

TOPIC- THE HR AND EMPLOYMENT LAW LANDSCAPE IN 2016.....WHAT EMPLOYERS CAN EXPECT

We intend to look at the changes that 2016 will bring for Organisations, and potential areas of discussion in the area of HR and employment law, however we cannot look at 2016 without looking at the changes in 2015, which will have an impact into the future.

2015 was a busy year in employment law terms, below we have summarised the key changes:

- [Introduction of the Workplace Relations Commission](#) – The most significant change in employment legislation in Ireland over 70 years. The amalgamation of the Labour Relations Commission, Employment Appeals Tribunal, the Labour Court, National Employment Rights Authority and Equality Tribunal, into a single adjudication body has changed the sphere for employment law going forward.
- [Accrual of Annual Leave while on Sick Leave](#) – Employees are now entitled to accrue annual leave whilst on long term sick leave, for a period of 15 months.
- [Driving to Work is “Work”](#) - The European Court of Justice on the Working Time Directive, in 2015 ruled that time spent by Employees who do not have a fixed office, who are travelling to and from first and last appointments should be regarded as working time. Organisations now have to pay Employees who do not have a fixed working base for their journey time. This decision also has an impact on how rest break entitlements and maximum working hours are calculated.
- [Industrial Relations \(Amendment\) Act](#) was passed through the Oireachtas. This Act presents significant reforms to Industrial Relations legislation, namely
 - it reintroduces a mechanism for the registration of employment agreements (“REA’s”);
 - it provides a new statutory framework for the Labour Court to examine and establish rates of pay and conditions of employment in certain sectors;
 - most significantly for Employers (and particularly non-unionised Employers), it amends the law in relation to collective bargaining and the power of the Labour Court to make

legally binding orders regarding terms of employment against employers who do not have collective bargaining arrangements

- [Employment Equality \(Amendment\) Bill 2015](#) was published and provides equality for Employees of education, medical and other services under the direction of religious Organisations.
- [The Protected Disclosures Act 2014](#) had its first case heard in 2015. The case, which subsequently failed, had involved an individual who has allegedly made “protected disclosures” and subsequently was let go. The Judge in this case determined that the tests outlined in the Protected Disclosures Act were not satisfied by the Complainant.

A significant amount of these changes in 2015 will have an impact on the landscape going into 2016, and indeed in many years to come.

The introduction of the new structure of the Workplace Relations Commission whereby the Labour Relations Commission, Employment Appeals Tribunal, National Employment Rights Authority and Equality Tribunal are now one single body, should provide a much more user friendly approach to resolving employment related issues. It is hoped that the new structure will bring about a more effective, efficient, and impartial service, which is more workable for all parties involved. The streamlining of the database will also provide a centralised forum for all cases. It will be interesting to see whether the changes which have been forecast will occur in 2016, or if it may take a period of time to “bed down” in terms of processes and the system itself. Organisations who are attending in the near future find this process much more beneficial and simpler than the previous systems.

With regards to the ruling that “Driving to Work is Work” made by the European Court of Justice in 2015, there will potentially be significant ramifications for Employers going forward whose Employees have no fixed place of work. This will impact for example, Organisations who employ tradespeople, sale reps, delivery drivers and numerous other roles. These Organisations will have to examine whether they are currently in breach of this ruling from the ECJ in the context of Irish employment legislation. It is yet to be seen how this decision will be applicable in Ireland, however Organisations may potentially be liable for paying Employees who do not have a fixed place of work, for the time that they are travelling to their first place of work and also from their last place of work at the end of their working day.

Organisations that have Employees on certified sick leave since the 1st of August 2015, will also have to begin to calculate the entitlements of these Employees. This amendment to the Organisation of Working Time Act 1997 was also implemented in Ireland as a result of European Court of Justice Rulings on the accrual of annual leave entitlements during sick leave. Organisations should be cognisant of an increase in annual leave carryover from 6 months to 15 months, in cases where an Employee could not avail of annual leave during the leave year due to illness, this must be certified absence. This is an area which may become topical for Organisations as the means of calculating such carryover of annual leave may be more confusing than previously, where an Employee was not accruing annual leave whilst out on sick leave.

Paternity Leave is also due to become a statutory entitlement for fathers. This is anticipated to come into effect on the 1st of September 2016; however we will keep you updated as this transpires. This will be implemented as part of the Family Leave Bill which is due to consolidate all of the family leave legislation – which includes maternity leave, adoptive leave, force majeure leave, parental leave and carers leave.

Another area which will have significant impact on Organisations, and their cost base, is the increase in **Minimum Wage** from €8.65 per hour to €9.15 per hour. This may also have knock on effects with regards to the differential between a person who was originally paid €8.65 with a Manager / Team Leader on €10 per hour, and what it means when the person who was originally paid €8.65 wage is increased. Organisations should be cognisant that there may be ramifications in terms of pay for other Employees if challenged, and not necessarily just the Employees who are currently receiving the minimum wage.

All in all, 2016 once again promises to be another significant year in the area of employment legislation, and Organisations should ensure that they remain informed of changes, whether these are legislative or as a result of case law. We look forward to bringing you the latest news in 2016 as it happens to ensure that you are as up to date as possible with all of these changes in the year ahead.

ASE LAW – DISCIPLINARY PROCEDURE AND CCTV EVIDENCE

In this month's newsletter the Adare Human Resource Management team discuss two interesting cases relating to disciplinary procedure. In both cases CCTV was used as a form of evidence in the dismissal of the Employees, we consider the part this evidence played in the dismissal of these Employees and whether CCTV is enough to warrant the sanctions imposed. This area of case law is regularly a cause for concern for Employers, through our monthly case law analysis Adare Human Resource Management aim to examine interesting cases and highlight key learnings and pitfalls for Employers.

Former Dunnes Stores Employee Awarded €13,500 following Garda Sting

The Claimant joined the Respondent Company in 2000. In 2011 the Claimant was dismissed by the store for selling a bottle of alcohol to a minor who was acting on behalf of the Gardaí for a test purchase.

During the course of the investigation, the Assistant Manager and another Till Operator were interviewed, however were found not to be involved in the incident. The Store Manager was not present in the store when the Claimant sold the alcohol, but later received a phone call informing him of the incident. In giving her written statement the Claimant stated that she had queried about the customer's age after the purchase as she was giving change and agreed it was her fault.

The Claimant was suspended on Monday 12th December, and was later dismissed on Saturday 17th December. There were two meetings held on Thursday 15th December 2011. The Respondent considered other sanctions but considered the breach to be serious as the Gardaí were involved, as to warrant a dismissal.

The Claimant was not shown the CCTV footage during the investigation process. She received stills of the CCTV later through a data protection request. The Claimant was not offered the opportunity to bring a witness to the first meeting on the 10th December. For the second meeting, the Store Manager allowed the Claimant to bring a witness. The third meeting was a disciplinary meeting and the Claimant was again offered to bring a witness.

The Claimant applied for appeal as requested by the Company, on 2nd January. She understood there would be an appeal meeting, but on January 18th she received a letter stating that her appeal had failed. The Respondent submitted that appeals are always conducted in writing. The disciplinary procedure states that 'appeals will be heard by an appropriate member of management'.

The Tribunal concluded that the dismissal was unfair as fair procedures were not given to the Claimant. The Tribunal also concluded that there was a lack of assessment or consideration to the case given the personal background of the Claimant with 12 years of service. The Tribunal further stated that the Claimant was not afforded the opportunity to review the evidence against her by way of CCTV and was only allowed to review this following a data protection request. The Tribunal was given no evidence to do with the Appeal process undertaken against the decision to dismiss the Claimant. The tribunal awarded the Claimant the sum of €13,500 under the Unfair Dismissals Act 1977-2007.

Employee dismissed for eating Jam Tarts loses his Unfair Dismissal case

The Respondent is a distribution Company holding the contract for the supply of goods to customer T. The Claimant was formerly employed as a Warehouse Operative. Security Manager OR is employed by customer T and was responsible for CCTV footage. It is the Company's policy that no food is to be consumed on the shop floor. When viewing CCTV footage on the evening of 25th January he saw the Claimant eating something together with his colleague.

The witness brought the incident to the attention of the Warehouse Manager. The Warehouse Manager was instructed by another Manager to walk down to lane 52. It became apparent that a box containing jam tarts had been tampered with and two individual tarts were missing. JD, another Manager carried out an investigation into the alleged incident.

JD met the Claimant on 31st January together with his shop steward. The Claimant was asked what he was doing in lane 52. He said he was eating a mars bar and he shared it with his colleague PB. He returned a second time to lane 52 together with PB to view footage on PB's mobile phone.

JD did not find the Claimant's explanation to be credible and put the matter forward for disciplinary action. A disciplinary hearing on 20th March 2012. The Respondent had

been furnished with JDs report together with statements, CCTV evidence and photos of the incident. The Claimant had no reason to be in the vicinity of lane 52. AM concluded that it was reasonable for him to believe that the Claimant tampered with a packet of jam tarts. The product was rendered unsellable and had to be disposed of. An appeal hearing took place on the 1st May 2012. On the balance of probability it was believed that the Claimant had tampered with stock and the decision was upheld to dismiss the Claimant.

The Tribunal found agreed with the Respondent, in that the Claimant's evidence was not credible and on the balance of probability that he did tamper with the stock. The Tribunal also found that there were no procedural defects which would render the dismissal unfair. The investigation, disciplinary meetings and appeal were thorough, fair and objective and also provided the Claimant with all evidence against him. The Tribunal further accepted that the Respondent's zero tolerance policy was reasonable in the circumstances.

Both cases highlight the importance to Employers of following fair procedure when dismissing an Employee. A key learning for Employers in the first case unsurprisingly relates to the importance of following the correct procedures and allowing Employee's access any information they may require as part of their defence. The Respondent in this case heavily relied on CCTV when forming a case against the Employee in question, however denied the Employee the opportunity to review this evidence. This contributed to the Tribunals decision there Respondents dismissal was unfair.

In contrast the second case also relied on CCTV footage but found their investigation balanced and fair. Most importantly the Claimant was allowed to review the CCTV footage and other evidence against him. The Tribunal in this case stated that although the punishment did in fact seem harsh, the Company had maintained its decision in having a zero tolerance policy in place when dealing with the tampering of stock.

More information in relation to Unfair Dismissals case law is available via our Linea membership—www.adarehrm.ie/linea-membership

HR HELPDESK - HEALTH AND SAFETY IN YOUR ORGANISATION

Health and Safety in the workplace is a vitally important area for all Organisations to understand. Just recently an Employee at Moyvalley Meats was awarded just under €500,000 for injuries sustained while working for the Organisation. The High Court found the Organisation was negligent in terms of its Health and Safety of the Employee.

Health and Safety in the workplace in Ireland is governed by the Safety, Health and Welfare at Work Acts. These Acts outline the minimum requirements from both Employers and Employees when dealing with Health and Safety in the workplace. The Act covers all areas of Health and Safety from Operating Procedures in an Organisation to areas such as bullying and work related stress.

Employers Responsibilities

In complying with the Safety, Health and Welfare at Work Acts an Employers duties are outlined in section 8 of the Act. It states *“Every Employer shall ensure, so far as reasonably practicable, the safety, health and welfare at work of his or her employees”*, this includes:

- *“managing and conducting work activities in such a way as to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees”*
- *“managing and conducting work activities in such a way as to prevent, so far as is reasonably practicable, any improper conduct or behaviour likely to put the safety, health or welfare at work of his or her employees at risk”*
- *“providing and maintaining facilities and arrangements for the welfare of his or her employees at work”*

The Act details the obligations of the Employer in ensuring they are working in a safe environment. It is also essential for Organisations to provide their Employees with a Health and Safety Statement which details the identification of the hazards carried out under Section 19 of the Act, specifying the manner in which the safety, health and welfare at work of their Employees will be managed and put in place.

Employee Responsibilities

The Act also details the obligations of an Employee. All Employees should ensure that they bring any potential hazards within the Organisation to the attention of their Manager. The Act states the following in relation to an Employees duties within the Organisation:

“An employee shall, while at work”—

- *“Comply with the relevant statutory provisions, as appropriate, and take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee’s acts or omissions at work”*
- *“Ensure that he or she is not under the influence of an intoxicant to the extent that he or she is in such a state as to endanger his or her own safety, health or welfare at work or that of any other person”*
- *“If reasonably required by his or her employer, submit to any appropriate, reasonable and proportionate tests for intoxicants by, or under the supervision of, a registered medical practitioner who is a competent person, as may be prescribed”*

While the Act outlines clearly the obligations of an Employee in the workplace it is essential for the Organisation to ensure their policies and procedures reflect these terms and any particular Health and Safety policies which may be relevant to their particular business or industry.

Bullying and Stress in the Workplace

Bullying in the Workplace is an issue which effects many Organisations. As outlined above all Organisations have a duty of care in protecting their Employees and ensuring they build a safe working environment. The “Code of Practice for Employers and Employees on the Prevention and Resolution of Workplace Bullying” presented in the Health Safety Authority defines bullying and maintain 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”

The Code includes guidelines for Organisations on having bullying policies in place, and also outlines guidance in relation to carrying out investigations of allegations of bullying. An Organisations Code of Practice should include the following:

- The management ethos or attitude to the issue - a commitment to dignity in the workplace;
- Clearly outline what bullying is;
- Clearly outline the step by step procedure for managing complaints;
- Identify an informal and formal process, depending on each complaint.

In cases where an Organisation does not have a policies or procedures in place in relation to bullying and harassment they may in the future face issues in relation to defending a claim.

It is interesting to note that 60% of days lost in the workplace are stress related. This is a worrying statistic for all Organisations. It is also noteworthy that in many cases bullying and workplace stress are often linked. As mentioned previously having appropriate policies and procedures in place can limit the amount of stress placed on Employees.

Health and Safety is one of the most important facets of Irish Employment law. Not having policies and procedures in place can have a detrimental effect on the Organisation not just in relation to claims but also reduced productivity and a demoralised workforce, all effecting the profitability of the Organisation.

More information is available in relation to workplace Health and Safety is available via Linea -www.adarehrm.ie/health-safety