



Employment Law Update

October 2009

EAT award of €161,420 for spurious redundancy

Background. The Redundancy Payments Act 1967 provides five statutory definitions of redundancy. All of these have as a common theme: the necessity for impersonality and change in the business leading to the necessity for fewer employees. Impersonality means that it is the position that is redundant and not the person. The Unfair Dismissals Act 1977 deem all dismissals to be unfair unless there are specific grounds justifying them. Redundancy is one such ground but in order for an employer's decision not to be challenged as an unfair dismissal there must be a genuine redundancy situation. The selection of employees must be justified on objective grounds and, there must be some evidence of consultation with the employee on measures to avoid redundancy.

Facts. JVC Europe Limited decided to restructure its workforce due to a downturn in business and made its general manager JP and two other employees redundant. As part of the restructuring a new position of sales manager was created. JP argued that this new position was essentially the same as his role of general manager but with a lower salary.

Decision. The Employment Appeals Tribunal accepted that there was a downturn in the company's business and that redundancies were necessary. However it awarded €161,420 (14 month's salary) to JP as it was not satisfied that the redundancy was genuine. It found that JP's position still existed despite a change in the title of the role and therefore he had been unfairly dismissed.

Comment. The decision reinforces the fact that in order for a redundancy to be genuine the position must actually be redundant.

Case: Jerome Ponisi v JVC Europe Limited Case No UD949/2008

Entitlement to paid annual leave while on sick leave

Background. In *Schultz-Hoff v Deutsche Rentenversicherung Bund C-350/06*; *Stringer and others v HM Revenue & Customs (C-520/06 20 January 2009)* the European Court of Justice (ECJ) ruled on the effect of long-term sick leave on a worker's right to annual leave under the Working Time Directive (see *Employment Law Update, February 2009 for more detail*). It held that whether a worker is entitled to take annual leave during a period that would otherwise be sick leave is a matter for national law to determine. However, if a worker on sick leave is prevented from taking annual leave, national law must enable the worker to take their holiday at a later date, even after the end of the leave year.

Recent Irish decision. In following the ECJ cases, the Labour Court has found that a clinical nurse manager who was on sick leave for over one year preserved her right to annual leave.

Case: HSE Dublin North East and a worker CD/08/874 3 July 2009



Exceptional collective redundancies: first decision

Background. The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 (the Act) came into force on 8 May 2007. The parties to the social partnership “Towards 2016” agreed on the establishment of a redundancy panel resulting from the outcry following the Irish Ferries case. It was an attempt to prevent the so-called “race to the bottom” where employees could be made redundant and replaced by employees carrying out essentially the same functions on materially inferior terms and conditions. The Act establishes a redundancy panel to which proposals to create collective redundancies can be referred by either the employer or the employee representatives within the 30 day consultation or notification period. The panel therefore deals with collective redundancies to ensure that they are genuine redundancies as opposed to situations where existing workers are replaced by lower paid workers. If the redundancy panel decide that the proposed redundancies constitute exceptional collective redundancies, it may request the Minister for Enterprise, Trade and Employment to refer the issue to the Labour Court.

Facts. MTL which is owned by Peels Port Group provides stevedoring services at Dublin Port. It carried out a restructuring which included compulsory and voluntary redundancies and pay cuts. New terms and conditions were notified to the remaining employees by letter, stating that if they were not accepted within five days, that their jobs would be made redundant. None of the new terms and conditions was accepted by the employees. SIPTU referred the matter to the redundancy panel, subsequent to which MTL withdrew the proposed new terms and conditions, and notified employees that there would be a further nine redundancies.

Decision. The Labour Court, in its first decision under the Act, found that the proposed redundancies where employees did not accept the new terms and conditions could be exceptional collective redundancies, if implemented and if MTL subsequently replaced them with other employees on less favourable terms and conditions. As regards the actual redundancies implemented the court concluded that they were not exceptional collective redundancies as there was no evidence that those employees will be replaced.

Comment. There is no appeal from the Labour Court. If the Labour Court had found that the redundancies were exceptional collective redundancies then MTL may not receive a rebate on the redundancy payments and the employees would be able to take action for unfair dismissal. In addition where the rebate is refused then the exemption from income tax on the lump sum payments to the employees does not apply. This dispute is ongoing.

Case: Peel Ports (Marine Terminals Limited) and SIPTU 22 June 2009

Pensions Board prosecution

In September 2009 the Pensions Board (the Board) successfully prosecuted an engineering company for failure to submit an actuarial funding certificate within nine months of the effective date of the certificate as required. The company was convicted under section 3(1)(a)(i) of the Pensions Act 1990 (as amended) and fined €2,500 with 90 days to pay. The Board, as part of its regulatory role, monitors compliance with the requirement under the Act to submit actuarial funding certificates. The purpose of this certificate is to enable a pension scheme actuary to certify whether or not, if the scheme had wound up at the effective date of the certificate, its assets would have been sufficient to meet its liabilities. A certificate should be submitted to the Board no later than nine months after its effective date. If the scheme could not have met its liabilities a funding proposal must be submitted to the Board.



Transfer of Undertakings Regulations: refusal to transfer

Background. The European Communities (Protection of Employees' Rights on Transfer of Undertakings) Regulations 2003 (TUPE Regulations) implement the EU Acquired Rights Directive 77/187/EC (as amended). They provide that where a business is transferred, its employees are entitled to transfer to the new employer with their existing terms and conditions of employment (with an exception for pensions). This is known as the automatic transfer principle. The TUPE Regulations do not state what the legal effect of an objection to transfer is on an employee's contract of employment. This is in contrast with England where the implementing legislation provides that a refusal to transfer is deemed to be a resignation by the employee.

Facts. In 2006, Symantec Ltd, a software manufacturer, transferred part of its business to Corporate Occupier Solutions (Ireland) Limited. The two defendants were employed by Symantec at the time of the transfer and objected to it. They were told by Symantec that their failure to transfer would be treated as a resignation. They contended that they had been made redundant. The Employment Appeals Tribunal agreed and held that they were entitled to redundancy payments.

Decision. On appeal the High Court held that a refusal to transfer is, in fact, a resignation. It held that it does not follow that if an employee decides not to transfer a situation of redundancy automatically arises. The court also found that if the Irish legislature had wished the employment relationship with the transferor to continue so as to facilitate the employee in making a claim for redundancy it could have enacted legislation to that effect. The fact it has not done so was telling. Consequently the defendants were not entitled to any redundancy severance payments.

Comment. This case is important for employers who are considering a "TUPE" transfer as it clarifies how employees who refuse to transfer should be treated. This case is now being appealed.

Case: Symantec Ltd v Leddy [2009] IEHC 256

Industrial Relations (Amendment) Bill 2009

In August 2009 the Industrial Relations (Amendment) Bill 2009 was published. The Bill is to strengthen the existing system for the making of both Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs) and to provide for their continued effective operation. Minimum rates of pay and other conditions of employment for workers in certain sectors, such as the hotel sector, are set down in EROs currently made by the Labour Court. These orders are determined on the basis of proposals negotiated by the relevant Joint Labour Committees (JLCs) (independent bodies composed of representatives of employers and workers in a particular sector). An REA is an agreement made either between a trade union and an employer or employer's organisation or at a meeting of a registered joint industrial council, which relates to the pay or conditions of employment of any class, type or group of workers which is presented to the Labour Court for registration to make it legally enforceable.

In 2008 these systems were the subject of a number of legal challenges concerning their validity. As a result of this, the Bill provides for a number of amendments to the existing legislative framework surrounding the JLC and REA systems, including improved procedures, and clear principles and policies to be taken into account by JLCs when formulating proposals for EROs. The Bill also provides that legislative effect for EROs and REAs will in future be made by Ministerial Order and provides for Oireachtas scrutiny of the Orders.

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