Payment of Wages Claims

This Article looks at two defences, which are being put up on behalf of employers, in payment of wages claims which are being made by two non legal firms in particular. The defences are raised in cases where there has been either a deduction in the monies paid or non payment of wages in total.

Deduction Cases

This applies, under the Payment of Wages Act, where there has either been a non payment or a deduction. The two entities attempt to categorise any non payment in wages as a "reduction" in wages. The argument being made is that the Decision of Edwards J in the High Court in the case of Michael McKenzie and Others and Ireland and the Attorney General and the Minister for Defence Record Number 2009/551JR and in particular paragraph 5.8 thereof where the learned Judge states,

"5.8. Finally, the Court agrees with the Respondents' submission that the Payment of Wages Act, 1991 has no application on the circumstances of this case. Firstly, as has been pointed out, correctly in the Courts view, the reduction in the PDF ordinary timing allowance is not a "deduction" from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions as distinct from "deductions". Secondly, even if that were so, any alleged breach of the Payment of Wages Act, is not justiciable controversy before the High Court in circumstances where the Act sets up specific enforcements mechanisms to be availed of elsewhere in such circumstances".

The above portion of the Decision is the portion being relied on by these representatives to categorise a non payment of wages as a "reduction" in wages and therefore not a claim that can be made. What they do not point out, in the submissions which they make is that in making the determination Edwards J was referring to Paragraph 4.27 and 4.28. In those sections it was stated,

"4.27. In response to the argument based under S.5 of the Payment of Wages Act 1991 the Respondent submitted that the reduction on the PDF Allowance is not a "deduction" from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions (as distinct from "Deductions").

4.28. The Respondents further submit that the issue raised of non-compliance with Section 5 of the Payment of Wages Act is not properly justiciable by the High Court...."

The McKenzie case dealt with a "reduction of allowances". The Payment of Wages Act specifically excludes allowances from the terms of the Act and the definition of "wages" also specifically excludes allowances in the Payment of Wages Act.

The two entities using this defence seek to claim a non payment as a "reduction" in wages when they are "deduction in fact and in law. The counter argument to make in such cases is to refer to the case of Sean Senan Histon and Shannon Foynes Port Company 2006 IEHC292 in that case being a Judgment of Mr. Finley Geoghegan where he stated,

"The purpose of Section 5 is to preclude an employer from making deductions from the wages of employees unless certain specified conditions are met. Section 5 (2) is expressly directed to a prohibition against an employer making any deduction from wages in respect of "any act or omission of the employee unless certain specified conditions are met".

The learned High Court Judge went on to state,

"It does not appear to me arguable that a failure to pay the plaintiff any part of his salary is not a deduction from his salary within the meaning of Section 5 of the Act of 1991."

To make a deduction from an employees salary the employee must consent. Without the consent the deduction is illegal unless it is one required by legislation such as tax.

Reduction/Deduction was Reasonable

The two entities in question are as an alternative and often in the same cases, raising the issue of Section 6(2) Payment of Wages Act. That Section provides that where a Rights Commissioner/EAT decides that where a complaint is well founded the Rights Commissioner/EAT shall order the employer to pay to the employee compensation of such amount (if any) as the Rights Commissioner/EAT thinks reasonable in the circumstances.

The first point to raise, if this defence is put forward is that the provisions of Section 6 (2) only apply to a deduction. Therefore if the previous argument as regards the McKenzie case being put forward the argument under Section 6(2) cannot both be forward as they are contradictory. The defence that has been put forward is that because of the economic circumstances the employer had no alternative but to make the deduction. The usual argument is that it was for the purposes of maintaining the business, maintaining employment or some similar argument.

This defence is being put forward without any back up financial documentation being produced. If such a defence is put forward I would advise colleagues to seek to have the financial information produced to include audited accounts and management accounts. Where these are not being proffered for inspection colleagues would be entitled to object to that defence being furnished on the basis of the case of Ryanair and The Labour Court. In that case the Supreme Court held that where one party had to run the gauntlet of cross examination whereas the other party could submit by way of written or oral submissions that that was not a fair procedure. If this defence is put forward the representative of an employee is entitled to see the financial documentation on which this is based. When looking at the financial documentation it is worth looking to see what drawings and salaries including pension contributions have been made on behalf of directors or spouses and children of directors. Colleagues may well find that while the employee is expected to take a reduction in salary/wages that directors, spouses of directors and family members of directors have taken no reduction or in some cases have actually increased their net takings from the employer company. It should be remembered in companies that the accounts not only set out salaries but also other items that have to be added back such as expenses paid on behalf of directors and others and tax paid

Conclusion

The representatives who are putting forward these defences are not Solicitors. They therefore have no duty to a Tribunal which a Solicitor would have, not to mislead in relation to stating the Law. As Solicitors, if asked by a Court we are obliged to advise a Court on the Law even if it is against the interest of our client. The same I believe would apply in the case of a Quasi Judicial Tribunal such as Rights Commissioners or the Employment Appeals Tribunal. This requirement, as Officers of the Court which we as Solicitors take on does not apply to non lawyers even those who appear before such Tribunals. I would caution colleagues to be wary of these defences. Because they are becoming commonplace now other representatives are tending to use the defence. In my view the defence being put up, in the case of the McKenzie Judgement is an incorrect statement of the Law. In the second defence in relation to Section 6(2) of the 1991 Act the representatives are trying to put forward this proposal that the “deduction was reasonable” without supporting evidence. These defences can and should be challenged.