

### WELCOME

Employment Law has seen radical changes over the last 20 years. It is an increasingly regulated area and one of growing concern to businesses at all levels. The ongoing changes in legislation necessitate contracts and work permits being constantly reviewed. Our Employment Law Unit has continued to grow and now has four dedicated solicitors offering specialist advice on all Employment Law issues.

This is the first periodic employment law bulletin which will highlight developments in the law.

### COLLECTIVE REDUNDANCIES

#### **New ECJ decision results in extension of consultation period.**

Under the Protection of Employment Act, 1977, if an employer proposes to implement collective redundancies he must initiate consultations with officials and shop stewards of the trade union or staff association representing the workers affected by the proposed redundancies. These consultations must be initiated "at the earliest opportunity" but at least 30 days before the date on which the first dismissal takes effect, to see if agreement can be reached.

A recent ECJ decision has given a different interpretation to "the date of dismissal". In the case of *Junk -v- Kuhnel*, the ECJ ruled that, where employers are contemplating redundancy, it will be necessary for them to consult with employees when they first contemplate redundancy and not when they have made the decision to make employees redundant. The obligation is to consult and to notify employees prior to any decision by the employer to terminate contracts of employment by way of redundancy.

It follows from the above then that an employer cannot terminate contracts of employment before the end of the consultation period.

### REPORT FROM THE EQUALITY AUTHORITY, 2004

The Equality Authority, in its report for 2004, has stated that, under the Employment Equality Acts, 1998 – 2004, the highest case files continue to relate to claims of discrimination on the ground of race followed by the gender, disability and age ground. The dominant issues continue to be allegations of discrimination relating to working conditions, access to employment, dismissal, sexual harassment and harassment and equal pay.

For the second year in a row, the Tribunal has awarded, in a sexual harassment claim, the maximum compensation of two years salary.

Equality claims against employers are expected to quadruple in 2005. RDJ in conjunction with RecruitIreland.com will be hosting a seminar on **Equality Issues in Employment and Recruitment**, with guest speaker, Melanie Pyne, Director of the Equality Authority, in Dublin on the 2<sup>nd</sup> November in the Burlington Hotel at 7.30 am. If you are interested in attending this please contact our Marketing Manager, Susie Horgan at [susie.horgan@rdj.ie](mailto:susie.horgan@rdj.ie)

### THE REPORT OF EXPERT ADVISORY GROUP ON WORKPLACE BULLYING

This report by the Expert Advisory Group on workplace bullying was published by the Minister for Labour, Mr. Tony Killeen, in August this year. The Group was established to advise, among other things, on the effectiveness of measures relating to the prevention of workplace bullying. It has determined that workplace bullying is an increasing problem; there is an ever increasing number of complaints; there are higher levels of workplace stress; greater frustration with a lack of formal channels for resolving such complaints and an increased burden on all parties to resolve disputes. The Group found that existing measures to tackle the

problem of workplace bullying are insufficient. The key recommendations in the Report are that legislation be introduced immediately to deal with workplace bullying. The recommended requirements by the Group are as follows:

1. The inclusion of bullying as a risk together with policies and procedures to mitigate that risk should be mandatory in every employer's safety statement. The Health and Safety Authority will be charged with ensuring that this is enforced.
2. A formal model for the handling of bullying cases should be published for the guidance of employers in their workplace dispute resolution procedures and should be followed by the State for cases referred out of the workplace.
3. The Labour Relations Commission should be the single State agency charged with the management of specific allegations of workplace bullying.
4. The Employment Appeals Tribunal or the Labour Court will be the Court of appeal for decisions by Rights Commissioners.
5. The Labour Relations Commission will encourage and promote alternative dispute resolution as the preferred approach to tackling instances of bullying. The Commission will resource its teams and allocate responsibilities accordingly.
6. Decisions by the Employment Appeals Tribunal or the Labour Court are binding and legally enforceable through the Courts.

#### LEGAL REPRESENTATION AT DISCIPLINARY MEETINGS

In the case of *Alan Burns and John Hartigan –v- The Governor of Castlereagh Prison and the Minister for Justice, Equality and Law Reform*, proceedings were brought by the Claimants alleging that, amongst other things, the Applicant, a Prison Officer, was denied legal representation at a disciplinary hearing. In this case the Prison Officers' Disciplinary Code provided that "*the accused officer should be allowed to have an Officer of his or her choice to act on his or her behalf or assist him or her in the presentation of his or her case at an oral hearing*". The Court held that while these rules provided for representation by a fellow

officer, they did not expressly preclude any right to legal representation. The Court held that, where there was a risk of dismissal from the prison service, the Claimant was entitled to legal representation on the grounds of natural or constitutional justice.

In this case legal representation was permitted. Prior to this decision, legal representation was generally permitted in exceptional circumstances only and mostly where the employee being disciplined was at risk of criminal sanctions. However, it appears that the Courts have now taken the view that dismissal is a serious enough sanction to warrant legal representation at a disciplinary meeting where the disciplinary procedures do not expressly prohibit or preclude such representation.

#### EMPLOYMENT PERMITS BILL, 2005 and MIGRANT WORKERS

The Employment Permits Bill, 2005 was published by the Department of Enterprise, Trade and Employment in June of this year. The Bill was introduced to codify the procedures for the work permit, work visa/work authorisation schemes, and provide for the application, grant, renewal or refusal and revocation of employment permits. A significant change under the Bill is that a non-national who is subject to certain conditions, such as having a job offer in writing in advance, may apply for a work permit. The work permit, irrespective of who applies, will be granted to the individual employee as distinct from the employer as is currently the case.

#### RESTRAINT OF TRADE CLAUSES

Two recent High Court decisions have illustrated willingness on the part of the Courts to recognise and enforce restraint of trade clauses in employment contracts. These decisions are of particular relevance to employers, as they impact considerably on the drafting and formation of contracts of employment. In *Brightwater –v- Gemma Allen and Robert Walters Limited (12<sup>th</sup> May, 2005)* the restraint of trade clause in the contract of employment was upheld by the High Court and Mrs. Allen was restrained from soliciting contacts established during her employment with Brightwater. The High Court in *Murgitroyd & Co. Limited –v- Purdy (1<sup>st</sup> June, 2005)* held that a restraint of trade clause in the contract of employment was valid and operative at the time the Defendant terminated his contract. The Court went further to hold that a geographical restriction

encompassing the entire State and a twelve month limit was not excessive. It felt however that a restriction on potential clients of the Plaintiff was unenforceable. In light of these judgements, employers will now have to look more closely at restraint of trade clauses contained in contracts of employment. Until now Courts tended to adopt a narrow interpretation of the clauses and were slow to enforce them.

It will not be necessary or appropriate to include a restraint of trade clause in every contract of employment. Whether or not to include such a clause will depend very much on the position held by the employee and the level of sensitive information dealt with by the employee. Legal advice should therefore be sought in each individual circumstance. It is not recommended that a “one for all” approach be adopted.

In addition, employers should be aware that if they take on new employees in the hope that they will bring with them new contacts from their former employment, they must ensure that this information has been obtained by lawful purposes and that the employee is not in breach of a restraint of trade clause with their previous employer. As was illustrated by the Brightwater decision, breach of the restraint of trade clause in the previous contract of employment could expose the new employer to litigation if they use the information or induce the employee to do so. All employers should include an acknowledgement in their contracts that the new employee is not in breach of any obligations to their former employer.

#### **SAFETY HEALTH AND WELFARE AT WORK ACT, 2005**

The Safety, Health and Welfare at Work Act, 2005 (“the Act”) came into effect on the 1<sup>st</sup> September this year. This Act replaced the 1989 Act and was enacted in compliance with European Directives in the area of health and safety.

The aim of the Act is to encourage better consultation and provide better workplace accident prevention by imposing new duties and increasing fines and penalties. The following is a sample of some of the innovations contained in the new Act and is not exhaustive:

- Section 78 of the Act provides for increased penalties for breaches of the legislation. A person guilty of an offence under the Act is liable to a fine of up to €3,000 and/or

imprisonment for up to two years. Section 79 empowers inspectors of the Health and Safety Authority (“HSA”) to impose on the spot fines of up to €1,000 where they find a clear breach of the Health and Safety Code.

- The HSA is further empowered to compile and publish a list of the names and addresses of businesses on which fines have been imposed by a Court under the Act.
- The Act imposes a duty on the employee not to be under the influence of an intoxicant at the place of work, among other general duties. The Act further provides for testing for intoxicants by the employer, but this must be done under the supervision of a medical practitioner.
- A major innovation in the Act is the provision that, where employers and trade unions get together and agree practical guidance on health and safety in an industry or sector, that agreement can be taken into account by the HSA in enforcement.
- There is a provision in the Act which protects an employee against penalisation or dismissal for carrying out their duty in regard to safety matters.

The Act does not impose a burden on any single group, but focuses on responsibilities and obligations of employers and employees alike. It is therefore important that all parties be aware of its provisions in order to ensure compliance.

**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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