Stratis CONSULTING
Leading People Strategies

Client Update
November 2019
stratis.ie

Welcome to our client update as 2019 draws to a close. At **Stratis** we support organisations who want to lead improvements in *critical* areas of *Employee Relations, People Strategy and Workplace Innovation*. Along with our team of Associates we bring our career experience, knowledge and insight to the full advantage of our clients in leading people strategies. We provide partner-led, practical and decisive advice and are personally available to advise and support senior leaders on any sensitive people strategy issues.

In this update and review of the current landscape, we share our thoughts on some key issues including:

1. *Employers need to challenge escalating pay costs.*
2. *Is there tentative interest in a new national social dialogue?*
3. *Proposed Gender Pay Gap Legislation.*
4. *Parent Leave entitlements extended.*
5. *High Court Overturns Labour Court decision on Sunday Premium.*
6. *Reasonable accommodation in disability cases.*
7. *Bogus Self-Employment in focus.*
8. *Pensions auto enrolment proposed by 2022.*
9. *A Right to Disconnect.*
10. *Hosting of the first Stratis Employment Relations Summit – '2020 Vision', 28.11.19.*

1. Employers need to challenge escalating pay costs

Over recent years trade unions have persisted with so called '*pattern bargaining*', where a headline settlement is promoted and is followed by other firms within a sector. Usually this is driven by a strategy of seeking to secure baseline pay deals, without productivity concessions, which they see as appropriate for separate discussion – *'two tier bargaining'.*

Employers are now concerned that this unmanaged *'two tier bargaining'* is driving pay settlements to uncompetitive levels. The National Competitiveness Council reported in April 2019 that, after years of moderate growth, labour costs have increased by about 2.9%, four times faster than average prices. Without similar increases in labour productivity, this increase in costs will simply put pressure on Irish prices, particularly for essential consumer products like housing and residential rent, and childcare costs. If unchecked, it will also lead over time to Ireland becoming uncompetitive as a location for international investment.

Amidst considerable uncertainty in our trading environment, sustainable growth will depend on our ability to tackle the productivity deficit across many sectors and occupations, and especially in the indigenous and locally-trading sectors. Irish labour productivity growth is skewed by a small number of firms mainly in the manufacturing and ICT sectors. The recent OECD review of SME policy and entrepreneurship in Ireland found that productivity growth among established Irish SMEs, had either flatlined or declined in the past decade for a variety of reasons, including poor skills development, a slower pace of digitisation and/or a lack of "internationalisation". Increasingly, small firms should be encouraged to invest in various forms of workplace innovation as part of their effort to boost productivity levels at enterprise level.

Consumer prices have remained at low levels with inflation for 2017 and 2018 having been just 0.4% and 0.5% respectively. Yet compensation per employee in 2018 increased by 2.7%. Whilst we have seen some upward pressure on prices due to Vat changes in the hospitality sector and increases in utilities and housing costs, CSO data show that prices rose by just 0.9% in the year to September 2019 (CPI) or by 0.6% using the HICP measure. The Central Bank (see Q4, Bulletin 2019) has predicted that *'compensation per employee'* [1] could increase by up to 3.6% in 2019 and 3.5% in 2020.

There is little cost of living justification for pay increases as the rising cost of services has generally been offset by lower goods prices and the average full-time worker is now earning about 8% more than they did in 2008.

Despite trade risks which pose a threat to the labour market and employment and recognising a continuing tightness in the labour market, it is our assessment that most employers still expect to provide pay adjustments in 2020 but within an indicative settlement range of 2.0-2.75%. Any adjustments beyond this level must be strictly by exception.

However, we do foresee significant sector differences and with deals at the lower end of this spectrum being more likely where there are Brexit concerns e.g. in the agri-food sector. Primary agriculture and the food processing sector (agri-food sector) employ around 153,000 people in Ireland, accounting for almost 7% of all jobs.

It should be of great concern to businesses that these developments are occurring in the absence of any national guidance or a settled pay policy. In this context, Stratis is reminding employers that they remain entitled to seek cost offsetting measures in return for any basic rate increases[2]. We would also encourage employers to consider the wider implications of any pay agreements they are concluding for employers in their Sector, Region and Nationally.

2. Is there tentative interest in a new national social dialogue?

The emergence of a greater shared interest expressed by some business and union leaders in exploring possibilities for genuine collaboration on issues of national importance is potentially significant. Whilst these remarks took place on quite different platforms by Danny McCoy, CEO of Ibec in September and the Fórsa General Secretary Kevin Callinan in October, it is also the case that nationally, a key challenge for Government is to oversee the economy through a lower trajectory for economic growth over coming years and managing all its implications.

The public service pay bill (2018) has risen at a rate of more than three times that of other spending (c. 12.6% versus 4%). One clear implication is that a decline in growth rate of tax revenues, will not allow the Government to sustain the level of increases which we have witnessed in the rate of government spending. This will also have serious implications for public service pay policy and therefore Government, as employer will have to rethink its own pay strategy.

A shared goal of all stakeholders should be to ensure Ireland is the preferred choice for employees to work and employers to do business. There are some signals that a range of common problems have emerged for both employers and workers, albeit with strong views on whether there is the potential for pay determination to form part of this movement to any collaboration nationally. This may be a step too far in the near term. However, the need to address other genuine issues of social infrastructure and to support high quality employment so that businesses can continue to attract and retain the best talent ought to be a shared priority.

The cost of housing, commuting, a lack of quality and affordable childcare, the need for increased investment in skills, education (at all levels) and training and in social inclusion along with the uncompetitive marginal tax rates for second earners are significant challenges for many businesses and their workers. The challenges facing Ireland in supporting businesses and workers in preparing for the 'Future of Work' and the implications of climate change are other important issues for business and workers. There is an urgent need to build on the reforms to our workplace relations system introduced in 2015 and to make it truly 'world class'[3] .

The reality too is difficult issues will remain on which business and trade unions will struggle to reach any new accommodations such as e.g. on collective bargaining rights. However, on the other matters

1. Compensation per employee should not be confused with adjustments in base pay and allows for other impacts on compensation, including e.g. additional hours working.
2. Stratis Consulting has developed a comprehensive Pay Negotiations Checklist for Employers — if you would like to receive a copy please e-mail us.
3. See Stratis Consulting *'White Paper-2020 Vision'* Assessment, *The Journey Towards a 'World Class' Workplace Relations System – Where Are We?* November 2019 available at www.stratis.ie from 28 November 2019.

mentioned above, there may be a real opportunity for dialogue and for progress on issues where a shared interest can be fashioned towards a new *'social contract'* and which recommits to addressing slippages in national competitiveness. In time an agreed framework to inform pay discussions, whether at national or local level could also emerge.

Yet, it is also clear that the Labour Employer Economic Forum is ill equipped to deal with the scale of these challenges and if these tentative exchanges are to be taken seriously, then a new vehicle to engage with the interests of the stakeholders on these issues will have to be found with Government having a central role and with appropriate safeguards for Oireachtas oversight.

3. Proposed Gender Pay Gap legislation

At present, there are two bills on gender pay gap reporting before the Oireachtas. However, it is likely that only one of these will be finally enacted into law – namely, the Gender Pay Gap Information Bill.

The Bill is at the early stages of the legislative process and will be subject to further amendments. The Gender Pay Gap Information Bill proposes to initially require publication of gender pay data in both the public and private sector entities with over 250 employees. This threshold will gradually fall to a threshold of 50 employees. Employers will be required to publish differences between men and women in their hourly pay, bonus pay, part-time pay and temporary contract pay. Publication of differences in pay by reference to job classifications may also be required.

The enforcement mechanisms will permit the Irish Human Rights and Equality Commission to apply to the Circuit Court for an order requiring an employer to comply with the legislation. An employee of the employer concerned may apply to the Workplace Relations Commission for an order requiring compliance. Designated officers may also be entitled to investigate a sample of employers to ensure that the information published is accurate.

Importantly, the precise mechanisms to collate and process gender pay data and the penalties for breach have yet to be determined.

4. Parent Leave Extended

Under the Parent's Leave and Benefit Act 2019, from 01.11.19, new mothers and fathers are each entitled to two weeks of 'paid parent leave' within the first year of their child being born at a rate of €245 per week. This is the same rate paid for existing maternity and paternity leave. The measure is applicable for children born or adopted from 01.11.19.

Paid parent's leave must be taken after birth or placement for adoption and be taken within 52 weeks of birth or placement.

The two weeks are in addition to the existing maternity and paternity leave, and unpaid parental leave entitlements already available to them. For example, fathers still must take paternity leave within 26 weeks of the baby's birth but have up to 52 weeks for parents leave.

When a child is born a father can take two weeks paid paternity leave within six months of the baby's birth. They are now entitled, after taking the paternity leave, to another two weeks within the first year of the baby's birth, meaning they have four weeks in total. These weeks are paid at a benefit rate of €245 per week.

For new mums, they were previously entitled to 26 paid weeks of maternity leave and could also add 16 weeks to this leave which is unpaid and at their own discretion. Now following the initial 26 weeks payment under the maternity leave scheme, new mothers can avail of an additional two weeks paid parents leave and all 28 of these weeks are paid at a benefit rate of €245 per week.

It should also be noted that in addition to the above maternity and paternity leave, new parents are also entitled to up to 22 weeks unpaid parental leave each, which can be taken in one bloc or two split blocs, before their child reaches 12 years old.

5. High Court Overturns Labour Court decision on Sunday Premium

The High Court has recently overturned a 2017 decision of the Labour Court, regarding Sunday premium for two hotel workers. The High Court found that the decision ignored an express

statement in the employment contracts of the workers concerned who were employed by the Trinity City Hotel. *(See Trinity Leisure Holdings ltd v Sofia Kolesnik an Natalia Alfimova, [2017] 81 MCA)*.

The case hinged on whether the pay for the workers incorporated having to work two out of three Sundays. Their contract of employment provided that their hourly rate of pay of €9.53 "includes your Sunday premium based on you getting every third Sunday off."

It was argued by the employer that the hourly rate was essentially the minimum wage (then €8.65), but owing to an obligation to work Sundays it was enhanced to €9.53. However, this was not explicitly provided for in their contract. The Labour Court in 2017 found the employer failed to provide evidence in relation to what, if any, element of the workers hourly rate of pay was specifically referable to the contractual obligation to work on Sundays. The Labour Court awarded the workers a 30% premium for all Sunday hours worked in the relevant period.

The High Court found that it was incorrect to say that there was no evidence before the Labour Court as regards the question as to whether or not the rate of pay took account of the requirement to work on Sundays. It was found the language used in the employment contract was plain and clear that the hourly rate of pay included the Sunday premium.

The Labour Court had also misinterpreted the Organisation of Working Time Act, 1997, by deeming an obligation on an employer *"to explain by way of a breakdown any statement to the effect that an hourly rate takes into account the obligation to work on a Sunday."*

The High Court clarified that if an employee wishes to assert that their rate of pay does not take account of Sunday working, then they must advance credible evidence to rebut any express provision of the contract. In other words, where the employee makes a claim under S.14(1) of the Organisation of Working Time Act, 1997 they must advance evidence to explain why he/she claims that what is stated in the contract is not correct.

6. Reasonable accommodation - *Daly v Nano Nagle school*

The Supreme Court in this case set out the core principles for dealing with a disabled employee. This could relate to a new recruit or an individual who develops a disability while in your employment. The law requires all employers to take appropriate measures to facilitate persons with disabilities in accessing ad participating in employment including adaption of equipment and premises and other adjustments to responsibilities / tasks or hours of work. Provided such measures are not disproportionate on the employer in question.

A critical aspect of this Supreme Court judgement was to state that employers should consider adjustments to core as well as non-core responsibilities / tasks.

The onus is on the employer to demonstrate that they considered all measures and where these were not entertained be able to show how they constituted a disproportionate burden on the employer.

The Supreme Court also stated that it would be wise for an employer to consult with the individual involved on the process of considering and evaluating options. This is important in terms of fair procedure. Public funding should be sought in assisting to cover any costs that might be involved in reasonable accommodation.

The onus of proof, as in most employment rights cases, rests with the employer once a prima facia case has been established, as such, employers must have records on the entire process, as outlined above, in order to successfully defend a case of discrimination based on disability.

7. Issue of Bogus Self-Employment in focus

In September 2019, Minister for Employment Affairs and Social Protection, Regina Doherty T.D. announced as part of a new *"Compliance and Anti-Fraud Strategy 2019-2023"* the intention to place a renewed focus on social welfare fraud and on bogus self-employment.

This has also occurred against a backdrop of assertions by the ICTU that bogus self-employment was estimated to cost the exchequer up to up to a quarter of a billion euro per year in lost PRSI contributions to the Social Insurance Fund, which pays for employment entitlements including jobseekers benefit and the state pension. Trade unions have

advocated that bogus self-employment will only be resolved when the Revenue Commissioners compel employers/contractors to register all workers as direct employees unless they can prove otherwise. The issue has been cited as being prominent in construction amongst other sectors.

Currently, S.251 and S.252 of the Social Welfare Consolidation Act 2005 prohibit employers from misclassifying employees as being self-employed. Sanctions include fines of up to €13,000 or imprisonment for a term of up to 3 years or both. The 'Scope' section in the Department currently determines employment status and ensures that the correct class of PRSI is being applied to workers. Some 60 cases were dealt with by the 'Scope' section YTD to the end of August 2019.

Key measures now being progressed include:

- The establishment of a new 'Employment Status Inspection Unit' of social welfare inspectors to investigate and determine the employment status of workers in larger cases.
- An existing team of 380 inspectors has received additional training in the area of employer inspections.
- Targeted and strategic inspections are underway to tackle false self-employment in a range of sectors.
- By the end of 2019, the Government plans to pass legislation to protect workers, (including on anti-victimisation) seeking a determination on employment status, and
- Revisions to the Code of Practice for Determining Employment or Self-Employment Status of Individuals (2007) are being finalised by an inter-departmental group by year end.

8. Pensions auto enrolment proposed by 2022

After many false starts, the Government on 30th October 2019 announced its revised plans for a new automatic enrolment pension system which could benefit 585,000 workers and confirmed its intention to introduce what will be a defined contribution scheme by 2022. Important elements include:

- The arrangements will apply where there is not an existing workplace pension;
- The automatic enrolment of current and new employees between 23 and 60 years of age and earning above €20,000;
- Employees earning below €20,000 per annum and employees aged under 23 and over 60 will be able to 'opt-in' to the system;
- Employees and employers will have to make a 1.5% minimum contribution for three years, which will increase by 1.5% every 3 years to a maximum of 6%c after 10 years;
- Employers will be required to make a matching (tax deductible) contribution on behalf of the employee i.e. at a specified contribution rate but limited to a qualifying earnings threshold of €75,000;
- There will be no employee waiting period before enrolment and employees will be automatically enrolled with a Central Processing Authority by their employer on commencement of employment;
- Contributions during the first six months of membership will be compulsory;
- Member opt-out of the system will be facilitated in a two month 'opt-out window' (between the start of the 7th month and the end of the 8th month);
- Members who opt-out will be automatically re-enrolled after three years but will have the ability to opt-out again;
- Early access to accumulated retirement savings may be provided on the grounds of ill health and enforced workplace retirement.

On review of the latest proposals, they do partly address business concerns about the rapid escalation of escalation of employer and employee contribution rates from 1% to 6% within six years. The plan now envisages an initial rate of 1.5% for three years followed by an increase of 1.5% every three years thereafter to a maximum of 6% in year 10.

However, Stratis is concerned that the proposals do not recognise the diversity of employment arrangements and would appear, in the absence of any employee waiting period before enrolment, to oblige employers to auto-enroll individuals who will be at significant risk of opting-out where they are employed for short periods. This includes short-term seasonal workers, casual workers and other workers on short fixed-term contracts.

Finally, employers remain concerned that the move to auto enrolment, which obliges contributions by both the employee to be then matched by the employer, could herald a wave of inflated pay claims over time where employees look to their employer for recompense for the employee minimum contribution which is to escalate over 10 years.

9. A Right to Disconnect

Over recent months, campaigns are being supported by several trade union, noticeably by the FSU in Ireland, for a right to disconnect. The Irish Government has signaled its intention to consider legislating for the issue. This refers to the right of employees to disconnect from their work and to not receive or answer any work-related emails, calls, or messages outside of normal working hours. Proponents argue that technological developments and mobile devices have allowed employees to perform their work anywhere and at any time. While acknowledging the benefits with this flexible approach to work, they point to the risks in eroding the barriers between working and leisure time. They also point to an implicit or explicit expectation to check emails at home and at night, as well as during weekends and holidays.

The right to disconnect would, if established, create boundaries around the use of electronic communication after working hours and provide employees with the right to not engage in any work-related activities at home. The right could also be extended to one of not being penalized for failing to connect, or conversely to be rewarded for staying connected.

The legal right to disconnect emerged in France in 2016 where a law was enacted that introduced the right to disconnect as a matter for mandatory negotiation in companies. Since then, in Spain a right to disconnect was included in a Data Protection Act 2018. In Italy a right to disconnect was contained in a law on "smart working" in 2017. Meanwhile, in Germany, a non-legal approach to the right to disconnect has been encouraged through negotiations between the social partners as a better way to secure disconnection.

Worryingly, the debate in Ireland appears to be taking in place in ignorance of the existing obligations under the Organisation of Working Time Act, 1997 which gives significant protection to the limits of working time with a requirement for record keeping by employers to show compliance. The onus is on the employer to ensure that employees do not work in excess of the maximum daily and weekly working hours prescribed in law and that they take their statutory rest breaks. Breaches of the legislation can attract a prosecution and fine as well as a civil claim and award of damages.

10. Hosting of the first Stratis Employment Relations Summit – '2020 Vision' on 28 November 2019

We are delighted with the positive reaction to our hosting of the first Stratis Employment Relations Summit – '2020 Vision' which will have a strong practitioner focus to the three Summit themes on 'Leading Employment Relations in a full Employment Economy':

- **Theme 1 - Meeting the Challenges of Leading Transformation and Change.**
- **Theme 2- The Journey Towards a 'World Class' Workplace Relations System – Where are we now?**
- **Theme 3 - Challenging Times for Private Sector Pay – 'The Next Phase of the Journey' for Total Rewards, Market Based Pay and the Employee Experience.**

We promise you some great insights and it is a must for anyone wishing to keep on top of pending employment relations issues as 2020 beckons. It's a full house but for any last minute bookings check out *www.stratis.ie/events*, email *events@stratis.ie* or call us at 01 9058555.

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