January 2019

International Employment Law

Sajai Singh
Deirdre Lynch

Recommended Citation
International Employment Law

SAJAI SINGH AND DEIRDRE LYNCH

This article reviews significant legal developments in India and Ireland during 2018 in the field of international employment law.

I. India
A. Rules for Creche Facilities Under the Maternity Benefit Act, 1961

The Maternity Benefit Act, 1961 was amended in 2017, enhancing maternity leave and requiring employers with more than fifty employees to provide creche facilities.1 Subsequently, the State of Haryana announced through a press release rules governing creche facilities.2 The State of Karnataka also published draft rules, inviting public comments prior to their promulgation.3

The Haryana rules and the Karnataka draft rules appear to be similar in many respects. By and large, they focus on the distance within which the creche is required to be located, the physical specifications of the creche, and the requirement to provide refreshments such as milk to children attending the creche. The Karnataka draft rules also require the creche to be operational during the working hours of the women availing themselves of the facility and require it to be located on the ground floor of the building.4

Employers may find it difficult to comply with some of the rule requirements. For example, many employers may find it difficult to comply with the requirement that the creche be situated on the ground floor of the building. Employers might also find it difficult to limit the creche to only thirty children.5

---

4. Id. §§ 2(i), 2(vi), 4.
5. Id. § 1.
B. Decriminalization of Homosexuality

In a landmark decision, the Supreme Court of India declared Section 377 of the Indian Penal Code, 1860 to be unconstitutional insofar as it criminalized private consensual same-sex relationships between two adults. Employers in India, who may have been hesitant to explicitly support their LGBTQ employees, may now be motivated to strengthen their diversity programs and to robustly show support for their LGBTQ employees.

C. Disclosure Requirements Related to Prevention of Sexual Harassment

The recently ratified Companies (Accounts) Amendment Rules, 2018 now require companies to disclose compliance with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“POSH Act”) in their boards’ reports.

The POSH Act requires an employer to constitute an Internal Committee (“IC”) to resolve sexual harassment complaints at the workplace. The IC must have an external member experienced in handling such matters and committed to the cause of women. A court may order reconstitution of the IC if it is not formed in accordance with the POSH Act.

The Delhi High Court ordered the reconstitution of one company’s IC where it believed that the external member did not have the requisite qualifications to handle matters of this nature. In this case, the external member was an employment lawyer. The court observed that although the member may have been experienced in handling labour matters, nothing in the record demonstrated that he was committed to the cause of women.

D. Amendment to the Payment of Gratuity Act, 1972 (“Gratuity Act”)

The Gratuity Act provides for social security benefits to employees on their retirement or their attaining superannuation. Payment of gratuity was capped at INR 10,00,000/-. By way of an amendment, which came into effect on March 29, 2018, this ceiling was revised to INR 20,00,000/-.  

---

6. Navtej Singh Johar & Ors. v. Union of India Thr. Secretary Ministry of Law and Justice, W. P. (Crl.) No. 76 of 2016 (Supreme Court of India) (Sept. 6, 2018).
9. Id. at ch. II, § 4(f). 
E. Right to Strike

The High Court of Himachal Pradesh, India, reaffirmed the legal position that the right to strike is not an absolute right and that it “is subject to reasonable restrictions.”12 The right of an Indian worker to strike has been recognized but has been qualified with the condition that the right to strike must be exercised peacefully.13 The courts will not tolerate violence and will not allow workers to take the “law into their own hands.”14 An employer’s management has every right to ensure that its work is not hindered or obstructed due to the strike. Therefore, when addressing the right to strike, a balance must be struck between competing interests.

II. Ireland

There were several legislative and judicial developments in Irish employment and labour law in 2018. These developments emerged in the context of continued economic recovery and a return to pre-economic crisis levels of employment. On January 1, 2018, the minimum wage increased to €9.55 per hour15 and on January 1, 2019, it is expected to increase to €9.80 per hour.16 Moreover, the rate of unemployment fell to a ten-year low of 5.3 percent in October of 2018.17 This rate was a marked decrease from the 6.6 percent rate of unemployment of October of the previous year and was a more than ten percent decrease from the post-crisis peak of 15.9 percent in early 2012.18

A. Disability and Reasonable Accommodation

The interpretation of disability law underwent a significant change in 2018. The Employment Equality Acts 1998–2015 prohibit discrimination on the grounds of disability19 and obligate employers to make reasonable accommodations regarding the recruitment, retention, promotion, and

13. Id. ¶ 9–10.
training of candidates and employees with disabilities. This obligation exists as long as it does not place a disproportionate burden on the employer.\textsuperscript{20}

Over the past twenty years, a voluminous body of case law has developed regarding the obligation to provide reasonable accommodation for disabled employees. Until recently, the principles applicable to the duty to make reasonable accommodation were those which emanated from a handful of early cases and the jurisprudence was relatively well-settled. As is often the case in employment law, it was the process adopted by the employer that was found to be in error in many cases. Employees were often able to show that their employers never considered whether a reasonable accommodation could have enabled the employees to carry out their duties.\textsuperscript{21}

On January 31, 2018, the Court of Appeal delivered a significant judgment concerning the extent of the employer’s obligation to provide reasonable accommodation.\textsuperscript{22} The Court unanimously held that the employer has an obligation to consider appropriate measures, including redistribution of tasks associated with a duty or duties attached to the position in order to enable the worker with a disability to be fully competent or capable of undertaking the duties attached to the position. But this obligation does not extend to consideration of the removal of a duty which is “a main duty or essential function of the position concerned by the redistribution of all tasks demanded by that duty.”\textsuperscript{23} The Court held that there is not a freestanding obligation on an employer to carry out an evaluation of reasonable accommodation for an employee. The Court further held that where no reasonable adjustments can be made for a worker with a disability, the employer is not liable for failing to consider the matter. The Court decided that “[i]t is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated the fact that the process of decision is flawed does not avail the employee.”\textsuperscript{24} The decision has been appealed to the Supreme Court.\textsuperscript{25}

\section*{B. Mandatory Retirement}

Following a period of consultation with employer and employee representative organizations, the Workplace Relations Commission published the Code of Practice on Longer Working in December 2017.\textsuperscript{26} The Code’s objective is to provide best practice on managing the engagement between employers and employees in the period of time leading to retirement. The Code is not legally binding; however, compliance with

\begin{footnotesize}
\begin{enumerate}
\item Id. § 16(3)(c).
\item \textit{E.g., A Meat Worker v. A Meat Processor} [2016] 27 ELR 322 (Ir.).
\item \textit{Nano Nagle School v Daly} [2018] IECA 11 [2018] 29 E.L.R. 249 (Ir.).
\item Id. ¶ 32.
\item Id. ¶ 63.
\item \textit{Nano Nagle School v Marie Daly} [2018] IESCDET 103 (Unreported, SC, July 6, 2018) (Ir.).
\end{enumerate}
\end{footnotesize}
its provisions will assist employers in defending against claims of discrimination in relation to retirement.

The Code advises employers that, as an employee is nearing retirement age, it is good practice to notify the employee of his or her contractual retirement date approximately six to twelve months before that date arrives and thereafter to engage in a period of consultative guidance through notifications in writing and face-to-face meetings. The Code also provides examples of legitimate objectives which an employer could cite as grounds for imposing a mandatory retirement age: intergenerational fairness in order to allow younger workers to progress; “[m]otivation and dynamism through the increased prospect of promotion”; health and safety (which is generally only applicable in “safety critical occupations”); the “[c]reation of a balanced age structure in the workforce”; “personal and professional dignity,” such as “avoiding capability issues” as employees age; and for succession planning.27

C. LEGAL REPRESENTATION DURING DISCIPLINARY PROCESS

The Court of Appeal recently settled a year of uncertainty as to whether an employee, subject to a disciplinary investigation, is entitled to legal representation during the investigation. In May 2017, the High Court suggested that the full panoply of fair procedures is available to an employee during the investigation stage of a disciplinary procedure, including the right to cross-examine witnesses and the right to be legally represented.28 This decision was quickly followed by two further High Court decisions,29 which appeared to run contrary to those findings. On these subsequent occasions, the High Court concluded that the rights to legal representation and cross-examination of witnesses are confined to the formal disciplinary hearing stage—the point at which an adverse decision against the employee can be made and not before.30

On October 31, 2018, the Court of Appeal emphasized that employees who are the subject of internal disciplinary inquiries will not normally be entitled to have legal representation during such inquiries.31 The Court of Appeal found that whether an entitlement to legal representation arises depends on the circumstances of each case. Circumstances which must be considered are as follows: “the seriousness of the charge” and the proposed penalty; whether any points of law are likely to arise; “the capacity of the particular [person] to present his [or her] own case”; procedural difficulty; “the need for reasonable speed in making the adjudication”; and “the need for reasonable speed in making the adjudication”;

27. Id.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW
for fairness" between the different categories of people involved in the process.\textsuperscript{32} The Court of Appeal was not asked to determine the status of the right to cross-examine on this occasion, so there is still incongruity in judicial guidance concerning when this right crystallizes for an employee during the disciplinary process.

\textsuperscript{32} Id. ¶ 38.