This is an extract from a seminar paper given by Richard Grogan of this firm to The Southern Law Association on 30th November 2018.

Penalisation of a Worker – Section 26

Section 26 sets out that an employer shall not penalise an employee for having in good faith opposed by lawful means an Act which is unlawful under the Act or the Activities of Doctors in Training Regulations. Where a penalisation of an employee, in contravention of the Act, constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2007 relief may not be granted to the employee in respect of penalisation both under the OWTA and under those Acts. The legislation however does not preclude a claim for claiming compensation and obtaining compensation both under the OWTA and the Safety Health and Welfare at Work Act.

In Paris Bakery and Pastry Ltd and Mrzliak DWT68-2014 the Labour Court confirmed that penalisation includes what is generally referred to as a constructive dismissal. The Labour Court considered Sections 26 of the Act in detail.

The Court pointed out that the term "dismissal" is not defined in the Act. The Court logically determined that the reference in Section 26 to the Unfair Dismissal Acts suggests that the term should be given the same meaning as is ascribed to it in those Acts. The Court referred to Section 1 of the Unfair Dismissal Acts 1977 to 2007 and in particular referred to Section 1 (b) and (c). The Court held that where the employer commenced a repudiatory breach of contract the employees entitled to accept the repudiation and consider himself or herself dismissed. In this case the conduct of the proprietor of the respondent company in perpetrating a serious and unprovoked assault on the employee had the effect of undermining the duty of mutual trust and confidence. The Court measured the quantum of compensation as being €10,000. In this case the employee had complained about not receiving a break at work and had informed the proprietor that he was entitled to receive a break.

The ECJ has ruled that where an employee objects to working over 48 hours but is normally working 48 hours where an employer reduces the employee's hours and reduces their wages that by reducing the hours to below 48 where an employee is entitled to work 48 hours a week amounts to penalisation Case C-243-09 Fuss –v- Stadt Halle and Case 429/09 Fuss –v-Stadt Halle (No. 2).

In First Glass Limited and Babianskas DWT1647 the Labour Court held that while penalisation is not defined, it is:

"Generally accepted as the imposition on the employee of some detriment."

Can an employer threaten an employee? If they do is this penalisation?

An employer it appears under the OWTA can threaten an employee and it does not amount to penalisation. This was held by the Labour Court in the case of Nurendale Limited and Ainars Lucens. Ainars Lucens worked for Nurendale Limited T/A Panda Waste. The employee made a complaint that he had been penalised. The employee in this case had issued a complaint against the employer. A Decision of the Adjudicator was made which was appealed. The employee then submitted a fresh series of complaints to the Adjudicator. Shortly after this the complainant was called to a meeting with the company manager. In the conversation that took place at this meeting the employee maintains it amounted to penalisation.

The Court had to consider did this amount to penalisation. The Court stated;

"However, the section appears to apply in circumstances where penalisation has actually taken place. The section does not appear to protect a worker against a threat of penalisation".

The Labour Court pointed out that an employer shall not penalise an employee for having in good faith opposed by lawful means an Act which is unlawful under the Act. The Labour Court contrasted Section 26 of the OWTA with Section 27 (3) of the Safety Health and Welfare at Work Act 2005 which states that an employer shall not penalise or threaten penalisation against an employee.

The Labour Court therefore properly held that the Oireachtas could have chosen to protect employees against a threat of penalisation under Section 26 of the Act. The Court held that as the evidence did not disclose any actual detriment that had been suffered by the employee therefore the Court had to conclude that Section 26 of the Act had not been infringed.

The effect of this decision is that an employer can with immunity threaten an employee. It is not a complete immunity. For example, if an employee was put in fear of physical abuse that would of course be penalisation. However, for example a threat that an employee would be fired, demoted, or have their pay reduced but with none of these actually happening would only be a threat and would not be covered under the provisions of the Act.

This is certainly a shortfall in the legislation.

Section 17 Employment (Miscellaneous Provisions) Bill 2017 will rectify this defect.

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