

### **PRE-EMPLOYMENT ISSUES**

#### **EMPLOYEE OR INDEPENDENT CONTRACTOR?**

The purpose of this article is to provide advice to **employees** - not to provide advice to independent contractors. It is wise for you to be aware that if an agreement is given to you and it says that you are an independent contractor then that will mean that you do not have the protection of any employment legislation. Some people prefer to be independent contractors because they like to run their own business, work for more than one company and there are tax advantages for them. It is an issue to be aware of and, if there are any questions, raise it with a lawyer.

### **TYPES OF EMPLOYMENT AGREEMENTS**

- **Fixed Term Employment Agreements**

If the employment agreement that you have been provided with says that you are being employed for a fixed term period, say for 6 months, then the employment agreement expires and that is the end of your employment. Fixed term agreements are allowed but the employment agreement must specifically state that the employment is for a fixed term and there must be a valid reason for having a fixed term employment agreement. For example, being employed to finish a project would be a valid reason for a fixed term employment agreement. However, having a fixed term employment agreement just to see whether or not somebody is suitable is not valid. If you find yourself in a situation whereby you are employed for a fixed term period and there does not appear to be a valid reason or a project for which you are employed then when the fixed term period is about to expire it would be wise to seek advice as to whether or not your employment should come to an end.

- **Temporary/Part-Time Employment Agreements**

Often employers consider that their obligations with respect to temporary or part-time employees are different from those owed to permanent employees. This is not the case.

Employment legislation applies equally to temporary/part-timers as to permanent staff. Part-timers are entitled to holidays, special leave for sickness, bereavement etc, minimum wages and are subject to the Employment Relations Act 2000. If the employer wishes to terminate the employment agreement of a temporary or part-time employee then the same principles of fair dealing apply as with permanent staff.

The main area of confusion with regard to part-timers is in the holiday area which will be covered below in the Holidays Act.

- **Casual Employment Agreements**

Sometimes an organisation needs help from time to time on an irregular basis. The service industry is a good example.

A true casual is one employed for a day, or a couple of days now and then. Their engagement starts at the beginning of the day/or couple of days and ends at the end of that day/couple of days. Employers do not have the same obligations regarding casuals. If at the end of the day/2 days or so, the employer does not want or need them back, it is not a dismissal situation.

Because the employees are employed on a daily/couple of days basis, holiday pay is usually paid at the end of the day or at the end of a couple of days. No issues as to leave/special leave arises. Casuals become problematic if an employer regularly employs them, then it is questionable as to whether or not they are in fact part-timers and therefore entitled to notice, fair dealing when dismissed, sick leave etc.

- **Indefinite Employment Agreements**

These are by far the most common and we will focus mainly on that situation in this article.

We will primarily look at individual employment agreements because collective employment agreements are ones which are negotiated by a Union and therefore you can seek assistance from your Union in that event.

### **THE INTERVIEW**

The pre-employment phase is often the most critical part of the employment relationship. It is a time for both the employee and the employer to agree on the expectations for the job.

You are under no duty at the interview stage to divulge discreditable events in your past life, however, if you are asked a question for example about previous criminal convictions, you can not answer the questions falsely or if this is found out at a later stage the employment agreement can be set aside.

### **REFERENCES**

Often employers seek to check the employee's past employment history to be sure they have the right person for the job. If you do not provide a reference or do not give consent to contact past employers then an employer trying to do so will be in breach of the Privacy Act 1993. The Privacy Act makes it clear that an agency collecting personal information must do so directly from the individual concerned. Therefore, your consent is necessary before your prospective employer contacts previous employers.

If you have put a reference on your C.V., that is implied consent for an employer to contact that person.

### **QUESTIONS AT INTERVIEW**

The Human Rights Act is important. If you have got the qualifications for the job and you have been asked what seem to be irrelevant questions, there may be some issues regarding the Human Rights Act. Under the Human Rights Act it is discrimination to take into account such things as a person's:

- Sex;
- Marital status and family status;
- Religious or ethical beliefs;
- Race;
- Colour and ethnical national origins;

- Disability;
- Age;
- Political opinion;
- Employment status;
- Sexual orientation.

### **INDIVIDUAL EMPLOYMENT AGREEMENTS**

#### **OFFER OF EMPLOYMENT**

If you are offered a position with a company, before you accept the position, the employer must provide you with a copy of the intended agreement and must advise you that you are entitled to seek independent advice about the intended agreement and must give you a reasonable opportunity to seek that advice. If you raise any issues about the intended agreement these must be responded to by the employer.

This is a radical departure from the way in which employment agreements were negotiated under the Employment Contracts Act. Under the Employment Contracts Act, if you were offered a position it was a take it or leave it situation. Now under the Employment Relations Act and its recent amendment, an employer must give you a copy of the intended agreement, let you seek independent advice and give you reasonable time to do so. They must also respond to issues you raise about the agreement.

#### **ESSENTIAL ELEMENTS OF THE EMPLOYMENT AGREEMENT**

The Employment Relations Act sets out some mandatory requirements for employment agreements entered into after the Act. They must be in writing and include the following:

- The names of the employee and employer concerned;
- A job description;
- An indication of where the employee is to perform the work;
- An indication of the arrangements relating to the times the employee is to work;

- The wages or salary payable;
- A plain language explanation of the services available for resolution of employment relationship problems, including notification that a personal grievance must be raised within 90 days by the employee.
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### **OTHER EXPRESS TERMS IN THE EMPLOYMENT AGREEMENT**

Other express terms that you should keep an eye out for include:

- **Restraint of trade**

If an employer is seeking to restrain you from working for a company which competes with it for a period of time after the employment agreement comes to an end and within a certain geographical area, the restraint of trade clause must be expressly included in writing in the employment agreement. This is because the Courts do not like employees being stopped from making a livelihood. If you see a restraint of trade clause in your employment agreement please read it carefully because it may prevent you from certain activities following the termination of your employment agreement.

- **Intellectual Property**

Normally, any design or idea developed by you while carrying out your duties for an employer will be the employer's property and cannot be used by the employee for his/her own benefit. It is wise to keep that in mind if you are employed in a business whereby intellectual property, such as designing, is of importance. You may be prevented from using your own designs at a later stage after the employment as come to an end.

- **Redundancy**

It is more difficult to get redundancy compensation if you are made redundant if your employment agreement does not contain a clause which spells out how much notice you are to be given if you are made redundant, and how much compensation you are to receive in that event. Therefore, it is a good idea to carefully consider your employment agreement to see whether there is a redundancy clause because more

and more employees are being made redundant and it would be wise to ensure that you have a good notice period (say a month) and some provision for extra payment if made redundant so that you can find yourself another job.

### **IMPLIED TERMS**

Every employment agreement has implied terms. These are terms which are included in the employment agreement by virtue of other laws.

### **EMPLOYER'S DUTIES**

- Good faith;
- Fair treatment;
- To protect employees and provide safe systems of work;
- Confidentiality.

### **EMPLOYEE'S DUTIES**

- Duty of good faith and fidelity;
- To do the job they are contracted to do to the best of their ability;
- To comply with reasonable and lawful instructions;
- To be honest in dealings;
- Confidentiality.

### **CONFIDENTIALITY**

It is an important implied term of every employment agreement that if you come into contact with trade secrets, commercial information which would be useful to competitors or potentially damaging to the business, that such information is kept confidential both during the employment agreement and afterwards.

### **OTHER LAWS WHICH AFFECT THE EMPLOYMENT RELATIONSHIP**

The following legislation forms part of every employment agreement whether or not they are specifically referred to in the Employment Agreement.

#### **THE HOLIDAYS ACT 2003**

Provides a minimum statutory code covering annual holidays, public holidays and sick leave. Under the Holidays Act, each employee is entitled to 15 days annual leave, the 11 statutory holidays listed in the Holidays Act and up to 20 days sick leave, 15 of which can be carried over for sickness, that of their spouse, dependent child etc, bereavement leave.

#### **THE HUMAN RIGHTS ACT 1993**

Unlawful to discriminate on any of the grounds of discrimination listed in that Act.

#### **HEALTH & SAFETY IN EMPLOYMENT ACT 1992 & AMENDMENTS**

Duty on both employer and employee to ensure that workplace is safe.

#### **PARENTAL LEAVE & EMPLOYMENT PROTECTION ACT 1987 & AMENDMENTS**

Allows employees who have been employed continuously for 1 year with an employer to have rights to unpaid parental leave and the employer must keep the employee's job open, unless they hold a key position. There is a provision for a period of Government funded parental leave.

#### **MINIMUM WAGE ACT 1983**

Requires employers to pay no less than the minimum wage.

### **WAGES PROTECTION ACT 1983**

Requires the employer to pay money for wages and not to deduct anything except for such items as PAYE which is required by law, from an employee's wages without their written consent.

For more information on employment agreements and rights and obligations under them contact LawWorks at the address below.