

Recent Developments in Employment Law

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Today's agenda



- EU (Transparent and Predictable Working Conditions) Regulations 2022
- The Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza [2023] IESC 24
- Pay Transparency Directive
- Protected Disclosures (Amendment) Act 2022
- Work Life Balance and Miscellaneous Provisions Act 2023
- Sick Leave Act 2022

Transparent and Predictable Working Conditions Regulations 2022

- EU Directive 2019/1152 was transposed into Irish law by the European Union (Transparent and Predictable Working Conditions) Regulations 2022
- The Directive aims to improve working conditions by promoting more transparent and predictable employment, in particular, for workers whose working hours and security of tenure may not be stable
- The Regulations apply to employees with limited exceptions
 - employees who have less than four consecutive weeks' service; and
 - whose working hours amount to an average of three hours or less per week
- A contract of employment is now defined under the Terms of Employment (Information) Acts 1994 to 2014 to include “...*any other contract whereby an individual agrees with another person personally to execute any work or service for that person...*”.

Working Conditions

Transparent and Predictable Working Conditions Regulations 2022

- Additional terms to be provided within **five days**
 - terms relating to remuneration, place of work, job title, commencement date, hours of work and details of any probationary period
- Additional terms to be provided within **one month**
 - terms relating to training entitlement, the identity of social security institutions and, where applicable, information relating to unpredictable work patterns
- Any **changes** to the written terms must now be notified no later than the day on which the change takes effect

Probationary Periods

Transparent and Predictable Working Conditions Regulations 2022



General principle

- Probationary period (PP) shall not exceed **six months** (for private employers) but can be extended to **twelve months**, on an exceptional basis where it “*would be in the interest of the employee*”

Extension due to protected leave

- Where an employee is absent from work during PP, the PP “*shall*” be extended by the employer for the duration of the absence (protected leave)

Fixed-term workers

- For employees with fixed term contracts, probationary periods shall be *proportionate* to the expected *duration* of the contract and the *nature* of the work performed

Existing probationary periods

- Where, on 16 December 2022, an employee is subject to a PP exceeding 6 months and the employee has completed at least 6 months of the PP, the PP expired at the latest on 1 February 2023

Exclusive Service and Training

Transparent and Predictable Working Conditions Regulations 2022



- Prohibition on **exclusivity of services** clauses, except where the restriction is proportionate and based on objective grounds
 - non-exhaustive list of objective grounds, including health and safety, protection of business confidentiality, compliance with law and avoidance of conflicts of interest
 - the objective grounds must be detailed in the employee's employment contract or in a statement sent to the employee
- Where an employer is required to provide **training**, by law or collective agreement, the training must be (i) provided free of cost (ii) count as working time, and (iii) take place during working hours

Miscellaneous Provisions

Transparent and Predictable Working Conditions Regulations 2022



- Employees who have at least 6 months' service and have completed their probationary periods may request 'a form of employment with **more predictable and secure** working conditions'
- Employee may refuse work assignment if it is not within the reference hours and days notified to the employee and employee should not be subjected to adverse treatment for doing so
- Additional information for posted workers and employees who are required to work outside the State for one month or more
- Carve out for collective agreements

Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza [2023] IESC 24

- On 20 October 2023, the Supreme Court delivered its unanimous judgement in this case holding that pizza delivery drivers were to be treated as employees and not independent contractors for the purpose of the Taxes Consolidation Act 1997
- Background to the litigation
 - In 2014 the Revenue Commissioners determined that delivery drivers engaged by Karshan as independent contractors, were in fact working as employees, and as a result Karshan was deemed liable for PAYE and PRSI contributions in respect of those drivers
 - The decision of the Tax Appeals Commission was appealed to the High Court by Karshan and was upheld

Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza [2023] IESC 24

- The Court of Appeal later overturned the decision of the High Court
 - ❑ The CoA noted that for a contract of employment to exist there must be a mutuality of obligation comprised of both an obligation on the employer to provide work and an obligation on the employee to perform the work
 - ❑ The CoA referred to mutuality of obligation as “the gateway test”, stating that while the fact of its presence is not definitive as to the existence of an employment relationship, the fact of its absence means that an employment relationship does not exist
 - ❑ The CoA held that the Tax Appeals Commissioner had erred in determining that there was no requirement for ongoing obligations to provide and carry out work, in order for the required mutuality of obligation of an employment contract to be fulfilled

Mutuality of Obligation in the Supreme Court decision

- Question for the Supreme Court was whether the mutuality of obligation was a “*sine qua non*” of the employment relationship and created an ongoing obligation on the employer to provide work and the worker to perform work
- The Supreme Court rejected the contention that there is a requirement for mutuality of obligation on an ongoing basis
- In the unanimous judgement, Justice Murray stated that “*the term ‘mutuality of obligation’ has, through a combination of over-use and under-analysis been transformed in employment law from what should have been a straightforward description of the consideration underlying a contract of employment, to a wholly ambiguous label.*”



The New Five Factor Test

1. Does the contract involve the exchange of wages or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the worker to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

Application of the New Five Factor Test

- The Supreme Court held that the first three limbs of the test were satisfied
 - there were binding legal relations between the parties involving the exchange of consideration
 - the right of substitution or delegation was limited such that personal service was required
 - Karshan exercised significant control over the operation of rosters, allocation of work etc
- In relation to all circumstances of working arrangements, the Court noted that drivers did not employ their own labour, took no economic risk, worked exclusively from Karshan's premises, had limited ability to maximise profits, were required to wear branded uniforms and deliver as instructed by managers
- On that basis, they could not be said to have been engaged in their own business

Takeaways from the Supreme Court decision

- The Supreme Court therefore found that the Tax Appeals Commission was correct to determine that the drivers were employees of Karshan for the purpose of the Taxes Consolidation Act 1997
- The Supreme Court specifically stated in its judgment that the decision would not determine the drivers' continuous service for the purpose of their rights under employment law
- This decision and the new five factor test will have a significant impact on the how the question of employment status is assessed going forward by various adjudicating bodies including, not only the Revenue Commissioners, the Department of Social Protection, but also the WRC, Labour Court and the civil courts



Pay Transparency Directive

- EU Directive 2023/970 on Pay Transparency came into effect on 7 June 2023 and EU member states have **three years** to transpose its provisions into domestic law
- Equal pay for equal work is one of the European Union's founding principles enshrined in Article 157 of the Treaty on the Functioning of the European Union
- Lack of pay transparency has been identified by the European Commission as one of the key obstacles to achieving equal pay
- Aim of the Directive is to eliminate pay discrimination through pay transparency measures and stronger enforcement provisions, while also introducing gender pay gap reporting obligations in all EU member states

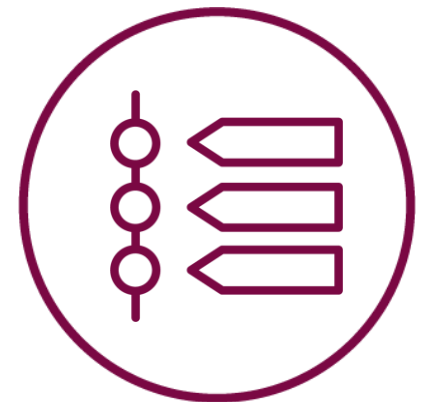
Pay Transparency Directive- Gender Pay Gap Reporting



- Mandatory gender pay gap reporting in all EU member states
- Reporting requirements under the Directive go further than the Irish GPG reporting requirement and require reporting of pay gaps by “**categories of workers**”
- “**Categories of workers**” refers to employees carrying out the same work or work of equal value
- Employees, their representatives, WRC and IHREC have the right to request clarifications on gender pay gap information reported and employer must respond within a reasonable time
- Management are required to verify the accuracy of the gender pay gap data reported, after consulting with employee representatives

Pay Transparency Directive - Joint Pay Assessment

- Directive introduces a new obligation to conduct a **Joint Pay Assessment** (a compulsory equal pay audit) where there is:
 - at least a **5%** gender pay gap in any category of workers
 - the gap has not been justified by objective and gender-neutral factors
 - the gap has not been remedied within six months of the gender pay gap report
- Headcount thresholds for gender pay gap reporting under the Directive
 - employers with 250+ employees report annually
 - employers with 100+ employees report every 3 years



Pay Transparency Directive - Pay Structures

- The Directive requires member states to remove the strict requirement to identify a real comparator to bring an equal pay claim
- Employers will be required to have pay structures in place which ensure that there is no gender-based pay differences between employees performing the same work or work of equal value
- **"Work of equal value"** means work that is determined to be of equal value in accordance with objective, gender neutral criteria, such as skills, effort, responsibility and working conditions
- Member states will be required to make tools or methodologies available and accessible to guide the assessment of "work of equal value"
 - Irish Human Rights and Equality Commission (IHREC) Code of Practice on Equal Pay

Pay Transparency for Job Applicants

- Applicants are entitled to receive information about the “**initial pay or its range**”
 - What: based on “objective, gender-neutral criteria”
 - When: In a manner as to ensure an “informed and transparent negotiation on pay” – e.g. **in the job notice or prior to interview**
 - How: This doesn’t limit employer or employee in negotiating a salary outside the range given
- Employers not permitted to ask applicants about their **pay history**
- Job vacancy notices and job titles to be gender neutral and recruitment processes to be “led in a non-discriminatory manner”

The Right to Information

- Employees (or their representatives) have right to request and receive information on individual & average pay levels, broken down by gender, for categories of workers doing the same work or work of equal value
- Employees may request clarifications and employer must reply within 2 months
- Employers must remind employees of this right to information annually
- Criteria used to determine pay and pay progression (e.g. performance, skills development, seniority) must be made easily accessible to employees
- Member States, will be obliged to put measures in place to prohibit contractual terms that restrict employees from disclosing information about their pay (**pay secrecy clauses**)

The Protected Disclosures Act 2014

- In force since 15 July 2015 allowing workers to raise concerns with the benefit of significant protections
- Amendments effective from 1 January 2023:
 - Expands scope of 2014 Act to “*workers*” which can include volunteers, shareholders, board members and job applicants
 - Definition of “*relevant wrongdoing*” extended
 - Prescriptive obligations re: acknowledgement, follow up and feedback
 - Broadening of what amounts to penalisation
 - Extension of legal remedies, including ‘interim relief’



What is a protected disclosure?



- Disclosure by worker of ‘*relevant information*’ which:
 - in the reasonable belief of the worker, tends to show ‘*relevant wrongdoings*’, and
 - came to the attention of the worker in a work-related context.

‘Relevant wrongdoing’

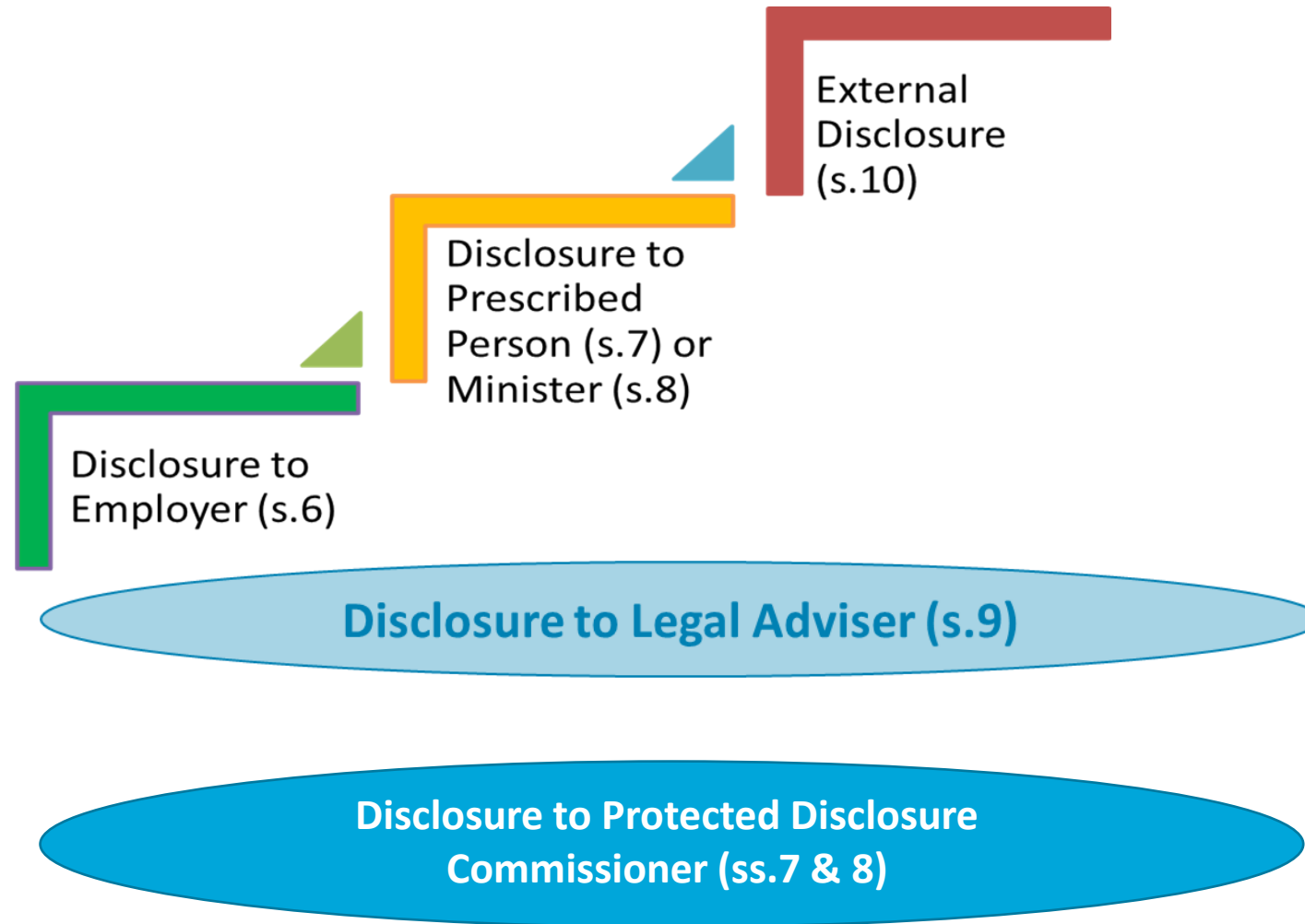
- ‘*Relevant wrongdoing*’ is a very broad term and includes:
 - offences
 - non-compliance with legal obligation (other than obligations under employment contract)
 - miscarriages of justice
 - environmental damage and health and safety endangerment
 - unlawful or improper use of public money
 - breaches of specified EU laws incl. financial services, money laundering, product safety and compliance, transport safety, protection of the environment, food and feed safety, consumer protection, data privacy, etc
 - concealment of any of the above wrongdoing
- Must come to worker’s attention in “*work-related context*” (including the activities of service providers, work-related social events)
 - doesn’t need to be become known as part of the worker’s own duties or even relate to their employer.
- Does not include a matter which it is the function of the worker to detect, investigate or prosecute and which does not relate to the worker’s employer
- Does not include “*interpersonal grievances exclusively affecting the reporting person*”

Remember...

- **Presumption** that a disclosure is a protected disclosure
- **Motivation is irrelevant** (although damages may be reduced), i.e. a malicious / bad faith disclosure may still be a protected disclosure
- **Offence** to make a report which worker knows to be false
- **Reasonable belief** – objective standard - worker entitled to be mistaken
- *Nolan v Fingal County Council* (High Court): wrongdoing not limited to wrongdoing by employer and can be carried out by **third party**
- *Baranya v Rosderra Irish Meats Group* (Supreme Court):
 - it is possible for a communication of a relevant wrongdoing to amount to **both a grievance and a protected disclosure**
 - context of disclosure is crucial



'Stepped Disclosure Regime'



Obligation to have a policy

- Must have a procedure for the making of and for dealing with protected disclosures where:
 - 250 or more employees
 - (from 17 December 2023) between 50 and 249 employees.
 - (for certain employers, including financial services firms), regardless of size.
- Offence not to establish such procedures
- Code of Practice expected shortly
- Procedure must be accessible to “*workers*”

Internal disclosures

- Encourage internal disclosure (whether orally and/or in writing) and outline protections in place
- **Offence** not to establish internal reporting **channels** which may be operated internally or provided externally by third party
- Impartial **designated person** be appointed with sufficient seniority to accept and follow up on reports, carry out initial assessment, maintain communication and required further information independently and impartially (e.g. from compliance function). Consider having more than one, or appoint deputies
- Channels must ensure confidentiality and security - should be separate from other lines of communication, restricted access, logging of access, etc.
- Records must be kept of all reports (including anonymous reports) – should be ring fenced within IT system

Acknowledgement

Within seven calendar days



Assessment

- Initial assessment (or screening process) must be undertaken to determine if *prima facie* evidence a relevant wrongdoing may have occurred and if it should be treated as a protected disclosure
- If not, close the matter
- If investigation required, consider nature & extent

“Follow up”

- Any action taken by recipient of a report to assess the accuracy of the information and, where relevant, to address the wrongdoing concerned, including:
 - Initial assessment;
 - Closure of procedure where no *prima facie* evidence of relevant wrongdoing;
 - Taking of appropriate action to address relevant wrongdoing;
 - Provision of feedback
 - Information about policy and external disclosures

Investigations



- General framework for investigations in policies – nothing too prescriptive!
- Terms of reference necessary only for more complex or serious investigations
- Legal representation exceptional – only where its absence would imperil a fair hearing
- If full investigation not required, “appropriate action” could be an informal response, although consider whether consent of the reporting person is required.

Feedback

- Must be provided to reporting person within 3 months of acknowledgement
- The provision of information on the action envisaged or taken as follow up and the reasons for that follow-up
- Extent of feedback will depend on report; consider personal data included
- No information included which might prejudice the outcome of the investigation or any disciplinary or other action

Anonymous disclosures

- Discretion re: whether to accept and follow-up on anonymous disclosures
- Failure to address may give reporter a basis to complain to outside bodies/corporate governance issues – on notice of matters
- If impossible to investigate, consider preliminary examination and keep records
- Focus should be on the reported wrongdoing and not on the reporter's identity

Penalisation

- Any direct or indirect act or omission in work-related context *due to* making of a protected disclosure which causes or may cause an unjustified detriment to the worker
 - **Examples:** suspension, lay-off or dismissal; loss of opportunity for promotion; transfer or change of duties/location/working hours; discrimination; coercion; ostracism; harassment; administering discipline; threat of reprisal; withholding of training; negative performance assessment or employment reference; failure to be offered a permanent contract after, or to renew, a fixed-term contract; blacklisting; medical referrals
- Offence of penalisation
- Presumption of penalisation in proceedings before the WRC
- Note: potential for detriment claim in civil courts – including against individual employees, and with potential for an injunction
- Measures to prevent penalisation/ training, awareness – reflect in Procedures
- Role for designated person

Protection of identity

- Obligation to protect identity of person making disclosure & any identifying information unless explicit consent, other than persons reasonably considered necessary for following up
- Criminal offence to disclose identity
- Set out measures in Procedures that protect identity: document security, IT, digital manual filing, etc.
- **Exceptions:**
 - Person to whom disclosure made took all reasonable steps to avoid disclosure;
 - Person to whom disclosure made reasonably believed it was necessary to prevent serious risk to the security of the State, public health, public safety or the environment;
 - Disclosure otherwise required by law;
 - Disclosure necessary and proportionate obligation imposed by Union or Irish law in the context of investigations or judicial proceedings, including with a view to safeguarding the rights of defence of the person concerned
- Where necessary to disclose, inform reporter in advance unless would jeopardise effective investigation or prevention of crime or risk to security of state/public health/public safety/environment & provide a review process

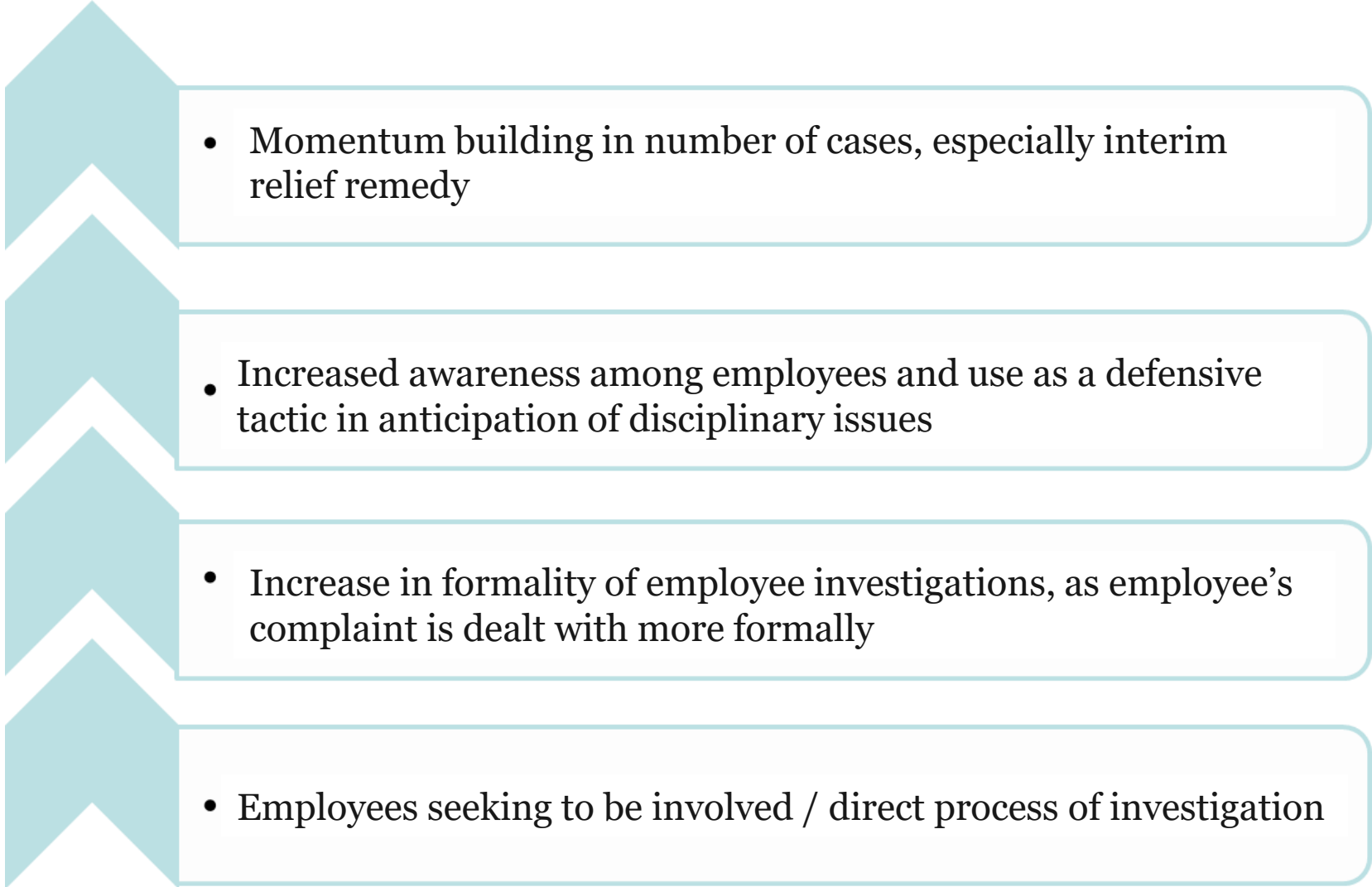
No contracting out

- Section 23 of the Act contains provisions that prevent employers from attempting to “contract out” of the obligations of the Act by
 - Restricting workers from making disclosures;
 - Precluding workers taking action under the Act;
 - Limiting any provisions of the Act.
- Careful drafting necessary in:
 - Confidentiality agreements
 - Compromise agreements

Common misconceptions

- A whistle-blower must state ‘protected disclosure’ in writing
- Whistle-blower entitled to key involvement in investigation
- A whistle-blower must act in good faith
- Grievances are necessarily distinct from protected disclosures
- Public interest must be engaged, as in UK
- Workers may investigate matters to find proof of their suspicion
- Protected disclosures can be withdrawn
- Protected disclosures immunise a whistleblower from the consequences of their own wrongdoing

Trends & predictions

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- Momentum building in number of cases, especially interim relief remedy
 - Increased awareness among employees and use as a defensive tactic in anticipation of disciplinary issues
 - Increase in formality of employee investigations, as employee's complaint is dealt with more formally
 - Employees seeking to be involved / direct process of investigation

Work Life Balance and Miscellaneous Provisions Act 2023

- Statutory right to request **remote working** and **flexible working for caring purposes** – now a statutory process
- Unpaid **leave for medical care** purposes (5 days)
- Paid **domestic violence leave** (5 days) where the purpose of the leave is to obtain “relevant services”
- Extension of the current entitlement to **breastfeeding breaks**



Work Life Balance and Miscellaneous Provisions Act 2023

- Remote working is defined as
 - *“an arrangement whereby some or all of the work ordinarily carried out by an employee at an employer’s place of business under a contract of employment is provided at a location other than at the employer’s place of business without change to the employee’s ordinary working hours or duties.”*

Statutory right to request remote working

- Right to request only
- 6 months' service requirement
- 4 weeks to “*consider*” request (which can be extended to up to 8 weeks) and employer must provide reasons for any refusal
- May be terminated where has “*substantial adverse effect on the operation of the business*”
- WRC Code of Practice
- WRC cannot consider the merits of the employer's decision to refuse a request

Statutory right to request flexible working for caring purposes

- ‘Flexible Working Arrangement’
 - *“a working arrangement where an employee’s working hours or patterns are adjusted, including through the use of remote working arrangements, flexible working schedules, or reduced working hours.”*
- Request must be made at least 8 weeks before the proposed start date of the flexible working arrangement
- Employer must consider *“having regard to his or her needs and the employee’s needs”*
- WRC cannot consider the merits of an employer’s refusal of a request
- Employers may terminate the arrangement where they have reasonable grounds for believing is not using the arrangement for caring purposes
- Update existing family and caring leave policies

Sick Leave Act 2022

- Statutory Sick Pay in the private sector
- 70% of daily salary capped at €110
- 3 days, rising to 10 by 2026
- Most private sector schemes will be more beneficial
- Obligations... shall not apply to an employer who provides a sick leave scheme to its employees where the terms of the scheme confer... benefits that are, as a whole, more favourable to the employee
- *Leszczynska v Musgrave Operating Partners* (ADJ-00044889)



Questions?



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