workers over the past twelve months before Rights Commissioners, the Labour Court and the High Court. Here is a summary of the most important points from that case law:
 - Conditions of employment covers matters relating to pension arrangements and career break and therefore fixed term workers are entitled to be treated no less favourably in relation to these conditions of employment, when compared to comparable permanent employees.
 - The meaning of a contract of indefinite duration has also been clarified. Essentially, a contract of indefinite duration contains all the same terms and conditions of the fixed term contract from which it is derived apart from the fixed term. When an employee becomes entitled by operation of law to a contract of indefinite duration, the offending terms of the

contract (dealing with the fixed term) are excluded from the contract and the contract therefore becomes one of indefinite duration.

- It has been held by the Labour Court that successive fixed term contracts, which are broken in time by a number of weeks or months, can in fact be deemed to be continuous employment for the purposes of the Fixed Term Workers legislation. Therefore, employers should note that simply because contracts are broken by a significant time period it does not necessarily mean that the employee in question will not be given the benefit of the 2003 legislation on the basis that they have “continuous employment”. The facts of each case will be looked at in detail in this regard.
- It has been confirmed by the Labour Court that the 2003 Act does not apply to apprenticeships but the Court will look at the details and factual characteristics of the alleged apprenticeship to ensure that it does fulfil the essential requirements of an apprenticeship.
- Objective justification must be understood as referring to precise and concrete circumstances characterising a given activity. Domestic legislative provisions cannot in itself provide objective reasons for not complying with the 2003 legislation.
- Costs, industrial relations harmony have also been held not to constitute objective justification for the purposes of the 2003 legislation.

NATIONAL EMPLOYMENT RIGHTS AUTHORITY (“NERA”)

NERA is a statutory body which has been established under the most recent Social Partnership Agreement “towards 2016”. NERA’s purpose is to increase the level of monitoring and compliance with employment rights in Ireland. NERA has yet to be placed on a statutory footing and awaits the introduction of new employment rights compliance legislation, which is expected to come into force sometime next year.

NERA will now manage the labour inspectors and employment rights sections of the Department of Enterprise Trade and Employment it is expected that the number of labour inspectors will be trebled by the end of 2007.

NERA will also be empowered to work on employment rights compliance issues with the Department of Social and Family Affairs and the Revenue Commissioners in Joint Investigations Units (“JIU’s”). The role of JIU’s is to address areas where there is evidence that non-

compliance exists and JIU’s will have particular focus on the employment status of workers.

Penalties for non-compliance in all areas of employment law will range from €5,000 on summary conviction to €250,000 on indictment. Other bodies such as the Rights Commissioner, Employment Appeals Tribunals and Labour Court will be able to award compensation of an amount of up to two years’ remuneration taking into account financial loss.

It has recently come to our attention that NERA are calling to employers and requesting that records are made available for inspection, and all of the following records are requested by NERA:

1. Employer registration number with the Revenue Commissioners.
2. Full name, address, PPS number for each employee.
3. Terms of employment for each employee.
4. Payroll details (gross and net, rate per hour, overtime, deductions, shift and other premiums and allowances, commissions and bonuses, service charges etc.)
5. Copies of payslips.
6. Employees job classification.
7. Dates of commencement and, where relevant, termination of employment.
8. Hours of work for each employee (including starting and finishing times, meal breaks and rest periods).
9. Register of employees under 18 years of age.
10. Whether board and lodgings or board and lodgings are provided and relevant details.
11. Holidays and public holiday entitlements received by each employee.
12. Any documentation necessary to demonstrate compliance with employment rights legislation.

It is important that employers are now aware that they are required to have all of this information in place and readily available for inspection by NERA.

END TO MANDATORY RETIREMENT AGE?

The ECJ has handed down its opinion in the case of [*Palacios -v- Cortefiel Servicios SA*](#) holding that a mandatory retirement age was justified, as it was proportionate means of achieving the legitimate social aim and promoting employment opportunities and reducing unemployment.

Following the ruling in the [*Palacios*](#) case of the European Court of Justice, Irish employers need to be aware of the

possibility of a challenge to any mandatory retirement clause in employment contracts.

The Judgment in this case states that it is lawful for a State to set a retirement age, and this will not be a discriminatory measure, provided that there are objective and reasonable grounds for the chosen age. Ireland has not formally legislated for a national retirement age and so it is up to individual employers to decide on a retirement age and make it a term of the employment contract. This can be said to lack the objectivity required, as employers can pick an age that suits their own particular company.

Setting a mandatory retirement age in an employment contract has, so far, not been found to contravene the Employment Equality Acts here in Ireland. Neither can employees, who must leave their employment when they reach the retirement age stated in their contract, claim for unfair dismissal. Now, however, such a term may contravene the ECJ's interpretation of Directive 2000/78/EC.

Therefore, the advantages of setting a mandatory retirement age as part of the employment contract must be balanced against the risks of a challenge based on a contravention of the Directive.

However, employers would be well advised to continue to make provision for retirement in the employment contracts. The fact that the age may be subject to variation within the terms of the pension scheme should be referred to also in the contract of employment. The risk of a challenge to such a term is outweighed by the possible challenges that can arise by not having a clear agreement and understanding, between employee and employer, on the age of which retirement must take place. An employee who does not have such a term included in their contract may well be able to take a successful claim against a company, normally based on grounds of contravention of the Equality Acts, with age as the only factor for termination of employment.

Interestingly a recent EU funded research body has called for the abolition of the mandatory retirement age in contracts in Ireland. This is one of the key recommendations of the Senior Select Retain and Re-train Partnership which consists of Age Action, FAS, IPTU, Parphis and Contact Recruitment. The recommendations of the SSRR are that the abolition of the national retirement age would give options to workers to remain on in their employment and for employers to retain some of their most experienced and valued staff.

One of the main findings of the report was the impact compulsory retirement has on people and, because of this, the report called for compulsory retirement ages, whether in the public service or not, to be removed.

TEMPORARY WORKERS MAY GET FULL WORK RIGHTS UNDER EU LAW

On the 5th December EU ministers discussed rights which would apply to workers hired through an agency or a third party and take effect a maximum of six weeks after a worker had been hired. Business leaders fear that the rights would put companies off hiring agency workers for busy periods or one off projects and would force permanent staff to work longer hours instead. The EU ministers failed to reach an agreement on the legislation and the matter will be discussed in 2008. Supporters of the use of temporary staff believe it has made the economy more flexible and it has warned that any changes to agency workers' rights could cost quarter of a million UK jobs.

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