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Country report

Gender equality

How are EU rules transposed into national law?

Ireland

Frances Meenan

Reporting period 1 January 2020 – 01 January 2021

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1 Introduction

1.1 Basic structure of the national legal system

Irish law consists of a written Constitution.¹ The Government in Ireland is divided between a legislature, executive and judiciary. The national legislature (the *Oireachtas*) comprises the President of Ireland and two houses, namely the upper chamber *Seanad Éireann* and the lower house *Dáil Éireann*. The judicial system² comprises courts of first instance and courts of appeal. The courts of first instance comprise the High Court, the Circuit Court and the District Court. There is also the Court of Appeal and the Supreme Court (which in the main deals with constitutional cases and matters of public importance). There are also criminal courts to include the Central Criminal Court and a Special Criminal Court.

Most employment and equality disputes are dealt with by adjudication bodies specifically legislated to determine employment and equality disputes. Commencing 1 October 2015, all employment and equality claims³ are heard by an adjudication officer of the Workplace Relations Commission. Decisions of an adjudication officer may be appealed to the Labour Court and may be appealed on a point of law only to the High Court.⁴

Sources of Irish law comprise EU law, constitutional law, legislation and the common law.

Throughout the text there is reference to the various adjudication bodies. For clarification, for claims initiated on or after 1 October 2015, claims are made to the Director General of the Workplace Relations Commission⁵ who then delegates the hearing of the claim to an adjudication officer whose decision may be appealed to the Labour Court. For claims initiated prior to 1 October 2015, claims were referred to the Director of the Equality Tribunal who delegated the investigation thereof to an equality officer whose decision may have been appealed to the Labour Court; in dismissal cases, reference may have been made to a rights commissioner or to the Employment Appeals Tribunal.

1.2 List of main legislation transposing and implementing the directives

All Acts from 1922-2020 and statutory instruments (from 1922-2020) are available on <http://www.irishstatutebook.ie/> and revised statutes are available on the website of the Law Reform Commission.⁶

Consolidated employment legislation is available on www.westlaw.ie/, a commercial service.

- The Employment Equality Act 1998 (in effect 18 October 1998) as amended by the Equality Act 2004 (in effect 18 July 2004), the Civil Law (Miscellaneous Provisions) Act 2008, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the Civil Law (Miscellaneous Provisions) Act 2011, and the Equality (Miscellaneous Provisions) Act 2015 (the Employment Equality Acts 1998 to 2015);
- The Equal Status Act 2000 (in effect 25 October 2000), as amended by the Intoxicating Liquor Act 2003, the Equality Act 2004 (in effect 18 July 2004), the Civil Law (Miscellaneous Provisions) Act 2008, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, Civil Law (Miscellaneous Provisions)

¹ *Bunreacht na hÉireann* (Constitution of Ireland) 1937.

² Articles 34-37 of the Constitution.

³ However, a complainant may elect to bring an equality claim on the gender ground to the Circuit Court.

⁴ The Workplace Relations Act 2015 set up this new adjudication system. In this paper, there is reference to the Equality Tribunal; this body will be dissolved when all claims initiated prior to 1 October 2015 have been heard. There are some other more minor procedural issues, for example, a decision of an adjudication officer under the Equal Status Act 2000 is appealed to the Circuit Court.

⁵ Workplace Relations Act 2015.

⁶ Revised statutes are available on the website of the Law Reform Commission <http://revisedacts.lawreform.ie/revacts/intro>.

- Act 2011, the Equal Status (Amendment) Act 2012, and the Equality (Miscellaneous Provisions) Act 2015 (Equal Status Acts 2000 to 2018); the Education (Admission to Schools) Act 2018; the National Minimum Wage (Low Pay Commission) Act 2015, the Workplace Relations Act 2015 and the Credit Guarantee (Amendment) Act 2016;
- Employment Equality Act 1998 (Section 76 – Right to Information) Regulations 1999 (SI No. 321 of 1999);
- The Irish Human Rights and Equality Commission Act 2014;
- The Maternity Protection of Employees Act 1994, as amended by the Maternity Protection of Employees (Amendment) Act 2004 (in effect 18 October 2004) (the Maternity Protection Acts 1994 and 2004), and as amended by the Maternity Protection Act 1994 (Extension of Periods of Leave) Order 2006 (SI No. 51 of 2006);
- Parental Leave Act 1998 as amended by the Parental Leave Act 2006 (in effect 18 May 2006), the Parental Leave (Amendment) Act 2019 (in effect 19 July 2019) and the European Union (Parental Leave) Regulations 2013 (SI No. 81 of 2013 (8 March 2013));
- Adoptive Leave Act 1995 as amended by the Adoptive Leave Act 2005 (in effect 28 November 2005 and 30 January 2006) and as amended by the Adoptive Leave Act 1995 (Extension of Periods of Leave) Order 2006 (SI No. 52 of 2006);
- Carer’s Leave Act 2001 (came into effect on 2 July 2001);
- Paternity Leave and Benefit Act 2016 (came into effect on 1 September 2016);
- Parent’s Leave and Benefit Act 2019 (came into effect on 1 November 2019);
- Family Leave and Miscellaneous Provisions Act 2021 (came into effect on 1 April 2021) (SI Nos. 148 and 151 of 2021);
- Social Welfare (Consolidation) Act 2005 – there are Social Welfare and/or Social Welfare and Pensions Acts every year;
- Pensions Act 1990 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 (as amended);
- Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (SI Nos. 359 and 515 of 2020) (provision to have remote hearings before the Workplace Relations Commission, the Labour Court and the courts);
- Employment Equality Act 1998 (Section 12) (Reservation of Vocational Training Places) Order (SI No. 260 of 2018) (reservation of places for teachers of the Church of Ireland denomination);
- The European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 (came into effect on 21 August 2017) (SI No. 360 of 2017);
- Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI No. 208 of 2012) (31 May 2012).

1.3 Sources of law

The sources of law are the Constitution of Ireland 1937,⁷ the EU Treaties, the relevant EU Directives, Acts of the *Oireachtas* (Parliament), the common law and case law of the CJEU and the courts and tribunals of Ireland.

⁷ *Bunreacht na hÉireann*.

2 General legal framework

2.1 Constitution

2.1.1 Constitutional ban on sex discrimination

The Irish Constitution of 1937 forbids any exclusion by reason of sex from Irish nationality and citizenship. Article 40 states that 'all citizens shall, as human persons, be held equal before the law' and proceeds to allow the state, in its enactments, to 'have due regard to differences of capacity, physical and moral, and of social function.' Article 45 provides that all citizens, 'men and women equally', have the right to 'an adequate means of livelihood', and directs the state to ensure that they may 'through their occupations find the means of making reasonable provision for their domestic needs.'⁸

2.1.2 Other constitutional protection of equality between men and women

Ireland acceded to the Convention on the Elimination of All Forms of Discrimination Against Women, and the Irish Human Rights and Equality Commission made its submission in January 2017⁹ and provides a useful report on the main areas of equality in Ireland. However, the Convention is not incorporated into Irish law.¹⁰ The Commission has recommended that the Convention be incorporated into Irish law.

2.2 Equal treatment legislation

The Employment Equality Acts 1998 to 2015 are concerned with matters in relation to employment; the Equal Status Acts 2000 to 2018 are concerned with the provision of goods and services; the Pensions Acts 1990 to 2018 are concerned with pensions. The Irish Human Rights and Equality Commission Act 2014 established the Irish Human Rights and Equality Commission to, inter alia, provide information to the public and keep under review the effectiveness of the equality¹¹ and human rights legislation.

The Employment Equality Acts,¹² the Equal Status Acts¹³ and the Pensions Acts¹⁴ provide for the following discriminatory grounds: namely gender, civil status, family status, age, religion, race, disability, sexual orientation and being a member of the Traveller community. There are a number of other statutes which provide for maternity, paternity and parental leave entitlements and protection.

⁸ Article 41.2 provides: '1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. 2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'. There has been considerable debate on having a constitutional referendum to amend this wording. Presently the Citizens' Assembly on Gender Equality is considering such provisions in the Constitution.

⁹ Based on the combined sixth and seventh report to the UN Committee. Ireland acceded to the Convention in 1985. <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

¹⁰ Article 29.6 of the Constitution of Ireland provides that 'no international agreement shall be part of the domestic law of the State save as may be determined by the *Oireachtas* [Parliament]'.

¹¹ If there is a claim under the Employment Equality Acts 1998 (as amended), the Equal Status Acts 2000 (as amended), the Pensions Acts 1990 (as amended), the Maternity Protection Acts 1994 (as amended), the Adoptive Leave Acts 1996 (as amended), the Parental Leave Acts 1998 (as amended), the Paternity Leave and Entitlements Act 2016, the Carer's Leave Acts 2000 (as amended) and the Parent's Leave and Benefit Act 2019 then in the first instance, the claim is referred to the Director General of the Workplace Relations Commission. Alternatively, if there is a claim under the Employment Equality Acts, the Equal Status Acts and the Pensions Acts on grounds of sex, the complainant may elect to initiate their claim in the Circuit Court with unlimited jurisdiction as to damages that may be awarded.

¹² Section 6 of the Employment Equality Act 1998 (as amended).

¹³ Section 3 of the Equal Status Act 2000 (as amended).

¹⁴ Section 66 of the Pensions Act 1990 as amended by the Social Welfare (Miscellaneous Provisions) Act 2004 (as amended).

3 Implementation of central concepts

3.1 General (legal) context

3.1.1 Surveys on the definition, implementation and limits of central concepts of gender equality law

There are no surveys concerning the definition, implementation and limits of the concepts. The limits of gender equality law – and more particularly in respect of equal pay – is the binary nature of the concept in that a complainant must have a comparator of the opposite sex in order to proceed with an equal pay claim.

In a recent survey, women are almost twice as likely as men to report discrimination in the workplace. Discrimination on pay and promotion were more frequently mentioned, which is consistent with evidence of the gender pay gap and low female representation in the most senior positions in the Irish labour market.¹⁵

3.1.2 Other issues

The implementation of legislation for the gender pay gap is awaited. The Gender Pay Gap Information Bill 2019 was published in April 2019. As of year-end 2020, it has not yet been passed through the *Oireachtas* (Parliament). Following the formation of the new Government in June 2020, the new Government Department of Children, Equality, Disability, Integration and Youth was established (formerly, Equality was part of the Department of Justice and Equality). The Bill lapsed with the dissolution of the *Dáil* in January 2020, with a general election in February 2020 before being restored. The Minister announced in December 2020 that he intended to strengthen the Bill – to ensure that it applies to all public bodies and Government departments – and strengthen the enforcement mechanisms in the Bill.

3.1.3 General overview of national acts

The various Acts prohibiting discrimination and promoting equality (where applicable) transpose the Directives. In addition, there is now a move towards positive action in regard to having a higher representation of women in the higher education sector at professorial level and also in the civil service.

3.1.4 Political and societal debate and pending legislative proposals

The Central Statistics Office Report entitled 'Women and Men in Ireland 2019'¹⁶ stated that out of a total population of 4 857 000, 2 405 800 are men and 2 451 300 are women. The employment rate of women was 63.7 % and men 74.6 %. The Report stated that:

- Irish women are more likely to have a third-level qualification than men, with over half (55.9 %) of women aged 25-34 having a third-level qualification compared to just 52.5 % of men in this age group.
- Men work longer hours than women in paid employment. Men worked an average of 40.1 hours a week in paid employment compared to 32.3 hours for women.
- Men have a higher rate of employment. The male employment rate was 74.6 % and the female rate being 63.7 %.
- Men also have a higher rate of unemployment with a rate of 5.6 % which was above the rate of 5.2 % for women.
- Just over one in three women work in the health or education sectors.

¹⁵ McGinnity, F. et al, 'Who Experiences Discrimination in Ireland – Evidence from the QNHS Equality Modules' (2017) IHREC and ESRI para. 5.2 <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

¹⁶ <https://www.cso.ie/en/releasesandpublications/ep/p-wamii/womenandmeninireland2019/>.

- Most workers in the Health and the Education sectors were women, while most workers in Agriculture, Construction and Transport were men.
- Irish women have a fertility rate of 1.77 (measured in 2017).
- The vast majority (98 %) of those who were looking after home/family in 2016 were women.
- Less than a quarter (22.2 %) of TDs in *Dáil Éireann* in 2016 (general election February 2016)¹⁷ were women.
- Just over one in four (26 %) of all senior roles in large enterprises were held by women in 2019.
- Women occupied only 11.5 % of Chief Executive Officer (CEO) positions and 28.3 % of Senior Executive roles.
- Women held just one in five positions on Boards of Directors (19.6 %) and only 7.4 % of Chairperson roles.

The National Strategy for Women and Girls 2017-2020 was published in April 2017.¹⁸ The Report states that:

'It is underpinned by the societal values of equality, non-discrimination, inclusiveness, generosity, intersectionality, diversity and respect for human rights. It recognises that achieving its vision will involve shared responsibility between Government, business, civil society and individuals of all genders at national and local level. It will require accountability from public and private sector organisations in the delivery of the actions outlined in the Strategy.'

The Strategy further states:

'The National Strategy is the framework through which the Government will pursue actions to advance the rights of women and girls and to enable their full participation in Irish society. A strategic approach is needed to identify remaining barriers which prevent women from achieving their full potential and from enjoying opportunities on a par with men. As opportunities and outcomes can differ for women and girls depending on their age, sexual orientation, gender identity, civil status, beliefs, ethnicity or ability, a national strategy is needed to address instances of multiple discrimination and to put forward positive action measures for women and girls who experience particular disadvantages arising from the intersection of gender with other aspects of their identity. There is an intrinsic right to equality that needs to be addressed.'

It is proposed to advance this goal through six high-level objectives and there is proposed legislation arising from some of the strategic goals, as follows:

- Advance socio-economic equality for women and girls, e.g. improved support for working parents, access to affordable childcare, increased availability of family leave and work-life balance, more women in apprenticeships, access to education, reduce the gender pay and pension gap.
- Advance the physical and mental health and wellbeing of women and girls e.g. draft legislation in respect of matters of surrogacy.
- Ensure the visibility in society of women and girls, and their equal and active citizenship.
- Advance women in leadership at all levels e.g. greater representation of women in senior positions in the civil and public service, more women in business leadership, gender balance on State Boards and higher education.
- Combat violence against women e.g. Istanbul Convention ratified and strategy implemented.

¹⁷ There was a general election in February 2020 and the position only changed marginally.

¹⁸ The Strategy is intended to be a living document. Further actions will be added where necessary over its lifetime.

- Embed gender equality in decision-making.

On 12 November 2018, the Prime Minister (*An Taoiseach*) and the Minister of State with special responsibility for Higher Education launched the *Gender Action Plan 2018 – 2020: Accelerating Gender Equality in Irish Higher Education Institutions*. The Action Plan is designed to transform the higher education sector’s gender equality performance. The Government initiative is that there will be 45 senior academic posts put in place to which *only women may apply*. Such appointments are to take place over three years and there is to be additional state funding for such posts. The minister also wants to have 40 % of professors in institutes of higher education to be female by 2024. The Gender Equality Taskforce was established in November 2017 to build on the work of the HEA National Review of Gender Equality in Irish Higher Education Institutions (2016). The Taskforce identified significant measures that will further accelerate progress in achieving gender equality in Irish higher education institutions following the recommendations of the HEA Expert Group (2016). The requirements for such appointments are awaited.¹⁹

In recent years, where there are major issues of constitutional importance,²⁰ there has been a Citizens’ Assembly²¹ formed of 99 citizens²² drawn randomly who meet and hear experts over a number of weeks on the particular subject matter. The Assembly on Gender Equality is chaired by Dr. Catherine Day, former Secretary General of the European Commission. The Assembly had some meetings in early 2020 and meetings were continued later in the year remotely (due to COVID-19 and public health guidelines). As of March 2021, the Assembly was still having meetings remotely, arising from public health guidelines.²³ Various topics have included violence, care, women in the home and in employment. The Assembly is due to report in the second quarter of 2021.

3.2 Sex/gender/transgender

3.2.1 Definition of gender and sex

There is no definition of gender and sex.

3.2.2 Protection of transgender, intersex and non-binary persons

Whilst discrimination due to gender reassignment is not explicitly prohibited in the Employment Equality Act 1998 (as amended), the Equality Tribunal has decided that the gender ground protects transgender persons from sex discrimination.²⁴ The Gender Recognition Act 2015 provides for gender recognition certificates and the subsequent amendment of the Register of Births, Marriages and Deaths.

The Equality Tribunal stated in *Hannon v First Direct Logistics Limited*:²⁵

- ‘4.3 It is well established in law that the gender ground protects transgender persons from sex discrimination, that is, discrimination arising essentially if not exclusively on the sex of the person concerned. Such approach was approved by the European Courts [sic] of Justice in P V S and Cornwall County Council
- 4.4 Transsexualism is a recognised medical condition. Transsexualism is treated by a combination of hormone therapy, surgery (in some cases) and “real life experience”, that is, living as a member of the other sex. To gain “real life

¹⁹ See Commentary in *Sunday Times* (Irish edition) on 14 April 2019 (pay wall).

²⁰ For example, deliberations prior to the referendum on the 8th amendment to the Constitution permitting termination of pregnancy under certain circumstances.

²¹ <https://www.citizensassembly.ie/en/>. The Citizens’ Assembly is formed by resolution of the Houses of the *Oireachtas* (Parliament).

²² Such persons being entitled to vote in a referendum to amend any article of the Constitution of Ireland.

²³ <https://www.citizensassembly.ie/en/what-we-do/>.

²⁴ *Hannon v First Direct Logistics Ltd*. DEC – E2011-66; EE/2008/043; [2011] ELR 215.

²⁵ DEC – E2011-066; EE/2008/043; [2011] ELR 215.

experience” the person must be able to live their life continuously in the other sex without the need to revert to the birth sex. It is clear that for such experience to be relevant and appropriate the person must be able to interact with the society as a whole. This also applies to the workplace and it is clear that these Acts impose an obligation on an employer to enable a person with a gender identity disorder to allow, within the confines of said workplace, allowing for health and safety, uniform etc. requirements, to accommodate such “real life experience”.’

3.2.3 Specific requirements

There is no requirement for such persons to undergo any surgery or medical treatment or indeed change their name by deed poll in order to claim on the gender ground. However, if bringing a claim on the disability ground (as well as the gender ground), such complainant would be advised to have appropriate medical evidence for the hearing.²⁶

3.3 Direct sex discrimination

3.3.1 Explicit prohibition

Direct discrimination is defined in national legislation:

‘6(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where –

A person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the “discriminatory grounds”) which—

(i) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned,

(b) a person who is associated with another person—

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination.

(2) As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are—

(a) that one is a woman and the other is a man (in this Act referred to as “the gender ground”),’

Section 21 of the Employment Equality Act 1998 provides that an equality clause is implied in the contract of employment.

3.3.2 Prohibition of pregnancy and maternity discrimination

Section 6(2A) of the Employment Equality Act 1998 (as amended) provides that discrimination on the gender ground occurs ‘where on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated.’ In addition, it is a statutory unfair dismissal if an employee is dismissed by reason of her pregnancy (or matters connected therewith) under the Unfair Dismissals Acts 1977 to 2015 (this is in addition to a discriminatory dismissal under the Employment Equality Acts 1998 to 2015). Furthermore, if an employer refuses to re-employ an employee in their employment (or in suitable alternative employment if their contractual employment no longer exists)

²⁶ For example, *Hannon v First Direct Logistics Ltd.* DEC – E2011-066; EE/2008/043; [2011] ELR 215.

following maternity, paternity, adoptive, parental or carer's leave, it is an unfair dismissal under the Maternity Protection Acts 1994 and 2004, the Paternity Leave and Benefit Act 2016, the Adoptive Leave Acts 1995 and 2005, the Parental Leave Acts 1998 and 2006, the Parent's Leave and Benefit Act 2019 or the Carer's Leave Act 2001, as the case may be.

3.3.3 Specific difficulties

Whilst not a specific difficulty, in the event of a proposed claim for dismissal arising out of a pregnancy-related matter, the complainant must elect as to whether to bring the claim under the Unfair Dismissals Acts 1977 to 2015 or under the Employment Equality Acts 1998 to 2015; then if the claim is to be brought under the Employment Equality Acts, there has to be an election as to whether the claim is to be brought to the Workplace Relations Commission with two years as the maximum award, or to the Circuit Court with unlimited redress but a risk of an exposure to costs, if unsuccessful.

3.4 Indirect sex discrimination

3.4.1 Explicit prohibition

Section 19 Employment Equality Act 1998 (as amended) provides that there cannot be indirect discrimination in respect of remuneration and Section 22 of the same Act provides that there cannot be indirect discrimination in relation to equal treatment.

Indirect discrimination is prohibited in respect of remuneration and equal treatment.²⁷ Section 19(4) (remuneration) provides:

'(a) Indirect discrimination occurs where an apparently neutral provision would put persons of a particular gender (being As or Bs) at a particular disadvantage in respect of remuneration compared with other employees of their employer.

(b) Where paragraph (a) applies, the persons referred to in that paragraph shall each be treated for the purposes of subsection (1) as complying or, as the case may be, not complying with the provision concerned, whichever results in the higher remuneration, unless the provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. (c) In any proceedings statistics are admissible for the purpose of determining whether this subsection applies in relation to A or B.'

Section 19(5) provides: 'Subject to subsection (4), nothing in this Part shall prevent an employer from paying on grounds other than the gender ground, different rates of remuneration to different employees.'

Section 22(1) (equal treatment) provides:

'(a) Indirect discrimination occurs where an apparently neutral provision would put persons of a particular gender (being As or Bs) at a particular disadvantage in respect of any matter other than remuneration compared with other employees of their employer. (b) Where paragraph (a) applies, the employer shall be treated for the purposes of this Act as discriminating against each of the persons referred to (including A or B) unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. (c) In any proceedings statistics are admissible for the purpose of determining whether subsection (1) applies in relation to A or B.'

²⁷ Sections 19 and 22 of the Employment Equality Act 1998 (as amended) by Sections 8 and 9 respectively of the Equality (Miscellaneous Provisions) Act 2015.

The definition of 'indirect discrimination' was amended by the Equality (Miscellaneous Provisions) Act 2015 so that the wording would be compliant with Article 2(1)(b) of Directive 2006/54.²⁸ Some years ago the Labour Court observed in *Department of Justice, Equality and Law Reform v Civil Public and Services Union*²⁹ that the definition of 'indirect discrimination' in the legislation³⁰ in respect of equal pay did not fully comply with the definition of that concept in Directive 97/80 and noted that if there is a conflict between national law and Community law then Community law shall prevail. In the interim, Article 2(1)(b) of Directive 2006/54 provided a definition of 'indirect discrimination'. This case arose from equal pay proceedings by clerical officers in the Department of Justice, Equality and Law Reform who were assigned to work as clerical officers in the police force.³¹ The comparators were members of the police force who were assigned to carry out clerical duties. The Court went on to adopt the test for 'objective justification' utilised in *Barton v Investec Henderson Crosthwaite Securities Ltd.*³² namely:

'(1) that there were objective reasons for the difference; (2) unrelated to sex; (3) corresponding to a real need on the part of the undertaking; (4) appropriate to achieving the objective pursued; (5) it was necessary to that end; (6) that the difference conformed to the principle of proportionality; (7) that was the case throughout the period during which the differential existed.'

3.4.2 Statistical evidence

Section 22(1)(c) of the Employment Equality Act 1998 (as amended) provides that statistics are admissible in indirect discrimination proceedings.³³ In *Nationalist & Leinster Times Limited v Ashmore*,³⁴ the complainant and the male comparator were involved in like work within the statutory meaning. The complainant worked part time whereas the male comparator worked full time. The complainant was paid less per hour as her male comparator received an additional element of pay known as the 'in house rate' in addition to the basic industry rate for the printing sector which the complainant also did not receive. Further, the complainant alleged that her male comparator received a higher employer pension contribution rate relative to her. The complainant's claim for equal pay involved two aspects of equal pay. The first is that there is a difference in overall pay between her and the male comparator. The second is that there is a difference in pension contributions on the part of the respondent to those of the complainant and the male comparator. The complainant appealed the decision of the Equality Officer that she had failed to establish a prima facie claim of discrimination or regarding equal pay to the Labour Court. The Labour Court was required to establish whether the complainant was entitled to equal pay, pro rata to her hours of work. The Labour Court determined that in a claim for equal pay, evidence showing that more men than women are in receipt of higher pay for like work does not, in itself, establish prima facie indirect discrimination. It is permissible if it is genuinely the result of an unrelated factor to that of gender. In order to establish a claim for equal pay in a claim of indirect discrimination on grounds of gender, it must be demonstrated that the cause of the difference in pay has such a disparate effect between men and women as to infer that an ostensibly gender-neutral determinative of pay is in reality discriminatory as it leads to unequal pay for equal work. Statistics are not decisive in themselves; they are only one aspect to be taken into account when considering whether a putative gender-neutral requirement is in fact indirectly discriminatory. The statistical evidence in this case was unreliable and of little or no probative value. It is for the complainant to establish, on credible evidence, the factual basis upon which an

²⁸ Sections 8 and 9 of the Equality (Miscellaneous Provisions) Act 2015 commenced on 1 January 2016.

²⁹ [2008] ELR 140; this determination was referred to the CJEU *sub nom. Kenny v Minister for Justice, Equality and Law Reform Case C-427/11*.

³⁰ I.e., the Employment Equality Act 1998 and the Equality Act 2004.

³¹ *An Garda Síochána*.

³² [2003] IRLR 332.

³³ See *King v Minister for Finance* [2010] IEHC 307 and *Inoue v NBK Designs Ltd.* DEE 12/2002; [2003] ELR 98 (Labour Court).

³⁴ EDA133, [2013] ELR 216.

inference of discrimination can properly be drawn.³⁵ The pay difference is based entirely on the date of commencement of employment and is equally applicable to men and women. In the absence of a finding of indirect discrimination, this is a complete defence, as it is based on a ground other than gender by reason of Section 19(5) of the Employment Equality Act 1998 (as amended). The rate of pension contributions made by the respondent are determined solely on the basis of the pension scheme in which the employees are enrolled and apply equally to men and women.

The requirement to have a comparator of the opposite sex and segregated employment was considered in *Health Service Executive v 248 Named Complainants*³⁶ where the complainants were a group of female assistant directors of public health nursing (predominantly female) as compared with a group of assistant directors of nursing who had a slightly higher number of male comparators but the difference was so small as to be effectively gender-neutral. By agreement between the parties, the only matter to be determined by the Court was whether or not the complainants had established a prima facie case of indirect pay discrimination. The principle that the Labour Court considered was that gender discrimination is binary in nature and where grades of pay are involved, a predominantly female grade must be compared with a predominantly male grade in order to establish a prima facie case of discrimination. The Acts have no effect where the pay of a woman is compared with that of another woman or the pay of a predominantly female grade is compared with that of a grade that is gender-neutral. Statistical analysis is a tool that is designed to assist the court to reveal discrimination which is not immediately apparent.

3.4.3 Application of the objective justification test

In *Inoue v NBK Designs Ltd.*,³⁷ the Labour Court was satisfied that the dismissal of a part-time/job-sharing secretary who was a female lone parent with a child attending school was indirect discrimination following the employer's decision to amalgamate the position into a full-time post. The questions asked were: does the need to work full time correspond to a real need on the part of the employer? Were the means chosen appropriate? Was the method chosen appropriate to meet the end in view? The Labour Court was satisfied that the impugned requirement (i.e. to work full time) was not necessary and appropriate and cannot be justified by objective factors unrelated to the claimant's sex.

3.4.4 Specific difficulties

The real issue is the burden of proof and the making of a prima facie case when there is alleged indirect discrimination. The best advice that can be given in such circumstances is to use all the information that one can obtain from the employment concerned, by the seeking of information in respect of the alleged indirect discrimination and the obtaining of statistics.

3.5 Multiple discrimination and intersectional discrimination³⁸

3.5.1 Definition and explicit prohibition

Section 6 of the Employment Equality Act 1998 (as amended) and the Pensions Acts 1990 to 2019 provide that there are nine grounds of discrimination in the legislation and a prospective claimant may bring proceedings on one or more grounds of discrimination.

³⁵ *Kelly v National University of Ireland (UCD)* Case 104/10 [2011] E.C.R. I-06813 and *Meister v Speech Design Carrier Systems GmbH* [2012] I.C.R. 1006; [2012] Eq. L.R. 602 followed.

³⁶ EDA132, [2013] ELR 206.

³⁷ DEE 12/2002; [2003] ELR 98 (Labour Court) applying *Bilka-Kaufhaus GmbH* Case C-170/84.

³⁸ See for more information Fredman, S., Intersectional discrimination in EU gender equality and non-discrimination law (2016) European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb>.

However, the legislation provides that, in practice, those who claim discrimination on a particular ground must compare themselves with somebody else on the same ground, e.g. two persons of the opposite sex, so that one is a man and the other is a woman. There is no 'compound' discrimination where each ground adds to the other ground. Each ground is a separate case which must be pleaded and defended.

It is important to note that even if a claimant succeeds on more than one ground of discrimination, the maximum award can only be two years' remuneration (i.e. the same ceiling as if a claimant was successful on one ground).

3.5.2 Case law and judicial recognition

In *Lawless v Eurozone Investment Options Ltd.*,³⁹ the Equality Tribunal confirmed that each ground had to be considered separately. In *Freeman v Superquinn*,⁴⁰ the Labour Court, on appeal, overturned a recommendation where it considered that an equality officer dealt with the three grounds of discrimination, of marital status (now civil status), family status and age, as one issue.

The cases do not raise a concern but there is the issue that each ground stands on its own merits and likewise even if a claimant succeeds on more than one ground the compensation will still be as if they succeeded on only one ground.

3.6 Positive action

3.6.1 Definition and explicit prohibition

Section 24 of the Employment Equality Act 1998 (as amended) provides for certain limited positive action:

- '24(1) This Act is without prejudice to any measures –
- (a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and
 - (b) providing for specific advantages so as –
 - (i) to make it easier for an under-represented sex to pursue a vocational activity, or
 - (ii) to prevent or compensate for disadvantages in professional careers.'

It is considered that this definition complies with Article 157(4) TFEU. In addition to this provision, the Electoral (Amendment) (Political Funding) Act 2012⁴¹ provides that state funding of political parties for the next general election⁴² is dependent on the political party having no less than 40 % female candidates in the general election. In January 2020, third-level colleges received approval for 20 women-only professorships. A total of 45 posts are to be allocated over a 3-year period.⁴³

3.6.2 Conceptual distinctions between 'equal opportunities' and 'positive action' in national law

Positive action is considered to be a method of achieving 'equal opportunities' and 'equality of opportunity'. Positive action may be where two persons are of equal merit and there is a policy of giving the employment position to a person who is a member of the under-represented sex. Various legislative provisions provide for equality on State Boards by specifying that there is to be a particular percentage of men and women on the relevant

³⁹ E/2007/101 (Equality Tribunal).

⁴⁰ DEC-E/2002/13 (Labour Court).

⁴¹ <http://www.irishstatutebook.ie/eli/2012/act/36/enacted/en/print.html>.

⁴² The general election took place in February 2016.

⁴³ <https://www.thejournal.ie/women-only-roles-irish-education-4335004-Nov2018/>.

board. These are self-standing legal concepts insofar as public bodies have certain obligations. For example, it is a policy of the Government to have at least 40 % female representation on State Boards (unless the governing legislation provides for specific representation); also, in the higher echelons of the civil service where females are under-represented, then there may be a policy of positive action in relation to appointments. A 'public body' comprises a Department of State for which a Minister of the Government is responsible,⁴⁴ a local authority, the Health Service Executive, a university or institute of technology, any education and training board, and any other person, body or organisation established by or under an enactment or charter, or a company established under the companies legislation which is financed wholly by the state or any other body or person where the funds are provided by the *Oireachtas* (Parliament).

Section 42 of the Irish Human Rights and Equality Commission Act 2014 provides:

'(1) A public body shall, in the performance of its functions, have regard to the need to-

.....

(b) Promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and'

3.6.3 Specific difficulties

There are no difficulties but there has been considerable discourse about gender quotas and positive discrimination in relation to numbers of female candidates relating to the general election which took place in February 2016. The 'quota' of 30 % has to go up to 40 % in the next general election and if it fails to do so, there will be a severe reduction in state funding for any such political party which fails to apply the quota in the next parliamentary term.

3.6.4 Measures to improve the gender balance on company boards

In Ireland there are two approaches aimed at improving the gender balance on the boards of large companies: the requirement for a non-financial statement and for companies listed on the stock exchange, a diversity report. For companies listed on the stock exchange the 'soft law' approach also applies.

The European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 came into operation on 21 August 2017 in respect of financial years commencing 1 August 2017.⁴⁵ The Regulations apply to a company which is either a large company with an average number of employees exceeding 500, or a holding company which qualifies as a large company and is the holding company of a group where the aggregate number of employees exceeds 500. Inter alia, the Regulations provide for a non-financial statement which contains information about social and employment matters. In addition, the directors of a large trading company (i.e. a company which trades in shares) shall include a description of the diversity policy in relation to the company's board of directors with regard to aspects such as age, gender or educational and professional backgrounds, the objective of the diversity policy, how the policy has been implemented and the results of the diversity policy in the financial year. In the absence of such a policy the directors must provide an explanation as to why there is no such policy. The company's statutory auditors will have to report as to whether this information is contained in the corporate governance statement. If a person fails to comply with these Regulations, they may be subject to a fine on summary conviction or to imprisonment for a term not exceeding six months, or to both. The Director of Corporate

⁴⁴ Other than in relation to the Department of Defence, the Defence Forces (army, navy, air corps).

⁴⁵ European Union (Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups) Regulations 2017 SI No. 360 of 2017 implementing Directive 2014/495/EU. <https://www.djei.ie/en/Legislation/SI-No-360-of-2017.html>.

Enforcement may investigate instances of suspected offences under these Regulations, enforce the Regulations and undertake all acts or things necessary for the performance of their functions under the Regulations.

The self-regulatory requirement of the Irish Stock Exchange, i.e. a code of conduct, is also relevant to the improvement of the gender balance on company boards. The Irish Corporate Governance Annex states⁴⁶ that the Irish Stock Exchange applies the UK Corporate Governance Code and that Code sets the standard for corporate governance internationally. Where a company has not complied with the Code, it is required to set out the nature and the extent of, as well as the reasons for, non-compliance. For listed companies, there is no precise quota and if there is a target, it is a 'soft target'. For example, some companies, mainly the Bank of Ireland⁴⁷ and Allied Irish Bank,⁴⁸ have published their diversity policies. The Bank of Ireland sets a target of 15 % female representation and has 2 female members among the 12 directors (presently 17 %).⁴⁹ The Allied Irish Bank has also published a diversity policy. Its aim is to have a 25 % gender target and it presently has 3 female directors out of a total of 12 directors. The highest proportion of female board membership is one-third, namely 4 out of 12 on the board of Cement Roadstone Holdings plc.⁵⁰

Appointments to State Boards are managed by the Public Appointments Service.⁵¹ The website provides statistics of the numbers applying for advertised positions and the resultant outcome; all statistics are broken down into male and female. It must be emphasised that such boards are in the main statutory bodies, e.g. the Residential Tenancies Board, which has a regulatory remit and a quasi-judicial role in relation to tenancies, or the Road Safety Authority. A few of such bodies (e.g. commercial semi-state companies) are incorporated as companies.⁵² However, they are not listed companies. In the case of state/semi-state companies set up by statute, directors are appointed by the relevant Minister (or the Government of Ireland, as provided in the relevant statute). The relevant statute more usually provides that there should be a gender balance on the board.⁵³ The relevant line Minister⁵⁴ appoints the members of the relevant board of a commercial semi-state company and ensures that there is a gender balance on the board. The Programme for Partnership Government of May 2016 provides that there should be at least 40 % female representation on State Boards.⁵⁵ To this end, various pieces of

⁴⁶ <http://www.ise.ie/search/?q=governance>. In addition, the Corporate Code of Conduct applies to companies listed on the main securities market of the Irish Stock Exchange. Companies listed on the Premium List of the London Stock Exchange and the Main Securities Market of the Irish Stock Exchange must adhere to the UK Corporate Governance Code.

⁴⁷ This is not the Central Bank of Ireland but a commercial bank trading on the Irish Stock Exchange.

⁴⁸ This state-owned bank has been taken over by the Irish Government since the financial crash.

⁴⁹ See the Annual Report – Bank of Ireland 2016 and in particular the report of the Group Nomination and Governance Committee of the Court of Directors refers to, inter alia, gender diversity as being beneficial to the Court (Board) (see p. 152), <https://investorrelations.bankofireland.com/2016-results-announcement/>.

⁵⁰ Cement Roadstone Holdings, https://www.crh.com/media/1311/crh-annual-report-2016_lowres.pdf.

⁵¹ See: <http://www.stateboards.ie/stateboards>.

⁵² For example, Dublin Bus, Irish Rail and *Bus Éireann* (all designated activity companies). The holding body, *Córas Iompair Éireann*, is a statutory corporation. The Government of Ireland is the sole shareholder. There has been a policy of appointing both men and women to the boards of these companies and bodies. Such companies are not listed on the stock exchange.

⁵³ See earlier report on equality and company boards where there is a full list of Irish statutes setting out equality requirements.

⁵⁴ In some cases, the appointment is by the Government of Ireland.

⁵⁵ https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf (see Sections 11.11 and 11.13) of the 'Programme for a Partnership Government May 2016'. There was a general election in early February 2020 and as of 29 June 2020 a new Government is now in place comprising three parties, namely *Fine Gael*, *Fianna Fáil* and the Green Party. There is a section on gender equality which provides that during the term of the Government (usually 5 years) the Government will develop and implement a new National Strategy for Women and Girls. The Government will also consider as to whether there is to be a referendum to amend Article 41.2. of the Constitution which provides: '1. In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. 2. The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'. Presently the Citizens' Assembly on Gender Equality is considering such provisions in the

legislation setting up State Boards and committees in recent years have contained provisions requiring appointments to have either a set minimum number of male and female members or to have as far as reasonably practicable an equitable balance between women and men.⁵⁶

By way of background, company law adopts a relatively hands-off approach in relation to the procedures for appointing directors.⁵⁷ The reason is that historically the appointment of directors was seen as an internal company matter and, secondly, company law provides for rules in the form of model articles (the constitution of the company) which can be adapted or departed from by companies at their discretion. The reason for such a lack of procedures is because of the different types of company, for example, as to whether the company is owner managed, the types of persons who can be appointed and so on. Therefore, shareholders have considerable flexibility in choosing appointment procedures. The appointment of directors is an accepted function of the shareholders in general meeting and the members have the power to appoint directors. An employee can be an executive director, e.g. a managing director of a company. Such a person would be an employee working under a contract of service in addition to being a member of the board as approved by the shareholders in the general meeting. Such employee's original employment and recruitment would be subject to the Employment Equality Acts 1998 to 2015.

The Worker Participation (State Enterprises) Act 1977 (as amended) provides for employee participation at board level in certain semi-state companies. The legislation provides for election to the board among employees. In addition, the Worker Participation (State Enterprises) Amendment Act 1998 provided for sub-board level participation in certain semi-state companies and organisations; again, that is provided for by election to the sub-board. Obviously in both situations men and women can seek election to the relevant board.

There are various women's groups promoting gender balance on company boards.⁵⁸

3.6.5 Positive action measures to improve the gender balance in other areas

The Electoral (Amendment) (Political Funding) Act 2012⁵⁹ provides that at least half of the future funding of political parties is linked to certain gender quotas being reached in relation to candidates. This first time the legislation came into operation was in respect of the general election which took place on 26 February 2016 and will apply to future general elections. Therefore, at the general elections which took place in 2016 and 2020, there was a 30 % quota each of men and women in respect of the qualifying parties (a registered political party and whose candidates have got at least 2 % of the national vote in the previous general election). Then within seven years of the general election of 2016 (i.e. from 2023 onwards), there will have to be a quota of 40 % men and 40 % women in respect of the qualifying political parties. Failure to comply with this provision will mean that the state funding of the political party will be reduced by 50 %.⁶⁰

Constitution. In addition, the Government intend to introduce legislation on the gender pay gap in larger companies and the expansion of the equality budgeting programme across all Government departments. There are also to be additional benefits for carers.

https://www.fine Gael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf.

⁵⁶ Such legislation includes for example Section 12 of the Inland Fisheries Act 2010; Section 98 of the Adoption Act 2010; Schedule 1 Article 4 of the Charities Act 2009; Section 8 of the Broadcasting Act 2009; Section 19 of the National Asset Management Agency Act 2009.

⁵⁷ Ahern, D. (2009), *Directors' Duties – Law and Practice*, Round Hall, Dublin, at paragraph 1-49.

⁵⁸ For example, the 30 % Club <https://30percentclub.org/about/chapters/ireland>.

⁵⁹ <http://www.irishstatutebook.ie/eli/2012/act/36/enacted/en/html>.

⁶⁰ This issue will be heard in *Mohan v Ireland* and the Attorney General Supreme Court, 21 March 2019 <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/43c7b853bba05851802583c400561cbb?OpenDocument>; Court of Appeal, 9 February 2018 <http://www.courts.ie/Judgments.nsf/0/E4C2EBB60C0246F280258234003D0129>; High Court, 2 February 2016 <http://www.courts.ie/Judgments.nsf/0/C9788FB8B228680580257F4F0037B507>. The Supreme Court

At the last general election in February 2020, 22.5 % women were elected as members of parliament (lower house).⁶¹

3.7 Harassment and sexual harassment

3.7.1 Definition and explicit prohibition of harassment

Section 14A(7)(a)(i):

'Harassment' is defined as:

'any form of unwanted conduct related to any of the discriminatory grounds, and

(b) Being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

(c) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.'

This definition in the author's view complies with the EU definition found in Article 2(1)(c) of Directive 2006/54.

3.7.2 Scope of the prohibition of harassment

The scope of the prohibition is provided for in Section 14A of the Employment Equality Act 1998 (as amended). Harassment may be defined as where an employee is harassed or sexually harassed either at a place where the employee is employed ('the workplace') or otherwise in the course of his or her employment by a person who is employed at that place or by the employer, or client, customer or other business contact of the victim's employer. Furthermore, if the circumstances of the harassment are such that the employer ought reasonably to have taken steps to prevent it, or if the harassment has occurred and either the victim is treated differently in the workplace or otherwise in the course of his or her employment by reason of rejecting or accepting the harassment, or it could reasonably be anticipated that he or she would be so treated, the harassment or sexual harassment constitutes discrimination by the victim's employer in relation to the victim's conditions of employment.⁶² A person's rejection or submission to harassment or sexual harassment may not be used by an employer as a basis for a decision affecting that person.⁶³

The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 provides an approved code of practice for the purposes of the 1998 Act.⁶⁴ An employer who takes the steps as set out in the Code to prevent harassment or to reverse it or to prevent its recurrence may avoid liability in any proceedings. Employers must have a policy to deal with complaints of harassment or sexual harassment even if it is a small employer⁶⁵ Even if an employer has a policy to deal with complaints of sexual harassment, the managers must be trained as to how to deal with such complaints.⁶⁶

has remitted the substantive issue to the High Court as both the High Court and Court of Appeal considered that there was no locus standi to hear the substantive issue regarding the constitutionality of quotas.

⁶¹ This is only a marginal increase on the February 2016 general election.

⁶² Section 14A(1)(a) and (b) of the Employment Equality Act 1998 (as amended).

⁶³ Section 14A(3) of the Employment Equality Act 1998 (as amended).

⁶⁴ SI No. 208 of 2012.

⁶⁵ *Catlan Trading Co. Ltd. v McGuinness* EDA 5/2017 (Labour Court). The employer did not have a policy in place to deal with allegations of harassment or sexual harassment.

<https://www.workplacerelations.ie/en/Cases/2017/March/EDA175.html>.

⁶⁶ *A Store v A Worker* EDA 3/2016 (Labour Court)

<https://www.workplacerelations.ie/en/Cases/2016/January/EDA163.html>.

Section 11 of the Equal Status Act 2000 (as amended) provides that a person shall not sexually harass or harass another person ('the victim') where the victim avails or seeks to avail himself or herself of any service or the purchase of goods, or accommodation, services or amenities in relation to accommodation, or is a student who has applied for admission or seeks to avail of any service by an educational establishment and where the alleged perpetrator is in a position of authority. It shall be a defence for the responsible person to prove that they took such steps as are reasonably practicable to prevent the sexual harassment or harassment.⁶⁷

3.7.3 Definition and explicit prohibition of sexual harassment

Section 7 (a) (ii) provides that

- '(ii) references to sexual harassment are to any form of verbal, non-verbal or physical conduct of a sexual nature,
- (b) being conduct which in either case has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.
- (c) Without prejudice to the generality of paragraph (a), such unwanted conduct may consist of acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other material.'

This definition in the author's view complies with the EU definition in Article 2(1)(d) of Directive 2006/54. Employers must have a policy to deal with complaints of harassment or sexual harassment even if it is a small employer.⁶⁸ Even if an employer has a policy to deal with complaints of sexual harassment, the managers must be trained as to how to deal with such complaints.⁶⁹

3.7.4 Scope of the prohibition of sexual harassment

The prohibition of 'sexual harassment' also applies where an employee may have been sexually harassed by an independent contractor of the employer.⁷⁰ Sexual harassment is also prohibited outside of the workplace. The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 provides an approved code of practice for the purposes of the 1998 Act.⁷¹ An employer who takes the steps as set out in the Code to prevent harassment (to include sexual harassment) or to reverse it or to prevent its recurrence may avoid liability in any proceedings. However, the policy must have been in place before the harassment occurred and must have been effectively communicated to all employees.⁷² In *Brannigan v County Louth Vocational Education Committee*,⁷³ the respondent satisfied the requirement by ensuring a copy of the 'Code of Practice for Dealing with Complaints of Bullying and Harassment in VEC Workplaces' was included in a pack circulated to staff at the commencement of each academic year and thus, the respondent was entitled to rely on the defence. In another case, offensive posting about an employee in a web chat system was considered to be sexual harassment. However, in this case,⁷⁴ the respondent could not rely on the defence as it failed to take any action

⁶⁷ The definitions of harassment and sexual harassment are the same as under the Employment Equality Act 1998 (as amended).

⁶⁸ *Catlan Trading Co. Ltd. v McGuinness* EDA 5/2017 (Labour Court). The employer did not have a policy in place to deal with allegations of harassment or sexual harassment. <https://www.workplacerelations.ie/en/Cases/2017/March/EDA175.html>.

⁶⁹ *A Store v A Worker* EDA 3/2016 (Labour Court) <https://www.workplacerelations.ie/en/Cases/2016/January/EDA163.html>.

⁷⁰ For example, see *Atkinson v Carty* [2005] ELR 1.

⁷¹ SI No. 208 of 2012.

⁷² *A Hotel v A Worker* EDA 0915 (Labour Court).

⁷³ EDA 193 [2019] ELR 147. <https://www.workplacerelations.ie/en/cases/2019/february/eda193.html>.

⁷⁴ *A Receptionist v A Car Parts Company* ADJ-00009794 [2019] ELR 45. The complainant was dismissed for rejecting such behaviour and was awarded compensation in the sum of EUR 46 000 being two years' remuneration.

when the complaint was made and it did not appear to have any policy or procedure to deal with complaints of sexual harassment.

3.7.5 Understanding of (sexual) harassment as discrimination

'Sexual harassment' is defined as discrimination.

3.7.6 Specific difficulties

There are no specific difficulties other than (in practice) a person who alleges sexual harassment may consider that they will be victimised in the future, given a small population. Of course, there is provision in the legislation against victimisation but nonetheless there may be fear on the part of the person reporting the allegations. This is notwithstanding that any decision of an adjudication officer or the Labour Court would be anonymised. Of course, the key issue in relation to sexual harassment is that it is unwanted by the recipient.

3.8 Instruction to discriminate

3.8.1 Explicit prohibition

Section 14 of the Employment Equality Act 1998 provides that a person who procures or attempts to procure another person to do anything which constitutes discrimination which is unlawful under the Act or constitutes victimisation shall be guilty of an offence.

3.8.2 Specific difficulties

There are no specific difficulties.

3.9 Other forms of discrimination

The definition of 'discrimination' is broad and is defined as:

'6(1) For the purposes of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where –

A person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2) (in this Act referred to as the "discriminatory grounds") which—

(i) exists,

(ii) existed but no longer exists,

(iii) may exist in the future, or

(iv) is imputed to the person concerned,

(b) a person who is associated with another person—

(i) is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or would be treated in a comparable situation, and

(ii) similar treatment of that other person on any of the discriminatory grounds would, by virtue of paragraph (a), constitute discrimination.'

Therefore, discrimination may be in the present, in the past, may exist in the future, is imputed to the person concerned, or is by association. The Employment Equality Act 1998 (as amended) provides that there are other grounds of discrimination namely civil status, family status, age, disability, race, religion, sexual orientation and being a member of the Traveller community. There may be discrimination as regards access to employment, conditions of employment, training or experience for or in relation to employment,

promotion or re-grading and the classification of posts.⁷⁵ There may not be discriminatory advertising⁷⁶ or discrimination by employment agencies.⁷⁷

3.10 Evaluation of implementation

In general, the legislation is satisfactory and implements EU law. Ireland is at the preliminary stages of considering 'positive action' in respect of areas where there is an under-representation of women, e.g. at professorial level in the third-level sector.

3.11 Remaining issues

As stated above, the key remaining issue is in relation to 'positive action'.

⁷⁵ Section 8 of the Employment Equality Act 1998 (as amended).

⁷⁶ Section 10 of the Employment Equality Act 1998 (as amended).

⁷⁷ Section 11 of the Employment Equality Act 1998.

4 Equal pay and equal treatment at work (Article 157 of the Treaty on the Functioning of the European Union (TFEU) and Recast Directive 2006/54)

4.1 General (legal) context

4.1.1 Surveys on the gender pay gap and the difficulties of realising equal pay

The Summary of Public Consultation in respect of the Gender Pay Gap was published by the Department of Justice and Equality in January 2018. The Government proposes to undertake a number of measures to narrow the gender pay gap. In order to do so, the report stated that it intended to commence discussions with the stakeholder namely the employer bodies and the trade unions and to develop and promote practical information resources to explain and increase understanding of the multifaceted aspects of the gender pay gap and its causes.⁷⁸ It is also proposed to develop practical tools to assist employers to calculate the gender pay gap within their organisations and to consider its aspects and causes, mindful of obligations regarding privacy and data protection. The Summary sets out the reasons, citing some factors influencing the gender pay gap as including that 47 % of women are in caring roles; 37 % of women in occupational and sectoral gender segregation roles; 34 % in lower paid employment; 24 % discriminated against in the workplace; 24 % unconscious bias; 21 % of women working in a part-time capacity; 13 % where there is no transparency in pay structures; and 3 % in precarious employment or working on zero-hour contracts.⁷⁹

4.1.2 Surveys on the difficulties of realising equal treatment at work

The key survey has been on the gender pay gap, under 4.1.1 above.

4.1.3 Other issues

In this writer's opinion, one of the key issues in respect of the gender pay gap is in segregated employment (as cited above) as a complainant must have a comparator of the opposite sex in order to pursue an equal pay claim.

4.1.4 Political and societal debate and pending legislative proposals

The Gender Pay Gap Information Bill 2019 was published in April 2019. As drafted, the Bill provides that there will be an amendment to the Employment Equality Act 1998 (as amended).⁸⁰ The Bill, when enacted, will permit the Minister for Justice and Equality to make regulations requiring employers of large corporations to publish information relating to the gender pay gap in their firm or organisation. Employers will also be required to show proposals as to how they propose to eliminate the gender pay gap in their firm.

The Minister will have to produce regulations requiring employers to publish information relating to pay for the purposes of showing whether there is a difference in pay referable to gender, and the size of the difference, if any. The information which has to be published includes the difference between both the mean and the median hourly pay of male and female employees; the difference between both the mean and the median of bonus pay

⁷⁸ I.e. traditional role models, gender-segregated education and labour market, the challenges of balancing work and family life, the difference in participation of men and women in family responsibilities, the availability of quality, affordable childcare facilities and out-of-school hours care, and processes within organisations where imbalance needs to be addressed.

⁷⁹ <http://genderequality.ie/en/GE/Summary%20of%20Public%20Consultation%20on%20Gender%20Pay%20Gap%20-%20FINAL.pdf/Files/Summary%20of%20Public%20Consultation%20on%20Gender%20Pay%20Gap%20-%20FINAL.pdf>.

⁸⁰ The Government published the Gender Pay Gap Bill 2019 in April 2019. <https://www.oireachtas.ie/en/bills/bill/2019/30/>. The Employment Equality Act 1998 will be amended by the insertion of a number of sections to include: 'Gender Pay Gap Information'.

of male and female employees; the difference between the mean and the median hourly pay of part-time male and female employees and the percentage of male and female employees who received bonuses and benefits in kind. The differences shall be expressed in percentages. The employer will have to publish the reasons for such differences.

The proposed legislation will apply to employers with 250 or more employees in the first two years post commencement of the legislation. Then, in the third year, the legislation will apply to employers who have 150 or more employees. Then the provisions will apply to employers of 50 or more employees. There is a provision for pseudonymisation of the personal data.

There will also be specific provisions for Government departments and the police and defence forces.

There is a provision for the appointment of designated officers to ensure that the information published by employers is accurate. The officers will have the power to enter premises and inspect records of an employer. If an employer fails to comply with a requirement of a designated officer, application can be made to the Circuit Court for an order requiring compliance. If an employer then fails to comply, the employer will be in contempt of court and subject to fines and/or imprisonment. Also, if an employer fails to comply, the Irish Human Rights and Equality Commission can also apply to the Circuit Court for an order requiring the employer to comply.

An employee who considers that their employer has failed to comply with the requirement to publish pay gap information may make an application to the Workplace Relations Commission who will investigate the complaint. If the complaint is upheld, the employer may be ordered to take a specified course of action to comply with the regulations. To date, there is no provision for the payment of compensation to the employee nor a provision stating that a fine may be imposed.

Given that the proposed legislation is an amendment of the Employment Equality Act 1998, the broad definition of remuneration will apply. As the draft regulations have not been published, the precise detail of the proposals is not yet known. One employer, the accountancy firm PWC, has issued its gender pay gap information and shows the gender pay gap is 5.7 % and the overall gender bonus gap is 11.8 % which is a result of more men than women being in senior roles within the firm.

A revised version of the Gender Pay Gap Information Bill 2019 is due to be published, ensuring that it applies to all public bodies and that it has stronger enforcement mechanisms.⁸¹

4.2 Equal pay

4.2.1 Implementation in national law

Section 7 of the Employment Equality Act 1998 provides that two persons are employed to do 'like work' if: (a) both perform the same work under the same or similar conditions or each is interchangeable with the other in relation to the work; or (b) the work performed by one is similar in nature to that performed by the other employee or if the conditions under which it is performed by each are of small importance in relation to the work as a whole or occur with such irregularity as not to be significant to the work as a whole; or (c)

⁸¹ This follows the publication on 4 March 2021 of the EU proposals for binding pay transparency measures. <https://www.gov.ie/en/press-release/d361b-cabinet-approves-gender-pay-gap-legislation-proposals/#:~:text=The%20Gender%20Pay%20Gap%20Information%20Bill%202019%20will%20require%20organisations,It%20will%20include%20bonuses.&text=On%204%20March%202021%2C%20the,for%20binding%20pay%20transparency%20measures.>

the work performed by one is equal in value to the work performed by the other, having regard to such matters as skill, physical or mental requirements, responsibility and working conditions. In the event that a 'primary worker' receives less remuneration than another worker ('the comparator') and the work performed by the primary worker is greater in value than that performed by the comparator, the work shall be regarded as equal in value to the work performed by the comparator. A claimant for equal pay must have a comparator of the opposite sex.

Section 19 of the Employment Equality Act 1998 (as amended) provides for the entitlement to equal pay on the gender ground in respect of both direct and indirect discrimination.

4.2.2 Definition in national law

Section 2 of the Employment Equality Act 1998 (as amended).

'Remuneration' is defined as:

'in relation to an employee, does not include pension rights but, subject to that, includes any consideration, whether in cash or in kind, which the employee receives, directly or indirectly, from the employer in respect of the employment.'

Equal treatment in respect of occupational benefit schemes is regulated by Part VII of the Pensions Act 1990 as inserted by the Social Welfare (Miscellaneous Provisions) Act 2004.

This definition complies with the definition of Article 157(2) TFEU.

4.2.3 Explicit implementation of Article 4 of Recast Directive 2006/54

Section 19 of the Employment Equality Act 1998 (as amended) provides that it is a term of the contract of employment that two persons are entitled to the same rate of remuneration as another employee of the other sex if they are employed to do like work by the same or an associated employer at the relevant time, i.e. during the preceding three years or the three following years. Indirect discrimination in respect of remuneration is also prohibited, that is, where an apparently neutral provision would put persons of a particular gender at a particular disadvantage in respect of remuneration compared with other employees of the same employer unless the said provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In any proceedings, statistics are admissible for the purpose of determining whether there is indirect discrimination in respect of remuneration or not. There may be different rates of remuneration on grounds other than the gender ground. In addition, Section 7 of the Employment Equality Act 1998 (as amended) requires that a complainant must have a comparator of the opposite sex; a hypothetical comparator is not permitted.

4.2.4 Related case law

The work actually performed and the conditions under which it is performed by the claimant and the comparator must be virtually identical. In the early years of the equal pay legislation, there were a large number of claims under this heading. In one case, where the employer argued that a claimant's work was not the same as that of her comparator because the comparator had a liability for additional attendance and duties, it was found that, in practice, the work performed was substantially the same. Equal pay was therefore awarded on the basis of the actual work situation rather than additional work, which rarely occurred.⁸²

⁸² *Department of Posts and Telegraphs v Kennefick* (EP/9/1979); (DEP/2/1980).

This definition in the Act applies where work is broadly similar; where differences occur only infrequently and are of small importance in relation to the work as a whole. This means that there can be differences as long as they remain 'of small importance'. However, even an occasional difference can make the work dissimilar if it is sufficiently important in relation to the job as a whole. There have been several key cases in this area, such as *Toyota Motor Distributors Ireland Ltd v Kavanagh*⁸³ and *Dowdall O'Mahony & Co. Ltd v 9 Female Employees*.⁸⁴ In the *Dowdall O'Mahony* case, women on a lower grade maintained that they were doing 'like work' similar in nature with men on a higher grade. The Labour Court considered as to whether the work performed by each claimant was similar in nature to that performed by each comparator. Were there any differences between the work performed by each complainant and each comparator? Did the differences occur infrequently? Were the differences of small importance in relation to the work as a whole? The Labour Court found that the work performed was of a similar nature. The complainants and comparators each performed general operative factory work and the court took the view that the intention of this definition was to cover claims from persons employed in such situations, as opposed to persons employed in the same work – two bus conductors, for example – or work that is not the same or similar which is covered by subsection (c) – a clerical worker and a general operative worker, for example. The court found that there were differences between the work performed by each complainant and each comparator. These differences occurred on an ongoing basis and therefore occurred frequently. The court further stated that the Act did not state a basis for assessing what is or is not of small importance. Therefore, this must be a matter for judgment. If the company had a job classification system which was free of sex bias, then that would be used. In the *Dowdall O'Mahony* case, the court had difficulty in assessing what criteria were used in assessing the work classified as grade 1 (the complainants) and that of grade 2 (the male comparators). Thus, in the absence of such criteria, the court decided that it had to examine the work and make a judgment based on its own experience of grading structures, salary scales and rates of pay. The court then sought (a) to identify the differences and (b) to decide whether or not these differences were of such importance that they would normally be used as the basis for establishing a different grade, salary scale or rate of pay, irrespective of the sex of the workers concerned. In this case, the major difference that the Labour Court saw related to the physical demands of the jobs performed by the complainants and comparators. The court considered that this difference was not significant and did not justify a difference in pay. Thus the claimants and the comparators were doing 'like work' and equal pay was awarded.

Carroll J. in *An Comhairle Oilíúna Talmhaíochta v Doyle*⁸⁵ considered that, in order to make a finding under subsection (b), the Labour Court must find that the work is of a similar nature, and that (a) either there are no differences in the work performed or the conditions under which it is performed by each or (b) any differences are either infrequent or of small importance in relation to the work as a whole.

The Supreme Court considered the issue of whether work was of a 'similar nature' in *O'Leary v Minister for Energy, Transport and Communications*.⁸⁶ The complainants, working at Dublin Airport, claimed equal pay under the Anti-Discrimination Pay Act 1974, contending that they carried out work of a 'similar nature' to two male radio operators and that any differences in the work occurred only infrequently and were of small importance. The equality officer concluded that the work was of a similar nature, but that the comparators' work frequently differed from the complainants' and the differences that occurred were of more than small importance in that they required the comparators' additional qualifications and skills. The equality officer therefore recommended that the claimants and the comparators did not do 'like work'. On appeal, the Labour Court upheld this finding. On further appeal, the High Court held that there was no discrimination and

⁸³ (EP/17/1985); (DEP/1/1986).

⁸⁴ (EP/2/1987); (DEP/6/1987).

⁸⁵ [1989] I.R. 33; [1990] I.L.R.M. 21.

⁸⁶ [1998] E.L.R. 113; [1998] 1 I.R. 558.

this was then appealed to the Supreme Court on the grounds that the Labour Court had given inadequate grounds for its decision. The Supreme Court dismissed the appeal, reasoning that, for the claims to succeed, it would have to be established that the applicant and the comparators were engaged in 'like work'. The Supreme Court stated that to liken patently different categories of work one with another by reference to the demands which they make on skill, effort and responsibility of the workers involved may be a difficult task. Where, however, as in the present case, there is at the very least a significant degree of similarity between the work performed by the claimants and comparators, it should be an easier task to compare the demands which each makes on those engaged in its performance. The possibility of establishing equality of demands or identifying the basis for any inequality must be enhanced in proportion to the degree of similarity between the allegedly different works. According to the Supreme Court, there was no doubt that the Labour Court fully intended to endorse the findings and conclusions of the equality officer and that there was ample evidence to support the decisions reached.

Section 7(3) of the 1998 Act provides that if workers are earning less remuneration than their comparators and the work that they are doing is *higher* in value than that carried out by the comparator, then for the purposes of the Act the work performed by the complainant is regarded as work of equal value.

In *Dunne v The Irish Prison Service*,⁸⁷ the complainants were female prison officers, employed in an all-male prison. The complainants submitted that they had been discriminated against on the grounds of gender and equal pay in comparison to their male colleagues in the context of a night shift quota which attracted an additional night allowance in the nature of pay. The female prison guards alleged they were financially disadvantaged as although they wish to work nights, they were prevented from doing so by reason of the gender quota. It was alleged that the discrimination stemmed from the introduction of a gender quota, setting a maximum limit on the number of female prison guards who could be on duty during a night shift. The quota system was specific to the prison in question and was introduced by the chief officer for security reasons. The complainants submitted that the quota was discriminatory as there was neither objective justification nor consistency in its implementation. The respondents also relied on the defence in Section 27(1)(a)(i) and (ii) of the Employment Equality Acts that the measure was essential in order to guard, escort and control prisoners and to quell violent disturbances while protecting the privacy and decency of the prisoners. The equality tribunal held against the complainants as there was a legal requirement to have a gender quota in place to ensure that there are sufficient male officers on duty at all times and to comply with the prison rules. The specific nature of work of prison warders and the conditions in which such duties are undertaken justifies the exclusion of women from posts in male prisons and men from posts in female prisons. These factors justify the reserving of night duties primarily for men in male prisons. The quota is proportionate to secure the privacy and decency of prisoners as required by the legislation.⁸⁸

Industrial relations issues may be one of a number of factors to be taken into account. Following the judgment of the CJEU in *Kenny v Minister for Justice and Law Reform*,⁸⁹ the matter was remitted to the High Court under the name of *Kenny v The Department of Justice, Equality and Law Reform*.⁹⁰ The claimants were 14 clerical officers employed by the Department of Justice, Equality and Law Reform who were assigned to clerical duties in *An Garda Síochána* (the police force). They brought a claim for equal pay and the comparators were members of the force who were assigned to perform certain clerical and

⁸⁷ DEC-E2015-097; [2017] ELR 96.

⁸⁸ *Commission v France* Case 318/86 [1988] E.C.R. 3559; [1989] 3 C.M.L.R. 663 applied.

⁸⁹ Case C-427/11. For a complete commentary on this case see Meenan, F., Enforcement of the Principle of Equal Pay <https://www.equalitylaw.eu/downloads/3950-paper-frances-meenan-workshop-equal-pay-pdf-385-kb> (November 2016). [2018] IESC 62 (costs).

⁹⁰ [2014] IEHC 11, Judgment of Mr. Justice McCarthy of 13 January 2014. For clarification, this case originated in an appeal on a point of law from a determination of the Labour Court of 27 July 2007 (EDA 13/2007). Certain questions were referred to the CJEU. Judgment was delivered on 28 February 2013.

administrative duties. Following on judgment from the CJEU, the High Court remitted the matter to the Labour Court stating that the Labour Court should adopt the following approach (in summary) namely that the Labour Court should chose comparators drawn from the generality of all those engaged in clerical work for or as members of the police force; then the Labour Court should address the issue of whether or not the work performed by the claimants is like work; then if the work is like work, the Labour Court should address the issue as to whether or not the difference in pay is objectively justified. This will not involve consideration of the reasons for the assignment of members of the police force to certain posts. Industrial relations issues cannot of themselves be the sole basis justifying a differential in pay but regard may be had to industrial issues as one of a number of factors. In addition, consideration must be given to the context in which the generality of those engaged in clerical work; this will extend to taking into account the nature of not only the clerical work but all police work, including all incidents of service in the police force. The matter is presently before the Labour Court and is to hear submissions as to how it should proceed in the selection of comparators. The most recent decision of the Labour Court was in November 2015.⁹¹

4.2.5 Permissibility of pay differences

There may be differences of remuneration on grounds other than the gender ground.⁹² Examples may be the performance of extra duties,⁹³ 'red circling' or the retention of a personal rate of pay because of particular circumstances that are not based on sex may be permissible,⁹⁴ the performance of a wider range of tasks, thus requiring higher qualifications, is also permissible.⁹⁵

4.2.6 Requirement for comparators

Section 7 of the Employment Equality Act 1998 (as amended) requires that a claimant must have a comparator of the opposite sex. In *Brides v Minister for Agriculture*,⁹⁶ 'an actual concrete real life comparator of the other sex' performing like work is required.

4.2.7 Existence of parameters for establishing the equal value of the work performed

Section 7(1)(c) of the Employment Equality Act 1998 provides the parameters are skill, physical or mental requirements, responsibility and working conditions.

4.2.8 Other relevant rules or policies

The one key point about the Irish legislation is that consideration of equal pay comparing the work of a complainant with a comparator of the opposite sex is a compare and contrast situation and consideration by an adjudication officer or the Labour Court is a factual exercise.

4.2.9 Job evaluation and classification systems

The [1998 Act](#) does not specifically provide for job evaluation. Such schemes have been considered in a number of cases, but they have not generally formed the basis of any recommendation or determination from equality officers or the Labour Court. Invariably, both the employer and the complainants provide their own job evaluation reports and use

⁹¹ *Department of Justice, Equality and Law Reform v CPSU* EDA1518. This decision was essentially a case management conference.

⁹² Section 19(5) of the Employment Equality Act 1998.

⁹³ *Dunnes Stores (Parkway) Ltd. v 28 Dunnes Stores (Parkway) Ltd. Female Employees* (EP/6/1987).

⁹⁴ For example, *Schiesser (International) Ireland Ltd. v 217 Female Employees* (EP/11-15/1988) where one of the male comparators was not working the full range of duties because of illness, yet he retained his original higher rate of pay.

⁹⁵ *Twenty-five Named Employees v Irish Aviation Authority* [2010] ELR 211.

⁹⁶ [1998] 4 IR 250 at 270.

such reports as the basis of their arguments. The court made its attitude to job evaluation clear at a relatively early stage, when it said that, in effect, in assessing a case, evaluations would be one of a number of considerations to be borne in mind, but not the determining one. The results may, or may not, contain an element of bias based on sex, but they should not be ignored.

The Act does not provide any assistance as to how jobs should be assessed and compared in terms of the provisions of [Section 3\(c\)](#) (namely, skill, responsibility, mental and physical effort and working conditions). In every case, the equality officer and the Labour Court (as the case may be) compare and contrast the claimant and the comparator under each heading and then weigh up all the factors to see if the work is equal in value. It is not a mathematical process, so objective judgment must be used. In the case of *Pauwels Trafo (Ireland) Ltd v 15 Women Catering Machine Operators*,⁹⁷ the equality officer stated:

'There is no method by which the equality officer nor any assessor can determine with mathematical precision that the woman's work and the man's work come out exactly the same. The equality officer must therefore take a practical approach to the work under examination and determine whether the total package of every individual's work under examination can be reckoned as being of equal value in terms of [Section 3\(c\)](#).'

4.2.10 Wage transparency

Legislation is awaited to implement the European Commission's Recommendation on strengthening the principle of equal pay between men and women.

4.2.11 Implementation of the transparency measures set out by European Commission's Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women

On Tuesday, 26 June 2018, the Government approved the General Scheme of the Gender Pay Gap Information Bill.⁹⁸ The proposed legislation will be cited as the Gender Pay Gap Information Act [2019]. The Bill was published in April 2019 but it lapsed since the dissolution of *Dáil Éireann* in January 2020. However, it has since been restored following the election in February 2020. The Employment Equality Act 1998 will be amended by the insertion of a number of sections to include: 'Gender Pay Gap Information'. The Minister will make regulations requiring employers to publish information related to the pay of their employees for the purpose of showing whether there are differences in the pay of male and female employees and if so, the scale of such difference. The Minister will also have regard to the cost of complying with such regulations. These regulations will not apply to employers having fewer than 50 employees. It is proposed that for the first two years of the legislation, it shall apply to employment having over 250 employees and then within three years that upper limit shall become 150 employees. The regulations may prescribe classes of employer to which the regulations shall relate, including by reference to the number of employees the employer has; classes of employee; how to calculate the number of employees; how to calculate the pay of employees; and the form and manner in which and the frequency with which information is to be published under the proposed regulations and the proportions of male and female employees who are paid bonus pay and benefits in kind. There is to be provision for publication of the hourly rate of pay for men and women in respect of each category of employee; and also whether the employees are permanent, on fixed-term contracts or are part-time employees. The mean and median rate(s) of pay shall be published for each group of employees. It is proposed that such information shall be published each year. The Irish Human Rights and Equality Commission (IHREC) may make application to court if there is an alleged breach of the proposed

⁹⁷ EP 48/1981.

⁹⁸ The Government published the Gender Pay Gap Information Bill 2019 in April 2019. <https://www.oireachtas.ie/en/bills/bill/2019/30/>.

legislation. There will also be additional enforcement powers and access to the Workplace Relations Commission if an employee considers that there has been a breach of the legislation. It may be noted that the new Minister for Equality has announced that he intends to amend the proposed legislation with stronger enforcement mechanisms.

Regulations may require the employer to publish information in respect of each Department of State, each scheduled office within the meaning of the Public Service Management Act 1997 (various state bodies), *An Garda Síochána* (police), and the Defence Forces.

4.2.12 Other measures, tools or procedures

There are no other measures or tools, however, prior to bringing a claim for equal pay, a complainant may seek certain 'material information' from the employer under the 'right to information', provided that such information is not 'confidential information'.⁹⁹ Information on remuneration may be obtained except, of course, personal information relating to any individual. However, if proceedings are issued, the employer would have to provide the remuneration of the comparator. In the event that the employer refuses to provide such information, then the adjudication officer may be able to infer discrimination from such failure.

Article 4 of the European Social Charter provides a right to a fair remuneration and Article 20 provides for the right to equal opportunities and equal treatment in employment and occupation without sex discrimination. The European Committee of Social Rights in *University Women of Europe (UWE) v Ireland*¹⁰⁰ concluded that there was a violation of Articles 4(3) (work of equal value) and 20.c (terms of employment, and working conditions, including remuneration) of the European Social Charter on the grounds that pay transparency is still not ensured in practice; there is a violation of Article 20.c of the Charter on the grounds that there is an absence of indicators showing measurable progress in promoting equal opportunities between men and women in respect of equal pay; and that there is a violation of Article 20.d of the Charter (career development including promotion) on the grounds that there has been insufficient progress in ensuring a balanced representation of women in decision-making positions within private companies.

4.3 Access to work, working conditions and dismissal

4.3.1 Definition of the personal scope (Article 14 of Recast Directive 2006/54)

Section 2 defines an 'employee' as a person who works or worked under a 'contract of employment' but that in relation to access to employment does not include a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect the private or family life of those persons. The 'contract of employment' includes a contract of employment or apprenticeship or where a person agrees personally to execute any work or service for that other person.

This definition encompasses a self-employed person, i.e. a person who works under a contract for services as opposed to a contract of service. In addition, Section 13A provides that a partner in a partnership also falls within the scope of the legislation.

National law has a definition of a 'worker' – but each piece of legislation has a separate definition. In the case of the employment equality legislation, the definition of 'employee' and 'contract of employment' is clearly very broad. See 4.2.1 above. This definition of a 'worker' reflects the relevant case law of the CJEU.

⁹⁹ Section 76 of the Employment Equality Act 1998.

¹⁰⁰ (2020) 71 EHRR SE4.

4.3.2 Definition of the material scope (Article 14(1) of Recast Directive 2006/54)

Section 8 of the Employment Equality Act 1998¹⁰¹ (access to employment), Section 12 of the Employment Equality Act 1998 (as amended) (vocational training) and Section 13 of the Employment Equality Act 1998 (membership of certain bodies) stipulate:

'8(1) In relation to –

- (a) access to employment.
- (b) conditions of employment,
- (c) training or experience for or in relation to employment.
- (d) promotion or re-grading, or
- (e) classification of posts,

An employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker.'

Section 8(5) and (6) provides –

'Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or prospective employee in relation to access to employment if the employer discriminates against the employee or prospective employee –

- (a) in any arrangements the employer makes for the purpose of deciding to whom employment should be offered, or
- (b) by specifying in respect of one person or class of persons, entry requirements for employment which are not specified in respect of other persons or classes of persons, where the circumstances in which both such persons or classes would be materially different,
- (c) by publishing or displaying or causing to be published or displayed, an advertisement which contravenes Section 10(1) in so far as such advertisement relates to access to employment.

(6) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or a prospective employee in relation to conditions of employment if, on any of the discriminatory grounds, the employer does not offer or afford to that employee or prospective employee or to a class of persons of whom he or she is one –

- (a) the same terms of employment (other than remuneration and pension rights),
- (b) the same working conditions, and
- (c)

as the employer offers or affords to another person or class of persons, where the circumstances in which both such persons or classes are or would be employed are not materially different.'

Section 12 provides¹⁰²

'(1) Subject to subsection (7) any person, including an educational or training body, who offers a course of vocational training shall not, in respect of any such course offered to persons over the maximum age at which those persons are statutorily obliged to attend school, discriminate against a person (whether at the request of an employer, a trade union or a group of employers or trade union or otherwise) –

- (a) in the terms on which any such course or facility is offered,
- (b) by refusing or omitting to afford access to any such course or facility, or
- (c) in the manner in which any such course or facility is provided.

¹⁰¹ As amended by the Equality (Miscellaneous Provisions) Act 2015. An individual can now bring a claim in respect of an alleged discriminatory advertisement.

¹⁰² As amended by the Equality (Miscellaneous Provisions) Act 2015.

(d) by publishing or displaying, or causing to be published or displayed, an advertisement in contravention of Section 10(1) in respect of any such course offered.

(2) In this section "vocational training" means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity....'

Section 13(1) provides¹⁰³ –

'A body which –

(a) Is an organisation of workers or of employers,

(b) Is a professional or trade organisation, or

(c) Controls entry to, or the carrying on of, a profession, vocation or occupation, Shall not discriminate against a person in relation to membership of that body or any benefits, other than pension rights, provided by it or in relation to entry to, or the carrying on of, that profession, vocation or occupation.

(2) A body referred to in subsection (1) shall not discriminate against a person by publishing or displaying, or causing to be published or displayed, an advertisement in contravention of Section 10(1) in so far as the advertisement relates to –

(a) membership of that body or any benefits, other than pension rights, provided by it, or

(b) entry to, or the carrying on of, a profession, vocation or occupation controlled by that body.'

An 'advertisement' is defined as '[including] every form of statement to the public and every form of advertisement, whether to the public or not.'¹⁰⁴ Section 10 of the 1998 Act (as amended) prohibits discriminatory advertising in its widest form and application may be made for a court injunction by the Irish Human Rights and Equality Commission to prevent the appointment of any person to any post to which the advertisement relates.

The legislation is in compliance with Article 14(1) of the Recast Directive.

The controversial Section 37 of the Employment Equality Act 1998 (as amended) has been amended by the Equality (Miscellaneous Provisions) Act 2015. The section provided for the exclusion of discrimination on certain grounds in employment. There was always controversy in respect of the protection of certain religious, educational and medical institutions which are under the direction and control of a religious body or whose objectives include the provision of services in an environment promoting religious values shall not be taken to discriminate against a person if it gives more favourable treatment on the religious ground to an employee or a prospective employee in order to maintain the religious ethos of the institution. The provision also applies where the institution takes action which is reasonably necessary to prevent such employee from undermining the religious ethos of the institution. Teachers' unions were very critical of this section as they saw that it discriminated against gay teachers in a Catholic school, for example. The Bill originated in the *Seanad*¹⁰⁵ (the Senate / upper house) and it was stated that the section confirmed a controversial decision of the High Court in 1985 when the dismissal of a pregnant unmarried teacher living with a married man in a country town and teaching in a girls' Catholic secondary school was upheld. The judgment considered that the claimant/appellant was in breach of the norms of behaviour and the religious tenets which the school was trying to promote and thus there were substantial grounds justifying the

¹⁰³ As amended by the Equality (Miscellaneous Provisions) Act 2015.

¹⁰⁴ As amended by the Equality (Miscellaneous Provisions) Act 2015.

¹⁰⁵ The second stage debate in respect of this Bill makes interesting reading to the background of this amendment,
<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2013/2313/document1.htm>.

dismissal.¹⁰⁶ The Act of 2015 has amended the provisions somewhat by providing that there is to be a distinction drawn between the state-funded institutions and those funded privately. The practical effect of this amendment is that virtually all schools and hospitals will fall within the scope of the section as they receive state funding. Any action by such body shall be taken to be discriminatory unless such action is objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution and the means of achieving that aim are appropriate and necessary. Such action shall not be objectively justified unless the action is rationally and strictly related to the institution's ethos; a response to the employee undermining the religious ethos of the institution 'rather than a response to the employee's gender, civil status, family status, sexual orientation, age, disability, race or membership of the Traveller community,' and is proportionate to the conduct of the employee, having due regard to, inter alia, the consequences of the action for the employee and his/her privacy and the actual damage caused to the institution.¹⁰⁷

4.3.3 Implementation of the exception on occupational activities (Article 14(2) of Recast Directive 2006/54)

Section 25 of the Employment Equality Act 1998 (as amended)¹⁰⁸ provides that a particular characteristic that is based on the gender ground in respect of access to employment in a particular post shall not constitute discrimination where by reason of the particular occupational activities concerned or of the context in which they are carried out –

- (a) The characteristic constitutes a genuine and determining occupational requirement for the post, and
- (b) The objective is legitimate and the requirement proportionate.

The reference to employment includes a reference to any training leading to such employment.

4.3.4 Protection against the non-hiring, non-renewal of a fixed-term contract, non-continuation of a contract and dismissal of women connected to their state of pregnancy and/or maternity

Any person can bring a claim under the Employment Equality Acts 1998 to 2015 on the basis that they have been so discriminated against. However, if there is, for example, the non-renewal of a fixed-term contract, they might give consideration to bringing a claim under the Protection of Employees (Fixed-Term) Act 2003 as there may be an entitlement to a contract of indefinite duration. In respect of dismissal, the complainant may elect between a claim under the Employment Equality Acts or the Unfair Dismissals Acts 1977 to 2015. If there is a non-renewal of a fixed-term contract arising from pregnancy, such employee may alternatively bring a claim for dismissal under the Employment Equality Act 1998 (as amended) as then it may be a discriminatory dismissal.

¹⁰⁶ *Flynn v Sr. Mary Anna Power and the Sisters of the Holy Faith* [1985] IR 648.

¹⁰⁷ 'Employee' includes 'prospective employee'.

¹⁰⁸ This section was applied in the case of *A Prospective Employee v A Company* [2016] ELR 36 where the claimant was a prospective employee of the respondent who provides care and support for adults with physical and intellectual needs. The Health Service Executive approached the respondent to provide services for a man with a history of convictions for sexual offences involving females. The respondent carried out a risk assessment. The respondent sought 'a support worker' and the claimant applied for the position which involved staying in the man's home at night. The claimant was advised that she was successful in the interview but was subsequently informed that the 'respondent was looking for a male' to carry out the role. It was determined that there was no discrimination as staff welfare had to be a priority for the employer and a female employee could not be exposed to such a high level of risk. In addition, male gender is a bona fide occupational qualification for the role as it was a male-specific role.

4.3.5 Implementation of the exception on the protection for women in relation to pregnancy and maternity (Article 28(1) of Recast Directive 2006/54)

Section 6(2A) of the Employment Equality Act 1998 (as amended) provides that any less favourable treatment on the grounds of pregnancy or maternity leave is discrimination within the meaning of the legislation. In *Trailer Care Holdings Ltd. v Healy*,¹⁰⁹ the Labour Court stated that women were to be given 'special protection from adverse treatment' from the commencement of their pregnancy until the end of their maternity leave.

4.3.6 Particular difficulties

There are no practical difficulties with respect to the legislation concerning access to employment, vocational training, equal working conditions, promotion and protection against dismissal on the gender ground.

4.3.7 Positive action measures (Article 3 of Recast Directive 2006/54)

Section 24 of the Employment Equality Act 1998¹¹⁰ provides that:

- 'This Act is without prejudice to any measures-
- (a) maintained or adopted with a view to ensuring full equality in practice between men and women in their employments, and
 - (b) providing for specific advantages so as-
 - (i) to make it easier for the under-represented sex to pursue vocational activity, or
 - (ii) to prevent or compensate for disadvantages in professional careers....'.

State Boards

Various pieces of legislation setting up State Boards and committees in recent years have contained provisions requiring appointments to have either a set minimum number of male and female members or to have as far as reasonably practicable an equitable balance between women and men.¹¹¹

On 10 September 2020, the Department of Public Expenditure and Reform issued an Annex on Gender Balance, Diversity and Inclusion to the Code of Practice for the Governance of State Bodies.¹¹² Over recent years, various governments have had a policy of increasing openness, transparency and gender balance on State Boards. In 2014, the then Minister for Public Expenditure and Reform prepared guidelines to the effect that there was a longstanding target to achieve 40 % representation of women and men on State Boards. This target was also reflected in a National Strategy for Women and Girls 2017-2020. Then with a view to accelerating progress in achieving this target in respect of all State Boards, the Government agreed on 11 December 2018 to convene an interdepartmental group on gender balance in State Boards. The result of such deliberations was the Annex which updates the provisions of the Code of Practice.

¹⁰⁹ EDA 12/2012.

¹¹⁰ As amended by Section 15 of the Equality Act 2004 transposing Article 3 of Directive 2006/54/EC. <http://revisedacts.lawreform.ie/eli/1998/act/21/front/revised/en/html>.

¹¹¹ Such legislation includes, for example, Section 12 of the Inland Fisheries Act 2010, <http://www.irishstatutebook.ie/eli/2010/act/10/section/12/enacted/en/html#sec12>; Section 98 of the Adoption Act 2010, <http://www.irishstatutebook.ie/eli/2010/act/21/section/98/enacted/en/html#sec98>; Schedule 1 Article 4 of the Charities Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/6/schedule/1/enacted/en/html#sched1>; Section 8 of the Broadcasting Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print#sec8>; Section 19 of the National Asset Management Agency Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/34/section/19/enacted/en/html>.

¹¹² <https://www.gov.ie/en/publication/8e884-code-of-practice-for-the-governance-of-state-bodies-annex-on-gender-balance-diversity-and-inclusion/>.

A key requirement of the Code of Practice for the Governance of State Bodies 2016 is that:

'Appointments to State Boards should be made against objective criteria with due regard for the benefits of diversity on the Board. The Chairperson of the Board, in assisting the Department in drawing up the specification for the Board appointment should have due regard for the benefits of a gender balanced and diverse Board.

Chairpersons should maintain a focus on those Boards on which either women or men are significantly under-represented and should actively seek to appoint candidates of the under-represented gender from the Public Appointments Service shortlist where possible.'

The developments in these governance documents underpins Section 42 of the Irish Human Rights and Equality Commission Act 2014 which establishes a positive duty on public sector bodies to eliminate discrimination, protect human rights and promote equality of opportunity of their employees, customers, service users and everyone affected by their policies and plans. The updated Code also provides for the terms of Board appointments to be varied to between three and five years. A period of appointment may be renewed for a further period, to a maximum of eight years in total. Most appointments to State Boards are governed by the statute setting up the State body or commercial enterprise. Accordingly, for this provision in the additional Code of 2020, there may need to be legislative amendments.

However, the most important aspect of these Code provisions is that:

'The comprehensive report issued to the relevant Minister covering the State body should also include the following details:

- (a) the gender balance of appointments made to the State Board in question in the previous year;
- (b) where the Board stands vis-à-vis the 40 % gender balance requirement;
- (c) the key elements of the Board's approach to the promotion of diversity and inclusion and the progress being made in this area... including the approach being pursued to promote gender balance and diversity in Board membership;
- (d) in the case of a State Board which continues to have either all-male or all-female membership, the measures being taken to address urgently the situation and to promote better gender balance.'

Arising from these amendments to the Code of Practice, the Appendices provide that each Board should provide the Minister with a statement as to gender balance in the Board membership, detailing the percentage of female and number of persons and likewise for males and the number of positions that are vacant along with a statement as to whether the target of a minimum of 40 % representation of each gender is so provided on the Board and furthermore the measures that are planned to address such imbalance (if any). There is also to be a statement for submissions to Ministers on appointments/reappointments to Boards, namely having the details of the current Board and what is required to meet the gender balance and finally, a Board self-assessment evaluation.

Policy

A (soft) policy has also been announced in respect of third-level education professorial positions (public sector) where specific newly created posts are to be provided for women only. Such policy applies to top leadership positions in the public sector (civil service) and the public service (e.g. the judiciary).

Civil Service

The policy is set out in the Civil Service Renewal Plan – A Vision and Three-Year Action Plan for the Civil Service.¹¹³ As regards gender balance in the civil service, the Minister for Public Expenditure and Reform stated on 16 January 2017 that there is a target of 50:50 gender balance in appointments at senior level. The merit-based approach of ‘best person for the job’ will continue to apply, however, in cases where candidates who compete for Top Level Appointment Committee (‘TLAC’)¹¹⁴ appointments are of equal merit, the priority would be given to the female candidates where they are under-represented on the management board of the Department/Office in question.

The TLAC Report 2017¹¹⁵ published on 9 September 2018 noted that the number of women applying for such senior positions is increasing. In addition, such numbers are increasing at preliminary interview stage and this may be evidence of the impact of policies and the focus of tackling gender diversity in leadership positions. In 2017, the competitions comprised of 5 Secretary-General posts, 2 deputy Secretary posts, 23 Assistant Secretary posts and 9 specialist roles at Assistant Secretary level. Secretary-General is the highest civil service grade in a Government department, then deputy secretary and so on. There were 57 % male candidates and 43 % female candidates successful.

Third-level education appointments

On 12 November 2018, *An Taoiseach* (the Prime Minister) and the Minister for State with special responsibility for Higher Education launched the *Gender Action Plan 2018 – 2020: Accelerating Gender Equality in Irish Higher Education Institutions*.¹¹⁶ It was announced that up to 45 professorial level posts would be created for women across the higher education sector over a three-year period.¹¹⁷ The Government wants 40 % of professorial posts in higher education institutions to be held by females by 2024.

The Action Plan is designed to transform the Higher Education sector’s gender equality performance. This initiative follows the Gender Equality Taskforce which was established in November 2017 to build on the work of the *HEA National Review of Gender Equality in Irish Higher Education Institutions (2016)*. This Review identified that women accounted for 52 % of entry level positions but only account for 19 % of professorial positions across the (then) seven universities in Ireland;¹¹⁸ it was noted that the most damning statistic was that no woman has been appointed to the position of president in any Irish university. Since then, women have been appointed as president to four Irish universities.¹¹⁹ The Taskforce identified significant measures that will further accelerate progress in achieving gender equality in Irish Higher Education Institutions following on from the recommendations of the HEA Expert Group (2016).

The background to this policy initiative was the case of *Sheehy Skeffington v NUI Galway*,¹²⁰ where the equality tribunal decided that NUI Galway had both directly and

¹¹³ <https://www.per.gov.ie/en/minister-donohoe-announces-new-initiatives-for-achieving-gender-balance-in-the-civil-service/>; <https://www.per.gov.ie/en/civil-service-renewal/>.

¹¹⁴ <https://www.per.gov.ie/ga/top-level-appointments-committee-tlac/>.

¹¹⁵ <https://assets.gov.ie/5728/170119155115-624da66a3b9043e28efea61b7f267c9a.pdf>.

¹¹⁶ <https://www.education.ie/en/Press-Events/Press-Releases/2018-press-releases/PR18-11-12.html>;
<https://www.education.ie/en/Press-Events/Press-Releases/2018-press-releases/PR181112.html>.

¹¹⁷ The Action Plan relates to all third-level institutions of higher education, i.e. universities and institutes of technology.

¹¹⁸ There is now an additional university, the Technical University Dublin (comprising a number of institutes of technology) (2019).

¹¹⁹ The University of Limerick (interim President September 2020), the Munster Technological University, the National University Maynooth and Trinity College Dublin.

¹²⁰ DEC-E2014-078 (Equality Tribunal). <https://www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html>. Quinlivan, S., *Disrupting the Status Quo? Discrimination in Academic Promotions (2017) 2 IELJ 14(3) 68-75.* (available on Westlaw.ie or Westlaw.uk – by subscription). The case related to the 2008/09 promotions where candidates compete for a limited number of places for promotion (across all

indirectly discriminated against a female lecturer in respect of access to promotion for a senior lecturer position.¹²¹ The equality tribunal ordered that the complainant be promoted to senior lecturer and that the promotion and the adjustments to her salary be backdated to 1 July 2009. She was also awarded EUR 70 000. The respondent was required to review all its policies and procedures in respect of promotion to senior lecturer and in particular in relation to gender. The report was to be filed with the Irish Human Rights and Equality Commission within a year and the Commission to take any steps as appropriate.¹²²

In January 2020, third-level colleges received approval for 20 women-only professorships. A total of 45 posts are to be allocated over a 3-year period.¹²³

This initiative has been criticised on the basis that a person who succeeded in obtaining promotion under this scheme is somewhat inferior and would not have obtained promotion unless these special arrangements had been made. Another criticism is that transsexuals may be discriminated against because of this proposed positive action.

Craft Apprenticeships

There are few women applying for craft apprenticeships notwithstanding that there is a subsidy for employers who take on female apprentices.¹²⁴ Only 2 % of women are in craft apprenticeships. It should be noted that in this writer's opinion, this may also have been as a result of cultural issues, as secondary education for girls in Ireland was always of a high academic standard; there were many posts open to women, for example in banks, the civil service, insurance and the professions (e.g. medicine, law, accountancy), and of course, nursing and teaching. Education for men was of a similar high standard but boys may have been more likely to have left earlier to go into agriculture and to go to agricultural college, the police force or various other clerical positions. Ireland was not an economy with heavy industry which would have attracted craft apprenticeships; it was and still is an agricultural economy. By reason of Irish history, education was a prized possession and as a result, many women went into the professions both in Ireland and the United Kingdom (for example, nursing and teaching).

4.4 Evaluation of implementation

EU law is fully transposed by the Employment Equality Acts 1998 to 2015.

4.5 Remaining issues

The key remaining issue will be the application of positive action policies. There has been commentary that the COVID-19 pandemic has affected women disproportionately. In Ireland, there have been three (level 5) full lockdowns; two in 2020. During such periods, schools have been closed down, so parents were home-schooling their children. At various times, crèches and schools for young pupils opened gradually along with schools for children with special needs. Inevitably, this particularly impacted lone parents and where families had fewer resources for their children to access remote learning. Women are also

faculties). 17 persons were promoted and only 1 was female. There were 47 applicants of which 32 were male and 15 female. 23 male applicants were shortlisted and 16 appointed to senior lecturer; 7 females were shortlisted and 1 appointed. The complainant was one of those shortlisted. It was noted by the equality tribunal that one of the male candidates should not have been appointed as he was not eligible.

¹²¹ When the complainant was not appointed, she appealed the decision. The appeal process was in breach of fair procedures.

¹²² Five of the other female applicants also instigated litigation. There were time limit issues, so common law actions were initiated. *Lannegrand v The National University of Ireland Galway* [2016] IEHC 518 (which were subsequently settled).

<http://www.courts.ie/Judgments.nsf/0/1FAF3C4D0AE9170F8025802F002D549E>.

¹²³ <http://www.universitytimes.ie/2020/01/third-level-institutes-to-get-20-women-only-professorships/>. <https://www.gov.ie/en/press-release/6c9c70-minister-mitchell-oconnor-announces-approval-for-20-professorial-lev/>.

¹²⁴ <http://www.solas.ie/SolasPdfLibrary/PathwaysApprenticeshipReviewNov18.pdf>.

predominantly in healthcare, working in hospitals, etc., so were exposed to the virus, as were many women in other essential services, e.g. essential retail. Women from marginalised groups, such as members of the Travelling community and homeless communities and also those who are poor, were disproportionately affected by the pandemic and the lockdowns. In this writer's opinion, we have not fully seen the effect of the pandemic on women's working lives yet. Whilst there is certain work flexibility such as home-working, there may be the difficulty in the future that if a woman is less visible in the workplace, she may be overlooked for promotion or pay increases. Furthermore, as of May 2021, the various state employment supports are still in place, however, once these supports are gradually removed, there might be a large number of redundancies and women may be disproportionately affected by selection for redundancy.

5 Pregnancy, maternity, and leave related to work-life balance for workers (Directive 92/85, relevant provisions of Directives 2006/54, 2010/18 and 2019/1158)¹²⁵

5.1 General (legal) context

5.1.1 Surveys and reports on the practical difficulties linked to work-life balance

In Ireland, there is an annual birth rate of some 60 000 babies per annum. Figures released from the Department of Social Protection and Employment¹²⁶ state that since the introduction of paternity leave (two weeks) and benefit in September 2016, some 55 652 fathers have taken paternity leave.¹²⁷ In 2018, only 40 % of fathers took such leave, i.e. 24 080 fathers.

The Department of Children and Youth Affairs¹²⁸ announced the National Childcare Scheme in the Budget 2017 with the first payments made under the Scheme from November 2019. The Scheme provides various allowances for parents (working or otherwise) based on income.¹²⁹ The Scheme provided the first statutory support for childcare in Ireland. Childcare in Ireland is expensive and the cost of childcare is not tax deductible. The Child and Family Agency provides access to research in respect of childcare and related matters.¹³⁰ A second issue is that only maternity leave is paid for by the state; some employers may 'top-up' the maternity leave pay to the mother's full remuneration. Additional maternity leave and parental leave¹³¹ are unpaid, so many parents cannot afford such leave. There has been criticism to the effect that mothers and parents cannot afford to take such leave.¹³²

In March 2020, the Government passed the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public Interest (COVID-19) Act 2020, and regulations made thereunder to provide for certain provisions in relation to the public health emergency arising from the pandemic. The impact of the pandemic cannot be underestimated. As of April 2020, there was 28.2 % unemployment, up from 15.5 % unemployment in March 2020. In addition, this does not include the 427 000 workers who are on the Wage Subsidy Scheme. By comparison, the unemployment rate as of April 2019 was only 5.2 %.

As an emergency measure, the Government introduced the COVID-19 unemployment payment in the sum of EUR 350 gross per week for employees and self-employed persons who had lost all their employment due to the COVID-19 public health emergency. This payment was effective from the end of March 2020 and was extended to 10 August 2020.

¹²⁵ See Masselot, A., Family leave: enforcement of the protection against dismissal and unfavourable treatment (2018) European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4808-family-leave-enforcement-of-the-protection-against-dismissal-and-unfavourable-treatment-pdf-962-kb> and McColgan, A., Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway (2015) European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/3631-reconciliation>.

¹²⁶ Now entitled the Department of Social Protection (since June 2020).

¹²⁷ Paternity leave is available to same-sex natural and adoptive parents.

¹²⁸ Now entitled the Department of Children, Equality, Disability, Integration and Youth (since June 2020).

¹²⁹ <https://www.dcyu.gov.ie/docs/EN/Affordable-Childcare-Scheme/212/4402.htm>.

¹³⁰ <https://www.tusla.ie/research/statistics-and-surveys/>. The Child and Family Agency is known as Tusla.

¹³¹ In April 2019, the Minister for Employment Affairs and Social Protection has announced that there are to be extensions to statutory parental leave with payment at the same rate as maternity pay to be extended over a number of years. <http://www.welfare.ie/en/pressoffice/Pages/PR230419.aspx>. As regards family issues and research, most of the research is over 10 years old and various pieces of legislation have been enacted since, e.g. see <http://www.welfare.ie/en/Pages/Balancing-Work-and-Family-Life.aspx>.

¹³² The National Women's Council has noted that Ireland is the bottom of the league in respect of pay for family leave. <https://www.nwci.ie/learn/article/ireland-bottom-of-the-european-league-when-it-comes-to-paid-maternity-leave>.

However, the rate of payment changed for persons who were earning less than EUR 200 per week effective from the end of June 2020. In order to receive the pandemic unemployment payment, the persons must be aged between 18 and 66 years, live in the Republic of Ireland, have been in employment or self-employment before 13 March 2020 and if a person was in atypical employment, in employment after 6 March 2020.

However, a problem arose when a person had completed maternity leave, adoptive leave and any related leave. They initially were told that they were not entitled to the COVID-19 pandemic unemployment payment as they were not in employment in the weeks leading up to the state of emergency, as they were on maternity leave or adoptive leave. However, urgent changes were made so that 'the date last worked' for the COVID-19 unemployment payment is the date that they were due to return to work. This payment applies when their employer has no work due to the pandemic and this payment is higher than the payment for jobseekers. If a person was pregnant and there was no work available due to COVID-19, a person was and is entitled to the COVID-19 unemployment payment and should submit their forms for maternity leave in the normal way.

The Government also brought in a number of subsidies for employers so that they could retain staff. One such subsidy was the Temporary Wage Subsidy Scheme. This scheme was available to employers severely affected by the pandemic. The employee then received payments through their employer, effective from 26 March 2020, rather than through the social protection system so that there was still a link between employer and employee. Again, due to an anomaly, changes were made to facilitate employees who were not on the employer's payroll on 29 February 2020 following a period of maternity, adoptive leave or related unpaid leave or paternity, parental or related unpaid leave, or having been in receipt of health and safety benefit from the Department of Employment Affairs and Social Protection, or having been in receipt of illness benefit. There were amendments again made to this anomaly so that persons could receive payment of up to EUR 410 per week.

All public sector staff remained on full pay.

The economy was effectively closed down from mid-March 2020 and started reopening at the end of May and into June, with limited travel until the end of June. As of mid-June, there are many employments which are still closed, more particularly in the services and hospitality sectors. There was a further level 5 (most severe) lockdown from the end of October 2020 to mid-December 2020.

One major issue arose from the closing of schools on 12 March 2020 along with crèches and various childcare arrangements. As of 15 June 2020, there was still a major problem over the reopening of childcare arrangements due to social distancing (notwithstanding state subsidies). Many crèches closed down and primary schools were not reopened until the end of August 2020. Many employees could not return to work due to the lack of childcare arrangements. However, persons who left work because they did not have proper childcare arrangements, due to the closing of crèches and schools, were entitled to the COVID-19 pandemic unemployment payment. As of 29 June 2020, certain childcare arrangements reopened for children of certain essential workers and certain other children. It should be noted that there was an additional scheme entitled The Department of Children and Youth Affairs Temporary COVID-19 Wage Subsidy Childcare Scheme. As regards domestic violence, there have been significant publicity campaigns and special arrangements for immediate rent payments to victims of domestic abuse.

In 2020, the Irish Government handled the pandemic well with a clear strategy. Significant and generous social welfare payments were made to people due to the closedown. The issue over persons who were due to go back to work following maternity or adoptive leave was an anomaly which was corrected as soon as the issue came to light. It should be noted

that the legislation was emergency legislation that had to be passed through Parliament. There was a general election in February 2020, with no party having an overall majority hence there had to be formation talks on a new Government. In addition, following the general election, the upper house (*Seanad*) was due to be dissolved at the end of March 2020, so again there was further urgency to pass the legislation. A new Government was not formed until the end of June 2020.

5.1.2 Other issues

In a fast-moving technological workplace, there may be a re-organisation when an employee is on maternity leave or parental leave and other related family leave. Such leave may total approximately 60 weeks. In a fast-moving technological workplace, the re-organisation may result in a change of 'job' or a potential redundancy situation. The employee may be offered suitable alternative employment but nonetheless, the employee may have difficulty accepting such new role and may resign from their employment and claim constructive dismissal.

In December 2020, the Minister for Justice announced that she was expecting a baby in 2021 and that she would be taking some time off from public duties after the birth next spring. She is the first Cabinet minister to expect a baby whilst in office. This announcement has highlighted the anomaly that female politicians in Ireland do not have an entitlement to maternity leave of 26 weeks (with maternity benefit) along with additional maternity leave of 16 weeks. In order to take time off, a politician has to take sick leave. This anomaly applies to members of Parliament (the *Dáil* and *Seanad* (the upper and lower house of the *Oireachtas*)) and also to local politicians (councillors). This anomaly arises because members of Parliament are office-holders along with others such as judges. Such office-holders pay Pay-Related Social Insurance (PRSI) at the K1 rate of 4 % but receive no benefits. Other issues arise, such as voting in Parliament during any period of leave, but 'pairing' arrangements can be made where a member of the opposition can abstain from voting. Hence, parliamentary difficulties need not arise. Such arrangements are frequently made when, for example, a Government minister is away on Government business. In addition, another member of Cabinet could be appointed to act as a minister for a certain period of time (while the Cabinet minister takes leave) to take parliamentary questions, sign statutory instruments, etc.; this is the arrangement that has been announced and the Minister for Justice remains in Cabinet for her maternity leave of 26 weeks, which will be paid.¹³³

This anomaly affects female politicians but it also affects fathers or the other parent, as leave under the Paternity Leave and Benefits Act 2016, the Adoptive Leave Acts 1995 and 2005, the Parental Leave Acts 1998 and 2006 and the Parents' Leave and Benefit Act 2019, do not apply to politicians either. Other office-holders such as judges are also not entitled to maternity leave and related periods of leave with any social welfare benefits. This is a matter that is being addressed by the Citizens' Assembly when it is envisaged that it will report in the second quarter of 2021.

5.1.3 Overview of national acts on work-life balance issues

The legislation concerning 'family leave', namely the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005, the Parental Leave Acts 1998 and 2006, the Paternity Leave and Benefit Act 2016, the Carer's Leave Act 2000 and the Parent's Leave and Benefit Act 2019 are complicated more particularly as concerns the numerous notice periods and forms required to take such leave. Nonetheless the legislation provides for certain protections for employees who take such leave and wish to return to work.¹³⁴ The Family Leave and Miscellaneous Provisions Bill 2021 was published by the Government in March 2021 to make a number of technical amendments to the family leave legislation

¹³³ <http://www.justice.ie/en/JELR/Pages/PR21000051>.

and came into operation on 1 April 2021. Parents are entitled to 'parental leave', which is 26 weeks' unpaid leave from their employment, and also the confusingly named 'parents' leave' of 5 weeks, which is paid leave (from April 2021).

5.1.4 Political and societal debate and pending legislative proposals

There has been considerable change in the area of parental leave in the last two years. The Parental Leave (Amendment) Act 2019 came into effect on 1 September 2019; parents of children up to the age of 12 years are entitled to 26 weeks' parental leave. Such leave is unpaid. In addition, the Parents' Leave and Benefit Act 2019 has been enacted to provide for paid leave for parents of children up to the age of two years. From April 2021, parents' leave is paid leave of up to five weeks. Both parents are entitled to such leave.

5.2 Pregnancy and maternity protection

5.2.1 Definition in national law

Section 2 of the Maternity Protection Act 1994 provides that a "pregnant employee" means an employee who is pregnant and who has informed her employer of her condition.'

The definition is consistent with the definition in Article 2 of Directive 92/85. In addition, Section 6(2A) of the Employment Equality Act 1998 (as amended) provides that discrimination on the ground of gender shall be taken to occur where a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated on a ground related to her pregnancy or maternity leave. Section 26 of the Employment Equality Act 1998 allows an employer to provide for beneficial treatment for women in connection with pregnancy and maternity (including breastfeeding) or adoption.

It should be noted that there are two further definitions of importance in Section 2 of the Maternity Protection Act 1994, namely –

"employee who has recently given birth" means at any time an employee whose date of confinement was not more than 14 weeks earlier and who has informed her employer of her condition.'

"employee who is breastfeeding" means at any time an employee whose date of confinement was not more than twenty-six weeks earlier, and who has informed her employer of her condition.'

5.2.2 Obligation to inform employer

The definition of a 'pregnant employee' is one who has informed her employer of her condition. An employee is obliged to notify her employer in order to be entitled to the minimum amount of maternity leave; she must do so in writing as soon as reasonably practicable but not later than four weeks prior to the commencement of maternity leave. The notification must include a medical or other appropriate certificate confirming the pregnancy and specifying the expected week of confinement. An employee can revoke the notification.¹³⁵ In addition, if an employee wishes to take additional maternity leave, she must again give the notice four weeks before the commencement of the additional maternity leave.¹³⁶

¹³⁵ Section 9 of the Maternity Protection Act 1994. If an employee has not provided such notice, then she cannot be considered to have availed of statutory maternity leave *Lee v Vaiciulyste* DWT 170/2010.

¹³⁶ Section 14 of the Maternity Protection Act 1994.

5.2.3 Case law on the definition of a pregnant worker, a worker who has recently given birth and/or a worker who is breastfeeding

There is no case law.

5.2.4 Implementation of protective measures (Articles 4-6 of Directive 92/85)

Safety, Health and Welfare at Work (General Application) Regulations 2007¹³⁷ and also Section 18 of the Maternity Act 1994 provide for health and safety leave.

These Regulations provide for risk assessment for sensitive risk groups of employees, namely pregnant, post-natal and breastfeeding employees, and the taking of protective or preventative measures to include the transfer of the employee to where there is not a risk to the employee. Also, in respect of night work – where there is medical certification, the employee may be removed from night work and transferred to day work; in the event that this is not feasible, the employee shall be placed on leave or maternity leave extended. In the event that an employee cannot be transferred to safer work, they may be placed on health and safety leave.

The Regulations also list the agents, processes and working conditions that are the subject of the risk assessment.

If there is a risk to the employee, and the employee is placed on health and safety leave, the employer pays the first 21 days of such leave and the state thereafter, at the same rate as state disability benefit. Such leave only arises during pregnancy or 26 weeks post confinement.

5.2.5 Case law on issues addressed in Articles 4 and 5 of Directive 92/85

There is no case law.

5.2.6 Prohibition of night work

Section 18 of the Maternity Protection Act provides for the granting of health and safety leave for employees, inter alia, who cannot be required to perform night work.¹³⁸ 'Night work' means between the hours of 11 pm on any day and 6 am the following day where the employee works at least three hours in that period as a normal course or at least 25 % of the employee's monthly time in that period. An employer shall – if a registered medical practitioner certifies that it is necessary for the safety or health of an employee that she should not be required to perform night work during pregnancy or for 14 weeks following childbirth – not oblige her to perform night work during that period. In such cases, the employer should transfer the employee to daytime work, or where this is objectively not feasible on substantiated grounds, grant the employee leave or extend the period of maternity leave.¹³⁹

5.2.7 Case law on the prohibition of night work

There is no case law.

¹³⁷ SI No. 299 of 2007.

¹³⁸ See, generally, the Safety, Health and Welfare at Work (General Application) Regulations 2007 (SI No. 299 of 2007) Articles 147-152.

¹³⁹ Article 151 of the Safety, Health and Welfare at Work (General Application) Regulations 2007 (SI No. 299 of 2007).

5.2.8 Prohibition of dismissal

Section 6 of the Unfair Dismissals Act 1977 (as amended) provides that if an employee is dismissed by reason of pregnancy, she may bring a claim under the Unfair Dismissals Acts or under Section 8 of the Employment Equality Act 1998 (as amended). An employee would have to elect which statute she would claim under.¹⁴⁰

It is an unfair dismissal to dismiss an employee due to the employee's pregnancy, attendance at ante-natal classes, giving birth or breastfeeding or any matters connected therewith; the exercise or proposed exercise by the employee of a right under the Maternity Protection Act 1994 to any form of protective leave or natal care absence, to attend ante-natal classes or to time-off from work or a reduction in working hours for breastfeeding under the Maternity Protection Acts. It is also an unfair dismissal to dismiss an employee in respect of the exercise or the contemplated exercise by an adoptive parent of the parent's right under the Adoptive Leave Acts 1995 and 2005 to adoptive leave or additional adoptive leave or a period of time-off to attend certain pre-adoption classes or meetings. If an employee is not permitted to return to work after maternity leave,¹⁴¹ they may bring a claim under the Unfair Dismissals Acts. However, an employer can argue that the employee was dismissed for some other reason, e.g. capability, conduct, competence, redundancy, etc.

If the employee is dismissed by reason of pregnancy, she may bring a claim under either the Unfair Dismissals Acts or the Employment Equality Acts. The redress under both is the same, namely that an unfairly dismissed employee or an employee who was dismissed for a discriminatory reason may be reinstated, re-engaged or awarded two years' remuneration. If an employee brings a claim under the Employment Equality Acts, they must show that the dismissal was for one of the discriminatory grounds and the employee must show a prima facie case of discrimination. Whilst if an employee brings an unfair dismissal claim, the burden of proof is on the employer to show that the dismissal was reasonable in all the circumstances. The burden of proof is only on the employee under the Unfair Dismissals Acts if the employee has less than one year's service or if the employee resigns arising from the actions of the employer.

An employee can be dismissed fairly, e.g. if the employee was dismissed by reason of capability, competence, conduct, redundancy (provided that they were fairly selected for redundancy). The Labour Court has summarised the position as being that:

'no employee can be dismissed while they are pregnant unless there are exceptional circumstances unconnected with the pregnancy and those exceptional circumstances are notified to the employee in writing.'¹⁴²

5.2.9 Redundancy and payment during maternity leave

An employee cannot be dismissed during maternity leave. Dismissal by reason of redundancy would only come into effect on the completion of the maternity leave (or additional maternity leave); the employee would also be entitled to their period of notice.¹⁴³

5.2.10 Employer's obligation to substantiate a dismissal

Section 14 of the Unfair Dismissals Act 1977 requires an employer to provide the reasons for dismissal. The burden of proof is on an employer in the event of a dismissal. However, if an employee resigns and claims constructive dismissal arising from the conduct of her

¹⁴⁰ Section 101 of the Employment Equality Act 1998 (as amended).

¹⁴¹ Section 40 of the Maternity Protection Act 1994.

¹⁴² For example, see *Carroll v Cullen* DEE13/2002 and *Trailer Care Holdings Ltd. v Healy* EDA 14/2013.

¹⁴³ Section 40 of the Maternity Protection Act 1994.

employer, the burden of proof is on the employee to prove that it was due to the actions of her employer that she resigned; once she proves that she resigned because of the actions of her employer, the burden of proof transfers to the employer.

5.2.11 Case law on the protection against dismissal

In *O'Brien v Persian Properties Ltd., trading as O'Callaghan Hotels*,¹⁴⁴ the former director of sales and marketing for a hotel group with multi-million Euro revenue targets had her contract of employment unilaterally terminated when she was on maternity leave. This was discriminatory dismissal on grounds of gender and further, she was harassed on the grounds of gender and family status; she was also victimised. The claimant had a significant remuneration package and she was awarded EUR 221 500, i.e. 21 months' salary in compensation for the harassment and discriminatory dismissal and EUR 94 500 (nine months' salary) for victimisation plus interest on half the award. The total was EUR 315 000.

An employee can elect to bring a claim under the Unfair Dismissals Act 1977.¹⁴⁵

5.3 Maternity leave

5.3.1 Length

Maternity leave is 26 weeks pursuant to Section 8 of the Maternity Protection Act 1994 (as amended).¹⁴⁶ There is no entitlement to remuneration from the employer during maternity leave. From 1 October 2017, if there is a stillbirth or miscarriage any time after the 24th week of pregnancy, the employee is entitled to full maternity leave. Maternity leave is also now extended in the event that the baby is born early, so that the mother receives the additional weeks between the date of birth up to the date of the commencement of maternity leave. For example, if the baby is born during week 30 of gestation, the mother receives additional weeks of maternity leave up to the date that she would normally have started her leave. The mother is in receipt of maternity benefit for the extra weeks.¹⁴⁷

5.3.2 Obligatory maternity leave

Section 10 of the Maternity Protection Act 1994 (as amended) provides that the obligatory period is two weeks.

5.3.3 Legal protection of employment rights (Articles 5, 6 and 7 of Directive 92/85)

Section 22 of the Maternity Protection Act 1994 (as amended) provides that during any period of health and safety leave, maternity leave and time-off under the Act, the employee is deemed to be in employment. However, the employee's right to remuneration is suspended (i.e. she has no entitlement to remuneration) during maternity leave; in addition, the employer is not obliged to pay contributions in respect of superannuation.¹⁴⁸

¹⁴⁴ [2012] ELR 211. <http://workplacerelements.ie/en/Cases/2012/February/DEC-E2012-010-Full-Case-Report.html>.

¹⁴⁵ There are many claims arising from dismissal during pregnancy, e.g. *Kirk v Irish Hole Masters Ltd.* UD 601/97.

¹⁴⁶ As amended by the Maternity Protection (Amendment) Act 2004, Maternity Protection Act 1994 (Extension of Periods of Leave) Order 2006, SI No. 51 of 2006. The adjudication process was amended by the Workplace Relations Act 2015. Leave under the legislation includes maternity leave, additional maternity leave, ante-natal leave for classes, health and safety leave, ante-natal care, post-natal care time-off from work or reduced working hours for breastfeeding. The following is the revised legislation drafted by the Law Reform Commission. <http://revisedacts.lawreform.ie/eli/1994/act/34/front/revised/en/html>.

¹⁴⁷ Social Welfare Act 2017.

¹⁴⁸ Employer contributions to pension schemes are deemed remuneration during maternity leave and are therefore not payable during maternity leave under the Act. *Wessel v Aer Lingus Ltd.* DEC-2016-14 <https://www.workplacerelements.ie/en/search/?decisions=1&nameofparty=wessel>.

5.3.4 Legal protection of rights ensuing from the employment contract

Section 22 of the Maternity Protection Act 1994 (as amended) provides that during any period of health and safety leave, maternity leave and time-off under the Act, the employee is deemed to be in employment. However, the employee's right to remuneration is suspended (i.e. she has no entitlement to remuneration) during maternity leave; in addition, the employer is not obliged to pay contributions in respect of superannuation.¹⁴⁹

5.3.5 Level of pay or allowance

Chapter 9 of the Social Welfare Consolidation Act 2005 (as amended) provides that maternity benefit is presently EUR 240 gross per week.¹⁵⁰ This is a flat amount that does not depend on the salary of the employee. Such sum is subject to income tax and any other levies required by law.

Section 52 of the Social Welfare (Consolidation) Act 2005 (as amended) provides that there is an entitlement to health and safety benefit. The employer pays for the employee's normal remuneration during the first 21 days of health and safety leave; thereafter the employee is entitled to health and safety benefit based on the employee's weekly earnings with additional payments for adult and child dependants.¹⁵¹ This entitlement ends when the employee becomes entitled to maternity benefit. Such payment is subject to income tax and any other levies required by law.

5.3.6 Additional statutory maternity benefits

There are no additional maternity benefits but an employer may 'top-up' the state maternity benefit to the employee's normal remuneration.

5.3.7 Conditions for eligibility (Article 11(4) of Directive 92/85)

State maternity benefit is subject to income tax and any other levies required by law. The employee must have 39 weeks paid Pay Related Social Insurance in the 12-month period prior to the commencement of maternity leave or at least 39 weeks' contributions paid since first starting work and at least 39 weeks paid contributions in the relevant tax year or 26 weeks' contributions paid in the relevant tax year and 26 weeks' contributions paid in the tax year prior to the relevant tax year.

5.3.8 Right to return to the same or an equivalent job (Article 15 of Directive 2006/54)

The Maternity Protection Act provides for a general right to return to the same job of the employee who has been on maternity leave¹⁵² subject to notification by the employee.¹⁵³ Where an employee has been absent on protective leave, she must give the employer four weeks' notice of her return. An employer may waive its right to such notice. If an employee fails to give such notice, the employee may apply to the Workplace Relations Commission for an extension of time to give such notification. Section 26 of the Act provides 'the employee shall be entitled to return to work:

- (a) with the employer with whom he or she was working immediately before the start of the period or, where during the employee's absence from work there was a change of ownership of the undertaking in which she or he was employed immediately before his or her absence, with the owner (in this Act referred to as the "the successor") of

¹⁴⁹ Employer contributions to pension schemes are deemed remuneration during maternity leave and are therefore not payable during maternity leave under the Act. *Wessel v Aer Lingus Ltd.* DEC-2016-14 <https://www.workplacerelations.ie/en/search/?decisions=1&nameofparty=wessel>.

¹⁵⁰ EUR 245 from end of March 2019.

¹⁵¹ <http://www.welfare.ie/en/Pages/Health-and-Safety-Benefit.aspx>.

¹⁵² Section 26 of the 1994 as amended by s.18 of the 2004 Act.

¹⁵³ Section 28 as amended by s.20 of the 2004 Act.

- the undertaking at the expiry of the period of absence.
- (b) in the job which the employee held immediately before the start of that period, and
 - (c) under the contract of employment under which the employee was employed immediately before the start of that period, or, where a change of ownership such as is referred to in paragraph (a) has occurred, under a contract of employment with the successor which is identical to the contract under which the employee was employed immediately before the start of that period, and (in either case) under terms or conditions—
 - (i) not less favourable than those that would have been applicable to the employee, and
 - (ii) that incorporate any improvement to the terms or conditions of employment to which the employee would have been entitled, if she or he had not been so absent from work.

(2) For the purposes of subsection (1)(b), where the job held by an employee immediately before the start of the period of her or his absence on protective leave was not the employee's normal or usual job, the employee shall be entitled to return to work, either in her or his normal or usual job or in that job as soon as is practicable without contravention by the employee or the employer of any provision of a statute or instrument made under statute.

(3) In this section "job", in relation to an employee, means the nature of the work which she or he is employed to do in accordance with her or his contract of employment and the capacity and place in which she or he is so employed.'

Section 27 of the Maternity Protection Act on the right to suitable alternative work provides:

(1) "Where an employee is entitled to return to work in accordance with Section 26 but it is not reasonably practicable for the employer or the successor to permit the employee to return to work in accordance with that section, the employee shall, subject to this Part, be entitled to be offered by the employer, the successor or an associated employer suitable alternative work under a new contract of employment.

(2) Work under a new contract of employment constitutes suitable alternative work for the purposes of this Act if—

- (a) the work required to be done under the contract is of a kind which is suitable in relation to the employee concerned and appropriate for the employee to do in the circumstances; and
- (b) the terms or conditions of the contract—
 - (i) relating to the place where the work under it is required to be done, the capacity in which the employee concerned is to be employed and any other terms or conditions of employment are not less favourable to the employee than those of her or his contract of employment immediately before the start of the period of absence from work while on protective leave, and
 - (ii) incorporate any improvement to the terms or conditions of employment to which the employee would have been entitled if she or he had not been so absent from work during that period.

(3) For the purposes of this Act one employer shall be taken to be associated with another—

- (a) if one is a body corporate of which the other (whether directly or indirectly) has control; or
- (b) if both are bodies corporate of which a third person (whether directly or indirectly) has control."

If an employee cannot return to her usual job, the employer must provide suitable alternative work. Alternative work must be work that is suitable to the particular employee

and appropriate for her in the circumstances.¹⁵⁴ Section 27(2) of the 1994 Act as amended by Section 18 of the 2004 Act ensures compliance with Directive 2006/54 by providing that in the event of an employee returning to work on the expiration of protective leave, the resumption of the same work not being practicable and suitable alternative work being offered, the terms or conditions of such employment shall not be less favourable to the employee than those of her contract of employment immediately before protective leave. It also provides that such terms or conditions shall incorporate any improvement to which the employee would have been entitled had she not been absent from work on such leave.¹⁵⁵

In the event that an employee returns to work after maternity leave and is offered a different post to what she was working at prior to her maternity leave, what options are open to her? She can bring a claim under the Maternity Protection Act but receive little by way of compensation under that Act or alternatively bring a claim under the Employment Equality Acts where, if successful, she would be in receipt of more substantial compensation.

The employee has to notify her employer in writing four weeks before the date on which she expects to return to work.¹⁵⁶ If there is a problem with this notification, where there is a failure to give the notification or it is late, the adjudication officer¹⁵⁷ or on appeal, the Labour Court, may extend the four-week time limit for giving notification. However, if there are not reasonable grounds for the failure to give notifications or the breach of the time limit, these matters will be taken into account if there is a termination of the employee's employment and if there is a claim for unfair dismissal. The adjudication officer may provide redress as appropriate and compensation of up to 20 weeks' remuneration.¹⁵⁸

Under the 1994 Act, if an employee is not permitted to return to work, she is deemed to have been dismissed on the expected date of her return, and the dismissal shall be deemed to be an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Where an employee shows a prima facie case of discrimination or indirect discrimination in any proceedings under the Act or in respect of a dismissal, the burden of proof shall be on the respondent.¹⁵⁹

5.3.9 Legal right to share maternity leave

There is no legal right to share maternity leave. However, in the event of the death of the mother and if there is a balance of maternity leave outstanding, the balance may be taken over by the father of the baby.

5.3.10 Case law

In *Byrne v Minister for Defence*,¹⁶⁰ an army officer (professional engineer) was denied access to promotion when she was on maternity leave. In addition, throughout her

¹⁵⁴ Section 26 of the 1994 Act as amended by Section 19 of the 2004 Act. In *McGrath v Irish Distillers Ltd* (P/1/2003), it was held that there was a breach of Section 26 of the Act in that the claimant did not return to the job she held immediately before her maternity leave and the Tribunal was satisfied that the work to which she returned was not of equal status, nature or extent and therefore did not comply with Section 27. As reinstatement was not an option, the rights commissioner ordered 20 weeks' remuneration, which amounted to EUR 17 000. This was upheld.

¹⁵⁵ See claims under the Employment Equality Acts 1998-2015: *Shinkwin v Millett* [2004] E.L.R. 319 (EED/044), February 16, 2004 and *Jones v Norwich Union International Ltd* (DEC/E2006/062).

¹⁵⁶ Section 28 of the 1994 Act as amended by Section 20 of the 2004 Act. Maternity Protection (Disputes and Appeals) Regulations 1995 (SI No. 17 of 1995).

¹⁵⁷ Section 28(2) of the 1994 Act as amended by Section 21 of the 2004 Act.

¹⁵⁸ Maternity Protection (Maximum Compensation) Regulations 1999 (SI No. 134 of 1999).

¹⁵⁹ Section 33A of the 1994 Act as amended by Section 22 of the 2004 Act.

¹⁶⁰ [2019] IECA 2019; [2017] IEHC 453; [2016] IEHC 464, <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/426c1032ef0b2f93802580180053b54f?OpenDocument>.

pregnancy, she was placed under stress. The applicant, a mechanical engineer in the Permanent Defence Forces, was granted an order of the High Court in July 2017 by way of judicial review, declaring that she was qualified for promotion from the rank of captain to commandant in accordance with the relevant section of the Defence Force regulations. She also obtained a declaration that the state was in breach of Articles 2(2)(c), 14(2) and 15 of Directive 2006/54. She was awarded damages in the sum of EUR 824 794 to include loss of pension. On appeal, by the state, this judgment was overturned by the Court of Appeal. The applicant had applied to the High Court by way of judicial review, however, as she had an adequate alternative remedy, then unless the interests of justice dictate, she was obliged to utilise that remedy in the first place. The applicant had made no argument that the Equality Directive had not been adequately transposed. Accordingly, she should have utilised, in the first instance, the Redress of Wrongs procedure as provided for in the Defence Act 1954 – this might have resolved the entire matter and it could have been done speedily. Following that procedure, the applicant could have made a claim to the Workplace Relations Commission, under the Employment Equality Act 1998. This judgment was subsequently overturned by the Court of Appeal on procedural grounds.

In *O'Rourke v Minister for Defence*,¹⁶¹ the complainant was a former member of the Defence Forces who joined in 1991 as a cadet and became a commissioned officer at the rank of lieutenant in 1994. The complainant asserted that she was discriminated against on grounds of gender in that the respondent treated two lengthy absences from work, both on maternity leave, as equivalent to sick absences of a male officer and gave her a poor performance rating which impacted her ability to go on a mandatory training course which she would have needed to advance to the role of commandant. The complainant brought claims on the gender, family status and disability grounds and also claimed victimisation. In order to be promoted she needed to complete a certain course or alternatively, have been certified by the Chief of Staff as having successfully completed a course acceptable in lieu of that course. Over a period of two to three years, the complainant had miscarriages, two successful pregnancies and was away from work for a period of approximately two years consisting of sick leave, maternity leave and annual leave. The General Officer Commanding of the Air Corps recommended against her attending the course and thereby effectively barring the complainant from becoming eligible for promotion to commandant. She was also removed from her duties as refuelling officer on health and safety grounds. In summary, she was permitted to do the course but by that stage her health had deteriorated so she could not do the course and was retired from the Defence Forces on grounds of ill-health.

The issue for decision was whether the complainant had been discriminated against on the grounds of gender in relation to promotion, due to the treatment of her absences on maternity leave in her performance appraisals, which hindered her access to the training necessary to become eligible for promotion. Relying on case law of the CJEU,¹⁶² the adjudication officer decided that maternity leave and pregnancy-related absences are conditions that only women can experience and which must not be equated with sick leave absences which a man might accrue. This is, therefore, prima facie discrimination. It was considered that the Defence Forces handbook reference to discrimination was short and inadequate and that the complainant was subject to a 'major systems failure'. The adjudication officer ordered that a comprehensive review of training and information materials, instructions and local practices within the Defence Forces be carried out by 31 December 2021 to ensure their compatibility with the protection that pregnant persons enjoy under anti-discrimination law and to ensure that the basic provisions of Irish law are

<http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/899d0a7f3303833f8025815b0031a78c?OpenDocument>. https://beta.courts.ie/acc/alfresco/a563d770-9dc9-42f7-9ee1-02ac55c5fe59/2019_IFCA_338_1.pdf/pdf#view=fitH.

¹⁶¹ <https://www.workplacereactions.ie/en/cases/2020/december/adj-00007375.html>.

¹⁶² *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* (case C-77/88) and *Handels- og Kontorfunktionærernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening* (acting for Aldi Marked K/S) (case C-179/88), and *Webb v EMO Air Cargo (UK) Ltd* (case C-32/93).

clearly written in the Defence Forces materials along with relevant training for staff with personnel responsibilities. The complainant was awarded two years' salary in the sum of EUR 117 814 in respect of discrimination, along with interest dating from 1 May 2013, being the date of reference of the claim, to the date of payment.

In a recent case,¹⁶³ the High Court considered the issue as to when a teacher was entitled to annual leave and public holidays after maternity leave. Section 22(4) of the Maternity Act 1994 provides:

'A period of absence from work while on protective leave shall not be treated as part of any other leave (including sick leave or annual leave) to which the employee concerned is entitled.'

The case arose from a Circular 0009/2013 where teachers were obliged to take leave accruing during maternity leave during school closure periods rather than during term-time. The teachers objected to this on the basis that they were all pregnant by the time the 2013 Circular was published and had notified their schools of their pregnancy. The Circular, in summary, provided that, in general, employees are entitled to 20 days' annual leave as per the so-called Working Time Directive 93/104/EC which was transposed in Ireland by the Organisation of Working Time Act 1997. The Circular then stated that the annual leave entitlements 'are to be taken on existing school closure days that occur in the leave year in question, i.e. both before and after the maternity leave period. Annual leave entitlements are to be taken at a time outside of the period of maternity leave'. The Circular further provided that when availing of statutory maternity leave and if there are not enough school closure days left in the leave year to absorb all the annual leave entitlements, it is permitted to take the annual leave immediately before the maternity leave in the same leave year. In the alternative, the teacher will be allowed to carry the balance forward to the following leave year but must then take the leave during school closures. The High Court considered that the teachers were expressly permitted to accumulate annual leave and that leave derived from public holidays to be taken after maternity leave has ended. The judgment recited inter alia Article 8 of Directive 92/85/EEC, Article 7 of Directive 93/104/EC and *Gomez*,¹⁶⁴ stating that maternity leave is separate from annual leave. The most important point is that maternity leave is not to be treated as any other type of leave. The case was referred back to the tribunal for a decision in light of the High Court judgment in *Butler v Smurfit Ireland Ltd t/a Paclene*,¹⁶⁵ where an employee had originally worked as an accounts clerk and was offered the position of receptionist and resigned from her employment. The claimant was awarded IR£ 8 000 (EUR 8 880).

In *Tighe v Travenol Laboratories*,¹⁶⁶ the claimant claimed that she had been unfairly constructively dismissed when she returned from maternity leave to be given production work, having previously been employed in the office. The Tribunal considered that the work in production was different to that in an office and did not consider it appropriate, although management did argue that it was appropriate.

In *Pratt v Schlumberger Information Solutions*,¹⁶⁷ the Tribunal determined that the employer pay EUR 12 500, after an employee was constructively dismissed as no arrangements were put in place to accommodate her on her return from maternity leave. She 'was left with nothing to do and no concrete assurance that the situation would

¹⁶³ In the matter of Section 34 of the Maternity Protection Act 1994; *the Boards of Management of Scoil An Chroí Ró Naofa Íosa and Ors. v Donnelly and Ors.* [2020] IEHC 550 (Hyland J., 2 November 2020) https://www.courts.ie/acc/alfresco/092fef6f-7512-4581-aaef-6ba68b8ae7a1/2020_IEHC_550.pdf/pdf#view=fitH.

¹⁶⁴ (Case C-342/01) [2004] ECR I – 02605.

¹⁶⁵ (P/3/1988). See also, *O'Brien v Harrington and Goodlass Ltd* (P/2/1981), where reinstatement was awarded.

¹⁶⁶ (1989) 8 J.I.S.L.L. 124.

¹⁶⁷ (UD/1321/2005).

improve. As a direct result, the claimant left on sick leave and subsequently resigned’.

In *Brennan v Board of Management of Scoil Mhuire agus Iosaf Junior School*,¹⁶⁸ a promotion opportunity arose for the position of acting principal and acting deputy principal whilst the complainant was on maternity leave. The complainant was not informed and a male colleague was appointed to the role of acting deputy principal and thereafter acting principal. On hearing of this, the complainant said that she would return early to work to fulfil the role of acting deputy principal. She returned to work. She alleged that the failure to notify her of these promotion opportunities denied her the opportunity of gaining experience in a principal’s role and violated the terms and conditions of employment whilst on maternity leave. She subsequently applied for the permanent position of principal and the same male colleague succeeded in obtaining that role. She maintained that she was denied promotion in spite of her relevant qualifications, competencies and experience. There was no explanation why her marks on the scoresheet were reduced after they were totalled. The complainant made out a prima facie claim of discrimination and on the balance of probabilities, the selection process was tainted with discrimination on the gender ground. The complainant was awarded 78 weeks’ remuneration amounting to EUR 93 498.

In a number of cases there is ongoing discrimination based on pregnancy or maternity and the employee subsequently resigns. In such situation, the former employee can receive compensation for discrimination, harassment and victimisation.

5.4 Adoption leave

5.4.1 Existence of adoption leave in national law

The Adoptive Leave Acts 1995 and 2005 provide for statutory adoptive leave.¹⁶⁹ The Family Leave and Miscellaneous Provisions Act 2021 provides inter alia that the adoptive leave legislation is amended to provide for adoptive leave for male same-sex couples and to enable adoptive couples to choose which parent can avail of adoptive leave. The length of the leave is 24 weeks for a qualified adopter.¹⁷⁰ Adoptive leave benefit is paid on the same terms as maternity benefit.¹⁷¹ There is additional adoptive leave of 16 weeks (unpaid). The conditions for the taking of statutory adoptive leave mirror those for statutory maternity leave. Employees who wish to avail of statutory adoptive leave have to give four weeks’ notice to their employers of their intention to take such leave and of the expected date of placement of the child with evidence thereof; in the case of a foreign adoption such evidence is required as soon as reasonably practicable. Employees are entitled to paid time-off for pre-adoption classes and meetings. There is provision for the qualified adopter to take the balance of adoptive leave or additional adoptive leave in the event of the death of the mother. There is provision for the break and resumption of adoptive leave and additional adoptive leave in the event of the hospitalisation of the child. In the event of

¹⁶⁸ [2020] ELR 21; ADJ-00018053 (Workplace Relations Commission, 19 September 2019).

¹⁶⁹ Section 6 of the Adoptive Leave Act 1995.

¹⁷⁰ Section 5 of the Family Leave and Miscellaneous Provisions Act 2021 defines ‘qualifying adopter’ as: ‘where a child is placed, or is to be placed, in the care of a couple (of whom neither is the mother or father of the child), with a view to the making of an adoption order, or to the effecting of a foreign adoption or following any such adoption, the member of the couple who is – an employee, and chosen by the couple to be the qualifying adopter for the purposes of this Act, in any other case, an employee, who is not a surviving parent in relation to the child, in whose care a child has been placed or is to be placed with a view to the making of an adoption order, or to the effecting of a foreign adoption or following any such adoption.’ The Family Leave and Miscellaneous Provisions Act 2021 changed the definition of ‘adopting parent’ so that a married couple, civil partners or a co-habiting couple can choose as to which partner is to take the adoptive leave where the member of the couple is an employee. It should be noted, however, that a self-employed parent can also be entitled to adoptive leave. This means that the partner who takes adoptive leave will not be able to avail of statutory paternity leave. There is also provision for the other partner to take over any leave where the partner chosen to take adoptive leave dies. This arrangement does not apply to a couple where one or other of the partners is the child’s natural parent. (Sections 5 and 6 of the Act of 2021).

¹⁷¹ Self-employed persons are also entitled to adoptive leave benefit provided they have the requisite social insurance contributions required, which is the same as under the maternity legislation.

the illness of the qualified adopter (the employee), additional adoption leave may be terminated. There are special arrangements for the return to work where there are placements of less than 20 weeks duration. Adoptive benefit is paid at the same rate as maternity benefit with the same social insurance requirements. There is a right of return to work following leave under the Acts to the same or a similar job. In brief, all the protections available under statutory maternity leave are also available under statutory adoptive leave.

5.4.2 Protection against dismissal (Article 16 of Directive 2006/54)

Sections 18 and 19 of the Adoptive Leave Act 1995 (as amended) provide a right to suitable alternative employment if their original job is not available. The provisions mirror the same provisions as for protection against dismissal for workers who take maternity leave.

5.4.3 Case law

In *McCormack v Ark Fashions (Dundrum) Ltd*,¹⁷² the EAT awarded EUR 3 000 to a part-time sales assistant after it determined that her employer had substantially altered the terms of her employment upon her return from adoptive leave.

5.5 Parental leave

5.5.1 Implementation of Directive 2010/18

The Parental Leave Acts 1998 and 2006 with the European Union (Parental Leave) Regulations 2013 ('the 2013 Regulations') entered into effect on 8 March 2013. The Parental Leave Acts 1998 and 2006¹⁷³ now provide for 26 working weeks¹⁷⁴ of unpaid parental leave for the parents of natural or adopting parents (where an adoption order is awaited)¹⁷⁵ or adoptive parents (where an adoption order is in place) or a parent *in loco parentis* in all sectors of employment.

In addition, there is the Parent's Leave and Benefit Act 2019¹⁷⁶ as amended by the Family Leave and Miscellaneous Provisions Act 2021 which as of April 2021 provides for five weeks' paid parent's leave with parent's benefit. The provisions apply to a parent who fulfils eligibility requirements as the parent of a child adopted or born on or after 1 November 2019.¹⁷⁷ The five weeks' leave can be extended to a maximum of nine weeks by ministerial order. There is no sharing of parent's leave so as to encourage fathers to take the leave.

5.5.2 Applicability to public and private sectors (Clause 1 of Directive 2010/18)

The legislation applies to all employees regardless of whether they are working in the public or private sector.

¹⁷² (UD/115/2007).

¹⁷³ The relevant legislation is the Parental Leave Act 1998, the Parental Leave (Amendment) Act 2006, the Parental Leave (Notice of *Force Majeure* Leave) Regulations (SI No. 454 of 1998), the Parental Leave (Disputes and Appeals) Regulations (SI No. 6 of 1999), the Parental Leave (Maximum Compensation) Regulations (SI No. 34 of 1999), the Circuit Court Rules (SI No. 510 of 2001), and the European Communities (Parental Leave) Regulations (SI No. 231 of 2000) and the European Union (Parental Leave) Regulations 2013 (SI No. 81 of 2013).

¹⁷⁴ Since 1 September 2020.

¹⁷⁵ An 'adopting parent' means a qualifying adopter or a surviving parent, as amended by Section 6 of the Family Leave and Miscellaneous Provisions Act 2021.

¹⁷⁶ <http://www.irishstatutebook.ie/eli/2019/act/35/enacted/en/html>;
<https://www.oireachtas.ie/en/bills/bill/2021/33/>.

¹⁷⁷ Parent's Leave and Benefit Act 2019 (Commencement of Certain Provisions of Part 5) Order 2019 (SI No. 553 of 2019).

5.5.3 Scope of the transposing legislation

Subject to the necessary service requirements, the legislation provides for parental leave and parent's leave for all employees (to include public servants). The scope of the Parental Leave Act 1998 (as amended) refers to the parent, the qualifying adopter in respect of the child.

The Parent's Leave and Benefit Act 2019 applies to employees, but in addition, self-employed persons may be so entitled to benefit payments under the Act. This Act applies to a 'relevant parent' which includes a parent of the child, the spouse, civil partner or cohabitant, as the case may be, of the parent of the child, or a parent of a child under Section 5 of the Children and Family Relationships Act 2015 where the child is a donor-conceived child within the meaning of that Act; or in the case of a child who is or is to be adopted, the qualifying adopter of the child or the spouse, civil partner or co-habitant as may be of the qualifying adopter of the child.

5.5.4 Length of parental leave

Parental leave is 26 working weeks effective from 1 September 2020.¹⁷⁸ Parent's leave is five weeks from April 2021 and can be extended to a maximum of nine weeks by ministerial order; such leave is retrospective to children born on or after 1 November 2019.

5.5.5 Age limits

Parental leave shall end not later than the child's 12th birthday. If a child has a disability or a long-term illness, the upper age limit is 16 years or the cessation of the child's disability or illness (whichever occurs first).

Parent's leave is in respect of a child aged up to 24 months (or 2 years from adoption).

5.5.6 Individual nature of the right to parental leave

The right is individual to each parent,¹⁷⁹ i.e. 26 weeks each in respect of parental leave.

Each parent has the right to parent's leave of five weeks.

5.5.7 Transferability of the right to parental leave

Section 6 of the Parental Leave Act 1998 (as amended) provides that there is provision for the transfer of up to 14 weeks' parental leave entitlements from one parent to the other parent where both are employed by the same employer and the employer consents to the transfer of leave. The 'donor' parent retains the right to four weeks' parental leave. Therefore, if both parents are not employed by the same employer, such transfer of leave may not take place.¹⁸⁰

In respect of parent's leave, there is no transfer.¹⁸¹

5.5.8 Form of parental leave

Parental leave may be taken in a continuous period of 26 working weeks or two separate periods of not less than 6 weeks each (and not consisting of more than 26 working

¹⁷⁸ Section 6 of the Parental Leave Act 1998 (as amended).

¹⁷⁹ To include a donor-conceived child as provided under Section 5 of the Children and Family Relationships Act 2015.

¹⁸⁰ Section 6 of the Parental Leave Act 1998 (as amended).

¹⁸¹ Section 5(4) of the Parent's Leave and Benefit Act 2019, unless the parent dies before the period of the expiration of the entitlement to such leave or any balance period of leave (Section 16 of the Parent's Leave and Benefit Act 2019).

weeks).¹⁸² In other words, two periods of six weeks and the balance, as agreed between employer and employee. Subject to agreement with the employer, parental leave may be taken in shorter blocks or by reduced hours, for example for a time to make up the period of 26 working weeks.¹⁸³

Parent's leave must be taken in one continuous period of five weeks or else periods each consisting of one week.¹⁸⁴

5.5.9 Work and/or length of service requirements (Clause 3(b) of Directive 2010/18)

The employee must have one year of continuous service¹⁸⁵ before they are entitled to parental leave. However, if the employee's child is very near the age threshold and where the employee has been working for three months for the employer concerned, there is provision for pro-rata parental leave: one week of leave for every month of employment completed. If an employee changes employment and if the child is still below the age threshold and the parental leave allowance has not been fully used then the employee may use up the balance of the allowance of leave when one year's employment has been completed and the child is still below the qualifying age.

It includes employment under two or more continuous fixed-term contracts with the same employer.

In respect of parent's leave, there is no service requirement.¹⁸⁶

5.5.10 Notice period

The employee¹⁸⁷ must give the employer six weeks' notice in writing of his or her wish to take parental leave and the manner in which it is to be taken. The employer will then provide a confirmation document confirming the entitlement to take the parental leave not less than four weeks before the commencement of the leave. Both employer and employee then prepare a confirmation document not later than four weeks before the leave is to begin and setting out details of the leave. Once the document is signed an employer cannot refuse the leave.

In respect of parent's leave, the employee¹⁸⁸ must give six weeks' notice to his or her employer setting out the date that leave is expected to begin and the duration of the planned leave.

5.5.11 Postponement of parental leave (Clause 3(c) of Directive 2010/18)

The employer may postpone the parental leave if there is a substantial adverse effect on the employer's business. The employer may postpone the leave by six months.¹⁸⁹ There are also special arrangements in the event that an employee taking parental leave seeks postponement because of illness, etc. In general, the employer can only postpone parental leave once in respect of any particular child. However, the employer may postpone the leave twice on the basis of seasonal variations and the volume of work.

¹⁸² When the leave is taken in periods as above, then there must be a break of 10 weeks between periods of parental leave unless agreed otherwise.

¹⁸³ Section 7 of the Parental Leave Act 1998 (as amended).

¹⁸⁴ Section 5 of Parent's Leave and Benefit Act 2019.

¹⁸⁵ For parental leave under the Parental Leave Act 1998 (as amended).

¹⁸⁶ Parent's Leave and Benefit Act 2019.

¹⁸⁷ Parental Leave Act 1998 (as amended).

¹⁸⁸ Section 6 of the Parent's Leave and Benefit Act 2019.

¹⁸⁹ Section 10 of the Parental Leave Act 1998 (as amended).

5.5.12 Special arrangements for small firms (Clause 3(d) of Directive 2010/18)

There are no special arrangements for small firms.¹⁹⁰

5.5.13 Special rules and exceptional conditions for parents of children with a disability or long-term illness (Clause 3(3) Directive 2010/18)

If a child has a disability or a long-term illness, the upper age limit is 16 years or the cessation of the child's disability or illness (whichever occurs first).¹⁹¹

The normal provisions for parent's leave apply.

5.5.14 Measures addressing the specific needs of adoptive parents (Clause 4 of Directive 2010/18)

Adoptive parents may take parental leave and parent's leave the same as natural parents. Parental leave is in addition to statutory adoptive leave and additional adoptive leave.

5.5.15 Provisions protecting workers against less favourable treatment or dismissal (Clause 5(4) of Directive 2010/18)

There is provision that an employee cannot be penalised by their employer for exercising or proposing to exercise their rights under the legislation, unfair treatment of the employee, selection for redundancy, and an unfavourable change in the conditions of employment of the employee. Penalisation includes dismissal of an employee.¹⁹²

There is also provision under the Parent's Leave and Benefit Act 2019 to protect an employee from penalisation (to include dismissal).¹⁹³

5.5.16 Right to return to the same or an equivalent job (Clause 5(1) of Directive 2010/18)

On the expiration of parental leave, the employee is entitled to return to work with his or her employer in the job which they held immediately before the commencement of the leave. The employee must work under the same contract of employment on terms which are not less favourable and which contract incorporates any improvement to the terms or conditions of employment which the employee would be entitled to if they had not been absent from work. In a situation where the job carried out by the employee immediately before the period of parental leave was not the employee's normal or usual job, then the employee will be entitled to return to work either in his or her usual job or in that job as soon as reasonably practicable without contravention of any statutory provision. In the event of a transfer of business during the period of parental leave, the employee will be entitled to return to work with the new owner on the same terms as if no transfer of business had taken place. In the event that there is an interruption or a cessation of work (e.g. a lack of work or if a fire had occurred) in an employee's place of employment, then the employee shall return to work after such interruption or cessation as soon as possible thereafter.¹⁹⁴

Similar provisions apply in respect of the Parent's Leave and Benefit Act 2019.¹⁹⁵

¹⁹⁰ This arises from the constitutional provision that all persons are equal.

¹⁹¹ Section 6 of the Parental Leave Act 1998 (as amended).

¹⁹² Section 16A of the Parental Leave Act 1998 (as amended).

¹⁹³ Section 19 of the Parent's Leave and Benefit Act 2019.

¹⁹⁴ Section 15 of the Parental Leave Act 1998. As noted above, there are similar provisions in the Maternity Protection Act 1994 and the Adoptive Leave Act 1995.

¹⁹⁵ Section 20 of the Parent's Leave and Benefit Act 2019.

5.5.17 Maintenance of rights acquired or in the process of being acquired by the worker (Clause 5(2) of Directive 2010/18)

During the period of parental leave, the employee retains the right to public holidays and any public holidays that fall in the period of leave are added at the end of the parental leave. Annual leave which accrues during parental leave shall be granted in accordance with the Organisation of Working Time Act 1997, which means that the time at which annual leave is granted to the employee is decided by the employer having regard to the requirements of the employer's business and subject to the employer taking into account the need for the employee to reconcile work and family responsibilities and rest and recreation.¹⁹⁶

The same rights apply if an employee is on parent's leave.

5.5.18 Status of the employment contract or relationship during parental leave

During the period of parental leave, the employee's contract of employment stands suspended. There is no entitlement to payment from the employer, but there may be a contractual arrangement for payment or partial payment.¹⁹⁷

During the period of parent's leave, the contract stands suspended.¹⁹⁸

However, under parent's leave, a relevant parent is entitled to parent's leave benefit of EUR 245 gross per week provided they have the necessary social insurance entitlements.¹⁹⁹

5.5.19 Continuity of entitlement to social security benefits

All statutory social welfare entitlements remain in place during parental leave.²⁰⁰

During a period of parent's leave, an employee is not deemed to be a contributor for the purposes of the Social Welfare Consolidation Act 2005 if they are not in receipt of any reckonable earnings from their employer.

5.5.20 Remuneration

There is no statutory entitlement to remuneration for parental leave; however, there may be private contractual arrangements between employer and employee.

During parent's leave, an employee or a self-employed person is entitled to parent's benefit provided they have the necessary PRSI (pay related social insurance) contributions. Parent's benefit is EUR 245 gross per week.

5.5.21 Social security allowance

There is no social security allowance for parental leave.

During parent's leave, an employee or a self-employed person is entitled to parent's benefit provided they have the necessary PRSI (pay related social insurance) contributions. Parent's benefit is EUR 245 gross per week.

¹⁹⁶ Section 7 of the Parental Leave Act 1998.

¹⁹⁷ Effective 1 September 2019, each parent will be entitled to four weeks paid parental leave in the first year of life of the child and an additional four weeks from 1 September 2020 under the Parental Leave (Amendment) Act 2019.

¹⁹⁸ Section 18 of the Parent's Leave and Benefit Act 2019.

¹⁹⁹ The same as for maternity, adoptive or paternity benefits.

²⁰⁰ Social Welfare (Consolidation) Act 2005 (as amended).

5.5.22 More favourable provisions (Clause 8 Directive 2010/18)

The Parental Leave Act 1998 (as amended) presently provides for 22 weeks parental leave, which is in excess of the requirements of the Directive. Effective 1 September 2020, this will be increased to 26 weeks. These latter eight weeks will be paid leave to be taken within the first year of the child's life. The age of the child generally has been increased to 12 years. The period of leave (22 weeks) is longer than the minimum period of 4 months mentioned in the directive.

There is now the additional two weeks' parent's leave under the Parent's Leave and Benefit Act 2019 where an employee is entitled to parent's leave of EUR 245 gross per week.

5.5.23 Case law

Parental leave may be taken in shorter blocks than 22 (previously 18 weeks) weeks. However, if the employer does not so agree, then the employee does not have such an entitlement to take leave other than in a block of 18 weeks (now 22 weeks).²⁰¹

5.6 Paternity leave

5.6.1 Existence of paternity leave in national law

The Paternity Leave and Benefit Act commenced on 1 September 2016.²⁰² The Act provides that 'a relevant parent'²⁰³ (other than the mother) may take two weeks of statutory paid²⁰⁴ paternity leave on the birth or adoption of their child (which is in addition to statutory adoptive leave). Such leave applies to employed and self-employed parents. Such leave must be taken within six months after the birth or placement for adoption.²⁰⁵ The purpose of such leave is to provide or assist in the care of the child or to provide support to the mother or adopting parent of the child.²⁰⁶ Only one parent of the child is entitled to paternity leave. A relevant parent must give his or her employer four weeks' notice of the expected week of confinement or the placement date for adoption. There are provisions for the taking of leave early, in the case of early confinement, and for postponement in the event of late confinement or the illness of the parent who wishes to take paternity leave, or the hospitalisation of the child. Under the Maternity Leave Acts, in the event of the death of the mother, the father or other parent²⁰⁷ is entitled to the balance of the maternity leave or additional maternity leave. Then the relevant parent is entitled to

²⁰¹ *O'Neill v Dunnes Stores* [2000] ELR 306.

²⁰² <http://www.irishstatutebook.ie/eli/2016/act/11/enacted/en/html>. Paternity Leave and Benefit Act 2016 (Sections 30 and 31) (Commencement Order) 2016 SI No. 434 of 2016; Paternity Leave and Benefit Act 2016 (Commencement Order) 2016 SI No. 435 of 2016.

²⁰³ 'A relevant parent' means a person other than the mother of the child, who in the case of a child which is or is to be adopted by a married couple of the same sex is the spouse chosen by the couple to be the relevant parent for the purposes of the Act, or in any other case, the spouse, civil partner or cohabitant of the adopting mother or sole male adopter of the child or in any other case the father of the child, the spouse, civil partner or cohabitant of the mother of the child or the parent of a donor-conceived child. The reference to a 'donor-conceived child' is as defined in Section 5 of the Children and Family Relationships Act 2015 which section has not yet commenced. Therefore, such 'relevant parent' does not have entitlement under the Act until the relevant section of the Act of 2015 is commenced. A 'cohabitant' is one of two adults (whether of the same or opposite sex) who live together as a couple in an 'intimate and committed relationship' and who are not related to each other within the prohibited degrees of relationship (such as brother and sister) or married to each other or civil partners of each other (Section 2 of the Act of 2016).

²⁰⁴ A relevant parent is entitled to EUR 245 from 26 March 2019 provided the employee/self-employed parent has made the relevant social insurance contributions (the same requirements as for maternity and adoptive benefit). Social Welfare (Consolidated Claims, Payments and Control) (Amendment) (No. 2) (Paternity Benefit) Regulations 2016 SI No. 442 of 2016 and Social Welfare, Pensions and Civil Registration Act 2018.

²⁰⁵ If the employee is employed on a fixed-term contract and the last day of the contract expires before the leave is completed then the date of expiry of the leave is the date of the termination of the fixed-term contract. A fixed-term contract cannot be extended for such leave.

²⁰⁶ Section 6 of the Paternity Leave and Benefits Act 2016.

²⁰⁷ Child and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2019 SI No. 624 of 2019 commenced on 4 May 2020.

paternity leave at the end of the transferred maternity leave.²⁰⁸ There are also provisions that a surviving employed parent may be entitled to paternity leave if the relevant parent dies within 28 weeks after the birth or the placement for adoption. A relevant parent is entitled to return to work following such leave and there is also protection in the event of penalisation or dismissal.

5.6.2 Protection against unfavourable treatment and/or dismissal (Article 16 of Directive 2006/54)

An employee who takes paternity leave is entitled to return to work and also enjoys protection in the case of dismissal.²⁰⁹ In addition, in the event that the relevant parent dies within 28 weeks of the date of confinement or placement for adoption, the other parent takes over the paternity leave and all entitlements in relation thereto.²¹⁰

In the event of the death of the mother during maternity leave or adoptive leave, the father is entitled to the balance of such leave and he has the same entitlements as the mother would have.²¹¹

5.6.3 Case law

In *A Horticulturist v A Garden Centre*,²¹² a father was dismissed by his employer on grounds of redundancy some 11 days after the birth of his new-born baby while on paternity leave. The dismissal was by reason of redundancy due to a re-organisation. The adjudicator stated that fair procedures should have been followed and given that the son of the employer was the beneficiary of the apparent re-organisation, the argument was not sustainable. As this was a dismissal, the claim was brought under the Unfair Dismissals Act 1977 and he was awarded the sum of EUR 2 461 by way of compensation. This appears to be a small award but the claimant obtained suitable alternative employment at a higher rate of pay.

5.7 Time off for *force majeure*

5.7.1 Time off for *force majeure*

Section 13 of the Parental Leave Act 1998 (as amended) provides that an employee is entitled to *force majeure* leave where for urgent family reasons owing to injury or illness, the immediate presence of the employee is indispensable. The provision applies to the following relationships of the employee namely husband, wife or living as husband or wife, parent or adoptive parent, brother or sister, a person *in loco parentis* of the employee, or grandparent or persons living in domestic dependency (and the sexual orientation of the parties is immaterial).

There must be urgent family reasons due to injury or illness. The immediate presence of the employee at the place where the person is, whether at his or her home or elsewhere, is indispensable.

Force majeure leave shall not exceed 3 working days in any period of 12 consecutive months or 5 working days in any period of 36 consecutive months.

²⁰⁸ There are similar provisions in the case of the death of an adopting relevant parent.

²⁰⁹ Sections 19-27 of the Paternity Leave and Benefit Act 2016.

²¹⁰ Section 15 of the Paternity Leave and Benefit Act 2016 – ‘transferred paternity leave’.

²¹¹ Section 16 of the Maternity Protection Act 1994 (as amended); Section 9 of the Adoptive Leave Act 1995 (as amended).

²¹² <https://www.workplacerelations.ie/en/Cases/2018/May/ADJ-00008251.html>;
<https://www.irishtimes.com/news/crime-and-law/dad-sacked-11-days-after-birth-of-new-baby-and-while-on-paternity-leave-1.3505633>, Irish Times.

5.7.2 Case law

The Employment Appeals Tribunal case of *O'Hanlon v Bus Átha Cliath*²¹³ is particularly useful, because it actually sets out the precise meaning of Section 13(4) of the Act, which provides that the *force majeure* days taken by an employee 'shall not exceed 3 days in any period of 12 consecutive months or 5 days in any period of 36 consecutive months'. The Tribunal stated that the Parental Leave Act 1998 must be interpreted to mean:

'That the period of 36 months is to be calculated by starting on the day for which *force majeure* leave is claimed and counting the number of days taken as *force majeure* leave in the period of 36 consecutive months immediately preceding the day in question.'

Both parents who work for the same employer may be on *force majeure* leave at the same time.²¹⁴ In *Kenny v Fingal County Council*,²¹⁵ the husband and wife were parents of a severely autistic and non-verbal five-year-old son, who must have someone he knows with him at all times. In this case, the child was taken to hospital with severe breathing difficulties and both husband and wife had to spend time with the child who was ill and also look after their other child.

There has been a series of cases dealing with 'urgency'. In *Carey v Penn Racquet Sports Ltd*,²¹⁶ Carroll J. in the High Court emphasised that questions of urgency and indispensability should not be judged with hindsight. The plaintiff was a single mother with an eight-year-old child who had taken a day's leave to look after her child, who had woken up with a rash on her legs. Her employer refused to grant leave, because the child was subsequently diagnosed as having a rash, which was not serious. It was held that the Employment Appeals Tribunal had erred in upholding the employer's decision. Carroll J. stated the matter should have been looked at from the plaintiff's point of view at the time the decision was made not to go to work. Also, the plaintiff could not be assumed to have medical knowledge which she did not possess. This was considered to be 'clear authority' by McCracken J. in *McGaley v Liebherr Container Cranes Ltd*.²¹⁷ He went on to state that the question of whether the employee's immediate presence was or was not indispensable was a matter of fact to be decided by the Tribunal looking at the circumstances that were known when the employee decided to stay at home. In *Murphy v Celtic Linen Ltd*,²¹⁸ the claimant's 22-month-old child became ill with an ear, throat and chest infection on 2 January 2002. The employee brought the child to the doctor, who prescribed antibiotics. On questioning, the doctor said that there should be an improvement in about 48 hours. The child was very ill for the following 48 hours and the claimant had to remain at home with her. The claimant applied for *force majeure* leave for the two days but was refused. The employer argued that it believed that it was a 'routine absence' and it was incumbent on parents to make arrangements for routine illnesses. It was also noted that the claimant had made four applications for such leave prior to this. In summary, the Tribunal considered that in the final analysis, it is for the parent to decide as to whether his or her immediate presence is indispensable, i.e. it is a subjective test. Thus, the parent had such

²¹³ (PL/1/2006). The facts were that the claimant took leave from his employment on 28 June and 28 July 2005. He submitted claims to the respondent for these days to be treated as *force majeure* days within the meaning of the Parental Leave Act 1998. The respondent declined to so treat them and accordingly did not pay him for those days. The claimant had previously taken *force majeure* days in July and November 2000, January 2001, two days in October 2002 and further days in December 2003 and in February and May 2004. Section 13(4) of the Act provides that the *force majeure* days taken by an employee 'shall not exceed 3 days in any period of 12 consecutive months or 5 days of any period of 36 consecutive months'. In this case, the respondent contended that during the 36 months preceding both June and July 2005 the claimant had had 5 days of *force majeure* leave and was therefore not entitled to any further such leave.

²¹⁴ Of course, there is also nothing preventing two parents working for different employers being on *force majeure* leave at the same time.

²¹⁵ (PL/2/2004).

²¹⁶ [2001] 3 I.R. 32; [2001] E.L.R. 27.

²¹⁷ [2001] 3 I.R. 563.

²¹⁸ (PL/1/2003).

entitlement.

5.8 Care leave

5.8.1 Existence of care (or carers') leave in national law

The Carer's Leave Act 2001 provides that an employee with one year's service may have a break of up to two years from their employment (or 208 weeks if more than one person) to look after a person who is ill and needs care. The employee has full entitlements to return to work and may be in receipt of state carer's leave benefit. There are some facilities where the employee may do a certain number of hours of work in any week.²¹⁹ There are provisions for the right to return to work and also protection against penalisation to include dismissal.²²⁰

5.8.2 Case law

There is no case law.

5.9 Leave in relation to surrogacy

The legislation does not provide for such entitlement. However, a relevant parent under the Parental Leave Act includes a parent *in loco parentis*, and arguably, there may be such an entitlement.²²¹

5.10 Flexible working time arrangements

5.10.1 Right to reduce or extend working time

The right to reduce or extend working time is only by agreement between the employer and employee. Frequently, on return from maternity leave, an employee may want to reduce her hours of work or move from full-time to part-time hours. Clause 5 of the Framework Agreement on Part-time Work (Directive 97/81) provides that Member States in consultation with the social partners should identify and review obstacles of a legal or administrative nature which may limit the opportunities for part-time work and, where appropriate, eliminate them. Clause 5(3) provides, *inter alia*, that employers should give consideration to requests by workers to transfer from full-time to part-time work. This Directive was given effect in Ireland by the Protection of Employees (Part-time Work) Act 2001. Prior to the enactment of this Act, part-time female employees had to rely on the employment equality legislation. In order to comply with clause 5(3) of the Directive, the Industrial Relations Act 1990 (Code of Practice on Access to Part-Time Working) Declaration Order 2006²²² was agreed between the social partners. Paragraph 8 of the Order provides that the facility to change hours of work is a matter to be agreed between employer and employee rather than a statutory entitlement. Best practice states that

²¹⁹ Social Welfare (Consolidated Contributions and Insurability) (Amendment) (No. 1) (Carer's Benefit) Regulations 2000 (SI No. 338 of 2000) and the Social Welfare (Consolidated Payments Provisions) (Amendment) (No. 13) (Carers) Regulations 2000 (SI No. 340 of 2000). Carer's benefit is EUR 220 gross per week plus dependent allowances if they are aged over 16 years, have satisfied the social insurance contributions, have been in paid employment for the previous three months and leaves his or her employment to provide full-time care to a person who has been certified by an officer of the Department of Employment Affairs and Social Protection as being in need of full-time care and attention and is living in the State and is not living in a hospital, convalescent home or similar institution. The carer may engage in limited self-employment within the home or outside the home for up to 10 hours per week. They may also undertake an educational course of up to 10 hours per week.

²²⁰ These are similar provisions in respect of family leave arrangements, e.g. maternity, adoptive, paternity and parental leave.

²²¹ Parental leave is unpaid and this writer is not aware of a case where this was tested, more likely due to the fact that such leave is unpaid. For a useful discussion of surrogacy and maternity and adoptive leave see *G. v The Department of Social Protection* [2015] IEHC 419:

<http://www.courts.ie/Judgments.nsf/0/CE885D9FE65B899B80257E7E00504287>.

²²² SI No. 8 of 2006.

employers should treat such requests seriously and, where possible, explore with their employees to see if accommodation can be made.²²³

On return from parental leave, an employee has a right to request changes to his or her working hours or patterns of such hours, or both. The employee must give at least six weeks' notice of such request. The notice shall give the details of the nature of the changes so requested along with the date of commencement and the duration of same. The employer shall consider the request having regard to the needs of the employment concerned. The employer must respond within four weeks and either refuse or agree to the request. If there is a change to the work or work patterns, an agreement shall be prepared and signed. There is provision that the employee may revoke the request before it is signed. There is no provision to the effect that the employee has to give a reason for the refusal.²²⁴ Of course, an employee may at any time seek the agreement of their employer to move to part-time work or any other pattern of work. An employer should carefully consider such request and have good reasons if such application is refused.

5.10.2 Right to adjust working time patterns

The right to adjust working time patterns is only by agreement between employer and employee as noted under 5.9.1 above.

5.10.3 Right to work from home or remotely

The right to work from home is only by agreement between employer and employee as noted under 5.9.1 above. However, the COVID-19 pandemic has resulted in Government requesting employers to have workers working from home. This applies to all workers except for essential workers (e.g. medical personnel and other frontline workers, transport workers, shop workers and so on). Essentially arising from the changed working landscape and increased use of digital remote working, the *Tánaiste* (deputy prime minister) and Minister for Enterprise, Trade and Employment requested a draft code of practice from the Workplace Relations Commission on the right to disconnect. A code of practice was agreed and published in March 2021. The key issue is to provide assurances to employees who feel obligated to routinely work longer hours than those agreed in their terms and conditions of employment. Employees essentially should work their normal working hours and not be expected to be on duty responding to emails, etc. at any hour. An employee asserting their right to disconnect should not be penalised.²²⁵

5.10.4 Other legal rights to flexible working arrangements

Flexible work arrangements are only by agreement between employer and employee as set out under 5.9.1 above.

5.10.5 Case law

The requirement to work full time was considered in *Inoue v NBK Designs Ltd*²²⁶ in a claim under the Employment Equality Act 1998. The claimant, a lone parent with a child attending school, was working part time on a job-sharing arrangement. As business expanded, the employer wanted the two part-time positions to be amalgamated into one post; the claimant was offered the post, which she refused, and she was dismissed. The Labour Court²²⁷ had to decide whether the requirement to work full time was one which

²²³ Meenan, 'Protection of Employees (Part-time Work) Act 2001: A Five Year Update' (2006–2007) 1 *Employment Law Review-Ireland* 4.

²²⁴ Section 15A of the Parental Leave Act (as amended).

²²⁵ https://www.workplacerelements.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf.

²²⁶ [2003] E.L.R. 98.

²²⁷ The court determined that an expert tribunal can reach conclusions by relying on the knowledge and experience of members without elaborate statistical evidence being adduced on the point. The court

could be complied with by a significantly higher proportion of men than women and/or those of a different marital or family status to that of the claimant. If the answer to this was in the affirmative, then the requirement was prima facie discriminatory and the court had to consider whether the requirement could be justified by objective factors unrelated to the claimant's sex. The court was satisfied that the requirement to work full time was not necessary and, accordingly, the claimant was discriminated against on gender, family status and marital status grounds.

5.11 Evaluation of implementation

Council Directive 2010/18/EU has been transposed in full. The periods of leave under all the family leave legislation not only comply with EU directives but in addition, over the last number of years, there is paid paternity leave and also now five weeks' paid parent's leave.

5.12 Remaining issues

The main issue is that parental leave is unpaid for 26 weeks, therefore, many parents state that they cannot afford to take parental leave. However, the Parent's Leave and Benefit Act 2019 has changed this somewhat by providing for five weeks' paid leave for each parent. Parent's leave cannot be shared between the parents – that is, it must be taken individually. In other words, so that the father of the child may spend time looking after the child. Furthermore, it is paid by way of parent's benefit, presently EUR 245 gross per week. This leave may be extended by ministerial order to up to nine weeks.

There was considerable commentary on work-life balance issues arising from the COVID-19 pandemic. In particular, there was discussion that women were especially affected by the lockdown and the closure of schools, with having to carry out their normal duties when they were working from home along with home-schooling. For some parents, at various stages crèches were also closed, so they were working from home with children which was particularly difficult, as were situations where children had special needs. The *Fine Gael* MEP (Christian Democratic MEP for Dublin) stated that working from home was 'not a substitute for childcare' and that supports for parents should be a central part of the recovery from the pandemic.²²⁸

commented that the question does not appear to have been previously considered by the court. See also, *Steinicke v Bundesanstalt für Arbeit* (C-77/02) [2003] E.C.R. I-9027; [2003] I.R.L.R. 892 and *Bus Éireann v McLoughlin* (EDA0516).

²²⁸ For example, see Irish Times, 21 February 2021. <https://www.irishtimes.com/news/social-affairs/gender-equality-has-taken-a-big-step-back-during-covid-19-1.4481405>. Central Statistics Office, April 2020, <https://www.cso.ie/en/releasesandpublications/er/sic19wm/socialimpactofcovid-19onwomenandmenapril2020/>.

6 Occupational social security schemes (Chapter 2 of Directive 2006/54)

6.1 General (legal) context

6.1.1 Surveys and reports on the practical difficulties linked to occupational and/or statutory social security issues

There are approximately 160 000 pensions schemes in Ireland; they may be defined benefit or defined contribution schemes. Just 35 % of the private sector workforce have pension schemes. The provision of a pension scheme in the private sector is not compulsory. In many employments where there are pension schemes, membership of the scheme may or may not be compulsory. The Irish Government has published a roadmap for pensions 2018 to 2023 which proposed to introduce auto-enrolment in pensions for employees.²²⁹ The other key development is the extension of the retirement age in the public service to 70 years. There have been no key developments other than, given the gender pay gap, there is also a pension gap for women.²³⁰ It is noted that there are significant policy challenges:

‘not least to ameliorate old age pension pressures on public finances by bringing many more employees and self-employed persons into the world of pension provision, by auto-enrolment or otherwise’.²³¹

There are a significant number of underfunded defined benefit schemes in many employments.

6.1.2 Other issues related to gender equality and social security

The key area is that there is also a pension gap for women.²³²

6.1.3 Political and societal debate and pending legislative proposals

There have been no key developments other than that, given the gender pay gap, there is also a pension gap for women.²³³ The Government proposed by 2023 to introduce a system of auto-enrolment in pension schemes for those who are not members of such a scheme.

6.2 Direct and indirect discrimination

The key legislation in Ireland on pensions is the Pensions Act 1990 (as amended).²³⁴ There has been little litigation in Ireland in relation to gender equality and pension schemes, as Ireland has never had different retirement ages in respect of employment. There have never been different state retirement ages, either, and this obviously resulted in the same retirement ages in pensionable employment.

The prohibition of discrimination is laid down in Part VII of the Pensions Act 2004 (contained in Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004). It

²²⁹ <https://www.welfare.ie/en/pressoffice/pdf/PensionsRoadmap.pdf>.

²³⁰ See commentary based on the combined sixth and seventh report to the UN Committee. Ireland acceded to the Convention in 1985. <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

²³¹ Murphy, F., ‘Financial Services Law in Ireland’ (2018) Round Hall (chapter 55) at para. 55.14.

²³² See commentary based on the combined sixth and seventh report to the UN Committee. Ireland acceded to the Convention in 1985. <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

²³³ See commentary based on the combined sixth and seventh report to the UN Committee. Ireland acceded to the Convention in 1985. <https://www.ihrec.ie/app/uploads/2017/02/Ireland-and-the-Convention-on-the-Elimination-of-All-Forms-of-Discrimination-Against-Women.pdf>.

²³⁴ For an overview of the regulations of pensions, see Murphy, F., ‘Financial Services Law in Ireland’ (2018) Round Hall (chapter 55).

should be noted that Part VII of the Pensions Acts states that the principle of equal pay and equal treatment is that there shall be no direct or indirect discrimination on any of the discriminatory grounds in respect of any rule of a scheme. Part VII relates to occupational benefits and the Employment Equality Acts 1998 to 2015 deal with pensions. This is a confusing feature of the Irish legislation and to date it is not entirely clear. Arguably it is safer to issue proceedings under both Acts if it is unclear as to whether it is a pension (i.e. pay) or a benefit matter (under the pensions legislation).

6.3 Personal scope

Part VII of the Pensions Acts applies to occupational benefits (i.e. non-statutory pension schemes) and it would appear that the self-employed are excluded by virtue of not being an employee. The net effect of this is that the self-employed cannot bring proceedings under the Pensions Acts.

6.4 Material scope

Part VII of the Pensions Acts applies to occupational benefit schemes, that is, pensions and other benefits offered by employers, i.e. in the form of pensions, payable in cash or in kind in respect of the termination of service, retirement, old age or death, interruptions of service due to illness or invalidity accidents, injuries, etc. arising in the course of employment, unemployment and expenses in connection with children or other dependants. There is no case law.

6.5 Exclusions

Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 provides that the definition of 'occupational benefit scheme' means—

- (a) in relation to self-employed persons, any occupational pension scheme or arrangement which is comprised in one or more instruments or agreements and which provides, or is capable of providing, occupational benefits in relation to self-employed persons in any description of self-employment within the State, but does not include—
 - (i) any individual contract made by or on behalf of a self-employed person, or
 - (ii) any scheme for a self-employed person which has only one member, or
 - (iii) any scheme in so far as benefits are financed by contributions paid by the members on a voluntary basis,or
- (b) in relation to employed persons, any occupational pension scheme or arrangement which is comprised in one or more instruments or agreements and which provides, or is capable of providing, occupational benefits in relation to employed persons in any description of employment within the State, but does not include—
 - (i) any insurance contract made by or on behalf of an employed person to which the employer is not a party, or
 - (ii) any scheme in so far as benefits are financed by contributions paid by the members on a voluntary basis.

6.6 Laws and case law falling under the examples of sex discrimination mentioned in Article 9 of Directive 2006/54

Section 22 of the Social Welfare (Miscellaneous Provisions) Act 2004 provides that there cannot be direct or indirect discrimination in relation to occupational pension schemes.²³⁵ It should be noted that different retirement ages for men and women has never been a feature of Irish employment. In addition, there is little case law. It should also be noted

²³⁵ The definition of indirect discrimination was updated by the Equality (Miscellaneous Provisions) Act 2015.

that there are fewer and fewer occupational pension schemes and many schemes are winding up.

6.7 Actuarial factors

Section 71(1) and (2) of the Pensions Act 2004 provides for certain derogations to include differences in employer contributions, differences in benefits under defined contribution schemes and differences on the basis of sex in defined benefit schemes. On a practical point, there are fewer and fewer defined benefit schemes. There is no case law.

6.8 Difficulties

Murphy makes a number of scathing criticisms of the Irish legislation not so much in that it does not comply with the Directive but that Ireland has used all the language of the Directives and that it must be impossible for trustees of a pension scheme to operate, to identify future discrimination, as he considers the definition of indirect discrimination to be too complicated, for example. The author advises that trustees are best advised to consult the list of suspect practices that are listed in Directive 86/378/EEC.²³⁶

6.9 Evaluation of implementation

There has been little litigation on pension schemes in Ireland based on the gender ground.

6.10 Remaining issues

The key remaining issue is not directly gender based but a macro-economic issue based on the lack of private sector employees being a member of a pension scheme. This is to be rectified by compulsory auto-enrolment of employees by 2023 which should, in time, assist on any gender pay gap in respect of pensions.

²³⁶ Murphy, F., 'Financial Services Law in Ireland' (2018) Round Hall (Chapter 55).

7 Statutory schemes of social security (Directive 79/7)

7.1 General (legal) context

7.1.1 Surveys and reports on the practical difficulties linked to statutory schemes of social security (Directive 79/7)

The major practical difficulty with the social welfare/protection legislation is its complexity.²³⁷

7.1.2 Other relevant issues

The social welfare system provides for care credits for the calculation of a person's entitlements in relation to periods when the worker was taking care of his or her children or ill family members, for example. Credits are also available for periods on maternity and various other forms of statutory leave. The Home Makers Scheme came into operation on 6 April 1994. During the economic crisis in 2012, there were certain changes to the Scheme resulting in reduced pensions. The persons affected by such reduction were mainly women. The Minister for Employment Affairs and Social Protection announced²³⁸ on 23 January 2018 that there will be significant improvements to pension outcomes to homemakers and carers who are assessed under the rate band changes²³⁹ introduced in September 2012 and the current yearly averaging system. The new system is available to all people who reached pension age after 1 September 2012 when the impugned rate bands became effective. A new Total Contribution Approach will be available to pensioners affected by the 2012 changes and will include up to 20 years of a new Home Caring credit. There will be Home Caring Periods which can be added to a person's pension in order to increase it. The maximum state pension is EUR 243 gross per week. A 'Home Caring Period' is the name for a period of time when a person was not in employment or signing on for credits because the person was providing for full-time care for a child or children under 12 years of age, a child or children over 12 years of age who needed an increased level of care, or an adult who needed an increased level of care. These benefits are only for persons born after 1 September 1946. A Home Caring Period may be awarded for each week not already covered by a paid or credited social insurance contribution when caring for a child or an ill person. As stated above, the Home Makers Scheme came into operation on 6 April 1994 (i.e. which is a disregard for any periods spent as a Homemaker since that date) and applies to the yearly average method of calculating the State Contributory Pension, whilst the Home Caring Periods scheme applies to anybody who was born on or after 1 September 1946 and spent time out of the workforce, for use under the new State Pension Contributory Aggregated Calculation Method of pension calculation. The benefit of the new scheme is that many women remained at home looking after their children and may have had larger families and/or looked after a member of the family who was ill or an elderly member of the family (e.g. a parent or parent-in-law). Such persons may have carried out this childcare or elder care for years without the benefit of the Home Maker Scheme. The Minister states that this new arrangement will significantly benefit many people and in particular women. This new system will ensure that the totality of a person's social insurance contributions, as opposed to the timing of them, will determine the final pension outcome. These new arrangements will come into effect from 30 March 2018 so pensioners with a pension calculated under the 2012 system can have their pension calculated under the new system to see if they get a higher rate of pension. The first payments will be made in quarter 1 2019, backdated to 30 March 2018. The Total Contribution Approach will replace the 'yearly average' approach for all new contributory state pensions applicants from around 2020 onwards.²⁴⁰

²³⁷ Social Welfare (Consolidation) Act 2005 (as amended).

²³⁸ <http://www.welfare.ie/en/Pages/Pension-Calculation-Changes-Announcement-January-2018.aspx>.

²³⁹ I.e. new formulae which resulted in reduced pensions.

²⁴⁰ <http://www.welfare.ie/en/Pages/HomeCaring-Periods.aspx> and Section 9 of the Social Welfare, Pensions and Civil Registration Act 2018. <http://www.welfare.ie/en/pressoffice/Pages/pr260419.aspx>.

7.1.3 Overview of national acts

The Social Welfare Consolidation Act 2005 (as amended) with regulations provides for social welfare. The social welfare system in Ireland is divided into three main types of payments. These are Social insurance payments, Means-tested payments and Universal payments. With all social welfare payments, the applicant must satisfy specific personal circumstances that are set out in the rules for each scheme. For example, to claim the one-parent family payment, the parent must be parenting alone and not cohabiting. As well as satisfying the necessary circumstantial criteria, other rules also apply. There is also a range of employment schemes which encourage long-term unemployed people to return to work. A person must be habitually resident to qualify for social assistance payments in Ireland.²⁴¹ With all social welfare payments, you must satisfy specific personal circumstances that are set out in the rules for each scheme. With all social welfare payments in Ireland, you must satisfy the rules for each scheme to qualify. Payments include the back to work family dividend, blind pension, carer's allowance, child benefit, disability allowance, domiciliary care allowance, guardian's payment (non-contributory), jobseeker's allowance and jobseeker's transitional payment, one-parent family payment, state pension (non-contributory), supplementary welfare allowance, widow's, widower's or surviving civil partner's (non-contributory) pension. The following Irish social welfare payments are classified as family benefits under EU law, namely the back to work family dividend, child benefit, domiciliary care allowance, guardian's payment (non-contributory), working family payment and one-parent family payment.²⁴²

People who do not have to satisfy the habitual residence condition for Family Benefits include EEA/EU citizens who are currently employed or self-employed in Ireland (or who are getting Jobseeker's Benefit or any other benefit which derives from their employment such as Maternity Benefit, Illness Benefit or Occupational Injuries Benefit) and non-EEA nationals, who have previously worked in another EEA State, and are currently legally employed or self-employed in Ireland.

7.1.4 Political and societal debate and pending legislative proposals

The key Government proposal was to bring the self-employed within the scope of the social welfare system so that they may receive benefits, namely the widow and widower's and surviving partners' pension, state pension, guardian's payment, various benefits to include optical, dental and aural and invalidity pension. In addition, such persons are entitled to maternity, adoptive and paternity leave with payments. Such benefits commenced in 2017.

7.2 Implementation of the principle of equal treatment for men and women in matters of social security

Each entitlement to benefit is considered separately in the Social Welfare Consolidation Act 2005, e.g. Chapter 9 of the Act of 2005 (as amended) provides for maternity benefit, and other leave allowances. There is no difference in retirement age between men and women.

7.3 Personal scope

Statutory social security or social welfare is provided to all insured contributors and their dependants. It must be noted, however, that the self-employed who are also 'workers' are entitled to jobseeker's allowance (i.e. unemployment).

²⁴¹ Excluding family benefits and supplementary welfare allowance.

²⁴² See generally, website of the Department of Family Affairs and Social Protection.

7.4 Material scope

Statutory social security or social welfare is provided to all insured contributors and their dependants. The material scope of social protection in Ireland covers the main provisions of this Article. The self-employed are obtaining an increasing number of entitlements, e.g. optical and dental benefit and by year end 2019, jobseekers' benefit or allowance.²⁴³

7.5 Exclusions

Not all the exclusions allowed by Directive 79/7 have been implemented in Irish law as, for example, a parent who is looking after their child is deemed to be a contributor for state pension. This means that the parent does not get a child allowance if their partner, spouse or cohabitant earns over EUR 400 per week and only gets a reduced allowance if the partner, spouse or cohabitant earns between EUR 310 and 400 per week.²⁴⁴

7.6 Actuarial factors

Sex is not used as an actuarial factor.

7.7 Difficulties

There are no specific difficulties.

7.8 Evaluation of implementation

The EU law appears to be implemented.

7.9 Remaining issues

There do not appear to be any remaining issues except that there were special emergency payments to persons who were laid-off arising from the orders to close business and services during the lockdowns. There was an emergency pandemic unemployment payment of initially EUR 350 per week in the first period, which was reduced in accordance with the earlier earnings of the employee or the self-employed person in question. These payments are ongoing as of May 2021, as the economy is only coming out of the third lockdown.

²⁴³ <http://m.welfare.ie/en/Pages/Self-Employed-and-Jobseekers-Supports.aspx>.

²⁴⁴ <http://m.welfare.ie/en/Pages/State-Pension-Contributory.aspx>.

8 Self-employed workers (Directive 2010/41/EU and some relevant provisions of the Recast Directive)

8.1 General (legal) context

8.1.1 Surveys and reports on the specific difficulties of self-employed workers

The key issue that self-employed persons have raised is that during the major recession of some 10 years ago, the self-employed may have been persons who employed other staff and paid into the Social Insurance Fund on their behalf as their employer but that when the crash came, the self-employed employer had no entitlements to Jobseeker's Benefit or Allowance. This anomaly has now been corrected.

8.1.2 Other issues

The self-employed have increasingly been in receipt of the various benefits and allowances that the employed are entitled to, based on their pay-related social insurance contributions. Of course, the key exclusion for women, for example, on maternity leave, is that they have no entitlement to employ somebody in their absence on leave.

8.1.3 Overview of national acts

A self-employed person who personally provides services or a partner in a firm falls within the scope of the Employment Equality Acts 1998 to 2015.²⁴⁵

8.1.4 Political and societal debate and pending legislative proposals

Self-employed workers are entitled to Jobseeker's Benefit from year end 2019. As a major initiative, the self-employed are entitled to the various optical and dental benefits that other insured workers have received for years.²⁴⁶ The self-employed are also entitled to the pandemic unemployment payment where they are/were prevented from working (or have lost their work but are still in employment) due to the COVID-19 pandemic.

8.2 Implementation of Directive 2010/41/EU

The Employment Equality Act 1998 was amended by the Equality Act 2004 so that self-employed persons came within the scope of the legislation as required by Article 14 of the Recast Directive 2006/54/EC. The social protection aspects of the application of Directive 2010/41 are contained in the Social Welfare and Pensions Act 2014 which was signed into law on 17 July 2014. The Department of Social Protection provides a very useful outline of entitlements to spouses or civil partners of the self-employed who are doing similar or ancillary tasks. Such persons must earn over EUR 5 000 per annum and then they must pay the relevant rate of Pay Related Social Insurance. They will then be entitled to maternity, paternity, adoptive and parent leave benefits and state pensions when they have the necessary contributions.

8.3 Personal scope

8.3.1 Scope

The term 'self-employment' is not used in employment legislation but the term to 'personally' provide a service is more usually used. Such persons work under a contract for services. It should be noted that the self-employed technically fall within the scope of the Employment Equality Acts 1998 to 2015.

²⁴⁵ Self-employed persons, by definition, are persons who do not have a contract of employment but are working under a contract for services.

²⁴⁶ <http://m.welfare.ie/en/Pages/Self-Employed-and-Jobseekers-Supports.aspx>.

8.3.2 Definitions

All self-employed workers fall within the scope of this legislation without distinction as to occupation.

8.3.3 Categorisation and coverage

As stated above, a self-employed person falls within the scope of the Employment Equality Acts 1998 to 2015. There is no restriction.

8.3.4 Recognition of life partners

Life partners are recognised as spouses or civil partners. Directive 2010/41 has now been put in place further to the Social Welfare and Pensions Act 2014 which ends the exclusion from social insurance of spouses or civil partners of a self-employed worker who participate in the activities of their self-employed spouse or civil partner performing the same or ancillary tasks. The legislation extends social insurance cover to spouses or civil partners of a self-employed contributor in cases where that spouse or civil partner is participating in that person's business and earning more than EUR 5 000 per year. The spouse or civil partner will be liable to pay 'Pay Related Social Insurance' ('PRSI') contributions. Previously only one of the couple could be insured as a self-employed worker for social insurance benefits. This means that the spouse or civil partner will be able to establish, over time, entitlement to maternity benefit, widow's, widower's or surviving civil partner's (as the case may be) contributory pension and state contributory pension in their own right. It is understood that about 6 000 people will benefit from this reform. The Department of Employment Affairs and Social Protection states that entitlement to the state pension provision will be subject to the spouse or civil partner paying PRSI contributions for at least 10 years. Same-sex marriage legislation commenced on 18 November 2015 and, therefore, a civil partnership will no longer be available.

8.4 Material scope

8.4.1 Implementation of Article 4 of Directive 2010/41/EU

The Social Welfare Act 2016 covers state pensions, invalidity pension and various other benefits which came into effect in the year 2017. Self-employed persons may be in receipt of jobseeker's benefit if they have worked as an employee in the previous four years and from year end 2019 will be so entitled purely as a self-employed person; self-employed persons may be in receipt of jobseeker's allowance if they do not receive sufficient income from their earnings in self-employment.

The main value of the Directive is that self-employed partners have protection under the Employment Equality Acts 1998 to 2015 and that self-employed women have maternity and adoptive leave benefits (of course, such entitlement was already available provided that the self-employed person had sufficient PRSI contributions). Class S PRSI is paid by farmers, professional people, and partners in a business partnership and provides for widow's and widower's contributory pension, orphan's contributory allowance, old-age contributory pension, maternity and adoptive benefit and bereavement grant. A 'prescribed relative' is a spouse, son or daughter, parent, brother or sister who helps a self-employed person with his or her business but who is not a partner in the business and does not pay class S PRSI. If he or she has previously been self-employed or employed, the person may pay voluntary contributions.

The payment of contributions is mandatory.

8.4.2 Material scope

All self-employed workers fall within the scope of the legislation without distinction as to occupation.

8.5 Positive action

A self-employed person falls within the scope of the Employment Equality Acts 1998 to 2015. However, in practical terms it is hard to assess and apply the provisions in the Acts as regards positive action but there is strategic assistance for female entrepreneurs²⁴⁷ and other women in decision-making (e.g. as State Board directors).

8.6 Social protection

As stated, the self-employed have entitlements to contributory social welfare benefits, provided they pay PRSI contributions (as required), and are also entitled to non-contributory payments (e.g. child allowance).

8.7 Maternity benefits

The maternity allowance meets the requirement of sufficiency in Article 8(3) – the payment is the same as for those in employment, i.e. EUR 245²⁴⁸ gross per week (Chapter 9 of the Social Welfare Consolidation Act 2005 (as amended)).

The maternity benefit is based on Pay Related Social Insurance contributions in the same manner as for employees. The taking of maternity leave and the allowance is voluntary but the payment of social insurance contributions is mandatory.

There is no provision for temporary replacements. Adoptive, paternity and parent leave benefits are also available to the self-employed payable at the same rate as for maternity benefit.

8.8 Occupational social security

8.8.1 Implementation of provisions regarding occupational social security

There is a gradual implementation of occupational security for self-employed persons to include illness benefit, various other benefits (e.g. optical, dental), and future unemployment benefit.

8.8.2 Application of exceptions for self-employed persons regarding matters of occupational social security (Article 11 of Recast Directive 2006/54)

Single member pension schemes are excluded from the Pensions Acts 1990 (as amended).

8.9 Prohibition of discrimination

As stated, the self-employed fall within the scope of the Employment Equality Acts 1998 to 2015.

²⁴⁷ <http://www.genderequality.ie/en/GE/NationalStrategyWomenAndGirls2017-2020.pdf/Files/NationalStrategyWomenAndGirls2017-2020.pdf>.

²⁴⁸ EUR 245 per week from 25 March 2019.

8.10 Evaluation of implementation

There is a broad scope to the Employment Equality Acts 1998 to 2015, along with entitlements to maternity, adoptive, paternity and parent leave benefits (under the relevant legislation).

8.11 Remaining issues

There are no remaining issues except, for example, a female self-employed person who is on maternity leave has no access to a replacement to take over her work whilst she is on leave. Self-employed persons, as stated above, were and are entitled to the pandemic unemployment payment where they could not work due to the three lockdowns (to date in May 2021). These social protection payments were generous in the sum of EUR 350 per week in the early stages and were subsequently reduced based on the earnings of the person. Businesses (even the self-employed) could access payments for the changes to their business arising from the pandemic, along with other grants for online trading, for example. It entirely depended on the economic sector that the self-employed were in as to whether they were seriously affected.²⁴⁹ The self-employed were still entitled to all the family leave arrangements and payments as before. It is only when economic life returns to normal that we will see the full effect of the pandemic.

²⁴⁹ For example, the self-employed in the entertainment industry were badly affected.

9 Goods and services (Directive 2004/113)²⁵⁰

9.1 General (legal) context

9.1.1 Surveys and reports about the difficulties linked to equal access to and supply of goods and services

There appear to be no gender differences in service-based discrimination regarding public or private services.²⁵¹

9.1.2 Specific problems of discrimination in the online environment / digital market / collaborative economy

There do not appear to be any particular difficulties in respect of the online market or 'gig economy'.

9.1.3 Political and societal debate

There does not appear to be any political or societal debate in respect of equal status in the provision of goods and services.

9.2 Prohibition of direct and indirect discrimination

The Equal Status Acts 2000 to 2018 provide that there cannot be direct discrimination, discrimination by association or by imputation, or indirect discrimination based on gender²⁵² in respect of the access to and supply of goods and services, the disposal of premises and the provision of accommodation, activities of educational establishments and activities of registered clubs.

9.3 Material scope

The Equal Status Acts 2000 to 2018 provide that there cannot be discrimination in respect of the access to and supply of goods (any article of movable property) and services (a service or facility of any nature which is available to the public generally or a section of the public and includes access to and the use of any place, facilities for banking, insurance, grants, loans, credit or financing, entertainment, recreation or refreshments, cultural activities, or transport or travel. There are exceptions in relation to services of an aesthetic, cosmetic or a similar nature and where the services require physical contact between the service provider and the recipient and also for reasons of authenticity (e.g. dramatic performances). There cannot be discrimination in respect of the disposal of real property or the termination of a tenancy; such provision excludes the disposal of any property by will or gift. Educational establishments (a pre-school service, primary or post-primary school, institution of further education or a university or third-level or higher institution whether or not supported by public funds) shall not discriminate in respect of admission, access to courses, facilities or benefits or expulsion or any sanction.²⁵³ However, a school may admit students of one gender only or students of a particular religion (i.e. an institution for the training of ministers of religion may admit students of one gender or religious belief (a Roman Catholic seminary, for example)). A registered club²⁵⁴ is a discriminating club if it has different rules for membership or provides different terms and

²⁵⁰ See e.g. Caracciolo di Torella, E., and McLellan, B., Gender equality and the collaborative economy (2018) European network of legal experts in gender equality and non-discrimination, available at: <https://www.equalitylaw.eu/downloads/4573-gender-equality-and-the-collaborative-economy-pdf-721-kb>.

²⁵¹ McGinnity, F. et al, Who Experiences Discrimination in Ireland? – Evidence from the QNHS Equality Modules (2017) IHREC and ESRI para. 5.3. <https://www.ihrec.ie/app/uploads/2017/11/Who-experiences-discrimination-in-Ireland-Report.pdf>.

²⁵² And also civil status, family status, age, disability, religion, race, sexual orientation and being a Traveller.

²⁵³ There are general exemptions in respect of sport.

²⁵⁴ Registration of Clubs Acts 1904 to 1999.

conditions of membership. This provision was to prohibit male-only golf, tennis and gentlemen's clubs, however, a male-only golf club was not considered discriminatory.²⁵⁵

9.4 Exceptions

Section 12 of the Equal Status Act 2000 (advertising) and Section 7 of the Equal Status Act 2000 (educational establishments) provide exceptions to the material scope.

Section 12 of the Equal Status Act 2000 provides that certain advertising is prohibited, namely advertisements which indicate an intention to engage in prohibited conduct, i.e. discrimination against or harassment or sexual harassment of a person in contravention of the Act. Section 7 of the Equal Status Act 2000 provides that there are certain exceptions on the ground of gender, namely differences in relation to services of an aesthetic, cosmetic or a similar nature where the services require physical contact between the service provider and the recipient. Therefore, there may be 'discriminatory advertising' for such services.

Section 7 of the Equal Status Act allows for single-sex schools and also allows institutions for the training of ministers of religion to admit students of one gender only (e.g. Roman Catholic seminaries). The Irish legislation has somewhat gone beyond the exceptions in Article 3.3.

9.5 Justification of differences in treatment

A male-only golf club was considered not to be discriminatory under the Acts. The Supreme Court by majority considered that sporting or cultural activities to which clubs and voluntary associations are typically devoted cannot be considered to be needs of a particular gender 'as such'. In order for this interpretation to have any meaning, certain activities could be said to be a need of all men and all women. This is not the case here. The fact that a club is required by law to cater for the needs of female golfers, in as much as they are part of the general public, is not relevant in determining the principal purpose of the club. The purpose of a body of persons is defined by those persons themselves and the fact that they are obliged by law to do other things as well can in no way be regarded as permitting a different purpose to that for which they have themselves associated to be attributed to them. The principal purpose of the club is not to play golf but to provide facilities for the playing of golf by men.²⁵⁶

9.6 Actuarial factors

The Act provides for the amendment of certain provisions of the Equal Status Act 2000 so as to provide in Irish law for the mandatory introduction of unisex premiums and benefits in insurance as from 21 December 2012.

9.7 Interpretation of exception contained in Article 5(2) of Directive 2004/113

The Equal Status (Amendment) Act 2012 commenced on 21 December 2012. The Act amended the Equal Status Act 2000 (as amended).²⁵⁷ Effective from 21 December 2012,

²⁵⁵ In the Matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, *the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane, Ireland and the Attorney General* [2005] IEHC 235, [2009] IESC 73 and see Section 9.5 (below).

²⁵⁶ In the Matter of Section 2 of the Summary Jurisdiction Act, 1857 as amended by Section 51 of the Courts (Supplemental Provisions) Act, 1961, *the Equality Authority v Portmarnock Golf Club and Others and Robert C. Cuddy and David Keane, Ireland and the Attorney General* [2005] IEHC 235, [2009] IESC 73.

²⁵⁷ The Explanatory Memorandum to the Bill stated that the ECJ had declared the provision invalid; the said provision had allowed an exception to the principle of equal treatment provided for in Directive 2004/113/EC so that insurance companies could price insurance products differently for men and women where this difference is reasonable and supported by actuarial or statistical data. Ireland had availed of this

the legislation states that the derogation only applies to the classes of insurance where the contract has been concluded before 21 December 2012. In summary, there cannot be a difference in treatment on the gender ground or in any other circumstances to which the Gender Goods and Services Directive applies related to the assessment of risk in respect of contracts of insurance. All contracts in relation to car insurance and life assurance entered into force for the first time from 21 December 2012 must comply with the unisex rule.

Section 5(6) of the Equal Status Act 2000 as amended by the Equal Status (Amendment) Act 2012 provides that the Central Bank of Ireland was obliged to cease to compile, publish and maintain data supporting the state's decision to permit gender-sensitive pricing of insurance products based on mortality, morbidity and the risk of road traffic accidents. Insurance providers may, however, continue to collect, store and use gender status or gender-related information which is *bona fide* intended for the purposes of reserving and internal pricing, reinsurance pricing, marketing and advertising and life and health underwriting.

9.8 Positive action measures (Article 6 of Directive 2004/113)

Section 14 of the Equal Status Act 2000 provides for positive action. One cannot give a specific example under the equal status legislation.

9.9 Specific problems related to pregnancy, maternity or parenthood

One of the grounds of discrimination under this legislation is the family status ground, the definition of which includes 'being pregnant'. In one case, where a pregnant traveller was denied return passage by an airline, the equality tribunal decided that it was not the pregnancy that was the reason for the refusal but the stage of the pregnancy and the issue of safety.²⁵⁸ A theatre insisted that a mother breastfeeding a two-year-old child must pay for a second ticket for the child, which was held not to be discriminatory. It was considered that the mother and child were not one and the same and thus the claimant did not succeed in her claim.²⁵⁹

9.10 Evaluation of implementation

The implementation of this legislation is satisfactory. However, the maximum award of EUR 15 000 which may be awarded by the Workplace Relations Commission is low. A claimant may elect to bring a claim to the Circuit Court which may award compensation as is proportionate (i.e. no jurisdictional limit).

exemption in the Equal Status Act 2000 as amended by the Civil Law (Miscellaneous Provisions) Act 2008 that is permitting gender differentiation to continue in the areas of motor insurance, life assurance, critical illness cover, income protection cover and private annuities and pensions, <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2012/11012/b11012d.pdf>.

²⁵⁸ In *Kelly v Panorama Holiday Group Limited* DEC – S2008 – 007, the claimant maintained that she was discriminated against on grounds of pregnancy where she was refused passage on a return flight as she was over 28 weeks pregnant. The tour operator stated that it was the air carrier who refused her passage. At the time of the refusal, the claimant did not seek clarification as to the precise nature of the refusal to provide clearance to fly or the requirement for her to have medical certification. She did not seek the precise identity of the person or the company who was refusing clearance for her. Therefore, in the circumstances it is uncertain as to whether the correct respondent was named. The issues involved raised safety issues for everyone and it was for this reason that medical clearance was required. It was also noted that the airline could have sought medical clearance in a range of situations involving medical difficulties. As it was not the pregnancy which was the reason but the stage of the pregnancy which could rise to medical difficulties on the flight, the equality officer decided that the claimant had not established a *prima facie* case.

²⁵⁹ *Stevens v The Helix Theatre* DEC – S2008 – 033.

9.11 Remaining issues

Male-only golf clubs is a remaining issue. However, given the importance of golf clubs wanting to host international competitions on their golf links or courses (especially in Ireland, which is renowned for its golf), Portmarnock Golf Club is reconsidering its male-only membership rule. Essentially if there are international competitions, e.g. the Ryder Cup, the Government provides certain significant funding – but Government may not give funds to an all-male golf club, for example.²⁶⁰

The major effect that the COVID-19 pandemic had on the provision of goods and services with the two full lockdowns in 2020 and a four-month lockdown in 2021 were economic with a switch to online retailing, for example. Essential services remained open, obviously including hospitals, essential retail, transport and so on. For long periods of time, primary and secondary schooling moved online until there was a gradual return to school. Third-level education remained online. It is difficult to assess whether there will be any lasting effect except for economic difficulties, with resultant redundancies in due course when the state supports are lifted. There will, of course, be a change in the pattern of consumerism but on the face of it, there have not been many gender-related issues.²⁶¹

²⁶⁰ <https://www.irishtimes.com/sport/golf/portmarnock-golf-club-to-review-men-only-membership-policy-1.3911186>.

²⁶¹ https://www.esri.ie/system/files/publications/RS106_2.pdf. De Bruin, K., The Environmental and Economic Impacts of the COVID-19 Crisis on the Irish Economy (Research Series No. 106, 2020). The Economic and Social Research Institute has published a study on COVID-19 in July 2020 but since then, Ireland has had two lengthy lockdowns. The report noted the economic aspects of the global pandemic.

10 Violence against women and domestic violence in relation to the Istanbul Convention

10.1 General (legal) context

10.1.1 Surveys and reports on issues of violence against women and domestic violence

There is a detailed action plan in respect of what legislation has to be introduced or amended.²⁶² The Government has set out the outstanding actions and these actions form part of the actions in the Second National Strategy on Domestic, Sexual and Gender-based Violence 2015-2020 which is currently being finalised and will be submitted to the Government for approval following consultation with the voluntary and community sector in the near future.

10.1.2 Overview of national acts on violence against women, domestic violence and issues related to the Istanbul Convention

The actions to be taken include:

- education and training for the police force, court services, probation service staff and health and children agency staff, and law students;
- the Domestic Violence Act 2018 was passed, which in summary means that various factors can be taken into account when application is made to court for a barring order;
- review of the Criminal Injuries Compensation Scheme for victims of domestic violence;
- the development of a Risk Assessment Matrix for all victims of domestic violence and sexual crimes;
- a National Helpline Service to respond to issues of domestic and sexual violence;
- the Criminal Law (Mutual Assistance) Act 2008 shall be amended to include reference to the Istanbul Convention;
- the Irish Human Rights and Equality Commission is committed to providing information to victims of violence on access to complaint mechanisms such as the European Court of Human Rights;
- extend access to barring orders;
- legislate for extraterritoriality where an offence is committed by an Irish national or a person who is habitually resident in Ireland over offences in the Non-Fatal Offences Against the Person Act 1997, sexual offences and the new offence of forced marriage;
- annual report on the monitoring of the application of the Convention;
- provide support to child witnesses of domestic and sexual violence;
- examine the potential for the removal of the common law defence of reasonable chastisement which may be availed of in proceedings under the Non-Fatal Offences Against the Person Act 1997 and under Section 246 of the Children's Act 2001.

The Criminal Law (Sexual Offences) Act 2017 gave effect to Directive No. 2011/93/EU of the European Parliament and of the Council of 13 December 2011¹ on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. The Act amends certain other legislation and provides for offences relating to sexual acts with protected persons and relating to payment for sexual activity with prostitutes, offensive conduct of a sexual nature and harassment of victims of sexual offences. In addition, the Criminal Law (Sexual Offences) (Amendment) Act 2019 was enacted to amend the Act of 2017. The Act of 2019 sets out the arrangements for sentencing for repeat sexual offenders and providing for minimum periods of imprisonment.

²⁶² http://www.justice.ie/en/JELR/Pages/Istanbul_Convention_Action_Plan.

10.1.3 National provisions on online violence and online harassment

The Harassment, Harmful Communications and Related Offences Act 2020²⁶³ (the '2020 Act') was enacted on 28 December 2020 and commenced on 9 February 2021. Section 2 of the Act provides for an offence of distributing, publishing or threatening to distribute or publish an intimate image without consent with intent to cause harm or being reckless as to whether harm is caused. The section provides as follows:

(1) A person who distributes, publishes or threatens to distribute or publish an intimate image of another person-

- (a) without that other person's consent and
- (b) with intent to cause harm to, or being reckless as to whether or not harm is caused to the other person,

is guilty of an offence.

(2) For the purposes of subsection (1), a person causes harm to another person where-

- (a) he or she, by his or her acts, intentionally or recklessly seriously interferes with the other person's peace and privacy or causes alarm or distress to the other person, and
- (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other person's peace and privacy or cause alarm or distress to the other person.²⁶⁴

Section 3 of the 2020 Act provides a further offence of recording, distributing or publishing intimate images without consent. The section provides as follows:

(1) Subject to subsection (2), a person is guilty of an offence where-

- (a) he or she records, distributes or publishes an intimate image of another person without that other person's consent, and
- (b) that recording, distribution or publication, as the case may be, seriously interferes with that other person's peace and privacy or causes alarm, distress or harm to that other person.

(2) Subsection (1) shall not apply to a person who distributes or publishes an intimate image for the purpose of the prevention, investigation or prosecution of an offence under this section.²⁶⁵

The 2020 Act provides penalties of up to 12 months' imprisonment and/or a fine of up to EUR 5 000 on summary conviction and a fine and/or imprisonment for up to 7 years for distributing, publishing or threatening to distribute or publish intimate images without consent and with intention to cause harm or being reckless as to whether such harm is caused.²⁶⁶ The offence of recording, distributing or publishing intimate images without consent attracts a penalty of up to 12 months' imprisonment and/or a fine of EUR 5 000.²⁶⁷ The offence of distributing, publishing or sending threatening or grossly offensive communication is subject to a fine of up to EUR 5 000 and/or up to 6 months' imprisonment on summary conviction or a fine and up to 2 years' imprisonment on indictment.²⁶⁸

²⁶³ <http://www.irishstatutebook.ie/eli/2020/act/32/enacted/en/html>.

²⁶⁴ Section 2 Harassment, Harmful Communications and Related Offences Act 2020.

²⁶⁵ Section 3 Harassment, Harmful Communications and Related Offences Act 2020.

²⁶⁶ Section 2 Harassment, Harmful Communications and Related Offences Act 2020.

²⁶⁷ Section 3 Harassment, Harmful Communications and Related Offences Act 2020.

²⁶⁸ Section 4 Harassment, Harmful Communications and Related Offences Act 2020.

Political and societal debate

There was considerable disquiet about the failure to ratify the Istanbul Convention (however, the Convention has since been ratified on 8 March 2019). It was reported at the end of 2020 that during the COVID-19 pandemic, there was a steep increase in women and children fleeing domestic violence. It has been reported that almost 2 000 women and 411 children were in receipt of support each month, such support being access to a refuge, counselling, information and advice. From April 2020, there was an average of 575 women and 98 children accessing the service for the first time. Some 33 941 helpline calls were answered during the period and many requests for access to refuges could not be met, due to lack of space. The Health Service Executive provided details of various organisations who can assist persons who are subject to domestic violence during the pandemic.²⁶⁹

10.2 Ratification of the Istanbul Convention

Ireland signed the Istanbul Convention on 5 November 2015.²⁷⁰ Ireland ratified the Convention on 8 March 2019.²⁷¹ The Government has set out the outstanding actions and these actions form part of the Second National Strategy on Domestic, Sexual and Gender-based Violence 2015-2020, which is currently being finalised and will be submitted to the Government for approval following consultation with the voluntary and community sector in the near future.

²⁶⁹ <https://www.irishtimes.com/news/social-affairs/covid-19-sharp-increase-in-women-and-children-fleeing-domestic-violence-1.4404850>. <https://www.hse.ie/eng/about/who/primarycare/socialinclusion/other-areas/domestic-violence/guidance-and-resources-dsgbv.html>.

²⁷⁰ Ireland ratified the Istanbul Convention on 8 March 2019. The Criminal Law (Extraterritorial Jurisdiction) Act 2019 was also passed. <http://www.justice.ie/en/JELR/Pages/PR19000066>.

²⁷¹ <http://www.justice.ie/en/JELR/Pages/PR15000568>.
http://www.justice.ie/en/JELR/Pages/Istanbul_Convention_Action_Plan.

11 Compliance and enforcement aspects (horizontal provisions of all directives)

11.1 General (legal) context

11.1.1 Surveys and reports about the particular difficulties related to obtaining legal redress

There are no particular issues about obtaining redress.

11.1.2 Other issues related to the pursuit of a discrimination claim

There are two issues related to the pursuit of a discrimination claim, namely publicity and the costs of bringing such a claim. Firstly, if a person brings a claim, the decision will be published and unless there are issues that are personal, for example, a sexual harassment claim, the names of the parties will be published on the website of the Workplace Relations Commission. Such publicity may affect their future chances of employment more particularly in a relatively small country. Secondly, if a prospective complainant is a member of a trade union, the trade union may act for the complainant as part of their membership subscription but failing that, there may be legal costs for the complainant; although it may be noted that at the adjudication officer and appeal stage to the Labour Court, there may not be a costs order²⁷² against an unsuccessful complainant.

11.1.3 Political and societal debate and pending legislative proposals

There are none.

11.1.4 Gender mainstreaming

Section 10 of the Irish Human Rights and Equality Commission Act 2014 provides that the Irish Human Rights and Equality Commission (IHREC) has a duty to keep under review the adequacy and effectiveness of law and practice in the state relating to the protection of human rights and equality; either of its own volition or on being so requested by a Minister of the Government, to examine any legislative proposal and report its views on any implications for human rights or equality; and either of its own volition or on being so requested by the Government, to make such recommendations to the Government as it deems appropriate in relation to the measures which the Commission considers should be taken to strengthen, protect and uphold human rights and equality in the state.

Section 30 of the Act provides that IHREC must ensure the effectiveness of the equality and related legislation.

11.2 Victimisation

Section 74(2) of the Employment Equality Act 1998 (as amended) provides that victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to a complaint of discrimination made by the employee to the employer. 'Victimisation' also includes any reaction by an employer to any proceedings by a complainant, an employee having represented or otherwise supported a complainant, the work of an employee having been compared with that of another employee, an employee having being a witness in any proceedings under this Act or the Equal Status Act 2000 or an employee having given notice of an intention to take any of the above actions.

²⁷² Unless the claim is frivolous and vexatious; such an order is remote.

In *Barrett v Department of Defence*,²⁷³ the Labour Court set out the three components which must be present for a claim of victimisation under Section 74(2) of the Act to be made out. It stated that the claimant must have taken action of a type referred to in Section 74(2) – what it terms ‘a protected act’, and the claimant must be subjected to adverse treatment by his or her employer; and the adverse treatment must be in reaction to the protected act having been taken by the claimant to stop the bringing of the complaint.

The protection against victimisation complies with the Directives.

11.3 Access to courts

11.3.1 Difficulties and barriers related to access to courts

Overall, access to the courts or tribunals is straightforward. The main barrier, of course, is the issue of costs for the complainant. However, in many cases before the Workplace Relations Commission (the WRC)²⁷⁴ and the Labour Court, a complainant may be represented by their trade union. Claims are brought under the Employment Equality Acts 1998 to 2015, the Equal Status Acts 2000 to 2018 and the Pensions Acts 1990 (as amended). The Workplace Relations Commission has a target waiting time of three months from the commencement of proceedings to the date of hearing and the decision to be produced within four months of the commencement of the case.²⁷⁵ The Workplace Relations Act 2015 came into operation on 1 October 2015 and provides that adjudication officers will hear equality claims, thus replacing the Equality Tribunal²⁷⁶ and on appeal (as before) to the Labour Court. The Workplace Relations Commission appears to be efficient in the timely handling of cases with a mediation or hearing date within six months from the date of initiation of the proceedings. A complainant may elect to bring their claim on the gender ground directly to the Circuit Court. Arising from the COVID-19 pandemic, the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 was passed which inter alia provides for remote hearings.²⁷⁷ It may be noted, however, if one of the parties objects to a remote hearing, the hearing may be adjourned; this is particularly an issue where there are witnesses and there is direct and cross-examination of witnesses. The hearing of evidence remotely is not ideal and more particularly, if a witness is under cross-examination in a remote hearing, there are issues as to the veracity of their evidence.²⁷⁸

11.3.2 Availability of legal aid

Civil legal aid is not generally available for claimants in respect of gender discrimination, the reason being that in many cases trade unions represent their members. In addition, the Irish Human Rights and Equality Commission may provide legal assistance to a person who in their opinion needs such assistance, more usually where there is a point of principle involved.²⁷⁹

²⁷³ EDA/1017 (Labour Court). See also *Matthews v ESB t/a ESB Networks* DEC- E 2015-068 (Equality Tribunal) EDA1610 (Labour Court).

²⁷⁴ See generally *Minister for Justice and Equality v Workplace Relations Commission* C-378/17 [2019] ELR 57 concerning the status of the Workplace Relations Commission being a national body to ensure enforcement of EU law.

²⁷⁵ http://www.merrionstreet.ie/en/News-Room/News/First_Strategy_Statement_for_the_Workplace_Relations_Commission_Launched.html.

²⁷⁶ Many former equality officers of the Equality Tribunal are now adjudication officers of the Workplace Relations Commission.

²⁷⁷ SI Nos. 359 and 515 of 2020 provide that the Workplace Relations Commission and the Labour Court are designated bodies to have remote hearings.

²⁷⁸ For example, their answers to questions could be prompted by another person (off screen) who is in the room.

²⁷⁹ See Section 40 of the Irish Human Rights and Equality Commission Act 2014.

11.4 Horizontal effect of the applicable law

11.4.1 Horizontal effect of relevant gender equality law

There is horizontal effect in respect of Article 157 of the Treaty.

11.4.2 Impact of horizontal direct effects of the charter after *Bauer*

It would appear that the *Bauer* judgment would suggest that the Charter may have horizontal direct effect under some conditions. In the event that a national court was unable to interpret national legislation in a manner ensuring its compliance with Article 31(2) of the Charter, it would be required to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying, if need be, the national legislation.²⁸⁰

11.5 Burden of proof

Section 85A of the Employment Equality Act 1998 (as amended).²⁸¹

This section of the Act provides:

'(1) Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary.

(2) This section is without prejudice to any other enactment or rule of law in relation to the burden of proof in any proceedings which may be more favourable to a complainant.'

In *Southern Health Board v Mitchell*,²⁸² the Labour Court considered the extent of the evidential burden which a claimant must discharge before a prima facie case of discrimination can be made out. The Court stated:

'The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination.

It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment.'

It is further clear from the Labour Court's comments in *Valpeters v Melbury Developments Limited*²⁸³ that the initial burden of establishing the necessary primary facts from which an inference of unlawful treatment can be drawn rests squarely on the claimant's shoulders. The claimant had failed to adduce any credible evidence to support this assertion on this point and he had failed to establish a prima facie case of victimisation contrary to the Acts. In the case of *Dyflen Publications Limited v Spasic*,²⁸⁴ the Labour Court, in adopting the approach of Mummery L.J. in *Madrassy v Numura International plc*,²⁸⁵ stated that:

²⁸⁰ See also *Minister for Justice and Equality v Workplace Relations Commission (C-378/17)*; [2019] 30 ELR 57.

²⁸¹ See also Section 33A of the Maternity Protection Act 1994 (as amended) and Section 29 of the Paternity Leave and Benefit Act 2016.

²⁸² [2001] ELR 201.

²⁸³ [2010] ELR 64.

²⁸⁴ ADE/087.

²⁸⁵ [2007] IRLR 246.

'... the court should consider the primary facts which are relied upon by the Complainant in their proper contexts. It also indicates that in considering if the burden of proof shifts the court should consider any evidence adduced by the Respondent ...'

In the case of *IBM Ireland Product Distribution Limited v Svoboda*,²⁸⁶ the Labour Court stated that it had 'consistently found that mere allegations unsupported by any corroborative evidence are insufficient to establish a prima facie case and so transfer the burden of proof.' The Labour Court cited its earlier decision in *Melbury Developments Limited v Valpeters* where it stated that:

'Mere speculation or assertion, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn.'

The rules on the burden of proof comply with EU law, specifically in light of case C-415/10 *Kelly and Meister*. It should also be added that the Irish legislation provides for a 'right to information' under the Employment Equality Act 1998 (Right to Information) Regulations 1999.²⁸⁷ The right to information may be sought where a complainant considers that there has been a contravention of the 1998 Act (as amended), or he or she may have been dismissed or otherwise penalised in circumstances amounting to victimisation, or where there is an allegation that there is a breach of an equal remuneration term in his or her contract of employment or where a complainant alleges that there has been a breach of an equality clause in a contract of employment. The questionnaire may be sent to the employer at any stage either before or after the issuing of proceedings. Indeed, the purpose of the questionnaire is to assist the complainant, who would otherwise be unable to obtain the necessary proofs in order to process a complaint under the Acts.²⁸⁸ The Employment Equality Act 1998 (Section 76—Right to Information) Regulations 1999²⁸⁹ provides for a questionnaire (the EE2 Form) that a person (the complainant) may send to a proposed respondent in order to establish 'material information' to assist him or her in deciding whether to issue proceedings against the proposed respondent under Section 77 of the Act and also to formulate and present his or her case in the most effective manner. The complainant essentially sets out his or her case and in practical terms it is an assessment as to whether the complainant has a prima facie case of discrimination. In the first schedule to the questionnaire, the complainant asks the respondent whether it agrees that the statement of discrimination is accurate or what the respondent's version of events is. The second question the respondent is asked is whether the respondent agrees that the treatment or rate of remuneration is unlawful and then, if not, why not and the reasons why the complainant received the treatment/remuneration which is the subject of the complaint. The complainant may also raise other questions, to include a request for other non-confidential material information in respect of other persons who are in a comparable position to the complainant or other information which it is reasonable that the complainant request. The respondent replies using the second schedule to the questionnaire. In the replies the respondent may admit liability or else dispute that such alleged treatment was unlawful and give reasons therefore. The complainant will be put on notice of the defence that the respondent may rely on. Of course, either party may raise further allegations or defences in the claim form or at hearing. There is no time limit within which the response must be sent to the complainant.

Information sought may only be 'material information' and such information cannot be confidential. Such 'material information' is relevant if it is:

²⁸⁶ EDA 1116.

²⁸⁷ SI No. 321 of 1999.

²⁸⁸ *Valpeters v Melbury Developments Ltd* [2010] [vol.] E.L.R. 64.

²⁸⁹ SI No. 321 of 1999. The right to information under this section is without prejudice to the right to information under various other sections in the Act.

1. information as to the reasons for the alleged discrimination or for doing or omitting to do any relevant act and as to any practices or procedures material to any such act;
2. information, other than confidential information, about the remuneration or treatment of other persons who are similar to any proposed claimant; or
3. other information which is not confidential information or information about the scale or financial resources of the employer's business and which in the circumstances of the case it is reasonable for the complainant to require.

'Confidential information' means any information which relates to a particular individual and to the disclosure of which that individual does not agree.²⁹⁰ The ECJ has considered that 'entitlement to access can be affected by rules of European Union law and Article 8 of the Charter of Fundamental Rights of the European Union relating to confidentiality'.²⁹¹ No person who has allegedly discriminated shall have to:

1. furnish any reference (or any copy or extract) or any report (or copy or extract) relating to the character or the suitability for employment of any person (including the proposed complainant themselves); or
2. disclose the contents of such reference or report.²⁹²

If a person considers that he or she may have been discriminated against by or in the course of an interview conducted by or on behalf of the holder of a recruitment licence under the Public Service Management (Recruitment and Appointments) Act 2004, where in the course of a recruitment and selection process (other than where the licence-holder is recruiting within its own staff; by the Minister for Defence in the course of a recruitment process for the Defence Forces; or by the Commissioner of *An Garda Síochána* in the course of a recruitment process for *An Garda Síochána*), information shall not be regarded as material information, if it relates to communications with external advisors or where it identifies the successful and unsuccessful candidates by reference to their sex, or in terms of the discriminatory grounds in relation to any of the other discriminatory grounds under the Act.²⁹³

The Circuit Court, the Labour Court or an adjudication officer may draw appropriate inferences if information was not supplied, or if it was false or misleading or was not sufficient.²⁹⁴ In the event that the claim is brought to the Circuit Court, there could be an application for discovery of documents which may be of assistance to either party but more particularly, a complainant.

²⁹⁰ Section 76(3) of the Employment Equality Act 1998.

²⁹¹ This was considered within the context of an applicant for vocational training relying on Directive 97/80 in order to obtain information about the qualifications of other course candidates and it has been noted that such entitlement to access can be affected by the rules of European Union law relating to confidentiality. In *Kelly v National University of Ireland* (C-104/10) [2012] I.C.R. 322 at para. 55, the ECJ stated: 'In assessing such facts, national courts or other competent bodies must take into account the rules governing confidentiality which follow from European Union Legal Acts, such as Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L281, p 31) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L201, p 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L337, p 11). The protection of personal data is also provided for in article 8 of the Charter of Fundamental Rights of the European Union.'

²⁹² Section 76(4) of the Employment Equality Act 1998.

²⁹³ Section 76(5) of the Employment Equality Act 1998 as amended by s.61 of the Public Service Management (Recruitment and Appointments) Act 2004 and Section 76(6). If such bodies obtain external advice, such information shall not be sought on or relied upon for the purposes of an investigation or an appeal unless the adjudication officer considers it necessary (Section 79(5)).

²⁹⁴ Section 81. There is a similar provision under Section 26 of the Equal Status Act 2000. In *Connors v Molly Heffernan's Pub* (DEC/S/2001/003), the equality officer stated: 'the inference which I think is appropriate to draw, in the light of all the evidence presented, is that the reason for the refusal of service to both complainants was based on their membership of the Traveller community'.

Other cases concerned the use of statistical evidence²⁹⁵ and in *Irish Ale Breweries v O'Sullivan*,²⁹⁶ the complainant sought to rely on a comparator who was not known to her. The respondent company failed to provide her with information regarding the duties and remuneration of a possible comparator. The Labour Court held that while the onus of proving like work usually fell to the claimants, an overtly rigid application of this principle could impair the protection that the Act offered. The Court found that it should proceed on the basis of a rebuttable inference that the claimant and the comparator were engaged in like work. As no evidence was put forward to rebut this, the Court found in favour of the claimant.

11.6 Remedies and sanctions

11.6.1 Types of remedies and sanctions

The adjudication officer²⁹⁷ of the Workplace Relations Commission or (on appeal) the Labour Court may order in respect of equal pay arrears of remuneration not earlier than three years prior to the date of reference of the claim with an order for ongoing equal pay, and an order for compensation for the effects of acts of discrimination or victimisation. In equal treatment cases there may be an order for compensation of up to a maximum of two years' remuneration or EUR 40 000, whichever is the greater, and/or an order for a specified course of action. In dismissal cases, reinstatement, re-engagement or compensation up to a maximum of two years' remuneration may be ordered. There is an arguable case that the limited compensation that can be awarded by an adjudication officer or the Labour Court is in breach of Marshall II. However, a complainant may elect to initiate their claim in the Circuit Court (permitted on the gender ground only), where there is unlimited compensation (for the effect of the discrimination for six years prior to the reference of the claim). Where the claimant is not an employee, the maximum award is EUR 13 000. Interest may be awarded and the Circuit Court may award costs. If a claimant also succeeds in a victimisation claim, they may get an award of up to an additional two years' remuneration.

If a person fails to comply with a decision of the director or a determination of the Labour Court, then, on application, the Circuit Court may make an order directing the person to carry out the decision or determination.²⁹⁸

A determination of the Labour Court may be appealed to the High Court on a point of law only. An application for judicial review can be made to the High Court in respect of any proceedings before an adjudication officer or the Labour Court.

The dismissal of an employee in circumstances amounting to victimisation is an offence.²⁹⁹ If an employer is convicted of such an offence, the court may, if it thinks fit and considers that the Labour Court would have power to do so, make an order for reinstatement or re-engagement or, in addition to imposing a fine for an offence, make an order for the employer to pay compensation. The court will obviously hear any evidence and have the consent of the employee before it exercises its powers.³⁰⁰ The amount of compensation awarded shall not exceed either 104 weeks' remuneration³⁰¹ or, if the order is made by the District Court, EUR 15 000.³⁰² The employer may appeal such an order to the Circuit

²⁹⁵ *King v Minister for Finance* [2010] IEHC 307.

²⁹⁶ [2007] ELR 150.

²⁹⁷ Formerly the Equality Tribunal.

²⁹⁸ Section 91 of the Employment Equality Act 1998.

²⁹⁹ Section 98(1) of the Employment Equality Act 1998 and see generally, Fines Act 2010.

³⁰⁰ Section 98(2)-(4) of the Employment Equality Act 1998.

³⁰¹ Or EUR 40 000, whichever is the higher.

³⁰² The jurisdictional limit of the District Court. The Courts and Civil Law (Miscellaneous Provisions) Act 2013 and came into effect on 1 February 2014 on foot of the Courts and Civil Law (Miscellaneous Provisions) Act 2013 (Jurisdiction of District Court and Circuit Court) (Commencement) Order 2013, SI No. 566 of 2013. The Circuit Court has a jurisdictional limit of EUR 75 000.

or High Court, as appropriate. The employee concerned shall have the right to appeal limited to the amount of the compensation that has been awarded to the Circuit Court or the High Court, and such court's decision shall be final. Any person who obstructs or impedes the Labour Court or an officer of the Workplace Relations Commission in the exercise of their powers or fails to comply with a requirement shall be guilty of an offence.³⁰³

A person guilty of an offence under this Act on summary conviction (tried by a judge alone) shall be liable to a fine up to EUR 2 500 or to imprisonment of a term of up to one year or both. On conviction on indictment (tried by a jury, directed by a judge on matters of law), a person is liable to a fine not exceeding EUR 31 743.45 or to imprisonment for a term up to two years or both. If the offence is continued after conviction, the person shall be guilty of a further offence for every day the offence continues and shall be liable on summary conviction to a fine not exceeding EUR 500 and on conviction on indictment to a fine not exceeding EUR 1 904.61. Summary proceedings for an offence may be instituted by the Minister and by the IHREC and within 12 months from the date of the offence. Where the offence is committed by a body corporate, any director, manager, secretary or similar officer shall be guilty of the offence and liable to be proceeded against.³⁰⁴

A claimant may be awarded up to EUR 15 000 by the Workplace Relations Commission under the Equal Status Act 2000; at the claimant's election in the case of a claim on gender discrimination, the claim may be brought to the Circuit Court where they may be awarded unlimited compensation. Any adjudicating body or court may order that a specified course of action be taken to remedy the discrimination.

11.6.2 Effectiveness, proportionality and dissuasiveness

In general, the sanctions are effective, proportionate and dissuasive in that significant orders for compensation have been made. However, if there is discrimination on more than one ground, the claimant may only receive compensation on the basis of discrimination on one ground only. However, in the event that a complainant is, for example, successful in an employment discrimination case and has also successfully brought a victimisation claim, they may be entitled to up to four years' remuneration. Adjudication officers of the Workplace Relations Commission and the Labour Court have considerable scope in the making of orders. Not only may there be an order for compensation but also an order for equal treatment as is relevant to the particular case and/or an order that a specified person take a particular course of action, for example the introduction of policy guidelines to prevent harassment and sexual harassment.

In *O'Brien v Persian Properties trading as O'Callaghan Hotels*,³⁰⁵ the claimant succeeded in her claim and was awarded EUR 220 500 that is 21 months' salary in compensation for the harassment and the discriminatory dismissal and EUR 94 500 which equated to nine months' salary for distress caused by victimisation. She was also entitled to interest on part of these sums. The total award of EUR 315 000 plus interest was not subject to income tax.

11.7 Equality body

The Irish Human Rights and Equality Commission³⁰⁶ ('IHREC') (inter alia) is responsible for the gender, civil status, family status, age, religion, race, disability, sexual orientation and the Traveller grounds of discrimination. The IHREC was established under the Irish Human Rights and Equality Commission Act 2014 and it is an amalgamation of the Human Rights Commission and the Equality Authority. It is an independent body and may publish

³⁰³ Section 99 of the Employment Equality Act 1998.

³⁰⁴ Section 100 of the Employment Equality Act 1998.

³⁰⁵ [2012] ELR 211.

³⁰⁶ www.ihrec.ie.

codes of practice in respect of human rights, for the elimination of discrimination and the promotion of equal opportunity. The commissioners are appointed by the President of Ireland so that there can be no perception of political interference. The Commission has both a human rights and equality brief. The IHREC has extensive powers to carry out equality reviews, inquiries, etc., for example.³⁰⁷ The Commission may of its own volition, or if it is requested by the Minister for Justice and Equality, conduct an inquiry if the IHREC considers that within any body, institution, sector of society or geographical area there is evidence of a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or a systematic failure to comply with human rights or equality of treatment obligations where the matter is of grave public concern and it is in the circumstances necessary to carry out such an inquiry.³⁰⁸ In conducting the inquiry, the IHREC shall to the greatest possible extent consistent with its duties seek the voluntary co-operation of the persons whose evidence is desired for the purpose of the inquiry and facilitate such co-operation.

The IHREC may invite a particular undertaking (an activity giving rise to employment) or a group of undertakings or the undertaking making up a particular industry or sector thereof to carry out an equality review in relation to that undertaking or those undertakings, or prepare and implement an equality action plan in respect of the undertaking or those undertakings or both. The IHREC may carry out an equality action plan in any undertaking where there are more than 50 employees.

The IHREC may also act as an *amicus curiae* in cases before the courts³⁰⁹ and may institute proceedings for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.³¹⁰

11.8 Social partners

The employers' body (bodies) and trade unions are representative bodies representing their members' interests, the largest being the Irish Business and Employers' Confederation. The umbrella body for trade unions is the Irish Congress of Trade Unions.³¹¹ Both representative bodies have been effective in implementing equality legislation.

11.9 Other relevant bodies

The Irish Women's Council would generally lobby in relation to equality matters.

11.10 Evaluation of implementation

Overall, the EU directives have been satisfactorily transposed into Irish law and are applied continuously by both the Equality Tribunal / adjudication officers and the Labour Court. It is questionable, however, whether the legislation includes 'real and effective compensation', given that awards are capped even where there is discrimination on more than one ground. The decisions of the adjudication officers and Labour Court are detailed and reasoned decisions. There have been considerable delays in cases getting a date for hearing. In many cases the delay has been up to two years after the commencement of the proceedings; however, the First Strategy Statement for the Workplace Relations Commission (April 2016) envisages cases being heard within three months of initiation of proceedings and the decision being issued within four months of the initiation of

³⁰⁷ See Section 32-39 of the Irish Human Rights and Equality Commission Act 2014.

³⁰⁸ Sections 34 and 35 of the Irish Human Rights and Equality Commission Act 2014.

³⁰⁹ The IHREC has published Amicus Curiae Guidelines and are available on its website. An application has to be made to the court in which the case is being heard but such application may be refused, e.g. *L.C. v Director of Oberstown* [2016] IEHC 705, Eagar J. 9 December 2016.

³¹⁰ Section 41 of the Irish Human Rights and Equality Commission Act 2014.

³¹¹ Although not all trade unions are members of the Irish Congress of Trade Unions.

proceedings.³¹² In addition, equality claims may take longer given their complexity. In practice, in the past, such delays may have had a dissuasive effect on a claimant or prospective claimant. There has been a considerable volume of case law and the Equality Tribunal (now adjudication officers), the Labour Court and the courts have applied the jurisprudence of the CJEU.

11.11 Remaining issues

The two issues are that if there is discrimination on two grounds, the successful complainant will only succeed in obtaining compensation as if they were successful on one ground, i.e. up to two years' compensation and the difficulty with this is the legislation would appear to be in breach of Marshall II. Secondly, in the event that the complainant elects to bring their gender discrimination claim to the Circuit Court, it can only be on the gender ground, and there is a risk of an order of costs against the complainant if they are unsuccessful.

³¹² http://www.merrionstreet.ie/en/News-Room/News/First_Strategy_Statement_for_the_Workplace_Relations_Commission_Launched.html.

12 Overall assessment

The following transposition problems were mentioned in this report:

1. The requirement to have a comparator of the opposite sex is an ongoing problematic issue; hence, matters of segregated employment are problematic in respect of pay rates. The economic crash of 2008 resulted in pay cuts which in particular affected certain segregated employment in the public service. The restoration of certain pay cuts is now taking place but this does not solve issues of gender segregated employment.
2. It is questionable whether the employment equality legislation includes 'real and effective compensation' given that awards are capped even where there is discrimination on more than one ground. In addition, capping the award of two years' remuneration when a case on the gender ground is before the adjudication officer or the Labour Court is questionable; the reason why is that if the complainant elects to bring the claim to the Circuit Court, they may receive compensation of unlimited amount, yet there is a risk that if they lose there may be a liability as to costs.
3. The Gender Pay Gap Information Bill 2019 was introduced to Parliament in April 2019 but has now lapsed due to the dissolution of *Dáil Éireann* and the subsequent general election in February 2020. As of 29 June 2020, a new Government has been formed and one of the aspects of the programme for Government is legislation on the gender pay gap for larger companies; as of April 2021, the Minister with responsibility for the legislation states that he is going to strengthen the draft legislation.³¹³
4. The COVID-19 pandemic, along with delays in the formation of a new Government, resulted in a stasis in legislative change and ideas. However, this was remedied in the first quarter of 2021 with developments in child-friendly policies, a code of practice for employers and employees on the right to disconnect and currently, as of May 2021, public consultation on the right to request remote work. Many of these changes or proposals were in train but the pandemic, along with the requirement to work from home and the enhanced use of technology, expedited the apparent flexibility of home-working. Whilst it is more likely to affect women, the benefits of home-working may be overstated, as women may lose out on promotion or increases in remuneration. This will inevitably become a matter for discussion in due course.
5. The one major development in early 2021 was the increase in parents' leave. Confusingly named, this leave is paid parents' leave which is in addition to unpaid parental leave. Parents' leave is 5 weeks' paid leave which must be taken within the first 2 years of a child's life (or placement, following adoption). There are now a number of statutes providing for child-friendly policies. Some years ago, it was promised that such policies would be consolidated into one piece of legislation. Regrettably, such promise was not fulfilled.

Overall, however, the EU Directives have been satisfactorily transposed into Irish law and are applied continuously by adjudication officers, the Labour Court and the superior courts. Judgments of the CJEU are continually cited in the various decisions and judgments.

³¹³ https://www.fine Gael.ie/app/uploads/2020/06/ProgrammeforGovernment_Final_16.06.20-1.pdf.

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