



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.

EQUALITY TRIBUNAL CASE: 58 NAMED COMPLAINANTS V GOODE CONCRETE LIMITED 30/04/2008

The recently published Equality Tribunal case of 58 Named Complainants v Goode Concrete Limited (DEC-E2008-020) has potentially serious implications for the huge number of employers in this jurisdiction employing foreign workers. The matter concerned 58 employees, mostly truck drivers, who took a case against their employer for a variety of alleged instances of discriminatory treatment. One of the matters complained of concerned Contracts of Employment.

The 58 complainants all originally argued that they had not received proper terms and conditions of employment, saying those that were furnished were deficient as they did not contain all of the statutory terms. This claim was denied by the Company, who said that all but one of the workers were furnished with Contracts. However, the complainants alleged that they had been treated less favourably on grounds of race as the Contracts were furnished in English but not in their native language. The complainants comprised six different nationalities, namely Polish, Lithuanian, Latvian, Slovakian, Romanian and Uzbekistani. The Terms of Employment (Information) Act, 1994 provides that a written statement of terms and conditions must be

furnished but it does not state that it must be in the worker's native language.

The Equality Officer, citing the Labour Court case of *Rasaq v Campbell Catering Ltd* [EED048], referred to the "special measures" which may be necessary when dealing with non-national workers, and noted that Goode Concrete Ltd had in fact translated other Company documentation into a common language (Russian). It was not unreasonable, therefore, to expect the Company to provide Contracts in Russian or English, or failing that obtain a translator (but not another employee) to explain the meaning of the contract.

In the circumstances, the Equality Officer found that each of the 58 complainants was treated less favourably than Irish employees in relation to their Employment Contracts. Each of the complainants was awarded €5,000 compensation, a total award of €290,000 against the company.

It is understood that the Company is to appeal the decision.

THE TREATMENT OF MISCARRIAGES IN THE WORKPLACE

This article considers the sensitive issue of the treatment of miscarriages in the workplace. Irish legislation draws a distinction between miscarriages that take place prior to twenty four weeks and after twenty four weeks gestation. In short, miscarriages which occur prior to twenty four weeks gestation result in the employee falling to be considered under the employer's sick pay policy. After twenty four weeks gestation, Irish legislation provides that employees are entitled to full maternity leave.

If a miscarriage occurs before twenty weeks of pregnancy, then the employee has no statutory rights to maternity leave pursuant to the Maternity Protection Act 1994. The employee therefore has no

contractual rights to maternity pay. Her situation should fall to be considered under whatever sick provisions apply in the contract of employment.

As a matter of law, employers are not obliged to treat an employee any differently because her sick leave is ultimately on the grounds of pregnancy.

In the case of *McKenna –v- North Western Health Board*, a case was made before the Equality Tribunal to the effect that reducing the pay of an employee who was on long term sick leave on the grounds of pregnancy to half pay was in breach of her rights pursuant to the Employment Equality Acts 1998 - 2004.

The case succeeded before the Equality Tribunal, it went on appeal to the Labour Court and ultimately was referred to the European Court of Justice for ruling. The European Court of Justice found that the reduction of the employee's salary was in accordance with the contractual provisions on sick pay which applied to all employees regardless of gender and did not constitute discrimination on the grounds of gender, even though the employee's illness was related to her pregnancy.

If the employer does not provide for paid sick leave or if the employee's contractual right to sick leave has already been exhausted, the employer is best advised to give some consideration to allowing a few weeks of paid leave on an ex-gratia basis. In theory, an employer could be accused of treating an employee more favourably than other employees and then other employees may seek the same treatment on grounds of non-pregnancy related sick leave. Nevertheless in all the circumstances, an employer could successfully argue that this was special treatment on the grounds of a pregnancy related condition in what are clearly exceptional and difficult circumstances for the employee in question.

If the miscarriage takes place after the first twenty four weeks of the pregnancy, the employee is entitled to all other rights to maternity leave pursuant to the Maternity Protection Act 1994. Confinement is defined in section 51(1)(a) of the 2005 Social Welfare Amendment Act as the following:

“Labour resulting in the issue of a living child, or labour after twenty four weeks of pregnancy resulting in the issue of a child whether alive or dead.”

If there is a miscarriage after twenty four weeks of pregnancy, the employee's maternity leave takes place in the same way as if she had proceeded to full term and given birth to a live child. Therefore the employer is obliged to pay the employee in those circumstances the same maternity leave as it would pay to any of its other employees on maternity leave.

In summary therefore as a matter of law, employees who suffer a miscarriage before twenty four weeks of pregnancy do not have any particular rights over and above their contractual rights to sick leave and/or sick pay and the link between pregnancy and their unfitness to work does not give rise to any greater rights other than the rights they already have pursuant to their contracts of employment.

Of course there could be no question of an employee being dismissed on the grounds of non-availability due to sick leave having suffered a miscarriage but in any event, any employee on long term sick leave would have to be out for a very long time before their dismissal could be considered in a manner that would be considered lawful by the Employment Appeals Tribunal.

MAJOR DEVELOPMENTS FOR TEMPORARY AGENCY WORKERS

In March 2002, the European Commission adopted a draft Directive on foot of a proposal that all temporary agency workers across the EU would be given equal treatment to permanent employees in terms of pay and other conditions of employment. The draft Directive provided for the equal treatment to apply within six weeks of the commencement of the temporary assignment in the end-user organisation – the six week time limit proved hugely controversial across the EU and the proposal has remained deadlocked since then with several presidencies seeking to resolve the deadlock.

Earlier this month, EU Ministers succeeded in breaking the deadlock to agree new wording for the draft Directive. The agreement was reached in the early hours of the 10th June last and has been widely welcomed across the EU. The European Parliament must now consider the proposal and if and when the proposal is adopted at EU level, Ireland will have two years to implement national legislation giving effect to it.

Essentially, the agreement will allow for the introduction of legislation across the EU which will provide for equal treatment as of day one for temporary agency workers as well as regular workers in terms of pay, maternity leave and leave. However, the EU has provided for the possibility for individual member States to derogate from the proposal by means of collective agreements and agreements between social partners at national level. The Directive will also provide for temporary agency workers to be informed about permanent employment opportunities in the user enterprise and equal access to collective facilities such as canteen facilities; childcare facilities and transport services. Member States must also ensure penalties for non-compliance by employment agencies and enterprises.

The proposal has received a mixed reaction in Ireland. It is unclear to date how the legislation will be implemented here and this must be discussed by the Social Partners and other interested parties once the European Parliament has passed the Directive at EU level. It is hoped by many parties, such as ISME, that when national legislation is implemented, Ireland will take the opportunity to derogate from the principle of equal treatment for agency workers from day one and provide instead for a minimum timeframe for which the agency worker would have to be in the end-user organisation before the principle of equal treatment would apply.

CALCULATING HOLIDAY PAY

The Organisation of Working Time (Determination of Pay for Holidays) Regulations, 1997 sets out the details regarding the calculation of holiday pay. Essentially, where employees earn monthly commission, their payment for annual leave should not be based purely on salary; they should in fact be paid by calculating the average weekly pay by working out the average (excluding overtime) over the previous thirteen weeks before the leave was taken.

Where employers fail to calculate holiday pay correctly, they may face a claim under the legislation being brought before a Rights Commissioner. A Rights Commissioner can investigate a claim relating to a breach of the legislation which occurred

in the last six months or where reasonable cause is shown, the timeframe can be extended by a further six months. A Rights Commissioner can award compensation which is just and equitable in the circumstances but not more than two years' remuneration.

Many employers will be surprised to know that commission needs to be taken into account when calculating holiday pay and may now need to review their payroll systems to ensure that holiday pay is properly calculated in accordance with the 1997 regulations.

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