



Employment Law Update

May 2008

Disciplinary procedures for all employees regardless of seniority

Case: Graham v Portroe Stevedores (UD 574/2006)

Facts. A physical altercation occurred at an office Christmas party between the claimant, a senior manager and a junior employee. As a result the more junior employee received a cut on his nose. A considerable amount of drink was consumed by both parties. Although the junior employee made no written complaint, the employer conducted an investigation into the incident. The employer had no personnel file on the claimant and according to the claimant's evidence had no disciplinary procedure for managers. The investigation was conducted by a manager who witnessed the incident; the complaint was never put in writing; no allegations were put in writing; it appears that no opportunity was afforded to the claimant's representative to question witnesses; not all witnesses were interviewed; and the claimant appears to have been treated differently to another manager who had been disciplined previously.

The employer maintained that there had been a breach of trust by the claimant and that as a manager he should lead by example. He was therefore dismissed. The claimant appealed to the chief executive but the dismissal was upheld. The claimant was out of work for some time, suffered from depression and now has a lower paying job.

Decision. The Employment Appeals Tribunal made the maximum award available to it, that is, €154,722. The Tribunal believed that the differential in the claimant's salary over an 11 year period would be in the region of €300,000 however this was in excess of the maximum award. It is clear that the Tribunal preferred the evidence of the claimant and that they were unimpressed that a witness to the incident conducted the investigation. Interestingly it did not make any detailed finding about the employer's disciplinary procedures.

Comment. All employers should have clear procedures in place for dealing with grievance and disciplinary matters. It is essential that fair procedures and the rules of natural justice are observed. The Labour Relations Commission's Code of Practice: Grievance and Disciplinary Procedures S.I. No. 46 of 2000 is very useful in this regard. It is also admissible in evidence and can be taken into account by a court or tribunal in determining any questions before it.

UK case: employer liable for employee's suicide

Case: Corr (Administratrix of the Estate of Thomas Corr (Deceased)) v IBC Vehicles Limited [2008] UKHL 13

Facts. In 1996 Mr Corr, a maintenance engineer, suffered a serious accident at work in which he was nearly decapitated. He underwent long and painful reconstructive surgery subsequently. In addition to his physical injuries, he developed post traumatic stress disorder and depression. Prior to the accident Mr Corr had no history of psychiatric problems. Mr Corr's depression deepened and in 2002, he committed suicide by jumping from the top of a multi storey car park. His widow, who was also the administratrix of his estate, brought a negligence claim, on behalf of his estate against his employer IBC. She also brought a claim under the Fatal Accidents Act 1976 for financial loss attributable to his suicide. Her claim under the Act was rejected by the English High Court on the basis that his suicide was not a foreseeable result of his accident. The Court of Appeal overturned this decision on the basis that the class of harm on which the claim was founded was depression (IBC had admitted liability for this) and that there was a direct chain of causation between the accident and the suicide. Their reasoning was that so long as the kind of harm, in this case the psychiatric illness, was reasonably foreseeable, the defendant was liable for it. IBC appealed.

Decision. The House of Lords unanimously upheld the Court of Appeal decision. One of the first issues it considered was the scope of the duty of care that an employer owes to its employees. They held that IBC owed Mr Corr a duty to avoid causing him psychological as well as physical injury and that Mr Corr had suffered both types of injury. They held that although the law "*does not generally treat us as our brother's keeper, responsible for what he may choose to do to his own disadvantage*", Mr Corr had acted in a way that he would not have done but for the injury from which IBC's breach had caused him to suffer. Therefore his conduct in taking his own life could not be said to fall outside the scope of the duty that IBC had owed him.



Comment. Although this is a UK case and there is no equivalent here (yet) to the Fatal Accidents Act, it is clear that employers must be aware of the risk that where an employee suffers from depression and/or psychiatric illness following a workplace accident, it is open to a court to find that the employer is liable for all the reasonably foreseeable consequences flowing from that workplace injury even where it results in suicide. The House of Lords made it clear that the question of the employer's liability is a factual one and rests on the issue of causation. Apart from statutory duties under the Health, Safety & Welfare at Work Act 2005, employers have a duty under common law to take reasonable care for the health and safety of employees in the workplace.

Award for dismissed employee suffering from depression

Case: Croke v Oran UD 967/2006, MN631/2006, 29 November 2007

Facts. The claimant employee, who suffered from a depressive illness, was dismissed by his employer after being promoted to a more senior position. The employer did not contest that the dismissal had been unfair but contended that as the employee had been unavailable for work since the dismissal that he had not suffered any loss attributable to the dismissal. However, the claimant argued that the way in which his employer treated him during the period of his promotion contributed to his stress related illness.

Decision. The Employment Appeals Tribunal determined that the employer had placed more responsibility on the claimant by promoting him despite having been made aware by the claimant of his depressive illness. Further, the employer had not made a genuine effort to assist the claimant with the increasing level of stress associated with his new position. The Tribunal awarded the claimant €35,000 for unfair dismissal and the continued stress related illness under the Unfair Dismissals Acts 1977 to 2001 and four weeks pay of €3690.38 under the Minimum Notice and Terms of Employment Acts 1973 to 2001.

Comment. This case highlights, as in the House of Lords case above, the common law and statutory duty of care that employers have in relation to both the psychiatric and physical well being of their employees. Employers must take note of the stress its employees are under, particularly when an employee brings the matter to the attention of the employer. Training or in-service courses may provide assistance to employees suffering under stress or coping with increased responsibilities that often accompany job promotions.

Pensions Board: successful High Court action

Background. The Pensions Board (Board) was established under the Pensions Act 1990 and its primary function is to monitor and supervise the operation of the Act. Under section 87 of the Pensions (Amendment) Act 1996 the Board can apply to the High Court for an order to make an employer pay arrears of contributions to a pension scheme.

Facts. As a result of a complaint, the Board got a District Court warrant and accompanied by Gardaí, made an unannounced visit to Limestone Construction Limited's (Limestone's) premises and seized computer equipment and payroll records. With the aid of forensic accountants, the Board discovered that although pension contributions had been deducted from nearly 200 employees over the period of 14 months, these deductions had not been paid to the Construction Workers' Pension Scheme (CWPS). In addition Limestone had failed to make its employer contributions to the fund.

Decision. The Board took a case against Limestone in the High Court under section 87. On 31 March 2008, the High Court ordered Limestone to pay arrears of contributions of €186,825 to the CWPS. This is the first time the Board has used a High Court application against an employer to enforce payment of arrears.

Pensions Board: on the spot fines

Section 3A of the Pensions Act 1990 provides an alternative to the prosecution of certain offences under the Act. From 17 September 2007 a new on-the-spot fines regime commenced giving the Board power to levy on-the-spot fines for certain offences.

Under Section 3A of the Act, the Board may notify a person in writing about an alleged offence and if, within 21 days of the notice, the person has remedied the matter and paid a fine of €2,000, they will not be prosecuted.



On-the-spot fines apply to a range of lesser offences under the Pensions Act, including:

- Failure to register a scheme with the Board.
- Failure to provide scheme members with appropriate information.
- Failure to respond to requests for information from the Pensions Board.
- Employers not advising employees of pension or PRSA deductions.

The Board recently issued notices to the trustees of five defined benefit schemes in relation to alleged offences. In three cases the alleged offences were remedied to the satisfaction of the Board and fines of €2000 per trustee were paid within 21 days and the Board did not proceed with prosecutions. One of the other cases is still under review by the Board.

The Board has published Trustee and Employer Checklists to help trustees and employers comply with the Act. These are available at http://www.pensionsboard.ie/uploadedfiles/Booklets2008/Pensions_Checklist_February_2008.pdf

Code of Practice on Employee Information and Consultation

The Labour Relations Commission recently published a new Code of Practice on Employee Information and Consultation to assist employers and employees in implementing the Employees (Provision of Information and Consultation) Act 2006 (2006 Act). The 2006 Act gives employees the right to information and to be consulted about developments in their workplaces and applies to any business or organisation in the public or private sector with at least 50 employees from 23 March 2008.

The Code sets out the process for establishing an information and consultation arrangement, which can be initiated by the employees or the employer, and can be established by means of a negotiated agreement (negotiated between the employer and employees and approved by the employees); a pre-existing agreement (although the pre-existing agreement must have existed prior to 23 March 2008); or the Standard Rules. The Standard Rules are fall-back provisions which apply where there is an agreement by employees and employers to adopt them; the employer fails to initiate negotiations within three months of receiving a valid employee request; or where negotiations have failed to lead to an agreement after a six month period. The Code details how the process works where there is collective bargaining in place, where a minority of employees are represented by a union(s) and where there is no union representation of the employees and what to do if a dispute arises. The Code is available at <http://www.entemp.ie/publications/employment/2008/I&CCoP180308.pdf>

Employment Law Compliance Bill 2008

The Government recently published the Employment Law Compliance Bill 2008 which could become law by July 2008. The aim of the Bill is to achieve higher levels of compliance with employment law and protect lower paid employees in vulnerable industries and casual/seasonal employment. The Bill will increase the administrative obligations and duties of employers including the keeping of detailed records for each employee and obliging them to put up notices in the workplace informing employees of their rights and entitlements and how to contact the National Employment Rights Authority (NERA) for information about their rights.

In addition, the Bill introduces whistleblower protections; places NERA on statutory footing; empowers NERA to initiate investigations and publish the outcomes of cases of public interest; and provides for the exchange of information between statutory enforcement authorities and enhanced penalties for breaches of the law. Employers will also be required to keep employment records of employees for the previous three years and for two years after an employee leaves.

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