EMPLOYMENT BAR ASSOCIATION OF IRELAND

**Recent Developments in Employment Law**

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*Overview and References*

1. **Bullying in the Workplace: Ruffley in the Court of Appeal and now under appeal to the Supreme Court**

   - Following the overturning of the High Court judgment by a majority of the Court of Appeal ([2015] IECA 287), the Supreme Court has now granted the employee leave to appeal on two questions, having determined that the objective nature of the test is now satisfied as a matter of Irish law
   - Consideration of the two questions:

     “The Court considers that there are two aspects of the decision in the Court of Appeal, where the members of that Court diverged significantly in their assessment, that are of potential widespread significance to employees and employers. The Court accordingly grants leave to appeal on the following question[s]:

     Whether an unfairly carried out disciplinary process resulting in psychiatric injury is, in itself, capable of being actionable in damages on the basis that it amounts to workplace bullying without evidence of malicious intent on the part of the employer.

     Whether behaviour not witnessed by other persons in the workplace is capable of undermining the dignity of an employee.”

   - Implications and analysis of each of these two questions
     - Malicious intent
     - Dignity

2. **Most recent judgment in the Bullying context: Jackson**

   Jackson v Cahill and Cahill Solicitors (Unreported judgment of the High Court (Moriarty J) of 6th July 2016)

   - Post-Ruffley example of Plaintiff success in workplace bullying action
   - Moriarty J emphasises how close to the line the facts lay
   - Emphasis on effects on this plaintiff: ability to reconcile with objective test?
   - Implications
3. Payment of Wages, deductions and discretionary bonuses

*Cleary v B & Q Ireland Ltd* [2016] IEHC 119

- Appeal from a decision of the EAT in respect of claims pursuant to s 7(4)(b) of the Payment of Wages Act 1991
- Key issue of interest: bonus dispute
- Relevant contractual clause provided that ‘all bonus schemes are discretionary and are subject to scheme rules. They may be reviewed or withdrawn at any time’.
- EAT concluded that the clause was clear, unequivocal and incapable of any other interpretation

*Per McDermott J* at [63] – [64]:

“I am satisfied that in the circumstances of this case the overall discretionary nature of the bonus scheme does not extend to a withholding of the bonus due, in respect of that period, in respect of which the bonus was quantified and payable under the scheme, subject to compliance with the eligibility provisions. I am satisfied that the contract of employment and bonus scheme must be interpreted reasonably. The discretion to withdraw the bonus scheme at any time, in my view, was always intended to apply in *futuro* and attached to the conferring of bonuses, as yet unaccrued, under the terms of the scheme. The payment of the bonus crystallised as a contractual obligation once it was “earned” in accordance with the terms of the scheme as operated. I am satisfied that the Tribunal erred in law, in interpreting the discretion vested in the employer to withdraw the bonus scheme at any time as being applicable or attaching to this period.

I am therefore satisfied that notwithstanding the employer’s difficult financial circumstances in this case, it bore a contractual obligation to pay the 3% bonus accrued to each employee during the relevant six month period and that this was a bonus properly payable as “wages” under section 5(1) of the 1991 Act.”

- Implications and analysis

4. Mandatory Injunctions: The meaning of the *Maha Lingham* strong case threshold

*Earley v Health Service Executive* [2015] IEHC 841

- Senior manager seeking to restrain reassignment
- Important judicial clarification on *Maha Lingham* test
- *Per* Kennedy J [2015] IEHC 520 at [20]: Strong case threshold means a strong case that P will succeed at trial – not a strong case that P will secure permanent injunction – Implications
5. *Boyle v An Post* [2015] IEHC 58

- Attempt to restrain dismissal on grounds of misconduct
- Application unsuccessful due to *Maha Lingham* strong case test
- Judgment of Barrett J contains significant guidance for both plaintiffs and defendants in employment injunction applications
- *Per* Barrett J at [20]
  - "...[T]he court would observe that employers ought to be careful before they claim in court, or allow their advisors to so claim, that they have no confidence in a particular individual. No confidence? None? It is a very powerful assertion to make, and not one that ought lightly to be made. We all make mistakes; if and when we do it is well for those in a position of authority to remember Lincoln’s adage that ‘mercy bears richer fruits than strict justice’.
  - Implications for pleadings
- Important dicta on the application of *Nolan v Emo Oil* [2009] ELR 122:
  - *Per* Barrett J at [26]:
    
    “[The employer] may contend, it might even be right, that Mr Boyle’s best option was and remains to bring a complaint before the Employment Appeals Tribunal; and it is entitled to that belief. But [the employee] has entitlements too; among them is his entitlement to bring what is an arguable claim of wrongful dismissal before the court and to seek related reliefs such as those now sought in the within application. In general, one must tilt with one’s opponents where they seek to joust, and not in an arena of one’s choosing: here the court does not accept any contentions ..that the appropriate forum for the dispute between the parties necessarily lies elsewhere and/or that the within proceedings ought not to have been commenced.”

6. **Appropriate Measures in the context of disability discrimination cases**

*Nano Nagle School v Daly* [2015] IEHC 785

- Employment Equality Acts 1998 to 2015, s 90(1), s 16
- Complainant – SNA in employment since 1998. In 2010 she was in a serious accident in which she suffered spinal injuries which left her paralysed from the waist down and wheelchair bound. Diagnosis was that she was likely to remain unfit for the position of SNA permanently.
- OT report identified 16 categories of duties required of SNAs and considered that the respondent was able to carry out duties in nine of the categories either wholly or partly but not in the remaining seven.
- The definition of ‘appropriate measures’ in s. 16 (4) included the adaptation of both patterns of working time and distribution of tasks. Although article 5
of the Directive did not explicitly refer to patterns of working time and
distribution of tasks, these expressions were to be found in recital 20 which,
in itself, did not have the force of law but was closely mirrored by s 16(4)(b).

- Per Noonan J at [59] – [62]:

“59. At first blush, a literal interpretation of s.16 (1) (b) considered on its own
appears to support the position adopted, initially at least, by the school. However,
when read in conjunction with s. 16 (3) and (4) insofar as they apply to this case, it is
clear that a person with a disability is, for the purposes of the Act, to be regarded as
fully competent to undertake and fully capable of undertaking the duties of a given
job if such person would be so competent and capable on the distribution of tasks
associated with that job being adapted by the employer. As held by the CJEU in Ring,
the adaptation of patterns of working time must include the elimination of some of
that working time, subject always to the caveat that the measures must not impose
da disproportionate burden on the employer. The adaptation of the distribution of
tasks must also where appropriate include the elimination of tasks since otherwise
the section would fail to achieve the objective for which the legislation was enacted.

60. In considering Ring, the Labour Court concluded that by parity of reasoning it is
also for the national court to assess if a redistribution of tasks represents a
disproportionate burden on the facts of a particular case in which that question
arises. I can find no fault with that logic. The adaptation of the distribution of tasks
must in an appropriate case include a consideration of whether a reduction of those
tasks may be necessary in order to comply with s. 16. Indeed the school has
acknowledged as much in conceding that it may be necessary to strip out some
peripheral tasks from the job. Of course whether, and to what extent, a reduction in
tasks is required to comply with s. 16 must necessarily depend on the facts of each
case. It may or may not be relevant to consider whether a point is reached when the
appropriate measures transform the job into something entirely different from that
which originally existed. Some of the English authorities appear to go as far as
suggesting that under the equivalent, and admittedly different, English legislation
which pre-dates the Directive, the requirement to reasonably accommodate a
disabled employee may extend to transferring him or her to an entirely different
position within the same organisation – see Archibald v. Fife Council [2004] UKHL 32

61. While the school in its submissions criticised what it submits are various errors of
law in the Labour Court’s interpretation of the national and European case law, even
if same were made, which I do not determine, these do not appear to me to
undermine the ultimate outcome. The fundamental determination of the Labour
Court here was that the school failed to engage with its duty to consider whether or
not Ms. Daly could reasonably be accommodated by the implementation of
appropriate measures. The Labour Court did not conclude that Ms. Daly could be so
accommodated but rather it was the failure to even consider a redistribution of her
tasks as a SNA that rendered the school in breach of s. 16. It seems to me that on the
evidence, the Labour Court was perfectly entitled to reach the conclusion that there
had been no adequate consideration or evaluation of these issues by the school and
a phone call to the NCSE about funding, the content of which was never precisely determined, was an insufficient effort on the part of the school to comply with its statutory obligation.

62. These are all conclusions which in my view were open to the Labour Court on the evidence and it could not in any realistic sense be suggested that these were irrational or based on an erroneous interpretation of the law.”

- Implications and Analysis


- Elaine Dewhurst, “Proportionality assessments of mandatory retirement measures: uncovering guidance for national courts in age discrimination cases” [2016] Industrial Law Journal 60 proposes a new analytical model for the assessment of such cases at a national level.

- Involves an analysis of four specific factors:
  - the specific economic sector
  - the availability of a pension
  - the impact of the mandatory retirement measure on the right to work and earn a livelihood
  - the importance of consent
- Potential relevance for litigation on objective justification

8. Vicarious Liability


“….It has not yet come to a stop”. Per Lord Reed in Cox v Ministry of Justice [2016] UKSC 10 at [1].

- Two very significant UK Supreme Court cases this year on vicarious liability:
  - Cox v Ministry of Justice [2016] UKSC 10
  - Mohamud v WM Morrison Supermarkets plc [2016] UKSC 10

  - Relationship between wrongdoer and defendant
  - Relationship between wrong done and employment

- Challenge of determination by Social Welfare Appeals Officer that individual was in insurable employment
- Case raised question as to whether issue estoppel: the employment status of the individual had already been determined by a decision of a Rights Commissioner who had deemed her to be self-employed. The following year, a Deciding Officer in the Scope Section of the DSP determined, pursuant to s. 300 of the Social Welfare Consolidation Act 2005, that she was employed as a member of staff with the applicant and therefore was insurable under the Social Welfare Acts for all benefits and pensions at PRSI Class A for the period.

**Per Murphy J at [52] – [53]:**

“The Court does not consider that issue estoppel arises in the instant case. The Organisation of Working Time Act 1997, the Protection of Employees (Fixed Term Work) Act 2003 and the Social Welfare Consolidation Act have all provided for different statutory mechanisms to resolve what are in essence, different issues arising from an employer-employee relationship. Each of those Acts provides for an ultimate appeal to the High Court on a point of law. None of the Acts provides that the decision of one decision making body is binding on the other. The legislature in its wisdom has seen fit to set up different statutory schemes to deal with different employment issues. Undoubtedly it would be far more efficient to have one body charged with the resolution of all issues relating to employment status. This however is a matter for the legislature and not the courts and as matters stand, employees enjoy rights to seek redress simultaneously from the Rights Commissioner and the Department of Social Welfare depending on the nature of their complaint.

The Court does however note that the decision of the Rights Commissioner in relation to the status of the notice party had been made known to the Appeals Officer and the Deciding Officer prior to their embarkation on their own decision-making process under the 2005 Act. That decision is based on largely the same factual circumstances and that decision must be at least of some persuasive authority such that one would expect the Appeals Officer and Deciding Officer to explain the basis on which they came to a conclusion in relation to the notice party’s employment status which differs from that of the Rights Commissioner whose decision, in the Court’s view, seems more cogently formulated than those of the Deciding Officer and Appeals Officer of the SCOPE section of the respondent. Indeed, the Court’s views in this respect would seem to be in accordance with the remarks of Kelly J. in *Mulholland v. An Bord Pleanala* [2006] 1 IR 153 where he held that a decision making body:
“...must give its reasons and considerations in a way which not only explains why it has taken a different course but must do so in a cogent way so that an interested party can assess in a meaningful fashion whether or not the respondent’s decision is reasonably capable of challenge”.

10. High Court challenges to procedures at the Workplace Relations Commission: the implications of yesterday’s Supreme Court decision in County Louth Vocational Educational Committee v Equality Tribunal [2016] IESC 40

The appellant sought, inter alia, declarations, either to the effect that the Equality Officer acted ultra vires, in purporting to conduct an investigation falling outside the lawful terms of the original complaint made ... or, alternatively, an order requiring the Officer to confine her investigation to the issues set out in ......original complaint form.

Argued that time limits set out in the Acts debar Equality Officer from investigating any other matters said to have occurred much earlier, and which were not described in the EE1 form.

The appellant also sought an injunction by way of judicial review, staying the investigation being conducted into the alleged discriminatory acts, save insofar as the investigation is confined to the two allegations contained in the complaint which Mr. Brannigan made to the Tribunal on the 4th August, 2006.

- Per MacMenamin J:

It is well established that the purpose of a deciding body or tribunal, such as the respondent Tribunal, is to provide speedy and effective redress in cases of alleged discrimination. It is not in dispute the procedures employed may be both informal and flexible. It is true... that the range of claimants before such a Tribunal do not fit into any one category. They may or may not be legally represented and, therefore, flexibility is both warranted and necessary.

The question is, are there grounds for any declaration? It has been observed, more than once, and not only in this jurisdiction, that it is not in the public interest, nor the intent of the legislation, that investigations, or inquiries, of this nature should be intermittent, or be interspersed with unnecessary representations or counter-representations, or by premature applications made to the courts...”

- A number of factors were identified by MacMenamin J as militating against granting a declaration.

"First, the question arises in circumstances where it is very doubtful whether, in principle, the remedy of certiorari would be available at this stage. The officer has
denied she has made any decision or order which might be impugned by judicial review. This has not been disproved to the requisite level of probability. On the face of things, she is acting within jurisdiction, or rather it has not been shown that she has exceeded her jurisdiction.

53. Second, it is necessary to, again, point out that this is an inquiry which is still in the course of hearing. It has commenced. Much is still to be adduced. Should a court, even by declaratory order, seek to direct the manner in which the Equality Officer should carry out her task, not only in circumstances where she has sworn that she has not reached any conclusion in relation to jurisdiction, but where the hearing is still in being? I think not. A declaration is not to be seen either as a surrogate for certiorari or for an injunction. I would hold that neither certiorari, nor an injunction, could be granted restraining the hearing at this stage. Such an application would be premature.

Further, in order to obtain relief, even by way of declaration, it would be necessary for the appellant to demonstrate that it is in imminent danger of suffering a diminution of rights, or a detriment. But, as yet, there has been no determination of rights or interests.

- Consider the comments of MacMenamin J at [60]:

  “As Order 84, Rule 18(1) makes clear, the issue in this appeal concerns the question of whether or not it is “just and convenient” to grant a declaration. I do not consider that it would be either “just” or “convenient”. The hearing is still proceeding. It is to be presumed it will be fair. It is to be presumed that the Equality Officer will act within jurisdiction. The policy of this Act, and the courts generally, lean against interference in a pending hearing, save in the most exceptional circumstances. There has been no detriment, or denial of rights or interests, nor has it been sufficiently shown that there is an imminent danger of the appellant suffering such detriment.

- Observations and analysis

THANK YOU!

Comments and questions are most welcome: desmondryan@lawlibrary.ie