

LEWIS C. DOYLE & CO.

Solicitors

Lewis C. Doyle B.C.L.
Karina Doyle B.A. LL.B.
Patrick Sheehan B.A. LL.B.
Nuala Ford B.A. LL.B.
Cora Heagney B.A. LL.B.
Dawn Carney B.Corp.Law, LL.B.
Emma Cummins LL.B.

Augustine Court
St. Augustine Street
Galway
DX 4526 Galway Mary St

Telephone: 091 - 549300
Fax: 091- 549357
Email: info@lewisdoyle.com

legal brief

2008 - Issue 2

Workplace Bullying

The last few years has seen bullying become an increasing problem in the workplace. Bullying has been defined as "repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work" by The Health and Safety Authority (HSA) .

It is under the Safety, Health and Welfare at Work Acts and the Employment Equality Acts, that "Bullying in the Workplace" is addressed. Employers have a duty to ensure the health and safety of their employees in the workplace. Also in these acts it states employees also have a duty "not to engage in improper behaviour which would endanger him/her or other employees". The HSA is there to ensure workplace bullying is not tolerated and that all employers have procedures for dealing with such bullying as well as providing information and assistance to all employees on "Bullying in the Workplace". It is also expected of all employers that they must take reasonable steps to prevent any type of bullying in the workplace and should put in place an anti-bullying policy and procedures for dealing with related complaints. It is incumbent on the employer that he/she should ensure that all employees are aware of the policy on bullying and must also consider and act upon any complaints made.

Under the Employment Equality Acts, employers are obliged to prevent any harassment in the workplace. Section 14 of the 2004 Act governs the issue of harassment and details that it includes any form of unwanted conduct related to grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the Traveller Community. Sexual harassment is also included and is defined as "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature".

The first thing an employee should do is make the person concerned aware of the bullying and that their behaviour is unacceptable and undermining. If the employee doesn't get any satisfaction through those methods, they should then

consider making a formal complaint to his/her superior. Then if the complaint relates to one of the grounds of discrimination listed above a case may be brought before the Equality Tribunal.

It is very important for the employers to note that if an adequate bullying policy is not provided an employee can then go to the Workplace Contact Unit of the HSA and make a formal complaint of this fact to them.

Another piece of legislation that should be noted by any employees is The Unfair Dismissals Acts 1977-2001. This may be relevant where the bullying has such an effect as to force the employee to quit or leave their job. This may amount to 'constructive dismissal' and could result in the Employment Appeals Tribunal finding that the employee in question is entitled to compensation from his employer.

It is very important to note that all complaints under the Employment Equality Acts and the Safety, Health and Welfare at Work Act must be brought within the first 6 months of the incident or incidents. This can sometimes be extended to 12 months in exceptional circumstances where there is "reasonable cause" for the delay.



Snippets of Law

The Employment Rights Compliance Bill

This Bill was published in March of this year and aims to completely overhaul the State's employment rights framework. On its publication, the then Minister for Enterprise, Trade and Employment, Micheal Martin, stated that the Bill would "modernise the labour inspectorate, strengthen enforcement of employment rights and work permits, promote greater compliance in the workplace and increase the penalties for those employers who seek to gain advantage by denying employees their entitlements under law".

The measures proposed in the Bill include the following:

- Establishment of the National Employment Rights Authority (NERA) on a statutory basis;
- Increased powers for labour inspectors including ensuring labour inspectors have greater access to premises, personnel and data and empowering NERA to prosecute summary offences;
- Empowering labour inspectors in NERA to examine employment permits and to prosecute offences and to conduct investigations with other agencies including the Revenue Commissioners and An Garda Síochána;
- Provision for greater penalties for offences arising under employment law;
- Protection of whistleblowers in the event of breaches of employment law being reported in good faith and;
- Requirements for employers to retain employment related documents for specified periods.

The Minister described the Bill as "the most significant single piece of legislation introduced in the employment rights area in recent years". He also stated that compliance with all aspects of employment law would be strictly enforced.

Collaborative Law (Family Related Law)

The judicial process involved in family law cases too often has a negative impact on the parties involved and their families causing tension and stress and general emotional strain. For this reason it is becoming increasingly clear to many of those involved in family law that the courthouse is not the place to resolve family disputes.

Collaborative law is an alternative method of resolving family disputes. Its aim is to find a fair and equitable agreement for the couple based on reasoned judgment and realistic aspirations. The success and effectiveness of the system depends on the honesty, cooperation and integrity of the parties involved. The process is geared towards the ongoing wellbeing of the family as a whole.

The rationale behind the collaborative procedure is that the best interest of the spouses and their families is served by trying to resolve these disputes in a non-confrontational way. This is generally achieved by way of informal discussions with each party thus ensuring their direct influence on the outcome.

In practice all negotiations take place in four-way settlement meetings that both the parties and their lawyers attend. The lawyers' role is to guide and advise the parties towards a reasonable resolution and while legal advice is an integral part of the process, all decisions are ultimately made by the spouses. If either party decides to proceed to court, then the collaborative process ends and the spouses instruct new lawyers who can take the matter to court.

Major Developments For Temporary Agency Workers

In March 2002, the European Commission adopted a draft Directive on foot of a proposal that all temporary agency workers across the EU would be given equal treatment to permanent employees in terms of pay and other conditions of employment. The draft Directive provided for the equal treatment to apply within six weeks of the commencement of the temporary assignment. The six week time limit proved hugely controversial across the EU and the proposal has remained deadlocked. Since then with several presidencies seeking to resolve the deadlock.

Earlier this month, EU Ministers succeeded in breaking the deadlock to agree new wording for the draft Directive. The agreement was reached in the early hours of the 10 June last and has been widely welcomed across the EU. The European Parliament must now consider the proposal and if and when the proposal is adopted at EU level, Ireland will have two years to implement national legislation giving effect to it.

Essentially, the agreement will allow for the introduction of legislation across the EU which will provide for equal treatment as of day one for temporary agency workers as well as regular workers in terms of pay, maternity leave and annual leave. However, the EU has provided for the possibility for individual member States to derogate from the proposal by means of collective agreements and agreements between social partners at national level. The Directive will also provide for temporary agency workers to be informed about permanent employment opportunities in the user enterprise and equal access to collective facilities such as canteen facilities; childcare facilities and transport services. Member States must also ensure penalties for non-compliance by employment agencies and enterprises.

The proposal has received a mixed reaction in Ireland. It is unclear to date how the legislation will be implemented here and this must be discussed by the Social Partners and other interested parties once the European Parliament has passed the Directive at EU level. It is hoped by many parties, such as ISME, that when national legislation is implemented, Ireland will take the opportunity to derogate from the principle of equal treatment for agency workers from day one and provide instead for a minimum timeframe for which the agency worker would have to be in the end-user organisation before the principle of equal treatment would apply.

Recent Caselaw

Squatters' Rights

In a recent judgment of the European Court of Human Rights (*J.A. Pye (Oxford Ltd) v the U.K.*) it was found that adverse possession does not infringe the European Convention on Human Rights thus confirming the position of squatters' rights in Irish law.

Squatters' rights (The Doctrine of Adverse Possession) is where a non-owner takes and retains possession of a property for a prescribed period of time. This property must be held with an intention to exclude all others including the true owner. Squatters' rights are primarily acquired in two ways:

- By deliberately taking land which does not belong to the individual and;
- By innocently encroaching on the land of another.

However, a person's possession of land cannot be adverse if it is attributable to some right to be on the land such as a lease or a licence, which was conferred on him by the landowner.

The Statute of Limitations, 1957 provides that land must be held adverse to the title of the true land owner for a continuous period of 12 years in order for the landowner's title to become extinguished. However, it is not required that the same squatter would have to have been in possession for the entire period of time. It is only necessary that the property was continuously held with the intention of excluding the true owner. The squatter who is in possession of the land at the expiration of the limitation period will be entitled to the title.

In relation to tenants under a lease, time will not begin to run against the landowner until the tenancy has expired. If a tenant fails to pay the rent due under a lease, arrears of rent cease to be recoverable by the landlord six years after they become due.

Doyle v E.S.B. [2008] IEHC 88

The issue of the duty of care owed by employers to their employees was addressed in this case. The plaintiff here was an electrician employed by the defendant, the E.S.B. who, during the course of his employment, suffered recurrent bilateral epicondylitis of his elbows while using a tool supplied by his employers, namely a Pfisterer compression tool. The plaintiff claimed that this injury and the consequent loss and damaged which resulted from the injury were caused by reason of negligence, breach of duty and breach of statutory duty on the part of the defendant.

It was argued on behalf of the plaintiff that the defendant ought to have known that repetitive and physically stressful work activities can cause soft tissue injuries to employees. It was also put forward that the defendant should have foreseen the risk of injury and ought to have taken reasonable steps to reduce that risk. In addition to this, it was contended that the defendant had breached its statutory obligations under the Safety, Health and Welfare at Work Act,

1989. Sections 6 to 12 of this Act impose duties on employers requiring them to ensure "so far as is reasonably practicable" the safety, health and welfare at work of their employees.

The defendant argued that the tool in question was used by other employees without report of any injury. The Court was also told that this Pfisterer tool had been sold in 16 countries around the world without any report of a similar injury resulting from its use. It was also put forward on behalf of the defendant that as soon as the plaintiff learned from his doctor that his injury was connected to his employment, the plaintiff was immediately placed on light duties. According to the defendant this action was consistent with reasonable care for the safety and health of the plaintiff.

Mr. Justice Quirke found that the defendant was in breach of the strict duty imposed by Regulation 19 of the Safety, Health and Welfare at Work Regulations of 1993 to ensure that the work equipment which the plaintiff was required to use in the course of his work on behalf of the defendant, were suitable and could be used without risk of injury. The judge held that the plaintiff was entitled to recover damages to compensate him for the pain, suffering and distress that he encountered and awarded him €45,000 in general damages.

Complainants V Goode Concrete Limited

The recently published Equality Tribunal case of 58 Named Complainants v Goode Concrete Limited (DEC-E2008-020) has potentially serious implications for the huge number of employers in this jurisdiction employing foreign workers. The matter concerned 58 employees, mostly truck drivers, who took a case against their employer for a variety of alleged instances of discriminatory treatment. One of the matters complained of concerned Contracts of Employment.

The 58 complainants all originally argued that they had not received proper terms and conditions of employment, saying those that were furnished were deficient as they did not contain all of the statutory terms. This claim was denied by the Company, who said that all but one of the workers were furnished with Contracts. However, the complainants alleged that they had been treated less favourably on grounds of race as the Contracts were furnished in English but not in their native language. The Terms of Employment (Information) Act, 1994 provides that a written statement of terms and conditions must be furnished but it does not state that it must be in the worker's native language.

The Equality Officer, citing the Labour Court case of *Rasaq v Campbell Catering Ltd* [EED048], referred to the "special measures" which may be necessary when dealing with non-national workers, and noted that Goode Concrete Ltd had in fact translated other Company documentation into a common language (Russian). It was not unreasonable, therefore, to expect the Company to provide Contracts in Russian or English, or failing that obtain a translator (but not another employee) to explain the meaning of the contract.

In the circumstances, the Equality Officer found that each of the 58 complainants was treated less favourably than Irish employees in relation to their Employment Contracts. Each of the complainants was awarded €5,000 compensation, a total award of €290,000 against the company.

Employment Law – Are You Compliant?

The long awaited Employment Law Compliance Bill, 2008 (“the Bill”) was finally published on 18 March 2008 and has introduced some noteworthy measures including the placing of the National Employment Rights Authority (“NERA”) on a statutory footing.

The object of the legislation is to improve compliance with employment legislation by increasing penalties for certain offences under employment legislation and to appoint more Labour inspectors; their purpose to compel compliance.

Employers will be obliged to display a notice containing certain information in a prominent position in the workplace. The notice must be in a form easily understood by their employees; therefore, it may need to be translated into other languages. The notice must contain the following information:

- (a) employees’ entitlements under employment legislation;
- (b) complaints procedures concerning entitlements under employment legislation;
- (c) the contact details of the Director of NERA to assist employees if they wish to make general enquiries regarding their entitlements under employment legislation and to assist employees who wish to communicate information in relation to breaches of employment legislation to the Director of NERA.

The Bill provides that employers must keep the following records:-

- (a) a copy of each employee’s contract of employment;
- (b) records to demonstrate compliance with any relevant Employment Regulation Order or Registered Employment Agreement;
- (c) particulars of wages and deductions from wages of employees;
- (d) records to show the provisions of the Protection of Young Persons (Employment) Act 1996 are being complied with;
- (e) records to show that the provisions of the Organisation of Working Time Act, 1997 are being complied with;
- (f) Records to show compliance with the National Minimum Wage Act, 2000;
- (g) Records of the amount of Carer’s leave taken by each employee under the Carer’s Leave Act, 2001;

- (h) Records required under the Redundancy Payments Act, 1967, the Protection of Employment Act, 1977 and the Protection of Employees (Employers’ Insolvency) Act, 1984.

Practical Implications

In this new era of employment compliance, and in the wake of the publication of the Employment Law Compliance Bill, 2008, what are the practical implications for employers and how will this new compliance regime impact on a day to day basis on employers’ businesses?

First and foremost, the compliance obligations mean that employers are at increased risk of spot checks from Labour Inspectors who will seek access to all documentation and records required under the legislation. Therefore, employers must ensure they have in place all of the necessary documentation, such as contracts and policies and procedures together with all records. Therefore, all employers should conduct a HR audit of their organisation to ensure that they are in compliance with their obligations. If employers are not fully compliant, then they should take all steps necessary to make themselves fully compliant.

For organisations without employment contracts already in place, these should be put in place immediately. If your employees refuse to sign a written contract of employment where none existed previously, then at the very least you must issue them with a written statement of the main terms and conditions of their employment (which they are not required to sign but which must accurately reflect their actual terms and conditions and must include at least all of the information specified in the legislation) together with all appropriate policies and procedures.

Employers must also ensure that they are paying their employees correctly – consideration in this regard must be given to the National Minimum Wage legislation and the Organisation of Working Time legislation.

The publication of the Bill is a good opportunity for all employers to audit their employment practices and procedures and ensure they are fully compliant.

