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# THE EMPLOYMENT LAW REVIEW

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FOURTH EDITION

EDITOR  
ERIKA C COLLINS

LAW BUSINESS RESEARCH

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## EDITOR'S PREFACE

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It has once again been my great pleasure to edit this most recent edition of *The Employment Law Review*. In reviewing chapters for inclusion in this edition, I was struck repeatedly by both the breadth and variety of laws and approaches to employment regulation across jurisdictions as well as the similarities, especially with regard to certain trends, some of which are discussed below. As with the earlier editions, this book is not meant to provide a comprehensive treatise on the law of any particular country but instead is intended to assist practitioners and human resources professionals in identifying key issues so that they may, in turn, help their clients avoid potentially troublesome (and often costly) missteps.

One of the common themes during 2012 was an increase in the promulgation of laws and regulations designed to increase flexibility and lower the costs of labour for employers while maintaining sufficient protections for employees. A prime example of this trend is the passage throughout 2012 of legislation in EU Member States implementing the EU Directive on Temporary Agency Work, which came into effect in December 2011. The Directive and related implementing legislation ensure certain minimum compensation and benefits for temporary agency workers while also increasing flexibility for employers. Both Vietnam and Mexico also adopted legislation in 2012 that sanctions, but also places limitations on, labour outsourcing arrangements. In Brazil, President Dilma Rousseff's Greater Brazil Plan also has been aimed at increasing employment and avoiding the slowdown and economic crisis faced by other jurisdictions. Among the employment-related measures implemented pursuant to the Greater Brazil Plan are relief from payroll contributions for the information technology sector and other incentives to foster employment. Finally, in the UK, a novel idea is under consideration that would allow an employer to issue an ownership interest in the company to the employee in exchange for the employee's agreement not to be protected by the unfair dismissal laws.

While these efforts are, of course, aimed at benefiting workers by addressing unemployment, a number of them also are by-products of another trend: the implementation of austerity measures in response to debt crises in Europe and elsewhere. Fewer unemployed citizens means lower entitlement spending for governments. Other

employment-related austerity measures also have been implemented or proposed that are less beneficial to employees and jobseekers. In the Netherlands, for example, the period of time during which an individual can collect unemployment benefits was reduced from three years to two. Portugal continues to consider a reduction of remuneration and benefits for civil servants and employees public enterprises.

This fourth edition once again includes several general-interest chapters – one addressing employment issues in cross-border mergers and acquisitions, one addressing social media in the workplace, and another addressing global diversity initiatives. This edition also boasts the addition of five new countries, bringing the number of covered jurisdictions to 52.

I wish once again to thank our publisher, particularly Lydia Gerges, Adam Myers and Gideon Robertson; all of our contributors; and my associate, Michelle Gyves, for their tireless efforts to bring this edition to fruition.

**Erika C Collins**  
Paul Hastings LLP  
New York  
February 2013

## Chapter 24

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# IRELAND

*John Dunne and Georgina Kabemba*<sup>1</sup>

### I INTRODUCTION

The employment relationship 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, however, particularly in relation to applications for injunctions to restrain dismissals and actions for breach of contract. The main (although not exhaustive) legislation in the employment law area in Ireland includes the following statutes:

- a* the Industrial Relations Acts 1946–2012;
- b* the Redundancy Payments Acts 1967–2007;
- c* the Protection of Employment Act 1977;
- d* the Minimum Notice and Terms of Employment Acts 1973–2001;
- e* the Unfair Dismissals Acts 1977–2007;
- f* the Terms of Employment (Information) Acts 1994 and 2001;
- g* the Maternity Protection Acts 1994 and 2004;
- h* the Organisation of Working Time Act 1997;
- i* the Employment Equality Acts 1998–2008;
- 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 and 2006;

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- g* the Safety, Health and Welfare at Work (General Application) Regulations 2007; and
- r* the Protection of Employees (Temporary Agency Work) Act 2012.

Employment rights under Irish law can be enforced by any one of a variety of statutory tribunals and bodies, depending on the nature of the particular claim, or by the civil courts in appropriate cases. The process of determining which body or court will have jurisdiction in a particular case will depend on the legislation under which the claim is being pursued (or whether or not it is being pursued at common law), although employees will frequently have a choice of forum.

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 to 2007 or the Organisation of Working Time Act 1997) are heard by any one of the various bodies outlined below.

#### **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 €6,350 and this court rarely hears employment-related disputes. Also the District Court has no equitable jurisdiction, and cannot therefore hear applications for injunctive relief. The next level is the Circuit Court, the jurisdiction of which is generally limited to awards up to €38,092, although in circumstances where a case has been appealed to the Circuit Court from the Employment Appeals Tribunal ('the EAT'), it has jurisdiction to exceed this limit and make awards up to the jurisdictional level of the EAT. The Circuit Court also has potentially unlimited jurisdiction in relation to gender equality cases. Where the sums involved in a contractual claim exceed €38,092, 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 Labour Court**

The Labour Court is principally involved in the resolution of industrial disputes involving groups of employees but also has jurisdiction to hear certain individual claims relating to equality, organisation of working time, national minimum wage entitlements, part-time work and fixed-term work. The Labour Court generally only has an appellate jurisdiction and will not, other than in certain limited circumstances, hear a dispute until it has received a report from the Labour Relations Commission, stating that the body cannot resolve the matter and that the parties require the Labour Court's assistance. The Labour Court, having investigated a trade dispute, may make a recommendation setting out its opinions on the merits of the dispute and the terms on which it should be settled. The Court's recommendation is not legally binding on either party, except in cases referred to it under the Industrial Relations (Amendment) Act 2001 where the employer concerned does not engage in collective bargaining.

In relation to the individual claims referred to above, a determination of the Labour Court is legally binding on the parties, such as an award of compensation or reinstatement.

**iii Rights Commissioner Service**

The Rights Commissioner Service is housed within the Labour Relations Commission. Rights Commissioners are empowered to investigate disputes, grievances and claims that individuals or small groups of employees refer under various employment rights legislation. Rights Commissioners issue their findings in the form of recommendations or decisions, which are binding or non-binding depending on the statutory provision under which the claim was referred in the first instance. A dissatisfied party may, however, appeal to the Labour Court, or in some cases the EAT, against a Rights Commissioner's recommendation or decision. The decision of the Labour Court or the EAT in relation to such appeals is binding on the parties.

**iv The Employment Appeals Tribunal**

The EAT is the main forum for a number of statutory claims, including those in respect of minimum notice, unfair dismissal and redundancy payments. The EAT investigates unfair dismissal cases where the parties object to the claim being heard by a Rights Commissioner or where the decision of a Rights Commissioner is being appealed. The EAT's decision is called a 'determination' and is legally binding. In unfair dismissal cases a full appeal to the Circuit Court on the facts is available to either of the parties. In most other cases, the EAT's determination may be appealed to the High Court, but only on a point of law. The Minister for Jobs, Enterprise and Innovation can also refer a point of law to the High Court at the request of the EAT.

**v Equality Tribunal**

The Equality Tribunal is the forum of first instance for the investigation and adjudication of all complaints of discrimination in relation to terms and conditions of employment and occupational pension schemes. The Equality Tribunal can also attempt to mediate such disputes at the option of the parties. In particular, the Equality Tribunal has jurisdiction to hear claims concerning any of the nine grounds upon which discrimination is prohibited under the Employment Equality Acts 1998–2004. In practical terms, an Equality Officer will consider submissions from both parties in advance, before arranging a hearing of the case, to enable him or her to reach a decision that is binding on the parties. The decision may be appealed to the Labour Court.

**vi Labour Inspectorate of the National Employment Rights Authority**

The Labour Inspectorate has responsibility for the enforcement of employers' obligations in relation to the rights of employees as provided for by the Organisation of Working Time Act 1997, the National Minimum Wage Act 2000, the Industrial Relations Acts 1946–2001, the Protection of Young Persons (Employment) Act 1996 and the Payment of Wages Act 1991. It also has a role in relation to record inspections and information gathering for other sections of the Department of Jobs, Enterprise, and Innovation, and for the Department of Justice, Equality and Law Reform.

vii **The National Employment Rights Authority**

As part of the government's agreement with the Irish Congress of Trade Unions ('ICTU') in the last round of national partnership talks, the Office of the Director for Employment Rights Compliance was established, later renamed the National Employment Rights Authority ('NERA'). NERA's primary purpose is to promote a national culture of employment rights compliance in the labour market and to assume responsibility for the enforcement of employees' rights. Once it is put on a statutory footing, employees will be able, *inter alia*, to make complaints regarding non-compliance in a general way to NERA, provided such complaints are made in good faith, which will then be able to prosecute defaulting employers. NERA will also assume responsibility for the Labour Inspectorate units who will investigate non-compliance in a range of areas including annual leave, wages, working hours, notice, redundancy and dismissal. As an alternative to prosecution, and as currently envisaged, NERA may inform the employer and affected employees of any breaches identified and may also inform the latter of their options for redress, including the rectification of the matter in the workplace and the option of seeking a hearing before a Rights Commissioner. While it had been expected that NERA would be given statutory recognition in early 2012, the Employment Law Compliance Bill, through which this was to be achieved, has made no further progress through the legislature and does not appear to be high on the new government's list of priorities.

The government recently announced its intention to restructure the specialist fora in which employment disputes are litigated, as a result of which it is widely expected that those listed above (subsections ii to vii) will be replaced by a more streamlined system over the next 12 to 24 months.

## II YEAR IN REVIEW

As has been the case in recent years, 2012 was a difficult year for the Irish economy, although it has proven itself to be resilient in very difficult circumstances, with the export sector in particular performing well. The unemployment rate remains stubbornly high, however, in relative terms, and stood at 14.8 per cent by the end of the second quarter of the year. Ireland's annual migration figures in September 2012 stood at around 34,400. This is a startling figure when compared with 2008, when there was a net migration of 40,000 people into the country. Thus, as in previous years, emigration has acted as something of a safety valve for the Irish economy.

There have been a number of developments in the statutory employment law framework recently. On 1 January 2012, the Redundancy Payments Acts 1967–2007 were amended, whereby the rebate available to employers from the Department of Jobs, Enterprise and Innovation against statutory redundancy payments was drastically reduced from 60 per cent to 15 per cent. This has significantly increased the cost of redundancy for employers, particularly in the case of collective redundancies. At the time of writing, the government has proposed to abolish the rebate entirely in early 2013.

The Protection of Employees (Temporary Agency Work) Act 2012 was signed into law on 16 May 2012. A number of the Act's provisions were deemed to have come into effect retrospectively on 5 December 2011 in line with the deadline for the implementation of the European Temporary Agency Worker's Directive, with the

remainder coming into effect on 17 May 2012. The Act provides for equal treatment in terms of basic working and employment conditions for temporary agency workers as if they were recruited directly by the hirer to the same job. Guidance notes on the Protection of Employees (Temporary Agency Work) Act 2012 were published by the Department of Enterprise, Jobs and Innovation on 31 August 2012. The notes are intended to assist agency workers, hirers of agency workers and employment agencies to better understand the provisions of the Act, which give agency workers an entitlement to the same treatment as comparable employees with respect to basic employment and working conditions (subject to some limitations), had they been employed by the hirer under a contract at the same time.

Broadly, the guidance notes clarify the entitlements conferred by the 2012 Act and the obligations and responsibilities for the parties involved, and, in particular, confirm to whom the Act does not apply (including independent contractors, placement services and managed service contracts); what is included in the definition of pay; and what constitutes collective facilities in the workplace. They also refer to the grounds on which a hirer has objective justification to deny an agency worker access to such facilities.

The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 ('the Code of Practice') was published in June. Prepared by the Equality Authority, the Code of Practice aims to give practical advice to employers and employees on what is meant by sexual harassment and harassment in the workplace, how it may be prevented, and what procedures to follow in dealing with the problem and to prevent its reoccurrence. This Code of Practice updates the Employment Equality Acts 1998 (Code of Practice) (Harassment) Order 2002, and primarily addresses a number of anomalies and procedural matters. The main changes include a broadening of the definitions of 'harassment' and 'sexual harassment'; the amendment of the original discriminatory ground of 'marital status' to 'civil status' to incorporate a civil partnership as outlined under the Rights and Obligations of Co-habitants Act 2010; the inclusion of the provision that 'it is essential that the principles of natural justice be adhered to', in relation to investigations of complaints; a provision that 'external assistance may be necessary to deal with complaints in circumstances so as to ensure impartiality, objectivity and fairness in any investigation; a provision requiring employers to 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'; and an amendment of the maximum remedy from 104 weeks' pay to 104 weeks' pay or €40,000, whichever is more.

The Industrial Relations (Amendment) Act 2012 was signed into law on 1 August 2012. The main provisions of the Act implement the programme for the government's reform of the joint labour committee ('JLC') system and rectify deficiencies in the legal framework highlighted in last year's High Court judgment in the case of *John Grace Fried Chicken Limited, John Grace and Quick Service Food Alliance Limited v. The Catering Joint Labour Committee, The Labour Court, Ireland and the Attorney General*. The High Court ruled that the JLC system was unconstitutional, as the provisions of the Industrial Relations Acts, which establish JLCs, permit an excessive delegation of lawmaking power from the Dáil (the Irish parliament) to them, and to the Labour Court. The Act sets stricter conditions for the establishment and variation of employment regulation orders (EROs) and registered employment agreements (REAs).

On 12 October, in further reforms to the JLC system, three JLCs (namely the Aerated Waters & Wholesale Bottling JLC, the Clothing JLC and the Provender Milling JLC) were abolished by order of the Labour Court under Section 40 of the Industrial Relations Act 1946.

In reaction to, *inter alia*, the banking scandals that have emerged over the past few years, the Central Bank Reform Act 2010 introduced new Regulations and Standards of Fitness and Probity ('the Standards') for persons occupying certain positions in financial institutions and other related industries. The Act created the concept of 'controlled functions' ('CFs') and 'pre-approval controlled functions' ('PCFs'), which are subject to much stricter control and input from the Irish Central Bank. The Act also empowers the Central Bank to approve or veto the appointment of people to certain positions, to investigate and where appropriate remove or prohibit certain position holders, and to set statutory standards of fitness and probity across the financial services sector.

The Regulations came into operation on 1 December 2011 and the Standards were applied on a phased basis, initially to just persons occupying PCF roles. From 1 March 2012 the Standards were also applied to persons newly appointed to CF roles. The final phase was 1 December 2012, whereby the Standards now apply to all persons occupying CF roles.

### III SIGNIFICANT CASES

#### i Fixed-term workers

In February 2012, in the case of *University College Cork v. Bushin*,<sup>2</sup> the High Court upheld the rulings of both the Rights Commissioner and the Labour Court, that an *ex gratia* redundancy payment was a condition of employment, and that a fixed-term worker was entitled to the same *ex gratia* redundancy payment as a comparable permanent employee. Of significance in this case is the fact that the comparable permanent employee(s) were not employed by the complainant's employer, but by another employer in the same sector.

Dr Bushin brought a complaint pursuant to the Protection of Employees (Fixed-Term Work) Act 2003 to a Rights Commissioner claiming that a 'comparable' employee with a permanent employment contract would have received an additional *ex gratia* redundancy payment. The comparator did not work at the University but with another university. University College Cork argued that there were comparable permanent employees within its employment who should have been used as comparators, which would have resulted in the Labour Court determining that as the university had never made a redundancy payment to a comparable permanent employee, there could be no issue of less favourable treatment.

This decision gives rise to the perverse situation that a fixed-term employee may have a greater legal entitlement to an *ex gratia* payment than a permanent employee in the undertaking concerned as, strictly speaking, a permanent employee has no legal

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2 [2012] IEHC 76.

right to force an employer to make an *ex gratia* payment at all (save where provided for contractually).

## ii Employment of non-nationals

In August 2012, in the case of *Hussein v. The Labour Court and Younis*,<sup>3</sup> the High Court quashed a €92,000 award made by the Labour Court to a non-national in relation to employment law breaches because his employment was unlawful, as he did not have a work permit.

The Labour Court had previously ordered that Mr Hussein pay €1,500 under the Terms of Employment Information Act 1994; €5,000 for various breaches of the Organisation of Working Time Act 1997; and €86,132.42 in respect of back pay in accordance with the National Minimum Wage Act 2000. Mr Hussein sought and was granted a judicial review of the Labour Court's decision on the grounds that Mr Younis had no legal standing to invoke the protection of Irish employment legislation as his contract of employment, in the absence of an employment permit, was illegal.

In deciding the case, the High Court stated that the Employment Permits Act 2003 prohibits a non-national from being employed without the appropriate employment permit, and that this prohibition applies to both employer and employee. However, while an employer can defend criminal proceedings on grounds that it took all reasonable steps to comply with the 2003 Act, no such defence is available to the employee.

The High Court further held that neither the Rights Commissioner nor the Labour Court could lawfully entertain an application for relief in respect of an employment contract that was illegal as a result of the employee to whom it related not holding a work permit. The decision of the Labour Court could therefore not be allowed to stand. Notwithstanding the decision it felt obliged to make, the High Court accepted that were Mr Younis' version of events correct, he had been the victim of appalling exploitation in respect of which he had no effective recourse.

The Court made it clear that, while it felt compelled to apply the 2003 Act, there must be concern that that law creates unintended consequences, including that undocumented workers can be deprived of the benefits and the protections afforded to workers by Irish employment law. Accordingly, the Court felt it appropriate to send a copy of its decision to the Minister for Jobs, Enterprise and Innovation for consideration of policy. The government has confirmed that it will review the decision and determine what action is to be taken.

## IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

### i Employment relationship

Under the Terms of Employment (Information) Act 1994, all employers in Ireland are obliged, within two months of the commencement of employment, to provide their

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3 [2012] IEHC 364.

employees with a written statement setting out certain fundamental terms of their employment as follows:

- 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* details of 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 by or on behalf of the employer and 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.

In addition to this, however, it is recommended that employers consider whatever other terms might be necessary and appropriate and prepare comprehensive contracts. Other relevant terms will depend on the seniority of the employee in question, 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.

## **ii Probationary periods**

There is no Irish legislation that expressly deals with probationary periods. As a matter of contract law, a probationary period will only be effective if expressly provided for in the employment contract. The terms of the probationary period, including duration, the length of notice applicable during the period, and whether or not the employer has discretion to extend it, should also 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 Unfair Dismissals Acts 1977–2007 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, as there is little to be gained from extending it beyond this point. In considering the maximum length of a probationary

period, employers should ensure that the aggregate of this period when added to the period of notice to which the employee is entitled is less than 12 months.

### iii Establishing a presence

There is no specific requirement for an employer 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.

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.

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.

## 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 (which enforces competition law in Ireland) 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 in this regard 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 ('the OWTA') deals with maximum working hours and other matters relating to working time. Pursuant to the OWTA an employer may not permit an 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, as in other countries such as the UK. 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 generally provide expressly 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') or employment regulation order ('ERO'). REAs and EROs are essentially industry-specific collective agreements that are registered in the Labour Court, and bind all employers and employees in that industry or sector.

For those employees not covered by either REAs or EROs, 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 must pay them a premium for so doing (the level of which is not defined).

## **VII FOREIGN WORKERS**

EEA nationals do not require employment permits to work in Ireland. Bulgarian and Romanian nationals have been granted limited access to the Irish market. Nationals of Switzerland are also exempt from any requirement to obtain an employment permit to work in Ireland. An employment permit will not be granted where to do so would result in more than 50 per cent of a company's employees being non-EEA nationals. This rule does not apply, however, where the employee, rather than the employer, makes the application. There are different types of permits available depending on the circumstances.

Intra-company transfer permits can be granted to senior executives, key personnel or employees engaged in a training programme. Green cards can be granted to individuals earning €60,000 or more, or in limited circumstances between €30,000 and €59,999. Work permits are also available in limited circumstances. The Employment Permits Acts 2003 and 2006 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.

## **VIII GLOBAL POLICIES**

The Unfair Dismissals Acts 1977–2007 require employers to provide employees with written notice setting out the procedure to be applied if their dismissal is contemplated within 28 days of the commencement of employment. While the particulars to be contained in such a procedure are not prescribed, the concepts of natural justice and due

process, which derive from the Irish Constitution, are implicit in employment contracts in Ireland if not provided for otherwise. 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 in the event of an employee disputing his or her dismissal.

Employers are not required to obtain the approval of employees in relation to 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 1998–2008 (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). In addition to this the level of sanctions should be staggered to reflect the seriousness of the offence. It will generally suffice for the disciplinary policy to be available on an employer's intranet, provided employees are advised of this at the commencement of employment. If the employer does not have this facility, employees should be advised in their contracts or letters of appointment, or by way of the staff noticeboard, 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*,<sup>4</sup> non-national 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-national 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. In this

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4 DEC-E2008-020.

situation it would be good practice to have the employee sign a form to acknowledge their contract has been explained to them and that they understand its contents.

In the absence of any legislative guidance in the area, 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, health and safety materials and disciplinary materials.

The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 published in June is an example of new employment codes 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'.

In the absence of legislation, the formalities to be observed in respect of such translations are not set in stone and may vary depending on the circumstances and on the resources available to the employer. In general terms, however, and while certified translators would obviously be best where possible, employers should be guided by the principle of ensuring equality as between Irish and non-national workers and endeavour to ensure all employees understand all documents relating to their employment.

Where that principle is not complied with, employers face the risk of discrimination claims, and of awards to employees who bring such claims of 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.

### **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 alternatively where the employees are covered by a local or European-level works council.

The Transnational Information and Consultation of Employees Act 1996 (which implemented Council Directive 94/45/EC on European Works Councils), 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 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.

The Employees (Provision of Information and Consultation) Act 2006 obliges employers with at least 50 employees to enter into a written agreement with employees setting down formal procedures for informing and consulting with them, or with their elected representatives, on an ongoing basis, covering a broad range of issues affecting the business. The legislation will only apply if a prescribed minimum number of employees request it.

The Protection of Employment Act 1977 (as amended) provides for consultation for a minimum of 30 days between employers and employees prior to the implementation of collective redundancies. Such consultations should consider the possibility of avoiding the redundancies or reducing their number, as well as the criteria to be applied in selection for redundancy.

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 require both parties to a transaction to inform and consult with staff affected by the transfer in relation to certain aspects of it. In particular, both the transferor and the transferee are required to inform employee representatives of the reasons for the transfer, the legal, economic and social implications of the transfer for the employees, and of any measures envisaged in relation to them as a result of the transfer. If any such measures are envisaged, the employer is obliged to consult with employee representatives 30 days before the transfer, or otherwise in good time prior to it.

## **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 ('the 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 to obtain a copy of any personal data relating to them that are 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 the exemption applies. Registration is compulsory where a data controller holds or processes personal data by computer and 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 many other European 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 has registered under the US-EU Safe Harbor 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 preconditions, one of which must be satisfied prior to the processing of sensitive personal data. One of these preconditions provides that explicit consent of the data subject be given before a data controller can process the 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 limited circumstances), credit history checks, education verification, verification of entitlement to work in Ireland and also pre-employment medical assessment. Prior to carrying out a credit history check, an education verification or a pre-employment medical assessment, the explicit consent of the applicant is required. In respect of any method utilised 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 Irish equality legislation.

**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. In addition, and notwithstanding any express contractual right to terminate that the employer has, employees are afforded statutory protection against unfair or discriminatory dismissal. Pursuant to the Unfair Dismissals Acts 1977–2007, an employer cannot lawfully dismiss an employee unless substantial grounds exist to justify the termination of the employment contract. In addition to this, it is essential for an employer to be able to establish that fair procedures have been followed prior to the making of any decision to dismiss. Subject to certain exceptions, employees must have at least 12 months' continuous service to qualify for protection under these Acts.

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 he or she has been unfairly dismissed he or she may bring a claim to the Rights Commissioner or the EAT. The Rights Commissioner and the EAT can award redress in the form of compensation (subject to a maximum of two years' remuneration), reinstatement or re-engagement.

Where an employee is alleging that he or she has been dismissed in a discriminatory manner (i.e., on one of the nine grounds upon which discrimination is prohibited by the Employment Equality Acts 1998–2008), he or she may bring a claim before the Equality Tribunal and subsequently before the Labour Court on appeal. Either of these bodies may award compensation (subject to a maximum of two years' gross remuneration) 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.

Minimum periods of statutory notice of termination must be given to an employee who has been in continuous service for at least 13 weeks. The minimum length of the notice period that must be given by an employer to terminate an employment contract will depend on the employee's length of service as follows (although greater periods of notice can be provided for by contract):

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

An employee may waive his or her right to notice and accept payment in lieu of notice. Alternatively, the contract can stipulate a right for the employer to pay the employee in lieu of his or her notice period. 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 he or she is guilty of gross misconduct.

To settle a dispute, compromise or claim, the parties can enter into a settlement agreement. As a matter of contract law, there are certain basic elements that must be provided for, the most important of which is good consideration, which requires that the employee must receive something over and above what he or she might be entitled to in any event, either as a matter of contract, or by virtue of some statutory provision. Similarly, the employee should generally be given the opportunity to obtain independent legal or other appropriate professional advice in relation to the terms and conditions of the severance and settlement.

## **ii Redundancies**

The Protection of Employment Act 1977 must be complied with when an employer intends to implement collective redundancies. A collective redundancy means dismissals that are effected for reasons unconnected with the individual employee where, in any period of 30 days, the number of such dismissals is:

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

Where collective redundancies are proposed, the employer must first enter into consultation with employee representatives, 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 redundancies is issued. The Minister for Jobs, Employment and Innovation must also be notified at least 30 days in advance of the first redundancy taking effect.

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 proceed with the redundancies nonetheless, it will be exposed to significantly increased liabilities, *inter alia*, if claims are brought by the dismissed employees under the Unfair Dismissal Acts.

While there is no express statutory form of consultation required for individual redundancies, it is generally recommended that this take place as a matter of best practice. 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. In all cases of redundancy, whether collective or individual, a statutory form ('form RP50') should be served on both the employee and the Department of Jobs, Enterprise and Innovation.

### **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. It should be noted that there is no Irish decision yet on this point. 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. It is important to note that 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 at all, 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 prior to a sale of their business in order to make the business more attractive to prospective purchasers.

With regard to breaches of the Regulations, employees may bring complaints to the Rights Commissioners, with a right of appeal to the EAT. There is also a right of appeal to the High Court, from the EAT, on a point of law only. Unlike other employment provisions, such as unfair dismissals law, employees must first take their claim to the Rights Commissioner. There is no option to elect to take a complaint directly to the EAT.

#### **XIV OUTLOOK**

It is expected that 2013 will continue to be a challenging time for the Irish economy, particularly in light of the tough measures announced under the December 2012 budget, which is unlikely to encourage significant growth in the Irish economy. It is anticipated that the number of redundancies in the private sector in 2013 will remain at similar levels to the year gone by, albeit that job creation should also continue at similar (or slightly increased) levels. However, with reforms planned for the civil service, redundancies may well form a part of the restructuring process in the public sector, as well as the private sector, in the coming year.

The steady flow of claims for discriminatory dismissal on the grounds of age when employees reach retirement is likely to continue. In these challenging economic times where pension funds are not performing or individuals have remortgaged property, more and more employees are seeking to remain in work beyond age 65 (the traditional contractual retirement age in most organisations in Ireland). There is no statutory mandatory retirement age in Ireland, and it has traditionally been open to any employer to set different retirement ages, which is not discriminatory in accordance with the Employment Equality Acts, 1998–2008. However, where an employer has not set down contractually a retirement age, there is no right to terminate the employment of an employee merely because they have reached a certain age unless a clear custom and practice in the employment in this regard can be established.

To further complicate matters, on foot of the European Court of Justice ruling in *Palacios de la Villa v. Cortefiel Servicios SA*,<sup>5</sup> employers may now not be entitled to rely on the statutory discretion to set retirement ages without explanation insofar as that case determined, effectively, that mandatory retirement ages must be objectively justified. To this end, a private member's bill, the Employment Equality (Amendment) (No. 2) Bill 2012 was put forward in March 2012. The Bill proposes to prohibit compulsory retirement provisions (subject to the employee meeting necessary health requirements for the role) unless there is a legitimate aim met by such provisions, or no alternative available to the employer. The government outlined in November 2012 that it does not support the Bill as it feels that the employment legislation currently in place gives substantial protection to older workers, and that the Bill is too prescriptive on employers. The government has established an interdepartmental Working and Retirement Group to examine the issues related to longer working; however, this will be a slow process with no decisions expected in 2013. It is therefore anticipated that more of these cases will continue to come before the Equality Tribunal with varying results.

Since the implementation of the Protection of Employees (Temporary Agency Work) Act 2012, there are as yet no reported cases taken under the legislation. We expect this to change as more workers become aware of their rights and issue complaints under the Act.

The fallout from the *University College Cork v. Bushin* case is likely to have serious ramifications for the education sector, particularly in tertiary institutions where the employment of academics on fixed-term contracts is common practice. University teachers' unions have widely highlighted that the High Court has acknowledged that the practice prior to the case fostered discrimination by encouraging employers to select fixed-term employees for redundancy ahead of permanent employees. They now expect a greater security of tenure for their members. As a result it is expected that cases of this type will continue in the sector.

An employment permits bill is due for publication in early 2013. The Bill is expected to consolidate existing employment permits legislation, take into account evolving case law, such as *Hussein v. The Labour Court and Younis* and cater for future accessions to the European Union.

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5 European Court of Justice, case C-411/05.

## Appendix 1

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# ABOUT THE AUTHORS

### **JOHN DUNNE**

#### *Matheson*

John is a partner in the employment pensions and benefits group at Matheson. John advises on a wide range of employment law issues, both contentious and non-contentious. This work includes the drafting and review of employment contracts, company handbooks and human resource policies, plaintiff and defence work in litigious matters and advising on the various aspects of commercial transactions and on new developments in case law and legislation in the area of employment and equality law.

John previously practised with the Irish Business and Employers Confederation ('IBEC'), and has developed extensive experience both in industrial relations issues and trade union law, and in employment and equality law matters generally. He has particular expertise regarding contentious matters heard before the Employment Appeals Tribunal, and in this regard has represented numerous clients before the Rights Commissioner Service and the Tribunal. In addition to this, John has advised on a number of large and complex commercial transactions, involving many facets of employment and equality law, with particular emphasis on commercial restructuring and the transfer of employees.

John's clients range from large national and multinational employers requiring advice on compliance issues, human resource strategies, and commercial reorganisation, including semi-state bodies such as An Post, BGE and the Office of the Commission of Public Service Appointments, and private-sector companies such as Irish Distillers Limited, Ulster Bank Group and Capvest Equity Partners.

### **GEORGINA KABEMBA**

#### *Matheson*

Georgina is a professional support lawyer in the employment pensions and benefits group. Georgina previously trained with the Irish Business Employers Confederation ('IBEC') and has also practised as a senior HR consultant in the financial services sector.

Georgina advises on all aspects of employment and equality law, both in contentious and in non-contentious employment matters. Georgina is also responsible for maintaining the group's extensive employment, pensions and benefits precedents, training, and monitoring legal developments and changes in employment law.

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