

GOVERNANCE FORUM BRIEFING

Employment Law

Ercus Stewart SC
4 February 2010

Areas within presentation

- Recent Developments
- Issues relating to dismissals
 - Unfair, Wrongful
 - Redress
- Disciplinary procedures & Employee handbook
- Injunctions
- Contemporary situations

(Selected list of cases to demonstrate the decisions)

General comment

There is a need to have a solid and easily understood employment contract – delineating what is expected and also what constitutes a dismissible offence

Beware “home made” contracts

Keep them short, simple and clear!!

Dismissal

“ you’re fired, terminated, dismissed” –
however there is sometimes room for
doubt!!

Law on dismissals has changed since 1970's

Importance of good personnel management

Dismissal

Employers are finding that is they have not assisted, properly trained or helped an employee meet required standards of competence and conduct, they may not be able to " fire" the individual

Concept of constructive dismissal

Dismissal categories

- Ordinary dismissal
- Constructive dismissal
- By statute
- "gun to the head"
- Language which amounts to dismissal !!!

- Unfair dismissals – termination for unfair or inadmissible reasons
- Wrongful dismissal
(employee must elect which to use)
- Code of practice on G&D procedures
- Question of reasonable notice

There is no general legal requirement for a written employment contract – prudent to have one

Terms of Employment (Information) Act
1994

Importance of staff handbook

Legislation

- Employment Equality Acts
- Unfair Dismissals Acts
- Code of practice on G&D procedures (SI 246/2000)

Two fundamental principles of Natural Justice

Nemo iudex in causa sua

Audi alteram partem

Redress for dismissal

- Calculation of loss
- Specific performance
- Injunctions (relevant cases)

Carroll v Bus Átha Cliath,

“The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason. In those circumstances it was obvious that the only remedy for a breach of contract by way of dismissal was for the payment of the amount that would have been earned had appropriate notice been given. However, it is now frequently the case that employees cannot be dismissed, as a matter of contract, save for good reason, such as incapacity, stated misbehaviour, redundancy or the like. It would appear that the development of the law in relation to affording employees a certain compliance with the rules of natural justice in respect of possible dismissal derives, at least in material part, from this development. If the stated reason for seeking to dismiss an employee is an allegation of misconduct, then the courts have, consistently, held that there is an obligation to afford that employee fair procedures in respect of any determination leading to such dismissal. That does not alter the fact that an employer may still, if he is contractually free to do so, dismiss an employee for no reason. It simply means that where an employer is obliged to rely upon stated misconduct for a dismissal, or, where it is not so obliged, chooses to rely upon stated misconduct, the employer concerned is obliged to conduct the process leading to a determination as to whether there was such misconduct in accordance with many of the principles of natural justice.”

*Naujoks v National Institute of Bioprocessing, Research
and Training Limited*

"It seems to me that that is not far removed from making a judgment that there was a failure on the part of the Plaintiff to properly discharge his duties as CEO, which would entitle the Defendant to summarily dismiss the Plaintiff, but subject to affording him fair procedures."

Laffoy J.

Fennelly –v- Assicurazioni Generali

"In the meantime the plaintiff will be left without a salary and nothing to live on. The situation in which he finds himself would be little short of disastrous. It seems to me in that situation that the balance of convenience is in the plaintiff's favour. He should not be left in the situation between now and the action in which he would be virtually destitute with a prospect of damages at the action. That seems an unjust situation."

Costello J.

Parsons v. Iarnród Éireann

"What the Unfair Dismissals Act, 1977 does is to give the worker who feels that he has been unfairly dismissed an additional remedy which may carry with it the very far-reaching relief of reinstatement in his previous employment. It does not limit the worker's rights, it extends them. At the same time, s. 15 of the Unfair Dismissals Act provides that the worker must choose between suing for damages at common law and claiming relief under the new Act. Sub-section (2) accordingly provides that if he claims relief under the Act he is not entitled to recover damages at common law; while sub-section (3) provides that where proceedings for damages at common law for wrongful dismissal are initiated by or on behalf of an employee the employee shall not be entitled to redress under the Unfair Dismissals Act in respect of the same dismissal.

"The traditional relief at common law for unfair dismissal was a claim for damages. The plaintiff may also have been entitled to declarations in certain circumstances such as, for instance, that there was an implied term in his contract entitling him to fair procedures before he was dismissed. But such declarations were in aid of the common law remedy and had no independent existence apart from it. If the plaintiff loses his right to sue for damages at common law the heart has gone out of his claim and there is no other free-standing relief which he can claim at law or in equity."

Barrington J.

Heneghan v The Western Regional Fisheries Board

“It was highly objectionable that Mr. Kennedy who was the prime mover in the dismissal process, one of the main reasons for which was the element of personal antagonism and whose version of the facts was challenged by Mr. Heneghan, should decide the whole question”.

Carroll J.

Shortt v Data Packaging

"I am satisfied that damages are not an adequate remedy where the plaintiff will have to await the trial of the action in circumstances where he is totally without remuneration and where a trial will inevitably be some time away. Any loss sustained by the defendant will be adequately met by the plaintiff's undertakings. The balance of convenience is also in favour of the granting of an injunction pending the hearing in order to preserve the status quo."

Keane J.

Kiely v Minister for Social Welfare

“Tribunals exercising quasi-judicial functions are frequently allowed to act informally — to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like — but they may not act in such a way as to imperil a fair hearing or a fair result.”

Henchy J.

Cassidy-v- Shannon Castle Banquets

“When an employer is confronted with an allegation of misconduct against an employee, then it seems that before a decision is made to dismiss, the person accused must be informed clearly of that with which he is charged. He must then get a fair hearing. This does not necessarily mean such a hearing as he would get in a court of law but it does mean that he should be treated fairly according to the ordinary reasonable standards of fair play. He must be given a fair opportunity of refuting the charges and implicit in this is that he must be told reasonably full particulars of the charges.”

Budd J.

O'Sullivan V Mercy Hospital Cork Limited

"At one end of the scale is an entirely informal investigation carried out by an employer for the purposes of ascertaining whether there might be a basis for instituting disciplinary procedures ...

"At the other end of the spectrum there are statutory schemes which require a decision of a particular body as to the existence of a prima facie case as a pre-requisite to formal disciplinary proceedings ...

"In between those two extremes may be a variety of forms of preliminary enquiry which may vary as to their formality in the sense of whether they are a formal and necessary step to a subsequent stage in a disciplinary process...

"I am therefore satisfied that the plaintiff has made out a prima facie case that the terms of reference of the O'Brien Inquiry are such as to render that enquiry tainted by what, on the basis of the evidence before me at this stage, I must conclude was a legally flawed enquiry conducted by Mr. Brown."

Clarke J.

In Carroll v Bus Átha Cliath/Dublin Bus

"...The starting point is that Mr. Carroll has not yet been finally dismissed given that his appeal is pending. For the reasons indicated above I am satisfied that the stated basis as to why Mr. Donoghue refused to hear the case on 5th August was not a valid reason...

"... Having found that he (Mr. Duggan) was not entitled to reach conclusions on that basis it necessarily follows that his conclusions as to the appropriateness of dismissing Mr. Carroll were reached in breach of Mr. Carroll's entitlement to natural and constitutional justice...

"... I am not satisfied that it can be said that Mr. Carroll would have been afforded such overall fair procedures in that eventuality. In substance I have, for the reasons indicated above, come to the view that Mr. Carroll had, in effect, no real hearing before the relevant official such that the determination of that official should be treated as, in substance, a nullity ...

"... In those circumstances, even if the appeal hearing were conducted fairly, it is impossible to conclude that Mr. Carroll might not be at a disadvantage by virtue of not having had a proper "first instance" hearing and, in all the circumstances of the case, it appears to me that it is appropriate to make a declaration to the effect that the purported decision to dismiss by Mr. Duggan is void and of no effect ..."

Clarke J.

Maha Lingham v Health Service Executive

"...it is well established that the ordinary test of a fair issue to be tried is not sufficient to meet the first leg of the test for the grant of an interlocutory injunction where the injunction sought is in effect mandatory. In such a case, it is necessary for the applicant to show at least that he has a strong case that he is likely to succeed at the hearing of the action."

Fennelly J.

American Cyanamid v Ethicon Limited

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

Lord Diplock

EMPLOYMENT LAW – INJUNCTIONS

Relevant Cases

Ahmed v Health Service Executive [2007] IEHC 312; [2006] IEHC 245 (High Court, Laffoy J., 29/8/2007; 6/7/2006)

Becker v Board of Management St Dominic's Secondary School, Cabra (High Court, 15 April 2005; [2005] IEHC 122)

Berber v Dunnes Stores [2009] ELR 61 (Supreme Court)

Bergin v Galway Clinic Ltd [2008] I R [2007] IEHC 386 (High Court, Clarke J., July 2007)

Boland v Phoenix Shannon Plc [1997] 3 ELR 113 (High Court, Barron J.)

Burns v Governor Castlerea Prison [2009] IESC 33 (Supreme Court, Geoghegan J., 2/4/09)

Byrne v Shannon Foynes Port Co (High Court, Clarke J., 2008)

EMPLOYMENT LAW – INJUNCTIONS

Relevant Cases

- Cahill v DCU* [2007] ELR 113 (Supreme Court; High Court, Clarke J. interlocutory injunction and full High Court hearing)
- Campus Oil v Minister for Industry and Energy* (No. 2) [1983] IR 88 (Supreme Court)
- Carroll v Bus Átha Cliath/Dublin Bus* (No. 1 & 2) [2005] ELR 149 & 192 (High Court, Clarke J.)
- Cassidy v Shannon Castle Banquets & Heritage Limited* [2000] ELR 248 (High Court, Budd J.)
- Charlton –v- H.H. The Aga Khan* (No. 1) [1999] ELR 136 (High Court, Laffoy J.)
- Coffey v William Connolly & Sons Ltd* [2007] IEHC 319 (High Court, Edwards J.)
- Coonan v Attorney General / DPP* [2001] I R (Supreme Court; High Court, Carroll J.)
- Corrigan v Bank of Ireland* (High Court, Clarke J., 2008)
- Courtney v Radio 2000 Ltd* [1997] ELR 198 (High Court, Laffoy J.)
- Cronin v Eircom* [2007] ELR 84 (High Court, Laffoy J.)

Conclusion

Practice of labour law has changed over the last 40 years as reflected in legislation and regulations

Aim - Fairness and equity to workplace
Balancing rights and entitlements

The legislation is substantial and complex

GOVERNANCE FORUM BRIEFING

Employment Law

Thank You

*Ercus Stewart SC
4 February 2010*