Employment Law Bulletin

LANDWELL Solicitors

SUMMER 2004

In this issue:

The Dawn of the Virtual Office!

E- Working

The speed of technological changes in recent years is continuing to transform the traditional workplace. There is no longer a need for an employee to attend the workplace to perform his duties. Employees can perform their duties with the use of a laptop and a phone. As a consequence, many organisations and employees are availing of the opportunity to work from home. This is now commonly known as e-working. Current research illustrates that one in ten Irish businesses have one or more employees using e-work practices. With proper safeguards, employees can access new ways of working and benefit from the possibilities associated with e-working, such as more control over their working day including working hours, reductions in commuting time and a better balance between working and family/home life.

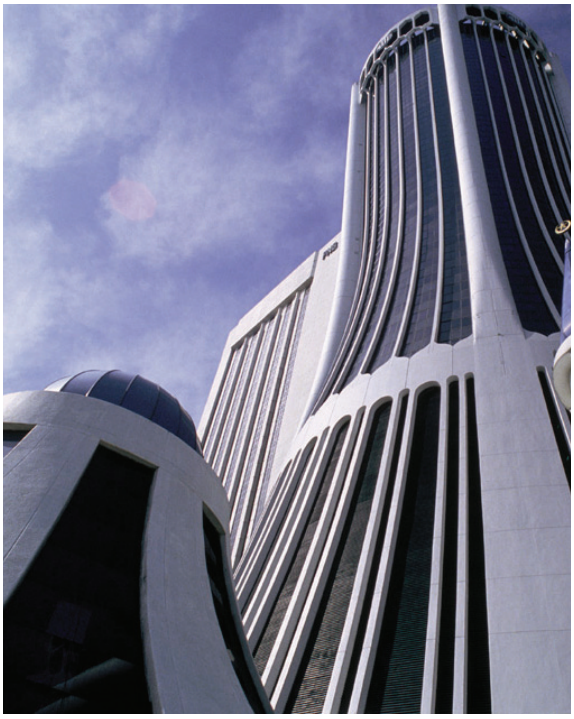
The UK recently introduced "The Flexible Working (Procedural Requirements) Regulations 2002, which provides a new statutory right to request the right to work on a flexible basis, including the right to work from home. Ireland does not have similar legislation and there are currently no plans to follow suit. However, there is a Code of Practice on e-Working ("the Code") that was introduced in 1999. The Code encourages the introduction of a formal e-working policy in organisations as a means of avoiding potential problems or difficulties that may arise with the introduction of this method of working.

The Risks

Employers are advised against agreeing to adhoc requests from employees to work from home and are instead advised to draft a clear policy that specifies the parameters of e-working. The e-working policy should be drafted with sufficient flexibility and there should be provisions for amending, suspending or terminating the e-working arrangement and returning to conventional office working subject to business requirements.

The risk in allowing an employee to work from home without the back up of an explicit e-working policy or letter that provides that the arrangement is subject to change, can be illustrated by a recent High Court decision in the case of *Carey v Independent Newspapers*. In this case, the former Evening Herald political correspondent Mairead Carey sued her former employer for breach of contract and negligent misstatement. Ms Carey alleged that it was agreed with the editor that she could work from home in the mornings, to facilitate her child care arrangements. When the editor left, Ms Carey was told she could not work from home and was required to attend the office at 7am. Ms Carey subsequently left her employment and sued her former employer for damages for breach of contract, wrongful dismissal and damages for negligent misstatement. The High Court awarded her EUR 52,226 damages and held that that the editor had made a negligent misstatement by saying she could work from home but failed to tell her that senior management had serious reservations about this.

Allowing an employee to work from home can constitute a fundamental term and condition of employment, which cannot be changed without the employee's consent. It is therefore imperative that the employer has an explicit agreement or a clear e-working policy that has the built in flexibility for the employer to change any home working arrangements subject to business requirements.



E - Working Policy - The Content

The e-working policy should specifically envisage how this arrangement will operate to avoid any potential problems that may arise. When drafting an e-working policy, employers should be aware of any potential equality or industrial relations issues that may arise from excluding certain workers from e-working. To avoid such a challenge, an objective criteria should be used to identify jobs or roles that are suitable for e-working, with a general overriding reservation to allow the employer to decline the request for operational reasons. Requests to work from home should be considered fairly and the implications of e-working for the employee and employer should be fully considered before agreeing to this request.

Consideration may also need to be given to the operation of company policies that may be affected by the e-working arrangement and how certain benefits may apply such as the reimbursement of the cost of the business use of a land line at home. The e-working policy should also include a procedure for regular monitoring and review of the e-worker's performance.

Where the introduction of e-working gives rise to any changes to normal work practices or to an employee's terms and conditions, these should be set out in an additional written letter to be given to the employee. Consequently, the e-working policy will set out the general terms and conditions of working from home and the letter will set out the specific e-working arrangements for the particular employee.

E- Workers - Legal Protection

There is sometimes an assumption that because an employee works from home, they are responsible for their own working conditions. This is not correct. Employees who work from home are still the responsibility of their employer. This means that they are still protected by the array of employment legislation such as their working time, health and safety, equality and unfair dismissal legislation.

An employer has a legal duty to ensure, so far as reasonably practicable, the safety, health and welfare of their employees. Employers should also be aware of the importance of undertaking a health and safety risk assessment to ensure that the e-worker's working condition complies with all health and safety legislation. It is important to be aware that carrying out a risk assessment of the home work station is the responsibility of the employer and may involve, by prior agreement, a home visit. The risk assessment should cover issues such as electrical safety, fire safety, lighting levels, provision of heating and ventilation, VDU requirements/information on ergonomic posture for prolonged use of computer work stations, use of portable computers and the importance of eyesight testing for all regular VDU users.

E-workers are also subject to the protection afforded to them by the Organisation of Working Time Act, 1997 ("the 1997 Act"). The 1997 Act specifies that an employee can not work on average in excess of 48 hours per week, all employees are entitled to 11 hours consecutive rest in each 24 hour period and an employee is entitled to rest breaks of 15 minutes per 4.5 hours and 30 minutes where 6 hours have been worked. The e-working policy should make it clear that the employer is obligated to comply with the provisions of the 1997 Act and that appropriate breaks should be taken during the working day.

E-workers are also covered by the Employment Equality Act, 1998 ("the 1998 Act"), which prohibits discrimination in respect of access to and terms and conditions of employment on nine grounds including gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the travelling community. It is probably correct that women are likely to constitute a significant group of e-workers, as often women will seek to combine a working life with child care. It will therefore be important that e-workers are treated equally with other employees who are based in the workplace, to avoid any contention that e-workers are being discriminated against on the ground of gender. Therefore, e-workers should be treated equally to work based employees in relation to access to terms and conditions such as promotion or access to bonuses etc.

The Future

It is likely that the trend towards e-working will increase. There is no doubt that e-workers have the potential to be a major impetus for sustained economic growth, however employers should have a clear written policy in place to enable companies to react readily with a degree of flexibility to such requests to work from home.

Breaks in Service - When do they Count?

Concept

The concept of continuity of employment or service of an employee is important because length of service determines an employee's statutory entitlements in relation to a variety of employee rights such as:

- notice periods
- unfair dismissal claims
- redundancy payment entitlements

The Legislation

The statutory rules regarding the interpretation of the term continuous service or continuous employment, are contained in:

- Schedule 1 of the **Minimum Notice and Terms of Employment Act, 1973** (the "1973 Act") ("Schedule 1"), which is used for the purposes of determining appropriate minimum notice periods for an employee and whether service is considered continuous for the purpose of the **Unfair Dismissals Act, 1977** (the "1977 Act"). An employee must have one year's continuous service to be afforded the protection provided by the 1977 Act.
- Schedule 3 of the **Redundancy Payments Act, 1967** (the "1967 Act") ("Schedule 3"), which calculates service periods for the purposes of any Statutory Redundancy Payment ("SRP") entitlements. An employee must have two years' continuous employment before he is entitled to a SRP when terminated on the grounds of redundancy.

Statutory Presumption of Continuity

The Schedules are similar in their approach to the interpretation of the meaning of the concept of continuity of employment or service. Under both Schedules, service is presumed continuous, unless terminated by either the dismissal of the employee or the employee voluntarily leaving the employment.

Break in Service?

When computing continuous service for the purposes of both the 1973 Act and the 1977 Act, Schedule 1 provides that a lay off, a lock out or a

strike will not break continuity of service. Schedule 1 also provides that if an employee is immediately re-employed or if there has been a transfer or a sale of a business from one employer to another, their continuity of service will not be broken. The latter provision is also reflected in the EC (Protection of Employees on Transfer of Undertakings) Regulations 2003, which implements the Acquired Rights Directive in Ireland.

Computable Service Periods

When computing the weeks which count towards continuous service for the purposes of the 1973 Act and the 1977 Act, Schedule 1 provides that any absences of **not more than 26 weeks** for sickness, injury, lay off or by agreement with the employer shall count as a period of service. However, any absences **in excess of 26 weeks** due to sickness or voluntary agreement, will not count as computable service.

For the purposes of the 1967 Act, Schedule 3 also provides that continuous employment will not be broken where an employee's period of service has been interrupted for example by a period of not more than 26 weeks due to lay off, holidays or voluntary arrangements. Interestingly, Schedule 3 does however allow a more generous period of absence of up to 78 weeks due to sickness to count as continuous employment. Absences in excess of these specified periods will not count as continuous employment for the purposes of the 1967 Act. However, regard should be had to the fact that Schedule 3 provides further rules for determining "reckonable service" for the purposes of calculating a SRP.

Case Study

By way of example, if an employee was employed for 9 months then went on sick leave for 7 months and was thereafter terminated, would the employee have the requisite one year's continuous service for the purposes of pursuing a claim under the 1977 Act?

Although the employee has been employed for 16 months, any absence in excess of 26 weeks due to sickness would **not** count as a period of computable service for the purposes of establishing continuous service of one year.

The question of whether the whole period of 26 weeks or just the period in excess of 26 weeks is discounted is not specifically dealt with in the Schedules. It was held in *O'Flaherty v. Rowntree Mackintosh (Ireland) Ltd (1987)* that the whole period would be discounted towards computing continuous employment under Schedule 3. However, there is a more practical view amongst academics that it is only the excess of the 26 week period which is to be discounted.

Taking the more practical view, the first 26 weeks of the 7 month absence would be taken into account in calculating continuity of service, which would satisfy the one year's continuous service requirement for the purposes of pursuing a claim under the 1977 Act. By contrast the employee would have the full 16 months continuous employment for the purposes of establishing a statutory entitlement to a SRP under the 1967 Act, which allows absences of up to 78 weeks on the grounds of sickness. However, as noted above there are different rules for calculating reckonable service for the actual amount of the SRP in the 1967 Act.

Stop Press!

I) Imminent Changes to Equality Law

The Equality Bill 2004 ("the Bill") is a significant piece of proposed discrimination legislation, which is due to be implemented later this year. The Bill provides for a number of amendments to the Employment Equality Act, 1998 ("the 1998 Act") and the Equal Status Act, 2000 ("the 2000 Act"). Both Acts prohibit discrimination on nine grounds in the area of employment and access to the provision of goods and services.

It is proposed that self-employed persons and partners in partnership will now be brought within the scope of the 1998 Act. There are other changes to disability, sexual harassment and age provisions in the aforementioned Acts, which are set out below.

Disability

Around 17% of the cases currently being dealt with by the Equality Authority relate to discrimination on the ground of disability in employment and the provision of services.

The Bill makes an interesting change to the 1998 Act in that under the 1998 Act, an employer must do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities. A refusal to provide such treatment or facilities would not be deemed unreasonable, unless such provision would give rise

to a cost other than a "*nominal cost*" to the employer.

The Bill now provides that employers must take effective and practical measures to adapt the workplace unless this would impose a disproportionate burden on the employer. It remains to be seen what is meant by "*disproportionate burden*" and whether this is a more stringent test for employers, compared to the previous "*nominal cost*" test. It may be noted that last month a court in Britain ruled that Ryanair's imposition of a levy on wheelchairs was unlawful and that Ryanair acted unlawfully by not ensuring that a wheelchair was provided free of charge to a disabled man at Stanstead airport.

Age

Under the 1998 Act it is unlawful to discriminate against an employee between the ages of 18 and 65. The Bill has lowered the age limit to 16 for the purposes of the 1998 Act. However an employer may still set a minimum age requirement, not exceeding 18 years, for potential applicants for a job.

Also of interest is the proposal that the Bill allows discrimination on the age ground in respect of occupational benefits schemes, which are statutory or non-statutory schemes. It provides that it is not discrimination for an employer to fix ages for admission or entitlement to benefits under such a scheme, or use age criteria in actuarial calculations in such schemes.

Sexual Harassment

The Bill expands the definition of sexual harassment in the workplace. Previously under the 1998 Act, sexual harassment was defined as an act or request, which is unwelcome and could *reasonably* be regarded as offensive, humiliating or intimidating. The conduct must now simply be unwanted and have the purpose or effect of violating a person's dignity and creating an intimidating and hostile, degrading, humiliating or offensive environment for the individual. It remains to be seen how this new definition will work in practice, however, in removing the "*reasonable*" requirement, it is likely that the new definition will be open to a wider interpretation.

II) New Immigration Rules

The Immigration Act, 2004 ("the Act") has recently been signed into law and provides for the controversial operation of controls on the entry and residence of non-nationals while within the State. The Act was considered necessary after a High Court decision in January 2004, which held that current law governing the entry and control of immigrants in the State was unconstitutional.

Appointment of Officers

Section 3 of the Act concerns the appointment of immigration officers. Section 3(3) empowers immigration officers to detain and examine any persons arriving or leaving a port "who is reasonably believed by the Officer to be a non national". This section is seen by some critics as controversial as it may imply the use of "racial profiling" by immigration officers of non-nationals because of their colour, ethnicity, descent or other distinguishing characteristics.

Permission to Land

Section 4 is the primary provision dealing with the operation of immigration controls at points of entry to the State. It confirms the requirement for a work permit in accordance with the Employment Permits Act, 2003.

Section 4(3)(c) allows for a refusal of entry to any person who suffers from a prescribed disease or a mental disorder as set out in the First Schedule to the Act. Again critics of this section are concerned that the provision as currently drafted has the potential to have a wide and possibly discriminatory impact on persons with physical, intellectual or sensory disabilities.

Examination and Detention of Non-nationals

Section 7 empowers the master of a ship or the pilot of an aircraft to detain on board any non-national coming from a place outside the State until he or she is landed for examination. This section provides that non-nationals must declare all documentation they are carrying or conveying, including letters, photographs or any written messages or memoranda, and if requested must hand them over. The officer may also search any non-national and any luggage belonging to them to ascertain whether they have any documentation and may detain such documents for as long as they see fit.

Requirement as to production of certain documents

Section 12 requires non-nationals to produce identity documents or passports on demand to immigration officers or Gardaí. It appears here that the power of the immigration officer or Gardaí is largely based on perception and a non-national who refuses such a request will be guilty of an offence and liable to either a fine or imprisonment.

Penalties

The Act will also for the first time criminalize Irish citizens for failing to comply with immigration provisions. For example hoteliers and landlords may be penalised for failing to maintain hotel registers. As a consequence they could be arrested without a warrant and are liable on summary conviction to a fine not exceeding €3,000 or one year of imprisonment. The Act also creates a situation where it is an offence for a non-national not to report to the Gardaí a co-habiting non-national, however it is not an offence for a national to fail to report this.

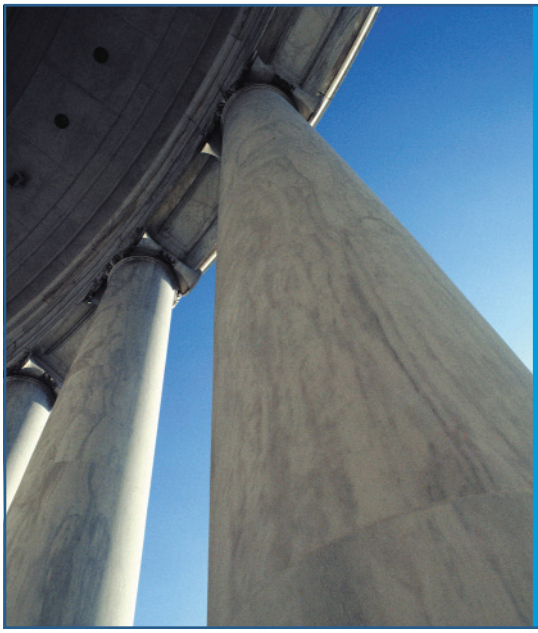
III) The Era of Compliance

Compliance is set to become the buzzword for 2004. Certainly it seems that there is an international awareness of the need for increased corporate regulation following the recent furore surrounding the collapse of multi-national companies in the US and UK and the subsequent public scrutiny of their internal affairs.

Landwell's Employment Law Unit is conducting HR Audits of company's employment policies and procedures to ensure compliance with all relevant legislation on a 2 stage basis.

1. **Stage One**- Review of policies and procedures, identification of areas of non compliance and recommendations; and
2. **Stage Two**- Implementation of recommendations.

You should have received a copy of our "HR Compliance Universe" Flyer with the Spring Bulletin. The Flyer highlights some of the key areas of employment law legislation, which require continual monitoring, and compliance. If you require further information in relation to this, please contact Colleen Cleary (+353 1 662 6110) or Wendy Doyle (+353 1 662 6467) of our Employment Law Unit.



Should you wish to discuss any of the above developments, you may contact members of the Employment Law Unit at the e-mail addresses and telephone numbers listed below:-

Jim Trueick (Partner)
jim.trueick@ie.landwellglobal.com Phone: 01 662 6303

Colleen Cleary (Senior Associate)
colleen.cleary@ie.landwellglobal.com Phone: 01 662 6110

Wendy Doyle (Solicitor)
wendy.doyle@ie.landwellglobal.com Phone: 01 662 6467