

BYRNE
WALLACE

LAW FIRM

CIPD
*Championing better
work and working lives*

Employment Law Health Check

Lorraine Smyth

1. Sick pay changes and assessing compliance

- The entitlement to paid sick leave under the Sick Leave Act 2022 increased from 3 days to 5 days per year from 1 January 2024.
- Sick pay is paid at 70% of the employee's normal pay up to a maximum of €110 a day.
- This is the second stage of a 4-year plan which will see employer-paid sick leave rise to 10 days in 2026.

Karolina Leszczynska v Musgrave Operating Partners Ltd ADJ-00044889 (23/09/2023)

- The Complainant: Absent due to illness for 4 days in 2023. Claimed entitlement to statutory sick pay - as provided for at section 5 of the Act of 2022.
- The Respondent's sick pay scheme: Eight weeks' paid sick leave per 12 months. But, the first 3 days of absence = "waiting days" and are unpaid.
- The Respondent argued:
 - its scheme provided a greater level of benefit compared to statutory sick leave, and
 - section 8 of the Act of 2022 permits an employer to substitute a more favourable sick pay scheme for the terms of statutory sick leave.

Karolina Leszczynska v Musgrave Operating Partners Ltd ADJ-00044889

- AO: Preamble of the Act of 2022, states that its purpose is “... *to provide that employees shall, subject to certain conditions, be entitled to up to and including 3 statutory leave days[.]*”
- In comparing the statutory scheme to the Employer’s, the AO held that:

“the duration of paid sick leave in the employer’s scheme, the amount of sick pay, the 26 weeks’ service requirement and the three-day waiting period combine to provide benefits that, on the whole, are more favourable to employees than the benefits provided in the Act.”

Karolina Leszczynska v Musgrave Operating Partners Ltd ADJ-00044889

- AO: Respondent's policy of not paying sick pay for the first 3 days of absence was a disadvantage for an employee who is absent for a maximum of three days once in 12 months, but this was outweighed by the combined benefits of the Respondent's scheme.
- AO: the design of the Respondent's scheme *"includes a provision that discourages short-term absences"*.
- Respondent's scheme was encompassed by section 9(1) of the Act and its benefits were, as a whole, more favourable to the employee than statutory sick leave.
- Claim failed.

2. National Minimum Wage – knock on effect?

- Increased from €11.30 per hour (31 December 2023) to €12.70 per hour (1 January 2024).
- This is a 12.4% increase.
- Knock-on impact?
- 5 December 2023, Minister for Enterprise, Trade and Employment Simon Coveney announced sign off on an increased package of €257 million for the Increased Cost of Business grant.

National Minimum Wage – knock on effect?

- The EU Adequacy of Statutory Minimum Wages Directive 2022/2041:
 - aims to help to achieve decent working and living conditions for employees in Europe.
 - Ireland is obliged to present an action plan to the European Commission as part of its transposition of the Directive by November 2024
- Member states with statutory minimum wages are requested to put in place a framework to set and update these minimum wages according to a set of clear criteria.

3. Pensions: preparing for auto-enrolment (AE)

- Government pushing ahead with its proposed implementation of AE.
- Still awaiting publication of the Automatic Enrolment Retirement Saving System Bill.
- Devil will be in the final detail.
- Employers will need to decide on how they will comply with its AE obligations and how they will interact with their current pension scheme/PRSA arrangements.
- Proposed target date is the second half of 2024.
- Unlikely to be a transitional or phased approach to the introduction date of AE.
- Once Bill is enacted, there will be a CIPD Pensions Webinar highlighting the key issues for consideration by employers.

4. Collective bargaining and consequences for non-union employers

- Collective bargaining currently remains voluntary.
- *Code of Practice on Grievance and Disciplinary Procedures*: "employee representative" includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.
- Section 2(1) of the *Industrial Relations (Amendment) Act 2001 (as amended)* provides an avenue for trade unions to request the Labour Court to investigate a trade dispute in certain circumstances.

Collective bargaining and consequences for non-union employers

- Article 4 of the *EU Adequacy of Statutory Minimum Wages Directive 2022/2041* relates to the promotion of collective bargaining on wage setting.
- Requires Member States with a collective bargaining coverage rate < 80% to: *“provide for a framework of enabling conditions for collective bargaining, either by law after consulting the social partners or by agreement with them”* and to establish an *“action plan to promote collective bargaining.”*
- One of the goals of the directive: to increase the number of workers who are covered by collective bargaining on wage setting.

Collective bargaining and consequences for non-union employers

- The Final Report of the Government's Labour Employer Economic Forum High Level Working Group on Collective Bargaining was published in October 2022.
- Amongst other recommendations, the Group proposes a process for Good Faith Engagement between trade unions and employers.
- No legislative proposal yet in respect of the recommendations made in the report.
- Debate over whether or not new legislation will be needed to properly transpose the *EU Adequacy of Statutory Minimum Wages Directive 2022/204*.

5. Protected disclosures – emerging impact

- The scope of the Protected Disclosures Act 2014 has been extended.
- Since 17 December 2023, employers with 50-249 employees have to establish internal reporting channels and procedures for the making of a protected disclosure.

6. Retirement age – a thing of the past?

- Retirement, in the context of age discrimination, has come to the fore in recent years with people living, and therefore working, for longer.
- Should you include details of the ‘normal retirement age’ in the employment contract?

Thomas Doolin v Eir Business Eircom Limited ADJ-00045261

- In January 2023, the Complainant was notified of his retirement on 1 July 2023. Made a formal request to work past turning 65. The request was refused.
- Appealed – unsuccessfully.
- Continued working until his employment terminated on his 65th birthday.
- The Complainant brought a case under the *Employment Equality Act 1998*.

Thomas Doolin v Eir Business Eircom Limited ADJ-00045261

- Respondent argued: the retirement was objectively justified due to **succession planning** and the desire to **maintain an age balance** in the workplace. Potential **bureaucratic challenges + additional costs**.
- AO found: Neither their succession plans nor a potential cliff-edge scenario, as set out in their Retirement Policy, would have been affected/arisen if the Complainant was retained in his employment.
- The decision was not objectively justified on any of the grounds set out in the Respondent's retirement policy, given his specific junior role which was non-critical in nature.

Thomas Doolin v Eir Business Eircom Limited ADJ-00045261

- The Respondent's evaluation of the Complainant's application to work beyond 65 highlighted: *"a lack of demonstrated scrutiny regarding the compatibility of the stated legitimate aims of the Respondent in the instant case with the specific characteristics of the Complainant."*
- No evidence to suggest the Respondent considered the Complainant's future job prospects and the anticipated reduction in his income when deciding to terminate his employment.
- The Complainant was re-instated to his previous role with effect from 1 July 2023.

Dermot Pisani v Transdev Dublin Light Rail Ltd ADJ-00041192

- In 2022 the Complainant, a luas driver, aged 65, was given a one year fixed term contract from the January 2022 to January 2023.
- He sought a further one year extension of employment but was informed in June 2022 that his employment would terminate in January 2023.
- The Complainant argued: the Respondent had not objectively and reasonably justified that there was a legitimate aim to terminate the employment and no other conclusion was possible other than the Complainant was discriminated against on the grounds of age.

Dermot Pisani v Transdev Dublin Light Rail Ltd ADJ-00041192

- The Respondent submitted that Luas tram drivers have a contractual retirement age of 65 years.
- Further to a collective agreement of March 2020 and the *Code of Practice on Longer Working* the Respondent grants Luas drivers a single one year fixed term contract after they reach retirement age, subject to a successful medical.

Dermot Pisani v Transdev Dublin Light Rail Ltd ADJ-00041192

- AO considered Labour Court's decision in *Chrzanowski -v- Transdev Light Rail Ltd* EDA 1632 on whether the imposition of a retirement age was justifiable as a genuine and determining occupational requirement.
- The Labour Court found: *".....the respondent has set out reasonable grounds that objectively justify a retirement age of 65 for tram drivers (including the complainant) who are classified as safety critical employees, in the interest of the safety of drivers, passengers and the public."*
- AO: Retirement age was objectively justified.

Bord Na Mona Plc v Anthony Kenny EDA2232

- The Complainant sought to remain in employment beyond his 65th birthday in April 2020. Request was rejected in December 2019. Appeal also rejected.
- A compulsory retirement age of 65 was incorporated into the Complainant's contract of employment through collective agreement and by custom and practice.
- In April 2020, significant changes made to the retirement age policy: grant of a one-year fixed-term contract, subject to passing an occupational health assessment. The Complainant did not avail of this.
- The Complainant alleged discrimination on the grounds of age.

Bord Na Mona Plc v Anthony Kenny EDA2232

- The Respondent asserted that the retirement of the Complainant was objectively justified by legitimate aims and that a retirement age of 65 was a necessary and appropriate means of protecting the health and safety of employees in the general operative grade, who perform physically demanding work.
- The legitimate aims included:
 - maintaining employment;
 - preserving the terms and conditions of employment among other employees;
 - the provision of a sustainable business; and
 - the protection of the health and safety of employees.

Bord Na Mona Plc v Anthony Kenny EDA2232

- Labour Court stated: *“Objective justification for interfering with an individual’s employment rights requires a proportionality assessment to balance conflicting interests that must be decided on the facts of each case.”*
- In the Court’s view: *“the collective agreement concluded between the Respondent and trade unions reflected the type of balancing exercise envisaged by the legislation in relation to retirement ages.”*
- The court was satisfied the Complainant was not discriminated against.

7. New Revenue Enhanced Reporting (ERR) Requirements

- ERR requirements take effect from 1 January 2024.
- Under ERR, employers will be required to notify Revenue **“on or before”** any of the following non-taxable items are provided to an employee:
 - Travel and subsistence;
 - Small benefit exemption; and
 - Remote working daily allowance.
- ERR is a real-time reporting regime.
- It is not a simple extension of PAYE Modernisation – this is a distinct and separate reporting requirement and separate return of information to Revenue.

8. Employment Permits – changes

- 11 roles added to Critical Skills Occupations List (now eligible for Critical Skills Employment Permit (CSEP)).
- 33 roles removed from Ineligible Occupations List (now eligible for General Employment Permit (GEP)).
- Quotas extended for 5 GEP roles.
- Increases to remuneration thresholds for GEP and CSEP permits – further increases planned.
- Effective from 17 January 2024 – previously issued permits which are still valid are unaffected, but changes apply to new and renewal applications.

BYRNE
WALLACE

LAW FIRM

CIPD
*Championing better
work and working lives*

Questions?