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Ireland

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Introduction – General labour market and related trends

Ireland's economy has continued its recovery since being the first EU country to exit the EU/IMF Programme in December 2013. In its Autumn 2015 Quarterly Report, the Economic and Social Research Institute predicted strong GNP growth for Ireland of 5.9% in 2015 and 4.0% in 2016. In September 2015, Ireland's unemployment rate fell to 9.4% (from a recent high of 15.1% in February 2012) and is expected to fall to 8% by the end of 2016, while the Eurozone average fell to 11%.

In October 2015, the Irish government delivered its second "non-austerity" budget in eight years, with a stated aim "*to keep that recovery going*". This budget has continued a trend of reducing income taxes for "middle-income" earners, with reductions in taxes and levies on incomes below €70,000. Other measures were introduced for employees with families, such as a second year of State-funded pre-school education and the introduction of two weeks' paternity leave (and State paternity benefit) from September 2016. Furthermore, the minimum wage has been increased to €9.15 per hour (up from €8.65) with effect from January 2016.

Ireland continues to excel in attracting companies to set up their European operations here, particularly technology companies, due to its recognised highly educated workforce, English speaking population, and corporation tax regime. Already a large number of leading global web-based and technology companies have their European and EMEA operations in Dublin, including nine of the global top 10 software companies and four of the top five IT services companies. Household names such as IBM, Google, Dell, Intel, Microsoft, Facebook, Twitter and LinkedIn continue to have large operations in Ireland, while many rapidly growing companies in the industry like Cartrawler, Hostelworld, HubSpot, Salesforce, Sage and Slack, also call Dublin home. The Irish Government's introduction of a "Knowledge Development Box" is likely to make Ireland an even more attractive location for global technology, pharmaceutical and medical technology companies to move or expand their operations in Ireland.

The improving economic climate continues to change the nature of employment litigation and employment law in Ireland, with increasing labour market opportunities creating new challenges for employers and employees. A reduction in claims was anticipated due to companies not feeling the need to effect as many redundancies, and the fact that dismissed employees were expected to obtain new jobs more easily in a rising labour market. However, for now, employment litigation appears to be continuing on a similar level as previous years, with figures released by the Employment Appeals Tribunal in its Annual Report for 2014 showing that the overall number of employment-related claims referred to it in 2014

was 4,162, which amounts to only a very slight decline from 4,168 in 2013. As mentioned below, however, the new Workplace Relations Commission structure only took effect from 1 October 2015, so it is yet to be seen what impact this will have on case numbers.

There have also been a number of landmark and record decisions under the Unfair Dismissals Acts, and the introduction of the Protected Disclosures Act (Ireland's flagship whistleblower law) is beginning to have an impact with the first claims starting to come through. These factors, in conjunction with the reform of Irish workplace relations structures discussed below, are likely to lead to significant changes in the employment litigation landscape in the near future.

This chapter will provide an update on:

1. current and future trends in Irish employment litigation;
2. key Irish case law relating to dismissals and redundancies;
3. recent changes in Irish employment law; and
4. reforms to Irish employment complaint structures and enforcement procedures.

Remuneration

Just as across the rest of Europe, Irish employers in the financial services sector are grappling with the implications of the remuneration requirements implemented under the CRD IV, MIFID, UCITS and AIFMD regimes, which place significant restrictions and increase complexity for employers putting in place remuneration plans for senior and key employees.

The Central Bank of Ireland has itself published limited guidance on the application of these requirements and, therefore, Irish employers are having direct regard to the guidance issued by the European Banking Authority and the European Securities and Markets Authority. In particular, Irish employers are waiting to see the outcome of the EBA's determination on proportionality, which suggests that a tougher application of the proportionality principle will lead to the application of the full CRD requirements to a greater number of employees. If implemented as the European Banking Authority has suggested, this is likely to lead to significant complexity in designing remuneration plans for such employees.

Age discrimination and compulsory retirement ages

As it currently stands, Irish law permits an employer to prescribe a mandatory age at which its employees must retire. However, due to recent decisions of the Court of Justice of the European Union ("**CJEU**"), as followed by decisions in Ireland in 2014/2015, the position is not clear cut and employers must exercise care in dealing with the issue. Given the increase in the State pension age (from age 65 to 66 in 2014, to 67 in 2021 and to 68 in 2028), the desire of employees to work beyond traditional retirement ages for financial reasons, and the fact that people are living longer, the number of requests to work beyond retirement is increasing, as are challenges to compulsory retirement ages where such requests are refused.

The Employment Equality Acts 1998-2011 (the "**EE Acts**") expressly provide that fixing a compulsory retirement age does not constitute age discrimination. The EE Acts are therefore inconsistent with European Council Directive 2000/78/EC which requires that any differences in treatment on grounds of age should be objectively justified by a legitimate aim so as not to constitute discriminatory treatment. Following the European position and the CJEU case law, in a number of recent cases the Equality Tribunal has held that an employer must provide objective justification for the imposition of a compulsory retirement

age, notwithstanding that no such requirement is stated in the EE Acts and notwithstanding that direct effect should only apply to emanations of the State and not to private companies.

These cases continue to be followed (with some exceptions). In the case of *Thomas O'Mahony v. Southwest Doctors on Call Ltd*[1] the Equality Tribunal awarded a driver €12,000 in compensation for discriminatory dismissal on the grounds of age on the basis that the employer did not provide objective justification for the retirement age of 65. Furthermore, the Tribunal found that the objective justification put forward by the employer of "*succession planning*" was not legitimate in a scenario where it was "*not trying to retain younger people or plan for succession; it was simply trying to reduce headcount in the least expensive way*". Similarly, the objective justification of health and safety put forward by the employer was not considered legitimate in the circumstances of the case.

In the case of *Richard Lett v. Earagail Eisc Teoranta*[2], the Equality Tribunal awarded the complainant €24,000 in compensation for discriminatory dismissal and discrimination on the grounds of age. The Tribunal did not accept the reasons advanced by the employer as objective justification for the compulsory retirement age imposed of 65. In relation to two of the reasons advanced, "*workplace planning*" and "*having an age balanced workforce and intergenerational fairness or sharing job opportunities amongst the generations*", the Tribunal found that, whereas in principle they could amount to objective justification, in this case the evidence was that the employer advertised externally for a replacement rather than internally. The Tribunal was critical of the employer taking a "*one size fits all approach*" to setting a retirement age.

In contrast, in the case of *John Roche v. Complete Bar Solutions*[3], the Tribunal held in favour of the employer on the basis that the policy of compulsory retirement at 65 was objectively justified on grounds that the employer did not wish to lose valuable staff by failing to provide internal promotional opportunities.

These cases highlight the importance of employers having genuine objective reasons for compulsory retirement ages, notwithstanding that the EE Acts do not require same, and also that the facts of each situation will be scrutinised closely by the Tribunal.

Whistleblowing

The effects of the implications of the Protected Disclosures Act 2014, Ireland's whistleblower protection law, are beginning to be seen, with the first cases starting to come through. The purpose of the Protected Disclosures Act was to protect "workers" (a broader concept than employees) across all sectors, from penalisation for whistleblowing to giving employees the ability to bring new forms of claim in the event that they are penalised for having made a "protected disclosure". There is an increased level of damages allowed under the Act of up to five years' remuneration. The Irish whistleblower regime has similarities to the UK, but there are key differences, such as the lack of a public interest test.

The Protected Disclosures Act includes a new and novel form of interim relief under which an employee who claims to have been dismissed "wholly or mainly" for having made a protected disclosure, can apply to the Circuit Court for interim relief. If the Court is satisfied that there are substantial grounds for the dismissal having resulted wholly or mainly from the making of a protected disclosure, it may grant an order of reinstatement, re-engagement or an order for the continuation of the employee's contract pending the outcome of a full claim for unfair dismissal.

The first challenge brought under this provision arose in early 2015 in *Philpott v. Marymount University Hospital and Hospice Limited*[4]. In the first test of this provision the Judge

refused relief as, while acknowledging the sincerity of the employee, he was not satisfied that the employee had satisfied the requisite test required under the Protected Disclosures Act. While this initial challenge failed, it is a notable example of the dangers for employers of employees seeking Circuit Court relief in support of Unfair Dismissals Acts claims and is a whole new area of risk and challenge for Irish employers. That said, this decision shows that the Court will thoroughly scrutinise a case before granting an order.

Unfair dismissal

Where an employer dismisses an employee, the employee may take a claim for unfair dismissal under the Unfair Dismissals Acts 1977 to 2015 (the "**UD Acts**") (subject to certain conditions, such as a requirement, in most cases, that the employee has one year's service with that employer). Unusually, the UD Acts essentially transfer the burden of proof onto the employer: a dismissal is deemed unfair unless the employer can show otherwise. The UD Acts list certain "fair" reasons for dismissal, such as terminations due to "redundancy", "competence" (i.e. performance), or capacity (i.e. ability to do the job from a physical/mental perspective). Claims are heard by an Adjudication Officer in the first instance, with an appeal to the Labour Court and, should an employee be successful in a claim under the UD Acts, he/she can be awarded reinstatement, re-engagement and/or up to two years' remuneration in compensation. A number of significant awards in 2014 and 2015 have shown that Courts and employment tribunals are willing to consider awards at the upper end of this spectrum if they feel it appropriate.

The UD Acts are particularly concerned that proper and fair procedures are provided to employees, and many employers can find themselves on the wrong end of a decision under the UD Acts for procedural reasons, even though the reason behind the dismissal may have been entirely genuine. For example, in the late 2014 case of *Claire Hayes v. Patrick Kinsella t/a Kinsella's of Rocklands*[5], the claimant Ms Hayes was dismissed by her employer from her position working in a shop for allegedly not carrying out tasks assigned to her, for using her mobile phone during work hours and, most importantly, after being observed in CCTV footage on multiple occasions taking items without paying for them. Although one would expect that CCTV footage would be relatively definitive, the Employment Appeals Tribunal (the "**EAT**") ruled that fair procedures had not been followed for reasons including that the claimant was not provided with the evidence against her in advance, she was not given the right to be accompanied, there was no right of appeal, and no till receipts or stocktake evidence was introduced to support the "subjective" CCTV footage. Therefore the employee was awarded €11,000 compensation.

In *Philip Smith v. RSA Insurance Ireland Limited*[6], the EAT made a record award under the UD Acts for a claim for constructive dismissal brought by the former CEO of RSA Insurance Ireland Limited, Mr Philip Smith. The case arose from an investigation by RSA in late 2013 and Mr Smith's suspension in the course of that investigation, during the course of which Mr Smith resigned. The EAT was very critical of the process of the investigation and, in particular, the public announcement of his suspension on television. Although the burden of proof is higher for a constructive dismissal claim like this, the EAT found a number of flaws throughout the investigation process and placed significant emphasis on the damage to Mr Smith's reputation. The EAT in particular held that the issues involved were known by too many senior people to "lay the blame solely at the feet of the claimant". The EAT also had regard to his future prospects of securing future employment elsewhere. Having regard to all of the circumstances, the EAT made an award of €1.25m. This was

only very slightly under the maximum amount it could have awarded to him, of two years' remuneration, and is illustrative of the potentially huge significance of getting a decision like this wrong.

In *Bank of Ireland v. Reilly*[7], the High Court, in a rare decision under the provisions of the UD Acts, reinstated a dismissed employee to his position notwithstanding his dismissal almost six years previously. The plaintiff was a sales manager with eight years' service who was accused of being a party to inappropriate emails in 2009. He had been placed on paid suspension pending an investigation and was subsequently dismissed for gross misconduct for breach of the Bank's email policy. The High Court strongly criticised what it described as an attempt to "make an example" out of the plaintiff. The High Court also gave helpful guidance on the circumstances in which a suspension will be justified, i.e. only where it is necessary to prevent repetition of the conduct complained of or interference with evidence; or to protect individuals at risk from such conduct or the employer's business and reputation.

In the circumstances, the Judge did not believe the suspension was necessary, and the Court ordered that he be reinstated to his position without breaking his continuity of service and with the benefit of back pay and benefits. While the EAT had previously awarded Mr Reilly compensation, the Judge found that this was an inadequate remedy for Mr Reilly. The net effect of this award was significantly more than any award of compensation, as it cost the defendant almost six years' remuneration.

Employment injunctions and "no-fault dismissals"

As an alternative to a claim under the UD Acts, an employee may decide to pursue a claim for wrongful dismissal, essentially based on a claim of breach of contract. This may be of more benefit to senior executives who, for example, may have long notice periods that the company has failed to comply with, but potentially of more importance is the fact that such wrongful dismissal/breach of contract claim is often now accompanied by an application by the employee to the High Court for an interlocutory injunction. Applications by employees for these "Employment Injunctions" are not common due to the cost involved, but they are by no means rare either, particularly amongst more senior or better-paid employees. The Court will typically hear the application for the injunction as a matter of urgency, and determine whether the circumstances warrant the granting of an order restraining the termination of the employee's employment pending a full High Court hearing on the alleged wrongful dismissal or breach of contract (which could take over a year to be heard). What is particularly devastating to an employer who is unsuccessful in defending such an injunction application, other than the costs involved, is the fact that the Court has the ability to make a "paying order", which requires the employee to be paid for the duration of the injunction. Very often, such an order leads to a settlement on more favourable terms to an employee than may previously have been offered.

This year has continued to see employment injunctions being sought by employees, either to prevent the termination of their employment, or even to reinstate them after dismissal has been effected (a "mandatory injunction"). Case law has reiterated time and time again the following well-known principles to be applied when determining whether such an injunction should be granted (in Ireland often referred to as the "Campus Oil principles", and outside of Ireland usually referred to as the "American Cyanamid principles"):

(a) whether there is a fair issue to be tried;

(b) whether damages would be an adequate remedy if the applicant was successful at the trial of the action; and

(c) whether the balance of convenience favours the grant or refusal of an injunction.

In the context of a mandatory employment injunction, the Courts have gone a step further and required that an employee establish that he or she has a strong case that is likely to succeed. In a judgment delivered as recently as 22 October 2015, the High Court granted just such an injunction in the case of *Conor Brennan v. Irish Pride Bakeries (In Receivership)*[8].

An interesting development is the fact that two recent High Court decisions have adjudicated upon injunction applications in the context of "no fault" dismissals. A "no fault dismissal" arises where an employer terminates a contract of employment by giving contractual notice to the employee (and complying with any other contractual terms) and the dismissal is not based on the employee's conduct or performance. Because of the requirement to have a fair reason for dismissal under the Unfair Dismissals Acts, employers would typically inform the employee of the reason for the dismissal in order to protect against claims, and in the case of misconduct or performance issues, for example, the employer should have followed fair procedures. But in the case of senior employees, employers are often less concerned with Unfair Dismissal Act claims (that might only come on for hearing many months later) and simply want the employee out of the business. An injunction application is the employer's main concern in such cases.

In the case of *Bradshaw v. Murphy and Others*[9], Finlay Geoghegan J. refused an interlocutory injunction application by the plaintiff, a chef and restaurateur of the defendant company, seeking to restrain the termination of his employment and restrain the defendants from terminating an alleged partnership. Allegations of misconduct had been raised with the plaintiff and it was indicated that his employment would be terminated as a result. The plaintiff sought an injunction.

At the hearing of the interlocutory motion, the defendants gave an undertaking to the Court not to dismiss the plaintiff for misconduct pending the determination of the action at a full hearing. Counsel for the plaintiff submitted that due to the allegation of misconduct, any subsequent termination of the plaintiff's employment required fair procedures to be followed. Counsel for the defendants argued that the defendant company should be entitled to terminate the plaintiff's employment in the intervening period between the interlocutory motion hearing and the trial of the action, but only in accordance with the plaintiff's contractual terms of employment.

Ms Justice Finlay Geoghegan noted that whilst the plaintiff had raised a serious issue to be tried in relation to whether the defendant company could terminate his employment on foot of the alleged misconduct, she held that the plaintiff had not raised a serious issue to be tried as to the defendant company's entitlement at common law to terminate the employment of the plaintiff, without cause, in accordance with his contractual terms of employment. The plaintiff's application for an injunction restraining the termination of his employment by the defendant company was, therefore, refused by the High Court in circumstances where the defendants had given the undertaking not to dismiss the plaintiff on the grounds of misconduct. The Court observed, however, that the fact that the defendants previously threatened to dismiss, for misconduct reasons, did not preclude the defendants from terminating in accordance with the contractual provisions.

Following that, in the case of *Hughes v. MongoDB Limited*[10], Mr Justice Keane in the High Court dismissed an application for interlocutory relief brought by a regional technical director who was dismissed because he was "not a good fit" for the defendant company. There was no evidence to show that the plaintiff's dismissal was on the grounds of misconduct or poor performance, though the plaintiff alleged that there must have been an ulterior motive. In

rejecting the injunction application, Mr Justice Keane referred to the evidence adduced by the defendant showing that it was willing to provide the plaintiff with a written reference that confirmed the defendant's confidence in the plaintiff's abilities and that the defendant would reiterate to whom it may concern that the plaintiff's termination did not arise from any fault, misconduct, or poor performance on his part. Keane J. also went so far as to say that even if the defendant was being disingenuous in the reasons it gave for the termination, there was no authority for the proposition that a "bad reason" that informs the termination of an employment contract in accordance with its terms renders that dismissal wrong in law.

Notwithstanding the above, employers should ensure that terminations are effected in accordance with contractual terms, express or implied, and, where appropriate, the employer company's memorandum and articles of association. Employers are also reminded that, while an employer who dismisses an employee for 'no fault' may avoid an injunction, it is likely to be faced with a claim for unfair dismissal under the UD Acts and be required to show that the dismissal was for a "fair reason" and in accordance with procedures.

Parallel investigations – Criminal investigations and employment dismissals

In *Rogers v. An Post*[11], the High Court gave important guidance to employers in dealing with employees who are the subject of parallel criminal investigations. In that case, the plaintiff sought an injunction restraining the defendant from taking any further steps in a disciplinary process until the determination of related criminal proceedings. The High Court refused the injunction, principally on the basis that granting an injunction would finally determine the matter, as the criminal trial would most likely bring an end to the matter, rather than a full trial of the matter. In the circumstances, the Court found this would prevent the defendant from fully vindicating its own rights.

This case is important as it confirms that employers do not have to adjourn disciplinary proceedings when there are criminal proceedings in being, as many employers typically would do. That said, it is clear that employers must tread very carefully when dealing with matters that intertwine with criminal matters, particularly if a mandatory reporting obligation may be engaged (such as under the Criminal Justice Act 2011).

Agency workers

The first High Court case under the Protection of Employees (Temporary Agency Workers) Act 2012 (the "**Agency Workers Act**") was decided in March 2015 in the case of *Mulholland v. QED Recruitment Limited*[12]. In that case, an agency worker had complained that there were discrepancies between the rates of pay he received compared with his peers and those directly employed by the hirer.

The High Court held that a person seeking to rely on the protections offered by the Agency Workers Act must be able to establish that a contractual term, collective agreement, or some other entitlement or agreement is in place which they have been denied by virtue of being an agency worker. It is not sufficient to identify just one fellow employee who received a different rate of pay; it must be proved that the term is of general application.

Reform of workplace relations structures – The Workplace Relations Act

The Workplace Relations Act 2015 (the "**WR Act**") was signed into law by the President of Ireland on 20 May 2015 and the new structures it effected came into operation from 1 October 2015. The WR Act marks the completion of a long period of review and public

consultation, which commenced in 2011 with the introduction of the programme of reform by Minister for Jobs, Enterprise and Innovation, Richard Bruton.

The reason behind the reform was that the existing employment law system, which had its origins in the 1960s and was supposed to be more simple than the civil court process, had in very many respects become more complicated than the civil courts. The employment law system had developed in patchwork fashion over the years. The WR Act constituted the most substantial revision of the Irish employment law framework since the introduction of the various dispute resolution bodies. Although the WR Act does not consolidate the numerous pieces of employment legislation, what it does is create a new single framework for the resolution of employment and equality disputes in Ireland.

The key reforms contained in the WR Act are:

- The establishment of a new body, the Workplace Relations Commission (the "**WRC**"), which will amalgamate the existing services of the Labour Relations Commission ("**LRC**"), the National Employment Rights Authority ("**NERA**"), the Equality Tribunal, and the first instance functions of the Employment Appeals Tribunal (the "**EAT**") and the Labour Court. The WRC will then have general responsibility for the promotion and improvement of industrial and employment relations.
- The creation of a new two-tier workplace relations structure, comprising the WRC, which will deal with workplace complaints in the first instance, and an expanded and reconfigured Labour Court, which will deal with all cases on appeal from the WRC.
- All employment claims at first instance will be heard by a single Adjudication Officer of the WRC sitting in private, and every decision of the Adjudication Officer shall be published on the internet in such form and in such manner as the WRC considers appropriate (other than information that would identify the parties in relation to whom the decision was made).
- Appeals of Adjudication Officer decisions are to the Labour Court, and decisions of the Labour Court may be appealed on a point of law only to the High Court.
- A standardising of the time taken for a decision to issue to parties.
- The transfer of all of the existing functions of the LRC (including industrial relations conciliation, advisory services and workplace mediation) to the WRC.
- The dissolution of the LRC and the EAT following their disposal of all legacy first instance complaints and appeals referred to them prior to the establishment of the WRC.
- The implementation of an early resolution/mediation service to facilitate the early resolution of disputes, allowing parties to enter into legally binding and enforceable agreements ahead of a hearing.
- The standardising of limitation periods for the referral of a dispute under employment legislation to six months, extendable to 12 months where "reasonable cause" is shown.
- A new ability to deal with certain complaints by written submissions only, rather than requiring oral hearings in every matter. Where the Director General of the WRC forms the opinion that a dispute or complaint can be dealt with in this manner, he may inform the parties of his intention not to hold a hearing. Either party may then object to this within 42 days. Similar provisions apply in respect of the Labour Court.
- New procedures for the enforcement of awards of an Adjudication Officer or the Labour Court through the District Court.

- Increased powers in the inspectorate functions of the WRC, including the introduction of two new compliance measures, a Compliance Notice and a Fixed Payment Notice, to promote higher levels of compliance amongst employers with employment legislation.

Claims brought after 1 October 2015 are under the "new" system, but it is expected that legacy claims lodged prior to 1 October 2015 will take up to two years to be dealt with, and so an understanding of the "old" system is still invaluable for the moment.

Significant industrial relations law changes

The commencement of the Industrial Relations (Amendment) Act 2015 (the "**IR Act**"), with effect from 1 August 2015, has changed the industrial relations landscape in Ireland. The IR Act will have a significant impact for employers by introducing a revised framework for the registration of employment agreements and by reforming the current law on employees' right to engage in collective bargaining.

Registered Employment Agreements and Sectoral Employment Orders

The Industrial Relations Act 1946 (as amended) had provided for Registered Employment Agreements ("**REAs**") whereby an employer and a trade union could register a collective agreement with the Labour Court, thus providing further protection against breach of such terms. An extension of this concept were REAs which applied sector-wide, most notably to the construction and electrical contracting sectors, whereby any employer in that sector had to comply with the terms of the REA (which included minimum pay rates far above the national minimum wage as set out in legislation, as well as various other terms) whether that employer was a party to the REA or not. In 2013 the REA system was held to be unconstitutional in the landmark Supreme Court decision of *McGowan & Ors v. Labour Court Ireland & Anor*[13]. The IR Act aims to reinstate an REA system by providing for:

(a) the reintroduction of a legislative framework for the registration of employment (i.e. collective) agreements between an employer or employers and trade unions governing terms and conditions in individual companies. These REAs will not be legally binding beyond the individual companies and, therefore, will not have sector-wide application; and

(b) a new statutory framework for the establishment of orders setting minimum rates of remuneration and other terms and conditions of employment for a specified type, class or group of workers ("**Sectoral Employment Orders**"). These Sectoral Employment Orders will act as the new framework to replace the previous sector-wide REAs.

The IR Act contains detailed procedures for the registration, variation and cancellation of REAs. It also establishes certain guidelines to assist the Labour Court when assessing an application to register an employment agreement. For example, the Labour Court must have regard to whether the registration of the agreement is likely to promote harmonious relations between the workers and the employer.

In respect of Sectoral Employment Orders, the IR Act permits a trade union(s) and/or employer body, which is substantially representative of workers or employers of such workers in a sector, to make an application to the Labour Court to request a review of the terms and conditions of workers in that sector, including terms relating to remuneration, sick pay and pensions. The Labour Court will then determine whether to make a recommendation to the Minister for Jobs, Enterprise and Innovation for the making of a Sectoral Employment Order for the sector in question.

Employers should note that where a worker of a class, type or group who is subject to an REA or Sectoral Employment Order receives less favourable remuneration and/or conditions of employment than those contained in the REA or Sectoral Employment Order, the REA or Sectoral Employment Order rate of remuneration and/or conditions of employment, as the case may be, will have effect as if the terms of the REA or Sectoral Employment Order were substituted for the terms contained in the worker's contract of employment.

Collective bargaining

The IR Act also provides for an improved framework for workers who seek to improve their terms and conditions in circumstances where collective bargaining is not recognised by their employer. However, importantly, the IR Act reiterates the voluntary nature of the Irish industrial relations system and does not oblige employers to engage in collective bargaining *per se* or require formal recognition of trade unions.

Employees in Ireland have a constitutional right to join a trade union. However, employers in Ireland are not required to recognise or negotiate with trade unions. Under the Industrial Relations (Amendment) Acts 2001 to 2004 (the "**IRAA Acts**") the Labour Court was empowered to investigate a trade dispute at the request of a trade union where it was the practice of the employer not to engage in collective bargaining. Essentially, trade unions saw the IRAA as their way of gaining access to a workplace where the employer refused to recognise trade unions. However, the decision of the Supreme Court of Ireland in *Ryanair Limited v. Labour Court and Ors*[14] limited the scope of the IRAA Acts. In summary, this protracted case determined that where an employer had put in place a mechanism whereby employees could raise issues with the employer for collective bargaining and negotiation purposes, whether through internally appointed employee representatives or staff groups, employees or their trade union could not seek to refer a trade dispute to the Labour Court under the IRAA for a binding decision.

The IR Act has now amended the IRAA Acts to insert the following definition of "collective bargaining":

> "*...voluntary engagements or negotiations between any employer or employers' organisation on the one hand and a trade union of workers or excepted body to which this Act applies on the other, with the object of reaching agreement regarding working conditions or terms of employment, or non-employment, of workers*."

It should be noted that where an employer asserts to the Labour Court that there is a practice in place of negotiating with an "excepted body" (i.e. a non-union body), it will be a matter for the Labour Court to determine that such negotiations take place, and the Labour Court will examine whether that "excepted body" genuinely has bargaining power and is not simply the employer paying lip-service to the concept. Furthermore, for the purposes of determining the status of any negotiations with an "excepted body", the IR Act now provides that such a body must be "*independent and not under the domination and control of an employer or trade union of employers*". Where such "collective bargaining" does not take place, a referral can be made to the Labour Court by employees or their trade union for a binding order.

So, although the IR Act does not go so far as to require employers to recognise trade unions, employers who wish to avoid the Labour Court interfering with terms and conditions of employment should now more than ever ensure that they have in place adequate and genuine collective bargaining procedures.

Paternity leave

A new paternity benefit of two weeks was announced in Budget 2016, which is expected to be introduced in respect of births from September 2016. Subject to the employee's PRSI contributions, it will be paid at €230 per week.

In conjunction with the paternity benefit, the statutory entitlement to take the paternity leave will be introduced in parallel. While a draft of the legislation has not yet been seen, it is expected that this will be included in the draft Family Leave Bill which aims to consolidate all of the existing pieces of legislation relating to Adoptive Leave, Maternity Leave, Carer's Leave, Parental Leave and now, Paternity Leave.

Annual leave and sickness absence

Following from the decisions of the Court of Justice of the European Union in *Schultz-Hoff v. Deutsche Rentenversicherung Bund* and *Stringer v. HM Revenue and Customs*[15], it became apparent that Irish Working Time legislation was incompatible with European Law in respect of employees' rights to accrue annual leave during periods of sick leave. Irish law has now been changed such that employees on certified sick leave will be considered to have been actually working for the purposes of calculating annual leave entitlement, and employees who cannot take annual leave during that leave year (or within six months with the agreement of the employer) as a result of illness must take any accrued annual leave within 15 months of the end of the leave year to which it relates.

* * *

Endnotes

1. DEC-E2014-031.
2. DEC-E2014-076.
3. DEC-E2013-197.
4. Circuit Court, Cork.
5. UD690/2012.
6. UD1673/2013.
7. [2015] IEHC 241.
8. Currently unreported.
9. [2014] IEHC 146.
10. [2014] IEHC 335.
11. [2014] IEHC 412.
12. [2015] IEHC 151.
13. [2013] IESC 21.
14. [2007] IESC 6.
15. Joined cases C-350/06 and C-520/06.

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Stephen is a Senior Associate at McCann FitzGerald and advises clients on operational, transactional and crisis issues in the workplace; in particular, on senior executive appointments; employee engagement and terminations; and the drafting and negotiation of key employment documentation. Stephen has significant experience before the various employment law tribunals and the High Court (including the Commercial Court), as well as through mediation. He also assists clients in conducting complex employee investigations. Stephen's work has a particular focus on whistleblowing (including the Protected Disclosures Act 2014) and executive remuneration; and his dual qualification as a Chartered Tax Adviser provides an additional perspective in employee remuneration matters. Stephen also regularly advises on the employment and industrial relations aspects of outsourcings, procurement and restructurings; including on redundancy law, union issues, consultation and TUPE.

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