
THE EMPLOYMENT LAW REVIEW

EIGHTH EDITION

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

THE EMPLOYMENT LAW REVIEW

The Employment Law Review
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THE EMPLOYMENT LAW REVIEW

Eighth Edition

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ERIKA C COLLINS

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EDITOR'S PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this eighth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past seven years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2016 in nations across the globe, and this is the topic of the second general interest chapter. In 2016, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring your own device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. 'Bring your own device' issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Last year we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2016, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this eighth edition of *The Employment Law Review* includes 48 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Robertson and Iain Wilson, for their hard work and continued support. I also wish to thank all of our contributors and my associate, Ryan Hutzler, for his invaluable efforts to bring this edition to fruition.

Erika C Collins

Proskauer Rose LLP

New York

January 2017

Chapter 26

IRELAND

Bryan Dunne and Bláthnaid Evans¹

I INTRODUCTION

Employment in Ireland is regulated by an extensive statutory framework, much of which finds its origin in European Community law. The Irish Constitution, the law of equity and the common law remain relevant, particularly in relation to applications for injunctions to restrain dismissals and actions for breach of contract. The main Irish legislation in the employment law area includes:

- a* the Industrial Relations Acts 1946–2015;
- b* the Redundancy Payments Acts 1967–2014;
- c* the Protection of Employment Act 1977;
- d* the Minimum Notice and Terms of Employment Acts 1973–2001;
- e* the Unfair Dismissals Acts 1977–2015;
- f* the Terms of Employment (Information) Acts 1994 and 2012;
- g* the Maternity Protection Acts 1994 and 2004;
- h* the Organisation of Working Time Act 1997;
- i* the Employment Equality Acts 1998–2015;
- j* the National Minimum Wage Act 2000;
- k* the Protection of Employees (Part-Time Work) Act 2001;
- l* the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003;
- m* the Protection of Employees (Fixed-Term Work) Act 2003;
- n* the Safety, Health and Welfare at Work Act 2005;
- o* the Employees (Provision of Information and Consultation) Act 2006;
- p* the Employment Permits Acts 2003–2014;
- q* the Safety, Health and Welfare at Work (General Application) Regulations 2007;
- r* the Protection of Employees (Temporary Agency Work) Act 2012;

1 Bryan Dunne is a partner and Bláthnaid Evans is a senior associate at Matheson.

- s the Protected Disclosures Act 2014;
- t the Workplace Relations Act 2015; and
- u the Paternity Leave and Benefit Act 2016.

Employment rights under Irish law can be enforced under the specially allocated statutory forum, or by the civil courts in appropriate cases. The process of determining which body or court will have jurisdiction in a particular case will now mainly depend on whether the claim is either being brought under statute or common law.

In general terms, employer's liability (i.e., personal injury) claims and claims of breach of contract are dealt with in the civil courts, as are applications for injunctive relief in relation to employment matters, whereas statutory claims (i.e., those made, for example, under the Unfair Dismissals Acts 1977–2015 or the Organisation of Working Time Act 1997) are heard by the new Workplace Relations Commission.

i Civil courts

The civil judicial system in Ireland is tiered, based on the monetary value of particular claims. At the lowest level, the District Court deals with claims not exceeding €15,000 and this court rarely hears employment-related disputes. Next is the Circuit Court, where jurisdiction is generally limited to awards of up to €75,000 (except for personal injury actions when the jurisdiction is limited to €60,000), although where a case has been appealed to the Circuit Court from the Employment Appeals Tribunal (EAT) in relation to any remaining legacy cases under the old system (see below for more detail), it has jurisdiction to exceed this limit and make awards up to the jurisdictional level of the EAT. There is no longer a right of appeal to the Circuit Court under the new Workplace Relations system for all cases issued on or after 1 October 2015. The Circuit Court also has potentially unlimited jurisdiction in relation to gender equality cases. Where the sums involved in a contractual claim exceed €75,000, the action must be brought in the High Court, which has unlimited jurisdiction. Only the Circuit and High Courts can hear applications for injunctive relief.

ii The Workplace Relations Commission

The Workplace Relations Commission (WRC) is an independent statutory body established on 1 October 2015 following the Workplace Relations Act 2015 (2015 Act). The WRC has taken over the functions of the National Employment Rights Authority (NERA), the Labour Relations Commission, the Equality Tribunal and the first-instance (complaints and referrals) function of the EAT. The WRC is now the sole body to which all industrial relation disputes and complaints in accordance with employment legislation will be presented. All claims issued prior to 1 October 2015 before any of the relevant bodies will be dealt with under the new system, until they have fully concluded.

Following the 2015 Act, the WRC provides conciliation, advisory, mediation and early resolution services, as well as an adjudication service. The adjudication service, which was formally the Rights Commissioner service, investigates disputes, grievances and claims made under the relevant employment legislation. A complaint may also be referred to mediation if deemed suitable; otherwise, it will go before an adjudicator. The WRC also has discretion to deal with the complaint by written submission only, unless either party objects within 42 days of being informed.

A major difference with the old system is that now all hearings are held in private. The employer has 56 days from the date of the decision to implement it, and should they fail to

do so the employee may apply to the District Court for an order directing the employer to fulfil the order. If the decision relates to the Unfair Dismissals Acts 1997–20015 (UDA), and the decision was to re-instate or re-engage the employee, the District Court may substitute an order to pay compensation of up to 104 weeks' pay, in accordance with the UDA.

The WRC has also taken over the role of NERA, which is now referred to as the Inspection and Enforcement Service (IES). The purpose of this service is to monitor employment conditions to ensure compliance and enforcement of employment rights legislation.

iii Labour Court

As of 1 October 2015, the Labour Court is the single appeal body for all workplace relation disputes. The EAT will continue to hear all appeals submitted prior to the commencement of the 2015 Act.

The Labour Court can chose to deal with the dispute by written submissions only, unless either party objects. Unlike the WRC, all hearings before the Labour Court are held in public, unless it decides, due to special circumstances, that the matter should be heard in private. The Labour Court has wide powers under the new legislation to require witnesses to attend and to take evidence on oath.

A decision of the Labour Court may be appealed on a point of law only to the High Court.

II YEAR IN REVIEW

With clear indications that the Irish economy is recovering, there is a renewed sense of optimism. There has also been a drop in the unemployment rate in Ireland, decreasing to 7.5 per cent in October 2016 from 8.5 per cent in January 2016.

The most notable piece of legislation implemented in 2016 was the Paternity Leave and Benefit Act 2016 (the 2016 Act). This came into force on 1 September 2016 and provides for two weeks' paternity leave following the birth or adoption of a child on or after 1 September 2016. This Act does not confine itself to biological fathers, but extends the entitlement to a 'relevant partner', which includes adoption scenarios, civil partners and cohabitants of the mother of the child. The purpose of the 2016 Act is to give the 'relevant parent' leave so that he can provide or assist in the provision of care for the child and to provide support to the mother or adoptive parent. The two-week period of leave can be taken at any time between the date of confinement or placement and a date not later than 26 weeks after such date.

The 2016 Act also brings it in line with current maternity and adoptive legislation whereby the two-week leave period is protected leave, meaning that the rights of the employee taking paternity leave must be preserved during the period of leave.

The 'relevant parent' can claim a paternity benefit for the two-week period, amounting to €230 per week, which is on par with similar benefits such as maternity benefit, subject to the employee having made appropriate PRSI contributions.

The Employment Permits (Amendment) (No.2) Regulations 2016 saw the introduction of a new Employment Permits Online System (EPOS) in September 2016. It is hoped that the EPOS will make the system more efficient and allow for secure payment of fees by credit or debit card.

III SIGNIFICANT CASES

i Protected disclosures

*Clark & Dougan v. Lifeline Ambulance Service Limited*²

In this case, the Circuit Court granted interim relief to two employees of Lifeline Ambulance Service Limited (Lifeline) pursuant to the Protected Disclosures Act 2014 (the 2014 Act) to protect their dismissal until their unfair dismissal case was heard by the WRC.

The employees made a disclosure to the Revenue Commissioners alleging that Lifeline was engaged in certain activities for the purpose of avoiding payment of tax. Subsequently, following a review from an external party into the complaint, the employees were given notice of redundancy. The employees claimed their dismissal was as a result of their disclosure to the Revenue Commissioners, which they contended was a protected disclosure within the meaning of the 2014 Act and not a genuine redundancy.

The Circuit Court was not convinced that the employee's dismissal was entirely related to the making of the protected disclosure. However, it was satisfied that they had met the threshold of establishing that there were substantial grounds for contending that the dismissal was wholly or mainly because of the disclosure. Lifeline was ordered to pay the employees' salaries until the full hearing of their unfair dismissal claims. This case was the first decision to grant such orders under the legislation and clearly shows that the threshold of successfully obtaining interim relief under the 2014 Act is not particularly hard to overcome. A further order was granted by the Circuit Court later this year in a separate case, which shows there is a definite increase in the number of employees now using this legislation.

*Anna Monaghan v. Aidan & Henrietta McGrath Partnership*³

The Labour Court in this case ordered that the respondents, Aidan & Henrietta McGrath Partnership, pay a former care assistant, Ms Monaghan, €17,500 following her suspension, which resulted from her making a protected disclosure to the Health Information and Quality Authority concerning the alleged mistreatment of patients in the nursing home.

An internal investigation was carried out on foot of the protected disclosure, which found that the claimant's allegations were unfounded and motivated by malice. As a result, the respondents suspended Ms Monaghan on full pay for almost five months.

The Labour Court was satisfied that the claimant's concerns were related to the safety and welfare of patients, and as such amounted to a protected disclosure under Section 5(3)(d) of the 2014 Act. The fact that the employer had concluded there was no substance to the disclosure was irrelevant, so long as the employee making the disclosure reasonably believed that it tended to show wrongdoing. On assessing whether the suspension of Ms Monaghan constituted a penalisation within the meaning of Section 12 of the 2014 Act, the Labour Court held that the suspension was 'influenced by the complaints made by her prior to and in the course of the investigation'. The Labour Court ultimately held that there was clearly a causal link between Ms Monaghan's protected disclosure and the suspension.

2 (Unreported) Circuit Court 2016.

3 Labour Court PD/15/1.

ii Collective bargaining

We saw the first case before the Labour Court under the indirect collective bargaining provisions provided for under the Industrial Relations (Amendment) Act 2015 (the 2015 Act), *Freshways Food Company v. SIPTU*.⁴ The 2015 Act introduced a new definition of collective bargaining, and amends the Labour Court's jurisdiction allowing it to make legally binding determinations with employers who do not engage in collective bargaining. In this case, the Labour Court made a number of recommendations relating to the new definition of 'collective bargaining' set out in the 2015 Act. Freshways Food Company (Freshways), a non-unionised sandwich producer, alleged that it engaged in collective bargaining through a staff representative group (SRG) and therefore fell outside the remit of the 2015 Act. However, the Labour Court disagreed, noting that the SRG did not have a practice of engaging in collective bargaining in a meaningful manner, but only on a one-off *ad hoc* basis.

Once the Labour Court was satisfied it had jurisdiction to hear the case, it employed a comparative analysis of other similar employees in the sector and assessed the particular facts of the case, including the financial position of Freshways. Ultimately, the Court recommended that certain improvements be made to the conditions of employment, including a series of stepped pay rises in the following three years.

The decision has been seen as a positive introduction as to how the Labour Court will deal with such cases, taking a fair and objective approach to the assessment of such claims.

iii Injunctions

In *Conor Brennan v. Irish Pride Bakeries*⁵ the High Court granted interlocutory relief against the defendants, who were in receivership, from terminating Mr Brennan's contract by giving two weeks' notice of redundancy. The Court made the order on the basis that the plaintiff was entitled to a three-month notice period as per his contract of employment.

The background to this case is that following notice of termination of Mr Brennan's employment, the receivers announced the sale of the majority of the defendant's assets and business to Pat the Baker and stated that 250 jobs would be secured. On this basis, Mr Brennan contended that had he been given his full contractual notice, as per his contract of employment, he would have been able to avail himself of the European Communities (Protection of Employees on Transfer of Undertakings) Regulation 2003, which would allow him to participate in the information and consultation process and ultimately transfer to Irish Pride as an employee of the transferee, thus continuing his employment.

The High Court, in assessing that the balance of convenience lay with Mr Brennan, noted that no wrongdoing was alleged against him and a relationship of trust and confidence between the parties remained intact. The Court recognised that damages would not be an adequate remedy for the plaintiff and also noted that rendering Mr Brennan's termination ineffective would not result in irreparable loss to the defendants.

It was submitted on behalf of the defendants that it was not permissible for the receivers to elevate the plaintiff's contractual entitlements beyond those of all other unsecured creditors. However, the Court took the view that Mr Brennan was not attempting to rank

4 LCR 21242.

5 *Conor Brennan v. Irish Pride Bakeries* [2016] 27 E.L.R 1.

ahead of other unsecured creditors but was instead simply seeking to rely on his contractual entitlements. Gilligan J concluded by noting, *obiter dictum*, that it is always open to the defendant to give the plaintiff three months' notice of termination of employment.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under the Terms of Employment (Information) Act 1994, all employers are obliged, within two months of commencement of employment, to provide their employees with a written statement setting out certain fundamental terms of their employment:

- a* date of commencement of employment;
- b* full name and address of employer and name of employee;
- c* the employee's place of work;
- d* the job title or a description of the nature of the work;
- e* if a temporary or fixed-term contract, the expiry date;
- f* pay including overtime, commission and bonus and methods of calculating these;
- g* whether pay is to be weekly, monthly or otherwise;
- h* the pay reference period;
- i* terms and conditions relating to hours of work and overtime;
- j* holiday or other paid leave entitlement;
- k* notice requirement;
- l* details of rest periods and breaks;
- m* details regarding sickness and sick pay;
- n* details of pensions and pension schemes; and
- o* reference to any applicable collective agreements.

The statement must be signed both by the employee and by the employer. It must be retained by the employer during the employment and for one year after the employee's employment has ceased. Any change to the statutory particulars must be notified to the employee, in writing, within one month.

Additionally, it is recommended that employers consider what other terms might be necessary and appropriate and prepare comprehensive contracts. Other relevant terms will depend on the seniority of the employee, and will range from intellectual property and exclusivity of service provisions, to post-termination restrictive covenants. Any changes or amendments to the employment contract of a material nature can only be implemented, generally speaking, with the agreement of both parties.

Fixed-term contracts are governed by the Protection of Employees (Fixed-Term Work) Act 2003 (the 2003 Act) and provides that where employees are employed on a series of fixed-term contracts, they may be entitled to a contract of indefinite duration.

ii Probationary periods

There is no Irish legislation that deals with probationary periods. Therefore, a probationary period will only be effective if expressly provided for. The terms of the probationary period, including duration, the length of notice, and whether or not the employer has discretion to extend it, should be set out in the contract.

While there is no statutory limit on how long an employee can be retained on probation, they will be covered by the UDA once 12 months' continuous service is accrued,

which will include any period of notice of termination. Accordingly, the right to protection against unfair dismissal will apply once the 12 month service threshold has been reached, even if the employee is still on probation. Employers will therefore usually seek to conclude the probationary period before the employee acquires 12 months' service.

iii Establishing a presence

An employer does not need to be registered as an entity or otherwise based in Ireland. In practice, and for varying tax and regulatory reasons, a large number of Irish employees across all sectors are employed by and report to foreign entities based outside Ireland. Similarly, it is also possible to hire employees through an agency without registering in Ireland.

A foreign employer will, however, be required to register for pay-as-you-earn (PAYE) income tax in Ireland where the income of its employees is within the scope of the Irish PAYE system. In addition to registration, the employer must deduct the amount of income tax due from the employees directly, and remit such amounts to the Revenue Commissioners. If, however, the foreign employer is engaging an independent contractor, then it will be the independent contractor's responsibility to pay the appropriate taxes, and not that of the foreign employer.

Income from non-Irish employment that is attributable to the performance in Ireland of the duties of that employment is also chargeable to Irish income tax and is within the scope of the PAYE system.

As regards mandatory benefits, at a minimum, an employer is required to provide its workforce with access to a Personal Retirement Savings Account if it does not have a pension scheme available to its employees within six months of joining their new place of work. There is also no obligation on the employer to make any contributions on the employee's behalf.

V RESTRICTIVE COVENANTS

The Competition Act 2002 prohibits agreements between undertakings that prevent, restrict or distort competition. Since employees are considered to be part of an undertaking and are not undertakings themselves, the Competition Authority considers that employment agreements are not covered by the competition rules. However, once an employee leaves an employer and sets up their own business, they will then be regarded as an undertaking. The Competition Authority has set out guidelines as to what types of non-compete provisions, in particular, will be acceptable in such situations. Generally, they must be reasonable in subject matter, geographical scope and duration.

The common law is also of relevance to the issue of restrictive covenants. The basic position applied by the courts is that such covenants are, *prima facie*, unenforceable for being unduly in restraint of trade, unless the party seeking to rely on them can demonstrate that the restrictions in question are no more than what is strictly necessary to protect a legitimate business interest and are not otherwise contrary to the public interest.

VI WAGES

i Working time

The Organisation of Working Time Act 1997 (OWTA) deals with maximum working hours and other matters relating to working time. Pursuant to the OWTA an employer may not

permit any employee to work for more than an average of 48 hours per week, although this can generally be averaged over a period of four months. Working time should only take account of time spent working (i.e., it should exclude rest and meal breaks). The averaging period for night workers is two months; for employees working in agriculture and tourism, six months; and it can be up to 12 months for employees covered by an approved collective agreement.

Employees cannot opt out of the 48-hour average working week. The legislation does, however, provide a particular exemption for senior or specialist employees, who can be said to determine their own working time, such that they are not subject to the restriction. The contracts of such employees should expressly provide that they are exempt from this part of the OWTA.

ii Overtime

Generally speaking, there is no statutory entitlement to overtime under Irish law, or to payment for overtime. In certain cases, however, specific categories of workers may be entitled to overtime pay if covered by a registered employment agreement (REA), sectoral employment order (SEO) or an employment regulation order (ERO).

For those employees not covered by either REAs, SEOs or EROs that are still valid, they will only be entitled to paid overtime if such an entitlement is contained in their employment contract or has been established by custom and practice in the employment concerned. Section 14 of the OWTA provides that employers that require employees to work on Sundays are required to compensate them for so doing.

VII FOREIGN WORKERS

EEA nationals and Swiss nationals do not require employment permits to work in Ireland. There are different types of employment permits available depending on the circumstances. An employment permit will generally not be granted where to do so would result in more than 50 per cent of a company's employees being non-EEA nationals; however, there are some limited exceptions to this.

Intra-company transfer permits can be granted to senior executives, key personnel or employees engaged in a training programme. Critical skills permits can be granted to individuals earning €60,000 or more, or in limited circumstances between €30,000 and €59,999. General permits are also available in limited circumstances. The Employment Permits Acts 2003–2014 apply significant penalties for employing non-EEA nationals without a valid employment permit. The maximum penalty for such an offence is a fine of up to a maximum of €250,000, up to 10 years' imprisonment, or both.

Most employment work permits will be for up to two years, however, these can be renewed, if required. There is no requirement to keep a register of foreign workers, however, it is good practice to do so, in particular noting their expiration date, to ensure that all employees have a valid work permit in place. Once an employee is legally able to work in Ireland, they are entitled to the same statutory benefits and subject to tax as if they are originally from Ireland.

VIII GLOBAL POLICIES

The UDA requires employers to provide employees with a written disciplinary procedure, which can either form part of the contract of employment or be kept as a separate document. This information must be furnished to employees within 28 days of commencement of employment. While there is no specific form for this to take, it must at least adhere to the concept of natural justice and fair procedures as enshrined in the Irish constitution. In addition, a Code of Practice concerning grievance and disciplinary procedures in the workplace was introduced in 2000, which provides general guidelines in relation to the preparation and application of disciplinary procedures. While not obligatory, a failure to apply the guidelines (in the absence of any other express procedure) could be held against an employer should an employee dispute their dismissal.

Employers are not required to obtain the approval of employees regarding the preparation or implementation of disciplinary procedures, although agreement in relation to such matters will often be obtained where collective bargaining takes place. A disciplinary policy must not discriminate against employees contrary to the Employment Equality Acts 1998–2015(EEA) (i.e., on grounds of gender, family status, age, disability, sexual orientation, race, religion, civil status or membership of the Traveller community), and must otherwise be fair and reasonable (i.e., provide that an employee is made aware of all the charges against them, is afforded a reasonable opportunity to rebut such charges and is afforded adequate representation throughout the process). Additionally, the level of sanctions should be staggered to reflect the seriousness of the offence. It will suffice for the disciplinary policy to be available on an employer's intranet, provided employees are made aware of this. If the employer does not have this facility, employees should be advised of where they can obtain a copy of the policy. The policy should generally, as a matter of best practice, be available in English and in any other language spoken by employees. Disciplinary procedures do not have to be filed with any state or government authority.

IX TRANSLATION

There is no statutory requirement in Irish law for employers to translate employment documents into other languages, and traditionally employers have provided these documents in English only. Best practice, however, and a decision of the Equality Tribunal in 2008, suggests that it may be prudent to make such documents available in different languages, depending on the circumstances. In *58 Named Complainants v. Goode Concrete Limited*,⁶ non-Irish employees contended that their contracts and safety documentation were defective on the basis that they were unable to understand them, and that this constituted discrimination. The Equality Officer found that the employees were treated less favourably than Irish employees in relation to their employment contracts. It was held that employers should have in place clear procedures to ensure non-Irish employees are able to understand their employment documentation and are not treated less favourably than Irish employees.

The Equality Officer did find that if an employer is not in a position to have these documents translated, it should arrange to have the contracts and other documentation

6 DEC-E2008-020.

explained to all employees by someone who speaks a language they understand, with the employee signing a form acknowledging that the contract has been explained to them and that they understand its contents.

There is no clear direction on exactly which documents are required to be translated or explained. The *Goode* decision, however, and common sense would dictate that this should be done in respect of employment documents such as the contract of employment and any documentation ancillary to it.

The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 is an example of an employment code and guidelines building on the *Goode* decision. The Code of Practice outlines that employers should ensure that staff have access to equality policies, including by means of certain measures 'to provide, where necessary, for the translation of policies and procedures into languages other than English as appropriate with provision of interpreters'.

Where documents are not translated or explained to the employee, employers face the risk of discrimination claims where they can be awarded up to two years' gross remuneration.

X EMPLOYEE REPRESENTATION

The concept of employee representation under Irish law relates to both unionised and non-unionised employees and is derived from a number of sources, both statutory and otherwise.

i Trade union representation

Any employee has the right to join a trade union, although trade unions may not legally compel employers to recognise and negotiate with them. The degree to which trade unions may embark upon industrial action (either to try and gain recognition from employers, or for any other reason) is regulated principally by the Industrial Relations Act 1990. The method of appointing employee representatives is done by way of secret ballot.

ii Information and consultation representation

In addition to any local representation arrangements that may exist (whether with trade unions or otherwise), employees may also be entitled to representation in certain circumstances as a matter of statute. This form of representation can arise in transfer of undertakings, collective redundancy situations or where the employees are covered by a local or European-level works council.

The Transnational Information and Consultation of Employees Act 1996 (as amended) (which implemented Council Directive 94/45/EC on European Works Councils) (1996 Act), requires multinational employers of a certain size to set up European works councils to inform and consult with their employees on a range of management issues relating to transnational developments within the organisation. The 1996 Act applies to undertakings with at least 1,000 employees in the EU and 150 or more employees in each of at least two Member States. A Special Negotiating Body (SNB) is established in accordance with the 1996 Act in order to negotiate with the employer. The duration and functions of the SNB will be subject to the terms and purpose of the Works Council agreement put in place. The Employees (Provision of Information and Consultation) Act 2006 obliges employers with at least 50 employees to enter into a written agreement with employees or their elected representatives setting down formal procedures for informing and consulting with them.

The legislation will only apply if a prescribed minimum number of employees request it. The legislation is silent on how employee representatives are elected, and it will be up to the employees to determine how this is conducted, but usually it is done by way of secret ballot. Furthermore the purpose of their role and how they conduct themselves will be subject to their own agreement.

The EEA provides that no employee should be discriminated for being a trade union member. Furthermore, all of the above legislation specifically provides that no employee representative should be penalised for carrying out their function as an employee representative.

XI DATA PROTECTION

i Requirements for registration

Issues regarding the keeping and disclosing of personal data relating to employees are covered by the Data Protection Acts 1988 and 2003 (DPAs). Under the DPAs, an employer established in Ireland that gathers, stores and processes any data about employees on any computerised or in a structured manual filing system is deemed to be a data controller.

Data controllers must follow eight fundamental data protection rules:

- a* obtain and process information fairly;
- b* only keep the information for one or more specified and lawful purposes;
- c* use and disclose the information only in ways compatible with these purposes;
- d* keep the information safe and secure;
- e* keep the information accurate, complete and up to date;
- f* ensure that the information is adequate, relevant and not excessive;
- g* retain the information for no longer than is necessary; and
- h* provide a copy of the employee's personal data if that employee requests a copy.

Employees have a right (subject to certain exceptions) to obtain a copy of any personal data relating to them that is kept on the employer's computer system or in a structured manual filing system by any person in the organisation. Employees are required to make a written request to their employer to obtain such data.

The default position in Ireland is that every data controller must register with the Data Protection Commissioner if not exempted from doing so. The DPAs require that certain types of data controllers must register even if an exemption applies. Registration is compulsory where a data controller falls within one of the following categories:

- a* government bodies or public authorities;
- b* banks and financial or credit institutions;
- c* insurance undertakings (not including brokers);
- d* persons whose business consists wholly or mainly of direct marketing;
- e* persons whose business consists wholly or mainly of providing credit references;
- f* persons whose business consists wholly or mainly of collecting debts;
- g* internet access providers;
- h* telecommunications network or service providers;
- i* anyone processing genetic data;
- j* certain health professionals processing personal data related to mental or physical health; or

k anyone whose business consists of processing personal data for supply to others, other than for journalistic, literary or artistic purposes.

ii Cross-border data transfers

Ireland, like other European Union member states, restricts the transfer of personal data from Ireland to jurisdictions outside the EEA that do not 'ensure an adequate level of protection', unless the transfer meets one of a number of conditions, including but not limited to:

- a* the transfer is pursuant to the 'standard contractual clauses' that have been specifically adopted by the European Commission for international transfers of data;
- b* the transfer is to an entity that is subject to the US–EU Privacy Shield Program operated by the US Department of Commerce; or
- c* the transfer is necessary for the performance of a contract between the data controller and the data subject.

iii Sensitive data

The DPAs define sensitive personal data as including data concerning racial or ethnic origin, political opinion, religious belief, trade union membership, mental or physical health, sexual life or data concerning the committing of an offence or proceedings in relation to an offence. The DPAs provide for additional conditions including the explicit consent of the data subject when processing sensitive personal data.

iv Background checks

Employers can carry out a number of background checks on applicants for employment. These can include reference checks, criminal-background checks (although only in very limited circumstances), credit-history checks, education verification, verification of entitlement to work in Ireland and also pre-employment medical assessment. Before carrying out any background checks, the resulting data must be relevant to the individual's role and the employer will need to have established a legitimate basis under the DPAs to obtain and process the data. In respect of any method used by the employer to verify a prospective employee's background, it should be ensured that such method is applied consistently to all applicants, and is not discriminating on any one of the nine grounds protected by the EEA.

XII DISCONTINUING EMPLOYMENT

i Dismissal

An employer can, at common law, terminate the employment contract without cause, provided this is done in accordance with its terms. If a term of the contract is breached, however, this can give rise to a claim for damages at common law, or even to a claim for injunctive relief in certain circumstances. Notwithstanding any express contractual right to terminate, employees are afforded statutory protection against unfair or discriminatory dismissal. Under the UDA, an employer cannot lawfully dismiss an employee unless substantial grounds exist to justify termination. Also, it is essential for an employer to be able to establish that fair procedures have been followed before making a decision to dismiss. Subject to certain exceptions, employees must have at least 12 months' continuous service to qualify for protection under the UDA.

To justify a dismissal, an employer must generally be able to show that it resulted wholly or mainly from one or more of the following grounds:

- a* the capability, competence or qualifications of the employee for the work concerned;
- b* the conduct of the employee;
- c* the redundancy of the employee; or
- d* the employee being prohibited by law from working or continuing to work (for example, not holding a valid work permit where one is required).

If the dismissal is not due to any of the grounds listed above, there must be some other substantial grounds to justify it. If an employee believes they have been unfairly dismissed, they may bring a claim to the WRC. An adjudicator can award redress in the form of compensation (subject to a maximum of two years' remuneration), reinstatement or re-engagement.

A dismissal is automatically deemed unfair under the UDA, if an employee can show that their dismissal was wholly or mainly attributable to one of the following:

- a* membership or proposed membership of a trade union or engaging in trade union activities;
- b* religious or political opinions;
- c* legal proceedings against an employer where an employee is a party or a witness;
- d* race, colour, sexual orientation, age or membership of the Traveller community;
- e* pregnancy, giving birth, breastfeeding or any matters connected with pregnancy or birth; and
- f* making a protected disclosure under the Protected Disclosures Act 2014.

Where an employee alleges that they have been dismissed in a discriminatory manner (i.e., on one of the nine grounds upon which discrimination is prohibited by the EEA), they may bring a claim before the WRC and subsequently before the Labour Court on appeal. Either of these bodies may award compensation (subject to a maximum of four years' gross remuneration, depending on the claim) or reinstatement. In gender discrimination cases, a claim may be made directly to the Circuit Court, which can, in theory, award unlimited compensation. There is no minimum service threshold for an employee to be covered by this legislation.

Once in continuous employment for at least 13 weeks, minimum periods of statutory notice of termination must be given to an employee. The minimum length of the notice period will depend on the employee's length of service (although greater periods of notice can be provided for by contract):

- a* between 13 weeks and two years' service: one week's notice;
- b* between two years' and five years' service: two weeks' notice;
- c* between five years' and 10 years' service: four weeks' notice;
- d* between 10 years' and 15 years' service: six weeks' notice; and
- e* 15 years' or more service: eight weeks' notice.

An employee may waive their right to notice and accept payment in lieu of notice. Alternatively, the contract can stipulate a right to pay in lieu of notice. An employer may dismiss an employee without notice or payment in lieu of notice if the employee has fundamentally breached the employment contract amounting to a repudiation of the employment contract, or where they are guilty of gross misconduct.

To settle a dispute including a redundancy situation, compromise or claim, the parties can enter into a settlement agreement. As a matter of contract law, the employee must receive something over and above what they might otherwise be entitled to in order for the settlement agreement to be enforced. The employee should also be advised in writing and given the opportunity to obtain independent legal advice in relation to the terms and conditions of the agreement.

ii Redundancies

The Protection of Employment Act 1977 must be complied with when an employer intends to implement collective redundancies. Collective redundancy occurs where in any period of 30 days, the number of such dismissals is:

- a* at least five in an establishment employing more than 20 and fewer than 50 employees;
- b* at least 10 in an establishment employing at least 50, but fewer than 100 employees;
- c* at least 10 per cent of the number of employees at an establishment employing at least 100, but fewer than 300 employees; and
- d* at least 30 in an establishment employing 300 or more employees.

Where collective redundancies are proposed, the employer must first enter into consultation with employee representatives, trade union or works council, with a view to reaching an agreement in relation to matters such as the possibility of avoiding or reducing the numbers to be made redundant and the criteria to be used in selecting employees for redundancy. Such consultation must commence at least 30 days before notice of the first redundancy is issued. The Minister for Jobs, Employment and Innovation must also be notified at least 30 days in advance of the first notice of termination by reason of redundancy issuing.

The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 established a redundancy panel to which employees or employers may refer certain proposed collective redundancies for an opinion and possible Labour Court hearing in circumstances where it is alleged that the dismissed employees will be replaced by new employees on lesser terms and conditions of employment. Should such a finding be made and the employer proceeds with the redundancies nonetheless, it will be exposed to significantly increased liabilities, *inter alia*, if claims are brought by the dismissed employees under the UDA.

While there is no express statutory form of consultation required for individual redundancies, it is best practice to do so. In this regard, it is also recommended that employers make at least some effort to locate an alternative position for the employee, if possible. As with any other form of dismissal (other than in cases of gross misconduct), notice of termination by reason of redundancy or payment in lieu thereof must be given.

It is also possible, when concluding the redundancy process, to enter into a compromise agreement with the employee whereby they would be paid an *ex gratia* payment in return for him or her waiving their rights and entitlement to bringing any claim against the employer.

Any employee who is on protected leave (for example, maternity or paternity leave) cannot be made redundant, and the employer will have to wait until they return before engaging with them.

XIII TRANSFER OF BUSINESS

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the Regulations) applies in circumstances where there is any transfer of an undertaking, business or part of an undertaking or business from one employer to another employer as a result of a legal transfer or merger. It is important to note that the Regulations include an assignment or forfeiture of a lease. Outsourcing of a service has also constituted a transfer within the meaning of the Regulations. The Regulations apply to any transfer within the EU, although a recent UK case suggests that they might also apply to transfers outside the EU or EEA, in respect at least of the obligations of the party to the transfer located within the EU. This extraterritorial aspect of the Regulations is particularly relevant in the context of outsourcing. The importance of the Regulations and the need to assess carefully whether they apply in any given scenario cannot be underestimated.

Transfer is defined as ‘the transfer of an economic entity which retains its identity’. Where a transfer within the meaning of the Regulations occurs, the acquiring party will be obliged to employ the employees of the disposing party on terms and conditions no less favourable than those previously enjoyed by them, and with their prior service intact. A lapse in time between the transferor ceasing business and the transferee resuming the business does not necessarily prevent there being a transfer of the business for the purposes of the Regulations. In assessing whether or not the Regulations apply, consideration must be given to the type of business concerned, whether there has been a transfer of assets, whether any employees have been transferred, whether customers have transferred and to what extent the activity carried on pre- and post-transfer is similar.

Where a transfer is taking place, it is important that the transferor and transferee take steps to ensure that the employees are informed in advance of the transfer. In practice, employee representatives must be informed of the reasons for the transfer and the legal, economic and social implications of the transfer for the employees, and also of any measures that are envisaged in relation to the employees. This information must be communicated at least 30 days in advance of the transfer, where possible, in order to enable the representatives to be consulted with in relation to any measures concerning the employees.

The Regulations do make provisions for transfer-related dismissals where the dismissals are due to economic, technical or organisational reasons that result in changes in the workforce. However, this defence is generally only available to the transferee. This makes it difficult for employers to implement changes before the sale of their business to make the business more attractive to prospective purchasers.

With regard to breaches of the Regulations, employees may bring complaints to the WRC, with a right of appeal to the Labour Court.

XIV OUTLOOK

It is envisaged that the economy will continue its gradual improvement, with employment levels continuing to rise, and job losses decreasing.

The national minimum wage is due to be increased from €9.15 to €9.25 from 1 January 2017, as part of the 2017 Budget.

On 23 June 2016, Britain voted out of the European Union (Brexit). Subject to the outcome of the UK Supreme Court challenge, it is anticipated that Article 50 will be invoked by March 2017. It is not quite known what to expect once Brexit actually happens,

and a lot will be dependent on what is negotiated as part of the exit agreement. However, following the vote in June 2016, Ireland saw a considerable increase in employment permit applications and it is envisaged that a number of multinational organisations having their EU headquarters in the UK will most likely move to Ireland, which will in turn increase employment.

Appendix 1

ABOUT THE AUTHORS

BRYAN DUNNE

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Bryan is a partner and head of the employment practice at Matheson. He advises on a variety of aspects of employment law, both contentious and non-contentious. This work includes advising on senior executive service agreements and termination strategies for international employers, defence work in contentious employment litigation matters and all employment aspects of commercial transactions. He also regularly advises employers on internal grievance and disciplinary processes, with particular focus on senior executive level employees.

Bryan's clients include a broad base of leading international companies and financial institutions, requiring diverse advice on compliance, operational and management issues in running their Irish business. Due to his involvement in some of the largest Irish and cross-border corporate transactions in recent years, Bryan has also built up considerable experience in the employment aspects of commercial projects and reorganisations when acting for foreign purchasers, including TUPE, employee relocation and post-acquisition restructuring. He has also led the employment due diligence on a number of high value private equity investments and acquisitions, covering numerous industry and regulated sectors in both the public and private sector.

BLÁTHNAID EVANS

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Bláthnaid is a senior associate in the employment, pensions and benefits group at Matheson and specialises in employment law.

Bláthnaid has experience in advising both employees and employers, and advises on all aspects of employment and equality law, both in contentious and non-contentious matters. This work comprises of advising employers on the termination of the employment relationship, including the redundancy process, general compliance with working time models, internal investigations, grievances, disciplinary processes and procedures, health and safety matters, as well as the preparation and review of employment contracts, company handbooks, and other ancillary human resource policies to ensure compliance with Irish employment

legislation and best practice. She also has experience in representing clients before the Rights Commissioners, Labour Court, EAT, the Equality Tribunal and the WRC as well as advising clients in respect of injunction applications. Bláthnaid also advises clients on issues relating to European Works Councils.

Bláthnaid has advised a variety of clients, including large national and multinational organisations, concerning commercial restructuring and the process of employees transferring pursuant to the TUPE regulations.

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