

National Labour Law Profile: Ireland

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Constitution

After more than three centuries of British rule, the Irish Free State was founded in 1921. Its first Constitution was enacted in 1922. The [present Constitution](#) was adopted by referendum in 1937, and it was amended several times since its adoption. In 1973 Ireland joined the European Community.

The Constitution defines Ireland as a sovereign, independent and democratic state. It sets out the administrative structure of the Government and states that all powers of the Government derive under God from the people. It defines the structure and principles of legal and social policy to guide the Oireachtas (Parliament). The rights of every citizen are also enshrined in the constitution.

The national languages are Irish and English.

Ireland is a parliamentary democracy. The National Parliament (Oireachtas) consists of the [President](#) and two [Houses](#): [Dáil Éireann](#) (the House of Representatives) and [Seanad Éireann](#) (the Senate). For a law to be adopted, it must be approved by both houses of the Oireachtas and signed into law by the President.

The Head of the Government is the Taoiseach (Prime Minister). He or she is appointed by the President, and may keep his or her post as long as the Government retains a majority, up to a maximum of five years. He or she shall resign from office upon his ceasing to retain the support of a majority in Dáil Éireann unless on his advice the President dissolves Dáil Éireann and on the reassembly of Dáil Éireann after the dissolution the Taoiseach secures the support of a majority in Dáil Éireann.

The Head of the State is the President. He or she is appointed by direct vote of the people, for a mandate of seven years, and can be re-elected only once.

The Judiciary is made up of the Chief Justice and seven other members of the Supreme Court, High Court judges, Circuit Court judges and District Court judges.

Under the Constitution, the State guarantees *the right of the citizens to form associations and unions. (art. 40.6.(iii)). Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right. Laws regulating the manner in which the right of forming associations and unions*

and the right of free assembly may be exercised shall contain no political, religious or class discrimination. Under article 45 the State shall, in particular, direct its policy towards securing that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs. The same article further states that the State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.

Labour Regulation

Irish labour law has developed according to a British-style voluntarist model. The traditional view accepted by lawyers and industrial relations practitioners and actors was that the law should adopt an abstentionist role in relation to collective bargaining and industrial action, while supporting the individual employment relationship with a safety net of rights and obligations. In general, the law was not used to impose employment conditions, other than the basic minima in such areas as protection from unfair dismissal, organisation of working time, employment equality and occupational safety and health.

However, changed economic and political conditions in the 1980s shattered this voluntarist consensus. Growing pressure from both employers and unions, political concern at addressing the perceived inflationary result of free collective bargaining, and the increased intervention of the EC in regulating the individual employment relationship all contributed to this change. As a result, labour law has become increasingly regulated, both at collective and individual level (see below).

Legislation on individual labour relations - A whole range of Acts, most deriving from EU Directives, now provide different forms of employment protection to individual employees. The most important of these are:

Minimum Notice and Terms of Employment Act 1973

Organisation of Working Time Act 1997

Payment of Wages Act 1991

Maternity Protection Act 1994

Redundancy Payments Acts 1967-1991

Protection of Young Persons (Employment) Act 1996

Parental Leave Act 1998.

Worker Protection (Regular Part-Time Employees) Act 1991

Unfair Dismissals Acts 1977-93

Employment Equality Act 1998

Legislation on collective labour relations

The Industrial Relations Act 1990 regulates industrial action. Collective bargaining is governed not by legislation but by a series of nationally-negotiated pay agreements based upon a social partnership model. Every three years the Government, representatives of the trade union movement, of employers' organisations and more recently also drawn from the non-governmental 'social pillar' (ie voluntary groups)

come together to negotiate a national agreement which fixes wage increases and other payments generally. The agreement also sets a framework for a wide range of government policies, ranging from, for example, education to national infrastructural development. The most recent is the [Programme for Prosperity and Fairness \(PPF\)](#).

Other sources of labour regulation

Administrative Regulations: These are of increasing importance as the quantity of labour legislation increases, and some incorporate important individual employee protections, eg the European Communities (Safeguarding of Employees Rights on transfer of Undertakings) Regulations 1980.

Collective agreements: again these are of increasing importance. Although traditionally, collective agreements did not have any binding legal effect, this is now changing: for example under the Organisation of Working Time Act 1997 collective agreements may be used to provide for legally enforceable mechanisms for compensatory rest arrangements.

Judicial decisions: in the Irish common law system, judicial decisions create precedent so they represent an important source of labour regulation.

Contract of Employment

Employment law is based on an assumption that an employer and employee, or 'master' and 'servant' in the old language, enter into a contractual relationship freely and voluntarily, on equal terms, and that this sets out the terms and conditions of employment. Traditionally, the regulation of the employment relationship has taken place almost exclusively at this individual contractual level. Irish employment law is therefore almost an extension of the law of contract, since much of its substance derives from and relates to contract law.

A contract of employment can be verbal or written, or a combination of both. The contract comes into existence when agreement is reached between employer and employee, when the offer of employment by the employer is accepted by the employee. Accordingly every employee has a contract of employment. The details of a contract of employment are referred to as its terms. Both the Common Law and Statute however recognise that all contracts of employment should contain basic terms and obligations particularly basic protections for employees. Such basic terms are included in each contract of employment whether expressly agreed between employer and employee or not, they are implied into each contract of employment. The parties are of course free to agree any terms suitable to the particular employment and to agree terms, which go beyond the minimum legal protections.

It is also common practice, particularly in employments where there is trade union representation for the parties to conclude a collective agreement, regarding terms, conditions, work practices and rules of employment, which applies to all employees in membership of the union. However, as collective agreements are not legally binding they cannot be enforced as such, for example before a tribunal. In order to bind the individual employer and the employee the collective agreement must be specifically incorporated into the contract of employment of each employee.

Unlimited and fixed-term contracts of employment

Most contracts of employment are unlimited i.e. they do not specify an end-date. Fixed-term contracts of employment are generally treated the same way as unlimited contracts, except that they are subject to special rules about termination as, subject to certain conditions, they are exempted from the provisions of the Unfair Dismissals Acts 1977-93. In other words, the parties can agree, subject to formalities, to "contract out" of the Act where fixed term or specific purpose contracts are in operation. However, abuse of fixed term and specific purpose contracts by an employer or successive renewals on expiry designed to avoid the provisions of the Acts will entitle an employee with the requisite service to the protection of the Acts.

Special contracts of employment

There are no special contracts of employment, although in the past, another type of employment relationship was deemed to exist where a person was working for the State in the civil service, for example. Such a person was regarded as holding 'office', ie their status was not that of employee but rather of 'office-holder'. They were seen as holding office at the will of the Executive (the Government), which could thus dismiss them at will. The only constraint on the power to dismiss at will was that the Government had to act subject to the principles of natural justice and fair procedures.

The term *office-holder* has now fallen into disuse, and civil servants are almost exclusively viewed as employees. Only Government Ministers, and those appointed directly by the Minister, might now be seen as office-holders. However the principles of natural justice and fair procedures developed in the courts in litigation involving dismissal of office-holders have now been applied generally, and continue to be applied, by the Employment Appeal Tribunal in any cases involving dismissal of employees.

Probation

Most contracts of employment specify a probation period of twelve months. The Unfair Dismissals Acts do not apply until an employee has worked for twelve months, so during the probation period the employee may be dismissed at will subject to rules on fair procedures and wrongful dismissal.

Suspension of the contract of employment - Grounds for suspension

The employee's service is continuous unless he/she is dismissed or leaves voluntarily. Service is not broken by a lock-out, lay-off, strike or change of ownership of business or dismissal followed by immediate re-engagement. During these periods the contract is regarded as being suspended. Employees who are laid off or on short time and who claim in line with the Redundancy Payments Acts 1967-1991 are entitled to statutory notice entitlements.

Termination of the contract of employment

Dismissal or termination is defined in the Unfair Dismissals Acts as occurring in the following situations:

The termination of the contract of employment by the employer with /without notice.

A constructive dismissal - that is the termination of the contract of employment by the employer with or without notice, in circumstances where, because of the conduct of the employer, the employee was entitled, or it was reasonable for the employee to terminate the contract without notice. We are dealing here with resignations by the employee which are brought about by the unreasonable conduct of the employer (some examples would include sexual harassment, unfounded or unsubstantiated accusations of pilferage, physical threats or violence toward employee, extreme isolation of employee).

The expiration of a fixed term or specific purpose contract (see above).

Grounds for termination at the initiative of the employer

S.6(1) of the Act provides that the dismissal is deemed unfair "unless, having regard to the circumstances, there were substantial grounds justifying the dismissal". It ensues that, in order to establish a fair dismissal the employer must show that the reason for dismissal falls into one of the categories of reasons for dismissal that are regarded as fair. The employer must also establish of course that the dismissal on the grounds specified was justified.

The employer may be able to justify dismissal on the following grounds:

Capability, competence or qualifications of the employee (e.g. absence, lack of capacity, ability).

The conduct of the employee (e.g. theft, assault, clocking offences).

Redundancy

The employer is prohibited by Statute from continuing the employment (e.g. safety requirements in line with Statute or requirement to have a particular class of driving licence).

Other substantial grounds justifying dismissal (e.g. unreasonable refusal to accept changes in the contract of employment, excessive disruption, inability of employee to meet insurance requirements).

Notice

Notice is provided for under the Minimum Notice and Terms of Employment Act 1973. Depending on the employee's length of employment, he or she is entitled to between one week and 8 weeks' notice. However many contracts of employment provide for longer notice entitlement.

Severance payment

Apart from redundancy an employee is not entitled to any payment other than payment in lieu of notice, where applicable, once the dismissal is fair. If the dismissal is deemed to be unfair, he or she may be entitled to compensation (see below).

Redundancy

An employee is always entitled to a payment in a redundancy situation. Under the Redundancy Payments Acts 1967-91, a redundancy arises in the event of a termination of employment where an employer requires fewer employees or a lesser number of employees of a particular kind. Redundancy can arise for a variety of reasons under the Acts.

An employee is entitled to a Statutory Redundancy Payment where:

- (a) He or she is dismissed by reason of redundancy, or
- (b) He or she is laid off or on short-time for a period of 4 consecutive weeks or 6 weeks out of any 13 consecutive week period.

An employer intending to make an employee redundant must give the employee at least 2 weeks written notice (a copy of such notice must be sent to the Minister for Enterprise, Trade and Employment). As the redundancy constitutes a termination of employment, the notice period required under the Minimum Notice and Terms of Employment Act 1973 or the Contract of Employment may be greater than 2 weeks. On the date of dismissal the employer must give the employee the completed redundancy form (RP2) together with the lump sum payment.

Statutory Redundancy Payment

When an employee has been dismissed by reason of redundancy he is entitled to a statutory lump sum or redundancy payment, calculated as follows:

A half week's normal weekly remuneration (includes any fixed allowances) for each year of continuous service between the ages of 16-41 year

and

A week's normal weekly remuneration for each year of continuous service between age 41 - 66 years and the equivalent of one weeks normal weekly remuneration There is a statutory ceiling on the maximum statutory payment, which is adjusted as deemed appropriate by Ministerial Order. The employer is also obliged to pay statutory minimum notice or notice under the Contract, whichever is the greater, and outstanding holiday entitlements and this should not be overlooked.

In reality, in industry where a redundancy situation arises and the business is ongoing (not in liquidation or receivership) a payment in excess of the statutory redundancy is negotiated. This is particularly so where a union is representing the employees Sums paid in addition to the statutory entitlement are classified as ex-gratia severance payments. A typical settlement would be statutory redundancy plus 3 to 5 weeks pay per year of service ex-gratia; some reports suggest that the typical redundancy payment is five or six times greater than the statutory requirement. Also, where a precedent has been set in terms of redundancy payments from a previous settlement, this may dictate future settlements.

Collective Agreements may also contain provisions allowing a reference to Industrial Relations mechanism, e.g. a Conciliation Officer of the Labour Court, to make a recommendation in a dispute. In addition, with regard to selection for redundancy or lay-off, a Collective Agreement or even a Contract of Employment may outline the procedure to be adopted in selection. A typical arrangement would include selection on the basis of seniority, all things being equal and having regard to the needs, skills and dictates (commercial considerations) of the business.

Redundancy Payment Fund

Employer PRSI redundancy contributions are paid into a fund established under the 1967 Act and in the event of a redundancy(ies) the relevant Minister may make a rebate payment to the employer of up to 60% of the statutory lump sum payment. The employer is obliged to comply with certain formalities:

- (i) The claim must be made within 6 months of the date of redundancy
- (ii) He or she must include a copy of the RP2.
- (iii) A copy of the RP3 rebate form certifying essential details must be sent to the Minister for Enterprise, Trade and Employment.

Collective Redundancies

Redundancy procedures must also comply with EC Directives. The relevant Directive is E.C. Directive 75/129/EEC as amended by Directive 92/56/EEC, which came into Irish law on 9 December 1996. Both Directives have been consolidated into Council Directive 98/59/EC of 20 July 1998. The Protection of Employment Act, 1977, as amended by the Protection of Employment Order, 1996 (SI No. 370 of 1996) implements these Directives and provides protection for employees faced with scale or mass redundancies. The Act does not apply to establishments employing less than 21 people.

Where the Act does apply, it requires full exchange of information and consultation with 'employees' representatives' concerned, and also for consultation with the Minister for Enterprise, Trade and Employment. Employers are required to hold consultations with 'employees' representatives' at the earliest opportunity, or at least 30 days before the first redundancy is implemented. 'Employees' representatives' mean a trade union or staff association or a person or persons chosen by the employees likely to be affected by the redundancies to represent them. The employer is obliged to provide the representatives with all information in writing in relation to the proposed redundancies, including the reason/s for the redundancies, the number proposed to be made redundant and the criteria to be used. The same notice period and information applies to the employer's obligation to notify the Minister for Enterprise, Trade and Employment. An employer who does not comply with the statutory consultation process shall be guilty of an offence and may be fined up to 635 Euros.

Collective redundancies are defined as arising from redundancy during any period of 30 consecutive days where the employees being made redundant are as follows:

When 5 or more employees in a workforce of between 21-49 employees are to be made redundant; or

10 employees in a 50-99 strong workforce, or

10% in a workforce numbering 100-299 or 30 or

more employees in a workforce of 300+.

Remedies in case of unfair dismissal

There are three alternative remedies:

Compensation
Reinstatement
Re-engagement

The Unfair Dismissals (Amendment) Act 1993 now provides that the Tribunal should specify the reasons they have adopted a particular form of redress as against others.

Compensation: If compensation is awarded, the award is subject to a maximum of 104 weeks remuneration. Remuneration includes basic pay, allowances, bonuses, benefit-in-kind and employers' contribution to Pension and V.H.I. schemes where applicable. The Tribunal, in setting the award, must consider actual and prospective loss. The Tribunal can reduce the level of an award due to the employees' contribution to the dismissal, the employees' failure to mitigate the loss or the employees' ability to mitigate the loss by securing alternative employment. The calculation of awards is usually based on net remuneration. The U.D.A. (Amendment) Act 1993 now permits the Tribunal to disregard Social Welfare benefits and tax rebates received by the claimant in assessing compensation levels. Where there has been no financial loss incurred the Tribunal may now make a financial award of up to 4 weeks pay.

Reinstatement: If this is awarded, the employment is reinstated without loss of any rights or remuneration. The employee is returned to the exact same job, with salary arrears from date of dismissal.

Re-engagement: Where this is awarded, the employee is entitled to either the same job as previously held or suitable job under the circumstances. The Tribunal can exercise flexibility with this remedy, the period since the date of dismissal may be regarded as suspension without pay, continuity of service is usually preserved and the Tribunal may leave any warning or disciplinary measures short of dismissal intact. The Tribunal rarely invokes this remedy.

The Unfair Dismissals (Amendment) Act 1993 now provides that the Tribunal (the Employment Appeals Tribunal) should specify the reasons they have adopted a particular form of redress as against others. In practice, compensation is the remedy most commonly awarded (in approximately 75% of successful claims). Re-engagement and re-instatement are much less common remedies due to a number of factors. In some cases, the employee may have already obtained alternative employment. In others, relations between employer and employee may have broken down to the extent that the Employment Appeals Tribunal will be reluctant to enforce the resumption of a working relationship. Finally, even where the employee succeeds in claiming unfair dismissal, there may be some element of contributory behaviour by the employee to the events leading to the dismissal and in those cases, again, the Employment Appeals Tribunal is reluctant to order that the employee be re-engaged or re-instated. For all these reasons, compensation is far more routinely awarded as a remedy.

Other remedies

Certain categories of office holders and employees of the State (e.g. Gardai, Defence Forces) excluded from the legislation may seek redress for dismissal in the ordinary courts. Two options may be available - an action for wrongful dismissal (this option is open to any employee as an alternative to a claim under the Unfair Dismissals Act 1977-1993), or judicial review of the decision to dismissal seeking a court order quashing the dismissal (an order of certiorari). Such an action will usually be based on a failure by the employer to comply with the tenets of natural justice. These principles include the right to be fully informed of the complaint, the right to respond with the benefit of adequate time and information to prepare and adequate representation.

In *Gleeson .v. Minister for Defence* (1976 Sup. Court), Gleeson, a member of the Armed Forces, had been discharged dishonourably on the basis of unsatisfactory conduct in breach of specific regulations governing the conduct of members of the Defence Forces. Mr. Gleeson had not been granted an opportunity to make representations prior to his discharge. He sought to challenge the dismissal (on order of Certiorari). The Supreme Court found there had been a failure to comply with the basic principles of natural justice and granted the order, notwithstanding conduct in breach of regulations. The opportunity to respond to a complaint however serious is a fundamental right which ought not to be overlooked regardless of the circumstances.

In *Al Mutari .v. Midland Health Board* (1988 High Court) a senior House Officer in St. Fintans Hospital was granted a declaration by the High Court that his dismissal was null and void where there had been a failure by the Health Board to comply with the principles of nature justice. In *Gunn .v. National College of Art & Design* (Supreme Court 1988) the Supreme Court set aside doubts as to whether employees who were not office holders were entitled to the protection of the principles of natural justice. In his judgement Justice Walsh indicated that the application of the rules of natural justice do not depend on the status of the person, office holder or employee of another kind. "The quality of justice does not depend on such distinctions". However, it should be noted that where there is clear agreement (a contract/collective agreement) or specific statutory provisions which govern disciplinary and dismissal procedures, the fairness or otherwise of the procedures adopted will be judged on the basis of the terms and provisions of the agreement or statute as applicable.

The Court of Appeal in England (*Donnell .v. London Borough of Brent* (1986 Court of Appeal) and *Hughes .v. London Borough of Southampton* (1987 Court of Appeal)) has indicated that it has power to grant an injunction to prevent a dismissal occurring where the dismissal would be wrongful and/or in breach of the principles of natural justice. In *Farrell .v. IPBS* 1993 High Court the court refused an injunction to Mr. Farrell restraining the IPBS from proceeding to have a meeting to consider his removal from office. The injunction was sought on the grounds that there had been a failure to furnish full information relating to the complaints against him. The Court refused to grant the injunction in the particular circumstances of the case but did not indicate that an injunction could not be granted to restrain a decision to dismiss where there had been a failure to comply with the principles of natural justice in relation to the disciplinary procedures adopted.

Termination at the initiative of the employee

An employee is always entitled to resign from employment, provided he or she gives the requisite period of notice (only one week under the 1971 Act, but usually the contract provides for a longer period). Where he/she is forced to resign by conduct of the employer amounting to a breach of contract, a constructive dismissal may arise.

Hours of Work

Working Time is regulated by the Organisation of Working Time Act 1997. Under this act the hours of work are limited to 48 hours per week, subject to certain exceptions. However, the average or standard working time may be lower, and it actually varies in the different sectors. Collective agreements normally address this issue, as well as overtime.

The Organisation of Working Time Act, 1997, also provides statutory minimum entitlements in respect of paid annual and public holidays. Under this law employees are entitled to 4 working weeks annual leave (20 days) in any leave year during which they have worked 1,365 hours. Leave may also be calculated as one-third of a working week for each month during which they have worked at least 117 hours, or 8% of the hours they have worked in the leave year, subject to a maximum of 20 days. Any employee who has worked for at least 8 months of the leave year is entitled to a 2 week unbroken leave period. Section 20 provides for times and pay for annual leave.

Employees are entitled to a paid day off on the following 9 public holidays: Christmas Day, St Stephen's Day, St Patrick's (17th March), Easter Monday, the first Monday in May, the first Monday in June and the first Monday in August, the last Monday in October and the first day of January.

Maternity Leave and maternity protection

This issue is regulated by the [Maternity Protection Act 1994](#) and associated regulations, in particular:

Maternity Protection (Disputes and Appeals) Regulations 1995 (SI No. 17 of 1995)

Maternity Protection (Time off for Ante Natal and Post Natal Care) Regulations 1995 (SI No. 18 of 1995)

Maternity Protection (Health and Safety Leave Certification) Regulations 1995 (SI No. 19 of 1995)

Maternity Protection (Health and Safety Leave Remuneration) Regulations 1995 (SI No. 20 of 1995)

For the purposes of the 1994 Act an employee is:

a person engaged under a contract of employment and who is pregnant, having informed her employer of her condition, or

has recently given birth (whether to a living child or stillborn child) and whose date of confinement was not more than 14 weeks earlier and who has notified the employer of her condition is breastfeeding within 26 weeks of the date of confinement and has informed her employer of her condition, or

is the father of a living child where the mother has died within 14 weeks of the mother's week of confinement

The 1994 Act continues the pattern of extending the scope of employment legislation to include atypical workers, as exemplified in the Unfair Dismissals (Amendment) Act 1993 and the Terms of Employment (Information) Act 1994. Under the provisions of the previous Maternity Act 1981, fixed term employees engaged for periods of less than 26 weeks or with less than 26 weeks to run on their contract were excluded from protection. Such employees now have full protection for the term of their contract. There are no service qualifications for employees as a prerequisite for protection under the Act. Employees engaged on a probationary period, trainees and Apprentices fall within the ambit of the Act, as do employees engaged through the services of an employment agency. Section 2(2)(c) provides that, for the purposes of the Act, the person liable to pay the wages of an employee engaged through an employment agency shall be deemed to be the employer. Officers and servants of the State, including members of the Garda Síochána and Defence Forces, and all other employees of the State, are not excluded from the legislation and are deemed to be employees within the meaning of the Act.

Maternity Leave

Article 8 of Directive 92/85/EEC, under which the 1994 Act was introduced, stipulates a minimum period of 14 weeks maternity leave, of which at least 2 must be allocated before and/or after confinement. The provisions of the 1981 Act were consistent with the 14-week period, but stipulated a period of leave minimum 4 weeks before and after confinement. This 4-week period is maintained in sections 8 and 10 of the 1994 Act.

Under section 12 of the 1994 Act, maternity leave will be extended where the date of confinement is after the expected week of confinement. The extension will last for the number of weeks necessary to ensure that there is a 4-week period of leave after confinement. Such an extension is deemed to be maternity leave in every respect. Under section 14 of the Act, additional leave, again up to a maximum of 4 weeks, is solely at the option of the employee and does not attract benefit payment. Service is continuous but not computable or reckonable for the purposes of other protective legislation.

Under section 3 of the Act, early confinement does not affect the entitlement to 14 weeks' maternity leave. If the baby is born four or more weeks before the expected week of confinement and leave has not begun, the 14 weeks' maternity leave period commences on the date of confinement. Where a pregnant employee is already on maternity leave, her entitlement remains at 14 weeks and there is no alteration to the expected date of return.

In addition to maternity leave, there is also provision for Health and Safety leave. An employee who is pregnant, has given birth within the previous 14 weeks, or is breastfeeding (for up to 26 weeks after the birth) and who as a result cannot do her job for particular health and safety reasons, must be offered suitable alternative employment. If none is available, she must be granted health and safety leave, and must continue to be paid by her employer for the first 21 days of such leave.

Thereafter she is entitled to be paid statutory health and safety benefit (see below). The same rights to return to work on the same or suitable alternative conditions apply in respect of an employee who has taken health and safety leave, and an employee returning from maternity leave.

Cash benefits and other entitlements during pregnancy and maternity leave

Section 15 of the 1994 Act provides a general right to time off for ante-natal and post-natal care, with the obligation on employers to pay during ante-natal and post-natal care absences. The right to time off without loss of pay covers the period from the beginning of pregnancy through to 14 weeks after the confinement. The entitlement to time off and payment for such absences is regulated by the Maternity Protection (Time off for Ante-natal and Post-natal Care) Regulations 1995.

Where health and safety leave is granted, section 18(4) of the 1994 Act obliges the employer to pay the employee's remuneration for a period of 21 days in any relevant period. On the level of remuneration and the manner of its payment, Regulation 3 of the Maternity Protection (Health and Safety Leave Remuneration) Regulations 1995 obliges the employer to pay an amount equal to three times the employee's normal weekly pay. There is no payment in respect of weekend days not normally worked, although Saturdays and Sundays are counted in the calculation that goes to make up the 21 days. The definition of normal weekly pay excludes any payments /remuneration or allowance in respect of overtime, night work, shift work, unsocial hours or an employee being available "on call".

Where the employee is paid at a fixed rate, i.e. a fixed salary, weekly wage, allowance, daily/hourly rate, in relation to fixed hours she should be entitled to 3 weeks' remuneration at that rate excluding any amount attributable to overtime. The reference period for establishing the rate of pay is the last week worked prior to the grant of health and safety leave. Where a fixed allowance is paid monthly or quarterly it must be apportioned on a pro rata basis. Where an employee is not paid at a fixed rate, say for example a commission-based employee, to calculate the 21-day remuneration the reference period is the remuneration earned in the previous 26-week period, the employee's weekly rate being equal to one-26th of her total remuneration in the 26-week period.

The European Communities (Social Welfare) Regulations 1995 provide for the payment of health and safety benefit to an employee who has been granted certified health and safety leave within the meaning of the 1994 Act. A maximum rate of benefit is set by regulation, with scale rates depending on the level of reckonable earnings. There is also provision for increase in this rate where there is an adult or child dependant. In order to qualify for benefit the claimant must meet qualifying conditions, as follows:

at least 13 paid contributions in the 12 months before the expected or actual date of the baby's birth, or at least 39 paid contributions since first becoming insured, or in the last complete tax year prior to the year prior to which health and safety benefit is claimed, and average earnings of not less than a prescribed amount.

Statutory Maternity Benefit (SMB)

The rules governing statutory maternity benefit are contained in the Social Welfare (Consolidation) Act 1993 and the Social Welfare (Consolidated Payments Provisions) Regulations 1994. An employee is entitled to SMB if she is

in employment immediately before the first day of her maternity leave; and she has paid the qualifying amount of PRSI contributions, namely at least 39 weeks of PRSI contributions in the 12-month period just before the first day of her maternity leave; or at least 39 weeks of PRSI contributions at any time since first starting work, and at least 39 weeks' PRSI in the relevant tax year before the year in which her maternity leave starts. SMB is paid at 70% of average weekly earnings, subject to certain maximum and minimum amounts.

Daily breaks for breastfeeding - There is at present a Government commitment to introducing some measure of provision for breastfeeding breaks in the workplace.

Parental leave

Parental leave is regulated by the Parental Leave Act 1998, which came into effect on December 3, 1998.

Each parent is entitled to 14 weeks parental leave in respect of each child born or adopted on or after 3 June (now 3 December 1993).

The leave must be taken in order to take care of the child, and any abuse of this can lead to the leave being terminated.

Parental leave is not transferable between parents.

The 14 weeks may be taken as a continuous block or, by agreement with the employer, in separate blocks or by working reduced hours.

Parental leave is unpaid but time spent on leave is reckonable for all employment rights purposes other than superannuation.

Employers may postpone parental leave for up to six months in certain circumstances.

Three days *force majeure* leave may be taken in any one year for a family crisis where the employee's presence is indispensable.

Not more than five days of *force majeure* leave may be taken in any three year period.

Employers may give leave in a manner more favourable to employees than the minimum required under the Act.

Disputes under the Act may be referred to a Rights Commissioner.

Section 6 provides the basic entitlement to parental leave. It states that an employee who is the natural or adoptive parent of a child is entitled to 14 working weeks leave to enable him or her to take care of the child. The bill had only made provision for parental leave “without pay”, but this last phrase was deleted during the Dail debates as it was suggested that those words could have prevented local agreements on parental leave with pay. Thus, the entitlement carries no right to pay, but the Act does not prohibit the granting of paid leave by individual organisations.

In the Act, the entitlement to leave originally only applied in respect of children born on or after June 3, 1996 (or whose adoption order was made on/after that date), but the leave could be taken until the child reached the age of 5 years (or where a child has been adopted between the ages of 3 and 8, within two years of making the adoption order). However, following a recent amendment to the Act, eligibility for parental leave is now expanded to include children born or adopted between December 3, 1993 and June 2, 1996. All leave in respect of children born or adopted during this period must be taken by December 31, 2001.

An employee must have worked for at least one year with the same employer before being able to take such leave, and is entitled to parental leave in respect of each child of which he or she is the natural or adoptive parent. This entitlement is non-transferable; it attaches separately to each parent.

Section 7 provides that the leave may consist of a continuous period of 14 weeks, or with the agreement of the employer, a number of periods broken down either into days or hours or a combination of both. This means that the general entitlement is to have one unbroken period of leave. In other words, it may only be broken into smaller periods at the option of the employer. The section also provides that where an employee is entitled to parental leave in respect of more than one child, and the children concerned are not children of a multiple birth, the period of parental leave taken by that parent in any one period of 12 months must not without the employer’s consent exceed the 14 weeks. This means that parents of twins or triplets or other multiple births may take 14 weeks in respect of each child, even if this amounts to more than 14 weeks in one 12 month period. This exception for multiple births was added during the Dail debates on the bill. Section 7 also describes how the leave is to be calculated; if it is done by hourly calculations, the number of hours is calculated according to the number of hours during which the employee worked in the continuous 14 week period just before the commencement of the leave. The employee is entitled to 14 weeks leave, exclusive of holidays, or time spent on maternity leave, adoptive leave or sick leave.

Other leave entitlements

Sick leave

There is no legislation governing sick leave; and no statutory obligation on employers to pay employees while they are absent on sick leave. However, if there is a sick pay scheme in operation in the workplace, details of it should be included in the employee's contract of employment as the employee will then have a contractual right to such payment. Despite the absence of any statutory obligation, many organisations operate sick leave/sick pay schemes. The type of scheme varies considerably across different organisations, but generally, schemes will provide for full pay for some

limited period of absence, and thereafter for half pay for a further period. A typical scheme might provide for sick pay for up to three months and half pay for a further three months. Pay is generally inclusive of any social welfare payments to which the employee is entitled; but in practice many employers continue to pay employees their normal salary while on sick leave, and the employees refund the company any social welfare cheques that they receive.

Other special leave

Force Majeure leave is provided for in the Parental Leave Act 1998. Section 13 provides for an entitlement to up to three days *force majeure* leave with pay per 12 month period (not to exceed five days in any three year period). Such an entitlement arises where “urgent family reasons”, owing to an injury or the illness of a child, spouse or partner, brother or sister, parent or grandparent, have arisen, such that the employee’s immediate presence is indispensable, at the place where that person is. The place is not defined; it does not have to be the employee’s own home, but could for example be a nursing home, creche or hospital. Nor are the categories of what might be described as “dependent person” exhaustive; the section says that the Minister may in future provide for other categories of person to be included.

Educational leave

There is no statutory obligation on employers to provide this type of leave; where it is done, it is entirely at the discretion of the employer.

Leave for trade union purposes or because of the holding of public office

There is no statutory obligation on an employer to provide such leave, although in practice reasonable requests for such leave should be granted.

Minimum age and protection of young workers

The statutory minimum age is 16 years old, except for

combined work training and placement/in plant training schemes,
light work not interfering with school/training programme and cultural,
artistic, sports and advertising activities.

Beyond this age and so far as a worker is aged less than 18 years old he or she are protected under the Protection of Young Persons (Employment) Act 1996. This law provides for minimum rest and break periods for young persons and children. It also establishes strict limits to night work for children and young persons, and it obliges employers to ensure that young people have working conditions which suit their age, including protection against economic exploitation. Also, employers are obliged to ensure that young persons are not engaged in work likely to harm safety, health or development/education.

Breach by an employer of the provisions of the Act is a criminal offence with a maximum fine of £1,500. However, there is also a limited remedy before a Rights Commissioner for a parent/guardian or young person in respect of certain breaches by

the employer - failure by the employer to preserve the pay and conditions of young persons/children employed prior to the Act coming into force (Section 13) and breach of Section 17 where an employee is penalised for refusing to co-operate with the employer breaching the Act.

Special measures of protection for young persons:

	NIGHT WORK	DAILY REST PERIOD	WEEKLY REST PERIOD	DAILY BREAKS
CHILDREN	CANNOT WORK BETWEEN 8 PM AND 8 AM	MINIMUM 14 HOURS REST IN ANY 24 HRS (LIMITED DEROGATION AVAILABLE)	2 DAYS REST (SHOULD BE CONSECUTIVE OR COMPENSATED)	30 CONSECUTIVE MINUTES (UNPAID) EVERY 4 HOURS
YOUNG PERSONS	CANNOT WORK BETWEEN 10 PM AND 6 AM	MINIMUM 12 HOUR REST IN ANY 24 HOUR PERIOD (LIMITED DEROGATION AVAILABLE)	2 DAYS (SHOULD BE CONSECUTIVE OR COMPENSATED)	30 CONSECUTIVE MINUTES (UNPAID) EVERY 4 1/2 HOURS

Equality

[The Employment Equality Act 1998](#) prohibits discrimination on 9 grounds:

Gender

Marital status - includes single, married, separated, divorced or widowed.

Family status - responsibility as a parent or loco parentis (eg foster parent) to a person under 18; or parent/resident primary carer of someone over 18 with a disability which gives rise to the need for ongoing care.

Sexual orientation - heterosexual, homosexual or bisexual

Religious belief - includes religious background or outlook

Age - only applies to persons between 18 - 65

Race - includes race, colour, nationality or ethnic or national origins

Membership of the Traveller community

Disability - which is defined as covering 5 issues: (a) total/partial absence of bodily or mental functions (was loss in the old Bill); (b) presence of organisms likely to cause chronic disease/illness; (c) malfunction, malformation or disfigurement of part of body; (d) condition or malfunction resulting in different learning ability; (e) condition, illness or disease which affects thought processes or results in disturbed behaviour. It includes a disability which exists at present, previously existed but no longer exists; or may exist in future or is imputed to a person (eg HIV+, stroke, heart attack, dementia...)

Harassment

Sexual harassment is defined by Section 23(3) of the Employment Equality Act, 1998. Under this law, sexual harassment can be any act of physical intimacy, request for sexual favours, or other act or conduct (including spoken words, gestures, or the production, display or circulation of written words, pictures or other material). Such act or conduct must be unwelcome to the person harassed and also reasonably capable of being regarded either sexually or on the gender ground as 'offensive, humiliating or intimidating' to him or her.

Section 32 prohibits harassment 'in relation to' any of the other specified grounds of discrimination, such as religion, age, disability, sexual orientation or race. Harassment in section 32(5) is defined as any act or conduct which is both unwelcome to the complainant, and could reasonably be regarded, in relation to the relevant characteristic of the person harassed, as 'offensive, humiliating or intimidating' to that person. Subsection (1) of each section states that harassment constitutes discrimination where it is perpetrated by a fellow employee, an employer or a client, customer or other business contact of the employer, in circumstances such that the employer 'ought reasonably to have taken steps to prevent' the harassment.

The definition of harassment provided in each section is therefore one which combines subjective and objective tests, since the conduct must be both unwelcome to the recipient *and* reasonably capable of being regarded as 'offensive, humiliating or intimidating' to them. To a large extent this is in keeping with previous Labour Court judgments which had recognised sexual harassment as actionable, despite the absence of any explicit reference to sexual harassment in the 1977 Employment Equality Act. The Court took a creative view, construing sexual harassment as constituting discriminatory conditions of employment in breach of section 3(4) of the 1977 Act. The landmark decision recognising harassment as a form of discrimination was that in *A Garage Proprietor v. A Worker* in 1985, where a fifteen-year old female petrol pump attendant had suffered continual sexual harassment, verbal and physical, from her employer. The Labour Court stated that 'freedom from sexual harassment is a condition of work which an employee of either sex is entitled to expect. The Court will, accordingly, treat any denial of that freedom as discrimination within the meaning of the Employment Equality Act, 1977.'¹ Thus, although an employer may not be personally or physically responsible for the harassment itself, the employer is legally responsible for the environment or conditions under which employees work.

The boundaries in this area were extended with the decision in *A Limited Company v. One Female Employee*, a case involving a residential training programme that took place in a hotel away from the workplace.² The claimant had returned to her hotel room to find it ransacked and her personal belongings littered in a sexually disturbing and suggestive manner. Fellow employees from senior management positions had been responsible for what they described as a 'prank'. The Equality Officer considered that the events constituted discrimination within the meaning of the Act. It was therefore established that harassment may occur outside the work place, and that in order to constitute actionable discrimination, it need not be overt or physical but can manifest itself in a more subtle manner.

¹ EE 02/1985.

² EE 10/1988.

Successful claims have also been made by male employees against female employers. In one 1992 decision, a claim by a young male apprentice that he was the subject of sexual harassment in employment was upheld by the Equality Officer, where he had been subjected to crude and offensive sexual comments.³ Claims have been upheld against employers even where the discrimination was not carried out by an employee, but by a visitor to the workplace. In *A Worker v. A Company*⁴, the Labour Court held that the employer was responsible for harassment of an employee by a visitor to the premises, because the visitor was there with the consent and acquiescence of the employer, who had a duty to protect the worker and provide an environment free from discrimination. The Court also indicated that sexual harassment can arise in relation to two persons of the same sex. In this case the employee alleging harassment ultimately resigned her employment due to the circumstances, and this constituted a constructive dismissal.

Measures to combat discrimination at work

These are all contained in the Employment Equality Act 1998, which prohibits both direct and indirect discrimination on any of the nine discriminatory grounds, in pay and other areas of employment.

Section 6 provides that discrimination occurs where, on one of the nine 'discriminatory grounds', a person is treated less favourably than another is, has been or would be treated. Discrimination is forbidden in relation both to pay (remuneration), and in relation to a range of non-pay issues.

Equal Pay

Sections 19 and 29 provide that persons of different categories employed by the same or an associated employer on 'like work' shall be entitled to the same rate of remuneration.

'Remuneration' is defined to include all consideration, in cash or kind, except pension rights. It would include company cars, lunch vouchers, or an overtime allowance. The 'same place' requirement is removed.

(i) Definition of 'Like Work'

- (a) the same work under the same or similar conditions;
- (b) work of a similar nature, any differences being of small importance;
- (c) work that is equal in value, having regard to skill, mental or physical requirements, responsibility and working conditions.

(ii) Indirect Pay Discrimination

This is expressly forbidden for the first time. It is now defined in sections 19 (gender) and 29 (other grounds), as follows:

³ EE 9/92.

⁴ EE 3/1991.

Section 19 (gender)

- (a) a term or criterion is applied to all employees, in such a way that those who fulfil the term or criterion receive different remuneration from those who do not;
- (b) the proportion of employees who are disadvantaged by the term or criterion is substantially higher in the case of employees of one sex than those of the other;
- (c) the term or criterion cannot be justified by objective factors unrelated to sex.

Section 29 (other grounds)

- (a) a term or criterion is applied to all employees, in such a way that those who fulfil the term or criterion receive different remuneration from those who do not;
- (b) the proportion of employees who can fulfil the term or criterion is substantially smaller in the case of those from one group when compared with those of the other group;
- (c) the term or criterion cannot be justified as being reasonable in all the circumstances.

(iii) 'Objective Factors Unrelated to Sex'

There are slightly different tests for indirect discrimination used in relation to gender claims as opposed to claims on other discrimination grounds. The 'objective factors unrelated to sex' is the ECJ-approved test, which replaces the slightly more nebulous test in section 2(3) of the 1974 Act, of 'grounds other than sex.' It might be predicted that it will be easier for employers to prove that a term was reasonable in all the circumstances, than it will be to prove that objective factors unrelated to sex existed, but this remains to be seen. However, some of the case law on the old provisions on indirect pay discrimination may still be useful.

The best-known recent decision in Ireland on indirect pay discrimination is that in the Penneys pay claim, *Mandate v. Penneys, HC, March 1999*, where historical differences in pay-bargaining procedures were successfully relied upon by Penneys to justify different pay rates for a group of 550 mainly female sales and clerical assistants, and a group of 11 male storemen. The work of both groups was found to be equal in value, but the larger group had relied upon their union negotiating pay rates with IBEC, whereas the smaller group had negotiated directly with Penneys management. This is the sort of practice that could still now be covered under the heading of 'objective factors unrelated to sex.'

In relation to grounds other than gender, section 34(1) provides that benefits may still be provided by employers in respect of changes in marital status; events related to the family of the employee; or to assist in the care of dependants for those employees with family status. Section 34(6) also provides that a further period of 3 years after section 29 of the Act has come into force is allowed for any existing practice of age-related remuneration to cease; and that in any case it is not regarded as age-based discrimination to pay different rates according to seniority or length of service.

Non-Pay Discrimination

Sections 8 and 10 provide that discrimination on any of 'discriminatory grounds' is forbidden in relation to advertising of posts, access to employment, conditions of employment, training or experience, promotion or re-grading, classification of posts. Both direct and indirect non-pay discrimination are prohibited.

(i) Indirect Discrimination

This is defined in section 22 and 31 of the Act (22 relates to gender; 31 to the other grounds), as follows: Section 22 (gender)

- (a) a provision is applied to the claimant and comparator;
- (b) the proportion of persons disadvantaged by the provision is substantially higher in the case of those of one sex than in the case of those of the other sex;
- (c) the provision cannot be justified by objective factors unrelated to the sex of the claimant.

Section 31 (other grounds) (a) a provision applies to employees including the claimant and comparator;

- (b) it operates to the disadvantage of the claimant, as compared to the comparator, in relation to access, promotion, etc.;
- (c) it can be complied with by a substantially smaller proportion of employees sharing the claimant's characteristics when compared with those sharing the comparator's characteristics;
- (d) it cannot be justified as being reasonable in all the circumstances of the case.

Again, slightly different tests are used depending on whether the claim is gender-based or not. But, again similar defences are provided of 'objective factors unrelated to sex' and 'reasonableness'. The concept of proportionality, which was introduced into indirect discrimination cases by the definition in the 1977 Act, remains in place in these definitions. Statistics may typically be relied upon in these cases.

Pay issues

Minimum wage

The National Minimum Wage Act, 2000 came into effect on April 1' 2000 and introduced a National Minimum Wage for the first time in Ireland. Many low paid workers benefited from its introduction, particularly women, young people and part-time workers. An increase in the National Minimum Wage came into effect on July 1, 2001, the first of two increases to the national minimum wage agreed by the social partners and accepted by the Government as part of the Programme for Prosperity and Fairness (PPF). The National Minimum Wage is now £4.70 (€5.97) per hour. From October 1, 2002 it will increase to £5.00 (€6.35) per hour.

Wage-fixing machinery

Wages are fixed through a series of nationally-negotiated pay agreements based upon a social partnership model. Every three years the Government, representatives of the trade union movement, of employers' organisations and more recently also drawn from the non-governmental 'social pillar' (ie voluntary groups) come together to negotiate a national agreement which fixes wage increases and other payments generally. The agreement also sets a framework for a wide range of government policies, ranging from, for example, education to national infrastructural development. The most recent of these is the Programme for Prosperity and Fairness (PPF).

Protection of wages

The Payment of Wages Act 1991 offers protection to wages as follows:

The Act regulates the mode and method of payment to employees

Establishes a range of acceptable modes of payment

Outlines the circumstances where reductions from pay by the employer are permissible

Protects the right of employees who prior to the coming into operation of the Act were being paid in cash or some other legal method by providing that a change in the mode of payment can only be achieved by agreement between employer and employee.

Protection of Workers' Claims in Case of Insolvency of their Employer

The financial position of employees who lose their jobs as a result of employer insolvency is protected under the Protection of Employees (Employers' Insolvency) Act 1984. The Act results from an EC Directive 80/087/EEC which came into force in Ireland on 22 October 1983, and applies to all insolvencies after that date.

Insolvency is defined as occurring where the employer is an individual, where he or she has been adjudicated bankrupt, or has filed a petition for or has executed a deed of arrangement with their creditors, or if they have died and the estate is insolvent. Where the employer is a company, *insolvent* is defined as occurring where the company is in liquidation or receivership, that is where it has either been wound up or where a receiver has been appointed to supervise the payment of creditors. An employer may also be deemed to be insolvent where they have ceased trading, even where no formal bankruptcy or winding-up proceedings have been initiated.

Employees' rights are protected in the event of insolvency in that any money owing to them by the employer in terms of remuneration, holiday pay, sick pay, monies in lieu of notice, or money owing under any recommendation or order made against the employer in respect of unfair dismissal, maternity or parental leave claims. Pension payments are also covered subject to a ceiling and time limits. The employee may be designated as a *preferred creditor* although debts owed to them rank behind the expenses of the liquidator or receiver, and any taxes owing to the Revenue Commissioners. In any event, the employee may apply to the Minister on the prescribed form and the Minister shall pay the debts owed, once the Minister is satisfied that the employee falls within the definition of the Act and the employer has become insolvent after 22 October 1983; and that on the 'relevant date' the employee was entitled to be paid the whole or part of any debt.

The payments are made out of the Social Insurance Fund, which is funded by employer PRSI payments. Further technical matters relating to payments are covered by the Protection of Employees (Employers' Insolvency) (Variation of Limit) Regulations 1994 (SI No. 17 of 1990, as amended by SI 62/1994).

Trade union regulation

The pattern favoured in the law throughout much of the last century was apparent from the two major pieces of legislation regulating trade union structures and organisation passed in Irish law prior to the last decade: the Trade Union Act 1941 and the Industrial Relations Act 1946. The 1941 Act, as subsequently amended, was concerned primarily with the problem of multiplicity of unions, seeking to tackle it by discouraging the formation of new trade unions and encouraging the merger of existing ones. The 1946 Act was concerned more generally with industrial relations, enshrining the principle of free collective bargaining, ensuring that the State's role in the collective bargaining process remained an auxiliary one. Since the commencement of the national centralised 'social partnership' process, the State's role in collective bargaining has clearly increased significantly. But in terms of trade union pattern, the policy remains one of discouraging a multiplicity of unions.

Prevailing patterns in practice

In 1980 trade union density (the percentage of those in employment who were union members) stood at 61.8%. By 1990 this figure had shrunk to an estimated 54.6%. Today the comparable figure is either 39.2% using figures from the ICTU or 42.05% based on LRC data. Using either set of figures we can see that union density has dropped by 50%, from 60% of the workforce to 40%. In the private sector union density stands at around 28%, or just over a quarter of the 1m workers employed by private sector companies.

This downward trend in trade union membership is not unique to Ireland. Recent data published in the *European Journal of Industrial Relations* (Vol. 6 No. 2 July 2000) shows the picture across Europe. In looking at these figures, it should also be remembered that in many European countries many more employees than are union members are covered by collectively negotiated agreements because of the sectoral or national application of such agreements, often by law.

From an Irish trade union perspective, what is worrying about the membership figures is that union density is decreasing during a period of strong employment growth. In the past, union membership and density has tended to increase during robust periods of economic growth. If present trends continue, then within the next five years union membership in the private sector will drop below 20% and could be fast approaching 15%. Unions have not actually lost members; membership simply has not grown at the same rate as employment growth.

There are a number of reasons to explain the drop in density. In part it derives from the decline of traditional, mass-manufacturing companies, with predominantly male workforces, which were the heartlands of the trade unions. It has been suggested by some commentators that the density drop results almost exclusively from the failure of the trade unions to build membership in the new growth sectors, such as computers,

informational technology, telecommunications and financial services, especially in overseas companies investing in this country.

The right of not to join a union

The Irish Constitution in Article 40.6.1(iii) guarantees: “*The right of citizens to form associations and unions*’ This constitutional right has been held, in *Educational Company v. Fitzpatrick* [1961] IR 323, for example, to include the right of any citizen not to join associations or unions if they so wish.

The case of *Meskeil v CIE* [1973] IR 121 held that to try to alter the constitutional rights of an employee retrospectively by enforcing a closed shop agreement on current employees was unconstitutional. This decision did not affect the rights of workers who join an employment which already has a pre-entry closed shop agreement, as the employee will know in advance that trade union membership of a particular union is an employment requirement. Such a condition of employment is not regarded as unconstitutional as neither compulsion nor coercion on the employee is involved - though it has to be said that these contentions have not been fully tested in the Courts.

Collection of union dues by check-off

The Payment of Wages Act 1991 allows deduction from wages of union dues or other payments, provided there is an agreement to do so in the Contract of Employment and the employee has been notified of the deduction. This is a usual practice in Ireland.

Registration and recognition of unions

Although many types of unions exist, from in-house staff associations to national bodies, and registration/authorisation is not obligatory, there are certain advantages to be gained from being an authorised trade union, particularly since the enactment of the Industrial Relations Act 1990. That Act provides for certain immunities from liability for trade unions involved in trade disputes, but these apply only in relation to 'authorised trade unions which for the time being are holders of negotiation licences under the Trade Union Act, 1941.' The 1941 Act provides for various restrictions on the granting and retention of such licences, which are designed to hinder any attempts to create new unions. The restrictions vary in accordance with the category of union to which the applicant union belongs.

The legal situation with regard to trade union recognition is that an employer does not have to recognise or bargain with a union.

In *Abbott and Whelan v ITGWU and the Southern Health Board* (1982) 1 JISLL 56, Mr. Justice McWilliams held that: “The suggestion...that there is a constitutional right to be represented by a union in the conduct of negotiations with employers...in my opinion could not be sustained. There is no duty placed on an employer to negotiate with any particular citizen or body of citizens.” In 1981, Mr. Justice Hamilton, in *Dublin Colleges ASA v City of Dublin VEC* (1982) 1 JISLL 73, where a number of teachers had formed a new union of their own and sought formal recognition said the plaintiffs naturally had a constitutional right of association: “But (there is) no corresponding obligation on any body or person, such as the defendants

herein, to recognize that association for the purpose of negotiating the terms and conditions of employment of its members, or for any purpose.”

The same point had been made in even stronger language by Mr. Justice Walsh in *EI & Company Ltd v Kennedy* [1968] IR 69: “In law an employer is not obliged to meet anybody as the representative of his workers, nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker may make.” The position was summarised by the late Professor John Kelly in his authoritative work on the Irish Constitution. According to Professor Kelly: “The right of association of employees does not imply any duty on an employer beyond respecting the right in itself, and of course discharging his side of any agreement with employees. In particular, it does not oblige him to negotiate with any association which employees may form”.

Nevertheless, the Courts have held that disputes over recognition are valid trade disputes. The Industrial Relations Act 1990 gives disputes over recognition immunity from “action in relation to any tortious act committed by or on behalf of the trade union in contemplation or furtherance of a trade dispute”, provided they comply with certain stated statutory requirements.

Remedies where an employer refuses to recognise a union

In an attempt to meet trade union concerns over the ability of employers to avoid union recognition the government recently enacted legislation, the Industrial Relations (Amendment) Act 2001 came into force on May 31, 2001. It is based on an agreed report from the social partners and relevant state agencies concerned with industrial relations issues. The new legislation gives the Labour Court the power to issue a legally binding ruling on pay and conditions of employment in circumstances in which an employer refuses to recognise a trade union. However, the Court cannot rule that an employer must recognise a trade union. Further, the procedure set out in the Act is long and cumbersome, possibly taking up to two years to complete, and has not yet been tested in practice.

Trade union membership and recognition is an important issue in Ireland, particularly because Irish legislation contains no *erga omnes* provisions whereby collective bargaining agreements are applied across sectors on a binding basis. Therefore, in Ireland, collective bargaining coverage is synonymous with union membership. As union density currently stands at around 40% (broken down as between around 80% in the public sector and 25% in the private sector) this means that around 60% of Irish workers have their pay and conditions unilaterally set by management, or as a result of individual negotiations. Further, because of the fact that the Irish Labour Inspectorate (which is seriously understaffed) operates on a reactive basis – i.e. they respond largely to complaints rather than proactively inspecting employers to ensure that employment laws are being adhered to – workers who, in theory, appear to be well protected, in reality may be inadequately protected or not protected at all.

Unfair labour practices

The concept of *unfair labour practices* does not exist as such. However, through the employment legislation detailed above employers are obliged to act fairly towards

their employees in a range of different ways. The Labour Relations Commission has published a range of Codes setting out best practice in different areas, for example on disciplinary and grievance procedures.

Collective Bargaining and Agreements

Collective bargaining regulation

The Trade Union Act 1941 identifies the primary function of a trade union as the carrying on of negotiations for the fixing of wages and other conditions of employment - the carrying on of such negotiations with employers is known as collective bargaining. Since the foundation of the State, with the exception of the limited period 1941-46 and certain temporary legislation with respect to the banks in 1973, 1975 and 1976, trade unions and employers have been free to bargain over wages and other conditions of employment without the intervention of the law.

Structure and levels of collective bargaining

Although collective bargaining has been based traditionally on the British voluntarist model and has not been subject to legal regulation (see above), a major feature of Irish industrial relations is the system of centralised wage bargaining which first began in 1948 with the first of a series of wage rounds. Between 1970-82, wage trends were determined by successive National Wage Agreements, which became National Understandings for Economic and Social Development, and have since become the more formalised Social Partnership Agreements (the present one is the PPF, or Programme for Prosperity and Fairness).

These Agreements or Programmes are negotiated at a national level, but local agreements may still be reached, and this is generally done informally. At present, local collective agreements are not binding due to the policy of voluntarism or exclusion of the courts, which is central to collective bargaining and industrial relations practice in Ireland. Whereas it is possible for collective agreements to be registered with the Labour Court, they seldom are in practice. If it is desired, then the parties to a Collective Agreement may apply to the Labour Court to register the Agreement. Once the Agreement is registered and any subsequent amendments notified, the Agreement is legally enforceable.

The parties to collective bargaining

At national level: the Government, representatives of the trade union movement, of employers' organisations and more recently also drawn from the non-governmental 'social pillar' (ie voluntary groups).

At local level: employers/employers' organisations and employee representative bodies.

Negotiation procedures

These are informal, and are not regulated by law. However, the Organisation of Working Time Act 1997 gives a more formalised role for collective agreements, allowing flexibility to be reached in the application of the Act through the negotiation of collective agreements. For example, the normal reference period over which the maximum 48-hour working week is calculated is 6 months, but this can instead be calculated over 12 months, where an employer concludes a collective agreement with the workforce, which is approved and registered by the Labour Court under section 24

of the Act. Collective agreements also allow greater flexibility in the scheduling of daily and weekly rest breaks, and the management of night work.

The Act thus gives greater importance to collective agreements, but technically speaking, collective agreements do not provide a way around the Act. Instead, they may provide for more flexibility within the operation of the Act. Section 2(1) defines collective agreement. "an agreement by or on behalf of an employer on the one hand, and by or on behalf of a body or bodies representative of the employees to whom the agreement relates on the other hand."

Thus, they do not have to be union-employer agreements. They may be concluded between an employer and an internal staff association. The procedure for concluding 'flexibility' collective agreements is provided for under section 24 of the Act, as follows:

A collective agreement is concluded;
It is submitted to the Labour Court for approval.
The Labour Court registers the agreement if approved.

Effects of collective agreements

Collective agreements are generally not binding on the parties. The terms of an agreement may, however, be binding on the workers and employers included within the agreement's scope but only to the extent that they are deemed to have been 'incorporated' into the employees' individual contracts of employment.

Where an agreement is concluded in a workplace, it will usually be applied to all employees in the organisation whether they are union members or not. The legality of this informal arrangement has, however, not been tested in the courts.

Duration of agreements varies.

Workers' representation in the enterprise

Representation of workers is either organised through trade unions, or organised on an informal basis, or not organised at all. Until EU legislation comes into effect, there is no obligation on the employer to have a mechanism for the representation of workers in Irish law.

Strikes and lock outs

The legal framework for strike action is made up by a combination of law, collective agreements and case law or a combination. [The Industrial Relations Act 1990](#) is now the governing statute in this area, and has been in force since July 1990. The objective of the Act was to reform the law in relation to trade disputes and Industrial Relation Institutions - to create a better framework/climate for dispute resolution and to incorporate some amendments in relation to trade union Law.

Prior to the 1990 Act, the right to strike and the law pursuant to Trade disputes was enshrined in the Trade Disputes Act 1906. This Act granted certain legal immunities

to persons engaged in a lawful trade dispute. These immunities are, to a large extent, preserved in the 1990 Act - the changes are designed to place observance of certain procedures as a precondition before the legal immunities will apply.

The Act defines "industrial action" as "any action which affects, or is likely to affect, the terms or conditions, whether express or implied, of a contract and which is taken by any number or body of workers acting in combination or under a common understanding as a means of compelling their employer, or to aid other workers in compelling their employer, to accept or not to accept terms or conditions of or affecting employment".

"Strike" is defined as meaning "a cessation of work by any number or body of workers acting in combination or a concerted refusal or a refusal under a common understanding of any number of workers to continue to work for their employer done as a means of compelling their employer, or to aid other workers in compelling their employer, to accept or not to accept terms or conditions of or affecting employment."

Section 10 of the 1990 Act confers immunity from prosecution or civil action for conspiracy where workers are taking industrial action in "contemplation of furtherance" of a trade dispute. Section 11 deals with immunity in relation to picketing including secondary picketing and provides that it shall be lawful to engage in peaceful picketing at that employee's place of work if the picketing is in contemplation or furtherance of a trade dispute and designed to peacefully obtain or communicate information or to peacefully persuade persons from abstaining from working.

With regard to secondary picketing (picketing at place of work of an employer who is not a party to the dispute) this is lawful only if those picketing have reasonable grounds to believe that the employer whose place of work is being picketed has or is directly assisting their own employer with a view to frustrating the strike or industrial action.

Section 12 provides immunity to persons acting in contemplation or furtherance of a trade dispute in relation to actions for breach of contract of employment, inducement to others to breach their contract or a threat to breach the contract of employment (a threatened strike). Section 13 provides immunity for actions in Tort (civil wrong) against Trade Unions, members of and Trade Union Officials provided their actions were taken in contemplation or furtherance of a trade dispute or with reasonable belief that they were in contemplation or furtherance of a trade dispute.

Who can convene a strike?

Anyone may convene a strike, but the protection against liability only applies to trade unions which convene a strike under certain procedural requirements imposed upon unions by the Act, with regard to taking lawful strike action.

Pre-requisites for strike action

Sections 14 and 19 of the Act require trade unions to ballot members in a secret ballot before organising or sanctioning industrial action in contemplation or furtherance of a trade dispute. If such ballot favours industrial action the union must give the

employer one week notice of the intention to take industrial action. If the union complies with this requirement the employer is precluded from seeking an ex parte (interim) injunction. The employer may still apply for an interlocutory injunction but section 19(2) provides that the Court will not grant the injunction where the Union establishes a fair case that they were acting in contemplation or furtherance of a trade dispute.

These protections are not available if the trade union fails to comply with the secret ballot and notice requirements and the detailed requirements in section 4(2), as follows:

The trade union must:

Have a provision in their rule book for holding of a secret ballot where industrial action is contemplated.

So far as is practicable, accord the right to vote to all members who it is envisaged will be required to participate in the action.

Take steps to ensure there is no intimidation or influence on voting intentions.

Refrain from organising or sanctioning industrial action against the vote of the secret ballot.

Section 9 of the Industrial Relations Act 1990 would appear to deprive employees of the immunity against suit and protection against an injunction in relation to picketing where certain conditions apply. If the dispute is in relation to the employment/non-employment or conditions of employment of an individual and the employee(s)/union involved have not exhausted all the procedures established by custom and practice or detailed in a Collective Agreement in relation to the processing of industrial grievances. This would appear to require an individual employee to process a dispute in relation to dismissal right through to the E.A.T. before industrial action could be taken with the protections. The employer however is also obliged to adhere to procedures - section 9(3) provides that where the employer refuses to comply with procedures, the employee will be deemed to have exhausted such procedures.

With regard to trade disputes which are not individual worker disputes, the Act is silent as to whether the union or the employees must exhaust procedures set down in a Collective Agreement before strike action is taken. Certainly they must comply with the secret ballot/notice requirements. However, it would also appear that if a Collective Agreement is incorporated into an individual employees contract and is thereby legally enforceable or is a Registered agreement the immunities in sections 12/S.13 may not be available if the action was taken without firstly exhausting the agreed dispute procedures in the Collective Agreement.

Strikes in essential services

Although the general criminal liability for breach of the contract of employment (such as through strike action) was abolished by the Employers and Workmen Act 1875, sections 4 and 5 of the Conspiracy and Protection of Property Act 1875 provide that breaches of the contract of employment will be illegal in two situations. First, where the breach is by persons employed in certain public utilities, and secondly, where the breach is likely to involve serious injury to any person or property. Section 4 imposes criminal liability on persons employed by municipal authority or any gas or water

supplier who breaks their contract. This provision was extended to electricity workers by section 110 of the Electricity Supply Act 1927.

Section 5 is broader and could potentially apply to other categories of essential service workers, such as hospital workers, fire brigade staff or security staff. It provides that breaching of contract is a criminal offence where the probable consequences are to 'endanger human life, or cause serious bodily injury, or to expose valuable property whether real or personal to destruction or serious injury.' Finally, other specific legislation applies eg to those who incite or encourage persons employed by the State to go on strike; or who induce members of the Gardai to go on strike, and further legislation applies to postal workers who go on strike.

Effects of legal and illegal strikes

Where a strike is deemed to be illegal, the employer may obtain an injunction against the union. An injunction is a court order which requires a person to do or to refrain from doing certain acts. It is a temporary order designed to preserve the status quo until the action (case) comes to trial. Trade disputes have been a fertile ground for employers to seek injunctions to restrain picketing. An employer successfully restraining picketing will often gain advantage in bargaining power and the result of the injunction will often lead to the end of the dispute. In relation to trade disputes, two types of injunction have been sought (1) "the interim injunction" or "ex parte injunction" sought as a matter of urgency and without notice to the other party. It is a very temporary order and a further application for an interlocutory injunction must be made within days.

Secondly, there is the interlocutory injunction, the procedure for which is as follows: Both sides are notified and the order, if granted, will be for a longer period but still temporary in nature. The injunction is granted on the following basis:

The party seeking the order must establish that there is a fair question to be raised which requires a full Court hearing.

That pending the trial, irreparable or substantial damage will be caused to them and that the balance of convenience lies with granting the injunction.

The 1990 Act introduced restrictions on the employer's rights to obtain injunctions and cushioned these changes by placing procedural requirements on unions with regard to taking lawful strike action.

Lock outs

Lockouts are not included in the definition of "strike" or "industrial action" under the Industrial Relations Act 1990, so are not regulated at the collective level. Rather, they are regulated at the individual employee level, under the Unfair Dismissals Acts 1977-93. If at the end of a lockout, an employee is not reinstated or re-engaged, and one or more others who were also locked out were reinstated or re-engaged, it would then be considered an unfair dismissal.

The 1993 Act amended the 1977 Act to provide that the dismissal of an employee for taking part in a strike or industrial action is an unfair dismissal if at least one other

employee was not dismissed for the same action, or if another employee was reinstated or re-engaged. The date of reinstatement or re-engagement is the date as agreed between the employer and employees, or if there is no agreement, the date on which reinstatement or re-engagement was offered to the majority of the workforce. If a particular employee is dismissed for taking part in a strike and other employees are not so dismissed, it would be an automatically unfair dismissal. However, if during the course of the strike or other industrial action, there was abusive behaviour by an employee, he or she could be deemed to be fairly dismissed for that reason.

Settlement of labour disputes

Labour law matters are generally not dealt with through the ordinary courts structures, but rather through a specialist structure of labour institutions: the Labour Relations Commission, Rights Commissioners, the Director of Equality Investigations, the Labour Court and the Employment Appeals Tribunal. Although labour law is often divided between collective and individual branches, this division is not reflected in the functions reserved to each of the labour institutions. The Labour Court, for example, was set up as a collective and voluntarist institution with a primary role in resolving trade disputes; but it has more recently been assigned jurisdiction over equality law matters and hears appeals from the Director of Equality Investigations under the Employment Equality Act 1998. Claims involving breaches of other employment protection legislation such as the Unfair Dismissals Acts 1977-93, the Organisation of Working Time Act 1997 or the Payment of Wages Act 1991 are all taken first to the Rights Commissioner and then to the Employment Appeals Tribunal.

Labour Court

The [Irish Labour Court](#) was established in 1946 (following the enactment of the Industrial Relations Act, 1946). Its main functions were to adjudicate in trade disputes and to provide a conciliation service. Other functions given to the Court included the establishment of Joint Labour Committees and the registration of employment agreements and Joint Industrial Councils. There have been many changes to its structure and functions since then, following amendments to the Industrial Relations Act in 1969, 1976, 1990 and 2001, and the enactment of other laws, such as the Anti-Discrimination (Pay) Act, 1974, the Employment Equality Act, 1977, the Pensions Act, 1990, the Organisation of Working Time Act, 1997, the Employment Equality Act, 1998, the National Minimum Wage Act, 2000, the Protection of Employees (Part-Time Work) Act, 2001. An equality service was added in 1975 to deal with equal pay - and later, equal treatment - cases. In 1991, this service, and the conciliation service of the Labour Court were transferred to the Labour Relations Commission. In 1999, the equality service was transferred from the Labour Relations Commission to the newly formed Equality Authority and Office of the Director of Equality Investigations, (under the auspices of the Department of Justice, Equality and Law Reform) under the Employment Equality Act, 1998.

The Labour Court is an independent body consisting of representatives of employers and workers participating on an equal basis. It consists of 9, full-time, members - a Chairman, 2 Deputy Chairmen and 6 Ordinary Members, 3 of whom are Employers' Members and 3 of whom are Workers' Members. It is not a court of law. It operates as an industrial relations tribunal, hearing both sides in trade disputes and then issuing

Recommendations setting out its opinion on the dispute and the terms on which it should be settled. While these Recommendations are not binding on the parties concerned, the parties are expected to give serious consideration to the Court's Recommendation. Ultimately, however, responsibility for the settlement of a dispute rests with the parties.

When dealing with cases involving breaches of registered employment agreements, the Labour Court makes legally binding orders. Also, the Court's determinations under the Employment Equality, Pensions, Organisation of Working Time, National Minimum Wage and Protection of Employees (Part-Time Work) Acts are legally binding.

More information on the Labour Court may be picked from its online brochure, in the following web address:

Labour Relations Commission

The [Labour Relations Commission \(LRC\)](#) was established on 21 January, 1991 under section 24 of the Industrial Relations Act, 1990. The LRC is made up of a chairperson and six ordinary members, of whom two are appointed by the Minister, two come from the workers sides and two from employers' side. The chairman shall be appointed by the Minister *after consultation with such organisations as the Minister considers to be representative of workers and of employers.*

The Commission has general responsibility for promoting the improvement of industrial relations. More specifically it :

- (a) provides a conciliation service;
- (b) provides an industrial relations advisory service;
- (c) prepares codes of practice relevant to industrial relations after consultation with unions and employer organisations;
- (d) offer guidance on codes of practice and help to resolve disputes concerning their implementation;
- (e) appoints equality officers of the Commission and provide staff and facilities for the equality officer service;
- (f) select and nominate persons for appointment as rights commissioners and provide staff and facilities for the rights commissioner service;
- (g) conduct or commission research into matters relevant to industrial relations;
- (h) review and monitor developments in the area of industrial relations;
- (i) assists joint labour committees and joint industrial councils in the exercise of their functions.

In addition to Senior Management, LRC's staff includes industrial relations officers (conciliation officers), rights commissioners and advisory, development and research officers.

Conciliation is a voluntary process. The process of conciliation begins when one or both disputing parties writes to the Labour Relations Commission requesting assistance with their industrial relations dispute. According to LRC's data, conciliation is successful in over 80 per cent of cases that are referred to it for conciliation. In case of failure the parties have the option of referring the dispute to the Labour Court for recommendation.

Rights Commissioners investigate disputes, grievances and claims that individuals or small groups of workers refer under various pieces of legislation, such as the Industrial Relations Act, 1969-1990, the Unfair Dismissals Acts, 1977-1993, the Payment of Wages Act, 1991, the Maternity Protection Act, 1994, the Protection of Young Persons (Employment) Act, 1998, the Organisation of Working Time Act, 1997, etc. However, a party to a dispute may object to a Rights Commissioner's investigation where the case has been referred under the Industrial Relations Acts, 1969-1990 or under the Unfair Dismissals Acts, 1977-1993. Where such an objection is made, the Rights Commissioner cannot investigate the case. The applicant can instead request the Labour Court or, depending on the legislation, the Employment Appeals Tribunal to hear the case.

After hearing the parties, rights commissioner issue the findings of their investigations in the form of either non-binding recommendations or decisions, depending on the legislation under which a case is referred. These can be appealed, provided the appeal is lodged within the time limits set down in the legislation. The relevant Acts govern whether the appeal is to the Labour Court or Employment Appeals Tribunal. Having heard the appeal, the Court, or Tribunal, will issue a decision, which is binding on the parties to the dispute.

Employment Appeals Tribunal

The Employment Appeals Tribunal is responsible for implementing rights under protective employment law. It hears a wide range of disputes concerning employment rights. It consists of three people: a Chairperson who has legal qualifications and one representative each from panels formed by the trade unions and employer organisations.

The decision of the Tribunal is generally called a "determination" and is legally binding. In most cases, the determination may be appealed to the High Court by either party but only on a point of law. The Minister for Enterprise, Trade and Employment also has power to refer an issue to the High Court at the request of the Tribunal.

Under the Unfair Dismissals Act and the Maternity Protection of Employees Act, either party may appeal to the Circuit Court within 6 weeks of the determination (the appeal is not confined to a point of law). If no appeal is brought to the Circuit Court and the employer does not implement the determination, the Minister for Enterprise,

Trade and Employment may bring proceedings in the Circuit Court on behalf of the employee.

Finally, it should be reminded that legal issues involving European Community Law may be referred by national courts to the European Court of Justice, for a preliminary ruling under art. 234 EC Treaty.

ILO Conventions ratified by Ireland

Ireland is member of the ILO since 1923. Until 31 st December 2001 it had ratified 71 ILO Convention, of which 57 were in force for the country.

Web links

[List of ILO Convention ratified by Ireland](#)
[The Government of Ireland Website](#)
[Department of Enterprise, Trade and Employment Website](#)
[Department of Justice, Equality & Law Reform Website](#)
[Labour Relations Commission](#)
[Employment Appeals Tribunal Website](#)
[Attorney-General's website containing searchable Irish legislation](#)
[Irish law website with special section on employment law](#)
[A Guide to the Labour Court](#)
[Director of Equality Investigations Website](#)
[General Irish law website with special section on employment law](#)
[General Irish and English law search website](#)
[Irish Times newspaper, general reference on Irish politics, society](#)

Bibliography

Bunreacht na hEireann, Constitution of Ireland, 1937
Byrne & McCutcheon, The Irish Legal System. Dublin: Butterworths, 1996
Kelly, J.M., The Irish Constitution (3rd ed). Dublin: Butterworths, 1994
Von Prondzynski, Employment Law in Ireland, Dublin: Sweet & Maxwell, 1989
Kerr & Whyte, Irish Trade Union Law. Dublin: Professional Books, 1985
Fennell & Lynch, Labour Law in Ireland. Dublin: Gill & Macmillan, 1993
Thompson Professional Information, Practical Employment Law (Ireland), 1999
Meenan, Working within the Law. Dublin: Oak Tree Press, 1999