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HR Network

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Donal Hamilton
Partner, Employment Group

HR Network

Retirement Ages



Agenda

- Context
- Sources of equal treatment law
- Cases from the WRC
- The *Eir* decision
- *Mallon* – a more employer friendly approach?
- Legislative Change on the horizon



Where to start...

- There is currently no set retirement age in Irish legislation
- A person is entitled to the State Pension once they turn 66 years of age
- Most contracts of employment will have a mandatory retirement age
- Some jobs, Gardai and civil servants for example, have statutory retirement ages
 - *Mallon*
- They are permissible under equality law but have been under fire for decades



Equal Treatment Directive (2000/78/EC)



- Prohibition on direct and indirect discrimination on age grounds – Article 2
- General principle of EU law – **Mangold v Helm** C-144/04
- Article 6 –

Differences of treatment on grounds of age shall not constitute discrimination if they are objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

Employment Equality Acts 1998-2021



- Prohibition on age discrimination – section 6(2)(f)
- Section 34(4)

“[I]t shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees if—

(a) it is objectively and reasonably justified by a legitimate aim, and (b) the means of achieving that aim are appropriate and necessary.”

- Section 85A – burden of proof on employer

When litigating over MRAs... make sure you have one in the first place...

- A clause incorporating a retirement age should be express or implied in the contract of employment
 - **A Secretary v A Solicitor's Firm** (ADJ00016645)
- Staff handbook
 - **Earagail Eisc Teo v Richard Lett** (EDA1513)
- Custom and practice



“A custom or usage of any kind is a difficult thing to establish... I have to be satisfied that it is so notorious, well-known and acquiesced in that in the absence of agreement in writing it has to be taken as one of those terms of the contract between the parties”

Maguire P in **O'Reilly v Irish Press**

[1937] 71 I.L.T.R 194

Beware of Normal Pensionable Age

- Bear in mind that a Mandatory Retirement Age is different to an employee's Normal Pensionable Age
- The fact that pension scheme rules contain an NPA should not be exclusively relied on as employers have had mixed success.
 - *HSE v Quigley*
 - *Marine Pilot v Port*
 - *Transdev v Michael Chrzanowski*
 - The employee here was a member of the scheme and received statements which clearly stated his retirement age.



Beware of Normal Pensionable Age

- **Connaught Airport Development Limited v John Glavey (EDA1710)**
 - No clause in the written contract of employment
 - Employer asserted it was custom and practice for employees to retire upon attaining 65 years of age
 - No evidence employee knew of a retirement age – wasn't in the scheme
 - Evidence of two employees working beyond age 65
 - Retirement age unenforceable



Objective justification



Examples:

1. Intergenerational fairness - ***Valerie Cox v RTÉ***;
2. Motivation and dynamism through increased prospect of promotion - ***Donnellan***;
3. Health and safety – ***Transdev***;
4. Creation of a balanced age structure in workforce – ***O’Dowd***;
5. Personal and professional dignity - ***Irish Ferries Ltd v Martin McDermott***;
and
6. Succession Planning – ***O’Donnell v O’Keeffe***.

- Reflected also in the WRC Code of Practice on Longer Working

Available Reliefs



- Section 82(1) of the Acts – types of redress include
 - Compensation for the effects of the discrimination;
 - Order for equal treatment in whatever respect is relevant;
 - Order for the taking of a specified course of action; and
 - Order for re-instatement or re-engagement – *Connaught Airport v Glavey* (EDA1710)
 - Wide discretion when awarding compensation – no requirement to show financial loss
 - Awards of compensation have tended to be modest - **A Receptionist v A Packaging Company** [ADJ-00005241]
- Option to bring Court proceedings for breach of contract
- Possibility of injunction (*Quigley v HSE*)

Some recent cases



- ***Patrick O'Callaghan v Ferrero Ireland Ltd*** (2023)
 - WRC made an award of **€20,000** for discriminatory dismissal on the grounds of age following the imposition of a mandatory retirement age. The respondent sought to rely on health and safety grounds for the imposition of a mandatory retirement age which was applied consistently across the company
- ***Tommy Browne v MSR-FSR Managed Engineering Solutions*** (2023)
 - the WRC held that a mandatory retirement age of 66 for technicians who worked in a physically demanding role and with chemicals, was objectively justified given the health and safety implications.
- ***Brendan Beirne v Rosderra Irish Meats Group*** (2023)
 - considered the timing of the establishment of an objective justification for a mandatory retirement age and made an award of **€30,000** for discriminatory dismissal on the grounds of age. Here, the Complainant's employer failed to consult or negotiate with the Complainant before making the decision to enforce its mandatory retirement age, forcing him to retire at 65.

Reinstatement - *Thomas Doolin v Eir*



- 2023 case in which the WRC was called upon to consider whether a mandatory retirement age was *objectively justifiable*
- Mr Doolin was a Desk Support Agent with Eir, after 3 years he was informed he would have to retire on 1 July 2023 when he turned 65
- He officially requested to work past his 65th birthday. This was denied.
- The WRC found that the mandatory retirement age in Eir was not applied universally and others had been approved to work past 65.
- Eir claimed intergenerational fairness (impeding the progression of younger employees) as their grounds for objective justification.
- AO found prima facie case of age discrimination, not rebutted by the objective justifications put forward by Eir based on an individual assessment, and ordered re-instatement.

Supreme Court View - *Mallon v Minister for Justice & Ors*



- This case concerns an appeal of a decision of the High Court of a judicial review challenge to the mandatory retirement age of 70 imposed on sheriffs pursuant to section 12(6)(b) of the Court Officers Act 1945.
- Mr Mallon argued that this statutory provision was incompatible with Council Directive 2000/78/EC and the Employment Equality Acts.
- The Supreme Court disagreed with Mr Mallon, finding as follows:
 - Individual assessment of objective justification is not required
 - A general objective may justify a broad retirement policy
 - Financial hardship is an important part of the assessment
 - A legitimate aim may evolve over time
 - It's possible to have different retirement ages for different roles

Supreme Court View - Mallon v Minister for Justice & Ors



- Case reopens many established principles
 - Individual assessment of objective justification is not required
 - But see: *O’Callaghan v Ferrero, Doolin v Eir*
 - A general objective may justify a broad retirement policy
 - But see: *Doolin v Eir*
 - A legitimate aim may evolve over time
 - But see: *Toland v Lifford Credit Union*
- Will this result in a more employer friendly approach?

General Scheme of the Employment (Restriction of Certain Mandatory Retirement Ages) Bill 2024

- Restriction on enforceability of contractual mandatory retirement ages before the age at which an employee becomes entitled to the state pension (currently 66)
- Objective is to allow, but not compel, employees to stay in work beyond their MRA until pensionable age.
- Employment Equality Acts will still apply
- Contrary to what the Supreme Court said in its judgement in *Mallon* the Bill proposes to insert a requirement for ‘individual assessment’ having regard to WRC trends.



Questions?





Eleanor Cunningham
Partner and Head of Pensions
& Incentives Group

HR Network

What to Expect When You're Expecting: Automatic Enrolment



Introductory remarks

- Automatic Enrolment Retirement Savings Bill 2024 (the “**AE Bill**”) was published on 5 April 2024, 25 years after it was first mooted in 2006 by Séamus Brennan and flagged in the 2007 Green Paper on Pensions
 - *“generational reform in the Irish Pensions landscape...turning the present system on its head”* (Heather Humphreys, Minister for Social Protection)
- Provides framework for automatic enrolment (“**AE**”) into a retirement savings scheme co-funded by employers and the State (the “**Scheme**”) for an initial 800,000 employees
- General Scheme of the Automatic Enrolment Retirement Savings Bill was published in October 2022
- The Joint Committee on Social Protection, Community, Rural Development and the Islands published pre-legislative scrutiny on 3 May 2023
- AE Bill passed Fifth Stage, Dáil Éireann on 22 May 2024 and will now be sent to the Seanad for debate
- Targeted date for implementation of the Scheme is 1 January 2025
- Government’s commitment to the State pension remaining the bedrock upon which the Irish pension system is founded has been reiterated - AE will be an additional source of income in retirement on top of the State pension

Why AE?

- Report of Commission on Pensions: Irish population enjoying increased longevity – less time in employment, more time in retirement
- Approximately 35% of private sector workers are without pension coverage
- Changes in the old age dependency ratio – smaller proportion of working age people funding pension payments of increasing pensioner population
- Dual aim of AE system:
 - Increase supplementary pension coverage
 - Ensure adequacy of retirement incomes
- Current minimum employer obligation: PRSA access; no contribution requirements



"Help! I haven't saved enough for retirement!"

CARPOONSTOCK.COM

Key features of the AE Bill: eligibility criteria

- Eligibility criteria (excluded workers can opt-in):
 - Employees aged 23-60
 - Earning over €20,000
 - Not already in a ‘qualifying occupational pension scheme’ (includes PRSAs, RACs and PEPPs)
- Self-employed and unemployed individuals will not be auto-enrolled
- AE applied to existing and new staff including those on probation, casual and part-time employees
- ‘Pot follows member’ approach
- Where someone has more than one job (or jobs) and pension contributions are not being made in respect of the additional jobs, they will be automatically enrolled in respect of the non-pension employment provided that the combined wages of all employment exceeds the earnings threshold i.e. €20,000

Key features of the AE Bill: contributions

- Contribution rates (phased in over 10-year period):

| AE | Employee | Employer | State |
|-----------|----------|----------|-------|
| Years 1-3 | 1.5% | 1.5% | 0.5% |
| Years 4-6 | 3% | 3% | 1% |
| Years 7-9 | 4.5% | 4.5% | 1.5% |
| Years 10+ | 6% | 6% | 2% |

- Matching employer and State contributions up to a maximum of €80,000 of earnings per annum

Key features of AE Bill: Tax Relief

- Different structure under AE versus occupational pension scheme/PRSA/RAC
- Current Structure:
 - Income tax relief against earnings for employee contributions (including AVCs) to an occupational pension scheme, PRSA, RAC or PEPP and overseas plans
 - Income tax relief is at marginal tax rate. No relief from USC/PRSI
 - Tax relief subject to an age-related earnings percentage limit and a total earnings limit of €115,000
 - Employer: contributions allowed as an expense under s774(6) TCA
- AE
 - No income tax relief for employee contributions

Key features of AE Bill (cont'd)

- Mandatory participation period/opt-out options
 - Once enrolled must remain in Scheme for minimum period of 6 months
 - Re-enrolment after 2 years
 - Opt-out windows in months 7 & 8
 - Opt-out will not be available after phasing-in once 6% contribution rate reached
- Non-interference from employer
 - Employers may not penalise employees for applying to Scheme
 - Cannot screen future employees at job application stage
 - Up to €5,000 may be awarded to an employee where a successful claim is brought against an employer

Key features of AE Bill (cont'd)

- Establishment of new authority
 - National Automatic Enrolment Retirement Savings Authority (“NAERSA”)
 - Role:
 - *“to administer the scheme and to act in the best interests of members, collect contributions, arrange for the investment of contributions, manage participant accounts that will be accessible through an online portal, and facilitate the payment of savings at retirement”*
- Prospective minimum standards
 - Department of Social Protection has confirmed that minimum standards for existing occupational pension schemes will be introduced in conjunction with Pensions Authority (years 7-9)
 - Ensuring employees in existing pension schemes are no worse off than were they auto-enrolled

Potential issues and areas of ambiguity

- Broad definitions of 'employee' and 'employer' – casting a very wide net and may have unintended consequences
- Interaction with typically complex areas of pensions unclear e.g. Revenue maxima and pension adjustment orders
- Individuals who have ceased pension contributions to avoid breaching the standard fund threshold will be caught for at least the minimum 6-month period
- Payroll providers have indicated that there is significant work to be done to update the software to facilitate the new system – c.9-10 months following implementation
- Current DC schemes have more flexibility re early retirement
- Pension schemes with particularities or 'quirks' in their design, e.g.:
 - Defined benefit schemes that operate voluntary severance programmes – members may no longer be making pension contributions but employer is funding the scheme - are these members captured?
 - Schemes with life assurance only members or AVC only members?
 - Eligibility criteria for mandatory membership of existing scheme not aligned with AE scheme e.g. a higher age of entry; Payment of Wages Act issues to enrol in existing scheme

Employer considerations

- According to Irish Life figures, 98% of schemes have some form of pension gap and will be impacted by the new Scheme due to:
 - Scheme being voluntary or opt-out permitted
 - Waiting period
 - Excluded/non-mandatory cohorts (short term contracts, age)
- Employers should review existing pension arrangements and rules, contracts of employment, payroll systems
- No mechanism whereby employees can be mandated to join existing pension scheme
- Communication process with employees and providing details of the Scheme and how it will operate in practice

Options for employers

- Assess pension coverage gap and decide on preferred approach:
 - Open membership of existing plan as-is to all employees on opt-in basis
 - Open membership of existing plan to all employees at AE rates on opt-in basis
 - Open membership of existing plan to all employees with only employer contributions
 - Do nothing – AE will pick up those not in pension scheme
 - Combination of the above depending on profile of workforce
- New joiners?
- AE v Existing Arrangements: Pros and Cons

Questions?



Tea Break





Mary Brassil
Partner and Head of
Employment Group

HR Network

The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza



Revenue Commissioners v Karshan Midlands Ltd t/a Dominos Pizza

- On 20 October 2023, the Supreme Court delivered its unanimous judgement holding that pizza delivery drivers were to be treated as employees and not independent contractors for tax purposes
- **Background**
 - Drivers were engaged to deliver pizzas for a Domino's pizza franchise (Karshan)
 - Umbrella contract between Karshan and the drivers, supplemented by individual contracts each time the driver was rostered
 - Umbrella contract described the delivery drivers as independent contractors and required the drivers to acknowledge that Karshan had no responsibility or liability to deduct and/or pay employment taxes on behalf of the drivers
 - Karshan would pay the drivers an amount depending on the number of deliveries made and in respect of brand promotion – i.e., wearing Domino's branded clothing and/or affixing the logo to their vehicles

Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza

- Revenue contended that the delivery drivers were employees and PAYE and PRSI should have been operated on payments made to the drivers. Karshan claimed that its delivery drivers were self-employed and responsible for their own tax deductions
- The **Tax Appeals Commission** agreed with Revenue that the delivery drivers should be classified as employees during the relevant tax years (2010 and 2011)
- The decision was appealed to the **High Court** by Karshan and the decision of the Tax Appeals Commission was upheld
- The **Court of Appeal** later overturned the decision of the High Court and found that, as there was no mutuality of obligation between the drivers and Karshan, the delivery drivers were independent contractors responsible for their own taxes
- The decision of the Court of Appeal was then appealed to the **Supreme Court**

Mutuality of Obligation: The Supreme Court's conclusions

- 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
- 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

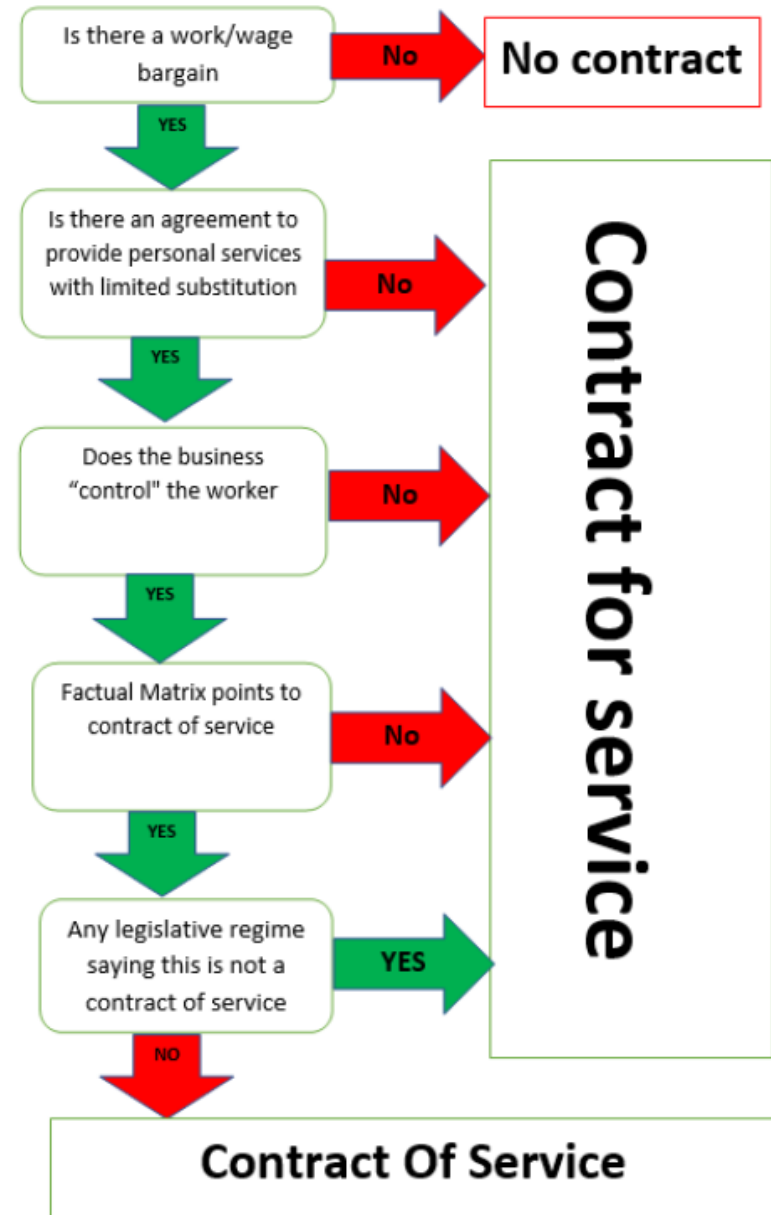
1. Was there an exchange of wages or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the putative employee 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.

What did the Supreme Court decide?

- The Supreme Court found the TAC was entitled to reach the conclusion that the drivers were employees for tax purposes
 - the drivers worked from Karshan’s premises, wearing uniforms directed by it, delivering pizzas in accordance with the directions of the managers and advertising Karshan’s business as they were required to do
 - the drivers’ remuneration was fixed by Karshan, as was the rate at which they would be paid for each pizza delivery
 - their work was controlled by Karshan, and they were not conducting business on their own account
 - the contract was one that envisaged personal service by them, with the facility for substitution on certain conditions, the substitutes being paid by Karshan and not by the driver originally rostered

Revenue Guidance on Supreme Court Case

- Five-step test provides a clear decision-making model
- The judgment / new code solely relates to tax treatment of individuals
- No change re: Personal Services companies
- “... essential that businesses urgently and comprehensively review [tax] arrangements”
- Specific guidance and examples on how to apply the 5-step test



Revenue Example Scenario

- A construction company, C Co, engages a general labourer, James, to work on a site.
- James is to be paid an hourly rate.
- James cannot send someone else in his place.
- C Co’s foreman determines the hours that will be worked.
- James does not supply equipment and supplies labour only.

Applying the decision tree, James will be an employee based on the relationship and PAYE should be applied by C Co.

| Step | Answer | Explanation |
|--|--------|--|
| 1. Work/wage bargain | Yes | James is paid an hourly rate to undertake work |
| 2. Personal Service | Yes | James cannot send someone else in his place |
| 3. Control | Yes | The site foreman, on behalf of C Co, determines how, where, what and when the work is to be done. |
| 4. All the circumstances of the employment | Yes | The contract of engagement is drafted as a self-employment contract with payments made to James reported through the RCT portal by C Co. The facts of the case do not support this position. In addition to the facts detailed under questions 1 to 3, James cannot profit beyond his set hourly rate, is told what he’s being paid by the foreman, uses tools supplied by C Co and is insured similar to an employee. |
| 5. Legislative context | N/A | There is no legislation that requires an adjustment or supplement to any of the questions above. |

Questions?





Sorcha Cusack
Associate,
Employment Group

HR Network

Code of Practice for Employers and Employees on the Right to Request Flexible Working and Remote Working



Overview – Right to Request Flexible Working and Remote Working

- Right to request flexible working and remote working contained in the **Work Life Balance and Miscellaneous Provisions Act 2023 (the “2023 Act”)**
- **Flexible Working** - any working arrangement where an employee’s working hours or working patterns are adjusted e.g., flexitime, remote working, job-sharing, reduced hours
- **Remote Working** - where an employee works all or part of their working week at a location remote from the workplace which may be the employee’s home.
- **Code of Practice – 7 March 2024**
 - Provides guidance on making and responding to FW and RW requests
 - Includes templates for work-life balance policy and template FW / RW request forms
 - Failure to follow the Code is not an offence however Code admissible in evidence in Court / WRC

Who can request flexible / remote working?

Flexible Working

- Applies to employees who are parents, or acting in loco parentis to a child **under 12** (or 16 if the child has a disability or long-term illness) for the purpose of **providing care** to that child; or
- Employees providing personal care or support to their child, spouse, civil partner, cohabitant, parent or grandparent, sibling, or a person residing in their household and who is in need of **significant care** or support for a **serious medical reason**.

Remote Working

- Applies to **all employees** irrespective of part-time / full-time status

Note: Employees must not be penalised for making FW / RW requests or seeking to return to their previous working arrangement

Right to Request Flexible Working and Remote Working

| <i>Requirements</i> | <i>Flexible Working Requests</i> | <i>Remote Working Requests</i> |
|--------------------------|---|--|
| Length of Service | Request can be made from Day 1, must have 6 months' service before arrangement commences | Request can be made from Day 1, must have 6 months' service before arrangement commences |
| Request Process | <p>Request must:</p> <ul style="list-style-type: none"> (i) Be in writing (can be online), signed by employee (ii) Specify form of arrangement, commencement date and duration (iii) Be submitted no later than 8 weeks before proposed start date <p>Supporting information should also be provided (e.g. birth cert, adoption cert, etc.)</p> | <p>Request must:</p> <ul style="list-style-type: none"> (i) Be in writing (can be online), signed by employee (ii) Specify days, commencement date and duration (iii) Provide details on suitability of remote working location (iv) Be submitted no later than 8 weeks before proposed start date |
| Review Timeframe | <p>Employer must consider needs of Company and employee and within 4 weeks:</p> <ul style="list-style-type: none"> - Approve request and sign agreement with employee - Refuse request and give reasons in writing - Extend review period from 4 – 8 weeks if having difficulty assessing viability of request | <p>Employer must consider needs of Company and employee <u>and requirements of the Code</u> and within 4 weeks:</p> <ul style="list-style-type: none"> - Approve request and sign agreement with employee - Refuse request and give reasons in writing - Extend review period from 4 – 8 weeks if having difficulty assessing viability of request |

Terminating the Flexible / Remote Working Arrangement

Termination by Employer

- Employer can terminate an arrangement if satisfied that it is having a “substantial adverse effect” on the business or if employer has reasonable grounds to believe that employee is abusing flexible / remote working arrangement
- Must provide 4 weeks’ notice in writing
- Reasons for termination must be objective, fair and reasonable
- Employee has 7 days from receipt of the notice to make representations which an employer must consider before confirming the termination

Termination by Employee

- Requests must be made in writing
- Employers must respond to request within 4 weeks
- Employer must consider needs of the business, the employee, the Code of Practice and, for termination of remote working arrangements, any legal or contractual obligations (e.g. health and safety)



Possible Claims / Redress

WRC Claims

Under the 2023 Act, the WRC does not have the power to assess the merits of any decision re flexible or remote working

- WRC can only look **at the process** which led to the employer's decision and the reasons for the refusal

Redress

- If there has been a breach of process, WRC may direct the employer to comply with specific sections of the Act and/or award compensation to the employee:
 - Breach of FW request process: Up to **20 weeks'** remuneration
 - Breach of RW request process: Up to **4 weeks'** remuneration

Record-keeping obligations

- Employers must keep a record of approved arrangements for three years. Failure to do so risks a fine of up to €2,500.

Possible Claims / Risks (Continued)

Discrimination claims

- Code of Practice provides that reasons for requesting remote working could include:
 - personal or domestic circumstances
 - neurodiversity or special medical needs or circumstances which could favour a quiet working environment or facilities not always available in the office

Caselaw

- *An Operation Co-Ordinator v A Facilities Management Service Provider (ADJ-00028293)*
- *Sarah Treacy v Centz Retail Holdings (ADJ-00037025)*
- *Wim Naude v University College Cork (ADJ-00042625)*

Other Risks

- Ensuring adequate insurance cover, health and safety, data protection

What should employers do now?

- Code of Practice recognises that workplaces differ, no “one size fits all” approach to work-life balance and remote working may not be suitable for all workplaces
- **Review Policies**
 - Ensure internal policies and procedures reflect the requirements of the Code of Practice
 - Policies should be proportionate to Company size and resources
 - Employers may wish to build trial periods into FW / RW request approvals
- **Consider costs involved** with implementing requests in practice
- Consider **health and safety** and **data protection** implications

Questions?



Principal Office

Riverside One, Sir John Rogerson's Quay
Dublin 2 D02 X576
+353 1 829 0000

London

Tower 42, Level 38C, 25 Old Broad Street
London EC2N 1HQ
+44 20 7621 1000

New York

One Rockefeller Plaza, 30th Floor
New York, NY 10020
+1 646 952 6001

Brussels

40 Square de Meeûs, 1000 Brussels
+32 2 740 0370

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