KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Unfair Dismissal Act and Fixed Term Contracts

The case of the Board of Management of Malahide Community School and Dawn Conaty 2019 IEHC 486 being a decision of the High Court delivered on the 5th July 2019 has brought great clarity to the issue of use of fixed term contracts entered into where an employee had an existing permanent contract.

The first issue that was looked at really relates to Section 13 of the Unfair Dismissal Acts which provides that a provision in an agreement whether a contract of employment or not and whether made before or after the commencement of the Act shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act.

It was his Honour pointed out that on a literal interpretation of Section 13 of the Act it would appear to include the possibility of an employee ever waiving their rights under the legislation. He pointed out that such an inflexible rule could prevent difficulties in practice. This would be especially so in the context of settlements of claim for alleged unfair dismissal. His Honour pointed out that the Courts have taken a pragmatic approach to the interpretation of Section 13. The case of Hurley –v- Royal Yacht Club 1997 ELR 225 was one which was quoted where his Honour held

"The Circuit Court accepted that, notwithstanding the literal meaning of Section 13, it cannot have been the intention of the legislature to prevent employers and employees from compromising claims under the Unfair Dismissals Act".

His Honour went on to state

"The judgement goes on to suggest that in order for an agreement to be valid

- *(i) The agreement must identify the employment protection legislation which is being waived*
- *(ii) The employee should have been advised in writing that he should take appropriate advice as to his rights"*

His Honour pointed out that the principle set out in that case had been endorsed in the High Court case of Sunday Newspaper Limited – v- Kinsella 2019 ELR53 and also quoted the case of Ryan, Redmond on Dismissal Law (Bloomsbury Third Addition 2018 in paragraph 25.54)
His Honour pointed out at paragraph 57 of the decision that the principle underlying the case law namely that a person cannot be taken to have waived the statutory right unless they make an informed decision to do so, would appear to apply equally to the advance waiver of rights under Section 2 (2) (b). This is the provision of the Unfair Dismissal Act 1977.

At paragraph 61 it is pointed out

"Section 2 (2) (b) allows for the possibility on an employee, at the commencement of their employment, making an informed decision to waive their statutory rights. This waiver must be confirmed by the employee signing a written contract which states that the Unfair Dismissal Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The provisions of Subsection 2 (2) (b) carves out an exception to the general rule in the Unfair Dismissal Act. As such, same falls to be interpreted strictly"

His Honour pointed out that this is not an exclusion from the Act but rather a "waiver".

In this case his Honour pointed out that there had been a history of employment and stated that the exemption under Section 2 (2) (b) is only available in the case of a first time employment, or, perhaps, employment pursuant to a series of fixed term contracts.

This statement of the law by the High Court is of significant importance in situations where an employee has a permanent contract and is then subsequently moved onto a fixed term contract. That now appears from this judgement not to be an option for employers. The High Court was very clear on it that allowing an employee to be moved from a permanent contract to a fixed term contract that such an interpretation would be open to potential abuse. The Court then dealt with the issue of informed consent. In relation to the exemption under Section 2 (2) (b) the Court held that it is nevertheless necessary that the waiver is given on the basis of

informed consent and that there is an implicit obligation on the employer to put an employee on notice that the entry into a particular contract will entail the loss of statutory rights previously acquired by the employee. The Court pointed out that a false statement to the effect that the Unfair Dismissal Act does not apply to the dismissal consisting only of the expiry of a fixed term would not be sufficient rather the contract would have to include an express acknowledgement to the effect that the employee was relinquishing their acquired rights to the protection of the Act.

The Court went on importantly to state at paragraph 76

"Alternatively, lest I am incorrect at my interpretation of Section 2 (2) (b), I am satisfied that, as a matter of contract law, an employer who requests an employee to agree to inferior terms and conditions, which involve the loss of statutory rights, is required to explain the precise legal effect of those changes to the employee. This implied term is part of the implied obligations of mutual trust and confidence between an employer and an employee. It is also necessary to reflect the unequal bargaining power between an employer and an employee."

There has been a system creeping into Irish Employment Law particularly in relation to individuals getting to retirement age or close to it where they are approached and advised that they can move on to a fixed term contract. At the end of the fixed term contract their employment is then terminated. This decision of the High Court appears clearly to outlaw such actions except where the employer clearly advises the employee that they are giving away important statutory rights and protections which they have. Effectively it moves the contracts into a situation where they become void unless the required consent has been obtained and importantly the effect of that consent has been advised to the employee in advance.