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CHANGES IN IRISH LEGISLATION: MORE EQUAL AND INCLUSIVE EMPLOYMENT CONDITIONS

Diversity has been described as both a labour-market imperative, and societal expectation and value¹. The law is a powerful tool in promoting increased equality, diversity and inclusion in the labour market, particularly where organisations are slow to respond in implementing changes which facilitate increased representation of diverse groups. This article examines a range of recent legislation either adopted or being proposed in the Irish context which should give effect to employment conditions that facilitate greater levels of diversity and inclusion, particularly with regards to women and those with caring responsibilities. The article will examine the Gender Pay Gap Information Act 2021, Transparent and Predictable Working Conditions Regulations 2022, the Work Life Balance and Miscellaneous Provisions Bill 2022, and the right to request to flexible working.

The Irish labour market has become increasingly diverse, particularly with regard to racial and ethnic diversity spurred by the increase in immigration that accompanied the economic boom of the late 1990s and early 2000s in Ireland². However, from a gender representation perspective, female participation in the Irish labour force is still well below the international average. Data from the Irish Central Statistics Office (CSO) estimated that the female participation rate in 2022 was just over 58 % (the male participation rate stands at 70 %), compared with a 75 % average across the 38 countries examined by the Organisation for Economic Co-operation and Development (OECD).³ While Ireland has lagged behind international counterparts in the past in regards to the female labour market participation rate, during the pandemic this trend was reversed as the data showed women took on roles in the labour market. During the peak of the Covid-19 pandemic in 2020 and 2021, female participation in Ireland increased by over 3 % but has since declined slightly to pre pandemic levels. The increased participation rate during the pandemic has been

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- 1 T. Kochan, K. Bezrukova, R. Ely, S. Jackson *et al.*, « The effects of diversity on business performance: Report of the diversity research network », *Human Resource Management*, no. 42(1), 2003, p. 3.
 - 2 F. McGinnity, R. Grotti, S. Groarke and S. Coughlan, *Ethnicity and nationality in the Irish labour market*, Economic and Social Research Institute, ESRI and The Irish Human Rights and Equality Commission (IHREC), 2018: https://www.esri.ie/system/files/publications/BKMNEXT369_0%20%281%29.pdf
 - 3 E. Burke Kennedy, « Female participation in Irish labour force still lags international average », *The Irish Times*, 19 January 2023: <https://www.irishtimes.com/business/2023/01/19/female-participation-in-irish-labour-force-still-lags-international-average/>

attributed to increased remote working, which is believed to have provided women with caring responsibility more choices in regard to work since they are not limited to attending the workplace in person on a daily basis.

We will look at the Gender Pay Gap Information Act 2021 **(I)**, the Transparent and Predictable Working Conditions Regulations 2022 **(II)**, the Work Life Balance and Miscellaneous Provisions Bill 2022, and the right to request flexible working hours **(III)**.

I - GENDER PAY GAP INFORMATION ACT 2021 AND REMUNERATION INFORMATION AND PAY TRANSPARENCY BILL 2023

The requirements for organisations to report on their gender pay gap i.e the difference in the average hourly wage of male and female employees within the organisation commenced in June 2022⁴. From that point, organisations with 250 employees or more had a period of six months to report their average gender pay gap. December 2022 marked the country's inaugural period of gender pay gap reporting. As the legislation becomes embedded the regulations will extend to organisations with 150 employees or more in 2024 and then to organisations of 50 or more in 2025.

The Director of the Chartered Institute of Personnel and Development noted that « information around rates for part-time workers and bonus payments is lacking in some places as are overall employee numbers » noting that employers should address this in order to give as clear a picture as possible of conditions for its workers⁵.

Some notable gender pay gaps⁶ reported in December include:

- IBEC (largest Irish employer representative body): 29 %
- SIPTU (Ireland's largest trade union): 13,6 %
- ESB (largest national energy provider): 10 %
- RTÉ (national broadcaster): 11,5 %

The Act is one of the core elements introduced as part of broader programme of work by the Irish Government to promote gender equality, within the framework of the National Strategy for Women and Girls. The current legislation requires employers to report the differences in average hourly pay, average bonus pay, and the percentage of male and female employees who receive either bonuses or benefits in kind. This is based on employees only and does not extend to partners or self-employed contractors, though some organisations did report such data. Employers are requested to give reasons for the difference in pay and detail possible

4 *Gender Pay Gap Information Act 2021*: <https://www.irishstatutebook.ie/eli/2021/act/20/enacted/en/print.html>

5 E. Walsh, « Compulsory pay gap reports reveal the companies in Ireland where women earn more than men », *Independent*, 4 January 2023: <https://www.independent.ie/irish-news/compulsory-pay-gap-reports-reveal-the-companies-in-ireland-where-women-earn-more-than-men/42261047.html>

6 *Ibid.*

measures to eliminate these differences over time. Currently there are no penalties for having a gender pay gap, nor for failing to issue a report, though the Workplace Relations Commission can make an order requiring a report to be produced⁷. However, gender pay gap reporting requirements are likely to increase further as the EU Directive on Pay Transparency takes effect (due for transposition in 2026) and goes beyond the current gender pay gap reporting obligations under the Gender Pay Gap Information Act 2021⁸. The EU Directive measures are expected to have an impact on the information employers can seek during recruitment regarding salary history and provide greater rights to workers and their representatives seeking wage information including salary scales and joint pay assessments where gender pay gaps exceed 5 %⁹.

In anticipation of the Directive, one of the current government parties, Fianna Fáil, have tabled the Remuneration Information and Pay Transparency Bill 2023 which matches the requirements of the forthcoming directive¹⁰. The aim of this is to « prevent an employer or a prospective employer, either directly or through an employment agency or by any other means, seeking information in respect of an employee or a prospective employee relating to the current or any previous remuneration received by him or her and, accordingly, an employer or prospective employer shall not so seek such information ». The legislation is anticipated to significantly increase workers ability to obtain pay information, for example for the purpose of equal pay claims¹¹. There is generally consensus that greater transparency will lead to a reduction in gender pay gaps since similar legislation introduced in the UK in 2017 has had an impact with the pay gap narrowing there¹².

II - TRANSPARENT AND PREDICTABLE WORKING CONDITIONS REGULATIONS 2022

To be fair and equitable, flexible labour market conditions need to deliver benefits for employees as well as employers. While for some employees flexible working can be hugely beneficial, a lack of predictability and transparency can be detrimental to earnings, work life balance and career progression. The Transparent and Predictable Working Conditions Regulations came into effect on December 16th,

7 Workplace Relations Commission.

8 A. Prendergast, « Pay transparency in focus with new law on the horizon », *Industrial Relations New*, no. 10, 9 March 2023.

9 *Ibid.*

10 *Remuneration Information and Pay Transparency Bill 2023*: <https://www.oireachtas.ie/en/bills/bill/2023/6/>

11 S. Benedí Lahuerta, « EU Pay Transparency Legislation to Address Gender Pay Inequity: What is on the Horizon and its Likely Impact in Ireland », *Irish Journal of European Law*, vol. 24, 2022, p. 161.

12 *Gender Pay Gap Reporting- new obligations on employers in Ireland*, Kennedys, 2023: <https://kennedyslaw.com/thought-leadership/article/2023/gender-pay-gap-reporting-new-obligations-on-employers-in-ireland/>

2022¹³, in line with the provisions of the EU Directive on Transparent and Predictable Working Conditions in the European Union¹⁴.

In the Irish context the Employment (Miscellaneous Provisions) Act 2018 already required employers to provide minimum details of employment relating to expected duration of contract as well as rates and methods of pay by the fifth day of employment¹⁵. However, the new regulations now require greater detail for employees in relation to how long a probationary period applies, and the conditions attached to it. Probationary periods cannot exceed 6 months, unless on an exceptional basis, where it would be in the interest of the employee to extend but for no longer than 12 months maximum. An employer must now also provide by day five of employment (where previously an employer in the Irish context had two months) information regarding the main place of work or to confirm that the employee is employed at various places or is free to determine his or her place of work where no main place of work exists. These details are in addition to the title, grade, nature and brief description of the work to be performed, date of commencement of the contract of employment and any terms and conditions relating to hours of work (including overtime)¹⁶. One of the most important elements of the regulation, from the perspective of allowing employees greater flexibility in terms of labour market participation, is the provision that now prevents an employer from banning an employee from working for another employer, outside their work schedule, or treating that employee adversely where they do choose to perform work for another employer¹⁷. A restriction on the right to work for another employer may be allowed but only where proportionate, and based on objective grounds relating to factors for example such as health and safety, confidentiality, or conflict of interest amongst others.

III - WORK LIFE BALANCE AND MISCELLANEOUS PROVISIONS BILL 2022

The pandemic brought to the fore difficulties experienced by those with caring responsibilities in balancing their work and caring roles. It also highlighted some of the additional challenges faced by workers in vulnerable domestic situations. When the government initially tabled the « Right to Request Remote Working Bill » in January 2022, it was met with significant criticism by employee representative bodies who argued that it was « stacked in favour of the employer when it came to

13 *Transparent and Predictable Working Conditions Regulations 2022*.

14 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union.

15 J. MacMahon, « Plus Ça Change? Regulating Zero-Hours Work in Ireland: An Analysis of Provisions of the Employment (Miscellaneous Provisions) Act 2018 », *Industrial Law Journal*, no. 48(3), 2019, p. 447.

16 S. Rush, « New regulations in Ireland on transparent and predictable working conditions », *Lewis Silkin*, 2023: <https://www.lewissilkin.com/en/insights/ireland-new-regulations-in-ireland-on-transparent-and-predictable-working-conditions>

17 *EU Directive on Transparent and Predictable Working Conditions signed into law*, Small Firms Association, 2023: <https://www.ibec.ie/sfa/news-insights-and-events/insights/2023/01/17/eu-directive-on-transparent-and-predictable-working-conditions>

grounds for refusal and grounds for appeal » listing thirteen grounds on which an employer could refuse remote working¹⁸.

Cognisant of this criticism, government reviewed the previous approach and set about merging remote work into the « Work Life Balance Bill ». This now includes provision for employers and employees to make requests for flexible or remote working under a Code of Practice to be developed by the Workplace Relations Commission¹⁹.

The Work Life Balance and Miscellaneous Provisions Bill 2022 (which passed initial stages in March 2023) is designed to create a labour market and workplace that meets the needs of carers and those with challenging personal lives in a number of ways. It provides a right to request remote working for certain employees by amending the Parental Leave Act, allows for unpaid leave relating to medical care and domestic violence and creates a right to request a flexible working arrangement, including through the use of remote work, for caring purposes²⁰.

According to the Bill, victims of domestic abuse will be entitled to up to five days paid leave in a 12-month period. Indeed, some leading employers have already anticipated the introduction of the legislation and introduced domestic violence policies at workplace level. One of the largest supermarket chains, Tesco, has introduced paid leave of five days for staff subjected to domestic abuse, this is without a requirement for proof of abuse to avail of the leave²¹. A feature of this leave is that it will be recorded using a specific absence code to safeguard the privacy of the worker and will not be included in the worker's overall absence rate, treated separately to sick leave²². The organisation has pointed out that this is not just a female centric issue and extends to other relationship situations. Furthermore, the organisation has stated that it plans to improve its bereavement leave policy to include early pregnancy loss leave, which will be available to staff, their partners and those involved in surrogacy²³.

Despite the Bill being welcomed as a step forward in many aspects, during its development it was still viewed as relatively light touch in actually allowing a legislative entitlement to flexibility and remote working. This is largely due to the fact that it allows recourse to the Workplace Relations Commission and Labour Court on procedural grounds but not to challenge the actual reason(s) for the employer's decision if requests are not granted²⁴. Neither a WRC adjudicator, nor the Labour

18 B. O'Donnovan, « Remote working law passed - what happens next? », *RTE News*, 1 April 2023.

19 *Ibid.*

20 *Work Life Balance Bill Update*, Mason Hayes Curran, 2022: <https://www.mhc.ie/latest/insights/work-life-balance-bill-update>

21 R. Angel, « Tesco introduces domestic abuse leave ahead of legislation », *Industrial Relations News*, 9 March 2023.

22 *Ibid.*

23 <https://tescoireland.ie/news/2023/tesco-becomes-first-major-irish-grocery-retailer-to-introduce-five-days-paid-leave-for-victims-of-domestic-abuse/>

24 A. Prendergast, « No right to challenge reason for refusing remote work in new bill », *Industrial Relations News*, no. 46, 15 December 2022.

Court (on appeal), would be permitted to assess the merits of an employer's decision to refuse a request for remote working under the updated Work Life Balance and Miscellaneous Provisions Bill. Business representatives have called the code of practice to be reviewed after 12 months once implemented to ensure it is working effectively and is flexible enough to complement the systems already in place in individual companies²⁵.

Conclusion

While many of the legal developments outlined above appear to centre on the needs of females and carers, there is evidence that in Ireland legislative change is underway to ensure greater inclusivity and opportunities to balance work and personal life for everyone.

For example, it has been suggested that a review of the Work Life Balance and Miscellaneous Provisions Bill 2022 will include consideration of whether the right to request flexible working should be extended beyond those who are parents and carers²⁶.

25 B. O'Donnovan, « Remote working law passed - what happens next? », *op. cit.*

26 A. Prendergast, « Concerns over how domestic violence leave pay will be calculated », *Industrial Relations News*, no. 6, 9 February 2023.