



# Employment Law Update

April 2009

## Redundancy and injunctions

**Background.** Under Irish law, an employee has two potential avenues to secure redress for a perceived unfair or wrongful dismissal. One is to bring an action at common law for wrongful dismissal where he contends that the dismissal was in breach of contract or in violation of his constitutional rights. The other is to pursue an unfair dismissal claim under the Unfair Dismissal Acts 1977 to 2008.

**Facts.** Nolan, a credit manager, was a permanent employee since 2001 with the defendant Emo Oil Services. His employment was terminable by four weeks' notice under his employment contract. Due to the economic downturn Emo introduced two redundancy schemes in 2008. The second scheme which invited applications for voluntary redundancy was announced in August 2008 while Nolan was on holiday. It was stated that in the absence of the required number of volunteers, there would be compulsory redundancies. The plaintiff received the redundancy notification while on holiday, but did not wish to avail of it. After he returned, he was informed that his position was being made redundant from the end of September 2008 and that, in future, his work would be done by the managing director and the financial controller. He was given three months' notice.

Nolan sought an interlocutory (interim) injunction restraining Emo from giving effect to his purported redundancy and requiring them to continue to pay his salary pending the outcome of his wrongful dismissal claim. He contended that a genuine redundancy did not exist or, that if a redundancy situation does exist, he has been unfairly selected for redundancy. Emo contended that the claim could not be litigated in a common law action for wrongful dismissal as the appropriate procedure was to bring a claim for unfair dismissal before the Employment Appeals Tribunal.

**Decision.** The High Court refused to grant the injunction and held that that, in order to obtain it, Nolan had to show a strong case that he was likely to succeed at the hearing of the action. The court further confirmed that a common law claim for wrongful dismissal and a statutory claim for unfair dismissal were mutually exclusive. The Unfair Dismissals Acts provided specific procedures and remedies for unfair dismissal in an alternative forum. For the courts to expand its common law jurisdiction in parallel to the statutory code in relation to unfair dismissal and redundancy would end up supplanting the code.

The court found that Nolan's employment was lawfully terminated on 30 November, 2008 as he received the required notice under his contract of employment. If, as he contended, his dismissal was unfair, then the only remedy available to him is the remedy provided by the Unfair Dismissals Acts as the court held he had not acquired a cause of action for breach of contract or otherwise prior to his dismissal.

**Comment.** This decision highlights the importance of ensuring you bring an employment law action in the appropriate forum.

*Case: Nolan v Emo Oil Services Ltd [2009] IEHC 15*



## Race and gender claims and redundancy

**Facts.** A Latvian born employee claimed that she was discriminated against on the grounds of her gender and race when she was made redundant. Her employer had lost a significant order and implemented 44 redundancies using the Last In, First Out (LIFO) rule. She was made redundant when she was seven months pregnant, of which her employer was aware. She also claimed that the meeting regarding the redundancy situation was conducted through English although she later admitted that a staff member was present to translate the proceedings into Russian.

**Decision.** The Equality Tribunal's opinion was that the claimant had established a *prima facie* case of discriminatory dismissal based on her gender. However the Tribunal held that the loss of such a significant order as in this case constituted exceptional circumstances as mentioned in an earlier Labour Court ruling when it stated "a worker can not be discriminated against, or dismissed while pregnant, except in exceptional circumstances unconnected with her pregnancy." The Tribunal was satisfied that the employer had applied the LIFO rule in a transparent manner. Neither the claimant nor her husband could identify anyone who was retained with shorter service. The Tribunal concluded that the employer had rebutted the inference of discrimination.

On the race ground, the Tribunal found that "the claimant has not submitted any evidence to show that the respondent departed from the LIFO rule, or that the application of this method discriminated against her because of her nationality." The Tribunal found that she was not dismissed on the grounds of her race.

**Comment.** The Tribunal observed that there may be a need for special measures in such situations with non-national workers and "applying the same procedural standards to a non- national worker ...could amount to the application of the same rules to different situations and could in itself amount to discrimination." The fact that the employer had implemented the redundancies by way of the LIFO method in a transparent manner and that an interpreter was present to translate the proceedings went in their favour.

*Case: Leva Cilinska-Snepste v Rye Valley Foods Dec – E2009-001*

## Bullying at work

The Supreme Court has overturned a High Court award of damages to an employee arising from psychiatric injury caused by stress in the workplace.

**Facts.** Mr Quigley was a factory operative for 12 years prior to his dismissal. He claimed that he was subjected to a campaign of harassment, bullying and victimisation by a new plant manager. He first attended his GP six months after his dismissal complaining that he had been suffering from depression for the previous six months. He brought a personal injuries action seeking damages for his psychological injuries allegedly caused by the bullying. His evidence of bullying at work was supported by other fellow employees. The High Court awarded him damages of €75,773.94 for psychiatric injury in the form of depression caused by bullying or harassment in the workplace. His employer appealed this decision.

**Decision.** The Supreme Court confirmed earlier findings that in order to amount to workplace bullying, the bullying must be repeated, inappropriate and undermining of the dignity of the employee at work. It upheld the High Court finding that Quigley had been bullied. However the court stated that a plaintiff must prove that he suffered damage amounting to personal injury as a result of the employer's actions and there must be an identifiable psychiatric injury where there is no direct physical injury. The employee could not recover damages for personal injuries suffered as a consequence of his dismissal of employment or from the involvement in subsequent legal proceedings. The medical evidence indicated that Quigley's depression was caused by his dismissal and the subsequent proceedings and there was no evidence of a causal link with the bullying. Quigley therefore had failed to prove that his depression was caused by the bullying at work and the High Court award of €75,773.94 was set aside.

**Comment.** This decision is in line with another recent Supreme Court decision in *Berber v Dunnes Stores* and underlines the unwillingness of the courts to award damages unless the alleged stress in the workplace causes clearly identifiable injury directly related to an employer's actions.

*Case: Quigley v Complex Tooling and Moulding Limited [2008] ELR 297*



## Compulsory retirement ages: ECJ decision

The European Court of Justice (ECJ) has confirmed that member state rules that provide for compulsory retirement are capable of being justified in certain circumstances.

**Facts.** The UK National Council on Ageing (Heyday) challenged the right of an employer to compulsorily retire an employee at age 65 or over without the dismissal being treated as age discrimination under the UK Employment Equality (Age) Regulations 2006. These Regulations provide that a worker who is 65 or over and who is dismissed for retirement will not be considered unfairly dismissed. The English High Court referred certain questions to the ECJ for a preliminary ruling.

**Decision.** The ECJ ruled that under the Equal Treatment Directive 2000/78/EC national rules which permit employers to dismiss employees aged 65 or over by reason of retirement are subject to age discrimination law, but can be justified by "legitimate social policy objectives such as those related to employment policy, the labour market or vocational training". The ECJ did not decide whether the UK's default retirement age of 65 is justified by a legitimate aim and held that that is for the national courts to decide so the case will now return to the English High Court.

**Comment.** In *Felix Palacios de la Villa v Cortefiel Servicios SA (Case C-411/05)* the ECJ held that a state could set a mandatory retirement age of 65 if (as in this case) the measure, although based on age, was objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy in the labour market, that is, the retirement age was used to reduce unemployment among under 65's (see *the November 2007 Employment Law ezine for more details*). In Ireland, there is no mandatory retirement age. This ECJ decision, which follows the *Palacios* case means that Irish employers can fix compulsory retirement ages but should be in a position to objectively justify such clauses to avoid age discrimination. It will be interesting to see the final UK decision.

*Case: The Incorporated Trustees of the National Council for Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform Case C-388/07*

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