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Employment Law

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A&L Goodbody

EMPLOYMENT LAW

SPEED READ: KEY POINTS

1. Has the pendulum swung back towards the employer? There has been a significant recent shift in HR priorities and government policy which means employers may be able to achieve things now that they would not have contemplated 3 years ago.

2. The Pension Time Bomb - State pensions dates are being pushed out, occupational pension schemes are being devalued and pension provision is now a priority for many departing senior executives. Disputes in this area are increasing.

3. Is Compulsory Retirement legal? - Many employers would think that contractual retirement ages cannot be challenged by employees who might not want to retire. However, this is a developing area of law and recent European law may suggest that blanket retirement clauses may constitute age discrimination.

4. Public Sector Watch Out - There is a perception that significant employment changes in the broader public sector is bound to occur soon. An increase in litigation and IR disputes is expected.

5. Beware of E-Mail - Some recent media reports have highlighted problems created by the unauthorised use of email by employees. However, employers adopting a best practice approach of prevention and cure will comply with their duty of care to other employees.

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1. **Has the pendulum swung back towards the employer?**

We have been saying for many years that the law is pro-employee and that the employment relationship was too heavily regulated. In the wake of cases like Irish Ferries and Gama, unions had the ear of law makers and the emphasis on social partnership meant that new laws were frequently promised to confer more rights on employees and regulate further employers. Many employers felt employee disputes were all too often difficult to win and HR practice and employers' approach to claims generally reflected this.

However, there has been a notable shift and HR practice is arguably more pro-employer now than for many years. Employers may be able to do things today that one would never have dreamt of doing four or five years ago. Salary deductions, bonus reductions, pension change and more have all been implemented successfully and some (though not all) have been defended in litigation. Union membership is down, their influence has waned and much of the promised regulatory employment legislation has been delayed and may not be implemented at all. Government policy has moved too and the focus is now more on competitiveness rather than compliance (e.g., the reduction in the minimum wage).

Be in no doubt that there is still a great deal of regulation but, for the first time in many years, the pendulum has swung somewhat back in the direction of the employer.

2. **Pension Time Bomb**

Individual pension disputes are on the increase. The reasons for this are manifold.

Pensions have reduced in value both in the occupational pension sense and in terms of State pensions.

The proposed National Pension Framework (repeated in the National Recovery Plan 2011-2014) will, if implemented, see the State pension pushed out to 66 by 2014, 67 by 2021 and 68 by 2028. This may seem like a long way off but will be significant in the medium term.

Because of the economic downturn, many occupational schemes are worth less.

Furthermore, as part of the private sector cost cutting of the last two years, many employers have adjusted costly benefit pension schemes to decrease the pension payable on retirement or replaced them entirely with fixed contribution schemes. Some employees are finding out to their surprise that the guaranteed benefit they always thought they would have on retirement is being replaced by a less valuable defined contribution scheme.

This has all led to an increased focus on pension arrangements in severance packages for senior executives and more individual disputes. Interestingly though, there has been little litigation over collective changes to scheme terms.

3. Retirement Age – Is compulsory retirement legal?

Is compulsory retirement legal?

Traditionally, the answer has always been an unequivocal "yes".

However, this is truly a developing area of law and there is a growing view that forcing an employee to retire at a certain age may constitute age discrimination. Some observers say this might be the case even where there is a mandatory retirement clause in an employment contract.

Age discrimination has been a developing area of EU law and Irish law since the implementation of the Employment Equality Acts in 1998. The Acts allow employers to impose a written contractual retirement age which has, by and large, been used successfully by Irish employers. However, increasingly, the judgments and rulings of the Court of Justice of the European Union raise questions on whether a blanket retirement clause without any objective policy justification may be unlawful and constitute such age discrimination.

The UK currently has a default retirement age (65) but this will be abolished in 2011 and it will be unlawful age discrimination for an employer in the UK to require employees to leave employment at a particular age by reason of retirement without objective justification. This may put pressure on Ireland to follow suit and may exert a persuasive influence on Irish courts and tribunals.

Following on from my previous point about the pensions time bomb, many employees will want (or need) to work longer.

As an employer, you will need to know that you may need to justify objectively compulsory retirements. This is especially the case if employees need or wish to work longer to cover a pension gap.

There has been a big increase in employment claims over compulsory retirement and this trend will continue. Cases by employees challenging retirement where there is no written contract of employment or (where there is one) no retirement clause, are increasingly being ruled in favour of such employees.

Otherwise, the majority of the results in these cases have so far been in favour of the employer. However, some have been decided on relatively narrow grounds and so it is wise to watch this space as this is a very developing area of law. Therefore, employers should look carefully at their need to have a retirement age and then at how to justify and implement it.

4. Public Sector watch out

The Public Service Agreement 2010 – 2014 (aka the "Croke Park" Agreement) and the more recent National Recovery Plan means that significant, if not historical, employment changes in the Civil Service, State Agencies and non-commercial State-sponsored bodies are likely to be implemented. This is likely also to be of significance for semi-State commercial organisations where pressure for organisational change and cost cutting may increase. Some of you in the private sector are likely to have

already seen substantial labour cost adjustments and may have a word of caution for those from the public sector that significantly increased job losses and pension changes will be implemented in the sector sooner rather than later.

5. Beware of E-Mail!

Some high profile recent cases have highlighted the PR and HR issues that can be caused by employees' wayward use of e-mail. The risk of employees' personal e-mails becoming "viral" is something that employers now need to be increasingly conscious of. The explosion of social networking on employer systems also introduces new challenges for employers.

Employers owe a duty of care to employees to take reasonable steps to prevent bullying and harassment arising through inappropriate use of the employer's email system. It will be impossible in practice to eliminate completely the risk but a dual approach of prevention and cure (or at least damage limitation) should be adopted.

Prevention: Inappropriate and damaging e-mails can damage a business' reputation and lead to legal liability and employers should send a clear message to employees at induction that such use is prohibited. Electronic communication policies should be introduced and highlighted with regular reminders to all staff. A cross reference to disciplinary policies will also be needed. Training and regular reminders for all staff should be incorporated. The employer's duty of care to employees may to a large degree be satisfied by ensuring good policies are in place and that such induction / training occurs.

Cure: It is accepted by courts and tribunals that even the best of efforts will not necessarily be enough to prevent all such unfortunate matters arising in the first place. The cure or damage limitation part of the process must then kick in. To achieve this, employers should adopt a caring approach to affected employees and offer assistance such as EAP (Employee Assistance Programmes), possibly relocation of employees and possible issuing of statements to clients or the media. Disciplinary procedures and sanctions against perpetrators may be required but employers should resist the temptation to be seen to go overboard and must always remember the importance of fair procedures and proportionality.