Ireland

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General labour market and litigation trends

Ireland's economy enjoyed robust economic growth in the course of the last year. The GDP growth of 5% that was predicted for 2017 by the EU Commission was far surpassed by the actual rate of 7.3%, making Ireland's the fastest GDP growth rate in Europe. Accordingly, the rate of 4% for 2018 was adjusted upwards to a predicted 5.6%, with a further prediction of 4% for 2019. Consistent with this growth, the Irish unemployment rate has continued to fall from 6.1% to 5.4%. The health of the economy is further reflected in the Central Statistics Office's findings that, for the first time in 10 years, there is net inward migration in 2018 of 34,000, compared to 19,800 last year.

In October 2018, the Irish government delivered its budgetary policy. The budget has continued the trend of reducing personal taxation levels. The new tax-advantaged share option scheme known as the Key Employee Engagement Programme ("KEEP") was amended with a view to encouraging more SMEs to implement the scheme. However, the KEEP requirements remain stringent, in particular the condition that the total market value of issued but unexercised share options per SME to join the scheme must not exceed €3 million.

PAYE Modernisation (Real Time Reporting), which effects changes to the current operation of payroll processing, will be implemented from 1 January 2019. Under the new regime, employers will be obliged to notify Revenue of every payment they make to employees including the date of payment and the amount of tax deductible or repayable. The Department of Finance estimates that this will yield an amount of €50 million in 2019.

The Workplace Relations Commission's ("WRC") annual report demonstrates a 6% increase in employment ligation in Ireland. 7,300 complaints were received by the WRC last year, with 92% of adjudication complaints processed within a shorter period of six months. The WRC Inspectorate Division carried out slightly fewer investigations this year, totalling 4,750.

The Labour Court's annual report shows a decrease of 2% in referrals, receiving 1,093 referrals and holding 708 hearings. The Labour Court did, however, experience an increase in appeals to it of decisions made by Adjudication Officers ("AO") after the passing of the Workplace Relations Act 2015 (the "2015 Act"). Such appeals increased from 399 in 2015 to 711 in 2017. This increase reflects that the Labour Court is now the single appeal avenue for most claims following the 2015 Act.

Redundancies, business transfers and reorganisations

Redundancy

Redundancies continued their downward trend in 2018. There were 1,646 redundancies in

the first eight months of this year, down 20% on the 2,053 in the same eight months of 2017. While redundancies have decreased, a higher portion of those that occur are compulsory as opposed to voluntary. However, there continues to be a strong practice, across all sectors, of employers paying additional *ex gratia* severance payments ranging from three to six weeks' pay per year of service. In some cases, worker demands for enhanced severance packages have been resolved by adding extra payments separate to the main "weeks per year of service" formula including, for example, the introduction of standalone loyalty payments to reward employees with longer service.

In **Cinders Limited –v– Celina Byrne**, the Labour Court considered the issue of entitlement to statutory redundancy payment where an employee refused an offer of alternative employment. The complainant worked for a boutique store which the respondent decided to close due to declining sales. The complainant was offered and rejected alternative employment, firstly in one of two concession stores operated by the respondent, and secondly in a boutique near to the one in which she had previously worked. While the Court considered it reasonable for the employee to refuse the offer of employment in the concession store on the basis of the differing nature of the work, it found the refusal to accept employment in the boutique was unreasonable as the employee had no reasonable basis for her assertion that it would also cease trading. Having unreasonably refused suitable offers of alternative employment, no redundancy payment was, therefore, due to the employee.

Business transfers

The assessment of whether the European Communities (Protection of Employees on the Transfer of Undertakings) Regulations 2003 (the "Transfer Regulations") apply is a fact-specific and complex matter which continues to be subject to dispute. In **Euro Car Parks (Ireland) Limited –v– Kelly**, the new owners of a car park decided to insource the operation of the business and terminated the contract of Euro Car Parks (Ireland) Limited which had previously been engaged to operate the car park. At first instance, the AO held that the Transfer Regulations did not apply to the employees of Euro Car Parks (Ireland) Limited as no transfer of assets occurred, no staff transferred and the previous holder of the contract did not cease to fully exist nor was a business or part of a business belonging to it transferred. However, the Labour Court, having satisfied itself that the operation of the car park could be characterised as a stable economic entity, focused on the *continuation in the use* of the core assets of the business post-transfer as opposed to the change in ownership of those assets and accordingly, held that the Transfer Regulations applied.

While recent authority had appeared to clarify that liability for breach of information and consultation obligations under the Transfer Regulations rests with the transferee, the decision of the Labour Court in **OSC One Complete Solution Limited –v– Grant** appears to have muddied the waters somewhat. The transferor in that case argued that it had not been possible to consult with employees in advance given the sensitivities of the commercial negotiations in circumstances where the transferee was a public listed company. It also submitted that it had consulted with the affected employees as soon as practicable following the transfer. However, the Labour Court held that as the transferor did not comply with its obligations prior to the date of the transfer, it was liable to pay the maximum compensation of four weeks' remuneration to the employee.

Business protection and restrictive covenants

The High Court decision in **Susquehanna International Group –v– Needham** will be of interest to employers seeking to enforce confidentiality obligations against former

employees. The plaintiff ("SIG") alleged that the defendant, its former employee, had assisted his new employer (a competitor of SIG) with the recruitment of other SIG employees and had supplied confidential information about SIG's business to that competitor. SIG took proceedings seeking injunctive relief and damages and as part of the discovery process, wished to obtain sight of any documents held by the defendant's new employer and the recruitment agency engaged by it to recruit him. Rather than seeking costly third-party discovery, SIG instead argued that documents were within the defendant's "*possession, power or procurement*" and thus discoverable directly from him, as they could be obtained by the defendant by way of a data subject access request to his new employer and the recruitment agency. Baker J accepted that where a party has documents in his possession or has the legal entitlement to require possession, the documents should be discovered. While an order compelling a counter-party to litigation to make a data subject access request will not always be appropriate, she generally endorsed this approach as a "*straightforward, less costly process*" to seeking non-discovery from a third party.

The cases of **Kerry Group Services International Limited –v– Oliveira** and **Danceglen Limited T/A Dubnoyne Castle Hotel & Spa –v –Riberio** earlier this year demonstrated the usefulness of robust policies and procedures relating to email and IT usage in the workplace. In the latter case, the employee's dismissal was upheld after he was found to be in "extremely serious" breach of the respondent employer's internet and email security policies following the removal of a USB key which contained highly confidential company information and data from the management information system.

Discrimination protection

Retirement ages

Mandatory retirement ages continue to dominate the political agenda, with the Government in its 'Roadmap for Pensions Reform' having committed to facilitating older people working beyond retirement age. This is expressly said to be to empower older people, to allow them to optimise their financial readiness for retirement and to sustain the viability of the wider pension system.

Earlier this year, the Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 (the "Code of Practice") was published. The Code of Practice, issued by the WRC, outlines best practice when engaging with employees about retirement and is likely to influence tribunals' approach to claims of age discrimination in mandatory retirement cases. The Code of Practice requires employers to provide employees with clear guidance about retirement procedures, both at retirement and throughout the employee's career, irrespective of whether the employee is a member of any pension scheme. The Code of Practice provides that, where an employer intends to retire an employee upon attaining the mandatory retirement age, it is best practice for an employer to notify the employee in writing six to 12 months in advance of that date before meeting with the employee face-to-face. Scrupulous adherence to the Code of Practice is likely to become a significant factor in successfully enforcing mandatory retirement ages.

The Code of Practice was followed by the publication of the Retirement and Fixed-Term Contracts Guidelines by the Irish Human Rights and Equality Commission (the "Guidelines"). The Guidelines address the use of fixed-term contracts beyond retirement age and confirm that such contracts can only be offered where an employee is actually subject to a mandatory retirement age. They also provide some guidance on the "objective and reasonable justification" exemption under the Employment Equality Acts 1998 to 2015 when justifying the recourse to fixed-term contracts.

Earlier this year, an award of €50,000 in compensation was made by the WRC in the well-publicised case of **Valerie Cox –v– RTE**. A former reporter who was no longer receiving work from the national broadcaster because of her age succeeded in a claim of age discrimination, where she could show others working in the same role (albeit as independent contractors) who were over the purported retirement age of 65. RTE's attempts to justify the retirement age, including on the grounds of intergenerational fairness, dignity and ensuring the promotion of younger members in a broadcasting setting, were rejected, given some level of ambiguity in the staff handbook concerning the mandatory retirement age.

The decision of the High Court in **Quigley –v– HSE** confirms that injunctive relief may be available in cases where an employer proposes to retire an employee upon reaching the mandatory retirement age. The Court in that case granted interlocutory relief restraining the termination of the plaintiff's employment as a doctor on the grounds that he had reached the purported retirement age. The doctor's contract was expressed to be of "indefinite duration" and was not subject to any express retirement age. Furthermore, there was evidence from colleagues of the plaintiff that many others in the organisation had been working beyond the retirement age. Noting that no others in the same contractual position as the plaintiff had been forced to retire, the Court held that the plaintiff had made out a "strong case likely to succeed" and noted that damages would be an inadequate remedy for the loss of professional standing if the plaintiff were forced to retire. The Court in this case was critical of the wastefulness of compulsorily retiring professionals of considerable accumulated skill and experience.

Reasonable accommodation

In January of this year, the Court of Appeal gave judgment in **Nano Nagle School –v– Marie Daly**. Ms Daly, who had been confined to a wheelchair following a road traffic accident, argued that her employer had failed to take "appropriate measures" under the Employment Equality Acts 1998 to 2015 (the "Equality Acts") to allow her, as a person with a disability, to participate in employment. Following her accident, Ms Daly's occupational health specialist certified that she was unable to perform seven of the sixteen tasks associated with her role. Section 16 of the Equality Acts requires that employers take appropriate measures unless the measures would impose a disproportionate burden on the employer.

The Court of Appeal held that it is correct to construe the obligation pursuant to section 16 as potentially including an obligation to consider redistributing certain tasks among other staff. However, whether an employer is obliged to do so depends upon whether the tasks in question are the essential tasks required of the role in question. The Court held that there is no legal requirement on an employer to remove *essential* tasks of a position or to redistribute these tasks to other employees. The employer in Ms Daly's case, therefore, was not obliged to even consider redistribution, as no amount of reasonable accommodation would have enabled her to perform the essential tasks of her role. Section 16, it was confirmed, envisages some distribution of tasks only where they are *not* essential to the position; in such instances, such a redistribution must be attempted, no matter how unrealistic the proposal. The decision in **Nano Nagle** also clarifies that, in considering reasonable accommodation, employers may validly take into account other legitimate interests which they may also have to accommodate, such as in the **Nano Nagle** case the interests of the school children.

Similar territory was traversed by the subsequent decision of the WRC in **Mary Doyle Guidera –v– Dunnes Stores**. In that case, the employee was unfit for work due to stress and anxiety. The company's occupational health physician stated that, with ongoing care and review, she would make a good recovery and return to work. The employer met with

the employee during her sick leave during which time she was requested to provide a return to work date. The employee provided her employer with a letter advising that she had been referred to a specialist and that her return to work would depend on the outcome of this referral. However, her employer insisted on being provided with a return to work date and when the employee was unable to provide one, her contract was terminated. The Court found that in the absence of an impending specialist's report, which would have allowed the employee's doctor to provide a return to work date, the employer was not in a position to objectively consider those appropriate adjustments which might be made to her working arrangements which could ensure her continued capability to perform her role with the employer. The Court upheld Ms Doyle Guidera's complaints of discrimination and awarded her compensation of €30,000.

Protection against dismissal

Unfair dismissal

The High Court earlier this year delivered judgment in **Bus Átha Cliath – Dublin Bus –v– McKevitt**, a case which provides important guidance in relation to fair procedures where a dismissal is based on medical incapability. In this case, a pattern of sickness absence by an employee culminated in permanent sick leave which lasted for over two years until the Company retired the employee on ill-health grounds. The Court found that the procedures applying to a dismissal on capacity grounds require the employer to show that (i) the incapacity was the reason for dismissal; (ii) the reason was substantial; (iii) the employee received fair notice that dismissal for incapacity was being considered; and (iv) the employee was afforded an opportunity of being heard. The Court found that although the employee had not been notified in writing that her retirement on ill-health was being considered, she had been informed verbally at numerous appointments with the Company doctor such that "*notice was given in substance*". The Court also stated that it could not be said that the employee did not have an opportunity to be heard, given the various reports forwarded by her own medical advisers. It found that there was no right to such an appeal in the context of dismissal due to incapacity and this model is instead "*that which applies in a case of alleged misconduct where witnesses may be called and findings of fact made*". The Court therefore upheld the dismissal.

In the case of **UPC Communications Ireland –v– Employment Appeals Tribunal and Ann Marie Ryan** the High Court found that, in circumstances where the terms of the employee's contract were silent on the implications and effect of a notice of dismissal, the employee was entitled to treat her dismissal as stayed pending the outcome of an internal appeal. This brought the employee's claim for unfair dismissal within the statutory time period. This case therefore serves as a caution to employers to ensure that their contracts, policies and procedures clearly outline the effect of a dismissal notice.

The case of **A Banker –v– A Bank** also underlines the importance of well-defined investigation and disciplinary procedures but also demonstrates that an employer will not be able to avoid an order for re-instatement or re-engagement of the employee simply by arguing that trust and confidence has broken down from its perspective. The claimant trader was dismissed for gross misconduct after he applied above-market interest rates to his parents' bank account. The claimant argued that this was a common practice in the Bank of which line managers were aware. The AO did not, on the evidence, consider this to constitute gross misconduct. He also found a number of serious deficiencies in the disciplinary process including a failure to properly record witness statements, failure to

afford the claimant with an opportunity to cross-examine witnesses at the disciplinary stage, proceeding in the claimant's absence at one disciplinary hearing and a failure to produce reports from the employer's IT system which may have corroborated the claimant's position that he had not been engaged in improper conduct. On the basis that the complainant's performance reviews were extremely positive, and that dismissal would have a severely negative impact on his career prospects in the financial regulated sector, the AO ordered his re-instatement with immediate effect from the date of his dismissal, despite the Bank's argument that re-instatement would lead to "*future friction [and] disharmony*". It should be noted, however, that no direct evidence was presented by the Bank of any basis for such fear.

In **Towerbrook Limited t/a Castle Durrow Country House Hotel –v– Ernest Young** the High Court provided guidance concerning bias in investigation and disciplinary processes. In this case, an employee was dismissed following an altercation with the managing director of his employer which resulted in the employee making a complaint to the employer company that he had been assaulted. A further altercation occurred between the employee and the CFO. Following receipt of the employee's complaint, the managing director suspended the employee on full pay, pending an investigation. The managing director then proceeded to investigate the employee's complaint himself and subsequently invited the employee to a disciplinary hearing conducted both by the managing director and CFO. The employee refused to participate in the disciplinary procedure which was conducted in his absence and resulted in his termination. The employee then took a successful action for unfair dismissal to the Employment Appeals Tribunal which the employer appealed to the Circuit Court and subsequently to the High Court. The High Court found that it was "*hardly surprising*" on the facts that the employee had objected to the investigator and found that the managing director was neither independent, impartial nor objective and that the entire process resulting in the dismissal was fundamentally flawed and contrary to the procedures of natural justice. The Towerbrook case followed the case of **Nasheueur –v– NUI Galway** earlier this year in which the Court of Appeal stated that the failure to consult with an employee in fixing the substance of the terms of reference of a bullying investigation did not raise a reasonable apprehension of bias in the mind of an informed observer. This was so even where the complainant and the employer had had such input.

<u>Constructive dismissal</u>

Recent cases have confirmed the high threshold required of employees seeking to successfully establish a claim of constructive dismissal. In **Kaydee Cosmetics Limited –v– Elizabeth Blake**, the Labour Court held that, while the actions of the employer were at times "*hamfisted*", they fell "*short by a considerable distance*" of the requisite threshold for a claim of constructive dismissal. In this case the employee had been involved in an altercation with her line manager after she was refused an additional day of annual leave. The employee's remark that she ought instead to have taken a sick day led to a meeting at which she received an informal warning. The employee was subsequently issued with a written warning, partly due to her conduct at this meeting and after which she took a period of sick leave. Upon her return, the employee was placed on temporary lay-off due to a downturn in the respondent's business. The Court noted that while the procedures employed relating to the lay-off were imperfect, a genuine effort had been made to retain staff with the optimum range of skills to steer the company through its difficulties. The employee later successfully appealed the written warning and raised various grievances which her employer sought to address by way of a meeting. Ultimately however, no meeting was held prior to the employee's resignation. The Court indicated that the key issue in this case was the employer's behaviour and not how the employee perceived it and was satisfied that the

employer's behaviour was *"at all times focused on repairing the relationship rather than oppressing the Complainant*".

However, the case of **An Employee –v– A Pharmacy** suggests that an alternative avenue of redress may be available under the Equality Acts for employees who resign their employment due to bullying, harassment or discriminatory conduct by their employer. In this case, the employee had been certified as unfit for work following a number of incidents whereby disparaging and critical remarks about her appearance were made by her employer in the presence of others. The AO was satisfied that on balance, the behaviour of the respondent was "*repeated, inappropriate and undermining of the dignity of the employee*" and found the employee had established a *prima facie* case of discrimination on the grounds of gender and harassment. The employee was awarded a sum equating to approximately 32 weeks' remuneration.

Statutory employment protection rights

Whistleblowing

The Protected Disclosures Act 2014 (the "PDA") sets out robust statutory protections for workers to raise concerns regarding potential wrongdoing that has come to their attention in the workplace. Section 5(7) of the PDA, as originally drafted, provided that the motivation for making a disclosure was irrelevant. However, the European Union (Protection of Trade Secrets) Regulation 2018 (the "Regulation") has, since coming into effect on 9 June 2018, changed this. Whistleblowers must now, inasmuch as they use or reveal a "trade secret" in the course of their disclosure, prove that they acted for the purpose of protecting a genuine public interest.

A trade secret is considered to be such if the information: (a) is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has a commercial value because it is a secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. Under the Regulation, whistleblowers are liable to a three-year custodial sentence and a fine of €50,000 for making a protected disclosure, using trade secrets, where it cannot be proven that the disclosure was motivated by the protection of the public interest.

Maternity, paternity and parental leave

Under the Maternity Protection Acts 1994 and 2004, pregnant employees are entitled to 26 weeks' ordinary maternity leave and may avail of an additional period of 16 weeks' maternity leave. Section 16 of the Social Welfare Act 2017 recently extended maternity leave entitlement (and the associated maternity benefit) to allow a further period of maternity leave for mothers of babies born prematurely on or after 1 October 2017. This is equal to the length of time between the actual, premature date of birth and two weeks before the expected date of birth. Separately, the Shared Maternity Leave and Benefit Bill 2018 is at an early legislative stage, and proposes to allow pregnant employees to share their entitlement to ordinary maternity leave (and the associated state benefit) with the father of the child, the spouse, civil partner or cohabitant of the mother of the child.

Until recently, there had been some speculation that an employer would be exposed to a claim of gender discrimination where the employer pays enhanced maternity benefit to its female employees who avail of maternity leave but do not pay enhanced paternity benefit to those male employees who avail of two weeks' paternity leave in accordance with the Paternity Leave and Benefit Act 2016. The case of **A Complainant –v– A**

Respondent earlier this year provides the latest confirmation that the two types of leave are not comparable, maternity leave being granted not only to allow bonding with the child, but also as a protection for the mother against the physiological and psychological effects of pregnancy and motherhood. Given the special protection afforded to pregnancy and maternity under Irish and European law, employers are not compelled to provide the same level of benefits to male employees on paternity leave as they do to female employees on maternity leave.

The Parental Leave Acts 1998 and 2006 provide an entitlement for parents to a period of 18 weeks parental leave per child up to 8 years of age (or 16 years of age where the child has a disability or long-term illness). The Parental Leave (Amendment) Bill 2017 proposes to extend parental leave entitlements from 18 weeks to 26 weeks per qualifying child. In addition, parental leave will now be able to be taken in respect of children up to 12 years of age. The Government in its Budget for 2019 has also announced that a scheme of parental leave payments for employed and self-employed persons from November 2019. This 'Parental Benefit' will provide two weeks' paid parental leave to both the mother and father of new born children at a level of €245 per week.

Worker consultation, trade union and industrial action

The Sectoral Employment Order (Mechanical Engineering Building Services Contracting Sector) 2018 (the "2018 Order") took effect on 6 March 2018. A Sectoral Employment Order sets minimum rates of remuneration and other terms and conditions applying to employees in a particular sector. The 2018 Order is the second such order to be given effect under amending provisions of the Industrial Relations (Amendment) Act 2015 which replaces the previous system of Registered Employment Agreements which became ineffective following the decision in **McGowan –v– Labour Court**. The 2018 Order relates to the mechanical engineering building services contracting sector, and applies to qualified plumbers and pipefitters and registered apprentice plumbers and pipefitters (craftsperson) employed in the mechanical engineering building services contracting sector. It provides for mandatory terms and conditions including minimum pay, pensions and sick leave entitlements, as well as the introduction of a new dispute-resolution procedure. The terms of the 2018 Order are now binding on employers and may be enforced before the WRC.

Employee privacy

The General Data Protection Regulation ("GDPR") applies to the processing of personal data in the EU from 25 May 2018. It provides for more extensive obligations on employers as data controllers and processors, and strengthens protections for employees as data subjects. Further rules are set out in the Data Protection Acts 1988 to 2018. Employers should also note that the Data Protection Commission ("DPC") has received a €3.5 million increase in funding as part of Budget 2019 which brings its total funding allocation for the year to €15.2 million – up from €1.9 million in 2014. These increased resources, along with a doubling of complaints to the DPC since the coming into force of the GDPR, mean employers should take extreme care in their handling of personal data. There have been more than 1,100 reports of data breaches involving personal information made to the DPC since GDPR came into effect.

Monitoring and surveillance in the workplace must be done in a manner which strikes an adequate balance between an employee's reasonable expectation of privacy and the employer's legitimate interests in protecting its business, reputation and resources.

Employers should therefore ensure that employees receive advance warning of the standards of behaviour expected of them and are aware that the employer may engage in monitoring, as well as ensuring that the business has valid reasons for monitoring and that such monitoring is proportionate to the aim sought to be achieved. In the case of **Dublin Port Company –v– 160 Various Grades**, employees hired post-2013 were contractually obliged to submit to testing for intoxicants while employees hired pre-2013 were subject to a dated policy which allowed intoxicant testing for due cause only. While there was no dispute regarding the necessity of an appropriate intoxication policy in this category of employment, the Court stated that random testing for intoxicants must be necessary, justified and proportionate with regard to operational issues identified by the employer. In this case, no such necessity was identified.

Other recent developments in the field of employment and labour law

Disciplinary processes

The Court of Appeal in **Iarnród Éireann –v– McKelvey** very recently reaffirmed the orthodox view that employees are not generally entitled to legal representation in the course of internal disciplinary processes. The employee in that case was the subject of a disciplinary inquiry regarding theft of company property and his request to be legally represented at the hearing was denied by his employer in accordance with the terms of its disciplinary procedure. Reaffirming the established principles from the leading case of **Burns –v– Governor of Castlerea Prison**, Irvine J held that the circumstances in this case were not of such exceptionality that the employer ought to have acceded to a request for legal representation. She noted that, although the employee faced a process which might result in his dismissal with a consequent impact on his employment prospects and reputation, this was a straightforward allegation and no different in substance to a substantial number of employees facing allegations of misconduct in the workplace.

The factors in deciding whether a right to legal representation arises were, in the **Burns** case, said to include the seriousness of the charge and proposed penalty, the likelihood of points of law arising, the capacity of the employee to present his own case, the likelihood of procedural difficulties arising, the need for speed in the adjudication and the need for fairness between those involved in the process. In **McKelvey**, the Court of Appeal seemed to suggest that, inasmuch as the highly publicised decision in **Lyons –v– Longford Westmeath ETB** "departed significantly" from the **Burns** line of authority, the **Lyons** case did not represent the law. In **Lyons**, the High Court had found that the failure of an employer to allow an employee to be legally represented in the course of an investigative hearing amounted to a breach of the constitutional right to fair procedures. Irvine J commented that the fact that the Code of Practice on Grievance and Disciplinary Procedures remains silent on legal representation is "*perhaps indicative of the view that it should be possible for organisations to carry out inquiries into alleged misconduct on the part of employees on an "in house" basis without the need to involve lawyers*". This, coupled with the comment from the Court that it is not necessary for "*the procedure to be deployed [to] ape the type of hearings with which we are familiar in criminal or civil proceedings before the courts*" will be broadly welcomed by employers.

Employment status

Irish law continues to preserve the traditional dichotomy of employees and independent contractors and an increasing number of claims come before the WRC where individuals classified as independent contractors have been found in reality to be employees. Earlier this

year, an independent review of RTÉ, the state broadcaster, found that out of a total of 433 contracts reviewed, up to 157 individuals in RTÉ were wrongly classified as independent contractors.

This followed the launch of an awareness campaign by the Department of Employment Affairs and Social Protection as part of which individuals are encouraged to apply to the Department for an assessment of their employment status. Two Private Members' Bills on this subject are also currently progressing through the legislative process.

In the case of **A Plasterer –v– A Plastering & Construction Company**, the WRC found that six plasterers employed by a plastering and construction business were employees rather than self-employed contractors and awarded each individual €18,000 in compensation. The WRC, as well as considering the Code of Practice for Determining Employment or Self Employment, applied the traditional employment status tests including consideration of the level of control, the mutuality of obligation, the ability to appoint a substitute, and the economic reality of the relationship. The WRC found that the plasterers worked hours specifically set by the business, which also supplied all of the necessary material and equipment, instructed the plasterers at all times as to what they were to work on and moved them from task to task.

Gender pay gap

The gender pay gap continues to dominate media headlines in Ireland. The most recent data discloses that women are paid an average of 13.9% less than men. Closing the gap is a priority under the current Programme for Government and both a government bill and a private members bill requiring mandatory gender pay gap reporting are currently making their way through the legislative process. The government bill, the Gender Pay Gap (Information) Bill, follows the outcome of a public consultation process on measures to tackle the gender pay gap.

Bullying or negligence?

Earlier this year, the Court of Appeal found an employer had breached its duty of care to a supervisor by failing to take action to prevent the recurrence of aggressive behaviour by her subordinates towards her. This finding was made notwithstanding that the legal threshold for bullying had not been met. **McCarthy –v– ISS Ireland Ltd** concerned a cleaning supervisor who, over two years, experienced five separate incidents where different subordinate employees acted aggressively towards her, the stress and anxiety from which caused her to resign. The Court of Appeal found that where the appellant had made complaints to her employer of this hostility, the employer owed her a duty of care to take reasonable steps to address what had occurred and to prevent recurrence. This was particularly so given that the appellant's supervisory role by its nature was capable of leading to confrontation with those being supervised. The employer was found liable for negligence by failing to have in place policies and procedures dealing with issues of this nature and by failing to provide the appellant with a safe place of work. It appears, therefore, that even where allegations of bullying are not sustained by an employee, the employee may yet succeed in a case of negligence against her employer.

Disciplinary sanctions

The imposition of disciplinary sanctions is frequently the subject of challenge. A case before the Court of Appeal earlier this year clarifies that, even where a final written warning has expired without further steps being taken against the employee, the Courts will take the reputational implications of such a warning very seriously and relief before the Courts

remains available in such instances. In **Dillon –v– Catholic University School**, disciplinary proceedings found that a teacher had engaged in "inappropriate behaviour towards a student" when he called the student by an offensive name. The teacher was issued with a final written warning, which was expressed to be "active for a period of 12 months". The teacher, having failed to obtain orders quashing the decision to impose the final written warning before the High Court, succeeded before the Court of Appeal. Whereas the High Court had considered the proceedings to be moot inasmuch as the warning had expired, the Court of Appeal disagreed that the warning no longer had any implications or effects. Hogan J stated that a final written warning of this kind, referring as it did to inappropriate contact with a pupil, is likely to have enormous implications on the teacher's constitutionally protected rights to a good name and to earn a living. He stated that, inasmuch as the final written warning had the potential to have a serious impact on his employment prospects and his ability to earn a livelihood in his chosen profession, the issue could not be reduced to the level of insubstantiality or mere technicality. The case is also noteworthy for the comment made by Birmingham P that, because there had been "an element here of playing fast and loose with the procedures and a failure to engage in the way one would expect of a long-term professional employee", he would consider carefully whether to depart from the usual rule that costs follow the event.

National minimum wage

The Minimum Wage in Ireland increased to €9.55 an hour from 1 January 2017 and will increase further to €9.80 per hour on 1 January 2019, together with some other tax changes introduced by Budget 2019.

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