Ibec submission to the Department of Enterprise, Trade and Employment on the transposition of Directive EU 2019/1152 on transparent and predictable working conditions in the European Union

22 October 2021

Executive summary of Ibec's position

The transposition of Directive EU 2019/1152 on transparent and predictable working conditions in the European Union will result in significant changes to Irish employment legislation, in what is already an increasingly over regulated environment with legislative proposals on both statutory sick pay and the right to request remote working imminent. Ibec submits that it is imperative that the transposition of the Directive does not give rise to any further unnecessary cost and administrative burden on employers and respectfully submits that the transposition exercise must remain cognisant of the need for employers to sustain employment and remain competitive at a time when they continue to face the challenges of both Brexit and the Covid pandemic.

In summarising our key concerns, Ibec submits that:

- limiting a probationary period to a maximum period of 6 months will be detrimental to the interests of both employers and employees. Ibec respectfully submits that the Department must legislate to allow employers the discretion to extend the probationary period, not just where the nature of the role requires it and where it is in the interests of the employee but where an employer is of the opinion that the extension is reasonable and appropriate in the circumstances

- s17 of the Organisation of Working Time Act 1997 already provides reasonable notice of start and finishing times to those working unpredictable or variable hours and provides for a reasonable form of notice that not only complies with working time legislation but does not encroach unnecessarily on the employee's right to disconnect from work and work devices

- an employee must not be afforded "favourable presumptions" where he/she claims that they have not received information as to the essential aspects of their role, as required by Article 4, any such presumptions are unnecessary and disproportionate. There is no requirement to transpose for a further right for an employee to bring a claim to a "competent" authority, as such a right already exists whereby an employee can bring a claim to the WRC under the Terms of Employment (Information) Act 1994 and the Employment (Miscellaneous Provisions) Act 2018

- significant protections already exists under Irish legislation to protect employees from penalisation or the threat of penalisation for invoking their rights under the Directive and no further legislation is required

- although the Directive confers rights on a "worker", it is clear from Article 1(2), that in order to come within the scope of the Directive the worker must have a contract of employment or employment relationship with Recital 8 confirming that "*genuinely self-employed persons should not fall within the scope of the Directive*". It is vital that, in transposing the Directive, the transposition only affords protection to employees as recognised by national law and practice

- any requirement for employers to pay for training must only be required where such training is required by law and essential to the performance of the employee's role. The timing, duration and cost of training must be reasonable in all the circumstances

- in order to protect their legitimate business interests, employers must be able to restrict an employee, during the period of his/her employment, from being engaged either directly or indirectly in any capacity in any business or employment including those which are similar to or, in competition with the business of the company or which may in the employer's opinion prejudice his/her ability to act at all times in the company's best interests

- s(10) of the Protection of Employees (Fixed-Term Workers) Act 2003 already requires employers to notify fixed term employees, including those who have passed probation and have at least 6 months service, of vacancies. Should an employee request a form of employment with more predictable hours, where same is available, there is no legal requirement to provide a written reasoned response. Ibec submits that employers should not be required to provide reasons for refusal and should only be required to notify the employee whether or not they have been successful or unsuccessful in the recruitment process

- to shift the burden of proof to an employer where an employee alleges that he/she was dismissed due to exercising their right to a statement of terms and conditions is wholly disproportionate and unnecessary

- including financial compensation as well as fines for breaches of the Directive is grossly disproportionate in a piece of legislation which is essentially an information/administrative exercise. Ibec submits that effective and significant redress already exists under a number of employment statutes

- it is imperative that the transposing legislation provides a "reasonable cause" defence for employers, similar to the Employment (Miscellaneous Provisions) Act 2018, for failure to provide a statement as to the essential aspects of the role. Additionally, Ibec submits that the legislation must also provide a defence whereby an error or omission regarded as a clerical mistake or made accidentally and in good faith is not a breach of the legislation.

Introduction

Ibec welcomes the opportunity afforded by the Department of Enterprise, Trade and Employment[1] to participate and respond to the framing of the transposition of EU Directive 2019/1152 on transparent and predictable working conditions in the European Union[2].

The Directive, which repeals the Written Statement Directive 91/533 EEC, aims to improve working conditions by promoting more transparent and predictable employment while ensuring labour market adaptability. The Directive pursues a social policy objective, which is interpreted together with the relevant provisions of the Charter of Fundamental Rights of the European Union and the European Pillar of Social Rights. In particular, Article 31 of the Charter provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to a limitation of maximum working hours, daily and weekly rest periods and to an annual period of paid leave. Notably, the Directive includes a new Chapter on minimum requirements relating to working conditions providing a number of new material rights for workers within the EU.

Ibec submits that the Employment (Miscellaneous Provisions) Act 2018[3] has already effectively pre-empted many aspects of the Directive, including the introduction of anti-penalisation provisions, stronger penalties for non-compliance, restriction of zero-hour contracts and more precise information on the terms and conditions of employment being provided to employees at the outset of the employment relationship. Fundamentally, the Directive is an exercise in establishing the minimum requirements for the provision of information to employees, and accordingly the obligations placed on employers by the Directive are already sufficiently enshrined in Irish employment law, most recently by the 2018 Act.

Ibec respectfully submits that it is imperative that the Department in transposing the Directive does so in a manner that is not detrimental to employers' interests and goes no further than transposing the minimum requirements required to give effect to the Directive.

RESPONSES

Question 1 – Probationary Period

There is currently no statutory provision covering the maximum probationary period at the beginning of a job under Irish Employment Law. If Ireland were to introduce a maximum probation period in Irish law, provision could also be made for employers to, on an exceptional basis, provide for longer probationary periods where this is justified by the nature of the employment, or in the interest of the worker.

Where the worker has been absent from work during the probationary period, employers could provide that the probationary period be extended correspondingly, in relation to the duration of the absence. Having regard to the above, what would be the benefits in establishing a maximum probation period of six months in line with the Directive?

Ibec notes that Article 8(1) of the Directive requires member states to ensure that where an employment is subject to a probationary period, as defined in national law and practice, that it shall not exceed 6 months. Article 8(3) states that member states may on an "exceptional" basis provide for longer probationary periods, where justified by the nature of the employment or in the interests

[1] hereinafter referred to as the "Department"
[2] hereinafter referred to as the "Directive"
[3] Hereinafter referred to as the "2018 Act"

of the worker. Article 8 further provides that where the worker has been absent from work during the probationary period, Member States may provide that the probationary period can be extended correspondingly, in relation to the duration of the absence.

The fact that a probationary period must be reasonable is enshrined in the European Pillar of Social Rights, providing that workers have the right to be informed in writing at the start of employment about their rights and obligations resulting from the employment relationship, including any probationary period. It states that the entry into the labour market or a transition to a new position should not be subject to prolonged insecurity. Common law further dictates that any contractual provision must be underpinned by reasonableness including the duration of a probationary period.

Ibec submits that legislating for a reduced probationary period will only serve as a negative development for employees. Employers, restricted to a 6-month probationary period, will have no option but to simply move to terminate employment earlier in the process, rather than giving the employee time to improve. Probationary periods are a key contractual mechanism to allow for a trial period in which an employer can evaluate an employee's suitability and compatibility for the role. It allows employees the opportunity to not only determine their own compatibility for the role but an opportunity to improve and, employers the time to ensure that adequate supports are put in place in accordance with the principles of natural justice and fair procedures.

Ibec notes that Article 8(1) makes it a requirement that member states ensure that a probationary period does not extend beyond 6 months. Ibec submits that it is essential that the probationary period is, therefore, no shorter than 6 months, as anything shorter than 6 months would be seriously detrimental to the interests of both parties.

The right to extend a probationary period

Ibec further notes that Article 8(3), states that member states "may" on an "exceptional" basis provide for longer periods of probation where justified by the nature of the employment or in the interests of the worker. Recital 28 states that "*exceptionally, it should be possible for probationary periods to last longer than six months, where justified by the nature of the employment, such as for managerial or executive positions or public service posts, or where in the interests of the worker, such as in the context of specific measures promoting permanent employment, in particular for young workers*".

Ibec respectfully submits that it is absolutely essential that the Department legislates for a probationary period to be extended beyond 6 months, ensuring that an employer has the discretion to do so, up to a maximum of 11 months. Limiting the right to extend the probationary period would be detrimental not only to an employee's ability to have a reasonable opportunity to improve but will ultimately fail to give employers reasonable time to ensure that they have adhered to the principles of fair procedures and natural justice before proceeding to dismissal, particularly where those issues that give rise to the dismissal are not evident at the outset or, at the early stages of the 6 month probationary period.

Although an employer has a right not to retain employees found to be unsuitable during probation, a decision of that nature can only be effectuated where the employer adheres to standard tenets of fair procedures. This includes goals and expectations being set, concerns being raised with the employee, supports being provided, performance being reviewed etc. It requires a process being put in place that adheres to the Constitutional requirements of fair procedures and natural justice, regardless of whether the dismissal is due to competence, capability or conduct. Any such process

and subsequent decision to dismiss must be underpinned by a requirement of reasonableness. However, what is reasonable will depend on the particular circumstances of a case.

It is the case that terminating employment within a probationary period is not without legal and reputational risk for employers. Although it is the case that the unfair dismissals legislation will not apply to termination during a probationary period where such termination meets the requirements of section 2(1), and/or section 3(1) of the Unfair Dismissal Act 1977, as amended, the fact remains that legal pitfalls still arise. Such pitfalls arise not only under the Industrial Relations Acts 1946-2015 but under those Acts where employers are exposed to significant liability where claims, requiring no service requirement, result in a legally binding decision on an employer, including under the Employment Equality Acts 1998-2015, Unfair Dismissals Acts 1977-2015[4], protective leave legislation, health and safety legislation and at common law for wrongful dismissal.

It is imperative that employers are in the best position possible to defend any such claims. For example, should an employee claim that her dismissal during probation was due to her pregnancy, giving rise to a discriminatory dismissal claim on the gender ground, the only way an employer can rebut that presumption of discrimination is by providing evidence that the dismissal was in fact due to her performance during probation and not her pregnancy. In order to do so, an employer will need to furnish evidence that the employee's performance was below expectations, that goals were set, opportunities were given to improve, review meetings were held, supports were provided etc. It is the case that this may take longer than 6 months, particularly where an issue with performance is not evident at the outset of employment. Therefore, it is crucial, in the interests of both parties, that an employer reserves the right to extend the period of probation beyond 6 months.

The case of *Beechside Company t/a park Hotel Kenmare v A Worker LCR 21798* highlights that failure to follow fair procedures in the course of a probationary period dismissal can expose employers to costly claims. The Labour Court found that if an employee is found to be unsuitable during a probationary period then an employer has a right not to retain them but a decision of this nature can only be carried out where an employer adheres to fair procedures. The Labour Court recommended an award of €90k given the lack of fair procedures and that fact that "*there was no doubt that the claimant's reputation has been seriously damaged by the actions of the employer*". Not only must fair procedures be followed during a probationary period, but it appears that there is a greater onus on employers to implement fair procedures where the dismissal results in serious reputational risk for an employee which may, depending on the circumstances, further expose an employer to an injunction for wrongful dismissal should the employer dismiss in breach of the employee's contract.

In the recent case of *A Hairdresser v A Hair Salon (ADJ-00016046),* the claimant brought a claim under the Unfair Dismissals Act 1977, as amended, claiming that she had been dismissed due to her pregnancy, thereby excluding her from the requirement to have one year's continuous service. The respondent argued that she was dismissed due to performance issues and she was dismissed during her probationary period. The WRC in finding that she had been unfairly dismissed found that the dismissal arose not from the employee's failure to meet expectations but instead arose "*wholly or mainly from her pregnancy*". Importantly, the decision was predominantly influenced by the absence of any performance review and or/disciplinary process for poor performance, where the WRC stated that "*there are no written records regarding the complainant's communication issues, lack of skills,*

[4] S6(2) sets out grounds on which an employee can bring a claim where one year's service is not required for eg, where the dismissal resulted wholly or mainly from the employee's pregnancy, trade union membership, having made a protected disclosure etc

lack of progression and no assessment of what skills the complainant had or did not have for the job".

Notably, this claim could also have been brought under the Employment Equality Acts 1999-2015, for discriminatory dismissal on the gender ground arising from her pregnancy. Should an employer be unable to show that the dismissal was due to performance and not pregnancy, it is the case that discrimination can be inferred, and employers will be exposed to significant liability for failure to rebut the presumption of discrimination. Therefore, it is imperative that employers have reasonable time, and, where necessary in an employer's opinion, the option to extend probation not only to give an employee the opportunity to improve but to ensure that an employer is in a position to rebut any presumption of discrimination or allegation that the dismissal was linked to something other than the employee's performance, capability or conduct during probation.

Not only will instances arises where employees will be absent during a period of probation, but an employee may have a disability, as defined under s2 of the Employment Equality Acts 1998-2015, that results, depending on the circumstances, in an employer extending probation to give that employee a reasonable opportunity to improve. Employers under s16 have a proactive obligation to reasonably accommodate an employee with a disability, and any failure to do so exposes an employer to significant liability of up to 2 years renumeration. S16(4) states that proactive measures include adaptation of patterns of working time and has been found to include a reduction in hours of work. The Labour Court, in *An Employer v A Worker EDA 13/2004* noted that the provision of "special treatment or facilitates" necessarily involved an element of more favourable treatment finding that "*this can involve affording the person with a disability more favourable treatment than would be awarded to a person without a disability… the scope of the duty is determined by what is reasonable…having regard to all the circumstances of the case*". In such a case, depending on the nature of the appropriate measures put in place, in accordance with s16(4), an employer requires the discretion to determine whether or not it is reasonable or appropriate to extend the period of probation and the right to do so.

Ibec submits that it is essential that the Department transposes the Directive to allow a period of probation not only be extended in the interests of employees and in light of the nature of the role but allows an employer the discretion to extend the period of probation where, in its opinion, such extension is reasonable and appropriate in all the circumstances. It is crucial that the ability to extend is not the "exception" but rather the norm given the significant impact the inability to extend would have for both parties and, in particular employees.

Extension of probationary period due to employee's absence

Article 8 states that where an employee has been absent from work during the probationary period, Member States may provide that the probationary period can be extended correspondingly, in relation to the duration of the absence. It is already the case that periods of probation are effectively suspended during periods of protective leave including where an employee is on maternity leave, adoptive leave, parental leave, with the probation recommencing at the end of the period of leave. Ibec submits that where the employee has been absent on a period of sick leave, whether the probationary period should be extended or not by the period of absence must be a matter to be determined by the employer depending on the circumstances of the case. It could be a case that an employee is absent for a continuous period of 3 months on sick leave, where circumstances may dictate that it is in the interests of both parties to extend the period of probation. However, absence may also arise as a continuous period of frequent intermittent absences (which may, depending on the circumstances, be a conduct issue) where it may not be reasonable or indeed appropriate to

extend the period of probation. Although both classified as "absences", there is a fundamental difference in the practical implications that may arise for employers in extending probation by the period of "absence" and Ibec respectfully submits that it is imperative that an employer retains the discretion to determine whether the probation should be extended or not, in light of the facts of a particular case.

Question 2

Where a worker's work pattern is entirely or mostly unpredictable, the worker shall not be required to work by the employer unless the work takes place within predetermined reference hours / days and the worker is informed by his or her employer of a work assignment within a reasonable notice period.

Where a worker is entitled to be informed within a reasonable notice period by his or her employer of an unpredictable work assignment, what form should this notice take?

Ibec has significant concerns regarding the transposition of Article 10 on the minimum predictability of work. It is imperative that an employer's ability to manage and roster staff in line with business demands and the needs of customers/service users is respected. Decisions regarding work organisation and working time arrangements should, therefore, be taken at local enterprise level and it is inappropriate for the EU to legislate in this regard. Ibec submits that it is imperative that the Department does not transpose the provision in a manner that would effectively remove an employer's ability to manage the flow of work in their organisation. The work in certain sectors (such as retail, hospitality, education, elder care, health care and social care) is by its very nature unpredictable. Employers in these sectors, therefore, depend heavily on non-traditional, flexible working arrangements in order to satisfactorily meet consumer needs and regulatory requirements, as recognised by the 2018 Act. This EU micromanagement of the contract of employment is of huge concern to Ibec and its members and is a most unwelcome development in EU employment policy which Ibec notes must now be transposed into Irish legislation and, therefore, Ibec submits that any such transposition must have minimal impact on businesses.

Notwithstanding and without prejudice to the aforementioned, Ibec submits that a legislative provision already exists which complies with Article 10 of the Directive. Not only does section 17 of the Organisation of Working Time Act 1997[5], establish what is a "reasonable" notice period to be given to employees, but stipulates what form that notice must take. Essentially, s17 provides that an employee shall be entitled to be notified in advance of the hours which the employer will require the employee to work, subject to unforeseen circumstances justifying a change in notified times.

Section 17(1) provides that where neither a contract of employment, ERO, REA, or collective agreement specifies the normal or regular starting and finishing times of work of an employee, the employee's employer shall notify the employee "*at least 24 hours before the first day or, as the case may be, the day, in each week that he or she proposes to require the employee to work of the times at which the employee will normally be required to start and finish work on each day, or, as the case may be the day or days concerned, of that week*". In summary, section 17(1) states that an employer shall notify the employee at least 24 hours before the first day or, as the case may be, the day, in each week that he or she proposes to require the employee to work.

The rationale for section 17 was found to be "*perfectly clear*" to the Labour Court in the case of *Lucey Transport Ltd v Serenas DWT 141/2013*, where the Court stated that "*where an employee's starting and finishing times are determinable solely by the employer the law requires that in order to maintain*

[5] hereinafter referred to as "the 1997 Act"

some degree of work/life balance reasonable notice of starting and finishing times must be furnished by the employer". Ibec submits that 24 hours is reasonable notice, as held by the Labour Court and meets the requirements of the Directive. Likewise, the Labour Court in *Anglo Irish Beef Processors v SIPTU DWT 19/2000* found that in accordance with s17 an employee is entitled to at least 24 hours' notice of overtime, finding such a time period to be reasonable.

Importantly, section 17(4) permits an employer to vary the notified start or finish time "*if circumstances, which could not have been reasonably foreseen, arise that justify the employer in requiring*" the employee to work at different times than the notified times.

The Department has sought views on what form the notice should take. Ibec submits that section 17(5) already provides an appropriate means of notification providing that "*it shall be sufficient notification to an employee of the matter referred to in subsection (1) or (2) for the employer concerned to post a notice of the matters in a conspicuous position in the place of the employee's employment*." Employers, in compliance with s17(5), generally notify employees, who work variable hours, by means of a roster and in light of the digitalisation of the workplace since the 1997 Act, employers may, in the alternative, use software, including apps, as a means of notifying employees of start and finish times. Notwithstanding s17, should the Department impose further obligations on employers as to the form of notification, Ibec respectfully submits that the Department needs to be cognisant not to legislate to require an additional form of notification that would unreasonably encroach on an employee's right to disconnect from work and work devices, as recognised in the recently published Code of Practice on the Right to Disconnect.

Notably, s17 is a provision specified for the purposes of section 28 of the Workplace Relations Act 2015[6] which empowers a WRC inspector to serve a compliance notice, where failure to comply with such a notice is a criminal offence in accordance with the 2015 Act, and Ibec submits that no further legislation is required to give effect to Article 10.

Ibec submits that the fact that the 2018 Act provides for a minimum floor payment to those who are required to work, but where no work is available, must also be considered in the transposition of Article 10. The 2018 amends section 18 of the 1997 Act to provide that where an employee is required to be available for work but he/she is not provided with work, the employee is entitled to a payment for the lesser of 25% of his/her contracted hours or 15 hours' work. In either case, the minimum payment which an employee receives must be three times the national minimum wage[7]. Ibec submits that there are already significant protections in place for employees, who work variable hours, introduced as recently as 2018.

Ibec submits that s17 already provides reasonable notice to those working unpredictable or variable hours and provides for a form of notice that not only complies with working time legislation but does not encroach unnecessarily on the employee's right to disconnect.

Question 3

Where a worker has not received in due time all or part of the documents required under the Directive, one or both of the following shall apply: the worker shall benefit from favourable presumptions which employers shall have the possibility to rebut and the worker shall have the

[6] hereinafter referred to as "the 2015 Act"

[7] An employee will not be entitled to a payment where the reason for reduced hours arises from the employee being laid off or on short time, exceptional or emergency circumstances outside the employer's control or the employee being unavailable to work due to illness

possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.

The WRC is a competent authority within the meaning of the Directive which provides adequate redress in a timely and effective manner. To provide the best protection to workers, should Ireland also introduce provisions that a worker shall benefit from favourable presumptions where a worker has not received in due time all or part of the documents required under the Directive?

Article 15(1) provides that Member States shall ensure that, where a worker has not received in due time all or part of the documents referred to in Article 5(1) or Article 6, one or both of the following shall apply:

(a) the worker shall benefit from favourable presumptions defined by the Member State, which employers shall have the possibility to rebut;

(b) the worker shall have the possibility to submit a complaint to a competent authority or body and to receive adequate redress in a timely and effective manner.

Ibec is opposed to the introduction of any legislative measures that would result in employees benefitting from favourable presumptions, which employers would then have to rebut. Ibec notes that those "favourable presumptions" are to be defined by Member states. Ibec notes that Article (1)2 makes it clear that the Directive only applies to those who have a contract of employment or employment relationship, which in the Irish context can only mean an employee. Notably, in other jurisdictions, including the UK, a further category of "worker" may benefit from the provisions of the Directive. In transposing the Directive, an entitlement to certain documentation as to the essential aspects of one's job, as listed for in Article 4, can only apply to an employee, as defined by national law and practice.

Should an employee allege that they have not been provided with the necessary documentation setting out the essential aspects of the job, as required by Article 4, Article 15 allows an employee to either bring a complaint for failure to so, or an employee would benefit from "favourable presumptions" that an employer must rebut**.** Should those presumptions go to the root of the employment relationship and confer upon the employee a right or status that was never intended by either party, on entering into the contractual relationship, Ibec submits that any such presumptions would be entirely disproportionate, unnecessary and contrary to the burden of proof that must be met by employees under employment law. Any presumption that results in a shift of burden of proof, in the context of an employee not receiving a statement as to their terms and conditions, would be entirely disproportionate to the breach and consequent detriment to the employee. Ibec strongly opposes the transposition of Article 15(1)(a).

Ibec further submits that there is no requirement to transpose Article 15(1)(b) as there is already sufficient legislation in place to allow an employee, who alleges he/she has not received a statement as to the essential aspects of their role, to bring a claim.

Ibec submits that employees already have the possibility to submit a complaint to a competent authority or body and to receive redress in a timely and effective manner where an employer fails to provide certain particulars of employment. Section 7 of the 2018 Act, amends section 3 of the 1994 Act, by listing core terms which an employer must furnish to an employee in writing within 5 days of an employee commencing employment. This obligation to provide core terms supplements, as opposed to replaces, the existing obligations to provide employees with a statement of main terms

and conditions of employment, as set out in the Terms of Employment (Information) Acts 1994[8]. Under the 1994 Act, an employer must provide a written statement to an employee outlining fifteen core terms of employment, within 2 months of the commencement of the employee's contract of employment.

Section 10 of the 2018 Act provides that where an employer who, without reasonable cause, fails to provide an employee with a statement of core terms within one month of the date of commencement of employment, will be guilty of an offence, liable on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both. Such summary proceedings are brought and prosecuted by the WRC. Personal liability is also provided for company officers in certain circumstances.

Furthermore, section 7 of the 1994 Act provides that where an employer fails to give to an employee particulars of the terms of the employee's employment within 2 months of the commencement of the employee's employment, the employee can bring a claim to the WRC, in accordance with the 2015 Act and the WRC can require the employer to comply with its statutory obligations and/or order the employer to pay to the employee compensation of such amount as the WRC considers just and equitable having regard to all the circumstances, but not exceeding 4 weeks' renumeration.

Ibec submits that in transposing the Directive, it is imperative that employers can avail of a "reasonable cause" defence for failing to provide the documentation required under Article 4. Ibec refers the Department to section 10 of the 2018 Act, where it is an offence for an employer to fail to provide core terms to an employee within 5 days of the date of the commencement of the employee's employment. Section 10 states that "*an employer who, without reasonable cause", fails to provide an employee with a statement*…", shall be in breach of the 2018 Act. Ibec submits that in transposing Article 15, it is vital that where employers fail to comply with Article 4, they have a defence of reasonable cause, and strongly opposes any favourable presumption being conferred on a claimant to the detriment of an employer.

Ibec submits that Irish legislation already exceeds the requirements of this Article by providing various avenues of redress, resulting in potential criminal liability, and Ibec respectfully submits that no further legislative measures are required.

Question 4 – Protection against adverse treatment

Workers, including those who are workers' representatives, will be protected from any adverse treatment by the employer and from any adverse consequences, including dismissal, resulting from a complaint lodged with the employer or resulting from any proceedings initiated with the aim of enforcing compliance with the rights provided for in this Directive.

There are existing anti penalisation provisions in section 6 C of the Terms of Employment (Information) Act 1994. In your view does the existing legislation provide sufficient protection against penalisation or threat of penalisation from an employer i.e. where an employee invokes any rights under that Act which cover the written statement and other key employment information for employees?

Ibec submits that Irish legislation already provides sufficient and significant protection to employees against penalisation or the threat of penalisation. The 2018 Act amends both the 1994 Act and the 1997 Act to provide robust protection for employees.

[8] Hereinafter referred to as the "1994 Act"

Section 11 of the 2018 Act amends section 6 of the 1994 Act to insert a new section 6C to provide that an employer shall not penalise of threaten penalisation of an employee for:

(a) invoking any right conferred on him or her by this Act,
(b) having in good faith opposed by lawful means an act that is unlawful under this Act,
(c) giving evidence in any proceedings under this Act, or
(d) giving notice of his or her intention to do any of the things referred to in the preceding paragraphs.

Notably, s11(3) states that in proceedings brought before the WRC under the 2015 Act, it shall be presumed until the contrary is proved that the employee concerned has acted reasonably and in good faith in forming the opinion and making the communication concerned.

Furthermore, the definition of penalisation as defined in section 11(5) is extensively broad, to the extent that no amendment is required in that it includes any act or omission that affects an employee to his/her detriment with respect to a term or condition of his or her employment and is not limited to dismissal but includes the transfer of duties, change of location, change of working hours, loss of opportunity for promotion etc.

Notably, section 17 of the 2018 Act amends section 26 of the 1997 Act to prohibit an employer from penalising or threatening penalisation of an employee in the terms set out above. Both Acts provide for significant redress where an employee has brought a complaint to the WRC under the Workplace Relations Act 2015, where the WRC can award up to 2 years renumeration for a breach of section 26 of the 1997 Act.

Therefore, both the 1994 Act and the 1997 Act have both been robustly strengthened by the 2018 Act to provide significant protection to employees who claim that they have been penalised or that an employer has threatened penalisation and Ibec submits that any further measures would be wholly disproportionate and unnecessary.

ANY OTHER COMMENTS

Article 1 – Purpose, subject matter and scope

Article 1(2) of the Directive states that "*this Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case law of the Court of Justice*".

Ibec notes in the consultation document that the Department states that "*under EU law the status of worker is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks and, for the duration of that relationship, forms an integral part of that employer's undertaking*".

Ibec submits that it is clear that the question of what constitutes a "worker" should remain within the competence of member states, to reflect the workplace cultural differences across member states. It is important that members states have discretion to manage the contract of employment

in a way that respects national law and practices and their individual labour markets. Ibec submits that it is imperative that, in transposing the Directive, the Department ensures that the protections afforded are for those who have "an employment contract" as required by the Directive. Unlike other jurisdictions, Ireland does not have a category of "worker", and therefore case law draws a clear distinction between employees and the self-employed. The recently updated Code of Practice on determining Employment Status highlights the clear distinction between the two categories. Decades of case law before the tribunals and courts have resulted in a nuanced test which looks at the realities of the relationship. An independent contractor/self-employed, who has neither an employment relationship nor a contract of employment with an employer, cannot be afforded the protections set out in the Directive. Ibec refers to Recital 8 of the Directive which confirms that "*genuinely self -employed persons should not come within the scope of the Directive".*

Ibec submits that the protections afforded by the Directive, to be transposed into Irish law, must only apply to those who have a contract of employment as set out in Article 1(2).

Article 9 – Parallel employment

Article 9(1) states that "*member states shall ensure that an employer neither prohibits a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subjects a worker to adverse treatment for doing so*". Article 2 defines 'work schedule' as meaning "*the schedule determining the hours and days on which performance of work starts and ends".*

Article 9(2) states that "*member states may lay down conditions for the use of incompatibility restrictions by employers, on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interests*".

In the first instance a clear distinction must be drawn between those restrictions that apply during employment and those restrictions imposed, as a matter of contract, between the parties that apply post termination. During employment, although employers will provide for an exclusivity clause within the employment contract to protect its legitimate business interests, it is the case that the common law will imply a duty of fidelity and loyalty into all contracts of employment. That duty has been held to include an obligation not to compete with the employer while in his employment. Ibec respectfully submits that the Department must not legislate in a manner that would be incompatible with common law principles.

It is not essential that an employer has a written or express term in a contract of employment to protect confidential information and trade secrets. The common law will protect confidential information and trade secrets if it can be shown that the information sought to be protected is of such a nature that confidentiality must apply to it or that it be treated as a trade secret. In *Faccenda Chicken Ltd v Fowler*, the English Court of Appeal examined various types of information and set out the principles that would apply in its protection and held as follows:

(a) in the absence of any express term in a contract of employment the obligations of an employee in respect of the use and disclosure of information are the subject of implied terms
(b) while the employment subsists obligations protecting the employer's information are included in the general implied common law term imposing a duty of good faith and fidelity on an employee;

(c) when the employment ceases the obligation not to use or disclose information covers only information that is of a sufficiently high degree of confidentiality as to amount to a trade secret. .

In *Hivac ltd v Park Royal Scientific Instruments Ltd [1948*], the employer succeeded in preventing competing activity during the employee's free time as they were held to be entitled to protect confidential information. In *Preece v irish Helicopters UD 236/1984*, the EAT held that "*an employer is entitled to insist that an employee does not interest himself in a company which will compete with the business of the employer. Failure of the claimant to commit himself not to do anything while in the respondent's employment in pursuit of his own interest which might conflict with the interest of his employer was reasonably construed as a breach of duty or loyalty".* In *Mulchrome v Feeney [UD 1023/1982*], the EAT upheld a dismissal of an employee working for a director competitor in her spare time. It is clear that where that duty of fidelity, trust and confidence is breached, it must be open to an employer to take disciplinary action up to and including dismissal for breach of contract.

Ibec notes that the Article 9 must be transposed by the Department to ensure that employers cannot prohibit employees from working, outside their working schedule, for another employer. Ibec further notes that the Directive states that member states "may" provide for exceptions to that prohibition. Ibec submits that given the implied duties of fidelity and loyalty and trust and confidence and the need for employers to protect their legitimate proprietary interests, it is absolutely essential that an employer can prohibit employees from working for another employer in various circumstances.

Ibec notes that post-termination restrictions must be reasonable and, in some cases, depending on the restriction in question, do not lend themselves to certain roles. However, where the employment relationship subsists, the duty of fidelity and loyalty is implied regardless of the nature or seniority of the role. It is the case that a number of roles are such that an employee will be privy to confidential and commercially sensitive information which, if disclosed to another employer, would be significantly detrimental to the company. Many of these roles are senior roles where the remuneration that the employee receives is reflective of the fact that they cannot work for another employer which, in company's opinion, would prejudice the employee's ability to act at all times in the company's best interests. Ibec submits that such a restriction is undoubtedly justified and required in order for an employer to protect its legitimate business interests**.**

It is vital that an employer can restrict an employee from working, or being engaged in another employment, including those in competition or similar to the employer, for a number of reasons including, but in no way limited, to protecting confidential and commercial information, avoiding conflicts of interest, protecting commercially sensitive information, ensuring compliance with employment and health and safety legislation, ensuring non-solicitation of customers and colleagues, avoiding reputational damage, ensuring competitive advantage or simply where, in the company's opinion, it would prejudice the employee's ability to act at all times in the company's best interests.

Ibec submits that if the Department legislates to unreasonably restrict an employer's use of an exclusivity clause, not only will it undermine common law principles but innovation may be significantly stifled if employers feel unable to protect their business from employees working for or, being engaged with another employer, including those similar to or, in competition with the company, where the employer is of the opinion that such employment would prejudice the employee's ability to act at all times in the company's best interests.

Article 12 – Transition to another form of employment

Article 12 provides that "*Member States shall ensure that a worker with at least six months' service with the same employer, who has completed his or her probationary period, if any, may request a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply. Member States may limit the frequency of requests triggering the obligation under this Article"*. Article 12(2) provides that the reasoned reply must be provided within 1 month of the request, extendable to three months in certain circumstances.

There is no legal requirement, nor should there be any, to provide an employee who has 6 months service a different form of employment with more predictable and secure working conditions, or to provide an employee with a written "reasoned" refusal for requesting same[9]. Ibec submits that where a role becomes available, should an employee meet the criteria to apply, in line with company policy, employees who have completed their probationary period may apply in the normal manner.

Section 10 of the Protection of Employees (Fixed Term Work) Act 2003 already ensures that an employer shall inform a fixed-term employee in relation to vacancies which become available to ensure that he/she shall have the same opportunities to secure a permanent position as other employees. Section 10 states that the information as to vacancies which become available may be provided by means of a general announcement at a suitable place in the undertaking or establishment. Section 10(3) further states that, as far as practicable, an employer shall facilitate access by a fixed-term employee to appropriate training opportunities to enhance his or her skills, career development and occupational mobility. Notably, failure to comply with the notification obligation as to vacancies exposes an employer to a claim with a maximum exposure of up to 2 years renumeration.

The Labour Court in *Aer Lingus v IMPACT FTD 4/2005*, in considering section 10, found that, although fixed-term employees had the right to receive information concerning vacancies for which they were qualified to apply, the section did not restrict the right of an employer to determine what those qualifications were to be. Likewise, it should be noted that where an employee, who has completed probation, requests a form of employment with more predictable hours, where available, it is the case that the employee would have to have the skills and knowledge required for that role and more so, should he/she be successful, would be subject to a further probationary period in that new role.

In *Minister for Finance v McArdle [2007] 2 ILRM 438*, the High Court has held that section 10(1) is not limited to vacancies for posts at the same level as a post occupied by a fixed-term employee and includes promotions. Therefore, fixed term employees, including those with 6 months service on variable hour contracts, will be informed as to vacancies that become available within the company.

An employer has no legal obligation to provide a "reasoned reply" to an employee who requests another form of employment. It is unclear at what stage that reply must be given, is it on applying for the role to confirm that the application has been received, or to inform the employee they have not been shortlisted or, is it a reply to notify the employee that he/she has been successful or unsuccessful in the recruitment process. Ibec notes that it's a requirement of the Directive that a reasoned reply be given and Ibec submits that employers must only be required to notify the

[9] Ibec notes the Code of Practice on Part-Time Working sets out best practice as to how employers respond to part-time working requests. In addition, s15A of the Parental Leave Amendment Act allows employees on return from a period of parental leave to request a change to his/her working hours or patterns of work. Notably an employer does not have to give reasons for refusal

employee whether they have been shortlisted, successful or unsuccessful in the recruitment process and there should be no legal requirement whatsoever to set out any reasons therein.

Should it be the case that Article 12 is transposed in a manner that allows an employee on a variable hours contract apply for more predictable working hours within the role they currently have, Ibec submits that the 2018 Act already provides a provision for doing so where the employee can request to be placed in a particular band of hours based on a reference period of 12 months prior to the date of request, where the employee has worked hours in excess of his/her contractual hours over the previous 12 months. Ibec submits that a reference period of 6 months would be wholly unreasonable as in many sectors given seasonal variations and demands in work volume, 6 months is simply not long enough to establish a pattern as to normal working hours.

Given the implications of the transposition of this Article, Ibec would welcome the opportunity to engage with the Department further on how it proposes to transpose this provision.

Article 13 – Mandatory training

Article 13 states that "*member states shall ensure that where an employer is required by Union or national law or by collective agreements to provide training to a worker to carry out the work for which he or she is employed, such training shall be provided to the worker free of cost, shall count as working time and, where possible, shall take place during working hours*".

Ibec submits that it is imperative that the transposition of this Article must be subject to the requirement of reasonableness, given the disproportionate cost and administrative burden on employers in facilitating such training. It must be a requirement that such training is required by law, for e.g. health and safety training and that the training is essential to the performance of the employee's role, as determined by an employer. It must be recognised that it is not always feasible for such training to take place during working time, given the difficulties in replacing key skills, at what can be short notice, where there may be no available employees to whom duties can be reallocated during the period of training. Ibec submits that the Department must be cognisant of the practical and cost implications that will be imposed on employers and would respectfully submit that the Article must be transposed in a manner that does not give rise to any further unnecessary cost and admin burden to employers.

Article 18 – Protection from dismissal and burden of proof

Article 18 provides that "*member states shall take necessary measures to prohibit the dismissal or preparations for dismissal on the grounds that a worker has exercised its rights under the Directive". Subsection 3 provides that "where a worker has established before, a competent authority, facts from which it may be presumed that there has been a dismissal or equivalent measures, it shall be for the employer to prove that the dismissal was based on grounds other than those alleged*".

Ibec submits that shifting the burden of proof to an employer in the manner provided is entirely disproportionate. In drafting this proposal, the Commission had stated that similar provisions have already been introduced in directives regarding equal treatment. Ibec submits that there is a considerable difference between the nature of those directives and this directive which legislates to shift the burden of proof to an employer in the event of a dismissal of an employee who may have exercised rights under the Directive. Contrary to the Equal Treatment Directives, the Directive does not include any fundamental rights that would justify special protection and is not focused on protecting specific vulnerable groups that could face discrimination. This Directive is fundamentally concerned with the provision of information to employees as to their terms and conditions of

employment, it is not the protection of the employee's fundamental rights nor protecting those falling within a protected ground under the equality legislation. To shift the burden of proof to an employer where an employee alleges, he/she was dismissed due to exercising their right to a statement of terms and conditions is wholly disproportionate and unnecessary. Ibec submits that there is sufficient protection and avenues of redress available, as set out in this submission, for those who claim they were dismissed due to exercising their rights under the Directive.

Article 19 – Penalties

Article 19 states that "*member states shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive or the relevant provisions already in force concerning the rights which are within the scope of this Directive. The penalties provided for shall be effective, proportionate and dissuasive*".

Notably Recital 45 states that "*member states should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive. Penalties can include administrative and financial penalties, such as fines or the payment of compensation, as well as other types of penalties".*

The proposal to include financial compensation as well as fines for breaches of the proposed Directive is grossly disproportionate in a piece of legislation which is essentially an information/administrative exercise. Sanctions, where they are justified in the event of a breach, should be proportionate to the detriment suffered by an employee. The proposed sanctions are excessive and fail to achieve the correct balance between the rights of employees and needs of employers. They also increase the likelihood of frivolous and vexatious claims being taken. Ibec notes that the penalties are to be "*effective, proportionate and dissuasive*", which Ibec notes is analogous to the Equal Treatment Directive. However, this Directive does not deal with the protection of an employee's fundamental right not to be discriminated against. Fines dealing with the failure to provide information must be proportionate to the breach and consequent detriment to an employee.

Currently, where an employer fails to provide an employee with a written statement of terms and conditions, as required by the 1994 Act, within two months of the commencement of employment, an employee can bring a claim to the WRC and the WRC can award an employee a maximum of 4 weeks' pay, which Ibec submits is proportionate to the breach and the damage to the employee.

Ibec submits that the 2018 Act has already introduced grossly disproportionate remedies for employees for an employer's failure to provide 5 core terms within five days of the commencement of employment. The 2018 essentially criminalises the failure to provide information whereby the WRC can prosecute an employer on summary conviction to a fine of up to €5,000 or imprisonment for a term not exceeding 12 months or both. Furthermore, it also provides for person liability for company officers in certain circumstances. To further criminalise employment law would, Ibec submits, be entirely unnecessary and disproportionate.

Ibec submits that, like the 2018 Act, it is important that the transposing legislation must provide not only a "reasonable cause" defence for employers for fail to provide information as to the essential aspects of the role, but a defence whereby an error or omission regarded as a clerical mistake or made accidentally and in good faith is not a breach of the legislation.

Conclusion

Ibec submits that it is imperative that the Department transposes the minimum requirements of the Directive in a manner that is not detrimental to an employer's need to sustain employment and remain competitive in what is becoming an increasingly overly regulated environment. Ibec would welcome the opportunity to engage further with the Department in the transposition of the Directive.