Recent Developments in Employment Litigation

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Key Developments at a glance

– The *Uber* Litigation: implications for employment status
– Bullying and Harassment: The Supreme Court decision in *Ruffley* and the High Court decision in *Hurley*
– Fixed-Term Work Act: *Wogan v DIT*: non-renewal to avoid CID held to be penalisation
– Parallel proceedings: the Court of Appeal decision in *Culkin*
– Mandatory Retirement Ages: lessons from *Transdev* for objective justification defence
– Fair Procedures and Investigations: the judgment in *Lyons*
– Suspensions: lessons from *Kinsella v Ulster Bank*
– Protected Disclosures Act 2014—first award for penalisation in *Monaghan* case
The *Uber* Litigation...implications

• [2017] UKEAT 0056_17_1011 (10 November 2017)

• Key findings of Employment Tribunal had been:

• Drivers are not required to make any commitment to work. However, when a driver signs into the app, this usually signals coming 'on-duty' and being available for work.

• Drivers supply their own vehicles and are responsible for all running costs.
The *Uber* Litigation...implications

- If a driver fails to accept a series of bookings, this can result in losing his account status. Acceptance statistics are recorded and Uber warns "you should accept at least 80% of trip requests to retain account status."

- Once a driver accepts a booking, Uber places the driver and passenger in direct contact, through the app.
The *Uber* Litigation

- Passenger pays fare directly to Uber, via the app. Uber subsequently pays drivers, weekly in arrears, in respect of the fares they have earned, minus a "service fee" of 20% to 25% for connecting the driver to the passenger through app.
- Driver is not made aware of the destination until collecting the passenger. The app provides detailed directions to the destination and the driver is expected to follow those directions unless the passenger stipulates a different route.
- Uber's servers calculate a recommended fare, based on GPS data from the driver's phone. The driver cannot negotiate or agree a higher fare.
The *Uber* Litigation

- Uber operates a rating system. If a driver falls below a set average rating Uber can withdraw the driver's access to the Uber app.
- Uber takes the risk in some matters such as certain passenger fraud.
- Uber deals with any fare complaints, often without requesting any comment from driver.
- Drivers are not required to wear any uniform and are not permitted to display the Uber logo in the London area.
UK Employment Tribunal findings

• The contract between Uber and the drivers was not considered to be at "arm's length between two independent business undertakings".

• The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common platform was, in the Tribunal's mind, “faintly ridiculous”.

• “The lady doth protest too much”.

• Implications and analysis in an Irish context: Ongoing Irish case of Barry v Minister for Agriculture/mutuality of obligation
Specific reliance on Autoclenz Ltd v Belcher and Ors [2011] ICR 1157

Implications and reflections
Bullying in the Workplace: The Supreme Court decision in *Ruffley*

• Following the overturning of the High Court judgment by a majority of the Court of Appeal ([2015] IECA 287), the Supreme Court has now delivered judgment disallowing the appeal: [2017] IESC 33.

• SC had granted the employee leave to appeal on two questions, having determined that the objective nature of the test was already satisfied as a matter of Irish law.
Questions on which leave granted in *Ruffley*

• “Whether an unfairly carried out disciplinary process resulting in psychiatric injury is, in itself, capable of being actionable in damages on the basis that it amounts to workplace bullying without evidence of malicious intent on the part of the employer.”

• Whether behaviour not witnessed by other persons in the workplace is capable of undermining the dignity of an employee.”
Responses to questions in *Ruffley*

- *Per O’Donnell J at [71]*
- Approach of the Court broadened considerably scope of analysis of bullying
- *Per O’Donnell J at [60]:*
- “I... agree that each component can usefully be considered separately and sequentially. However I would caution against viewing these three matters as separate and self-standing issues as if in a statutory definition...[I]t is necessary to remember that what is required to be repeated is inappropriate conduct undermining the individual’s dignity at work and not merely that the plaintiff be able to point to more than one incident of which he or she complains. Ultimately, while analysis may be facilitated by looking at the separate elements, it must be remembered that it is a single definition and a single test: was the defendant guilty of repeated inappropriate behaviour against the plaintiff which could reasonably be regarded as undermining the individual’s right to dignity at work?”
Further analysis of *Ruffley*

- Note intriguing comment *per O’Donnell J* at [68]:
  - ‘[In] many cases in which it can be said a person has been ‘targeted’ or ‘singled out’ for disciplinary sanction and which constitutes at least part of a finding of bullying, the fact of a general practice will have been known to the superior prior to the initiation of any disciplinary process, and in such circumstances may give rise to the inference that the disciplinary proceedings are not being pursued *bona fide* because of a concern about the practice or behaviour, but rather as a form of punishing and perhaps humiliating the individual concerned.’
- Implications and analysis
Recent decision in *Hurley v An Post* [2017] IEHC 568

- McDermott J found in favour of the plaintiff in the context of the employer’s failing to take adequate steps to support an individual who had made allegations of inappropriate behaviour in the workplace.

- Analysis of both primary and vicarious liability
Fixed-Term Workers: *Wogan v DIT*

- Section 13 of the FTWA 2003 provides: ‘—(1) An employer shall not penalise an employee—...(d) by dismissing the employee from his or her employment if the dismissal is wholly or partly for or connected with the purpose of the avoidance of a fixed-term contract being deemed to be a contract of indefinite duration under section 9(3).’
Wogan v DIT

- Labour Court commented on this section:
- “The language used ...imports a test of causation. The purpose of avoiding a fixed term contract being transmuted to one of indefinite duration need not be the only reason for the dismissal. It is sufficient if it was an operative consideration in the sense that it was an influential factor operating on the mind of the decision maker at the time that the impugned decision was made. What did, or... did not influence a decision maker is a question of fact which must be established by drawing inferences from the evidence adduced.” (emphasis added)
Wogan v DIT

• Determination FTD 164 (Labour Court, 9 May 2016)
• Penalisation, contrary to s.13(1)(d) of the Protection of Employees (Fixed-Term Work Act) 2003
• Employee employed on a series of fixed-term contracts between April 2009 and December 2012 – hence he had accrued 3 years 9 months service by the date his employment was terminated.
• Claimed he had been dismissed for the purpose of avoiding his fixed-term contract being deemed to be a Contract of Indefinite Duration (‘CID’)
Wogan

• **Findings of the Court:**
• A ‘central strategy’ of the employer was ‘to avoid situations in which fixed term employees would come within the ambit of s.9 of the Act’
• Court relied upon two documents as evidence of this strategy:
  – ‘Recommendations to Respond to CID Exposure and Support DIT Research’ – stated that employees whose fixed-term contracts had expired should be excluded from shortlisting for other non-permanent posts.
  – ‘Employment Contract Analysis’– noted potential exposure; recommended against renewing employee’s contract.
Wogan

• Conclusion of the Court:
• ‘...[T]he decision not to renew the Complainant’s final fixed term contract on its expiry was influenced by the probability that he would come within the protection of s.9(3) of the Act if his employment was further extended. It follows that the decision was connected with the avoidance of his fixed term contract being deemed to be a contract of indefinite duration under s.9(3) of the Act and therefore constituted penalisation within the meaning of s.13 of the Act.’ (emphasis added)
• Accordingly, the Employee was successful.
Lessons from this case:

Need to avoid policies/strategies that seek to prevent the attainment of a CID.

Bear in mind the positive benefits of objectively justified **renewal** from both the employer’s and employee’s standpoint.

Note the very high award of compensation made: 133% of the Complainant’s final annual remuneration. The Court awarded compensation in the amount of €112,932.
Employment Injunctions

- **Employer attempting to reassign duties: Earley v Health Service Executive [2017] IECA 157**
  - Senior manager seeking to restrain temporary reassignment.
  - Court of Appeal, reversing HC, held that the employer had breached plaintiff’s contract of employment by re-assigning her from the operational and clinical duties specified in that contract (and which were also specified in the accompanying job description for that post) to non-operational duties.
  - *Per* Hogan J at [38]:

- “This conclusion is unaffected by the fact that the plaintiff’s remuneration was unaffected by this change or that the re-assignment was expressed to be a temporary one or even that it was expressed to be on a without prejudice basis.”
Fair Procedures and Investigations

• Lyons v Longford Westmeath Education and Training Board [2017] IEHC 272
• Applicant accused of bullying and allegations against him ‘upheld’ by investigator
• albeit that he was afforded no opportunity to cross-examine witnesses
• Employer purported to subject him to disciplinary procedure
• *Per* Eagar J at [95] – [99]: “The processes adopted ... failed to vindicate the good name of the applicant, in their refusal to hold an appropriate hearing, whereby the applicant through solicitor or counsel may have cross-examined the complainant. Equally, the complainant ought be entitled to then cross-examine the applicant.

• Fair procedures manifestly indicate that the applicant has the right to confront and cross-examine the individual who has made allegations against him. ....

• It is clear to the Court that if there is a finding of bullying under an investigation that adopts constitutional fair procedures, this may amount to conduct of a serious nature. In a case such as this, such a finding would allow an employer to invoke Stage 4 of the procedures - but only if the investigation leading to such a finding had been conducted in line with fair procedure.”

• Implications and analysis
Mandatory Retirement Ages

• *Transdev Light Rail Limited v Chrzanowski* (EDA 1632, 29 November 2016)

• Complainant employed as a tram driver and was compulsorily retired aged 65.

• Argued that this was unlawfully discriminatory.

• Focus on requirement of objective justifications
Legitimate aims being pursued?

- Employer argued three central aims:
  - “Safety critical” work context requiring particular care and consideration
  - Inter-generational fairness argument
  - Medical opinion as to fitness of drivers above 65
Mandatory Retirement Ages

• Interesting to note that the conclusion of the Court was somewhat more nuanced:

• ‘Taking account of the medical opinions advanced coupled with the workforce planning requirements and the collectively agreed pension scheme, the Court is satisfied that a compulsory retirement age of 65 for tram drivers was reasonable and appropriate in the circumstances. Furthermore, it accepts that it constituted a legitimate aim of employment and labour market policy in order to prevent possible disputes concerning tram driver’s fitness to work beyond a certain age. (emphasis added)
• Lessons from this case:

  – Ensure employment contracts are updated to reflect retirement age.
  
  – Be able to set out clearly the objective justifications being relied upon, explaining both the aims being pursued and the proportionality of the means used to achieve that aim.
  
  – Bear in mind that safety critical nature of work in Transdev was a peculiar feature of that case.
Parallel proceedings in Employment law

- The Court of Appeal Decision in *Culkin v Sligo County Council* [2017] IECA 104
- Court of Appeal reverses High Court
- Hogan J analysis
- Treatment of *Cunningham v Intel Ireland Limited* [2013] IEHC 207
- Relevance of ‘collateral attack’
- Implications and analysis
Suspensions: *Kinsella v Ulster Bank*

- Decision of the High Court, 25 October 2016
- Continuing theme of precautionary suspensions covered at the 2016 Conference
- Employee – bank manager
- Her parents’ life savings placed into savings account in the bank
- Capital Markets division raised questions about the interest rates enjoyed by her parents
Suspensions: Kinsella

• 20 May 2015 – employee suspended from her duties with immediate effect. Suspension was expressly said to be a precautionary suspension with pay (ie not disciplinary action)

• Employee was assured that it would be progressed as quickly as possible and she would be kept updated

• Suspension ultimately continued for one year
Kinsella

• Employee challenged the lawfulness of her suspension in the High Court, arguing that the suspension was not necessary and that its length was completely disproportionate

• High Court refused to grant an injunction on the basis that she could not show that she was irredeemably prejudiced in participating in the disciplinary investigation
Kinsella

• Key lessons from the ongoing suspension case law:
  – Consider the reason for placing employee on holding/precautionary suspension: is it necessary for an investigation to take place?
  – What alternatives to suspension can the employer identify?
  – Has the employee been informed how regularly will the need for the suspension be kept under review? How and by whom will this be communicated to the employee?
  – Are there specific reputational concerns for the employee given the timing of the suspension?
Protected Disclosures Act 2014: first award for penalisation

Anna Monaghan v Aidan & Henrietta McGrath Partnership [2017] ELR 8

— Recap on principal features of the 2014 Act:
  • Robust set of protections for whistleblowers
  • Concept of ‘relevant wrongdoing’
  • Prohibition against penalisation
  • No requirement of one year’s continuous service in context of unfair dismissal
  • Up to five years’ remuneration available
  • Interim relief also available in Circuit Court
Penalisation for making protected disclosure

- *Monaghan*
- First award for penalisation under the 2014 Act
- Care assistant at a nursing home in Galway brought concerns regarding the treatment of patients to the attention of the matron at the nursing home.
- Claimant told she was a “trouble maker”.
- Calls to HIQA in relation to her concerns.
Monaghan

• A HIQA inspection was carried out in May 2014 on the same day that her employer announced that it had initiated a ‘provider led investigation’ into the claimant’s allegations. The investigation found that the claimant’s allegations were motivated by malice and could not find any evidence to substantiate her claims.

• Claimant was subsequently suspended on 20 June 2014 until 7 November 2014.

• When colleague asked when she would return...
  – “Over my dead body” - Matron

• €17,500 awarded for detriment suffered
Monaghan: Lessons for employers

- Distinction between grievance and protected disclosure
- Bear in mind that motivation of employee is irrelevant to whether or not it is a protected disclosure
- Ensure that Protected Disclosures Policy is in place: see Code of Practice on Protected Disclosures Act 2014 (Declaration) Order 2015 S.I. No. 464 of 2015
Q&A

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Thank you

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