WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the October 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.

Ken Casey

Partner

Mamma Mia! Pregnancy Related Dismissal Claims

There is strong legal protection in Ireland for expectant mothers, and women dismissed for pregnancy-related reasons can take a case under either the Unfair Dismissal Acts 1977-2015 (the "Unfair Dismissal Acts") or under the Employment Equality Acts 1998-2015 (the "Equality Acts"). Two recent cases highlight the need for employers to exercise extreme caution when dismissing a pregnant employee to ensure the dismissal is not *in any way* connected to the pregnancy.

Case law

In *Case ADJ-00002143* the Workplace Relations Commission (WRC) ordered a crèche owner to pay €4,902.12 to an employee for breach of a number of employment statutes as follows:

- €902.12 for breach of the Terms of Employment (Information) Act 1994 (this claim was conceded by the employer)
- €4,000 for breach of the Unfair Dismissals Acts finding that the employee was unfairly dismissed as a result of her pregnancy

The employer disputed that a dismissal had occurred saying that the employee had left of her own accord and that any issues which had arisen were due to the employee's work performance and her bad temper. The employer also alleged that the employee had not informed her that she was pregnant. However, on the contrary, the employee alleged that the employer had acted differently towards her from the moment she advised that she was pregnant. The employee also alleged that the employer had asked if her pregnancy was "*planned or unplanned*" weeks before dismissing her without notice.

At the hearing, the employee was able to show text messages supporting her version of events, including one sent to her employer on one occasion when she was unable to attend work as she had to go to hospital due to a suspected ectopic pregnancy. The employee claimed that this text was evidence that she had previously informed the employer of the fact that she was pregnant, contrary to the employer's claim that it was not advised of the pregnancy before the employee was dismissed.

In addition, the employee also produced texts received by her from the employer's crèche manager in which the crèche manager expressed concern for the employee's pregnancy. The employee also claimed that the crèche manager had previously witnessed the employee informing her employer that she was pregnant. This, the employee alleged, was

evidence that both the employer and the crèche manager were aware that the employee was pregnant before she was dismissed.

On balance, the WRC accepted that dismissal had occurred mainly as a result of the pregnancy and this was also supported by the fact that the employer had hired two new workers around the time of the dismissal.

In *BT Ward Ltd t/a Subway v Sandra Gegeckiene* the Labour Court awarded €10,000 to a woman who suffered gender discrimination contrary to the Equality Acts when her employer dismissed her for pregnancy-related reasons.

The employee had been employed initially on a three-month trial contract, during which time she informed her employer that she was pregnant. She alleged that her hours were immediately reduced as a result and that her request for paid time-off to attend hospital appointments was refused.

When her contract ended, she was given a *further* six-month trial contract and was dismissed without reason when it ended.

Her employer, on the other hand, alleged that:

1. Her request for time-off was accommodated as soon as the employer understood the true nature of the request
2. She was not offered extra shifts due to complaints about her work
3. It wished to terminate her employment at the end of the initial contract, but instead extended it because it was worried about dismissing a pregnant employee

There were obvious disparities between the employee's and employer's version of events. However, taking all of the evidence into account the Court held that the employer reduced the employee's hours immediately or shortly after she had announced her pregnancy and that this decision was largely due to her pregnancy. In addition, there was no record of any complaints made against or notified to the employee and the employer did not formally sanction her for poor performance.

The Court held that the employer ultimately wanted to terminate the employee's employment both due to her pregnancy and her request for paid time off, and that it reduced her hours, extended her probation, and finally dismissed her under the guise of not renewing a fixed contract of employment.

Legislation

Under the Unfair Dismissal Acts a dismissal is considered to be automatically unfair if the employee is dismissed for reason of pregnancy, giving birth or breast feeding or any connected matters. Employers should bear in mind that the 12 month service requirement, which usually applies under the Acts, does not apply to employees dismissed for these reasons. In the case of pregnant employees, the burden of proof is on an employer to prove, on the balance of probabilities, that the dismissal was unrelated to pregnancy.

The Equality Acts prohibit the treatment of one person less favourably than another on the basis of nine grounds including gender (this includes pregnancy-related discrimination). Once it can be shown the employer knew of the pregnancy, the burden of proof shifts to the employer to show, on the balance of probabilities, that there has been no discrimination. There is no service requirement under the Equality Acts: employees are entitled to this protection from day one of their employment.

Top tips for employers

- Ensure managers in your company know to inform HR as soon as an employee advises that she is pregnant
- Avoid making inappropriate comments about pregnancy to mitigate any claim of harassment or discrimination on the grounds of gender or family status;
- Carry out a risk assessment for any pregnant employees and new mothers and take action if risks are identified i.e. altering the employee's working conditions or offering suitable alternative work;
- Allow pregnant employees to attend ante natal appointments; and
- If you are considering dismissing an employee who is pregnant be mindful of the legislation referred to above.

Contributed by Catherine O'Flynn and Aedín Brennan

Changes to Section 110 Regime Relating to Irish Property Assets

On 6 September 2016, the Irish Minister for Finance released a statement advising of a proposed amendment to section 110 of the Taxes Consolidation Act, 1997 (section 110), which deals with the taxation regime for special purpose vehicles (SPVs) established in Ireland to securitise assets. These new draft tax rules will apply to certain section 110 SPVs, which hold debt interests secured on, or deriving most of their value, from Irish property. The changes, once enacted, are stated to apply from 6 September 2016.

The changes are being proposed to tackle what is a perceived misuse of section 110 by companies set up to hold distressed loans and mortgages to avoid paying tax on Irish property related transactions. Transactions of SPVs in relation to assets that are not related to Irish property will not be affected by these changes.

As currently drafted, it is only the 'Specified Property Business' of SPVs that will be impacted by the proposed changes. A 'Specified Property Business' is treated as a separate trade within the SPV and will consist of that part of the SPV's business that involves the holding or managing of ‘specified mortgages’; being any financial asset which derives its value, or the greater part of its value (directly or indirectly) from Irish property. This Specified Property Business will continue to be taxed under the section 110 rules but subject to a new restriction on the ability to deduct interest on profit-participating debt.

The new rules will not apply in all cases. Interest on profit-participating debt used in an SPV's 'Specified Property Business' will continue to be fully deductible where the interest is paid to:

i. A person within the charge to Irish corporation tax on the profit-participating loan interest
ii. Certain approved pension funds
iii. A person resident in another EU or EEA country where a range of conditions are met

Where applicable, the restriction will operate such that deductions will be capped to the amount of interest that would have been payable had the loan been entered into by way of bargain made at arm’s length and where the return was not dependent on the results of the Specified Property Business. The resulting taxable profits will be taxed at the rate of tax applicable to all securitisation activities i.e. 25%.

The Specified Property Business must be treated as a separate business within the SPV with income, profits, gains and expenses apportioned on a just and reasonable basis.

It is important to note that, as it stands, the proposed amendment will only impact SPVs that have Irish property related assets.

The amendment is expected to be included in the Finance Act which will pass through the Houses of the Oireachtas following the Budget announcement on 11 October 2016. The proposed changes remain proposals and are not yet law. It is likely that discussion between interested parties, the Department of Finance and the Revenue Commissioners will continue up until the Finance Bill is enacted and, as a result, there may be further changes.

On a separate point, the Department of Finance is reviewing the use of charitable trusts by section 110 companies and is also looking at proposals concerning the use of regulated fund structures in the domestic property market.

We at William Fry will keep you up to date on any developments regarding changes to the securitisation regime as and when they occur.

Contributed by Padhraic Mulpeter

The Impact of Non-Registration on a Loan Purchaser's Power to Appoint a Receiver

There are two mutually exclusive systems for the registration of land in Ireland – the registration of documents in the Registry of Deeds and the registration of title in the Land Registry. Property registered in the Registry of Deeds is said to be 'unregistered' and property registered in the Land Registry is said to be 'registered'.

Legislation on the registration of registered title provides that until the transferee is registered as the owner of the charge, the transfer of the charge does not confer any interest in the security to the transferee. What this means is that purchasers of loans over registered land cannot effectively exercise their power of sale and give good title to a purchaser without being registered as the owner of the security. Judgment given in a recent High Court injunction application suggests that the non-registration of ownership of security has an even greater impact on loan purchasers than was previously understood.

In *Harrington v Gulland Property Finance Limited* a company purchased loans in respect of registered land. The company failed to register the transfer of the charge in the Land Registry. A year later the company appointed a receiver pursuant to the power contained in the charge. The property owners sought and were granted an injunction against the acting receiver. The High Court held that the property owners had made out an arguable case that in the absence of registration, the contractual interest in the charge had not become transferred and that the company could not rely on a contractual power contained in that charge to appoint a receiver.

Interpreting the legislation in this way prevents a loan purchaser exercising a contractual power to appoint a receiver where its interest in the security over registered land has not been registered. Prior to enforcement of security, loan purchasers of registered land should ensure that they are registered as owners of the security. It will be interesting to see if the High Court's interpretation of this legislation at the injunction application is confirmed at the full hearing. We will circulate an update following the full hearing of the case.

Contributed by Tara Rush

Concussion in Rugby Union Has Entered the Legal Field of Play

Concussion in contact sports and particularly rugby union has become an increasingly constant feature of medical debate over the last 15 years. However, the issue recently came into sharp focus again when a former professional rugby player issued negligence proceedings in Manchester arising from concussive injury. It is reported that the player is alleging that the club and two doctors on its medical staff failed to appropriately treat two head injuries he sustained while on the field of play. The player retired due to concussion a short time later. While this is the first such reported case in professional rugby union, litigation arising from concussive injury is not a new phenomenon in other professional contact sports such as American Football or Ice Hockey.

It is anticipated that professional clubs, governing bodies and amateur clubs involved in rugby union (and indeed other contact sports) will monitor the progress of this recent case closely given the stakes involved and the potential 'flood-gate' consequences of similar suits being brought. It may well be that a private settlement will be reached without any admission of liability. However any finding of liability by the court could have far reaching implications for both the professional and amateur game.

Basic legal principles for negligence in sports injuries

There is essentially no distinction in the law of professional or medical negligence in Ireland between the treatment of injury sustained on the field of play or sustained in any other aspect of life. Applying basic legal principles, in order for liability to be attributed in negligence to a defendant (which may be the governing body, club, doctor or indeed all three) it must be established that the defendant owes a duty of care to the player, that the duty of care was breached by falling below reasonable and accepted standards of care and that it was reasonably foreseeable that harm would be caused to that player arising from the breach of duty.

Concussion protocols in rugby union

World Rugby and the national governing bodies (including the Irish Rugby Football Union) have specific protocols in place to identify and address concussion in both the professional and amateur forms of the game. The protocols are constantly adapting as technology and education on the area increases.

The legal application of these protocols is untested in court with regard to claims in negligence arising from concussive injury in professional rugby union. However, it is anticipated that adherence to the accepted protocols in place at the relevant time would form part of a medical practitioner or employer's defence in discharge of its duty of care to the player or, at the very least, be argued as mitigating circumstances in such defence.

This is an abridged version of an article published in the Sunday Business Post Article on 11 September 2016.

Contributed by Craig Sowman

Court of Justice Sets out Conditions for Liability in Hyperlinking to Unauthorised Copyrighted Material

In a landmark decision on hyperlinking, the Court of Justice of the European Union (CJEU) has provided guidance on some features distinguishing legal and illegal hyperlinking in a commercial context.

In the Dutch case of *GS Media v Sanoma Media*, Sanoma sued GS for allegedly publishing hyperlinks to one of its websites that directed viewers to another website, which featured unauthorised use of copyrighted images. The Dutch Supreme Court referred the question of whether a party could be liable for infringement in such a scenario to the CJEU.

In a two pronged decision the CJEU firstly decided that where hyperlinks are posted without the pursuit of financial gain then it will have to be proved that the poster knew or could reasonably have known the illegal nature of the publication.

Secondly it decided that where hyperlinks are posted for financial gain, there arises a rebuttable presumption that the poster had posted the hyperlink with full knowledge of the illegal nature of the content. In this particular case, GS was unable to rebut that presumption and could, therefore, be liable for infringement.

The decision departed from what was decided in the earlier *Svensson* case, where the CJEU stated that setting a hyperlink to a freely accessible website featuring copyright works did not constitute "communication" for the purpose of copyright infringement law.

This development is positive as it offers rights holders some protection against commercial websites who post links to unauthorised copies of their works, and also seeks to avoid a regime where internet users who have innocently posted hyperlinks are vulnerable to copyright infringement action.

The interpretation of the extent of circumstances in which a link will be deemed to be posted for financial gain has yet to be explored and will likely be vital in determining the impact of the CJEU's decision.

Businesses should always ensure the legality of any content they link to through their websites to minimise the chances of any potential liability arising.

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Contributed by Brian McElligott

Inaugural CCPC Annual Report

The Competition and Consumer Protection Commission (CCPC) has published its first annual report. The CCPC was established in October 2014 by the amalgamation of the Competition Authority and the National Consumer Agency and undertakes both competition law and consumer protection law functions.

The annual report outlines the work carried out by the CCPC in both fields from October 2014 to December 2015, and is a useful source of information on investigations opened, closed and ongoing during that time. Highlights include:

- **Cartel enforcement:** The CCPC investigated a bid-rigging agreement in the industrial flooring sector, which has resulted in criminal proceedings against an individual and an undertaking.It also opened a cartel investigation into allegations of a criminal breach of competition law in the aviation sector and continued its investigation in the bagged cement sector.
- **Civil competition law enforcement:** In October 2015, the CCPC secured binding commitments from Booking.com, a large online travel agent, in relation to its "Best Price Guarantee" clause which restricted hotels advertising on Booking.com from offering lower room rates on other platforms. It also intervened in relation to alleged anti-competitive practices in the provision of funeral services in the greater Dublin area.
- **Merger control:** Between October 2014 and December 2015, the CCPC reviewed 88 notifiable mergers. This was almost double the number reviewed in the corresponding period for 2013/2014. Seven of these required an extended review, and one was cleared on the basis of the rarely-used "failing firm" defence. Seven media mergers were considered. No mergers were prohibited, although remedies were imposed or accepted in two cases.
- **Consumer protection:** The CCPC undertook a number of investigations in relation to car "clocking", which led to enforcement action under the misleading advertising rules, as well as a criminal conviction under the General Product Safety Directive. It opened two investigations connected to Volkswagen AG's emissions declarations, and prohibited the placing on the market of unsafe hoverboards. It issued 33 fixed payment notices in connection with failures to indicate product prices, and 29 compliance notices relating to the requirement to inform consumers of their rights, including the right to cancel distance contracts.

Contributed by Claire Waterson

Regulating your Product: Borderline Medicine or a Food for a Specific Group?

Foods fortified with nutritional and disease-preventing qualities such as omega-3 fats and pre/probiotics are invigorating the world food industry. Health-conscious consumers are driving the demand for products that aim to promote better health, increase longevity and prevent the onset of chronic diseases. Increasingly we are seeing product innovation trends led by the food and pharmaceutical industries focussing heavily on the development of products targeting health promotion and not just health cure.

The functional food market is rapidly emerging as a distinct food category. Hovering somewhere between food and medicine, functional foods – sometimes known as nutraceuticals – are being used, distributed and regulated differently from medical foods and drugs. The primary distinction is that functional foods may be consumed freely as part of everyday life, whereas medical foods and drugs are used in specific cases, under medical supervision, to treat or manage a health condition. Although, “functional food” is not defined under EU or Irish food legislation it is currently regulated through existing general food law[1]. Therefore, prior to placing a new food on the EU market, specific authorisation must be obtained through the process outlined in the EU Novel Food Regulation (2015/2283).

Further, July 2016 saw the application of the Foods for Specific Groups (FSG) Regulation[2], which abolishes the concept of 'dietetic foods', and repeals the existing legislation that sets the framework for these products, (PARNUTS[3]). It also requires specific compositional and labelling rules to be established for certain food products that are created for and marketed to specific vulnerable groups of consumers (infants and young children, people with specific medical conditions and people undertaking energy-restricted diets to lose weight). Manufacturers whose products fall outside of the FSG criteria

have increasingly been considering registration of their functional food products as "medicinal products"; that is: substances containing properties for preventing or treating disease in human beings with a view to restoring, correcting or modifying a physiological function by exerting a pharmacological, immunological or metabolic action, or making a medical diagnosis.

Before deciding on registration, manufacturers should consider the additional regulatory and compliance obligations associated with such an authorisation. Further, as recent case-law has demonstrated, the registration of one food product as a medicinal product could potentially force an entire category of significantly similar products into regulation under the medicinal products regime.

In *R (Blue Bio Pharmaceuticals Ltd and Abba Pharma Ltd) v Secretary of State for Health (2016) EWCA Civ 554* the Court of Appeal required the UK Medicines Healthcare Products Regulatory Authority (MHRA) to re-consider whether some glucosamine products, which are marketed as food supplements, should be treated as medicinal products. The court found that glucosamine-containing products sharing the same dosage and form as licensed medicinal products should be classified in the same way unless some significant characteristic took them outside the "medicinal product" legal definition. Whilst method of use may be a significant characteristic, the MHRA had to establish the position through proper investigation and inquiry, but had failed to do so.

The requirement to hold a medicinal product manufacturer and/or marketing authorisation places a greater burden on the manufacturer to adhere to stricter controls than those required for food products. Therefore the decision to define a product as a food or medicine should be informedly made to ensure all legal and regulatory matters are complied with.

Contributed by Cliodhna McDonough

[1] Regulation (EC) 178/2002

[2] Regulation (EU) 609/2013

[3] Directive 2009/39/EC

In Short: William Fry Launches ‘PrivacySource’ - A Dedicated GDPR Implementation Resource

The long-awaited EU General Data Protection Regulation (“GDPR”) entered into force on 24 May 2016 and, following a two year transition period, will apply from 25 May 2018. Described as the most ground-breaking piece of EU legislation in the digital era, the GDPR aims to make businesses more accountable for data privacy compliance and offers citizens extra rights and more control over their personal data. The new rules will have significant impacts for all organisations.

In preparation for the application of GDPR, William Fry has launched “PrivacySource”; a dedicated website where our Technology team will provide ongoing analysis and assistance on the implementation of the GDPR. To gain access to this exclusive resource, we invite you to register here.

Contributed by John Magee

In Short: Clarification on Scope of Third Party Return Form 8-2

The Revenue Commissioners (Revenue) have a wide range of powers to oblige taxpayers to provide information on certain payments made to third parties. For example, the Form 46G requires taxpayers to provide information on payments related to services made to Irish companies or individuals.

Another reporting requirement relates to income received by a person belonging to another person. This information needs to be submitted to Revenue in a Form 8-2. In its eBrief No. 78/16, Revenue has clarified that the Form 8-2 needs to be completed by intermediary websites, such as Airbnb, who collect monies on behalf of persons using their services for business purposes.

The Form 8-2 and other third party filing obligations tend to be overlooked by taxpayers but these obligations need to be considered by taxpayers given that they are required to be filed on a self-assessment basis. Therefore, it is important to note that:

- The Form 8-2 should be filed on a self-assessment basis without prior notification from Revenue.
- To be included on the Form 8-2, income received by a person on behalf of another person must be chargeable to tax on the other person.
- Total payments to any one person for a year need only be included on the Form 8-2 where the amounts exceed €3,810.
- Filing is required within 9 months of year end (or the end of the date to which accounts are filed).

Contributed by Ted McGrath and David Barron