



# Employment Law Update

February 2009

## Entitlement to paid annual leave: ECJ ruling

*Case: 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) has ruled on the effect of long-term sick leave on a worker's right to annual leave under the Working Time Directive.

**Background.** Article 7 of the EC Working Time Directive 2003/88/EC provides that member states must "ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". Payment in lieu of this minimum entitlement is prohibited except on termination of employment.

**Decision.** The ECJ 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. Therefore a condition that the worker must actually have performed some work during the leave year in order to qualify for leave would be contrary to the Directive. The court further held that accrued annual leave must be paid (at the rate of the worker's "normal remuneration") in lieu on termination of employment, regardless of whether the employee has been on sick leave for the whole or part of the leave year.

**Comment.** The ECJ's judgment only applies to the four week minimum annual leave under the Directive. Under Irish law all employees have a minimum statutory holiday entitlement but it is the employer who determines when annual leave is actually taken by an employee. The ECJ found that untaken leave can be extinguished provided that where an employee has lost his right to paid annual leave he has actually had the opportunity to take that leave. This means that an employee on long term sick leave could possibly carry over holiday entitlement indefinitely and depending on how the judgment is interpreted claim all his back holiday pay on termination of his employment. This case may have financial implication for all employers with employees on long term sick leave. In view of the current economic climate this case is not welcome news from an employer's perspective.

## New Temporary Agency Workers Directive

The Temporary Agency Workers Directive 2008/104/EC was published on 5 December 2008 and must be implemented into Irish law by 5 December 2011. It applies to workers with a contract of employment or employment relationship with a temporary-work agency who are assigned to "user undertakings" (any natural or legal person for whom a temporary agency worker works temporarily) to work temporarily under their supervision and direction. It applies to all public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.

The Directive aims to ensure the protection of temporary agency workers (irrespective of whether the agency worker is engaged full-time, part-time or on a fixed term basis) and to improve the quality of temporary agency work by ensuring that the EU principle of equal treatment is applied to these workers. It provides that agency workers must have the right to equal basic working and employment conditions and training with comparable permanent employees. The Directive also provides for penalties for non-compliance to be introduced but leaves it up to each EU member state to provide for the appropriate penalty.



## Proposed employment Bills

The Government's Legislative Programme for the Dáil session which commenced on 26 January 2009 indicates that the Government intends to publish an Employment Agency Regulation Bill and Industrial Relations Amendment Bill during this session.

The Employment Agency Regulation Bill aims to regulate the employment agency sector by:

- Establishing a statutory code of practice;
- Setting out standards in that sector; and
- Setting up a Monitoring and Advisory Committee to oversee adherence to this code.

The purpose of the Industrial Relations Amendment Bill will be to amend the Industrial Relations Acts to provide for the continued effective operation of the Joint Labour Committee (which regulate conditions of employment and set minimum rates of pay for employees in certain sectors) and registered employment agreement (a collective agreement registered with the Labour Court) systems.

## Fixed term employees: severance package

*Case: St Catherine's College for Home Economics/Minister for Education and Science and Maloney/Moran (Determination No. FTD0819, 10 December 2008).*

**Background.** The Protection of Employees (Fixed-Term Work) Act 2003 ("2003 Act") provides that a fixed term employee shall not be treated in a less favourable manner in respect of his conditions of employment than a comparable permanent employee unless such treatment can be justified on objective grounds. Section 2 (1) of the 2003 Act provides that the term "conditions of employment" includes remuneration and related matters. If the treatment of the fixed term employee is based on the fixed term status of the employee then it is not an objective ground for less favourable treatment.

**Facts.** The complainants were employed under a series of fixed term contracts with St Catherine's College until it closed in 2007. They claimed that they were less favourably treated in relation to their conditions of employment on grounds of their fixed term status, when they were only offered a lump sum calculated by reference to their statutory redundancy entitlement of two weeks per year of service. Permanent college employees had three different and more favourable severance options depending on their length of service. The complainants brought a claim before a Rights Commissioner after an unsuccessful attempt to be treated the same as their permanent colleagues after the college informed them that the *ex-gratia* redundancy payments were not "pay" and therefore were outside the scope of the 2003 Act. The Rights Commissioner held in favour of the complainants.

**Decision.** On appeal the Labour Court awarded the complainants compensation of €2,500 each and granted them one of the severance options given to permanent employees. The court noted that in its own decision in *Sunday World Newspapers v Kinsella and Bradley* ([2006] 17 ELR 325) it held that *ex-gratia* redundancy pay constituted remuneration under the 2003 Act.

The court found that the complainants were in a comparable situation to that of a permanent employee having the same continuous service. However, the complainants were treated differently and this amounted to less favourable treatment under the 2003 Act. It dismissed the college's argument in court that there was an objective justification for the less favourable treatment of the complainants, namely the necessity to compensate permanent staff for the loss of tenure in their employment as permanent staff had tenure or potential service up to age 65. The court found that the "amount receivable by either fixed-term or permanent employees was in no sense whatsoever linked to or determinable by reference to tenure or potential service."

**Comment.** This case indicates that employers with fixed term employees who are proposing to make redundancies should not treat fixed term staff less favourably than their permanent employees unless they can objectively justify the difference in accordance with the 2003 Act.



## Contract of service or contract for service

*Case: Minister for Agriculture and Food v Barry and Others [2008] IEHC 216*

**Facts.** The respondents worked as temporary veterinary inspectors (TVIs) at the Galtee Meats Plant in Cork. Following the closure of the plant in 2004 they claimed entitlement to payments from the Minister for Agriculture and Food (the Minister) under the Redundancy Payments Acts 1967-2003 and under the Minimum Notice and Terms of Employment Acts 1973-2001. Any entitlement to the payments claimed was contingent on them having been employees who were employed at all material times by the Minister under a contract of service. The TVIs were private veterinary practitioners who were also in business on their own account and they continued their private practice work alongside undertaking TVI work. They were paid on an hourly fee basis at rates which were fixed at intervals between the Minister and their union Veterinary Ireland.

The Employment Appeals Tribunal (EAT) found that the respondents were employed under a contract of service and therefore were employees of the Minister and not independent contractors. The EAT adopted a two stage process in reaching its decision by applying a mutuality of obligation (the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer) test and then the so-called enterprise test (looking at the contract as a whole and asking is the person in business on his own account).

**Decision.** The High Court allowed the appeal by the Minister and held that, in considering whether a particular employment was a contract for service or of service, each case had to be considered in the light of its particular facts and applying the general principles which the courts had developed. It acknowledged that the work relationship between each of the TVIs and the Minister was a very unusual one, and one which it was not easy to classify.

The requirement of mutuality of obligation had to be satisfied if a contract of service was to exist. The fact of its existence was not, of itself, determinative of the nature of the relationship and it was necessary to examine the relationship further. The court held that in each instance it was incumbent on the EAT to ask three questions. The first question was whether the relationship between each respondent and the appellant was subject to just one contract, or more than one contract. The second question involved the scope of each contract. The third question involved the nature of each contract.

It held that the EAT erred in formulating the preliminary question in the way that it did, and in failing to have regard to all possibilities in determining the nature of the work relationship between the parties. That initial error was compounded by a finding of mutuality of obligation on a flawed basis and they were incorrect in regarding the so-called enterprise test as determinative of the issue.

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