WILLIAM FRY

LEGAL NEWS

Welcome

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

Adam Synnott

Partner

Rights of Au Pairs as Employees?

The Workplace Relations Commission (WRC) recently considered employment law compliance when engaging au pairs in Ireland. Although the official judgment has not yet been published by the WRC, the Migrant Rights Centre Ireland (which supported the claimant in bringing her case) has stated that the judgment makes it clear that au pairs are workers and therefore families must abide by Irish employment laws when engaging them.

Decision

The claimant, a Spanish au pair, worked for a family and cared for the family's children. The claimant was paid €100 per week in addition to her board and accommodation which was valued at €54.13 per week. The claimant worked a total of 490.5 hours over a period of 25 weeks.

The claimant brought a case to the WRC on the basis that the family was in breach of a number of employment laws.

The WRC found that the claimant had not been paid the minimum wage of €8.65 per hour (the rate at the time), in accordance with the National Minimum Wage Act 2000 and awarded her €3,829 in arrears.

The claimant was also awarded a further €400 on the basis that she had not been provided with a written statement of her terms and conditions of employment in accordance with the Terms of Employment (Information) Act 1994-2014.

In addition, the WRC found that the family had breached the annual leave provisions provided for under the Organisation of Working Time Act 1997 and awarded her a further €5,000 in compensation. In total the claimant was awarded €9,229.

The National Minimum Wage Act 2000

The current national minimum wage in Ireland for an employee who is over the age of 18 and who has two or more years' employment experience in any type of employment is €9.15 per hour. Employees are only entitled to a lower hourly rate of pay where either:

- The employee is under 18 (€6.41)
- The employee is in their first year of employment over the age of 18 (€7.32)
- The employee is in their second year of employment over the age of 18 (€8.24)
- The employee is engaged in a structured training course during working hours

This Act provides that, for the purpose of calculating the minimum wage, board and lodgings provided by a family can be included at the following rates:

- €54.13 for full board and lodgings per week or €7.73 per day
- €32.14 for full board only per week or €4.60 per day
- €21.85 for lodgings only per week or €3.14 per day

The Terms of Employment (Information) Act 1994 – 2014

Section 3 of this Act provides that employers must provide employees with a written statement of the terms of employment within two months of the commencement of employment. Employers are required to keep a copy of the statement of terms for the duration of the contract and for at least one year following termination of the contract.

The Organisation of Working Time Act 1997

Employees are statutorily entitled to 4 working weeks of paid annual leave in addition to nine public holiday days. Any annual leave provision over and above 4 working weeks is at the discretion of the employer.

Annual leave entitlements will continue to be accrued while employees are on sick leave, maternity leave, adoptive leave, parental leave, force majeure leave and carer's leave.

Lessons

As a result of the decision, au pairs will likely be deemed to be employed by the families that engage them. Accordingly, those who have an au pair should bear the following in mind:

- Au pairs who are over the age of 18 and not in their first two years of employment are entitled to be paid at least €9.15 per hour. Families are entitled to make deductions in respect of food and board in line with the amounts outlined above.
- Au pairs must not work more than 48 hours per week or an average of 48 hours per week calculated over a four month period.
- Au pairs should be provided with a written statement which covers the core terms of their employment and should also be provided with written pay slips.
- Au pairs are entitled to proper rest breaks i.e 15 minutes for every 4.5 hours worked or 30 minutes for every 6 hours worked.

- Au pairs are entitled to annual leave of at least 4 working weeks per year and the family should maintain records of holidays taken and hours worked.
- Families will be obliged to provide a safe place of work for au pairs and should agree in advance the duties which the au pair is required to undertake as part of the agreement.
- Families must give au pairs minimum periods of notice in the event of termination of the employment depending on the au pair's length of service.

Contributed by Catherine O'Flynn & Aedín Brennan.

Shareholder Disputes: Legal Advice Obtained by Company is Privileged

For the first time, the Irish courts have considered the question of whether privilege applies to legal advice which has been obtained by a company in anticipation of a dispute with a shareholder. In *Carlo Tassara Assets Management S.A. v. Eire Composites Teo [2016]*, it was held that legal privilege may apply where the shareholder's interests diverge from those of the company, but this was dependent on whether the parties at the time are 'sundered by litigation'.

Legal advice was obtained by the company in contemplation of a potential dispute over its conversion of a €2 million loan note held by the plaintiff into a 47% shareholding, which was subsequently sold to a third party pursuant to 'drag-along' provisions. The plaintiff claimed that it had not consented to the loan note conversion or the subsequent sale and, in taking action against the company, sought discovery of documentation regarding (1) the alleged agreement to convert the loan note; and (2) the offer to purchase the company.

The company claimed legal advice privilege and litigation privilege on the basis that the documents sought were communications between lawyer and client, had been produced for the purposes of giving or receiving legal advice, and their dominant purpose was to prepare for the litigation. The plaintiff claimed that it was entitled to discover legal advice received by the company during the time it was a registered shareholder, and that some of the advice pre-dated the legal action.

The court considered UK case law and concluded that legal advice obtained by a company regarding a particular course of action (even if that action might give rise to litigation) is advice which, in principle, is of joint interest to a shareholder claiming such actions are unlawful. However, this joint interest depends on the circumstances: legal advice sought after a company has taken the disputed actions, and when legal proceedings are contemplated, is less likely to be of joint interest and more likely to be sought for the benefit of one side to the dispute.

If, in reality, the dominant purpose is the pursuit or defence of litigation, or the legal advice arises in the context of discussions aimed at avoiding such litigation, the legal advice will attract legal professional privilege.

In this case, legal advice obtained by the company in advance of the alleged agreement to convert the loan note (even if in anticipation of litigation arising) would initially have been discoverable. However, from the point that litigation between the company and the shareholder became probable the legal advice attracted legal professional privilege.

Contributed by Adam Synnott & Lucy McCurry.

Irish High Court Refuses To Follow Recent UK Jurisprudence On Penalty Clauses

The two recent High Court decisions by Haughton J. in the cases of *Sheehan v Breccia and others* and *Flynn & Anor v Breccia* have reassessed the Irish position on penalty clauses. The cases take into account the recent decision by the UK Supreme Court, which is a departure from the traditional test applied both in the UK and Ireland.

A penalty clause is a clause which normally provides for the payment of a sum of money in the event of a breach of contract. In deciding whether or not a commercial provision constitutes a penalty clause, consideration is given as to whether the payment represents a genuine pre-estimate of loss or probable loss by reason of the breach. The Irish position is as set out in *ACC Bank plc v Friends First Management Pension Funds Limited*.

Recently the UK Supreme Court rejected the traditional test of whether a clause is a genuine pre-estimate of loss in favour of a test which looks at whether the clause imposes a detriment out of all proportion to any legitimate interest of the innocent party in the enforcement of the clause. It was determined that the focus should be on whether the clause is unconscionable or extravagant, and not on whether it is a genuine pre-estimate of loss.

Ultimately Haughton J. concluded that he is bound by judicial principles to follow the recent Irish case law, applying the genuine pre-estimate of loss test. It is worth noting that Haughton J. stated that it is the role of an appellate court to change the Irish approach to penalty clauses. It remains to be seen whether these cases will be appealed and if so how the Court of Appeal might assess the validity of penalty clauses in light of the recent UK jurisprudence.

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Contributed by Brian McElligott.

Market Abuse Update

As previously reported, the Market Abuse Regulation (MAR) becomes directly effective in Irish law from 3 July 2016. MAR is to be supplemented by delegated regulations (Delegated Regulations), and implementing technical standards and guidelines (Implementing Regulations) to be adopted by the European Commission and the European Securities and Markets Authority. In time, there will also be specific Irish implementing regulations.

The European Commission has recently adopted Delegated Regulations and Implementing Regulations regarding the following matters:

1. Precise format of insider lists and for updating insider lists

An Implementing Regulation prescribes the format for the preparation and maintenance of insider lists required to be prepared by issuers (or any persons acting on their behalf) and submitted to the competent authority. Annexes I and II contain the templates that must be used for this purpose. We will provide further information in our next edition on the practical implications of these requirements for the preparation, maintenance and submission of insider lists.

2. Conditions applicable to buy-back programmes and stabilisation measures

This Delegated Regulation sets out:

- Information to be disclosed by the issuer about a buy-back programme before trading
- Obligations on reporting and recording transactions related to buy-back programmes
- Activities which the issuer may not engage in during buy-back programmes

3. Technical arrangements for objective presentation of investment recommendations and for disclosure of interests

This requires persons producing investment recommendations to disclose their identities and any interests which may reasonably be deemed to impair the objectivity of the recommendation. It also imposes criteria relating to the content of such recommendations, for example, facts must be clearly distinguished from estimates and opinions.

4. Appropriate arrangements, systems, procedures and templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions

This imposes requirements on persons arranging or executing transactions and trading venue operators to establish procedures to report transactions and orders that could constitute offences such as insider dealing or other offences under MAR.

5. Criteria for establishing an accepted market practice

If behaviour that would otherwise constitute market manipulation is carried out for legitimate reasons and conforms with an accepted market practice (AMP) that behaviour will not fall foul of the prohibition on market manipulation under MAR. This Delegated Regulation sets out the criteria to which competent authorities must adhere when establishing an AMP.

6. Content, timing, format and template of notifications to be submitted to competent authorities

The Annex to this Delegated Regulation, together with a related Implementing Regulation, sets out the content, timing, and template of the notifications to be submitted by trading venue operators to competent authorities, including; details regarding the admission to trading of the financial instrument in question, and the cessation of such trading.

The Council of the EU and the European Parliament are currently considering the above Delegated Regulations, and if neither objects, the Delegated Regulations will apply from 3 July 2016. The Implementing Regulations will also apply from 3 July 2016.

If you have any queries in relation to the above developments or their practical implications for you, please do not hesitate to contact one of the key contacts detailed here or your usual William Fry contact.

Contributed by Niall Keane.

Vicarious Liability – When is an Employer Liable for its Employees' Actions?

In the case of *Mohamud v Wm Morrisson Supermarkets [2016]* the UK Supreme Court has held the defendant company liable for the actions of an employee.

The facts

In March 2008 the claimant attended a Morrisons petrol station in Birmingham. While there he asked if it would be possible to print some documentation from a USB stick. Mr. Khan, an employee who was working behind the counter, used racist and rude language and refused the claimant's request before asking the claimant to leave. As the claimant left, Mr. Khan followed the claimant to his car and opened the passenger door. The claimant asked Mr. Khan to close the door at which point Mr. Khan launched a serious assault on the claimant, knocking him to the ground and punching and kicking him despite Mr. Khan's supervisor telling him to stop.

Decision

At the trial and first appeal, the court held Morrisons as not vicariously liable for Mr. Khan's actions on the basis that there was not a sufficiently close connection between what Mr. Khan was employed to do and his unprovoked attack on the claimant.

However, on a further appeal to the UK Supreme Court, it was held that Morrisons was vicariously liable for the actions of Mr. Khan in attacking the claimant. The Court found that Mr. Khan's job was to serve customers and to respond to their enquiries and, although Mr. Khan's behaviour was a gross abuse of his position, his actions were within "*the field of activities*" assigned to him in his employment. The court also held that there was an "*unbroken sequence of events*" which led to the attack.

The Court further held that Mr. Khan's motive was irrelevant: he was entrusted to deal with members of the public during his employment. The Court therefore held Morrisons responsible for Mr. Khan's abuse of that trust.

The Irish position

In Ireland, under common law, employers are vicariously liable for the acts and/or omissions of their employees which occur in the course of the employees' employment.

In addition, under the Employment Equality Acts 1998-2011, employers will be vicariously liable for discriminatory acts of employees whether such acts are done with or without the employer's knowledge or consent. However, employers can avoid liability where they can prove that they took reasonable steps to prevent the discriminatory act.

Comment

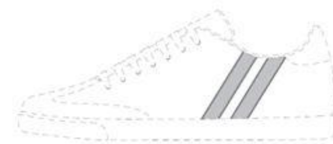
The decision of the UK Supreme Court illustrates the broad approach which the courts take to the close connection test. However, it is important to bear in mind that the court considered what was just in the particular circumstances and acknowledged that future decisions will require an evaluation of facts on a case-by-case basis. Nevertheless, the decision acts as a stark reminder to employers that they can be held vicariously liable for the acts of their employees.

Contributed by Catherine O'Flynn & Aedín Brennan.

CJEU issues decision in Adidas three-stripe case

The Court of Justice of the European Union (CJEU) has ruled on the case of alleged similarity regarding the well-known Adidas three-stripe trade mark (see first image below). Shoe Branding Europe BVBA applied for a Community Trade Mark (CTM) (see second image below) for two parallel stripes, both impressed on a shoe, and which appeared to be similar to the Adidas “Dragon” model. Adidas had a number of prior rights to a three-stripe mark protected in class 25 (i.e. for footwear) for which the Shoe Branding CTM also sought protection.

Adidas Registered CTM



Shoe Branding Europe BVBA CTM Application

The opposition by Adidas to the Shoe Branding application was dismissed by the Office for Harmonisation in the Internal Market’s (OHIM) Opposition Division and by the Board of Appeal. It held that the Adidas three-stripe mark was so banal that it could enjoy protection only against identical, or virtually identical, reproductions. In particular, the Board held that the differences in the details in the positioning, sloping and the number of stripes were sufficient to dispel any likelihood of confusion. The Board of Appeal also found that these dissimilarities were sufficient to dispel a risk of a link being made between the marks and therefore the application could not take unfair advantage or be otherwise detrimental to the distinctive character of Adidas’ three-stripe mark.

Adidas subsequently appealed this decision to the General Court where the decisions of the Opposition Division and Board of Appeal were overruled on the grounds that the difference in length of the stripes arising from their difference in inclination were minor and would not be noticed by a consumer with an average degree of attention. Shoe Branding appealed this decision to the CJEU where the General Court’s reasoning was upheld. The CJEU found that the "*minor differences*" between the shoes such as the length of the stripes, their different inclination and their number were not enough to say that the marks were dissimilar. As such, the CTM application was struck down on the basis that it would cause a likelihood of confusion amongst consumers.

The case highlights to brand owners that non-traditional trade marks can be an effective branding tool which can be used to keep copy cats and other infringers at bay.

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Contributed by Brian McElligott.

Standing Conciliator: New Appointment Form and Role for Public Works Contracts Disputes

As reported in our March 2016 edition, the Department of Public Expenditure and Reform (DEPR) has published revised arrangements for procuring public works. As part of these revisions a new model form for the appointment of a standing conciliator has also been published. The revisions took effect from 4 April 2016 and are set out in Circular 01/16 ("Construction Procurement - revision of arrangements for the procurement of public works projects").

New appointment form

The new conciliator appointment form sets out the terms and conditions upon which the standing conciliator should be engaged. It applies to parties using public works contract forms PWC-CF1 to PWC-CF4 where the contract sum exceeds €10 million (optional appointment below €10 million). The appointment should be completed having regard to these new contract forms and to the associated new guidance note relating to dispute resolution within the Capital Works Management Framework.

Standing conciliator - new role

The standing conciliator will act as conciliator for all disputes referred to conciliation under these contracts. The individual is appointed by mutual agreement or, failing agreement, by the appointing body referred to in the contract.

The intention is that the standing conciliator will encourage active engagement between the parties to avoid formal, lengthy and costly disputes. Where disputes arise, the standing conciliator will then act as a conciliator to resolve them. Generally, where disputes are not resolved by agreement within 42 days following referral to conciliation, the standing conciliator will issue its recommendation.

The new role of standing conciliator forms part of an overall stepped dispute resolution process, which also features a project board, arbitration and litigation.

New bond form

The model form bond for conciliation recommendation has also been updated.

Conclusion

Contracting authorities, professionals and those involved on public sector construction projects should familiarise themselves with these new obligations for procuring public works projects. The new model forms and guidance note are available on DEPR's website. Contracting authorities must use these forms where procuring projects or works from 4 April 2016, unless the prescribed derogation outlined in Circular 01/16 applies.

Contributed by Cassandra Byrne.

In Short: Converting to a Designated Activity Company (DAC) or a Private Company Limited by Shares (an LTD)? – Time Is Running Out!

Under the Companies Act 2014, all existing private companies limited by shares should convert to one of the new company types (DAC or LTD) during the transition period which ends on 30 November 2016.

Companies that have not applied to the Companies Registration Office (CRO) to be converted to either a DAC or an LTD during the transition period will be automatically converted to an LTD by the CRO after 1 December 2016. Companies wishing to convert to a DAC must either pass an ordinary resolution to convert by 31 August 2016 or convert by special resolution thereafter and companies wishing to convert to an LTD should pass a special resolution during the transition period ending 30 November 2016. However, it is envisaged that the CRO will receive an influx of conversion filings towards the end of the transition period and it is therefore advisable that companies pass a resolution sooner rather than later to ensure that the CRO has time to process such conversion applications. The CRO has stated that it is not guaranteed that applications received towards the end of the conversion process will be processed before 30 November 2016. We would encourage companies to consider this matter at the earliest opportunity and take the necessary steps to begin the process.

Please contact your usual William Fry contact or one of the key contacts detailed here if you wish us to assist with drafting the necessary documentation required for conversion.

Contributed by Deirdre Mooney.

In Short: European Commission Reaches Preliminary View that Insurance Block Exemption Regulation Is No Longer Necessary

The European Commission has published a review of the Insurance Block Exemption Regulation (IBER), which expires on 31 March 2017. The Commission's preliminary view is that the IBER is no longer necessary.

The IBER exempts from competition law two types of agreements between (re)insurers which meet certain criteria. This means that such agreements benefit from a presumption of compliance with competition law. The agreements in question are:

- First, (re)insurers may jointly compile and distribute information needed for costs calculations and the construction of mortality tables (but not share the calculations or mortality tables themselves). The Commission considers that a specific block exemption is no longer required for these activities, noting that its 2010 Guidance on Horizontal Co-operation provides relevant guidance on information exchange. The Commission has stated that if required, it could also provide complementary specific guidance.
- Second, (re)insurers may participate in co-insurance and co (re)-insurance pools. However, the Commission notes that there is an industry trend away from the use of institutionalised pools towards more flexible ways of co (re)insuring risks and that few industry participants have made use of this element of the IBER in practice.

The Commission will issue final proposals on the IBER in early 2017.

Contributed by Sheila Tormey.

In Short: William Fry M&A Review 2015

In March we welcomed the publication of the fifth annual William Fry M&A Review.

The review reveals a vibrant mergers and acquisitions (M&A) scene in 2015, with a significant rise in deal values, from €45.3bn in 2014 to €189bn in 2015, although a drop in deal volume, from 120 in 2014 down to 104 in 2015.

Among the many notable trends highlighted in 2015 is that half of all transactions with an Irish element were outbound, the highest on record for Irish businesses, making overseas acquisitions higher than recorded in other European countries. Inbound deals dominated by value, with nine out of the 10 largest deals by value in 2015 involving foreign bidders. The year also saw greater access and choice in source of finance, reflecting a return to more stable investment opportunities, while deals in the property sector continued to recover.

The review provides a detailed insight into Ireland's M&A landscape over the course of 2015, an examination of the emerging trends and opportunities in the current economic environment, as well as an outlook for 2016. Please click here to read the review in full.

Contributed by Adam Synnott.

In Short: Don't Delay Landlords! Timely Action Required to Avoid Charge for Outgoing Tenant Rates Arrears

We previously highlighted property owners' statutory duty to notify the local authority on a change of the rateable occupier and the risk of a charge being levied on the property for failure to comply. The 14 day notification period is tight.

Landlords are likely to be live to this obligation in situations where there is an obvious change in the rateable occupier such as on assignment, sub-letting and surrender. However, landlords should be equally quick to react any time possession of the property is taken back. For example, each of the following actions triggers the statutory notification requirement:

- The natural expiry of a lease
- Termination of a lease following the exercise by a tenant of a break option
- Forfeiture
- Landlord action following the return of keys by a tenant indicating acceptance by the landlord of the surrender of a tenancy

Contributed by Tara Rush.

In Short: UK and Ireland Align in Predictive Coding

On 16 February 2016, the UK High Court in *Pyrrho Investments and others v MWB Property and others [2016]* handed down its judgment affirming the use of predictive coding in discovery. The decision marks the first time a UK Court has given judgment on the matter, while noting the limited Irish and US jurisprudence on the topic.

Although the parties had agreed to the use of predictive coding, judicial approval was sought due to its relatively recent introduction into English litigation. In deciding that 'there were no factors of any weight' to point in the direction of not using predictive coding for their disclosure process, the Court had regard to the Irish Commercial Court's decision in *Irish Bank Resolution Corporation Ltd & ors v Quinn & ors [2015]* where predictive coding was endorsed; a decision which was validated by the Court of Appeal.

Predictive coding, often referred to as technology assisted review, is the use of computer software to review and analyse documents, determining if they are of relevance to the issues of the case. It is not without human input however as the computer must, first, be 'trained' in order to determine relevancy – it is an iterative process. Based on the training received, the software can review and score documents for relevancy, subject to quality assurance exercises carried out by the human reviewer.

Contributed by Greg Deane, eDiscovery Manager.