O'FLYNN EXHAMS LLP
SOLICITORS

Employment Law Round-Up Year To Date

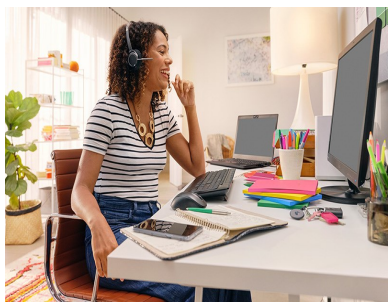
Content

Work Life Balance and Miscellaneous Provisions Act 2023

- The Work Life Balance and Miscellaneous Provisions Act 2023 was signed into law on 04 April 2023. The Act transposes the EU Directive on work-life balance for parents and carers as well as introducing new rights for employees. The Work Life Balance and Miscellaneous Provisions Act 2023 involves the following core elements:

1. Right to request remote working

- Qualification period of 6 months' continuous employment with employer before an employee will be entitled to the requested remote working arrangement.
- The employee must submit the request at least 8 weeks before the date they intend to start the new arrangement.
- Once commenced, employers, upon receipt of a request for remote working, must respond within 4 weeks (or 8 weeks if they are having problems deciding if the request is viable), must consider the employees' needs and the business' needs, and must give reasons if a request is refused.
- The Act provides for a process under which an employer may terminate a remote working arrangement where it is having a substantial adverse effect on the operation of the employer's business or there is an abuse of the arrangement.
- The WRC may award up to 4 weeks' remuneration in respect of a breach of the requirements for managing an employee's request and/or direct compliance with the requirements of the Act. However, importantly, the WRC will not be entitled to consider the "merits" of any decision made by the employer to refuse a request, including the reasons for reaching their decision.
- An Employer shall maintain a record of approved remote working arrangements taken by Employee including dates and times. The records shall be retained for 3 years.
- The WRC are to prepare a Code of Practice which will provide guidance for employers on how best to consider and properly manage remote and flexible working requests. The relevant aspects of the legislation will be commenced



2. Right to request working arrangements for caring purposes

- Qualification period of 6 months' continuous employment before an employee will be entitled to the requested arrangement.
- Employees who can avail of this right must be either a parent or a person providing personal care/support to a person that is in a degree of relationship to the employee that the Act recognises (this includes a spouse, civil partner, cohabitant, various family members, and persons living in the same household).
- The person in need of care/support must be in need of significant care/ support for a serious medical condition (owing to a person's disability, injury or illness).
- For flexible working arrangements to care for a child, the child must be less than 12 years of age or 16 years of age if the child is suffering from a disability/ long-term illness.
- The WRC may award up to 20 weeks' remuneration in respect of a breach of the requirements in respect of managing an employee's request and/or direct compliance with the requirements of the Act.

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Core Elements

- **Right to request remote working**
- **Right to request working arrangements for caring purposes**
- **Leave for medical care purposes**
- **Domestic Violence Leave**
- **Extension to Breastfeed Entitlements**
- **Amendments to Maternity Legislation- The 2023 Act further amends the Maternity Protection Acts 1994 to 2022 to extend the right of those to take maternity leave to transgender males who have obtained a gender recognition certificate, and subsequently become pregnant fall within its scope.**

3. Leave for Medical Care purposes

- Came into effect from **03 July 2023.**
- All employees will have entitlement to 5 days of unpaid leave in any period of 12 consecutive months, for serious medical reasons, the employee needs to provide personal care or support to a family member, or a cohabitant who is in need of significant care or support for a serious medical reason.
- No minimum service requirement.
- Employees must confirm to their employer in writing that they have taken/intend to take this leave and must include the date of commencement, duration and a statement of the facts entitling the employee to the leave.

4. Domestic Violence Leave

- Domestic violence leave will come into effect on 27 November 2023 (*Section 13AA in the Parental Leave Acts 1998 to 2023, inserted by the Work Life Balance and Miscellaneous Provisions Act 2023*).
- All Employees will have a right to take up to 5 days paid domestic violence leave in a 12-month period.
- An Employer shall pay an Employee availing of this leave their **full pay.**
- The purpose of the leave is to enable an employee or to assist a relevant person to seek medical attention, obtain services from a victim services organisation, obtain psychological or other professional counselling, relocate temporarily or permanently, obtain an order under the Domestic Violence Act 2018, seek assistance from the Garda Síochána and seek/obtain any other relevant services.
- When an employee has taken domestic violence leave, they must, as soon as reasonably practicable, send a notice to their employer confirming they have taken this leave, and specifying the dates on which it was taken.

5. Extension to Breastfeed Entitlements

- The 2023 Act amends the Maternity Protection Act 1994 to extend the entitlement to paid time off work to breastfeed from 26 weeks post-birth to 104 weeks (2 years).
- The entitlement also extends to transgender males who are breastfeeding.

Sick Leave Act 2022

- Commenced on 01 January 2023. For 2023 the entitlement is 3 days paid sick leave and it is proposed to increase the entitlement to 5 days in 2024, 7 days in 2025 and 10 days in 2026.
- Employees are entitled to 70% of their usual daily earnings up to a maximum of €110 a day for certified leave.
- Employees must have completed 13 weeks' continuous service with an employer before availing of statutory sick leave and must provide a medical certificate from a registered medical practitioner.
- Statutory sick leave may not apply where an employment contract provides for more favorable sick leave provisions. Any less favourable treatment in an employment contract will be overridden by the Act.
- Exemptions can be granted where the employer is experiencing severe financial difficulty.
- Employers must maintain a record of all statutory sick leave taken including the period of employment of an employee who avails of sick leave, dates of sick leave and the rate of statutory sick leave payment. Records must be retained for four years and if an employer fails to keep accurate records they may be convicted or subjected to fines of a relevant offence up to €2,500.
- The WRC have recently examined an employer's obligation to pay statutory sick pay. The WRC case of ***Katerina Leszcynska v Musgrave Operating Partners*** can be found **here.** The Claimant had claimed that her Employer's Policy did not pay sick pay until the 4th day of sick leave and was less favourable than the provisions of the Act. The WRC found that as the sick pay scheme provided for 8 weeks pay after the initial waiting period of 3 days, it appeared more favourable to the

Health & Safety– Psychosocial Risks

- In September 2023, the HSA published a guidance (**click here**) for psychosocial hazards in the workplace.
- The term 'psychosocial' relates to the combined influence that psychological factors and the surrounding social environment have on a person's physical and mental wellbeing and their ability to function.
- Psychosocial hazards will include aspects of a business, place of work or a system of work which a reasonable person would find challenging to the point of being potentially harmful.
- Employers have a responsibility to manage psychosocial hazards in the workplace such as bullying, conflicting demands and/or lack of role clarity, lack of support from colleagues and/or management, poor communication, remote working and poorly managed organizational change.
- Employers should identify psychosocial risks through risk assessment, put control measures in place, keep records of documents, policies and procedures, ensure such policies and procedures are brought to the attention of employees and ensure managers/supervisors are competent and trained to keep records of any issues arising and how best to deal with such psychosocial hazards.

Health & Safety– Air Quality

- The HSA has released a code of practice for indoor air quality. (**Click here)**
- The Code of Practice includes a template risk assessment to help employers determine the indoor air quality in their workplace and provides guidance on managing indoor air quality.

Protected Disclosures (Amendment) Act 2022

- Commenced on 01 January 2023 Currently, employers with 250 or more employees are required to have internal reporting channels and procedures in place and from 17 December 2023 this **will apply to employers with 50 or more employees.**
- Expands and strengthens existing whistleblowing rights in Ireland.
- A person / function should be designated to operate the channel, and maintain communication with the reporting person, follow-up on the report, and provide feedback to the reporting person.
- The internal reporting channels must be GDPR compliant and should ensure confidentiality.
- The Act expanded the definition of worker which now includes shareholders, directors (or members of other administrative/ management/ supervisory bodies), volunteers, job applicants, and those involved in pre-contract negotiations.
- The Act also broadened the definition of relevant information to include information which came to the attention of the worker in a "work-related context" rather than in the course of employment.
- The Act expanded the definition of relevant wrongdoing to include a breach of a broad range of EU law and an attempt to conceal or destroy information concerning a relevant wrongdoing.
- Reports can be made orally or in writing.

- This person/ function should have sufficient independence and authority within the organisation to carry out the functions specified in the Act. Persons operating the internal channel should be adequately trained in the handling of reports.
- The organisation must promote the existence of the internal channel and ensure workers have access to the procedures under which it operates. The internal function can be outsourced.
- Failure to comply with the requirements to establish, maintain and operate internal reporting channels and procedures is an offence.

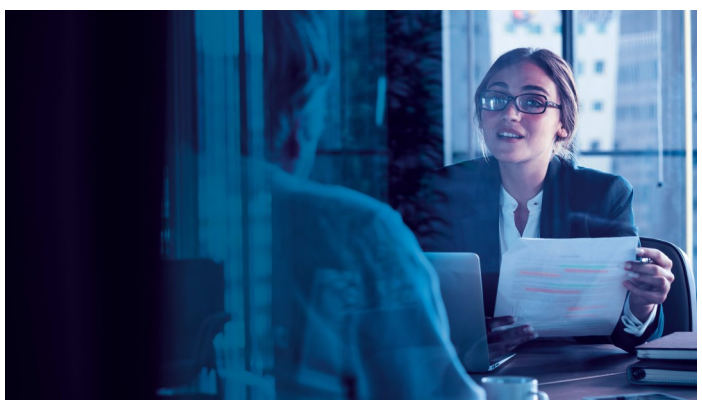
The procedures for internal reporting must include:

I. Acknowledgement of all reports received, in writing within **7 days.**

II. Diligent follow-up on all reports received,

III. The provision of feedback to the reporting person at **3-month** intervals, on request.

IV. A statement of policy as regards the conditions, if any, under which anonymous reports will be followed-up.



V. Provision of information on how to report externally to a prescribed person or the Protected Disclosures Commissioner.

Barrett v The Commissioner of An Garda Síochána and the Minister for Justice [2023] IECA 112

- The case of Barrett v The Commissioner of An Garda Síochána and the Minister for Justice [2023] IECA 112 is a Court of Appeal Case which provides a clear and comprehensive restatement of the law on when the courts will interfere in an ongoing disciplinary process and on protected disclosures.
- The most notable aspect of this case is the ruling regarding the standard of proof required in cases involving protected disclosures. The appellant, who held the position of Executive Director of Human Resources and People Development within An Garda Síochána, was the subject of a disciplinary process. The applicant complained that the entire disciplinary process was flawed from the outset and deeply unjust in and of itself. He alleged that the process was conceived out of malice and personal animus and maintained against him for improper reasons and constituted a detriment which he suffered for making protected disclosures under the Protected Disclosures Act 2014.
- Although the Barrett Case was decided prior to the introduction of the 2022 Act, it is an interesting ruling regarding the standard of proof, which is required when an application for an interlocutory injunction is sought by an applicant who claims that there is a connection between having made a protected disclosure and suffering a detriment.
- Ní Raifeartaigh J noted that protected disclosures are an area in which there is relatively little authority and an important issue was present in this case concerning the burden and standard of proof, therefore, she chose to address this issue, despite considering that the appellant's delay was sufficient to deny the application.
- This case also represents a clear and comprehensive restatement of the law in the area of the threshold for the Courts interfering in an ongoing disciplinary process.
- The clear statement that in an application for an interlocutory injunction the applicant has the benefit of the statutory presumption and the presumption does not apply to the question of whether there is a connection between a protected disclosure and an alleged detriment adds clarity to this difficult area of the law.

Suspensions & Fair Procedures

O'Sullivan v HSE [2023] IESC 11

- The aim of suspension is to preserve the status quo pending the outcome of the process.
- The Supreme Court considered the question of an employer's right to suspend an employee and the procedures involved.
- These proceedings concerned a consultant obstetrician and gynecologist who was placed on administrative leave with pay after being found to have performed experiments on patients without their consent. The consultant issued judicial review proceedings regarding his suspension and the ongoing disciplinary process was paused. The most notable aspects of the Supreme Court judgment are those that relate to fair procedures in decision making and to the review of decisions to suspend.
- The case highlights the significance of procedural integrity, clear contractual terms, fair treatment throughout the suspension process and decision makers setting out a considered logic in making their decisions, as well as recording them on file.
- The judgment also notes that while fair procedures must be afforded to an employee by an employer considering their suspension, placing an employee on administrative leave does not impose the same level of fair procedures as, for example, a full disciplinary hearing.
- Full judgment can be accessed by **Clicking Here**

Buttimer v Oak Fuel Supermarket Limited Trading as Costcutter Rathcormac [2023] IEHC 126

- The plaintiff claimed that she had been dismissed during her probationary period due to allegations of misconduct, before their obligations had been investigated or before the investigation was complete, which resulted in a breach of fair procedures.
- An employer is free to terminate an employee's employment for no reason during probation and, even where it relates to poor performance, the employer is not obliged to observe fair procedures but where the termination is for misconduct fair procedures must be observed.
- The High Court granted injunctions restraining the employer from:

i. appointing another person to fill the role left vacant following the disputed dismissal; and

ii. publishing or communicating to any party that the employee was no longer employed, pending the outcome of the full trial.

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The Supreme Court decision highlights:

i. **The importance of a contractual suspension clause.**

ii. **The nature of the suspension must be made clear.**

iii. **Suspensions may if improperly applied constitute a breach of the implied trust and confidence.**

iv. **The Court will not interfere with a decision unless it is unreasonable, arbitrary, capricious or one which no reasonable decision maker would have made.**

v. **Ensure employee reintegration into the workplace after suspension.**

Note from this case...

The exclusion of the application of the full disciplinary procedure to any termination during probation will not provide a defence to an injunction application by an employee who is dismissed for alleged misconduct without being afforded fair procedures.

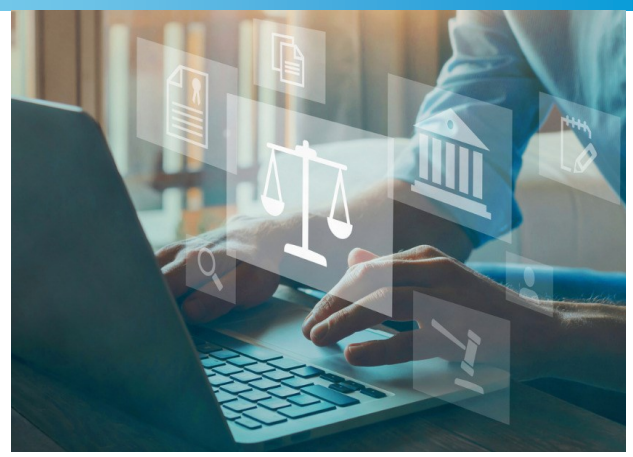
The Gender Pay Gap

- **From 2024**, employers with 50 or more employees, will have a new statutory obligation to calculate and report on differences in wages between their male and female employees. Currently employers with over 250 employees must report.
- The report must include; differences between the average hourly pay of male and female employees, bonus pay of male and female employees and the percentage of male and female employees who receive benefit in kind. The report must also include reasons for the difference in pay, and employers must also set out any reasons for such differences or any measures taken/proposed to be taken to eliminate or reduce such differences.
- The Minister is to set up an online forum to upload reports, however this is yet to be established. For now Employers are advised to publish their Gender Pay Gap Report on their company website or make it available in their registered offices.
- Currently, there are no penalties for failing to report for having a gender pay gap. However, employees can bring a claim to the WRC where there is a failure to report. Note the obligation to report is not an infrastructure for pay disputes as these disputes are covered by Equality legislation.
- The WRC can make an order requiring a report to be produced and there is also scope for the Irish Human Rights and Equality Commission to apply to the Circuit Court or the High Court for an enforcement order in respect of a report.

The European Union Pay Transparency Directive

- The EU Pay Directive came into force on **06 June 2023** and must be implemented by Member States by **June 2026**. The Directive lays down minimum requirements to strengthen the application of the principle of equal pay for equal work value between men and women, and enhance equality in the workplace.
- The Directive makes gender pay gap reporting compulsory for many employers across Europe. Employers with over 250 or more workers will have to report their gender pay gaps every year, and employers with between 150 and 249 workers to report every 3 years. The first report will be published in 2027 and will relate to the 2026 calendar year. Although the reporting requirements are similar to the requirement of the Gender Pay Gap Information Legislation currently in force, once introduced, relevant employers will be required to publish **additional details.**
- The Directive will require the publication of pay gaps by "categories of worker". Therefore, the Irish regime will need to be amended and employers will have to identify and publish gender pay gap information in the context of the job structures in their organisations.
- The Directive will also impose a positive obligation on employers to take action where pay differences cannot be justified by objective and gender-neutral means.
- There will be a new obligation to conduct a Joint Pay Assessment where there is at least a 5% Gender Pay Gap in any category of workers, that has not been justified by objective and gender neutral factors and has not been remedied within 6 months of the GPG Report.
- The Directive requires consultation with workers' representatives and confirmation of accurate gender pay gap data.
- Employees, their representatives and the Irish Human Rights and Equality Commission can request clarifications or ask for further details regarding any of the GPG data reported and the employer must provide a substantiated reply within a reasonable time.
- **Sanctions** for failure to comply with equal pay measures: Compensation for employees who are victims of gender pay discrimination (includes full recovery of all back pay and related bonuses), reversal of burden of proof (where the employer has failed to meet transparency obligations, it will be up to the employer to prove that there was no wage discrimination) and fines for violations of the regulations.
- Statute of Limitations: does not begin to run before the employee claimant knows/could reasonably have been expected to know about the infringement. The Directive also allows Member States to provide that the limitation period does not begin to run while the infringement is ongoing or before the end of the employment contract/ relationship- it is yet to be seen which approach Ireland will adopt.

Transparent and Predictable Working Conditions



- The Regulations create new employee rights and amend employers' obligations under the Terms of the Employment (Information) Act 1994, the Organisation of Working Time Act 1997 and the Protection of Employees (Fixed-Term Work) Act 2003.
- Expands the definition of "contract of employment" and "employee" to include a contract whereby an individual agrees with another person personally to execute any work or service for that person.

Written Terms of Employment

- The Regulations requires that certain additional information be provided within five days of the employee starting work.
- The new information required to be provided is:
    i) Confirmation of the place(s) of work/ that an employee is free to determine their own place of work.
    ii) The title, grade, nature, or category of work/ a brief specification or description of work.
    iii) The date of commencement of the employment contract.
    iv) Any terms and conditions relating to hours of work and overtime.
    v) The duration and conditions of any applicable probationary period.
- The Regulation requires employers to issue further information to employees via a written statement of terms and conditions relating to their employment within **one month** of commencing employment.
- The Regulation requires employers to also provide:
    i) The training entitlement provided by the employer.
    ii) For temporary agency workers, the identity of the end-user.
- Where the working schedule of the employee is unpredictable:
    i) Acknowledgement that the work schedule is variable.
    ii) The number of guaranteed paid hours.
    iii) Pay for work performed in addition to guaranteed hours.

Probationary Periods

- The Regulations provide that probationary periods in the private sector cannot exceed 6 months and for public servants, cannot exceed 12 months. However, the probationary periods can, on an exceptional basis, be longer than 6 months provided they do not exceed 12 months and it would be in the interest of the employee to extend.
- The Regulations amend the ***Protection of Employees (Fixed Term Work) Act 2003*** and provides that, where an employee is employed under a fixed term contract, the length of any probationary period must be proportionate to the expected duration of the fixed term contract and the nature of the work.
- Where the employee is absent from work during their probation, the probationary period can be extended for the duration of that absence.

Prohibition on exclusivity of service clauses (that must be provided for in the Contract of Employment)

- Employees may no longer be restrained without reason or face adverse consequences from their employer for working for another employer outside their work schedule.
- The Regulations oblige an employer to provide an employee the details of any incompatibility restriction, including details of the objective grounds on which the incompatibility restriction is based, when imposing an incompatibility restriction in a contract of employment.
- A restriction against a second job is only permitted where the restriction is proportionate and justified on objective grounds such as health and safety, the protection of business confidentiality, integrity of the public service, avoidance of conflicts of interest, protection of national security, compliance by the employer and the employee with any applicable statutory or regulatory obligations etc.

Transition to more predictable and secure working conditions

- Employees who have been in continuous service of an employer for not less than 6 months and have completed their probationary period, may once in any 12 months request a form of employment with more predictable and secure working conditions where available.
- The employer must provide a written reasoned reply to the request within 1 month. A verbal reply can be provided where the same worker submits a subsequent similar request, and the situation remains unchanged.
- The minimum predictability of work have now changed so any work assignment notified to an employee has to take place within the reference hours and days already notified to employees in their written terms. If this does not happen, the employee is entitled to refuse to work the assignment without any adverse consequences.
- If work related training is required by law or by a collective agreement, an employer must ensure that such training is provided to the employee free of charge, is counted as working hours, and is conducted during working hours if possible.
- If the employment in question is governed by a collective agreement approved of by the Labour Court or a registered employment agreement, the regulations on probationary periods, the right to seek parallel employment, the right to request transfer to another form of employment, and work- related training will not apply.
- If this does not happen, the employee is entitled to refuse to work the assignment without any adverse consequences.

Posted Workers

- Employers were obliged to provide certain information to employees who were required to work outside the State for a period of not less than 1 month; that information has been added to. Originally, the information required was the currency in which the employee will be paid, any benefits in kind, and the terms and conditions governing the employee's repatriation.
- The Regulations introduce a new requirement to provide the employee with information on the country/ countries in which the work is to be performed and the anticipated period of employment.
- In addition, where an employee is a posted worker (within the meaning of the European Union (Posting of Workers) Regulations 2016), the following additional information must be specified in writing:
  - i) The remuneration to which the employee is entitled in accordance with the applicable law of the host member state of the EU.
  - ii) Any allowances specific to posting and any arrangements for reimbursing expenditure on travel, board, and lodging.
  - iii) A link to the single official national website developed by the host member state relating to the posting of workers.

Deemed Employment Status/ Independent Contractor

Karshan (Midlands) Limited trading as Dominos Pizza v Revenue Commissioners [2023] IESC 24

- The dispute first arose in 2014 over the 'incorrect' classification of delivery drivers for tax purposes. Karshan contended that the delivery drivers were engaged as independent contractors under contracts for service while, the Appellant, the Revenue Commissioners argued that they were employees.
- When the matter was appealed to the High Court it was held that there was a contract in place which contained mutual obligations, so therefore the delivery drivers were independent contractors. This decision was subsequently appealed to the Court of Appeal, who overturned the High Court decision finding that delivery drivers should be treated as employees rather than self-employed independent contractors for the purpose of taxation.
- In October of this year, the Supreme Court heard the appeal from the decision of the Court of Appeal . The case provided an opportunity to clarify the law in this area. This decision will be of particular interest in the gig economy. The Supreme Court found that delivery drivers **should be treated as employees** and not contractors.
- The theory of **mutuality of obligation** was put forward and it was argued that mutual commitments had to present some type of continuity or have a forward thinking element. It was also argued that there had to be an obligation on the part of the employer to provide work and there had to be an obligation on the part of the employee to perform work. Justice Murray confirmed that **there is no such requirement in Irish law .**
- The question of whether a contract is one "of" or "for services should be resolved by reference to **five questions**. The first three questions must be met:

1. Does the contract involve the exchange of wage or other remuneration for the work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. And if so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some form of contract.
5. The final question is whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

- The evidence in this case displayed 'close control' by Karshan over the drivers when they work. The contract was one that envisaged personal service by them with the option to substitute on certain conditions. The substitutes were then paid by Karshan and not by the originally rostered drivers.

Non-Competes Clauses

- On 10 May, the UK government announced its intention to legislate to limit the length of non-compete clauses to a maximum of three months. Currently the proposal is light on detail, and it is unclear how it will be implemented.
- Under the proposal:

    i. The three-month cap will apply only to contracts of employment and worker contracts in Great Britain.
    ii. The cap will not apply to so-called wider workplace contracts such as partnership agreements, limited liability partnership agreements, and shareholder agreements.
    iii. The cap will not apply to non-solicitation clauses or non-dealing clauses.
    iv. The government also suggests that the proposal will not affect the ability to keep an employee out of the market using garden leave, or the ability of employers to strengthen their use of other restrictions such as confidentiality and intellectual property protections.

- Irish employers may start asking questions about hiring people in the UK, especially key people in research and development or other top technical roles, if their know-how could end up in the hands of a competitor in as little as three months. Therefore, employers should start to consider alternative ways of protecting the business, particularly for new starters in senior or sensitive roles.

Proposed reforms to the Transfer of Undertakings (Protection of Employment) 2006 (TUPE)

- The UK government is consulting on proposals to remove the requirements to elect representatives for the purpose of TUPE consultations for businesses with fewer than 50 employees or transfers affecting fewer than 10 employees. This would allow business' to consult directly with affected employees and reduce the complexities surrounding the election of representatives.

Finance Act 2022 introduced Section 897C– which requires Employers to report details of Certain Payments

The Revenue Commissioners have announced that from start of 2024, employers who pay certain expenses/benefits below to their employees will be required to report those benefits to Revenue "on or before" the making of the payment and a monthly basis:

- Travel and Subsistence
- Small Benefit Exemption
- Remote Working Daily Allowance

Further guidance is expected from the Revenue Commissioners shortly (**click here**).

Redundancy

WRC Case between Fiona Rabbitte and Llyods Pharmacy Ireland

- It has been assumed that if there is a change in location of work only a short distance, this will not result in redundancy. However, this case has provided an interesting outcome in this regard.
- Fiona Rabbitte was a supervising pharmacist in the Newbridge branch of Lloyds Pharmacy. Ms Rabbitte's legal team argued that Lloyd's move to close its branch in Newbridge on 23 June 2022 triggered a redundancy entitlement for their client, however, Lloyds argued that her employment of 18 years had not been terminated as she was offered and had rejected a "perfectly reasonable alternative" in the form of a position in their Naas branch.
- Ms Rabbitte had argued that the job in Naas was not suitable due to the significant traffic congestion from school runs in the morning and afternoon which would mean "hundreds of hours per year" longer spent commuting. Lloyds argued that going to Naas would have extended Ms Rabbittes commute by just over ten minutes.

- The WRC in awarding a redundancy lump sum to Ms Rabbitte noted that the closure of the complainant's workplace was expressly listed as a scenario giving rise to a statutory redundancy payment unless there was a suitable alternative offered, that the worker had unreasonably refused. The adjudication officer stated that the case law in this area held that the alternative role had to be considered on an objective basis, but the decision on whether or not to take it was a "personal" one and a subjective matter. Therefore, he held that it was reasonable in the circumstances for Ms Rabbitte to refuse the transfer.

Jane Crowe v Debenhams Retail (Ireland) Limited & Debenhams Retail (Ireland) Limited (in Liquidation) ADJ-00038906/00041248.

- The WRC provided an insight into how the WRC views employers' collective redundancy obligations under the Protection of Employment Act 1977.
- In this case the WRC awarded a former Debenham's employee eight weeks' pay. It awarded four weeks' pay for Debenham's failure to provide relevant information (the maximum it could have awarded under the Act for this breach) and a further four weeks' pay for breach of consultation obligations. The WRC place particular emphasis on the requirement that employees' representatives must be provided with all relevant information relating to the proposed redundancies. The WRC clarified that this does not mean all information. The WRC specifically said that it was not a defence for the employer to say they were unable to get the relevant information from the parent company.
- The WRC stressed the importance of commencing consultation at the earliest opportunity and that it must begin when a strategic/ economic decision is made that means it is intended/ contemplated that collective redundancies will take place (regardless of whether the decision is made by the parent company). In this case, a two-week delay and the appointment of the liquidators during those two weeks, meant there were less options available to reduce the number of redundancies and to mitigate the consequences of the redundancies.
- The WRC noted that the context of the fragility of the business was relevant in this case, given the delay, therefore, the WRC might be willing to give more latitude to an employer in terms of the timeline for commencing the process, depending on the factual scenario, and where the employer is not facing an insolvency situation.
- The WRC said that consultation must be meaningful. It held that this was not possible where the employees' representatives were not provided with the relevant information. The WRC noted that there was no evidence that there were any material changes made regarding what was proposed at the outset of the consultation and what was implemented. The WRC found that this indicated that it was therefore likely that meaningful consultation did not occur. It did note that this would not be the case for every case.

Pensions

- Auto-enrolment is a new retirement savings system for employees that will be introduced in the second half of 2024.
- Auto-enrolment is a system whereby employees who do not have an occupational pension are automatically enrolled into a workplace pension scheme which is co-funded by their employer and the State.
- Employees who are enrolled will have to stay in the system for 6 months, but they will be free to opt out in months 7 and 8 if they wish.
- Employees earning over €20,000 per year, aged between 23 and 60, and who aren't already in a pension scheme will be auto enrolled. Any person outside the earnings and age bracket who are not in a pension scheme, will not be auto enrolled but may opt in if they wish.
- Employee contributions will begin at 1.5% of gross pay and will increase in year 4 to 3%, year 7 to 4.5% and year 10 to the maximum rate of 6%.
- Employers will not need to establish a separate pension scheme but they will be required to enroll their employees in the auto-enrolment scheme.
- To find out more on the Auto-Enrolment Pension Scheme please click **here.**

Mandatory Retirement Age

Seamus Mallon v The Minister for Justice, Ireland and the Attorney General [2022] IEHC 546

- In Ireland, there is no set age for retirement. However, employers may include a mandatory retirement age in the contract of employment This case represents a helpful overview of the principles on mandatory retirement ages in EU law.
- The legal issue in this case was whether the mandatory age of 70 for sheriffs appointed under the Court Officers Act, 1945 is compliant with the age discrimination provisions of the Employment Equality Act, 1998 (as amended). The county sheriff failed in a challenge to the law requiring him to retire at 70.
- Different measures regulate retirement age across the public service. Under the Public Service Superannuation (Age of Retirement) Act 2018, 70 is the compulsory retirement age of those public servants subject to the 2018 Act, with the exception being those recruited between 2004 and 2012, who are not subject to any compulsory retirement age.
- The court applied the legitimate aim test the mandatory retirement measure must be objectively and reasonably justified by a legitimate aim and the means of achieving that aim must be appropriate and necessary.
- The Court held that " *...once there is a sound basis for the policy, the policy is not rendered other than legitimate because factors which inform the policy are more present in some sectors of the public service than others for so long as and provided that those policy considerations remain valid in respect of the sector in question to a sufficient extent that the measure passes a proportionality assessment*."
- The Court noted that among the factors to be weighted in a proportionality assessment of a mandatory retirement measure were the terms and conditions upon which a person takes up office or enters employment.

Government Legislation Programme

- **Automatic Enrolment Retirement Savings System Bill—Auto-enrolment is a quasi-mandatory pension system . Its purpose is to increase supplementary pension coverage.**
- **State Pensions Reform Bill to allow people reaching age 66 to defer access to the State Pension (Contributory) and access the pension at any point between age 66 and 70 and receive an actuarially-based increase in their weekly payment rate from the date they access their pension entitlement.**

Note from this case...

The Supreme Court has granted leave to appeal this case. The appeal will focus on issues including whether the mandatory retirement age was compatible with EU law and whether mandatory limits can be set in relation to defined groups based on general probabilities of age, health and competence, as opposed to individual characteristics on an individual assessment. This appeal could have significant implications if Mr Mallon succeeds. Also note that work is underway for the *Employment (Restriction of Certain Mandatory Retirement Ages) Bill*

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