



Innovation

ARTHUR COX

E X P E C T E X C E L L E N C E

CHRISTMAS 2011

## Employment & Industrial Relations Group Newsletter

# Employment Matters

### Contents

- » Reform of Irish Employment Rights and Industrial Relation Structures and Procedures 01
- » Transfer of Undertakings 02
- » Reforms to JLC/REA systems 02
- » Fixed-term work 02
- » 'Sham' redundancy 03
- » Human Rights and Equality 03
- » Transnational Information and Consultation 03
- » Watching Brief: forthcoming legislation 03
- » In Brief 03
- » About Us 05

*This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.*

We send all our clients very best wishes for a happy Christmas and a peaceful New Year. We are giving the first 50 clients who contact us a Christmas present, see *In Brief*.

In *Employment Matters*, the Arthur Cox Employment Law Group Newsletter, we look at a range of issues across our practice area and some recent and prospective developments in law. As is clear from this edition, the winds of change are blowing in relation to Ireland's employment law.

Arthur Cox has Ireland's largest employment and industrial relations law practice, consistently top ranked in the area, with considerable experience in advising on a vast range of complex employment and industrial relations issues for a wide variety of clients at both national and global levels. The Employment Law Group provides an extensive range of legal services to clients on all aspects of national and EU employment law and industrial relations. The group also provides a skilled mediation service.

See *About Us* and *In Brief* for information on who we are and what we have been up to recently. We also give details of webcasts you may listen to. Any feedback on these newsletters is welcome.

We send her our very best wishes to Sinead Casey, one of our Associates, and a former trainee in Arthur Cox, who is leaving us after Christmas to work in a major UK law firm. We are happy to welcome Jacqueline Ho to the Group, she joins us in January 2012, see *About Us*.

### Reform of Irish Employment Rights and Industrial Relation Structures and Procedures

Ireland's current system of employment rights and industrial relations is "*extremely complex and protracted*" according to the recent *Consultation Paper on Reform of the State's Employment Rights and Industrial Relations Structures and Procedures*.

The key stated objectives of the Minister for Jobs, Enterprise and Innovation's reform proposals in August 2011 are:

- » Resolution of grievances and disputes as close to the workplace as possible and as early as possible after they arise.
- » A simple and efficient institutional structure

- » Minimising the number of cases that present for resolution at formal hearings through active case progression and an increased range of interventions.

Arthur Cox made a Submission on the Consultation Paper. A summary and analysis of the Submissions are available on: <http://www.djei.ie/employment/rights/erirproject.html>

### Transfer of Undertakings

Article 3(1) of the TUPE Directive provides that “the transferor’s rights and obligations from a contract of employment ... existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.” The UK Supreme Court in *Alemo-Herron v Parkwood Leisure Ltd (2011)* recently decided to ask the European Court to clarify the interpretation of a transferee’s obligations under this Article, specifically whether the interpretation is ‘static’ or ‘dynamic’. What does this mean?

In *Werhof v Freeway Traffic Systems (2006)* the European Court gave a ‘static’ interpretation to Article 3(1) when it held that transferees who are not members of an employer’s association do not have to apply new collective agreements entered into by the association after the transfer. Good news for employers. However, there is a consistent line of UK EAT cases to the contrary which have given a different, ‘dynamic,’ interpretation to a transferee employer’s obligations. These cases held that where an employee has a contractual term that their pay will be determined in accordance with collective agreements negotiated from time to time, that term transfers with the employee under TUPE, thus obliging the transferee to apply the results of collective negotiations to which the transferor was a party, even if the transferee themselves were not.

Employers had hoped the UK Supreme Court would uphold a static interpretation and invalidate EAT cases to the contrary.

In Ireland with plans for cost reductions in the public sector and possible takeovers by private companies of public sector business, this is a highly relevant case particularly because the restatement of the core legal question by the UK Supreme Court is applicable to Ireland’s common law.

### Reforms to JLC/REA systems

In July 2011 the Minister for Jobs, Enterprise and Innovation announced reforms to the *Joint Labour Committee (JLC)* and *Registered Employment Agreement (REA)* wage-settling mechanisms, following a Government decision to reform the law when the High Court ruled the relevant wage-settling agreements were unconstitutional.

The case in question was taken by *John Grace Fried Chicken Ltd* and the *Quick Service Food Alliance Ltd* which represents the interests of owners of fast food restaurants. They succeeded in their claim that neither the *Industrial Relations Act of 1946* nor the *Act of 1990* identified any standards, goals or factors to be applied by the catering JLC and/or the Labour Court in exercising their powers under the Acts.

The High Court held the delegated power was ‘excessive’ and therefore unconstitutional.

While the case related to workers in the catering industry, the outcome has implications for all 190,000 or so workers under this system.

Following *Grace*, the *Industrial Relations (Amendment) Bill 2011* was introduced, see *Watching Brief*. Once enacted the Bill will enable the Minister for Jobs, Enterprise and Innovation to make new *Employment Regulation Orders* under a new statutory mechanism that takes into account and rectifies the failings in the Acts of 1946 and 1990 identified by the High Court. The Bill provides for the “principles and policies” to which a JLC must have regard when formulating proposals to submit to the Labour Court for Employment Regulation Orders.

### Fixed-term work

Cases on atypical workers continue apace. Recent High Court actions have sought to restrain termination for redundancy of employees who as a result of the *Protection of Employees (Fixed Term Work) Act 2003* (the 2003 Act) were deemed to have contracts of indefinite duration. In *McGrath v Athlone Institute of Technology (2011)* the applicant claimed he was a permanent employee pursuant to the 2003 Act and, although the High Court accepted that it could grant injunctive relief in such circumstances, it refused as in law an employer can dismiss for any reason or for none on giving reasonable notice, even in the case of a permanent employee.

In a later application, *Holland v Athlone Institute of Technology*, the plaintiff again sought an injunction restraining termination of his employment for redundancy. *Holland* brought up two new issues: the legal enforceability of the *Croke Park Agreement (CPA)*, and whether the CPA, along with certain circulars issued by the Department of Education, created enforceable legitimate expectations on which the plaintiff could rely. The circulars provided that “A person [who has a contract of indefinite duration] has an expectation that, subject to the normal date of retirement in the employment, she or he will be retained in the employment and will not be dismissed...”

The High Court acknowledged that a formal commitment given by or on behalf of the executive in relation to employment matters was capable of giving rise to a “legitimate expectation”. The defendant was an entity governed by statute and in principle the doctrine could be invoked. Having regard to the accepted legal position of collective agreements, the judge rejected the idea that the CPA could give rise to a legitimate expectation that no person working in the public sector would be subject to redundancy. It was otherwise however, so far as the Circulars were concerned.

The plaintiff had raised a “substantial issue” that the circulars created a legitimate expectation and Hogan J granted an interlocutory injunction restraining the plaintiff’s dismissal. The decision in this case, albeit interlocutory, is a good reason why employers should review any circulars affecting their employees.

## 'Sham' redundancy

*JVC Europe Ltd v Panisi (2011)* took a long time to wind its way from the EAT to the High Court, where the employer was obliged to pay a substantial top-up to its former employee for what was a dismissal not, as the employer claimed, a redundancy. The employee had been told his position, and that of two others, would no longer be required and was paid a total of €101,000. However, three 'new' posts were being created at the same time and one of these closely mirrored the claimant's job. The Court observed that the "redundancy" was more like a process of removing the claimant, and ordered the company to pay an additional €197,000.

The judge was severely critical of the statutory procedure for challenging dismissal, describing the procedure as "cumbersome and redolent with the potential for unfairness".

Reform is in the Minister's hands, as the first item in this Newsletter reported.

## Working Group on Human Rights and Equality Commission

In October 2011 the Minister for Justice, Equality and Defence announced the appointment of a Working Group to advise him on the establishment of a new and enhanced Human Rights and Equality Commission. He intends to have a new Commission in place by the end of February 2012.

The Working Group has begun a consultation process involving civil society, members of the public, and those interested in the future of human rights and equality in Ireland. The closing date for submissions was 23 November 2011.

## European Communities (Transnational Information and Consultation of Employees Act 1996) (Amendment) Regulations 2011 S.I. No. 380 of 2011

The Regulations transpose into Irish law the (recast) *Directive 2009/38/EC* on the establishment of a *European Works Council* (EWC) or a procedure in Community-scale undertakings for the purposes of informing and consulting employees.

Important changes in the recast Directive include a definition of "information", improvement of the definition of "consultation," a definition of "transnationality" and clarification of the transnational competence of EWCs.

## Watching Brief

Bills planned for the current session include:

- » The Competition (Penalties and Sanctions) Bill, to strengthen the effective enforcement of competition law in Ireland;
- » The Industrial Relations (Amendment) Bill, referred to above, to give effect to the Government's reform proposals concerning statutory wage-setting mechanisms and to address issues arising out of the recent High Court challenge to the JLC system;
- » The Temporary Agency Workers Bill, to give effect to the Directive on Temporary Agency Work and give equal treatment to temporary agency workers in terms of basic working and employment conditions;
- » The Human Rights and Equality Commission Bill, to replace the existing Equality Authority and Human Rights Commission with a new amalgamated structure.
- » Bills of significance for the next Dáil session in 2012 include the Mediation and Conciliation Bill which will implement recommendations of the Law Reform Commission. Along with the recent new High Court rules on mediation and conciliation (S.I. No. 502 of 2010), the Bill will heighten public awareness of the availability of ADR.

## In Brief

In this section, we let you in on what we have been up to in the past few months. If you would like further information about any of the items below, please contact any member of the Employment Law Group.

### Arthur Cox Employment Law Yearbook 2011

Do you, like so many, feel it's impossible to keep up to the date in employment law, the fastest moving target in the legal landscape? The *Arthur Cox Employment Law Yearbook 2011* is a new and exciting publication which will appear for the first time in February 2012. Published by Bloomsbury Professional, it will be an annual publication written by lawyers from Arthur Cox for all practitioners and professionals in the field. It will contain selected cases and materials for each successive year relevant to Employment Law, Data Protection, Taxation, Pensions, and Employee Benefits. It will cover Irish law: decisions of the superior courts, Labour Court, Equality Tribunal, Employment Appeals Tribunal; Irish legislation and statutory instruments; English law: relevant common law decisions; EU law: decisions of the Court of Justice of the European Communities, relevant Directives/Regulations, as well as decisions of the European Court of Human Rights. **Purchasers of the text will receive a voucher enabling them to access the selected material in full on the web.** The *Arthur Cox Employment Law Yearbook* will be essential for every employer and HR Manager. The price of €75 makes the *Yearbook* excellent value for money.

### Christmas presents!

The first 50 clients who contact us at [Niamh.Hanratty@arthurcox.com](mailto:Niamh.Hanratty@arthurcox.com) will receive a free copy of the *Arthur Cox Employment Law Yearbook 2011*. For clients who don't make the first 50, the publishers will generously provide the *Yearbook* on a discounted basis.

### Client Seminars:

The Employment Law group hosted a series of free, client seminars over the last three months, covering the following topics:

- » Kevin Langford, Partner, Arthur Cox, and Gerard O Shea, Sanders & Sidney O'Shea: *Implementing Redundancies, Maintaining the Employer's Brand*

- » Mary Redmond, Consultant, Arthur Cox, and Paula Downey, downey youell associates: *A living-systems approach to organization and change*
- » Rob Corbet, Partner, Arthur Cox : *Social Media: Managing the Legal Risks*

**Séamus Given** spoke on *Fixed-Term Employees - Defending Claims/Recent Developments in the Education Sector* at the Irish Universities HR Conference on 11 November 2011.

**Mary Redmond** spoke on *Employment Injunctions* at the Law Society's Diploma in Employment Law course on July 26 2011.

**Gill Woods** spoke on *Ill-health Retirement* at the Royal Society of Occupational Physicians conference in the Royal College of Physicians on 7 October 2011. We have prepared a client briefing on the Agency Workers Directive in November 2011. If you did not receive a copy, contact Gill.

**Barry Reynolds** spoke on *Severance Schemes in the Public Sector* at a seminar organized by Public Affairs Ireland in October 2011; he attended a conference in Berlin for European employment lawyers in September 2011 and spoke on claw back of bonuses at an "International Employment Law Seminar 2011" in Amsterdam.

**Sinead Casey** attended the IBA Global Immigration Conference in London in September 2011.

**Michael Doyle** attended the Employment Law Association of Ireland's talk on Social Media/Networks and Employment Law in Trinity College Dublin on 11 October 2011.

Beginning in January 2012, clients will be invited to the following free breakfast seminars hosted by the group:

- » *January 26 2012*  
Elaine Mettler, Associate, Arthur Cox:  
*Temporary Agency Workers - the Directive transposed*
- » *February 23 2012*  
Cian Beecher, Partner, Arthur Cox and  
Michael Stirling, HR Consultant:  
*Employee Engagement*
- » *March 9 2012*  
Séamus Given, Partner, Arthur Cox and  
Michel Van Beek, Legal Services, European Commission:  
*Fixed Term Work, Irish and European perspectives*
- » *April 19 2012*  
Gill Woods, Associate, Arthur Cox and  
Margaret Considine, Equita:  
*Top Tips for Employers on Bullying & Harassment Claims*

You will receive an invitation early in the New Year.

## About Us

If you have any queries about the topics in this publication or would like us to cover a particular subject in a future issue, or if you have any queries of an employment law nature, please contact:



### **Séamus Given** Partner

Séamus is a partner and Head of the Employment & Industrial Relations Law Group. He has over 25 years experience in advising employers, in the private, public and voluntary sectors on all employment law and industrial relations issues arising from the employer/employee and employer/trade union relationship. Séamus represents employers in disputes with employees, former employees/executives, job applicants and trade unions in all of the relevant Courts and Tribunals in Ireland. He has extensive experience in advising on all aspects of employment law and is consistently recognised as a leading employment lawyer in Ireland. Séamus is a CEDR trained mediator.

+353 (0)1 618 0565 | [seamus.given@arthurcox.com](mailto:seamus.given@arthurcox.com)



### **Kevin Langford** Partner

Kevin is a partner in the Employment Law Group with over 10 years experience representing employers in every aspect of the employment relationship. He offers practical and pragmatic solutions to clients. Kevin advises corporate clients in a wide range of sectors on all aspects of employment law. His client base includes financial institutions, pharmaceutical and healthcare companies, manufacturing and distribution companies, retail outlets, statutory bodies, Governmental and public institutions, universities, schools and hospitals. He also advises law firms in other jurisdictions on matters relating to Irish employment law. Kevin also acts in contentious employment law matters for his clients.

+353 (0)1 618 0588 | [kevin.langford@arthurcox.com](mailto:kevin.langford@arthurcox.com)



### **Cían Beecher** Partner

Cían is a partner in the Employment Law Group, also with over 10 years experience representing employers in every aspect of the employment relationship. He is an experienced solicitor who advises clients on all aspects of employment and industrial relations law. Cían's practice includes representing employers in contentious employment and industrial relations disputes before all of the employment law tribunals and the Irish courts. He also advises his clients on commercial and corporate matters relating to the employment relationship. As with the rest of the Group Cían's focus is on developing and implementing practical and effective strategies for our clients. Prior to joining Arthur Cox Cían was in-house counsel for a large multinational corporation where he also served as Company Secretary.

+353 (0)1 618 0539 | [cian.beecher@arthurcox.com](mailto:cian.beecher@arthurcox.com)



### **John O'Dwyer** Consultant

John is a consultant in the Employment Law Group, and has extensive experience of employment issues and industrial relations practices in Ireland. He advises employers on all employment aspects of commercial transactions, inward investment, individual and collective issues, termination of employment and on and on a wide range of employment related matters arising in the course of employment.

+353 (0)1 618 0520 | [john.odwyer@arthurcox.com](mailto:john.odwyer@arthurcox.com)



### **Dr Mary Redmond** Consultant

Mary is a consultant in the Employment Law Group. One of Ireland's leading employment lawyers, she advises many of Ireland's major companies. Mary has extensive experience of employment law and industrial relations and was a member of the Labour Relations Commission during two consecutive terms. She advises a wide range of clients on Irish and EU employment law and is the author of *Dismissal Law in Ireland* (2007) and co-author of *Strikes: An Essential Guide to Industrial Action and the Law* (2010). Her non-executive directorships of public and private (including not for profit) companies give her particular insight into the employment problems of commercial clients. Mary is a CEDR trained mediator.

+353 (0)1 618 0570 | [mary.redmond@arthurcox.com](mailto:mary.redmond@arthurcox.com)





**Elaine Mettler** Associate

Elaine is an associate in the Employment Law Group. She was a trainee solicitor in Arthur Cox, starting her traineeship in 2000 and qualifying as a solicitor into the Employment Law Group in 2003. Elaine advises a wide range of employers, including those in the commercial, educational, health and voluntary sector, public bodies, private and public limited companies, charities and on all matters arising out of the employer/employee relationship and employer/trade union relationship. She is a CEDR trained mediator.

+353 (0)1 618 0597 | [elaine.mettler@arthurcox.com](mailto:elaine.mettler@arthurcox.com)



**Barry Reynolds** Associate

Barry is an associate in the Employment Law Group. He advises employers on all aspects of managing the employment relationship in both contentious and non-contentious contexts to include grievance and disciplinary issues, termination of employment, discrimination, atypical working arrangements and human resources policies and procedures as well as advice in relation to commercial transactions, transfers of undertakings, and information and consultation. Barry has worked as an in-house legal adviser in a large financial institution specialising in employment issues. Prior to joining Arthur Cox, Barry spent 6.5 years at a large law firm in Dublin qualifying in its employment law and litigation unit in 2004.

+353 (0)1 618 1124 | [barry.reynolds@arthurcox.com](mailto:barry.reynolds@arthurcox.com)



**Gill Woods** Associate

Gill is an associate in the Employment Law group. She trained as a solicitor with Arthur Cox from 2004 to 2007 and on qualification joined the Employment Law Group. Gill advises clients on the defence of employment-related litigation, on statutory compliance and the legal framework governing the employment relationship, on employment law aspects of commercial transactions, and on the conduct of disciplinary processes, internal investigations, hearings, appeals and dismissals.

+353 (0)1 618 0544 | [gill.woods@arthurcox.com](mailto:gill.woods@arthurcox.com)



**Sinead Casey** Associate

Sinead is an associate in the Employment Law Group. She joined Arthur Cox in September 2006 and qualified as an associate in the Employment Law Group in 2009. Sinead specialises in all aspects of employment and industrial relations law, including the management of ongoing employee issues, grievance and disciplinary proceedings and employment disputes such as unfair dismissal, trade disputes, equality and discrimination claims. She is a member of the American Chamber of Commerce Employment Group.

+353 (0)1 618 1152 | [sinead.casey@arthurcox.com](mailto:sinead.casey@arthurcox.com)



**Michael Doyle** Associate

Michael is an associate in the Employment Law Group. He was admitted as a solicitor in 2010 and is one of the newest members of the Employment Law Group. Michael acts for a wide range of clients in the private and public sectors on all aspects of contentious and non-contentious employment matters. He commonly advises employers on disciplinary and grievance situations, employee relations issues, termination of employment, redundancy programmes and in the drafting of service contracts and employment policies.

+353 (0)1 618 0502 | [michael.doyle@arthurcox.com](mailto:michael.doyle@arthurcox.com)



**Louise O'Byrne** Associate

Louise is an associate in the Employment Law Group. She trained as a solicitor with Arthur Cox. Following qualification in December 2009, Louise commenced practice in the Employment Law Group. Her role is extremely client-focused and involves advising clients in relation to both contentious and advisory aspects of the employment relationship. Louise advises clients on employment law aspects of commercial transactions, compliance and policy and termination of employment and represents employers in employment disputes such as unfair dismissal and discrimination claims. She is also a member of the Arthur Cox Health and Safety Group.

+353 (0)1 618 0526 | [louise.obyrne@arthurcox.com](mailto:louise.obyrne@arthurcox.com)



**Sarah Grace** Associate

Sarah is an associate in the Employment Law Group. She trained as a solicitor with Arthur Cox and on qualification joined the Employment Law Group in 2011. Sarah advises clients in both the private and public sectors on all aspects of employment law from recruitment to retirement. She advises employers on all contentious and non-contentious matters arising out of the employment relationship, including the development of employment policies and procedures, the conduct of grievance and disciplinary processes, termination of employment, industrial relations issues and the defence of employment-related litigation. Sarah also advises clients on employment law aspects of commercial transactions.

+353 (0)1 618 0542 | [sarah.grace@arthurcox.com](mailto:sarah.grace@arthurcox.com)



**Jacqueline Ho** Associate

Jacqueline Ho is an Associate in the Employment Law Group. Jacqueline joined Arthur Cox as a trainee in 2009 and will qualify into the Employment Law Group in 2012.

+353 (0)1 618 0632 | [jacqueline.ho@arthurcox.com](mailto:jacqueline.ho@arthurcox.com)

**Dublin**

---

Earlsfort Centre, Earlsfort Terrace, Dublin 2, Ireland  
**tel:** +353 (0)1 618 0000 | **fax:** +353 (0)1 618 0618  
**email:** dublin@arthurcox.com

---

**London**

---

12 Gough Square, London EC4A 3DW, England  
**tel:** +44 (0)20 7832 0200 | **fax:** +44 (0)20 7832 0201  
**email:** london@arthurcox.com

---

**Belfast**

---

Capital House, 3 Upper Queen Street, Belfast BT1 6PU, Northern Ireland  
**tel:** +44 (0)28 9023 0007 | **fax:** +44 (0)28 9023 3464  
**email:** belfast@arthurcox.com

---

**New York**

---

One Rockefeller Plaza, 15th Floor, New York NY 10020, USA  
**tel:** +1 (1)212 782 3294 | **fax:** +1 (1)212 782 3295  
**email:** newyork@arthurcox.com

---