

Employment Law Update

The employment relationship is heavily regulated, and this area of regulation is constantly undergoing legislative change. The source of this change is generally either from the EU or from the Irish Oireachtas, and the impetus for this change is often the management of the social, economic and cultural dynamic. The purpose of this paper is to examine certain aspects of employment law that have undergone recent amendment, as well as areas where change is imminent.

In particular, this paper will review the following areas:

- Fixed Term Employees
- Employment Equality
- Protective Legislation
- Law on Employment References
- Law on Employee Work Permits
- Directive on Information & Consultation
- Unfair Dismissals

I. FIXED TERM EMPLOYEES

There is a genuine misconception that in order to be valid contracts of employment must be in writing. This is completely untrue, and the law has recognised that contracts of employment made orally are as valid as written contracts. These contracts are made by verbal agreement, although they also often arise based on customary practice. However, although there is no obligation that a contract of employment is deduced into writing, the employer has obligations pursuant to the Terms of Employment Information Act 1994, the Unfair Dismissals Act 1977-2001, and the Terms of Employment (Additional Information) Order 1998, to provide certain information particulars to employees. This obligation applies to all workers employed under a contract of service or apprenticeship.

In addition, there are two main classifications of employment contracts, namely, permanent contracts of indefinite duration and temporary/fixed term contracts. This latter area is now governed by the Protection of Employees (Fixed-Term Work) Act 2003 – which came into force on the 14th July 2003 with the objective of regulating the use of fixed term/temporary contracts, and was intended to ensure that fixed term/temporary workers are not treated less favourably than comparable permanent workers. The Act provides that fixed term/temporary workers are to be treated as comparable in relation to their permanent counter-parts, in relation to conditions of employment (Section 6), training and promotion (Section 10), and remuneration packages (including overtime payments, travel allowances, luncheon vouchers, qualification and location allowances, sick pay, accommodation and any other elements of the remuneration package). Other requirements relating to equal treatment include:

A. **Annual Leave:** Temporary employees are entitled to the same annual leave as permanent employees on a pro-rata basis, for example, workers employed on a six-

month temporary contract are entitled to half the annual leave entitlements of comparable permanent employees. Service related annual leave entitlements should also be afforded to temporary employees.

B. Sick Leave: The same conditions must apply equally to permanent and temporary employees – where employers require a minimum period of service before the right accrues, this obligation must be applied uniformly to both permanent and temporary employees.

C. Maternity Leave: All temporary employees are now entitled to receive maternity benefit. However, should the temporary contract expire before the end of maternity leave, maternity benefit will cease to be paid from the expiry date.

In addition, all temporary service staff must now be reckoned the same as permanent service staff for the purpose of access to permanent competitions. This means that there can be no distinction between permanent and temporary workers in relation to access to promotional posts. Additionally, an employer is obligated to inform a temporary worker of all permanent vacancies that arise within the organisation. Consequently, all permanent vacancies must be advertised in a manner that all temporary workers can access.

Section 8(1) of the Act further requires that all fixed term/temporary contract workers should be informed, when their contract is being issued, about the circumstances and objective reasons which will bring about the termination of their contracts, such as reaching a specific date, completing a specific task, or the occurrence of a specific event (such as the return of a permanent worker from sick leave or maternity leave). These conditions must be specified in writing in the contract of employment.

Renewing a Temporary Contract:

Where an employer proposes to renew a fixed term/temporary contract, the employee must be advised in writing by the employer of the objective reasons justifying the renewal and the reasons for the failure to offer a contract of indefinite duration must be clearly stated. This information must be given at the latest by the date of the renewal. An objective ground justifying the renewal of temporary contracts must be based on considerations other than the temporary status of the employee. The practice of automatic renewal of temporary contracts without any real regard to the circumstances that give rise to the renewal is no longer permitted.

Following three years continuous employment, the contract of a fixed term/temporary worker may be renewed on only one more occasion and that renewal may be for a period of no more than one year (Section 9(1)). Temporary employees will become permanent members of staff if the contract is renewed in the fourth year of employment. Furthermore, where an employee is employed on two or more continuous temporary contracts the total duration of these contracts may not exceed four years or the employee will be deemed to be permanent (Section 9(2)). However, the legislation does provide an

exemption to these provisions where there are objective grounds justifying the renewal of a contract of employment for a fixed term (Section 9(4)). This exemption will only apply to a single renewal, which must specify an expiry date.

Within the first three years of employment there is no limit to the number of temporary contracts with which an employee may be issued. It is important to note that the initial contract of employment may be issued for any period of time, for example, five years, and this does not mean that the employee is automatically entitled to a permanent position. But if after four years the contract is renewed the new contract is deemed to be a permanent contract.

Dispute Resolution:

Pursuant to Section 14, any dispute arising pursuant to this legislation may be referred to a Rights Commissioner in the first instance, within six months of the alleged contravention. This time limit may be extended to twelve months if the Rights Commissioner is satisfied that there is reasonable cause for the delay. These disputes may relate to equal treatment, penalising employees who attempt to exert their rights under the legislation, the non-renewal of a temporary contract for the purpose of avoiding obligations under the legislation. Decisions of the Rights Commissioner may be appealed, by either party, to the Labour Court within six weeks for a legally binding determination (Section 15). Determinations of the Labour Court may be appealed on a point of law to the High Court (Section 15(6)).

II. EMPLOYMENT EQUALITY

The Employment Equality Act 1998 (EEA 98), which came into force in October 1999, replaces the Employment Equality Act 1977. The Act makes provision for the promotion of equality and deals with all issues pertaining to discrimination in the workplace.

Section 6 of the EEA 98 establishes the grounds that can give rise to a claim for discrimination are follows:

- Sex/Gender: that is one person is a man and the other person is a woman (Section 6(2)(a)),
- Marital status: that they are of different marital status – single, married, separated, divorced or widowed (Section 6(2)(b)),
- Family status: that one has family status and the other does not – responsibility as a parent or acting in *loco parentis* to a person under 18 years of age or a person over 18 years but with a disability that results in a need for care and support on a continuing regular or frequent basis (Section 6(2)(c)),
- Sexual Orientation: that they are of different sexual orientations – heterosexual, homosexual or bisexual (Section 6(2)(d)),
- Religious Belief or Outlook: that one has a different religious belief from the other or that one has a religious belief and the other does not (Section 6(2)(e)),

- Age: that they are of different ages – provided that they are between the ages of 18-65 (Section 6(2)(f) & (Section 6(3)(a-b))),
- Disability: that one is a person with a disability and the other is not or has a different disability (Section 6(2)(g)),
- Race: that they are of a different race, colour, nationality or of different ethnic or national origins (Section 6(2)(h)), or
- Membership of the Traveller Community: that one is a member of the traveling community and the other is not (Section 6(2)(i)) – Membership of the Traveller Community has been defined by the Equal Status Act 2000 as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

Under Section 8 EEA 98, direct discrimination occurs where one person is, or has been treated less favourably than another on any of the aforementioned grounds in relation to:

A. Access or recruitment for employment: Selection processes should focus on the suitability of the applicant as regards previous experience and aptitude for the job and should not be based on discriminating factors. When recruiting employers should focus on the physical and intellectual demands, skills, experience and personality factors that are objective requirements in a suitable candidate, without biasing the candidate on any discriminatory and irrelevant grounds. For example, a notice that states “no women need apply”, “non-nationals need not apply” or “only applicants under the age of 30 need apply” would be viewed as discriminatory. Employers must ensure that when they are drafting application forms, advertising positions or conducting interviews that they are not acting in a discriminatory manner. In **Hurley v Mustoe (1981)** the Court held that to assume that a woman with young children would be an unreliable employee was direct discrimination. As a guideline, employers should only ask questions in interviews that they would put to all candidates, such as both male and female applicants, or to all races. Types of questions or statements to avoid at interviews include asking female applicants questions about childcare facilities, pregnancy plans etc ..., asking a candidate “what does your husband/wife think about you applying for this job?”, asking a question to a male as to how he would feel working in a predominantly female environment or asking a female how she would feel working in a predominantly male environment. Similarly, asking someone “how as a young man would you feel taking disciplinary action against someone old enough to be one of your parents?” would be discriminatory on age grounds, as such a question would rarely be asked to older candidates and consequently places a higher burden upon younger candidates applying for the job. In addition, asking a disabled person whether their disability has ever prevented them from performing certain aspects of their job in the past would be discriminatory. Such a question would not be asked of a person without a disability and again places an unfair burden on the applicant. In **Hussein v Saints Complete House Furnishers (1979)** the Ds were held to have discriminated during the recruitment process when they stipulated that when selecting candidates for interview they would not choose people who lived in the city-centre area of Liverpool. The

Tribunal held that this discriminated on racial grounds as the people who lived in that area were predominantly from an ethnic minority.

To ensure equality and to avoid discriminatory questions IBEC advise the following:

- ✓ The interview should be opened by advising the candidate that the organisation is an equal opportunities employer
- ✓ All candidates should be asked the same questions
- ✓ The interviewer should emphasise the demands of the job during the interview process
- ✓ Interview panels should be gender balanced, if possible
- ✓ The organisation should ensure that all members of the interview panel are aware of the requirements of the equality legislation and its implications.

B. Conditions of employment, in training, & in work experience: Discrimination occurs where the employer does not offer or afford to an employee or prospective employee the same terms of employment, working conditions or treatment. For example, if an employer employs one male and one female candidate to do the same job, they should be given the same holiday entitlements, pension entitlement, sick-leave etc ... In addition, they should be provided with equal access to training and experience. A statement that only Irish citizens would be provided with full pension rights would be viewed as discriminatory.

C. Opportunities for promotion or re-grading: Any discrimination in relation to promotion, transfers, benefits, facilities or services would be viewed as actionable. For example a statement that “only men will be promoted” would be discriminatory. In **Timex Corporation Ltd v Hodgson (1987)** a male employee was made redundant and not offered an alternative position, even though one existed. A less experienced female employee was offered the position. The Tribunal held that this action amounted to discrimination.

The refusal of a company to employ the spouse, parent, sibling or near relative of an employee is also discriminative.

Contracts and collective agreements will be declared void, if they discriminate within the terms of the Act (Section 9). Essentially, the legislation applies to both the public and the private sector, to employment agencies (Section 11), vocational training bodies (Section 12), full-time & part-time workers, trade unions, professional bodies (Section 13), and in relation to the publication of advertisements (Section 10).

Indirect discrimination/discrimination by impact is also prohibited under the Act (Section 19(4) & Section 22). Essentially, this is hidden or covert discrimination. This occurs where a non-essential requirement for a job, which may appear not to be discriminatory, adversely affects a particular group or class of persons who are protected by the Act. For example, a requirement that female employees wear uniforms with short skirts, contrary to the religious beliefs of certain groups such as Muslims, or a height requirement for a

particular job, which would preclude a higher percentage of female applicants, or the imposition of language tests which would exclude a large number of people from ethnic minorities. In **North Western Health Board v Martyn (1987)** the Court held that indirect discrimination existed where the P set an age limit of 27 years for permanent clerical posts. The D had worked for the P for several years, prior to her marriage, and subsequently worked part-time for the P but was disqualified from obtaining a permanent post because of the age limit. The Court held that the age barrier was indirect discrimination because a large number of women of that age were occupied in bearing and rearing children.

Where a person is victimised because they have brought a complaint of discrimination against their employer, the employee can seek further redress through the Courts. Examples of victimisation would include pressurising an employee to withdraw a discrimination complaint, refusing holiday leave requests, writing poor reference or the over-monitoring of work and timekeeping. In **Northants County Council v Dattani (1994)** the D had complained of racial discrimination. The P, his employer, instigated an internal investigation into the allegations. The P began to interview witnesses and collect evidence, but when the D brought a formal complaint to a Tribunal the Ps attitude changed and he halted the internal investigation and refused to discuss the matter further with the D. The Tribunal held that the halting of the investigation amounted to victimisation and awarded him damages.

Positive discrimination is permissible to eliminate the effects of past discrimination. Essentially, measures which are intended to reduce or eliminate the effects of past discrimination and which facilitate gender equality in the workplace, the integration into employment of persons over 50 years of age, or people with disabilities, or members of the travelling community are permitted. In **Application by Badeck (2000)** the ECJ upheld a law that gave women in the public service certain advantages when seeking promotions to posts where women were under-represented.

Discriminating Factors:

- A. **Gender Equality:** Part III of the EEA 98 specifically deals with gender equality and provides for equal pay and equal treatment, as well as stipulating that all contracts of employment must contain a gender equality clause – if it is not expressly mentioned the Courts will imply its existence (Section 21). In **Conlon v University of Limerick (1999)** the P argued that she was not given equal treatment, based on gender, in relation to promotional opportunities within the College to senior academic positions. The Court rejected her argument on the basis that the criteria adopted by the D in relation to promotions was entirely appropriate, in that they took into consideration whether applicants possessed a higher law degree, several years experience at senior academic level and whether they had published research in a specialised field of law. In **R v Birmingham City Council (1989)** the D allocated 390 of 600 available school places to boys and the remaining 210 to girls. The Court held that this amounted to gender discrimination and the girls did not receive the same treatment as the boys. In **Hereford County Council v Clayton (1996)** a

County Manager was held to have discriminated against a female employee when he announced to other staff the “bad news” concerning her appointment because she was a woman. In **Batisha v Say (1971)** a woman was refused a job as a cave guide because the employer thought that it was “a man’s job”. The Court held that this was an example of direct discrimination.

In relation to equal treatment the Act provides some exceptions, where gender discrimination is permitted:

- In the area of family and personal matters an employer may provide treatment that confers benefits upon women in connection with pregnancy, maternity and adoption (Section 28(1))
- On the grounds of authenticity for entertainment/occupational qualification, such as a male model or actor (Section 25). For example, a male actor playing Romeo and a female actor playing Juliette in Shakespeare’s Romeo and Juliette, a woman working in a Rape Crisis Centre or advertising for a Chinese chef or waiting staff to work in a Chinese restaurant.
- The performance of duties outside the State, where local laws or customs would not reasonably allow a person of another gender to perform the duties, such as a male engineer in Saudi Arabia or appointing a man to a post in a Middle Eastern country, where women are not allowed to drive (Section 25(3))
- Duties involving personal services, such as a personal nurse. For example, a job working in an all-male or all-female nursing/retirement home as a live-in carer.
- Where sleeping and sanitary facilities for employees are on a communal basis and it is unreasonable to expect the employer to provide separate facilities. In **Sisley v Britannia Security Systems (1983)** the Ps application for a job with the D company was rejected, as the D had a policy of only employing women. The women employed by the D worked 12-hour shifts. During rest breaks they undressed, rested and slept on the beds provided. The D claimed that for reasons of privacy and decency, they were justified in not appointing the P and the Court upheld this reasoning.
- Limited exemptions on the grounds of gender exist for the Gardai and prison service, in the interests of privacy and decency, in violent situations such as riots etc... (Section 27)

The Act also establishes the principle that men and women shall be entitled to equal pay for equal work (Section 19).

- B. **Disability:** In relation to disability Section 6(2)(g) EEA 98 provides that the disability ground relates to circumstances where one is a person with a disability and the other either is not disabled or is a person with a different disability. Disability is comprehensively defined in section 2 of the Act and includes: the total or partial absence of a person’s bodily or mental functions, the malfunction, malformation or disfigurement of a part of a person’s body; and a condition or malfunction which

results in a person learning differently from a person without the condition or malfunction.

Section 16 of the Act provides that an employer shall not be required to recruit, promote or maintain a person to a position or provide training to a person in a position if he will not undertake the relevant duties or conditions attached to the position or he is not fully competent to undertake the relevant duties. However, Section 16(2) further provides that a person with a disability shall not be regarded as other than fully competent to undertake the duties if with the assistance of special treatment or facilities' he would be fully competent to so undertake those duties. Furthermore, Section 16(3) obliges an employer to do all that is reasonable to accommodate the needs of a person with a disability by providing the requisite special treatment or facilities. A refusal or failure to provide such special treatment or facilities shall not be deemed reasonable unless its provision would give rise to a cost, other than a nominal cost, to the employer. The Act protects against direct discrimination and indirect discrimination. In terms of disability, direct discrimination occurs where a person with a disability is treated less favourably than a person with no disability or a different disability. Indirect discrimination occurs where there is a non-essential requirement for the job, with which a substantially higher proportion of non-disabled persons or persons with a different disability can comply. The statutory protection extends to working conditions and includes access to employment, i.e. advertising and interviewing, training, promotion and redundancy.

- C. **Race:** In **Owens & Briggs v James (1982)** the D had advertised regularly for new staff. The P had applied for a job as a secretary with the D on two separate occasions but was rejected. The P was a black woman and on the second occasion the job was offered to a caucasian woman with fewer qualifications and less experience. When the caucasian was offered the job, one of the interview panel said "why take on coloured girls when English girls are available?". The P complained to the Tribunal arguing that she had been discriminated against on the grounds of race. The Tribunal agreed and awarded her compensation, as they felt that the D had deliberately not offered her the job because she was not white. Similarly, in **Zarcynska v Levy (1978)** the Court held that discrimination existed where a barmaid was dismissed because she refused to follow orders not to serve black customers.

In addition, it is unlawful to impose requirements in relation to residence, citizenship or proficiency in Irish upon the Gardai, members of the defence forces, civil servants, officers of local authorities or teachers.

- D. **Religion:** There is a specific exclusion of discrimination by religious, educational or medical institutions where the institution is controlled by a religious body, and the discrimination is essential to the ethos of the institution.
- E. **Travelling Community:** In **Maguire v North Eastern Health Board (2003)** the P alleged that he was discriminated against by the D on the Traveller ground when his complaint following harassment at the Christmas party was not investigated. The P

also alleged that both management and colleagues treated him differently, when they became aware that he was a Traveller. The D denied the allegations made by the P and argued that in relation to the alleged harassment incident at the Christmas party that he did not consider that it was appropriate to get involved in an incident that occurred outside the workplace. The Court rejected this argument and based on the evidence ruled that the D had unfairly discriminated against the P.

- F. **Age:** In O'Mahoney, Smith, Lovett & O'Tuama v the Revenue Commissioners (2002) the Ps complained that their employer, the Revenue Commissioners, discriminated against them on grounds of their age in the conduct of a competition to select officers for assignment to enforcement duties. The four Ps were serving as higher executive officers in the office of the D. In December 1999 the D advertised a competition for enforcement officers, positions that offered higher pay. The Ps, all of whom were over 50 years of age, applied for the competition but were unsuccessful. They contended that they were discriminated against because of their age in not being placed on the panel of successful candidates. Relying on the statistical results of the competition in 10 locations around Ireland, the Ps argued that the results of the competitions for the 10 locations for which the Ps applied showed a clear pattern of discrimination in favour of younger candidates. The second named P also stated that he had been asked at interview "what are you going for this job for at this stage?". The D denied that the Ps were discriminated against on grounds of age and stated that the Ps were not placed on the panel because they did not possess the required qualities for the position as well as other candidates interviewed. The Tribunal concluded that on an analysis of the statistical information available on successful and unsuccessful candidates by age, it was clear that a candidate who was over 50 years of age and rated 'exceptionally suitable' for the position in question had a significantly lower likelihood of being appointed. A clear pattern was therefore established where the older candidates had little chance of being appointed, regardless of the quality of their assessment. Therefore, a *prima facie* case of discrimination on the age ground was established in relation to the P. In addition, the Tribunal felt that the question aimed at the second named P was also discriminatory. An award of €2,000 compensation was ordered in respect of the each of the Ps.

Equal Pay:

Basically, EEA 98 provides that where two persons are employed in the same workplace by the same employer or associated employer and where both are doing like work, both should receive the same remuneration. For the purpose of the EEA Section 7 states that two people are to be regarded as employed in like work where:

- A. They both perform the same work under the same or similar conditions or where each is in every respect interchangeable with the other in relation to the work, or
- B. Where the work performed by one is of a similar nature to that performed by the other and any differences between the work performed or the conditions under which it is performed, by each, occur infrequently or are of small importance in relation to the work as a whole, or alternatively

C. Where the work performed by one is equal in value to that performed by the other in terms of the demands it makes in relation to such matters as skill, physical or mental effort, responsibility and working conditions.

Consequently, pay scales relating to marital status or age related pay scales may no longer be in place. This may also apply to early retirement packages, which may foreseeably lead to a claim of discrimination.

In **Murphy & Others v An Bord Telecom Éireann (1986)** the Court held that a woman's job, which was more demanding and rewarding than a job held by a comparable man, who was earning more than she, was not work of equal value for the purpose of the Act. This decision was appealed to the ECJ, who rejected the argument, and provided that the P should be entitled to compensation.

In **Four Female Employees v Irish Aviation Authority (1998)**, four female "Communications Officers" employed by the D, claimed that they were entitled to equal pay as two "Radio Officers" because the work done was equal in value when compared under a number of different headings. The male workers were being paid £9,500 more per year than the female workers. The Labour Court ruled that the jobs were equal in value and the Ps were awarded £100,000 each back pay.

An employer who is paying different remuneration to men and women for like work being performed by them has a defence under Section 19(5) if he can establish that the reasons for the different treatment is "grounds other than gender". Essentially, the employer must demonstrate objectively justifiable grounds that warrant differences in pay. Relevant factors would include length of service, training and mobility (adaptability to hours and workplaces). In **Flynn v Primark (1999)** female sales assistants sought pay parity with male storemen employed in one of Penny's Dublin stores. The Court held, however, that the differences in pay were justified as the storemen had demonstrated exceptional industrial relations strength, which had resulted in the negotiation of five productivity agreements, and that these collective bargaining agreements were reflected in the storemen's rate of pay. Also, in **O'Leary v Minister for Transport (1998)** the Court upheld the disparity in pay between communication assistants (predominantly female) and radio officers (predominantly male), employed in Dublin Airport, as under international conventions, radio officers were required to have a higher level of qualifications.

Harassment:

The Equality Acts also prohibit certain types of harassment in the workplace or in the course of employment.

Sexual harassment amounts to discrimination on the grounds of gender and consists of any act of physical intimacy, or any request for sexual favours, or any act or conduct including spoken words, gestures, or the production, display or circulation of written words, pictures or other material if the act, request or conduct is unwelcome and could

reasonably be regarded as sexually offensive, humiliating or intimidating to the man or woman to whom it is aimed. The definition imposes an objective test of what a reasonable person would find offensive, rather than a subjective test of what the particular employee found offensive. In addition, a singular act of harassment is actionable under the Act. In **Bracebridge Engineering v Darby (1990)** the Tribunal found that a female worker who was sexually assaulted by two supervisors was entitled to compensation for harassment. Presently, sexual harassment can only be legally committed by a man against a woman or a woman against a man. Same sex harassment would legally be classified as “harassment” but not “sexual harassment”.

Section 23 defines harassment as any act or conduct including spoken words, gestures, or the production, display or circulation of written words, pictures or other material if the act, request or conduct is unwelcome and could reasonably be regarded as offensive, humiliating or intimidating by the person to whom it is aimed. An action for harassment could include racial harassment, harassment because of sexual orientation etc...

An employer may be liable where an employee is harassed by the employer, another employee or a client or customer of the employer (Section 23(1)), where the harassment occurs in the course of employment, whether or not the act was committed with the employer's approval or knowledge, unless the employer can demonstrate to the Court that he took reasonable steps to prevent such harassment. In **Butler v Four Star Pizza Ltd (1995)** the D employer was held vicariously liable when he failed to act following complaints by one staff member that another staff member was sexually harassing her.

An obligation is placed upon employers to ensure that all reasonable steps are taken to guarantee a harassment free workplace. To demonstrate an employer's commitment to this objective the Equal Authority suggests that every employer draw up their own code of practice to deal with harassment and bullying in the workplace. The EEA suggest that the key features of the code should include:

- ✓ A comprehensive definition of bullying, harassment, & sexual harassment
- ✓ A statement that such behaviour will not be tolerated, as well as the scope of protection afforded
- ✓ A statement identifying the hazard, assessing the risk, and indicating the precautionary measures that the organisation has undertaken to eliminate the risk
- ✓ A statement of commitment by the organisation to implementing the policy, as well as a commitment to communicating the policy to staff, providing appropriate training and instruction
- ✓ A statement requiring that employees acknowledge their own responsibilities and a clear guide relating to the allocation of responsibilities
- ✓ An assurance to monitor all staff
- ✓ The provision of informal and formal complaints procedures, and an investigation process
- ✓ A pledge to communicate outcomes and the protection of confidentiality

Enforcement Mechanisms:

A claim brought under the Act must be brought to the Director of Equality Investigations, who provides a mediation service (legally enforceable in the CC), through the actions of its equality officers. These officers were created by virtue of Section 6 of the Anti-Discrimination (Pay) Act, 1974. All claims must be made within six months of the occurrence of the event. When a dispute is referred to an Equality Officer, they must carry out an investigation and issue a recommendation based on the merits of the case. If mediation is not possible, the Director hears and determines the complaint. The Director may:

- A. In equal pay cases, order compensation of up to three years arrears of remuneration
- B. In equal treatment cases, order the payment of equal remuneration up to a maximum ceiling of two years pay
- C. Order compensation for the effects of the discrimination
- D. Order equal treatment in whatever respect is relevant
- E. Order a person to undertake a specific course of action to avoid future discrimination

In the course of the investigation the Equality Officer examines written submissions made by the parties and visits premises to inspect work in progress. They are empowered to enter premises, examine records or documents, seek information and inspect work in progress on the premises. If either party is dissatisfied with the opinion of the Equality Officer then a right of appeal exists to either the Labour Court (within 42 days of the issue of the opinion) or the High Court (if the dispute concerns the mis-interpretation of a point of law). On an appeal to the Labour Court, the Court may order remedies C-E above, as well as reinstatement or re-engagement, with or without compensation, where the discrimination has resulted in a dismissal.

A person who claims that they have been dismissed because of discrimination also has the option of seeking redress directly with the Labour Court – rather than through Equality Officers or the Director of Equality Investigations. Alternatively, where the discrimination is based on gender the complainant can seek redress from the Circuit Court within 6 months (extendable to 12 months).

The Act also provides for the establishment of a new Equality Authority. This body has the primary objective of eliminating discrimination in relation to employment, promoting equality of opportunity in relation to employment, and to provide information and keep under review the working of the Employment Equality Act itself, as well as the Maternity & Adoptive Leave Acts.

The Authority is also permitted to refer matters, including collective agreements, to the Director of Equality Investigations, to prosecute summarily for breaches of the Act, to seek injunctive relief to restrain discrimination where necessary, to develop codes of practice, carry out equality reviews, and institute proceedings in cases of discriminatory advertising.

III PROTECTIVE LEGISLATION

A. Maternity Protection:

Maternity rights in Ireland are governed by the Maternity Protection of Employment Acts of 1981, 1994 and 2001. These Acts give effect to EU Directives on the introduction of measures for the improvement of the safety and health of workers who are pregnant, have recently given birth and/or are breastfeeding. The legislation applies to all workers who have entered into a contract of employment, which is a contract of service whether agreed in writing or orally. Persons employed under a contract of apprenticeship and fixed term employees are also covered by the Act.

Any provision in any agreement, scheme or individual contract of employment that aims at excluding the provisions set out in the Maternity Protection Act will make that provision void. In addition, provisions that offer less favourable terms than those provided under the Acts are automatically void and will be modified.

These Acts entitle female employees to a period of maternity leave. The leave is of at least eighteen weeks (and may be extended by a further eight weeks), and is insurable for the purpose of the social welfare code. To be entitled the pregnant employee must notify her employer at least four weeks prior to taking maternity leave and provide her employer with a medical certificate confirming the pregnancy and specifying the expected week of confinement (birth). The pregnant woman can select the day upon which to take maternity leave but must take maternity leave no later than four weeks prior to the expected date of confinement. She can also select the day to recommence work but not earlier than four weeks after the expected week of confinement. The commencement can be specified by medical indication and, if so, the employer must cater for this and allow the worker to commence leave on the date specified. In relation to fixed contracts – a worker who is on a fixed contract and the day the contract is to be terminate is prior to the last day of the worker's maternity leave, protection under the Act also expires on that date. Maternity leave will always be at least four weeks after confinement. Thus, if the expected week of confinement is delayed by one week, maternity leave will be extended by one week. The worker must notify her employee of this and must specify the duration of the extension. If early confinement occurs in a week four weeks or more prior to the expected week of confinement, maternity leave starts automatically and the worker must notify the employer of this within fourteen days. The leave remains a minimum of eighteen weeks.

An employee is entitled to an extension of the maternity leave of a maximum of eight weeks (unpaid) even if the leave has already been extended due to late confinement. The worker is obliged to inform her employer, either at the time she informed her employer that she is taking maternity leave or no later than four weeks prior to the date she would have been expected to return to work.

Also, employees are entitled to time off for antenatal and/or post-natal care for medical or related appointments, without the loss of pay. Written notice regarding absence during

this time must be provided to the employer at least two weeks in advance, except in the case of a first/emergency appointment. The employee must produce the appointment card to the employer upon request.

During the 18 weeks leave, in relation to pay, an employee may apply for pay-related maternity benefit during maternity leave, where they satisfy the contribution conditions (PRSI). The amount payable is 70% of earnings, based on the weekly average of gross yearly earnings in the relevant income tax year, and in addition, the employee may benefit from a tax refund or a tax credit. There is also a minimum payment.

In addition, an employee on maternity leave is entitled to her full annual leave entitlement and to leave in lieu of public holidays occurring during the period of absence.

The Safety, Health and Welfare at Work Act, 1989 provides that in some instances, as a consequence of pregnancy, breastfeeding etc ... employers may be required to move workers to other work as a result of a risk assessment or because the employee concerned cannot be required to perform night work. In certain circumstances this may not always be possible. For example:

- A. Because of technical reasons/the move is objectively not feasible;
- B. The move cannot be substantiated; or
- C. The other work is not suitable either.

If this occurs, the pregnant employee is entitled to protective leave & can get a certificate stating the reasons for her leave & the expected duration of the leave. The employee is entitled to remuneration of an amount determined in accordance with the Regulations made by the Minister of Trade, Enterprise & Employment for the first 21 days of the leave. (Safety, Health and Welfare at Work (Pregnant Employees) Regulations 1994 (S.I. No. 446/1994)).

Additionally, during the period of maternity leave the relationship of employer and employee is suspended with no break in the continuity of service. This protection indicates that the employee shall be treated to be in employment, and her absence will not affect any right conferred upon her by legislation, by her contract of employment or rights related to her employment, except in relation to remuneration. Therefore, the employer cannot terminate the contract of employment, or suspend the worker, during the worker's protective leave or during time-off in respect of natal care or give notice that the contract will be terminated upon the expiring of the leave. The general rule is that the employee who was on leave is entitled to return to work with the same employer, in the same job under the same contract of employment. This right to return to work is subject to the employee notifying the employer in writing at least four weeks before the date of return to work. Failure to serve such notice deprives the employee of the statutory right to return to work. Where the employer cannot comply with the right of the employee the employer must offer suitable alternative employment.

Pregnancy, Equal Treatment & EU Law:

In relation to discrimination, it is not permissible to discriminate against an employee on the grounds of pregnancy. In **Dekker v Stichting (1990)** the ECJ ruled that to reject a job applicant on the grounds of pregnancy would contravene the Employment Equality Act 1998, unless the job is one of the very few where pregnant women are not allowed to work on account of health risks. Similarly, in **Webb v EMO Air Cargo (U.K.) Ltd (1994)** the ECJ held that it contravened the Equal Treatment Directive to dismiss an employee on account of her becoming pregnant. This is enforceable in Ireland under the terms of the Unfair Dismissals Acts 1977-93, which provides that an employee's dismissal is deemed to be unfair where done on the grounds of her pregnancy unless there were substantial grounds justifying that dismissal.

In relation to pay the law requires that pregnant employees are entitled to equal treatment. In **Gillespie v Northern Health Board (1996)** the Court held that the P had not been treated fairly, where a pay increase granted when the P was on maternity leave, was not back-dated with regard to her, because she was on leave. Similarly, in **Tribault v Caisse Nationale d'Assurance (1998)** the Ps employer argued that she did not qualify to be assessed for a pay rise or promotion because she was on maternity leave. The ECJ ruled that this was discriminatory as it applied unequal treatment for men and women. In **Boyle v Equal Opportunities Commission (1998)** the Court ruled that to deprive the P of the accrual of her pension rights while on maternity leave amounted to discrimination.

Paternity Leave:

Presently, there is no legislative right to paternity leave and any leave given is at the absolute discretion of the individual employer. However, a father is entitled to the remainder of leave upon the death of the mother, subject to notification requirements, and the production of a death and birth certificate, if applicable.

Recent Developments:

A Maternity Protection (Amendment) Bill, 2003 is currently being reviewed before the Oireachtas. This Bill proposes a number of changes to the existing legislation, including:

- The entitlement to terminate additional Maternity Leave in the event of sickness of the mother
- The entitlement to postpone Maternity Leave or Additional Maternity Leave if the child is hospitalised

In addition the Bill proposes that the obligation to commence leave within four week of the expected date of confinement be reduced to two weeks, and that the Mother would be entitled to time off, with pay for a full set of antenatal classes (other than the last three classes), and that the Father would be entitled to time off without loss of pay for the last two classes before the birth. This right is a once off entitlement in both instances and is not per child.

Also, the Bill proposes that breastfeeding mothers must be accommodated by employers, without loss of pay, to either breastfeeding breaks, where suitable facilities are provided by the employer, or an appropriate reduction of working hours up to a 26-week period. Employers will not be required to provide breastfeeding facilities if such facilities would give to more than a nominal cost. A Ministerial Regulation is expected to clarify this section.

B. Parental Leave

The right to parental leave is encompassed in the Parental Leave Act 1998, which gives effect to European Council Directive 96/34/EC. This Directive gives effect to the obligation of the EU to provide for equal treatment for men and women, including measures “enabling men and women to reconcile their occupational and family obligations”.

The objective of this Act is to provide parents with a temporary break (unpaid) from work to take care of young children. The Directive sets out minimum requirements in this regard:

- It grants male and female employees an entitlement to parental leave on the grounds of the birth or adoption of a child for a minimum period of three months;
- This right can be availed of until the child has reached an age of up to five years, although in adoption cases this age may be extended.

The Act applies to all employees who are under a contract of employment of service or apprenticeship, or who are employed through an employment agency. In addition, it also covers all employees who hold office or who are in the service of the State, including the Defence Forces, the Garda Síochána, and all civil servants within the meaning of the Civil Service Regulation Act 1956.

In particular Section 6(5) states that the employee/parent must be either the biological or adoptive parent of a child to be entitled to the leave period. The period of leave is fourteen working weeks. Section 6(2) of this Act provides that this entitlement is applicable only to children born or adopted on or after 3 June 1996, and that the parental leave must be used to take care of the child concerned (Section 12).

The right to the leave is also subject to the employee/parent having completed one-year continuous employment with an employer from whose employment leave is taken. This entitlement is non-transferable and is applicable to each natural or adoptive child (Section 6(5)) of the employee/parent.

Section 7(1) provides that parental leave can be taken for a continuous period of fourteen weeks or, in agreement with the employer, over a period of time, for example, one or two days in a week, or a certain amount of hours per day per week or a combination of both. However, an employee is restricted to a maximum of fourteen weeks leave in a twelve-

month period, unless the employer agrees otherwise, where they have more than one child, except in the case of multiple births.

Section 8(1) requires that an employee intending to take parental leave must give notice, in writing, and signed by the employee/parent, to his or her employer no later than six weeks before the intended commencement date of the leave (although this obligation may be waived at the discretion of the employer). The employer is required to supply the employee with a confirmation document no less than four weeks prior to the intended commencement date, and signed by both the employer and the employee.

The Act provides exemptions in respect of an employer in a small/medium-sized undertaking. In this scenario the employer is entitled to postpone the parental leave where it would cause undue hardship, but must agree to a date within six months. Basically, an employer can obligate the employee to postpone the leave if they can demonstrate a substantial effect on their business due to unavailability of a replacement, that other employees are already taking leave, or due to seasonal variations or any other relevant factors.

Recent Developments:

It is anticipated that legislative changes are in the pipeline in relation to parental leave, which will facilitate the following:

- ✓ Permitted fragmentation of leave to minimum blocks of six weeks (smaller blocks permissible by agreement)
- ✓ Increase in the maximum age from 5 to 8
- ✓ The age to be increased to 16 years for children suffering from disabilities
- ✓ A transfer from parental leave to sick leave, where applicable

C. Force Majeure Leave:

In addition, Section 13 of the Parental Leave Act provides that where for urgent family reasons, owing to an injury or an illness of a child, spouse, a person with whom the employee is living as husband or wife, a brother or sister, a parent or grandparent or a person to whom they are acting in *loco parentis*, the immediate presence of the employee is indispensable at the place where the person is, the employee is entitled to **force majeure** leave. This paid leave amounts to a maximum three-days in 12 consecutive months or five-days in 36 consecutive months. In order to avail of the leave notice must be given in writing as soon as is reasonably practicable. During parental leave, the employee's contract of employment does not cease to exist. Section 14(1) provides that none of the employee's rights under the contract, other than his or her right to remuneration and related rights, are affected.

In the event of any dispute or difference between an employer and an employee in relation to force majeure leave, either party may refer the issue to a rights commissioner, who decision may be appealed to the Employment Appeals Tribunal.

D. Adoptive Leave:

The Adoptive Leave Act 1995 entitles female employees and, under special circumstances, male employees to leave from their employment for the purpose of child adoption, and in doing so extends to them the provisions of the Unfair Dismissals Act 1977. Section 6 provides employees with an entitlement to adoptive leave for a period of no less than ten consecutive weeks (plus a discretionary four weeks) from the date of placement of the child in the arms of the adoptive parents. These employees must be the “employed adoptive mother” or the “sole male adopter” to be entitled to the leave period. Thus within a family it is only the employed adoptive mother who is entitled to leave, the father is not – and this is despite the fact that the Supreme Court has found this practice unconstitutional. In O’Grady v Telecom Éireann (1997) the P and his wife adopted a baby from Romania in 1991. He applied for adoptive leave and was refused, although female employees in comparative roles within the company had been afforded this leave. The P argued that the actions of the D constituted sexual discrimination, as there was no biological reason to restrict adoptive leave to women. The LC held that the P had been discriminated against, as he was treated less favourably by a woman in comparative circumstances. On appeal the SC agreed with this ruling and held that the practice was discriminatory. At present there is no legislative to introduce adoptive leave for married men.

The position with regard to payment is identical to the provisions in the Maternity Protection Acts.

Section 7 requires that to avail of the leave the adoptive mother (or sole male adopter), in the case of a non-foreign adoption, must notify the employer in writing no later than four weeks before the placement date. The adopter must also supply the employer with a certificate of placement after that date. Similarly, if the adopter intends to apply for the additional four weeks leave they must provide the employer with four weeks notice in writing.

Similar requirements are also necessary in relation to foreign adoptions. In this situation the employee may take leave immediately before the date of placement and subject to compliance notification and evidence requirements.

Section 8 provides that the employed adoptive mother or sole adoptive father is entitled to an additional adoptive leave of up to four consecutive weeks after informing his or her employer of such an intention.

Under certain conditions, an adopting father is entitled to adoptive leave, such as if the adoptive mother dies before or during her period of leave.

During the period of adoptive leave, the parent is deemed to have remained in employment, and is to be treated as such. The absence does not affect any right related to his or her employment, other than the right to remuneration during his or her absence,

whether conferred on him or her by statute, contract or otherwise. The employee has the right to return to work following the leave, on condition that they provide the employer with four weeks notice in writing. Redress is available under the Unfair Dismissals Act where an employee is dismissed due to the exercise or contemplated exercise of the right to adoptive leave or additional adoptive leave.

It is anticipated that the legislative also intend to introduce changes to this Act and will increase the basic leave from ten weeks to 16 weeks, and also provide a limited amount of time off pre-adoption without a loss of pay. In addition, and subject to the employer's agreement, an entitlement to terminate additional adoptive leave in the event of illness or postpone adoptive leave in the event of the child's hospitalisation is also anticipated.

E. Carers Leave:

The Carers Leave Act 2001 provides that an employee who has been employed for a period of twelve continuous months is entitled to leave for the purpose of providing full-time care and attention to a person with a disability. Full-time care and attention has been interpreted as continuous supervision and frequent assistance given throughout the day in connection with normal bodily functions or in order to avoid danger to the person with the disability. The nature and extent of the disability must be certified by a Medical Practitioner. The employee is obligated to provide the employer with six weeks notice of his intention to take the leave, or where impracticable, to provide notice as soon as is reasonably practicable. The initial period must not exceed 65 weeks, although this may be extended to 130 weeks should a second person with a disability require full-time care and attention. This leave may be taken in one continuous period or over a number of periods.

An employee is regarded as remaining in the employment concerned during an absence on carers leave, and retains all employment rights, except the following:

- ✓ The right to remuneration,
- ✓ Annual leave (after 13 weeks of absence)
- ✓ Public holidays (after 13 weeks of absence)

Although the absence counts as reckonable service for the purpose of increments, seniority, redundancy etc ... Carers leave cannot be treated as part of any other leave from employment, including sick leave, adoptive leave, maternity leave, parental leave, annual leave or force majeure leave to which an employee is entitled.

F. Part-Time Employees:

The Worker Protection (Regular Part-Time Employees) Act 2001 attempted to bring regular part-time employees within the scope of existing employment legislation. This category of employees includes all who normally work at least eight hours per week, and who have been in the continuous service of an employer for at least thirteen weeks.

The rights that now apply to such workers are under the following acts, where part-time workers are now entitled to equivalent rights to full-time workers:

- Terms of Employment Information Act 1994
- Equality Act 1998 (including equal pay)
- Holiday (Employees) Act 1973 & the Organisation of Working Time Act 1997
- Minimum Notice & Terms of Employment Act 1973
- Maternity Protection Acts 1981-2001
- Parental Leave Act 1998
- Adoptive Leave Act 1995
- Unfair Dismissals Act 1977-93
- Redundancy Payments Acts 1967-2003

Circumstances in which a part-time worker can be compared to a full-time worker:

- Where the part-time worker performs the same work as the full-time worker under the same or similar conditions. (Or both workers are interchangeable with the other in relation to the work).
- Where the work performed by one of the employees is of the same or a similar nature to that performed by the other worker. In addition, any differences between the work performed or the conditions under which it is performed by each worker are either of little importance in relation to the work as a whole, or occur so irregularly as not to be insignificant, and
- Where the work performed by the part-time employee is equal or greater in value to the work performed by the other employee concerned.

Circumstances in which a part-time worker can be treated less favourably than a full-time worker:

- A. Where the part-time worker's less favourable treatment can be justified on "**objective grounds**": "Objective grounds" for treating a part-time worker less favourably than a comparable full-time employee are based on considerations **other than** the status of the employee as a part-time worker. These grounds occur where the less favourable treatment is necessary for the purpose of achieving a legitimate objective of the employer.
- B. **Pensions**: A part-time employee who normally works less than 20 per cent of the normal hours of the comparable full-time employee can be treated in a less favourable manner with regard to a pension scheme or arrangement. However, this provision does not prevent an employer and a part-time employee from entering into an agreement whereby the part-time employee receives the same pension benefits as a comparable full-time employee.

Part-time workers and overtime:

Part-time workers are entitled to overtime if the full time employee to which they compare themselves is paid overtime after working his/her maximum hours per week. In order to claim overtime however, the part-time employee must also have worked their maximum hours per week.

Holiday entitlements of part-time workers:

Under the Organisation of Working Time Act, 1997, a part-time worker's annual leave entitlement is 8% of the hours worked in a leave year, subject to a maximum of 4 working weeks annual leave.

Complaints Procedure:

An employee (or any trade union that the employee belongs to, with the consent of the employee) can present a complaint to a Rights Commissioner. This happens where it appears that the employer has failed to provide an entitlement to which the employee is due under the Protection of Employees (Part-Time Work) Act, 2001. A written notice of complaint must be presented within 6 months of the date of the alleged breach of the Act. The time limit for submitting a complaint may be extended by a further 12 months if the Rights Commissioner is satisfied that the failure to present the complaint within the normal 6-month period was due to reasonable cause. Under the Act, the Rights Commissioner, on receiving a complaint, will send a copy of the notice of complaint to the employer. The Rights Commissioner will then give the parties an opportunity to be heard by them and to present any evidence relevant to the complaint. After hearing the parties, the Rights Commissioner will issue a written decision on the complaint. Proceedings before a Rights Commissioner are confidential and are held in private.

The provisions of the Protection of Employees (Part-Time Work) Act, 2001 regarding the resolution of access to Rights Commissioner or the Labour Court do not apply to members of the Defence Forces.

It is possible for an employee or employer to appeal a Rights Commissioner's recommendation to the Labour Court within 6 weeks from the date it was communicated to the parties. The Labour Court will copy the notice of appeal to the other party in the case and hear the parties according to its own procedures.

G. Protection of Young Persons (Employment) Act, 1996

The Act (implemented under Directive 94/33) impacts young people in employment and affords legislative protection to young workers under the age of eighteen. This Act applies to all employees, including apprentices, agency staff, public sector, civil service, local government, the Gardai and the Defence Forces. It contains the following provisions, namely:

- **Minimum Age for Entry into Employment:** The legislation prohibits the full-time employment of children until they have reached the minimum school leaving age (The Schools Attendance Act, 1926 requires that children between the ages of six and 15 must attend school). As evidence of this fact the worker must produce sight of a Birth Certificate and the employer must obtain permission from the parent or guardian before employing a person aged between 14-15. Employers must also maintain satisfactory records in this regard. The employment of people under the age of 15 is generally prohibited, although children over 14 are permitted to do light, non-industrial work, or complete work experience during school holidays, provided that it does not interfere with their schooling and is not harmful to health and normal development. The Minister may permit certain other forms of child employment, in the areas of cultural, artistic, sports or advertising activities.
- **Limitations on Working Hours:** The employment of children between that age and 18 is permitted subject to limitations. Workers aged 14 cannot work for more than seven hours in a day or 35 hours in a week (only outside of school term). Workers aged between 15-16 can only work for a maximum of eight hours in a day, and 40 hours in any week. Workers aged between 16-18 can only work for a maximum of nine hours in a day, and 172 in any four weeks, and 2000 hours in any year. Double employment i.e. working for more than two employers is prohibited where the aggregate hours worked exceed the prescribed maxima.
- **Rest Intervals:** Employees who work more than five days a week, and whose work on a Sunday exceeds three hours must be given at least 24 hours consecutive rest in every seven days. Any spell of work must not continue for more than four hours (14-15) or four and a half hours (16-18) without a rest interval of at least 30 minutes. Workers are also entitled to 12 hours consecutive break between working days.
- **Prohibition of Night Work:** Persons aged between 14-15 cannot be employed from 8 p.m. to 8 a.m., persons aged between 16-18 cannot be employed from 10 p.m. to 6 a.m. (in certain areas of activity, as agreed by the Minister, this period is 11 p.m. to 7 a.m.)

Breach of the Acts requirements is a criminal offence, prosecuted summarily by the Minister or the employee's Trade Union. Employers found guilty of an offence under the Act are liable on summary conviction to a fine of up to €1,904.61. Continuing breaches of the Act can attract a fine of up to €317.43 a day.

IV. Right to a Reference

It was decided in Lint v Johnston (1894) that no action can be brought against an employer for failure to furnish a reference. However, the position today is not so definitive. In the UK legal doctrine now dictates that there is no obligation, either at common law or statute law to provide an employee with a written reference. However, in Ireland Section 4 of the Servants Act 1715 still applies, and this section states that "On

the discharge or putting away of any servant from his or her service ... the master or mistress of such servant shall give certificate ... that such person was his or her servant, and shall in the said discharge certify, if desired ... the behaviour of the servant". In essence this section today translates to mean that an employer is obligated to confirm that the employee worked for the employer detailing what position he occupied, his main duties and responsibilities, and the dates of commencement and cessation of service. However, there is no legal obligation to provide an account of the employee's behaviour and performance during the period of employment.

Should an employer decide to provide a reference he acquires certain obligations. In effect the employer owe a *duty of care* to an employee when preparing a reference; what this means is that the reference must be both *true* and *accurate*. An employee can sue a former employer for a negligent reference and, if successful, could include a claim for damages for foreseeable losses such as the loss of a particular job opportunity or the impact on the employee's future carer prospects. In addition, not only must a reference be *accurate*, it must also be *fair*. While a number of discrete statements may be factually correct, they might, when read as a whole, convey an unfair impression. The general protection extended to employers giving employment references requires that the statements be made in good faith. An employer's statements are not made in good faith if the employer knows they are untrue or if the employer makes no effort to determine their accuracy.

For example, an employer who lied in stating that an employee had admitted falsifying expense records was liable for defamation. An employer whose manager made negative statements about an employee's work performance solely on the basis of rumours was also liable. The manager had never supervised, worked with, or evaluated the employee and misrepresented to the prospective employer that he had actually worked with the employee.

In effect, when providing a reference an employer must be in a position to provide factual information to substantiate any statements of opinion included in the reference. It is in the employer's best interest to refrain from stating anything but objective statements or clear opinion when discussing a former employee's work habits. Otherwise the employer is open to the imposition of liability for defamation of character, deceit or negligent misrepresentation as an employee has a right of access to their personnel files pursuant to the Data Protection Acts 1988 & 2003. Awards in successful cases may include damages for lost earnings, mental anguish, or pain and suffering and, if the employer's conduct was sufficiently serious, punitive damages.

Finally, in relation to written references, IBEC advises that they should be:

- ✓ Marked private and confidential,
- ✓ Never sent by fax
- ✓ Use e-mail advisedly
- ✓ Sent in a sealed envelope by post or courier marked Private & Confidential

In relation to telephone references it is advisable to verify the caller's details, emphasise that the status of the call is private and confidential, and never say anything that would cause difficulty if overheard by a third party.

V. EMPLOYMENT OF NON-IRISH NATIONALS

The employment of non-Irish nationals has become a complicated procedure, as policy and practice in this area undergoes constant change. The following information is intended as a guide for employers intending to employ non-nationals.

In accordance with the objective of free movement of labour, enshrined in the Treaty of Rome, Articles 48 and 49 provide that all European Union and European Economic Area¹ (EEA) nationals are allowed to work in any part of the EU without restrictions². The Employment Permits Act 2003 sanctions non-European Economic Area nationals who wish to work in Ireland to do so once they have obtained a valid work permit. It is an offence for both the employer and the employee to enter into a contract of employment absent a valid work permit. A person who contravenes this requirement shall be liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 12 months or both, or upon a conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 10 years or both.

The prospective employer is obligated to apply for the permit to the Employment Regulations Section of the Department of Enterprise, Trade and Employment. In addition, most non-EEA nationals must also register with the immigration authorities (Aliens Registration Office), or with the local Gardai. The application must be accompanied by two recently taken passport-sized photographs of the person whose employment is sought. The application will then be examined by reference to the rules for work permits. Depending on the circumstances, consultation may be necessary with other Departments and/or organisations, for example, professional associations. Further information/documentation may also be sought from the applicant.

Prior to applying for the work permit the employer is legally obligated to attempt to recruit an Irish/European Economic Area/Swiss national. As evidence of this action an employers must first register vacancies with FÁS recruitment services for a period of 4 weeks. FÁS will then notify both its local offices nationally as well as other European Economic Area (EEA)/Swiss Public Employment Services of those vacancies. This will help employers in their attempts to source local or EEA/Swiss labour to fill the position in advance of any potential work permit application.

Where specific skills are considered by FÁS and the Department of Enterprise, Trade and Employment to be in short supply, the existing requirement for the employer to advertise

¹The EEA comprises the European Union together with Iceland, Norway and Liechtenstein.

²However, in accordance with the term of the European Communities and Swiss Confederation Act, 2001, which came into operation on 1 June, 2002, workers can move freely between Switzerland and Ireland without the need for work permits.

the position locally with FÁS over an initial four-week period may be dispensed with³. In such cases, FÁS will give the employer notification that they may proceed directly with a work permit application to the Department.

New applications for work permits from employers will not be accepted by the Department unless they are accompanied by a letter from FÁS confirming that all reasonable efforts have been made by the employer, in co-operation with the FÁS Employment Services, to fill the vacancy through the domestic labour market, the wider European Economic Area (EEA) labour market or the Swiss labour market.

Occupations that are currently ineligible for work permits (after April, 2004):

The Department of Enterprise, Trade and Employment, following consultation with FÁS, will announce, on a quarterly basis, occupational sectors that are considered ineligible for work permits⁴

These occupations currently are:

- ✓ Clerical and administrative staff
- ✓ General labourers and builders
- ✓ Operator and production staff
- ✓ Sales Staff (including retail sales, sales representatives and Management/Supervisory/Specialist Sales)
- ✓ Transport staff, including drivers - bus, coach, car, taxi, fork lift, (excluding international HGV and articulated drivers) - international.
- ✓ Child care workers, including nursery/crèche workers, child minders/nannies
- ✓ Hotel, tourism and catering reception staff and barpersons
- ✓ Craft workers and apprentice/trainee craft workers, including bookbinders, bricklayers, cabinet makers, carpenters/joiners, carton makers, fitters - construction plant, electricians, instrumentation craftspeople, fitters, tilers - floor/wall, mechanics - heavy vehicles, metal fabricators, mechanics - motor, originators, painters and decorators, plumbers, printers, engineers - refrigeration, sheet metal workers, tool makers, vehicle body repairers, machinists - wood (excluding plasterers and aircraft mechanic/engineers)

If an employer applies to renew a work permit in respect of an existing employee, this will be facilitated. The requirement to engage with the FAS Employment Services will not be applied in these cases.

Work permits are not required by the following categories of persons:

³The Department of Enterprise, Trade & Employment has exempted key medical, health and social care professionals from the FAS rule. Therefore there is no need to advertise such positions through FAS in the first instance.

⁴This list has not changed since April 2004 and remains in force until further announcements by the Department of Trade, Enterprise & Employment.

- An EEA/Swiss citizen and his spouse (whether he/she is a European Economic Area/Swiss citizen or not) and his dependant children under the age of 21 years.
- A person who has been granted refugee status - whether through the normal process or as a programme refugee.
- A postgraduate student where the work is an integral part of the course of study being undertaken.
- A non-EEA national with permission to remain as a student in Ireland is also entitled to undertake casual employment⁵ without a work permit.
- A person who has been given permission to stay in the country by the Minister for Justice, Equality & Law Reform because they are the spouse of an Irish citizen or the parent of an Irish citizen.
- A person who has been refused refugee status but has been granted leave to remain on humanitarian grounds.
- A person coming to Ireland from an overseas company for a maximum period of three years for training, whether or not it entails paid work, at an Irish-based company. Evidence in the form of original letters from the overseas employer and the Irish host will be required.

Although you will still need a work permit, it will be granted without the need to establish that there is no suitable Irish/European Economic Area/Swiss national available, if you are:

- ✓ A doctor who has full medical registration from the Irish Medical Council and who has been offered a specified position in a hospital recognised by the Irish Medical Council. Doctors with temporary registration are classified by the Immigration Authorities as postgraduate students and a work permit is not required.
- ✓ An entertainer who is coming to Ireland to perform at a particular event - this includes performers and their back up crews and film crews
- ✓ A professional sportsperson and the granting of the permit would comply with the terms of an agreement made between the Department and the relevant sporting organisation.
- ✓ A participant in an exchange programme (such as working holiday schemes) recognised by the Minister for Enterprise, Trade and Employment.
- ✓ A person who is posted on a corporate transfer/secondment for a maximum period of four years to an establishment or undertaking in Ireland that is owned by a company or group that operates in more than one state.
- ✓ A person entitled to take up employment in Ireland under the terms of any international bilateral agreement ratified by Ireland.

A very restrictive policy operates regarding the issue of work permits for domestic staff. Applications will be entertained only where it has been established that the person has

⁵Casual employment is defined as up to 20 hours part-time work per week or full-time work during vacation periods.

been in employment with a family abroad for at least one year, prior to the date of applying for a work permit. Permits, where issued, are subject to strict conditions.

Because of the specialist nature of ethnic restaurants, some permits per branch may be granted in respect of qualified chefs/catering staff. The number of permits granted will depend upon the nature and scope of the restaurant and the number of European Economic Area/Swiss nationals employed in the business concerned.

Changing employment:

Where an employee in possession of a valid work permit wishes to change employment, the new employer must apply for a new work permit and the employee cannot commence the new job until the permit is issued.

VI. THE INFORMATION AND CONSULTATION DIRECTIVE

The IC Directive (2002/12/EC) finally reached the EU statute book some seven years after the idea was put forward in the European Commission's April 1995 medium-term social action programme and nearly three and a half years after the Commission initiated the legislative process in November 1998 by formally proposing a draft Directive. The IC Directive was formally adopted by the European Parliament and Council in February 2002 and came into force 23rd March 2002. The IC Directive will be implemented for larger firms (undertakings employing over 150 employees/establishments employing more than 100 employees) in Ireland by 2005, for medium sized firms (undertakings employing over 100 employees/establishments employing more than 50 employees) by 2007, and for all other firms by 2009.

The purpose of the Directive is to "establish a general framework setting out the minimum requirements for the right to information and consultation of employees in undertakings or establishments within the European Community". This Directive coupled with the trade union recognition provisions of the Employment Relations Act in the UK and Industrial Relations (Amendment) Act 2001 in Ireland create a new legal framework on collective workplace representation and marks a significant move away from the traditional voluntary approach to trade union/employer interaction. In effect the implementation of the Directive will require for the first time that large number of employers will have to introduce mandatory voice mechanisms providing workers with a range of information and consultation rights as a matter of law. Essentially the impetus behind the implementation of the IC Directive is to strengthen dialogue and promote mutual trust between employers and employees. The fundamental objective of the Directive is to give employees the right to be informed and consulted on matters likely to impact on their jobs and future work practices.

The IC Directive applies to all establishments with over 20 employees or all undertakings with over 50 employees, depending upon the terms of its implementation by the actual member state. The right to information and consultation covers:

- ✓ Information on recent and probable development of the undertaking's or establishment's activities and economic situation,
- ✓ Information and consultation on the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment, and
- ✓ Information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations

The information should be given at such time, in such fashion and with such content as are appropriate to enable employee's representatives to conduct an adequate study, and where necessary prepare for consultation.

Consultation shall take place:

- While ensuring that the timing, method and content are appropriate;
- At the relevant level of management and representation;
- On the basis of relevant information to be supplied by the employer and the opinion which the employee's representatives are entitled to formulate;
- In such a way as to enable the employee's representatives to meet with the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; and
- With a view to reaching an agreement on decisions within the scope of the employer's powers likely to lead to substantial changes in work organisation or in contractual terms.

As regards confidentiality, Member States must ensure that employee representatives and any experts who assist them should not disclose any expressly confidential information provided to them, though Member States may authorise its disclosure to employees and third parties bound by an obligation of confidentiality. Member States must also ensure, when implementing the Directive, that employers are not obligated to communicate any information or undertake any consultation that would seriously harm the functioning of the undertaking or would be prejudicial to it. Member States must also provide for administrative or judicial review procedures where employers require confidentiality or withhold prejudicial information. In addition, measures in the event of non-compliance, enforcement mechanisms and penalties must also be provided for.

The Directive is deliberately loose, vague and open to interpretation with each Member State responsible for implementing it and deciding its structure. In August 2003 the Minister for Labour Affairs Frank Fahey published a consultation paper, which, is intended to widen the debate on how the IC Directive should be transposed into Irish law inviting response from the social partners. The proposed Bill was due to be sent to the Oireachtas by the Summer of 2004, with an anticipated enactment date of March 2005.

The Directive has provoked sharp differences of opinion between employer's organisations, trade unions and between the government's of EU Member States.

Unsurprisingly the Irish Congress of Trade Unions (ICTU) welcomed the passing of the Directive and stated that they anticipate that it will increase the diffusion of enterprise level partnership between employers and employees. The ICTU has stated that it hopes the EU Directive can play a vital part in improving worker information and consultation rights relating to workplace change and restructuring.

Conversely, the Irish Business and Employers Union (IBEC) are lobbying for a minimalist interpretation of the Directive, in order to protect the employers right to manage. They have stated that they favour a pragmatic approach bearing in mind the values and the ethos of the company. IBEC have also warned of the effect the IC Directive will have on the US multinationals that operate in Ireland. These multinationals are mostly non-unionised and alien to the IC ethos. IBEC have further stated that based on the ethos and structure of companies it is imperative to provide flexibility on the structure and implementation of the IC Directive. Loughheed of IBEC has commented that IBEC have received an unprecedented number of calls seeking advice following the publication of the government's consultation paper.

In reality the impact of the Directive will be dependent upon the actual terms of its implementation and operation. In this regard both the UK and Irish governments in their transposition documents have adopted the view that a "one size fits all" approach will not work and that companies should be able to develop their own arrangements tailored to fit their particular circumstances.

VII. THE UNFAIR DISMISSALS ACT 1977, 1993 & 2001

This Act was enacted for the protection of employees in an attempt to protect them from unscrupulous employers. Simply, it states that every employee has the right not to be unfairly dismissed by an employer. A dismissal amounts to a termination of the employment contract, with or without notice where the employer terminates the contract of the employee or where the employee terminates the contract because of the employers conduct. Dismissal precludes resignation, frustration or the expiry of a fixed term contract.

The Unfair Dismissals Act applies to every employee who, at the date of dismissal, has at least one year's continuous service with the employer (except in cases of termination on the grounds of pregnancy or trade union membership or activities), and lays down the criteria by which the fairness of the dismissals is to be judged. Additionally, it establishes adjudication machinery and provides redress where the dismissal is held to be unfair. However, there are certain persons are excluded from the terms of the Act include:

- ✓ An employee who has reached old-age pension age or normal retirement age
- ✓ Persons employed by a close relative in a private house or farm where both reside
- ✓ Members of the Defence Forces & Gardai
- ✓ FAS trainees and apprentices

- ✓ Civil servants, employees of local authorities, Health Boards, VEC's or Committees of Agriculture
- ✓ Persons employed under fixed term contracts (in some instances)
- ✓ Persons who ordinarily, under their contract, work outside the State
- ✓ Persons undergoing promotion or training of a year or less, and this is specified in a written contract of employment
- ✓ Persons undertaking training for the purpose of obtaining qualifications or registration as a nurse, pharmacist, health inspector etc ...
- ✓ Persons working under illegal contracts of employment

Section 6(1) of the Unfair Dismissals Act 1977, provides that the dismissal of an employee shall be deemed, for the purposes of the Act, to be unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Section 6(6) provides that, in determining whether a dismissal was unfair or not, the onus is on the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in Section 6(4) or that there were 'other substantial grounds' justifying the dismissal. Section 6(4) of the Act specifies a number of circumstances that render a dismissal fair:

A. Employees Lack of Competence: it is fair dismissal to dismiss an employee shown to be incapable, incompetent or lacking the necessary qualification to perform the tasks he or she was employed to do. Although the terms have not been statutorily defined, capability has been interpreted as relating to a reduction in an employee's physical or mental capacity to do his/her job e.g. a driver losing his/her sight, or inadequate health to perform the task. Competence is considered to relate to work performance and where there is a reduction in competence, an employee should generally be advised of the matter and given an opportunity to rectify the situation. Qualifications include, for example, professional qualifications such as a solicitor who is struck off the roll of solicitors or a truck driver who loses his/her driving licence. The employer has approximately one year to measure the competence of the employee and therefore this ground is rarely invoked in practice. However, where invoked the burden is upon the employer to demonstrate that the employee was provided with adequate time to improve his performance, as well as appropriate training and support. In **Beck v Jack Touhy & Co. Ltd. (1978)** an employee dismissed for incapability was held to be unfairly dismissed where the computer used was frequently out of order and he was not provided with adequate training for his managerial position.

B. Employees Conduct: In order to provide grounds for unfair dismissal, the conduct must be of such a serious or continuing nature as to amount to serious misconduct. Isolated acts or behaviour, which have not warranted a warning by the employer, are not sufficient. In **Seale v Foreman Cameras (1978)** the court ruled that it was fair to dismiss an employee for misconduct for repeatedly being late for work and failing to show progress notwithstanding having been sent on training courses and having received several written warnings concerning late timekeeping's. Termination of a contract for misconduct is generally confined to conduct affecting one's work e.g. an

employee who holds a position of trust may be fired where he is convicted of an offence. However, the courts will not uphold a standard policy of dismissal upon conviction. It should be noted that an employee may be summarily dismissed for 'misconduct' (s.8 of the Minimum Notice and Terms of Employment Act 1973). This arises where an employee acts otherwise than as a reasonable employee in the performance of the express or implied terms of his/her contract. As examples, misconduct may incorporate violence or drinking at work and, where these circumstances arise, the employer need not give the employee any notice. Whether 'on the spot' dismissal is justifiable will depend on the circumstances, e.g. drinking during working hours may justify summary dismissal of a truck driver but not an accountant.

In addition, conduct external to the workplace that prejudicially affects the employer may give rise to a fair dismissal based on misconduct. In **Flynn v Sisters of Holy Faith (1985)** the P had an affair with a married man, whose wife left him when the P became pregnant with her husband's baby. The P was employed as a secondary school teacher with the D school, and following numerous complaints from parents the school dismissed the P. The EAT, CC and HC (on appeals) all held that there had been no unfair dismissal as the termination of the contract was not as a consequence of her pregnancy, but due to her refusal to terminate her relationship with a married man – the Court felt that this conduct violated her obligations to the school and amounted to a breach of the employment contract.

- C. Redundancy:** An employer is entitled to dismiss an employee on the grounds of redundancy. Redundancy is defined by the Redundancy Payments Acts 1967–2003. However, it will not be a fair ground where a selective redundancy is made. In **Quilty v Cassin Air Transport (Dublin) Ltd (1982)** the P was made redundant by the D company while on maternity leave – the Court ruled that this was unfair. Similarly, in **Dillon v Wexford Seamless Aluminium Gutters (1980)** the P was made redundant and argued that the reason he was selected for redundancy was based upon his trade union activities. On the evidence the Court agreed and awarded damages for unfair dismissal.
- D. Contravention of the Law:** An employer may dismiss an employee where the continued employment amounts to a contravention of the law. For example, to continue to employ a driver following a disqualification from driving is a contravention of the law. In **Ponnampalam v Mid Western Health Board (1979)** the P was a duly qualified doctor in India, who commenced employment with the D. In order to practice in Ireland the P was required to obtain the sanction of Board na n'Ospideal (Hospital Board) pursuant to the Health Act 1970. Despite numerous requests by the D the P never produced the certificate of sanction. Accordingly, the Court ruled that his dismissal was fair, as the Ps continued employment would amount to contravention of the Act.
- E. Other Substantial Grounds:** this must be proven, to the satisfaction of the courts, to be more than a trivial excuse and of a serious nature. In **Cox v Genfitt (1978)**, it was

held to be fair dismissal where the employer discovered that the employee had established a business in direct competition with the employer, such an action being considered by the court to amount to serious misconduct.

In addition, apart from demonstrating that the reason for the dismissal was a fair one, employers are also obligated to demonstrate that they acted reasonably in deciding to dismiss. Therefore, employers are obligated to conduct an adequate investigation, give the employee a right to be heard, relate the penalty proportionately to the offence, following agreed procedures and disciplinary action as established by the contract. In essence the principles of natural justice apply, and consequently the employee has the following rights:

- ✓ The right to know any allegations or complaints made against him, including witnesses names and statements
- ✓ To be afforded a reasonable opportunity to respond to the allegations, or make any submissions they wish
- ✓ The right to representation during disciplinary procedures, and
- ✓ The right to a fair and impartial determination.

In order to protect themselves IBEC advises employers to provide all employees with a written copy of the organisation's disciplinary procedures within 28 days of commencement of employment. This guide should contain all relevant rules and regulations, a discussion of the consequences of departing from acceptable standards, and the range of disciplinary actions that can be invoked.

Additionally, the 1993 Act provides that dismissal in a number of circumstances is always automatically unfair, and can never be justified. These include:

- Trade union membership and activities, either during or outside working hours – In **Williams v Gleeson (1978)** the P was told to choose between the Trade Union and his job and accordingly, his subsequent dismissal was deemed unfair.
- The religious or political opinions of the employee – In **Merriman v St James Hospital (1986)** the P was dismissed when she refused to bring a candle and crucifix to the bed of a dying man. The dismissal was ruled unfair.
- The race, colour or sexual orientation of the employee
- The age of the employee
- The employees membership of the traveller community
- The employee is involved in lawful industrial action
- The employee's participation in legal proceedings against the employer
- The pregnancy of the employee, unless it prevents the employee from carrying out their duties properly, and the employee has refused the offer of a suitable alternative, or that there was no suitable alternative available

- Where the employee exercises his entitlements, or future entitlements pursuant to the National Minimum Wage Act 2000, Adoptive Leave Act 1995, Parental Leave Act 1998 and the Carer's Leave Act 2001
- Unfair selection for redundancy, where there are no grounds for a redundancy, or where an employee is selected for a redundancy contrary to a fair or agreed procedure

Other areas where the Courts have held that a dismissal was unfair include:

- ✓ Instances of violence: the employer is obligated to take mitigating circumstances into consideration.
- ✓ Criminal convictions: this depends upon the crime, the impact upon the organisation, the attitude of co-workers and whether it brought the organisation's reputation into disrepute.
- ✓ Substance abuse and alcoholism: the organisation is obligated pursuant to EEA 98 to provide support to all employees suffering from these disabilities and not to treat them in a discriminatory manner.
- ✓ Email/Internet abuse: unless the organisation has a policy in place the employee accrues privacy rights and any interference is actionable by the employee.

An employee is entitled to request from their employer a written statement of the reasons for dismissal, which must then be supplied within 14 days.

A claim of under the terms of the Act must be brought within 6 months of the dismissal or possibly within 12 months where exceptional circumstances prevented the making of the claim. There are three possible stages of adjudication on claims for unfair dismissal. These include a Rights Commissioner, the Employment Appeals Tribunal (EAT) and an appeal to the Circuit Court, with a possible appeal to the High Court.

- **Rights Commissioner:** This role was created under Section 13 of the Industrial Relations Act, 1969. Presently there are 5 Rights Commissioners in office who are available to hear disputes, provided that there is agreement by both parties and that they also agree to be bound by the decision. Hearings are held in private and the Rights Commissioner is obliged to issue a written recommendation outlining their opinions on the merits of the dispute. If the action is settled, no further claim on the issue is allowed. If the recommendation is not acceptable then an employee is then eligible to bring a case before the EAT, within 6 weeks.
- **Employment Appeals Tribunal:** Under the Unfair Dismissals Act, 1977-1993 the Employment Appeals Tribunal (EAT) was established (3 person body) to hear all cases alleging unfair dismissal or regarding the determination of redundancy. It consists of a legally qualified chairperson and vice-chairperson together with an equal number of members nominated by employers' organisations and the ICTU.

A case can be presented directly to the EAT (under the Unfair Dismissals Act 1993) or may be by way of an appeal from a Rights Commissioner. The Tribunal is then responsible for sending a copy of the employee's claim to the ex-employer. The EAT

will then issue a determination on the case, which may in turn be appealed to the Circuit Court, within 6 weeks, and from there to the High Court or Supreme Court, if necessary.

Where the employer fails within 6 weeks to comply with the award of a Rights Commissioner or the EAT, the Minister may take the case to the Circuit Court on the employee's behalf to enforce the remedy obtained.

Where the adjudication body finds that the employee has been unfairly dismissed the remedies for unfair dismissal include:

- Reinstatement to the employee's former position on the same terms as prior to the dismissal – the employee will be entitled to arrears of salary and there will be deemed to have been no break in the contract of employment
- Re-engagement in that position or a suitable alternative position, on such terms as the adjudication body deems appropriate
- Financial compensation: If the employee incurs financial loss as a consequence of the dismissal, compensation (not exceeding 104 weeks remuneration – taking into consideration all relevant circumstances) – if the employee incurs no financial loss as a consequence of the dismissal, compensation not exceeding four weeks remuneration

However, where an employee is unfairly dismissed for a discriminatory reason (marital status or gender), the Employment Equality Act 1998, provides that the employee may go directly to the Circuit Court and it may award limited compensation for the discrimination (€20,000-€100,000).