

Employment and Pensions Newsletter Winter 2008

Legislative Update

Part IV of the Pensions Act: Temporary Extension Funding Proposal Timelines

Social Welfare and Pensions Act 2008: Update

Regulatory Compliance: The Pensions Board and the Pensions Ombudsman

National Pay Deal ratified by Social Partners

Aer Lingus cost cutting measures and the application of the Exceptional Collective Redundancies Legislation

EU agrees to 'Blue Card' to attract high-skilled workers

The New Agency Workers Directive (2008/104/EC)

Case Report

Pregnancy related discrimination leads to high award - Equality Tribunal; Heather Lane v. MBNA (2008)

Employers need to be careful what representations are made to employees during the course of employment - Employment Appeals Tribunal; Glen Hooper v. Mary Immaculate College (2008)

Iurie Panuta v. Watters Garden World and Watters Garden Sheds (2008)

Conlon v. Arcourt Ltd t/a Sheldon Park Hotel & Leisure Club (2008)

Driven by excellence.

Dublin London New York Palo Alto

MATHESON ORMSBY PRENTICE



Part IV of the Pensions Act: Temporary Extension Funding Proposal Timelines

Given the current volatility in world investment markets, the Minister for Social and Family Affairs announced that all funding proposals in respect of Actuarial Funding Certificates (AFCs) with an effective date falling between 31 December 2007 and 31 December 2008 inclusive, will be allowed 18 months for completion. This will mean an additional nine months in relation to statutory triennial valuations, and an additional six months to submit a funding proposal following an intervaluation.

Social Welfare and Pensions Act 2008: Update

The Social Welfare and Pensions Act 2008 (the "Act") was signed into law on 7 March 2008. At the time of its enactment it was envisaged that the new requirements relating to trustee training would take effect from 1 November 2008 in line with the new requirements for the appointment of Registered Administrators to occupational pension schemes (See Client Update Summer 2008). The regulations relating to the trustee training requirements have not yet been published, and at the time of writing, no alternative date has as yet been announced by the Minister for Social and Family Affairs. It is understood that this requirement may be implemented in the latter half of 2009. We will provide an update on this in future bulletins.



Regulatory Compliance: The Pensions Board and the Pensions Ombudsman

Regulatory activity by the Pensions Board and the Pensions Ombudsman in relation to compliance matters under the Pensions Act increased during the course of 2008.

In April of last year the Pensions Ombudsman secured its first successful criminal conviction against an employer under Section 3 (1)(b) of the Pensions Act 1990 for failure by the employer (a building firm in Galway) to comply with a request for payroll documentation made by one of the Ombudsman's investigators. This is the first time the Pensions Ombudsman has used the enforcement proceedings under Section 137 of the Pensions Act 1990. Section 137 sets out the powers of the Ombudsman in conducting its investigations. Where a person fails to respond to a request for information or hinders the Ombudsman's investigation, the Ombudsman can apply to the Circuit Court for an order compelling the compliance of that person. These powers were utilised by the Pensions Ombudsman in a separate set of proceedings against a Dublin based construction company which also resulted in a criminal prosecution and an additional fine of €5,000.

In October last year the Pensions Board was successful in its prosecution of an employer through the Dublin District Court in relation to the employer's failure to meet its obligations with respect to Personal Retirement Savings Accounts. The employer had failed to respond to a request for information from the Pensions Board and was fined the maximum penalty of €5,000 in addition to payment of the Board's costs.

These (and other) examples demonstrate that it is essential that both trustees and employers are fully aware of, and are compliant in all respects with, their

Pictured from left to right are: Ger Connolly, Siobhra Rush, Kerry Hiles McCloy, James Campbell

obligations and duties under the Pensions Act and regulations.

National Pay Deal ratified by Social Partners

The "Towards 2016" Review and Transitional Agreement worked out by the social partners in September last, has now been ratified by both the Irish Congress of Trade Unions and the Irish Business and Employers Confederation. The agreement aims to provide stability in the current uncertain economic climate, and covers a range of initiatives. As well as the usual and widely publicised pay components, the new agreement includes a series of commitments on the implementation of employment legislation dealing with issues such as employment rights compliance, agency workers and collective bargaining. Initially, the Employment Law Compliance Bill was due to be enacted before the end of 2008. However, since the conclusion of the agreement in September, there has been a period of further consultation with the social partners and a revised version of the Bill will appear shortly. The Bill will give statutory effect to the appointment of the National Employment Rights Authority (NERA).

Work on the drafting of the Employment Agency Regulation Bill is also at an advanced stage and is due to be published in the coming months. Interim legislation will also be enacted prohibiting the use of agency workers by an employer for the direct replacement of employees in cases of an official strike or a lock out, where the employees are not acting contrary to the terms of a Labour Court Recommendation. This measure will be retained in the legislation transposing the EU Directive on the Equality of Treatment for Temporary Agency Workers, (see comment on this Directive on page 3).

A review of collective bargaining is due to be completed by the end of March 2009, with a view to the enactment of legislation in June 2009. The Government will also bring forward legislative proposals to prevent victimisation based on an employee's membership or non-membership or activity, on behalf of a trade union.

Finally in relation to pensions, the agreement commits the Government to the publication of a comprehensive framework for future pensions' policy. Legislation was also due to be introduced before the end of 2008, to

transpose the optional pensions' provisions of the Acquired Rights Directive, so that pensions will come within the ambit of the Transfer of Undertakings Regulations. However, this legislation has yet to be enacted.

Aer Lingus cost cutting measures and the application of the Exceptional Collective Redundancies Legislation

In November last, Aer Lingus announced its intention to introduce new cost-cutting measures, which included the shedding of up to 1,500 jobs. Aer Lingus argued that the measures were necessary to ensure the future of its operations in the current economic climate. However, Trade Unions branded the €74 million cost saving measures as "Irish Ferries Mark II". The cost-cutting proposals sought to outsource more than a third of its total workforce, amounting to the loss of 1,500 jobs. Under the plan, workers would move to an outsourcing service provider under a transfer of undertakings arrangement, or alternatively take a redundancy package. Staff opting for the redundancy package could seek employment with the new service provider, but only on new terms and conditions.

Siptu, the largest union at Aer Lingus, balloted its 1,200 members for all-out industrial action in protest at the outsourcing plan. This was passed with a majority of 80 per cent in favour of strike action. It also balloted its members on the use of legislation on collective redundancies, introduced by the Government in the wake of the Irish Ferries controversy. The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007, came into force on 8 May 2007. Under the Act, an exceptional collective redundancy is a dismissal which is both collective and compulsory, and which takes place in circumstances where the dismissed employees are replaced by others who will perform essentially the same functions as those dismissed, but on terms and conditions of employment materially inferior to those who have been dismissed. The Act provides for the establishment of a redundancy panel, and for reference to it of certain proposed collective redundancies. If an exceptional collective redundancy situation exists and employees are dismissed, it is possible for employees to claim unfair dismissal and possibly receive



compensation of up to five years pay, depending on length of service.

It had been proposed by the company that services to Boston, New York and San Francisco would be operated by cabin crew recruited in the United States on different terms and conditions of employment that currently apply to staff working on these routes. Such measures were perceived in some quarters as potentially coming within the ambit of the exceptional collective redundancies legislation, as the company were intending to replace current employees with workers on less beneficial terms and conditions of employment. However, agreement was later reached between the company and the trade unions, and it is now intended that Irish based cabin crew will continue to operate the transatlantic routes. The agreement is subject to new lower entry rates, 96 voluntary redundancies and changes in working conditions.

After several tense weeks of threatened staff cuts, strike action, takeover bids and negotiations, an alternative plan was agreed averting the need for the outsourcing of 1,500 jobs. As part of the new deal, the number of staff will be reduced by 7 per cent through early retirement or voluntary redundancy. Further, half of the ground operations staff will be required to leave the company and reapply for positions with Aer Lingus on lower terms and conditions. A key feature of the deal was this 'leave and return' policy, under which some 850 workers have chosen to take a lump sum payment and leave the company before returning on reduced pay and conditions. The agreement is part of the overall cost reduction plan that envisages total savings of €74 million, of which €50 million will be taken from labour costs.

EU agrees to 'Blue Card' to attract high-skilled workers

The European Union has recently agreed on a fast-track "Blue Card" scheme in an attempt to attract high skilled migrant workers from developing countries in an effort to compete with the US Green Card scheme. Its aim is to provide EU Member States and employers with additional methods to recruit, retain and better allocate the workers which they require for their business. The Commission has stated that it wishes to increase the competitiveness of the EU economy by enhancing the contribution made by legal immigration. The precise terms of the Blue Card scheme are not yet known. However, it

will be valid for a maximum of three years, it will offer candidates faster permits and will also make it easier for the worker's family to join them, find public housing and acquire long-term resident status. The scheme proposes to develop a comprehensive immigration policy within the European Union.

The main components of the scheme include:

- to be eligible for a Blue Card a migrant must be offered a job with a gross salary of at least 1.7 times the average wage in the EU Member State concerned;
- migrants must have the equivalent of a bachelor degree or five years professional experience at a comparable level;
- Member State Governments may refuse to issue a Blue Card if there are labour market problems, or if national quotas are exceeded; and
- each EU Member State will decide how long a Blue Card will be valid, for a maximum period of three years.

It appears that the Blue Card will not offer free mobility within the EU. After two years of working with a Blue Card in one EU Member State, a migrant may move to another State, however, he/she must apply for a new Blue Card within a month of arrival. This seems to suggest that a Blue Card is not valid for the whole of the European Union and removes the main advantage of having an EU-wide scheme. Despite this, migrant workers will not have to face 27 different immigration systems, but will know the conditions to be satisfied in order to be admitted into any EU Member State.

This Blue Card scheme will be formally adopted in the coming months.

The New Agency Workers Directive (2008/104/EC)

The Agency Workers Directive (the "Directive") was adopted by the European Parliament on 19 November 2008. The Directive seeks to guarantee agency workers equal pay and conditions of employment compared to those employed directly in the end user business performing similar work. The Directive further aims to recognise temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working conditions.

The principle of equal treatment encompasses the basic working and employment conditions of temporary agency workers which shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

Though it was proposed as far back as 2002, various Member States delayed its enactment due to failure to reach agreement on when such rights would be triggered. Member States can exclude from the Directive's protection, national temporary workers who have a permanent contract which ensures that they are still paid even when they are not on a temporary posting.

Under the terms of the Directive, the principle of equal treatment should be applied from day one of employment. Therefore, any treatment at national level of temporary agency workers which seeks to limit this principle (for objective reasons), must be agreed by the social partners, either through collective bargaining or through social partnership agreements concluded at national level. For example, in the United Kingdom, the social partners agreed in May that the equal treatment principles of the Directive would apply to agency workers only after 12 weeks of employment. However, for the rest of the EU, who have not already agreed any such derogation at national level, it seems unlikely that trade unions will agree to a reduction in their members rights, when the default position under the Directive is that its provisions apply from day one.

All EU Member States will have until 5 December 2011 to transpose the Directive.

[Pregnancy related discrimination leads to high award - Equality Tribunal; Heather Lane v. MBNA \(2008\)](#)

The recent case of Heather Lane v. MBNA involved pregnancy related discrimination, which appears to be an increasingly popular ground of complaint. The award of the Tribunal is one of the highest ever made in a case of this nature.

There were two main grounds of complaint. First, Ms Lane claimed that she was discriminated against in relation to promotions and conditions of employment by MBNA, on the grounds of gender. Secondly, she claimed that she suffered victimisation as a result of making the complaint.

During her maternity leave, Ms Lane was discouraged from applying for promotion, as she was informed that the ideal candidate would have obtained a college degree. Later, the job was offered to a single woman with no degree. When she returned from maternity leave in June 2004, she did not receive a grade review which her manager had previously discussed with her. In March 2005, she informed her manager that she was pregnant again. In May 2005, she requested a written explanation as to why she still had not received her appraisal. In response, she was informed that her manager had performance issues with her. When she ultimately did receive an appraisal she disputed its findings as it was inconsistent with previous reviews.

Ms Lane's second complaint related to the Company's treatment of her after she made a complaint to the Equality Tribunal. She alleged that she was victimised as a result of making the complaint. In 2007, she was informed that she was to be made redundant, but that the company would attempt to find Ms Lane an alternative position. Failing this they would offer her an enhanced redundancy package providing she signed a waiver of claims. As this would have meant the abandonment of her claim before the Equality Tribunal, she did not sign the waiver and as a result, received a statutory redundancy payment of only €6,300, instead of an enhanced package of €13,000.

The Tribunal in coming to its decision referred to the case of Dekker v. Stichting [1990] ECR I-3941. This case held that pregnancy is a uniquely female condition and that where a woman experiences unfavourable treatment on the grounds of pregnancy, such treatment constitutes direct discrimination on the grounds of gender even though there is no male comparator.

The Tribunal concluded that inferences of discrimination could be drawn from the facts that:

1. the claimant was discouraged from applying for a job which was ultimately filled by a woman with no children;
2. she experienced poor conditions of employment when she returned to work after her maternity leave (she was not given a desk or a telephone of her own);
3. she was overlooked for a grade review; and
4. finally, she was given a poor appraisal. The claimant was awarded €17,000 in respect of the discrimination she suffered.

In relation to the complaint of victimisation, the Tribunal concluded that MBNA's failure to find an alternative position for her when a redundancy situation arose was not enough to conclude that she suffered adverse treatment as a result of making the complaint. However, the fact that Ms Lane's redundancy package would be reduced where she did not sign a waiver was found to amount to adverse treatment in relation to her claim within the meaning of section 74(2) of the Acts.

The Tribunal awarded her €6,315, being the difference between the basic and enhanced redundancy packages and a further €33,000, being the equivalent to a year's salary in compensation for the adverse treatment she suffered. In total Ms Lane was awarded €56,315. The award of the tribunal is one of the highest ever made in a case of this type.

[Employers need to be careful what representations are made to employees during the course of employment - Employment Appeals Tribunal; Glen Hooper v. Mary Immaculate College \(2008\)](#)

The case of Hooper v. Mary Immaculate College illustrates the dangers of representations being made to employees during the course of their employment as to their future employment prospects. If a representation is made, an employee may later be able to rely on this representation in an unfair dismissal claim.

Mr Hooper was employed by the college in June 2003 on a ten-month contract to fill a position left vacant by a Mr D., who was given a leave of absence for research. A fact which greatly influenced the tribunal was that Mr Hooper was employed in a full-time, permanent job within the English Department of the University of Aberdeen. Mr Hooper had been perturbed by the length of the respondent's contract but received assurances including "it is a ten-month contract but not a ten-month contract", from the Head of Department. On the basis of these assurances Mr Hooper accepted the position.

After this initial contract expired Mr Hooper was offered further contracts for the 2004/2005 and the 2005/2006 academic years. He was continuously being informed that a permanent job would soon arise, due to the expected retirement of a colleague. However, when this position arose in June 2006, the claimant was unsuccessful in his application for the post.

The claimant accepted that he had never received anything in writing from the Head of the Department concerning his future with the college. The claimant argued however, that it was stated emphatically to him that it was not just a ten-month contract and based on assurances received he expected to be employed by the respondents on a long-term basis.

In contrast, the respondents argued that the claimant's service was broken, that the job or positions undertaken by the claimant were different in character and finally, that the claimant had signed a waiver of his statutory rights on entering into the contract.

From the evidence received, the Tribunal determined that certain representations had been made to the claimant, which had the effect of establishing in the claimant an expectation that the fixed term contracts would lead to a permanent position, which would be offered to him on their expiration. The Tribunal was also satisfied that the claimant had established continuity of service. It was the view of the Tribunal that the claimant was led to believe, both expressly and inferentially, that he would be offered a permanent position.

The Tribunal concluded that following the non-renewal of the claimant's contract, his academic seniority had been irretrievably damaged. Based on these facts, the Tribunal found that the claimant was unfairly dismissed and awarded the claimant €123,928, which was two years remuneration, the maximum compensation that can be awarded under the Unfair Dismissals Act.

Lurie Panuta v. Watters Garden World and Watters Garden Sheds (2008)

This case concerned a claim by Mr Panuta that Watters Garden World and Watters Garden Sheds discriminated against him on grounds of race in not attending to his work permit or tax status, in the Respondent not providing important work related information in a language understood by him, and by notifying the Gardaí about his immigration status when he filed a complaint with the Equality Tribunal, which the complainant contended constituted victimisation under the Employment Equality Acts, 1998 to 2004.

Mr Panuta (the Complainant), a Moldovan national, submitted that the Respondent failed to apply for a work permit for him with the Department of Enterprise, Trade and Employment although, it promised him it would do so. The Complainant further submitted that he never received any P60 forms for the years 2003 to 2006 and that this failure on the part of the respondent to keep his tax affairs in order, together with the failure to apply for a work permit, constituted discrimination on the grounds of race and hampered him in obtaining legal residency in Ireland.

The Respondent refuted the Complainant's claims of discrimination and victimisation. In particular, the Respondent claimed that the Complainant approached it for work and advised it of his PPS number. By this, the Respondent assumed that the Complainant's affairs were in order. The Respondent denies that it was required to make an application on the Complainant's behalf to obtain a work permit, as it was under the impression

that Moldova was an EU accession state and that the Complainant would not need a work permit. Finally, the Respondent maintains that in reporting Mr Panuta's immigration status to An Garda Síochána, it was merely protecting its own position, and that this action could not be interpreted as victimisation.

In the case, the Equality Officer was critical of the fact that the Respondent was familiar with the work permit process and therefore, it should not have presumed that the Complainant did not need a work permit. On this point the Equality Officer held that the Complainant had established a case of less favourable treatment on the grounds of his Moldovan nationality, and it was held accordingly that the Complainant had been discriminated against on the grounds of race.

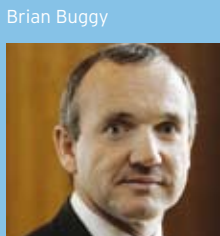
In coming to his decision, the Equality Officer referred to the case of Campbell Catering v. Aderonke Rasaan where the Labour Court held that, applying the same procedural standards to non-national workers as would be applied to an Irish national could amount to discrimination based on race. The Equality Officer held that the provision of employment contracts and health and safety information in languages other than English for employees who demonstrate such a need, falls under the principle established in Campbell. He held that the Complainant established a prima facie case of less favourable treatment on the grounds of race in that he had a limited standard of English despite which, he was not provided with important documentation in a language he could understand. The Equality Officer was also of the opinion that not issuing proper tax documents to the



Paul Glenfield



John Dunne



Brian Buggy



Bryan Dunne

CONTACTS IN THE EMPLOYMENT PENSIONS AND BENEFITS GROUP:

Paul Glenfield, Partner
paul.glenfield@mop.ie

Brian Buggy, Partner
brian.buggy@mop.ie

John Dunne, Partner
john.dunne@mop.ie

Bryan Dunne, Partner
bryan.dunne@mop.ie

James Campbell, Associate
james.campbell@mop.ie

Kerry Hiles McCloy, Associate
kerry.hilesmccloy@mop.ie

Siobhra Rush, Associate
siobhra.rush@mop.ie

Ger Connolly, Associate
ger.connolly@mop.ie

Deirdre Lynch, Associate
deirdre.lynch@mop.ie

Georgina Kabemba, Solicitor
georgina.kabemba@mop.ie

Ainsley Benefield, Solicitor
ainsley.benefield@mop.ie

Eithne Lynch, Solicitor
eithne.lynch@mop.ie

Orla O'Leary, Solicitor
orla.o'leary@mop.ie

complainant, an entitlement of which an Irish worker would have been aware, does bring the Complainant's situation under the above test formulated in Campbell Catering and constituted less favourable treatment on the grounds of race.

In relation to the claim of victimisation, the Equality Officer held that contacting the Gardaí in response to a notification that a complaint was lodged with the Tribunal constituted adverse treatment. The Equality Officer was of the opinion that the Respondent could have safe guarded its position through making enquires with the Department of Enterprise, Trade and Employment about the need of a work permit for the Complainant. Therefore, the action taken by the Respondents was not proportionate in response to proceedings which had been commenced by the Complainant, and resulted in the Complainant being victimised.

The Equality Officer ordered the Respondent to pay the complainant €10,000 for the effects of discrimination and €30,000 for victimisation.

Conlon v. Arcourt Ltd t/a Sheldon Park Hotel & Leisure Club (2008)

This dispute concerns a claim by Miss Emma Conlon (Complainant) that she was discriminated against in relation to her conditions of employment and suffered discriminatory dismissal by the Sheldon Park Hotel (the Respondent) on the grounds of gender. She further claimed that she was victimised and that this resulted in her dismissal in contravention of the

Employment Equality Acts, 1998 to 2004.

The Complainant claims that she was discriminated against in her conditions of employment by being instructed to wear a skirt by her employer. She also submitted that she had no problems at work until the Equality Authority wrote to the Respondent on her behalf, after which her shifts were reduced, and that this amounted to victimisation and ended in her being dismissed in a discriminatory manner.

The Respondent denied the allegations of discrimination, and victimisation and submitted that, at the time of the Complainant's employment, it had an employee handbook which was given to all staff with their conditions of employment, and which set out all the Respondent's policies and their employees' entitlements. The Respondent maintained that the policy during the Complainant's employment was that female waiting staff could choose to wear a skirt or trousers. The Respondent submitted that the Complainant was not dismissed due to her refusal to wear a skirt, but that she had a poor attendance record, as she did not clock out on five occasions, was late twice and did not show up for two shifts. The Respondent submitted copies of rosters and clock cards as evidence of these incidents.

The Equality Officer held that the Complainant gave clear and credible evidence that she did not receive a copy of the employee handbook, that her manager instructed her to wear a skirt and that she believed if she failed to do so she would be dismissed. Therefore, it was held that the Complainant established a prima facie case

of discrimination based on gender.

In relation to the claim of victimisation, the Equality Officer held that given the short period of time between the letter from the Equality Authority and the first shift being taken away and subsequent dismissal of the Complainant, this treatment amounted to victimisation in terms of the Employment Equality Acts, 1998 to 2004. The Equality Officer awarded the Complainant €1,600 in compensation for the discriminatory treatment suffered and €6,500 in compensation for the adverse treatment she suffered.

*The information in this document is not intended to provide and does not constitute legal or any other advice in any particular matter, and is provided for general information purposes only.



MATHESON ORMSBY PRENTICE 

Dublin

70 Sir John Rogerson's Quay
Dublin 2
Ireland

T: +353 1 232 2000
F: +353 1 232 3333
E: mop@mop.ie

www.mop.ie

London

Pinnacle House
23-26 St. Dunstan's Hill
London EC3R 8HN
England

T: +44 20 7618 6750
F: +44 20 7618 6790

New York

245 Park Avenue
New York
NY 10167
USA

T: +1 212 792 4141
F: +1 212 792 4131

Palo Alto

530 Lytton Avenue
Palo Alto
CA 94301
USA

T: +1 650 617 3351
F: +1 650 617 3251