

Employees and the pandemic: new set of employment law challenges

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As the pandemic enters its second year and workforces are forced to operate amid restored restrictions, employees and their advisors are faced with a new set of challenges. In important areas – particularly around home-working – detailed policy responses are in train.

People are gradually adapting to a crisis which has persisted much longer than many would have hoped.

A key area of concern centres around the prospect of alterations in the terms and conditions of employees by organisations either reacting to events, or on occasion, taking advantage of the prevailing circumstances.

Queries from people in 'lay off limbo' have been frequent

In complaints brought to the Workplace Relations Commission, failures on the part of employers to put in place written statements of terms and conditions are frequently pointed out.

Paul Joyce, Legal Advisor at FLAC, the Free Legal Advice Centres, says people are confused about their contractual rights. "A lot of people still do not have a written contract, or statement. If they do, the information is partial." This can result in difficulty when it comes to pinpointing entitlements, during the course of disputes.

The issues he is encountering most frequently centre around changes in terms and conditions, threats of redundancy, and a lack of clarity around maternity rights and grievance issues. Queries from people who can be best described as being in 'lay off limbo' have been frequent in the past couple of months.

Paul points to situations where employers are acting in breach of the rules, a case in point being the suspension of one of his clients by a large company in advance of an investigation into their performance. This clearly represents a breach of that employee's basic rights. As Mr Joyce puts it, "it is one thing to impose sanctions after the completion of an investigation."

According to Rachael Ryan, Head of SIPTU's Legal Rights Unit, written contracts are often not available in unorganised workplaces. Where they exist, they are often poorly drafted, or prepared with another legal jurisdiction in mind.

This view appears to be shared within the WRC, with one Adjudication Officer criticising the "fragmentary approach" of an employer to the provision of documents foundational to the employment relationship.

In cases where written terms and conditions are not on hand, people are advised to look for a statement or letter. The key point to note is that a contract will be in existence whether one is in writing, or not. The advent and prevalence of electronic systems of information storage means

that it is now much easier to gather evidence on the hours actually worked by an employee in cases where money is owed to them.

SICK PAY IN PLAY

Access to sick pay has emerged as an issue of critical importance during the pandemic. As things stand, an employee in Ireland has no statutory right under employment law to be paid while on sick leave. The decision is left to the employer.

Rachael Ryan says there is very low coverage in the private sector, with few, if any, schemes in place for people employed as cleaners, for example.

Most sick pay schemes look for some form of medical certification.

The Department of Enterprise is conducting a public consultation with a view to introducing a statutory right to illness leave, similar to that available in more than 20 EU states.

The Government has committed to reporting back by March. It is under pressure. The General Secretary of ICTU, Patricia King, has backed up calls for reform in this area.

Labour's spokesperson on employment affairs, Marie Sherlock, has pointed to the lack of such leave as being a "fundamental weakness in the fight against the epidemic." In September, the party published the Sick Pay & Parental Leave (Covid-19) Bill, 2020.

Its co-sponsor, Aodhan O'Riordain, T.D., contrasted the gap in social protection in this area with the "eye-watering sums paid out in social supports."

Under the Bill, employee earnings would be fully covered for six weeks once they had four weeks' service.

The Minister for Social Protection, Heather Humphreys, cautiously welcomed the Bill, noting eight years had passed since statutory sick pay was last analysed and "the idea merits detailed reconsideration."

The Government proposed that the Bill's progress be deferred for six months pending a full discussion. The Minister suggested that full pay for a two-week period would be "more manageable from a small business perspective."

CUSTOM & PRACTICE

Jeffrey Greene and Alice Compton, partners with the law firm William Fry, state that the Government committed to the introduction of statutory sick pay by the end of 2021. It remains to be seen whether the Government will introduce its own Bill.

Currently, employees are entitled to claim illness benefit of €203 or Covid illness benefit of €350.

In a recent blog, Barry Walsh of the law firm, Field Fisher, points out that custom and practice can create an enforceable contractual right to sick leave. While "meaningful legal clarification is thin on the ground", he points to a decision of the High Court in the case of *Elmes & Ors v Vedanta Lisheen Mining Ltd* (2014).

In the latter case, the Court ruled that the company by virtue of repeated practice created an enforceable contractual right. As a result, the employees concerned were held to be entitled to sick pay for a six-month period.

A note of caution on the introduction of statutory reforms has been provided by employment lawyer Richard Grogan, who has represented a significant number of employee litigants. He has warned that the introduction of a statutory scheme, when combined with a mandatory pension scheme arrangement, could have big cost implications for firms, affecting salary packages on offer.

As things stand, an ongoing legal problem stems from what Mr Walsh refers to as the “inconsistent practices” of employers when it comes to sick pay. In some cases, willingness to provide financial support to absent employees may be tied up with perceptions about their performance.

Then there are the usual suspicions that sick pay schemes are being exploited by some. This highlights the importance of clearly thought-out practices when it comes to medical certification and the monitoring of absent employees.

FLEXIBILITY

Many organisations are operating under stressful conditions in the current environment. One consequence, according to Paul Joyce, is that people are, in effect, being offered what amounts to ‘alternative jobs.’ They are being asked to move to a different locality, or work reduced hours. Some people have contacted FLAC to ask whether they can refuse this request/instruction.

There is a legal requirement to explain clearly to the employee concerned the effect of any change.

In the current circumstances, both parties – employer and employee – may be seeking flexibility. However, Roisin Boyle, an advisor with SIPTU’s Legal Rights Unit, points out that there is currently no legislation in place in Ireland – aside from the right to reasonable accommodation under the Employment Equality Act – that allows employees to request a flexible working arrangement.

In some cases, employers have tried to introduce changes verbally, or by way of written addendum into the worker’s terms of employment.

However, Roisin states that “employers should always seek consent to any changes and negotiate with the workers on what these changes might be. If consent cannot be achieved, the employer should honour the current terms of the contract, whether they are written or oral. Some individual workers have agreed to a temporary change in their contract for a specified duration – for example, the period of a colleague’s sick leave, maternity leave or for the duration of pandemic”.

However, she says this temporary change should be well documented between the worker and their employer to avoid a long-standing change being implied in the future. “A worker’s terms and conditions are sacred and an enforced fundamental change to them can amount to a breach of contract. In a collective situation, it is this type of enforcement by the employer that can lead to an industrial dispute,” she says.

Roisin also cites that some employees who were caught off guard by the closure of the schools, last March. When they told their employer that they could not come to work, they were either offered unpaid leave, threatened with disciplinary action or treated as if they were, in effect, resigning from their jobs. The workers affected might be able to claim for constructive, unfair dismissal or gender based discrimination (as they were predominantly women), but the prospects of success in such cases is yet to be determined.

WHAT IS ESSENTIAL?

SIPTU has also dealt with many requests regarding whether workers are entitled to annual leave while on lay off, short-time or under the wage subsidy scheme. While the short answer would appear to be 'No' where there has been no 'working time' accrued, the situation can be complex and each workplace needs to be looked at separately.

Many want to know whether they fall within the definition of 'essential worker'. According to Deirdre Malone, a lawyer with Ronan Daly Jermyn Solicitors, this can be important when it comes to securing access to a crèche for one's children, she points out.

Another source of concern arises from the ongoing suspension in Section 12 of the Redundancy Payments Act. This leaves some employees on layoff on the horns of a dilemma.

Ms Malone states: "Workers with transferable skills in sectors that have had to shut down are currently on lay off, while the 'essential' sectors are in need of workers with these transferable skills. Therefore, as a result of the suspension of Section 12, in order to avail of any alternative job opportunities, workers are being forced to resign from their positions and therefore forfeiting their right to a redundancy payment – despite the reality that there is no work available for them with their current employer, and there will not be for some time yet."

Clearly, this situation is far from ideal both from the individual perspective – people forced to remain economically idle – but also from the point of view of an efficiently functioning labour market.

DISPUTES MACHINERY

During the pandemic, a big shift towards the use of virtual hearings has taken place. This is a source of concern to many involved in employment related litigation.

Inevitably, there have been delays in the processing of complaints. SIPTU's Rachael Ryan accepts that the delays are "nobody's fault" given the limited time available for face-to-face hearings.

The WRC has carried out a consultation on virtual hearings, with particular reference to those who may not have access to the right technology, or may not be in a position to operate it. One drawback is the lack of 'flow' in the conduct of hearings.

There is now a fair degree of international experience when it comes to the conduct of virtual hearings.

In a recent article, Adrienne Goins, of the law firm, Vinson & Elkins LLP, looked at the challenges and opportunities presented in the field of international arbitration. She concluded that while the procedure is relatively manageable, evidentiary hearings with witness examination, pose real challenges.

The efficiency of proceedings has been compromised since the onset of the pandemic and challenges to due process have emerged. She concludes that “tribunal members may not have the same ability to analyse the body language of witnesses and experts as during in person testimony”.

Some witnesses on camera could be benefiting from secret advice or access to documents without the knowledge of the tribunal, or the other party. But this can be addressed through the use of a wider lens camera.

On the positive side, tribunals are forced to focus on the evidence, without it being impacted by unconscious bias of the sort that can exist in physical in-person settings.

FLAC’s Paul Joyce considers that issues arise away from the context of the virtual hearing. In his view, the Department of Enterprise remains reluctant to deal with ordinary queries arising from contracts of employment. This problem has long predated the pandemic: “People often look for clarification. It is very difficult to get it.”

Moreover, while any employee may raise a grievance over their treatment at work under the Industrial Relations Act, a decision on this complaint will not be legally binding.

REMOTE WORKING STRATEGY

Meanwhile, the Government have adopted a cautious approach to the framing of laws aimed at copper fastening the position of employees working from home, and from other locations away from their employer’s central place of business.

The National Remote Work Strategy uses a catchy slogan in its title: ‘Making Remote Work’. It seeks to build on a 2019 report by the Department of Business on remote working (see [IRN 03, 2020](#)).

Employees may be given the right to request remote work, while a Code of Practice on the ‘right to disconnect’ will be drawn up by the WRC, which will handle related disputes.

The Government commits to speeding up investment in broadband and to the construction of a network of remote work hubs, allowing people to enjoy a ‘halfway house’ situation.

A target of 20% of public sector employees working remotely by the year end has been set. The Government plans to “lead by example.”

Meanwhile, the EU is currently reviewing existing directives dealing with workplace relations in the light of changes brought about by the pandemic. In particular, there is to be an examination of the impact of remote working and the reduced visibility of home-based carers on gender equality.

The Government report states that employers should be “mindful of the potential negative impacts of remote work”. They are advised to gather data on career development, training and promotions so that the position of remote and non-remote workers can be compared.

Currently, employers may pay home-based employees a paltry €3.20 per day to cover their expenses. This is inadequate to say the least, given the cost savings in energy and water use accruing to employers whose offices have emptied.

In the absence of such payments, an employee may set off against their tax bill a sum for electricity, heating and broadband costs, based on an apportionment between business and private use.

DEUTSCHE BANK CASE

ICTU General Secretary Patricia King welcomed aspects of the Making Remote Work report but Labour's Senator Marie Sherlock claimed that it amounted to "lip service to worker protection".

"There is no detail on what a right to request remote work will look like. There is no legal right to disconnect provided for."

Solicitor Richard Grogan says that in relation to the compliance burden on employers stemming from remote working, the obligation to have in place reliable and accessible records of start and finish times is set out in Section 25 of the 1997 Act. This has been reinforced in a recent decision of the Court of Justice (CJEU) in the Deutsche Bank case (C-55/88).

If the records do not show compliance, the burden of proof is on the employer.

TAX ISSUES

Tax considerations also loom large. In its review of the Finance Bill 2020, on October 22 last, accountants PwC had this to say: "The Bill does not contain any additional reliefs to support the additional numbers working from home. The vast majority of employees would have liked further support."

Revenue has updated its guidance in relation to e-working. It is now clear that a deduction of 30% of broadband expenses incurred for the duration of the pandemic can be claimed.

A more comprehensive approach, in Budget 2022, next October, in response to a likely shift towards a 'blended' workplace - with a partial return to the office - is anticipated.