WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the August issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Carol Plunkett

Partner

"Death Bed Marriage" Rule in Pension Scheme Discriminatory

An Advocate General (AG) of the Court of Justice of the European Union (CJEU) has given her opinion that a former university lecturer, as a pension scheme member, was indirectly discriminated against based on his sexual orientation.

The plaintiff sought to establish that his same sex civil partner would be entitled to receive a survivor's pension on his death. The university's scheme rules prescribed that a survivor's pension would not be available where a member had married or entered into a civil partnership after reaching the age of 60 or after having retired. The lecturer retired in 2010. Civil partnership was not recognised in Ireland until 2011. It was legally impossible for him (or any other homosexual scheme members who turned 60 before 2011) to satisfy this requirement until 2011. The AG found this to be indirect discrimination based on sexual orientation. The restriction was viewed as an extremely drastic measure that could not be justified.

Submissions were made concerning the retroactive effect on the institution of civil partnership but were rejected. This is contrary to previous EU & UK case law on the "no retroactivity" and "future effects" principles of EU law.

An objection was also raised that the plaintiff's pension entitlements were based mostly on periods of service prior to the entry into force of the Framework Equality Directive (2000/78). The AG found no issue with this, stating that a new rule of law applies from the entry into force of the act introducing it.

The AG also briefly discussed age discrimination and the idea of the combined effect of discrimination.

Although an opinion of the AG is not binding on the CJEU, it is frequently followed. The AG's refusal to apply a temporal limit to the future affects of any determination could merit authoritative consideration by the CJEU. Employers with schemes applying similar restrictions should assess them in light of this opinion.

For more information generally on age discrimination see our Age Report.

Contributed by Jane Barrett & Ciara McLoughlin

Workplace Bullying – How Far Is Too Far?

Following on from a recent case before the Court of Appeal, which significantly reduced an award of damages in a workplace bullying action, the High Court, in *Mona Jackson-v-James Cahill* has awarded €40,000 to an employee in a successful workplace bullying claim.

The facts

The plaintiff employee worked as an associate solicitor for the defendant employer for approximately four years. The plaintiff alleged that she had been subjected to a number of instances of aggressive and inappropriate behaviour by the defendant in that:-

- She had suffered unequal treatment in relation to bonus payments
- She received unwarranted criticism in relation to finalising costs in a medical negligence case
- The defendant sent her an aggressive text message in order to finalise the terms of a reduction to her remuneration
- She was harassed in order to finalise her position in relation to pay cuts
- She was depicted in front of staff members as having no further interest in the firm after receiving a bonus
- There were issues in relation to the payment of her practising certificate
- She was told she was paid more generously than staff who had families to support in circumstances where the plaintiff had no children of her own
- She received an unsealed hand written letter from the defendant stating, among other things, that she was not bringing in sufficient fees
- She was subjected to demands for an immediate reply to the abovementioned letter in front of another member of staff by the defendant

Decision

The High Court held that the plaintiff had "*substantiated a majority of her claims of workplace bullying"* and awarded her €50,000 in general damages. However, the Court reduced the award by 20% due to the plaintiff's failure to mention the circumstances surrounding an unsuccessful hip surgery and her institution of separate High Court proceedings against a number of parties, to her psychiatrist. The High Court also took into account the fact that the plaintiff applied for jobs with a number of other firms in Dublin stating that she would be available for work immediately if she were successful in her application.

The Court considered the definition of workplace bullying as set out in the Code of Practice appended to the Industrial Relations Act, 1990 and also considered the Supreme Court decision in *Quigley –v– Complex Tooling and Machinery* and the Court of Appeal's decision in *Una Ruffley –v– Board of Management of St. Anne's School* in setting out what constitutes workplace bullying. In *Quigley*, it was accepted that bullying must be "*repeated, inappropriate and undermining of the dignity of the employee at work*". However, in *Ruffley,* the Court went further to provide a more onerous test to be met in that a plaintiff must be able to prove:

1. That the plaintiff suffered injury other than ordinary occupational stress
2. The injury must be attributable to the workplace
3. That the harm suffered must have been reasonably foreseeable in all the circumstances

The High Court held that the proof of the above three requirements is dependent on the application of an objective as opposed to a subjective test. In the present case, the Court was satisfied that the plaintiff had met the threshold of workplace bullying in accordance with the three-part test above.

The High Court held that the events outlined had caused or significantly contributed to the plaintiff suffering from depression and anxiety.

Comment

This case highlights the widening of the parameters within which a Court will assess a claim for bullying in the workplace. This is illustrated by the fact that the Court in this case assessed each alleged instance of bullying and determined whether each instance had, after applying the objective standard, met the threshold of bullying.

Until this case it was generally agreed that the Court of Appeal in the *Ruffley* decision had effectively narrowed the basis upon which a court was willing to find actionable loss in bullying cases. This decision may offer renewed hope for plaintiffs in establishing successful bullying and harassment claims in the workplace.

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Contributed by Catherine O'Flynn and Aedín Brennan

Employers Beware – How Safe Is Personal Data Held by Your Company?

On 21 June 2016, the Irish Data Protection Commissioner (the "Commissioner") published its annual report for 2015. One case study relating to the removal of records from the workplace to a private residence will be of particular interest for employers.

The facts

The case study concerned a complaint made to the Commissioner by a member of the Defence Forces that his personal data was not being kept safe by the Defence Forces. The complainant had made an internal complaint and a military investigating officer (MIO) was appointed to review it. The Defence Forces Ombudsman was appointed to review the process of the handling of the complaint, and it emerged that the MIO could not supply notes of the interview he had conducted with the complainant as he had brought them home, where they were subsequently lost or damaged following a burglary and flooding at the MIO's house.

The Commissioner's findings

The Defence Forces acknowledged that the loss of data should not have occurred. However, they stated that while such an action would normally constitute an offence under the Defence Act 1954, the MIO was no longer a serving member and was no longer subject to military law. Nevertheless, the Commissioner found that the Defence Forces had contravened Section 2(1)(d) of the Data Protection Acts 1988-2003 by "*failing to take appropriate security measures against unauthorised access to, or unauthorised alteration, disclosure of destruction of the complainant's personal data when it allowed it to be stored at an unsecure location, namely a private house*."

Lessons to be learned

This case study is of significant importance for employers as there are various workplace scenarios in which staff may need to take home files containing personal data. The Commissioner's finding acts as a reminder that extreme caution should be exercised to ensure there is no risk to the security of personal data in such a situation. A system recording the taking and returning of files should be in place, as well as approved measures for the safekeeping of personal data while files are outside of the workplace. Employers should ensure that employees are prohibited from emailing official files from workplace email accounts to personal email accounts, as in such a scenario, the data controller (i.e. the employer) loses control of the personal data, which they are obliged by law to safeguard.

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Contributed by Catherine O'Flynn & Aedín Brennan

Hefty Fines for a Non-compete Clause in a Share Purchase Agreement

Telefónica and PT (Portugal Telecom) are the primary telecoms operators in their home countries of Spain and Portugal respectively. They jointly controlled Vivo, one of the largest telecoms operators in Brazil. In September 2010, Telefónica and PT agreed that Telefónica would buy out PT's stake in Vivo. The Share Purchase Agreement (SPA) included a non-compete clause which provided that, to the extent permitted by law, the parties would refrain from competing in the Spanish and Portuguese telecoms markets. The duration of the clause was from September 2010 to December 2011.

In January 2011 the European Commission opened an investigation for breach of competition law, which prompted the parties to remove the clause in February 2011. The European Commission concluded its investigation in February 2013, deciding that the clause amounted to a market sharing agreement with the object of restricting competition in the internal market. It fined Telefónica and PT €67 million and €12 million respectively. The parties appealed the European Commission's decision to the General Court, but the General Court dismissed the appeal almost entirely.

Whilst the full facts of the case are complex, two of the more important points are as follows:

- Under EU competition law, non-compete clauses in SPAs may be deemed compliant as long as they are directly related to, and necessary for, the implementation of the transaction. The European Commission found that a non-compete clause covering the Spanish and Portuguese markets could not be considered directly related to or necessary for Telefónica's buy-out of PT's stake in Vivo in Brazil, and this finding was upheld by the General Court.

- The parties argued that the clause did not constitute a restriction of competition by object, since the European Commission had not demonstrated that they were potential competitors and that the clause was therefore capable of restricting competition. The General Court held that the Commission was not obliged to carry out detailed analysis on this point, as the very existence of the clause was a strong indication of potential competition between Telefónica and PT.

Contributed by Sheila Tormey

Keep Calm and Carry on Protecting Your Intellectual Property

In the wake of the uncertainty caused by the Brexit referendum, businesses are advised to review the legal frameworks protecting their intellectual property (IP) in the UK.

However, since the referendum was advisory rather than mandatory in nature, the people's decision will not have any legal implications until Article 50 of the Lisbon Treaty ("Article 50") is invoked and the subsequent two year negotiation period draws to a close. Despite no immediate changes taking effect, there are some likely implications in sight for those businesses who protect their IP in the EU and for whom the UK is an important trading market.

Registered European Trademarks and Designs

At present, European law enables businesses to protect their registered European Union Trade Marks (EUTM), Registered Community Designs (RCD), or Geographic Indications with a single application in all EU Member States. Once an application is lodged and registered, the EUTM, RCD or Geographic Indication is protected throughout the EU.

It is possible that design and trade mark legal protections afforded under European Law will cease to be effective in the UK if it is no longer an EU Member State.

Whilst a possible grandfathering of rights (terms and procedures for which are yet to be determined) may afford UK coverage based on existing EU rights, proprietors of existing EUTMs and RCDs are advised to consider their options with regard to individual applications in both the UK and EU to be ready to take all required action.

Patent Cooperation Treaty and European Patent Convention

The UK is a party to the Patent Cooperation Treaty (PCT) and the European Patent Convention (EPC). As both the PCT and EPC operate independently of the EU, national UK patents will not be affected following Brexit.

Despite the UK continuing to implement the PCT and EPC, Brexit could prevent the UK from participating in the long awaited Unitary Patent (UP) system. The UP system promises a comprehensive EU wide regulatory framework with a dedicated Unified Patent Court for litigants. Outside of the EU, it would seem unlikely that the UK will be permitted to join the UP system and businesses may be forced to consider alternative filing strategies for their patents.

Significantly, Brexit may also undermine the coming into force of the UP system. With the launch of the UP and Unified Patent Court tabled for January 2017, Brexit has dashed any hope of meeting this deadline. In its current form, Article 89 of the Unitary Patent Court Agreement (the "Agreement") provides that the Agreement can only enter into force after ratification by "the three Member States in which the highest number of European patents had effect in the year preceding the year in which the signature of the Agreement takes place". As one of the three relevant countries in question, the UK is required to ratify the Agreement to take force in its current form. In the wake of Brexit's legal and political turmoil, the UK may now not initiate steps to ratify a system, which will be limited in membership and scope to EU Member States.

The Agreement also faces other challenges, as one of the main seats of the proposed Unified Patent Court, a key provision of the UP system, was to be located in London.

Copyright and other unregistered rights

As in Ireland, UK national legislation primarily regulates copyright law and so it and the common law tort of passing off will likely remain unchanged in the wake of Brexit.

Conclusion

It is not yet possible to specify the legal implications of Brexit for IP in the UK. In the meantime, best practice would suggest that affected businesses should review their IP portfolios in order to ensure any EU IP rights are protected equally in both the EU and UK post-Brexit. Irrespective of what transitional provisions are implemented by the UK in the coming years, the words of Benjamin Franklin that "an ounce of prevention is worth a pound of cure" ring particularly true for businesses operating in the post-Brexit world.

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Contributed by Brian McElligott

Construction Contracts Act 2013 – New Adjudications Code of Practice Published

As previously reported, the Construction Contracts Act 2013 (the "Act") commenced on 25 July 2016. The Act applies to construction contracts entered into after that date and, for the first time in Ireland, introduces a new statutory dispute resolution mechanism for construction contract payment disputes, through adjudication by an independent third party. The Department of Jobs, Enterprise and Innovation has now published the following materials relating to the Act:

- *Information Booklet on the Construction Contracts Act 2013*
- *Construction Contracts Act 2013 Code of Practice on the Conduct of Adjudications*

Information booklet on the Construction Contracts Act 2013

The information booklet provides a summary of:

- Construction contracts covered by the Act
- Payment procedures under a construction contract, payment claim notices and responses
- Suspension for non-payment
- Adjudication procedures

Code of Practice on the Conduct of Adjudications

The Code of Practice on the Conduct of Adjudications (the "Code") is a statutory code governing the conduct of adjudication under Section 9 of the Act. A version of the Code published on 5 July 2016 has already been replaced by a version published on 25 July 2016. The Code addresses:

- **Appointment:** The Code governs the procedures for appointment of an adjudicator whether by agreement of the parties or from a statutorily appointed Panel, which has now been constituted. This includes the service of a "notice of intention" to commence adjudication.

- **Rapid decisions:** Adjudicators' decisions on a payment dispute must be reached within 28 days of referral, or 42 days with the referring party's consent. Decisions must be in writing and unless agreed by the parties, include reasons. Adjudicators' decisions are binding on parties until the dispute is resolved through agreement, arbitration or litigation. Adjudicators have the ability to invite written submissions/representations and evidence from the parties, but also to hold oral hearings where appropriate.

- **Costs:** Parties bear their own legal and other costs in connection with the adjudication. The Code provides that Adjudicators' decisions shall allocate such Adjudicator's fees as are authorised under the Act, although these should be reasonable having regard to the amount in dispute, the complexity of the issue and the time spent by the Adjudicator.

- **Adjudicator responsibilities:** the Code requires adjudicators to be independent and impartial and be satisfied that no actual conflict of interest exists. They should be competent to determine the issues in dispute and able to give the adjudication the time and attention that the parties are reasonably entitled to expect.

The scope of the Act is likely to be far reaching within the projects and construction industry. Parties should familiarise themselves both with the Act and the Code and consider the related implications for construction contracts, particularly as regards payments and dispute resolution.

Contributed by Cassandra Byrne and Jarleth Heneghan

High Court Directs Sale by Receiver Confirming Third Party Has No Locus Standi to Object

A receiver appointed over secured properties of a company recently sought a High Court direction pursuant to Section 438(1) of the Companies Act 2014, to allow the sale of secured properties to a proposed purchaser, pursuant to an existing contract for sale.

In their application, a third party asserted to the High Court that he had already entered into a contract for sale in 2004 relating to the secured properties and sought to oppose the application made by the receiver, on the basis that he had an equitable interest.

In respect of the alleged contract for sale entered into by the third party, the Court followed the case law that a purchaser obtains a beneficial interest "to the extent only to which the purchase price is paid". The Court found that it was evident that the third party neither paid any amount in relation to the relevant property nor sought specific performance of the alleged contract and thus could not enforce the alleged contract of sale.

The Court allowed the application of the receiver to sell the secured properties to the proposed purchaser. It stated that the third party was not a creditor of the company and had no locus standi to challenge the receiver's dealings with assets of the company.

This case confirms the position that only direct stakeholders can challenge the actions taken by the receiver of a company. Third parties without any direct interest do not have the locus standi to intervene.

Contributed by Craig Sowman

In Short: UK Modern Slavery Act 2015 – Relevance for Irish Clients

The Modern Slavery Act 2015 (the "Act") introduces changes in UK law focused on increasing transparency in businesses and in supply chains, with the overall aim of combatting slavery and human trafficking.

As we previously reported, the Act requires commercial organisations of a certain scale and which are carrying on business or part of their business in the UK to disclose the steps which they have taken (if any) to ensure their business and supply chains are free from modern slavery (that is, slavery, servitude, forced and compulsory labour and human trafficking). This disclosure takes the form of an "anti-slavery and human trafficking statement", which must be published each financial year on the organisation's website. The first statements are required for financial years ending on or after 31 March 2016 and should be published within six months of the organisation's financial year end. This means that the first such statements can be expected in September 2016.

Of particular interest for Irish clients is the extra-territorial reach of the Act: it applies not only to UK organisations, but also to businesses that are incorporated and headquartered outside the UK but that conduct business within the UK.

For a full briefing on the Act and to determine whether your organisation is in scope, please contact Emily Comber or Paul White or your usual William Fry contact.

Contributed by Aoife Kavanagh

In Short: New Options for Defined Benefit Buy-out Bond Holders Announced

The Minister for Finance has announced a policy change so that the holders of a Buy-out Bond whose funds originate from a defined benefit (DB) scheme will now have access to the Approved Retirement Fund (ARF) option. He said this change will take effect from 22 June 2016. The ARF option is an alternative to annuity purchase and can offer more flexibility and choice of investments to members past their normal retirement age.

The Minister has requested the Revenue to make any necessary administrative changes to reflect this policy change. He has clarified that it remains the case that the ARF option is not available to the main benefits paid from a DB scheme.

Contributed by Jane Barrett & Ciara McLoughlin

In Short: Views Sought on Reform and Simplification of Irish Pensions

On 18 July 2016 the Pensions Authority (the "Authority") published a consultation document unveiling a package of proposals for the reform and simplification of supplementary funded private pensions in Ireland.

Key targets for reform include trusteeship qualifications and experience, the manner of scheme authorisation/approval and the supervisory function of the Authority. The role of master trusts in Ireland is also included for discussion.

Submissions are sought on the issues raised in the report and are due by 3 October 2016.

Contributed by Jane Barrett & Ciara McLoughlin