



# Employment Law Update

April 2010

## European airspace closures and stranded employees

Many employees are unable to get a flight home because of the ongoing European airspace closures due to volcanic ash plumes from Iceland. Where an employee is stranded on holiday abroad and is unable to return to work, the employment contract should be deemed to be suspended for force majeure. Force majeure applies where one party is temporarily unable to fulfil his essential obligations due to unforeseeable circumstances outside the control of that party. The current airspace closures would be deemed to be an event of force majeure justifying suspension of the employment contract. In these circumstances, an employee is not entitled to receive salary even though the reason the employee cannot turn up for work is outside his control. An employee should take all reasonable steps to return home and work via alternative means of transport.

An employer could allow the employee use his holiday allocation to make up for the missed working days. Alternatively, the employer could deem the additional days to be unpaid leave. However, what is clear is that an employer should not take any form of disciplinary or other action against an employee for not turning up for work due to the exceptional circumstances. Employers should act fairly and reasonably.

However if the employee is away on a business trip and is left stranded, that employee should be paid in the usual manner. In addition the employer should take all necessary but reasonable steps to provide the employee with an alternative means of transport.

## Employers' insolvency and their obligation to pay employees

An employer is obliged to pay an employees' wages for hours worked under basic contract law principles and the Payment of Wages Act 1991 as amended. Similar rights are enshrined in other employment Acts in relation to redundancy payments, holiday pay and so on.

The Protection of Employees (Employers' Insolvency) Acts 1984 - 2004 protect certain outstanding entitlements relating to the pay of employees where their employers become insolvent. The Insolvency Payments Scheme is a scheme to protect pay-related entitlements of employees whose employer has become legally insolvent as defined in the Acts. Under the Scheme, employees may claim (normally through the liquidator or receiver) arrears of pay, holiday pay, pay in lieu of statutory notice and various other entitlements such as court orders in respect of wages, holiday pay or damages at common law for wrongful dismissal that may be owed to them by their employer. Certain contributions to occupational pension schemes or PRSAs are also covered. Where a payment is made to an employee under the Scheme, his claim against the employer for that debt is transferred to the Minister for Enterprise, Trade and Employment. All payments are made from the Social Insurance Fund, and certain conditions and limits apply to payments under the Scheme.

There is a current limit of €600 per week on any amount payable under the Scheme which may be calculated by reference to an employee's pay. Further arrears of normal pay, deductions for union dues, sick pay, holiday pay and pay in lieu of statutory notice are limited to a maximum of eight weeks and may relate only to the period of 18 months prior to the date of insolvency in most cases.



## Age discrimination: recent EU decisions

The European Court of Justice (ECJ) has recently upheld age limits imposed in two German cases on age discrimination concerning age limits for the employment of firemen and the age limits for panel dentists.

**Background.** The Equal Treatment Council Directive 2000/78/EC (the Directive) establishes a general framework for equal treatment in employment and prohibits many forms of discrimination including discrimination based on age. Article 4(1) of the Directive provides that no discrimination will occur where there is a difference of treatment based on a characteristic related to age and that characteristic constitutes a genuine occupational requirement, provided that the objective is legitimate and the requirement is proportionate. The Directive is implemented in Ireland under the Employment Equality Acts 1998 - 2008.

### Case 1

The first case related to a claim by an applicant Mr. Wolf for a position as a fireman with the German fire service. Mr. Wolf was not considered for the role because of the requirement that fire fighting roles were only open to the under 30s. The ECJ held that an entry level age bar of 30 years of age for firemen is justified under the Directive as a genuine occupational requirement which was intended to ensure that once firemen were trained they would be physically able to devote 15 to 20 years to the job. The court referred to data provided by the German Government according to which very few over 45 years of age have sufficient physical capacity to perform the fire-fighting role of their activities. This meant that the fire service was justified in rejecting Mr. Wolf despite the fact he was only a few months over the age limit.

### Case 2

The German Government require dentists in the German health service to retire at 68. In this case the applicant Petersen appealed a decision of the Appeals board for dentists for the district of Westphalia and Lippe concerning the board's refusal to authorise her to practise as a panel dentist after the age of 68 years.

The ECJ rejected the argument that the age limit was justified by the fact that competence reduces from that age and it was therefore necessary to impose the age limit to protect patients because dentists could continue to practice outside the health service without the age restriction. However, it concluded that it was possible for the age limit to be justified where the local labour market required it. In this context, where there were not enough opportunities for younger workers because the job market was saturated, an upper age limit could be justified under the Directive in the interests of allowing younger workers to join the health service. As to setting the age limit at 68, the court stated that that age may be regarded as sufficiently high to serve as the endpoint of admission to practise as a panel dentist.

This case is interesting as it shows that the ECJ will take into account broader reasons such as a country's labour market when determining whether or not an individual has been discriminated against on grounds of age.

*Cases: Case C-229/08 Wolf v Stadt Frankfurt am Main and Case C-341/08 Domenica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*



## €175,000 award in redundancy dismissal case

**Background.** The Unfair Dismissals Act 1977 (as amended) deem all dismissals to be unfair unless there are substantial grounds justifying them. Redundancy is one such substantial ground. However in order for an employer's decision to make an employee redundant not to be challenged as an unfair dismissal then it is critical that there is a genuine redundancy situation and, where there is not a complete cessation of a company's activity that the selection of employees is capable of being justified on clearly objective grounds.

**Facts.** The claimant worked for a technology company since 1999 which was taken over by a multi-national technology company in 2007. His role was then changed from general manager and chief technical officer to sales manager of the media division. He viewed this as a demotion and expressed concern that the new company had very little interest in the media area but was assured to the contrary and told that no redundancies would be made. The company made a €70,000 loss immediately by assigning him to that division alone due to his salary. There was very little direct contact from then on between the claimant and management and he felt ignored. The company did not allow him to attend a relevant EU trade fair and presentations he was to make on his division never materialised.

The claimant's division exceeded their sales target for the first quarter of 2008, however in May 2008 the company decided to make his position redundant due to losses in another area stating that it was not cost conscious to keep two people in the media division. He claimed he was unfairly selected for redundancy and that the company did not get rid of him at the time of the takeover as he still had a lot of knowledge that the company wanted.

**Decision.** The Employment Appeals Tribunal (EAT) upheld his claim and awarded him €175,000 in compensation. The EAT held that the claimant justifiably felt isolated and that the performance of his role was frustrated and made more difficult by the company's actions. The claimant was not kept adequately informed by the respondent company of developments, such as the promotion of another employee to replace him in the role of general manager. Placing the claimant into a division, which was then suffering a loss as a result of his salary, was in the view of the EAT a device or contrivance to bring about the claimant's redundancy.

**Comment.** The award is one of the largest awards to date from the EAT and possibly reflects the fact that it is currently difficult for claimants to secure alternative work and mitigate their loss.

*Case: Tom Mulligan v J2 Global (Ireland) Limited UD 1369/2008*

## Transformation, change, right-sizing and the legal implications

Beauchamps Solicitors will host a breakfast briefing entitled "*Transformation, change, right-sizing and the legal implications*" at their offices on Thursday 13th May 2010. Dermot Casserly, partner and head of Employment and Benefits at Beauchamps Solicitors will speak on the legal aspects of redundancy and John Behan - managing director at Beman Consulting will speak on implementing change and restructuring in the workplace. For more information on these topics and to register for this event please visit the events section of our website or contact Maree Kirby on [m.kirby@beauchamps.ie](mailto:m.kirby@beauchamps.ie).

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