THE EMPLOYMENT LAW REVIEW

Ninth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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NINTH EDITION

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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 ninth 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 eight 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 2017 in nations across the globe, and this is the topic of the second general interest chapter. In 2017, many countries in Asia and Europe, as well as 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 gender, 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.

In 2015, we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2017, 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 ninth edition of *The Employment Law Review* includes 46 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, and I wish to thank our publisher. I also wish to thank all of our contributors and my associate, Marissa Mastroianni, for her invaluable efforts to bring this edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2018

ERIKA C COLLINS

Proskauer Rose LLP

Erika Collins is a partner in the labour and employment law department and co-head of the international labour and employment law group of Proskauer Rose, resident in the New York office. Ms Collins advises and counsels multinational public and private companies on a wide range of cross-border employment and human resources matters throughout the Americas, Europe, Africa and Asia.

Ms Collins represents US and non-US employers in all aspects of company growth and restructuring, from office openings, executive hires and workforce expansions to company downsizing, employment terminations, mass lay-offs and office closures. She advises clients on preparing competitive employment packages and agreements, such as separation, expatriate and consulting agreements, that are compliant with local laws, as well as on payroll, benefits and vacation issues. Ms Collins regularly conducts multi-country audits of employment laws and practices in order to provide advice to clients regarding compliance with data privacy, fixed term contracts, outsourcing, and working time and leave regulations among numerous other issues.

Additionally, Ms Collins advises employers on sexual harassment and other misconduct allegations, as well as cross-border investigations. She also is experienced in conducting due

diligence on international subsidiaries and advising on applicable business transfer laws and employee transition issues in cross-border M&A transactions.

Ms Collins is the editor of *The Employment Law Review*, which covers employment laws in 46 countries. In addition to authoring numerous articles on international employment topics, Ms Collins is a regular speaker at the International Bar Association and the American Bar Association. Topics on which she has written and spoken recently include: cross-border transfers of executives; global mobility issues for multinationals; employment issues in cross-border M&A transactions; the landscape of issues in international employment law; global diversity programmes; the intersection of EU privacy and anti-discrimination laws; and cross-border investigations.

PROSKAUER ROSE LLP

Eleven Times Square
New York, 10036-8299
United States
Tel: +1 212 969 3555
Fax: +1 212 969 2900
ecollins@proskauer.com
www.proskauer.com

Chapter 23

IRELAND

Bryan Dunne and Bláthnaid Evans[1]

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 1973–2005;
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;
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 being brought under either statute or common law.

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

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 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 (the 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 reinstate 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. It is intended that the EAT will be wound up once all of the legacy cases have been heard.

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, owing 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 6 per cent in October 2017 from 7 per cent in January 2017.

The first sectoral employment order (SEO) was implemented on 19 October 2017 pursuant to the Industrial Relations (Amendment) Act 2015, namely the Construction Sector Order (CSO). The CSO fixes the statutory minimum pay, pension and sick pay entitlements for a number of categories of employees working in the construction industry.

As of 1 September 2017, the Protection of Employment Act 1977 was amended so that the notification of any collective redundancy must be directed to the Minister for Employment Affairs and Social Protection, rather than the Minister for Jobs, Enterprise and Innovation.

The Irish National Immigration Service also notably extended the duration of the Third Level Graduate Programme (more commonly known as the Stamp 1G Permission). Originally this programme allowed non-EEA nationals who had recently graduated from an Irish-recognised university to remain in Ireland to seek or undertake employment for a period of up to 12 months from the date of graduation, without the need of applying for an employment permit. This has now been extended to two years. However, only those who have graduated on or after 1 January 2017 can avail of this extended duration of the Stamp 1G Permission

III SIGNIFICANT CASES

i Investigations and fair procedures

There have been three High Court cases this year that delivered judgments within a number of weeks of each other all dealing with the issue of fair procedures in an investigation or disciplinary process. These cases are set out below.

Lyons v. Longford Westmeath Training and Education Board[2]

This case concerned a judicial review application by Michael Lyons to have the decision of Longford Westmeath Training and Education Board quashed on the basis that the procedures applied as part of a bullying complaint were applied unfairly. The High Court in this case held that the right to fair procedures and natural justice (including the right to legal representation and the right to cross-examine witnesses) applied at the preliminary investigation stage where the matter was sufficiently serious that a possible outcome could be dismissal.

It has generally been accepted for many years that the premise of natural justice and fair procedures need not apply at the investigation stage where it does not involve any finding or sanction, but would apply where there is a more formal finding of fact or determination of a sanction. While this particular case deals with bullying, importantly the *Lyons* decision relates to a decision made by the Education Board that resulted in a binding finding of facts, rather than merely being a fact-gathering exercise. The report delivered by the Board in the *Lyons* case ultimately decided upon the bullying allegation made against Mr Lyons.

The background to this case is that in May 2015, Mr Lyons, a deputy principal in a college, was notified that a complaint of bullying had been made against him by a colleague. The investigation was commenced in accordance with the 'Bullying Prevention Policy', which provided that an external investigator be appointed. The investigation consisted of two separate interviews with the complainant and two separate interviews with Mr Lyons. Statements were taken from three other witnesses. The investigator's final report was issued in March 2016 and concluded that there had been repeated inappropriate behaviour directed towards the complainant by Mr Lyons during the course of employment and that this could be reasonably regarded as undermining her right to work according to the definition outlined in the Bullying Policy. On 21 April 2016, Mr Lyons was informed by letter that the investigator's report was to be adopted by the respondent and he had 15 days to appeal it. Thereafter on 30 August 2016 the respondent confirmed that the findings of the investigation had been upheld and that he was now required to attend a Stage 4 disciplinary meeting 'for the purposes of determining the disciplinary action, if any, which may arise from the finding of the investigation report'. Stage 4 of the respondent's disciplinary procedure allowed for a range of sanctions to be imposed, including dismissal. This meeting took place on 15 September.

Having obtained legal advice, Mr Lyons objected to the findings of the investigation report, which were being relied upon in the disciplinary process. His solicitor confirmed that Mr Lyons must receive the benefit of fair procedure and stated that: 'our client is anxious to have all of his rights to fair procedures including challenging the evidence against him and in particular the right to cross-examine his accuser, his right to the presumption of innocence and his right to be advised in advance in writing of the specific allegations against him that are proposed to be the subject matter of any disciplinary procedure'.

The respondent's solicitor rejected Mr Lyons's argument and stated that they were entitled to refer the matter of the disciplinary procedure. They also highlighted that Mr Lyons had actively engaged in the process, given all relevant documentation and had access to representation at all stages of the process. However, this was not accepted by Mr Lyons and he and his solicitor applied to the High Court to judicially review the respondent's decision to convene the Stage 4 disciplinary procedure.

2 [2017] IEHC 272.

The E.G. v. The Society of Actuaries in Ireland[3]

This case was a judgment delivered after the *Lyons* case and concerned an allegation of professional misconduct made against the applicant, a member of the Society of Actuaries in Ireland. An investigative committee was appointed by the Society to determine (1) whether there was *prima facie* evidence of misconduct and (2) whether to refer the matter to a disciplinary tribunal.

The investigating committee found there was *prima facie* evidence of misconduct by the applicant and referred the matter to a disciplinary tribunal. The applicant argued that the investigating committee's finding of *prima facie* evidence of misconduct and the investigative process generally was in breach of the principles of natural justice and sought an order to set aside the committee's determination.

Reliance was placed on the judgment of Edwards J in the High Court case of *O'Sullivan v. Law Society of Ireland* [2009] IEHC 632, which was upheld by the Supreme Court, in particular his findings that the level of fair procedure and natural justice that applies at the investigation stage depends on the actual nature of the investigation. In that case, Edwards J ruled that if the investigation has the potential to result in the making of an adverse finding or the imposition of sanctions against the person under investigation, that person should be afforded fair procedures and natural justice appropriate to a formal disciplinary inquiry. If, on the other hand, the investigation is a preliminary step and the investigator does not have the power to make findings or impose sanctions upon the subject, but it is merely a fact-gathering exercise to determine if there is a basis for a disciplinary inquiry as is more often the case, then less formal procedures may be adequate and appropriate.

In this particular case, McDermott J was satisfied that the investigating committee was involved in an information-gathering process that went no further than a decision as to whether there was a *prima facie* case of misconduct, which would then be finally determined by a disciplinary tribunal. He was therefore satisfied that the full extent of rights, including, in particular, an opportunity to cross-examine witnesses, was not required at the investigation stage and that the decision reached by the investigating committee was not in breach of fair procedures or natural justice.

Of relevance to the Court's decision in this case was the fact that the investigating committee made no decision of a final nature against the applicant, or imposed any sanction upon him. This can be distinguished from *Lyons* where the bullying allegation was decided by the external investigator and involved a fact-finding exercise as opposed to a fact-gathering exercise.

N.M. v. Limerick and Clare Education Training Board[4]

The third case concerned an application by a teacher for an injunction to prevent the continuation of any investigation or disciplinary process by the respondent in respect of allegations of sexual harassment and unprofessional conduct made against him.

An external investigator was appointed to conduct the investigation. The terms of reference circulated outlined that the investigator would prepare a report setting out the findings of the investigation, 'including findings of fact'.

3 [2017] IEHC 392.

4 [2017] IEHC 588.

The case did not consider the applicant's right to legal representation in the investigation as the respondent conceded this at that stage. It did, however, consider whether the applicant was entitled to the right to cross-examine witnesses at the investigation stage.

The Court again considered the judgment of Edwards J in *O'Sullivan v. Law Society of Ireland* and noted that a distinction must be drawn in the standard of fair procedures applicable to an investigation that is an information-gathering exercise only. On that basis, the Court was satisfied in this case that:

a the procedure set out in the terms of reference was fair and appropriate, and that the applicant was not entitled to an opportunity to cross-examine others at the investigation stage; and

b even if it did involve an element of fact-finding, the decision to be taken by the investigators could not be regarded as a 'final or binding finding of fact' against the applicant.

It noted that the purpose of a disciplinary hearing is to ensure that principles of fair procedure and natural justice are observed in the final determination of the complaints.

It is perceived that, having now seen these three consecutive judgments of the High Court in respect of fair procedure, the approach being adopted is that the need for fair procedure at the investigation stage is only necessary when the employer is conducting a fact-finding investigation. Similarly the right to have legal representation and indeed the ability to cross-examine witnesses in a disciplinary matter, should only apply if there is a genuine possibility that the outcome could result in the employee's dismissal.

ii Unfair dismissal

Michael Coughlan v. DHL Express (Ireland) Limited[5]

This case concerns the Labour Court's decision of an unfair dismissal action. The employee was successful in proving that his dismissal was unfair and was afforded the full monetary award under the UDA of two years' gross remuneration. This was a move away from the original order of the WRC, which directed that the claimant be reinstated.

The claimant was employed as a driver for 11 years. He received a written warning for a driving incident in 2012, and a final written warning for a second incident in 2013. These warnings were 'live' for 12 months, after which they expired. Then in 2015 he was involved in another incident with a company van resulting in €2,500 worth of damage to the van. The claimant was invited to a disciplinary hearing for 'failure to protect and safeguard company property'.

The claimant admitted to the damage at the disciplinary hearing. Throughout the disciplinary hearing the disciplinary manager continuously referred to the earlier warnings even though they had long expired at the time of the disciplinary hearing in 2015. The claimant was summarily dismissed with immediate effect for gross misconduct on the basis that he had failed to protect and safeguard company property. The company also noted its serious concerns about his ability to safely carry out his duties. The hearing also commenced by describing the damage to the van as misconduct but by the time the company came to dismiss the claimant the offence was being described as gross misconduct.

5 ADJ-00001367.

The Labour Court in finding in the claimant's favour was critical of the company in how it changed the allegations made against the employee during the disciplinary process and of the respondent's reliance on previous warnings even though they were no longer live on the employee's file. The Labour Court decided that the incident in 2015 was not sufficiently serious to warrant summary dismissal and that appropriate consideration should have been given to an alternative sanction to dismissal. This case has since been appealed to the High Court on a judicial review basis.

iii Bullying

Ruffley v. Board of Management of St Anne's School[6]

This is the final stage in a very long saga, which ultimately arose from the imposition, in January 2010, of a disciplinary sanction against a special needs assistant (Ms Ruffley) by the board of management of St Anne's School. Ms Ruffley claimed to have been bullied in the course of the disciplinary process, resulting in a serious impact to her mental health, and in respect of which she sought to recover substantial damages in the High Court.

In 2014, the High Court made an aggregate damages award of €255,276 in favour of Ms Ruffley, where O'Neill J held that Ms Ruffley had been subjected to 'persistent, inappropriate behaviour' that 'wholly undermined the plaintiff's dignity in work'.

However, O'Neill J's judgment in the High Court was subsequently appealed to the Court of Appeal, and was overturned by a 2:1 majority. While acknowledging the fact that 'the Board may have conducted the investigative and disciplinary process in [a] hopelessly flawed manner', the majority of the Court of Appeal held that 'on the facts of this particular case, objectively ascertained, the defendant could not be considered guilty of the type of repetitive inappropriate conduct which undermined the right to dignity in the workplace for a period of over one year as was found by the trial judge'. In particular, Irvine J considered that in order to constitute repetition, the events relied upon had to be reasonably proximate to each other.

In one last attempt the decision of the Court of Appeal was appealed to the Supreme Court, and the Supreme Court handed down their decision in May 2017 dismissing the appeal in a decision that is regarded as particularly favourable to employers. The Supreme Court upheld the original dicta of bullying laid down in the *Quigley v. Complex Tooling & Moulding Ltd*[7] whereby Fennelly J held that in order to give rise to a claim for damages 'bullying must be (i) repeated, (ii) inappropriate, and (iii) undermining of the dignity of an employee at work' and further that 'where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury'.

The Supreme Court in *Ruffley* held that the *Quigley* test should be assessed separately and sequentially. In other words, it was held that each element of the test must be fulfilled – which O'Donnell J described as 'a single definition and a single test: was the defendant guilty of repeated inappropriate behaviour against the plaintiff which could reasonably be regarded as undermining the individual's right to dignity at work'. Therefore, unless there are repeated incidents of inappropriate conduct, each of which individually undermines an individual's right to dignity at work, then the test for bullying is not fulfilled.

6 [2017] IESC 33.

7 [2005] ELR 305.

Charleton J's judgment makes it clear that this test is objective, not subjective, and that an 'employer is entitled to expect ordinary robustness from its employees'.

Charleton J stated that 'the test for bullying is of necessity to be set very high'. In particular he states:

> *Correction and instruction are necessary in the functioning of any workplace and these are required to avoid accidents and to ensure that productive work is engaged in. It may be necessary to point to faults. It may be necessary to bring home a point by requesting engagement in an unusual task or longer or unsocial hours. It is a kindness to attempt to instil a work ethic or to save a job or a career by an early intervention. Bullying is not about being tough on employees. Appropriate interventions may not be pleasant and must simply be taken in the right spirit. Sometimes a disciplinary intervention may be necessary.*

This decision effectively raises the bar of what bullying in the workplace is, and is a useful decision in clearly laying out the legal definition of what is and is not bullying in the workplace.

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, he or she 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 his or her own business, he or she 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 related 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 average period for night workers is two months; for employees working in agriculture and tourism it is 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), 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 if the result in doing so means that more than 50 per cent of a company's employees are 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 or 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, but it is good practice to do so, in particular noting the expiration dates of work permits to ensure that all employees have a valid permit in place. Once an employee is legally able to work in Ireland, he or she is entitled to the same statutory benefits and subject to tax as if her or she were 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 procedure 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 (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 him or her, 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*,[8] 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 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.

8 DEC-E2008-020.

The Transnational Information and Consultation of Employees Act 1996 (as amended) (which implemented Council Directive 94/45/EC on European Works Councils) (the 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 Employment Equality Acts provide 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 in any computerised or 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 EU 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 individuals 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 Employment Equality Acts.

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 (e.g., not holding a valid work permit where one is required).

If the dismissal is not because of 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 Employment Equality Acts), 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 Employment Affairs and Social Protection must also be notified at least 30 days in advance of the first notice of termination by reason of redundancy being confirmed.

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 he or she would be paid an *ex gratia* payment in return for him or her waiving his or her rights and entitlement to bringing any claim against the employer.

Any employee who is on protected leave (e.g., maternity or paternity leave) cannot be made redundant, and the employer will have to wait until he or she returns before engaging with him or her on the issue.

XIII TRANSFER OF BUSINESS

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the Regulations) apply 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 because of 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 was increased from €9.12 to €9.55 from 1 January 2018, as part of the 2018 Budget.

In September 2017 it was announced that the Employment (Miscellaneous Provisions) Bill (the Bill), which aims to protect low-paid and vulnerable workers by effectively banning zero-hour contracts and bringing in banded contract hours, will be given priority with the intention that it is brought into law in early 2018. Zero-hour contracts are currently governed by the OWTA and provide that an employer does not have to provide minimum (or any) working hours to an employee, but the employee must be available for work for a certain number of hours per week. It is intended that the Bill will amend the OWTA to prohibit zero-hours contracts in most circumstances, unless it is genuinely casual work, emergency cover or short-term relief work.

The new General Data Protection Regulation (GDPR) will come into effect in Ireland in May 2018. The GDPR extends current obligations already in place pursuant to data protection legislation. For example, it will require employers to inform employees how long their personal data will be held for and whether it will be transferred to a third country. Employees are also to be advised of their right to make a data access request and the ability to rectify or delete personal data.

The GDPR will also deal with the issue of consent in more detail; importantly, it confirms that an employee can withdraw their consent at any time.

Appendix 1

ABOUT THE AUTHORS

BRYAN DUNNE

Matheson

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 a 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. Owing 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

Matheson

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 compromises 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 transferring employees pursuant to the TUPE regulations.

MATHESON

70 Sir John Rogerson's Quay
Dublin 2
Ireland
Tel: +353 1 232 2000
Fax: +353 1 232 3333
bryan.dunne@matheson.com
blathnaid.evans@matheson.com
www.matheson.com

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