

WELCOME

To the third edition of the employment law bulletin which will highlight some recent developments in employment law.

The RDJ Employment Unit continues to expand and develop its services. We now have four solicitors specialising in employment law and one of our exciting new initiatives is on site training for our clients. Ensuring your employees, particularly those in supervisory roles, are aware of their legal obligations, and how their behaviour can impact on the organisation's legal position, can be time-consuming and difficult. Our aim in designing training sessions is to make that job easier for you.

If you would be interested in receiving in house training please contact a member of the Employment Law Unit.

HEALTH AND SAFETY LEAVE AND PREGNANCY

The Safety, Health and Welfare at Work (Pregnant Employees) Regulations, 2000, ("the 2000 Regulations") oblige employers to take preventative and protective measures to ensure the health of pregnant employees. The new Safety, Health and Welfare at Work Act, 2005 obliges employers to carry out separate risk assessments in relation to pregnant employees.

If there are particular risks to an employee's health during pregnancy, these should be either removed or the employee moved away from them. If neither of these options is possible, the employee should be given health and safety leave from work, which may continue up to the beginning of maternity leave. If a doctor certifies that night work would be unsuitable for a pregnant employee, the employee must be given alternative work or health and safety leave.

During health and safety leave, employers must pay employees their normal wages for the first three weeks, after which health and safety benefit may then be paid by the State. Time spent on health and safety leave is treated as though the employee has been in employment and the time can also be used to accumulate annual leave and public holiday entitlement. However, employers must exercise their discretion to place employees on health and safety leave with caution as highlighted in a recent decision of the Equality Tribunal.

In the case of *Ms. Leslie Maye -v- ADM Ringaskiddy (DEC-E206-004)*, the Claimant alleged discrimination on the gender ground and that she was treated less favourably than other employees because of her pregnancy.

After she furnished a medical certificate that she should be given daytime and light duties during her pregnancy, her employer put her off work and it was only after her Union intervened that she got a limited period of daytime light work. She claimed that in other situations her employer had been able to facilitate employees with light duties and day work.

Her claim was ultimately referred to the Equality Tribunal where it was investigated by an Equality Officer. The Equality Officer was satisfied on the evidence that the employer had given lighter duties for a five month period to a male employee three years earlier. The Equality Officer went on to find that the employer had failed to establish that they made more than a very superficial effort to provide the Claimant with alternative working hours or review her duties. The Equality Officer noted that the 2000 Regulations put significant obligations on employers to find appropriate work for a pregnant employee and did not automatically require that the employee had to be put off work entirely. The Equality Officer noted that no evidence had been presented that short term options were considered by the employer to give time to carry out a thorough assessment of their obligations and the options available and no evidence was presented that they

complied with their own policy to discuss with an employee her potential absence to see if she could perform a useful function.

Furthermore, the employer provided no evidence that they had kept under review the availability of other appropriate work during the Claimant's health and safety leave. In the circumstances, the Equality Officer found that the Claimant had been discriminated against and made an award of just under €14,000 in respect of the discrimination.

This Decision sends a very clear message to employers that they have very significant obligations with regard to pregnant employees and taking the simple option of simply putting a pregnant employee out on health and safety leave is not available to employers until they have considered all other possible alternatives.

POINTS TO NOTE:

Ensure that separate risk assessments are carried out in relation to pregnant employees.

Consider what alternative work is available for employees who are at risk due to their pregnancy.

Only enforce health and safety leave on pregnant employees where there are no other options available.

NEW HEALTH & SAFETY CONSIDERATIONS FOR EMPLOYERS

The Safety, Health & Welfare at Work Act, 2005 came into effect on 1 September 2005. Employers are obliged under the 2005 Act to create and maintain a safe and healthy workplace.

Information for Employees

The 2005 Act prescribes that employers must give certain types of information on Safety Health & Welfare to their employees and that such information must be in the form, manner and language that is reasonably likely to be understood. This provision places an onus on employers that

employ non-national employees who do not have English as a first language and do not understand the information given to them. An employer would, in this instance, be obliged to translate the information for the non-national employees.

Drug and Alcohol Policy

The introduction of an alcohol and drug policy in the workplace is strongly recommended, especially in the light of the recent 2005 Act. Such a policy should clearly outline how the employer intends to deal with drug and alcohol issues in the workplace and should be communicated to employees in a supportive manner.

The 2005 Act obliges an employer to ensure the safety, health and welfare at work, insofar as is reasonable practicable, of his/her employees. There is a corresponding duty that employees will take reasonable care to protect their own safety, health and welfare at work and that of any other person who may be affected by their acts or omissions. An employee has a duty to ensure that he or she is not under the influence of an intoxicant to the extent that he or she might endanger themselves or any other person. An employer can require an employee to submit to tests for drugs or alcohol once the tests are reasonably required and conducted by a registered medical practitioner. The Minister for Enterprise, Trade and Employment has powers under the 2005 Act to regulate the area of substance testing, which has not yet been exercised.

Safety Statement

Employers are obliged under the legislation to have a Safety Statement in place. There is a requirement that a Safety Statement should specify how safety is managed and that the Safety Statement should be reviewed annually.

Each employee should be informed about the Safety Statement and given opportunities to inspect same. The Safety Statement should be communicated to all employees including temporary or fixed term employees contract staff, self employed persons, Consultants and regular visitors to the premises.

EMPLOYEES (PROVISIONS OF INFORMATION AND CONSULTATION) ACT 2006

The purpose of the 2006 Act is to provide for the establishment of a general framework which sets out minimum requirements for the right to information and consultation of employees and undertakings with at least 50 employees. The 2006 Act has not yet been commenced by the Minister for Enterprise Trade and Employment.

Employers will now be obliged to provide information and consultation on issues such as:

- Recent and probable development of the undertaking's activities and economic situation.
- Situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular where there is a threat to employment.
- Any decisions likely to lead to substantial changes in work organisation or contractual relations.

The provisions of the 2006 Act will be implemented on a phased basis and will firstly affect undertakings with at least 150 employees once commenced. The 2006 Act will then apply, from 23 March 2007, to undertakings with at least 100 employees and on 23 March 2008 it will finally apply to undertakings with at least 50 employees.

DATA PROTECTION ISSUES RELEVANT TO THE HR MANAGER

On the 11th of April last, the Data Protection Commissioner launched 17th Annual Report, 2005. As always, the Commissioners Report contains some interesting case studies which provide valuable lessons from an Employment Law perspective.

In one such case study the Commissioner received a complaint from an employee of a Residential Care School, regarding the apparent failure of the School to comply with a request for access to personal data held by the School relating to him. The School's defence to their refusal to grant access to the personal data was that the employee had a personal injuries action pending against the School and had sought Voluntary Discovery of various documents in the context of that claim. On the basis of its legal advice, the School submitted that the invoking of the jurisdiction of the High Court precluded the employee from using the Data Protection Act as a parallel process to obtain documentation and that his request for access to his personnel file was premature given that there were High Court proceedings in being.

The Commissioner pointed out that there is no provision in the Data Protection legislation restricting access to personal data which might impact on forthcoming proceedings, other than data in respect of which a claim of legal privilege could be maintained. The Commissioner therefore did not accept that, as the data subject had invoked the jurisdiction of the High Court, he was precluded from using Data Protection legislation to obtain documentation. The legislation requires the data controller, in this case the employer, to provide the data subject access to his personal data unless one of the exemptions in Section 5 of the legislation applies.

The School therefore complied with the request for personal data made by their employee.

It is extremely important for employers to note that a request for personal data by an employee is potentially a much wider request than a mere request for a copy of an individual's personnel file. Personal data means all documentation held relating to the individual which can in any way identify the individual. Therefore, a request for personal data could, for example, mean that documents held on a management file, which were not necessarily placed on the individual's personnel file, must be released to the individual. Once an individual makes a request for personal data, that request must be complied with within 40 days or else the individual making the request can refer a complaint to the Data Protection Commissioners office who will follow up on the complaint, as he did in the case outlined above.

There are eight fundamental principles of Data Protection set out in the legislation, which relate to such matters as obtaining and processing information fairly: not using it for the purpose other than the purpose for which it was obtained and keeping the data safe and secure. The Commissioner has made it clear that all organisations should have in place a clear Data Protection Policy which records the eight fundamental principles of data protection. The existence of such a Policy in itself is an important first point of defence for employers in answering an enquiry from the Commissioner's office.

POINTS TO NOTE:

Draft appropriate Data Protection Policy.

Ensure employees are trained on the operation of the Policy.

Ensure all requests for personal data are dealt with in a timely and appropriate manner.

REASONABLE ACCOMMODATION OF A DISABLED WORKER

The Employment Equality Act, 1998 ("the 1998 Act") prohibits discrimination on 9 grounds, one of which is disability. Discrimination is taken to occur where a person with a disability is treated less favourably than a person with either a different disability or without a disability.

Recent case law has extended the definition of a disability to include a person who suffers from anorexia/bulimia, alcoholism, obsessive compulsive disorder and a temporary injury.

The 1998 Act provides that an employer should do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, provided that the provision of such treatment or facilities only gives rise to a nominal cost to the employer.

The Equality Act, 2004 has amended the 1998 Act by providing that an employer will be obliged to

provide the facilities or training to the disabled person unless the measures would impose a disproportionate burden on the employer. This has resulted now in raising the bar for employers, especially the larger wealthier organisations who will now find it difficult to avoid the provisions of the 2004 Act.

In a recent case of *Irene Feore –v- The Alzheimer's Society of Ireland* the Complainant went out of work on sick leave in October 2002 for a period of 12 months suffering from a number of complaints.

In October 2003 the Complainant was certified fit by her doctor to return to work initially on the basis of a three day week with a view to returning to full time work. Ms. Feore's employer refused to allow her to return to work part time on a phased in basis. The Complainant in this case was awarded €20,000 by way of compensation for breach of her rights to equal treatment under the Employment Equality Act, 1998 and for the stress suffered as a result of such discrimination. The Equality Tribunal also ordered that the Complainant be offered her job as a Nurse Manager which she would have continued to hold but for the discrimination.

For further information, to receive a copy of our legal updates or to discuss any aspect of employment law please contact a member of our employment law team:

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