General Scheme of a Work-life Balance Directive and Miscellaneous Provisions Bill 2022

Ibec submission to the Joint Oireachtas Committee on Children, Equality, Disability, Integration and Youth

9 May 2022

Executive summary

The transposition of EU Directive 2019/1158 on work-life balance for parents and carers will result in significant changes to Irish employment legislation, in what is already an increasingly over regulated environment with legislative proposals on both statutory sick pay and the right to request remote working imminent. Ibec submits that it is imperative that the transposition of the Directive does not give rise to any further unnecessary cost and administrative burden on employers and, respectfully submits that the transposition exercise must remain cognisant of the continuing need for employers to sustain employment and remain competitive at a time when they continue to face the challenges of both Brexit and the Covid pandemic. Ibec submits that it is vital that the transposition exercise goes no further than necessary in transposing the minimum requirements of the Directive.

In summarising our key concerns, Ibec submits as follows:

Flexible working arrangements

- Section 6(A) provides for a right to request flexible working arrangements, yet does not define "flexible working arrangements". Ibec submits that the lack of precision and clarity will result in a potentially wide and unintended remit of arrangements being requested, including remote working, compressed hours, 4-day week, part-time work, flexi-work, reduced hours, many of which, due to their incompatibility, simply cannot form part of the working arrangements for many employers across various sectors/industries. Where they can be accommodated, for many businesses, and in particular SMEs, they are unsustainable and unaffordable

- Section 6(A)(4) requires an employee to have 6 months continuous service before "*a period of flexible working arrangements can commence*". Ibec submits that the legislation should be amended to require an employee to have 6 months continuous service before a request can be made in the first instance, rather than when the agreed arrangement can commence

- Section 6(A)(6) requires an employer to respond to a request within 4 weeks of the receipt of the request, which Ibec submits is wholly unreasonable. Ibec notes the 4-week period can be extended by a further 8 weeks, where an employer has "*difficulty in assessing the viability of a request".* However, that extension is subject to the employee's agreement. Ibec

submits that employers must have 12 weeks, from the date of receipt of request, to respond to all requests, which must not be subject to employee agreement. Ibec submits that 12 weeks is a reasonable time period within which an employer must respond, as provided for in the Right to Request Remote Work Bill 2022

- Section 6A provides a right for parents of children, up to a specified age, to request flexible working arrangements. Ibec submits that the age should be 8 years, as provided for in Article 6 of the Directive, and not 12 years as proposed by the Department

- Section 6A provides no limit on the number of requests a parent or carer can make for flexible working arrangements. Ibec submits that it is entirely reasonable that a request can only be made once in a 12-month period, to reduce any unnecessary cost and administrative burden on employers

- Section 6(A)(9) provides a number of grounds upon which an employer can postpone the commencement of flexible working arrangements. However, the proposed Bill provides no grounds upon which an employer can refuse a request, despite being statutorily required to give an employee a reason for declination in writing. Ibec submits that the grounds for refusing a remote work request, as set out in Head 12 of the Right to request Remote Work Bill 2022, in addition to a number of other proposed grounds, set out below, must be provided for in the proposed Bill, as grounds to refuse a flexible working request

- Section 6(A)(9) provides a number of grounds for postponement which represent relevant business grounds, however, Ibec submits that the grounds must be expanded upon to include those grounds for refusal, as provided for in Head 12 of the Right to Request Remote Work Bill 2022

- Section 21 of the Parental Leave Act 1998 will be amended to ensure that a decision of the WRC "*may contain a direction*" relating a claim brought under the proposed Bill. Ibec submits that the right to bring a claim to the WRC must not extend to the reasons for the postponement and/or refusal as the legislation provides a right to request, not a right to, flexible working arrangements. Furthermore, the WRC has no jurisdiction to determine grounds of refusal pertaining to an employee's home, arising from a remote work request as a form of flexible working.

<u>Leave for medical care purposes</u>

- there is no requirement for the Department to provide a new statutory leave for medical care purposes, resulting in a further unnecessary cost burden on employers, considering that there already exists 2 years of carer's leave which, Ibec submits, already meets the objectives of the Directive

- Section 13(a)(3) allows notice of an intention to take the leave to be given retrospectively. Ibec submits that an employee must be required to give a reasonable period of prior notice, and Ibec submits that at least 4 weeks' notice should be required before the leave can be taken

- S13(A) does not require a minimum service requirement before which leave can be taken, which will present significant challenges for employers. Ibec submits that at least 6 months continuous service is required.

Extension of breastfeeding breaks

- proposing to extend a paid entitlement to breastfeeding breaks from 26 weeks to 104 weeks not only represents a significant unprecedented increase but will give rise to significant cost burden and operational challenges for employers

- any increase must be done on an incremental basis, to reduce the significant cost impact on employers, and Ibec submits that increasing the paid entitlements to 52 weeks in the first instance is a more reasonable and balanced approach. Any extension beyond 52 weeks from the date of confinement should be unpaid.

Introduction

Ibec welcomes the opportunity afforded by the Joint Oireachtas Committee on Children, Equality, Disability, Integration and Youth to submits our views and the opportunity afforded by the Department of Children, Equality, Disability, Integration and Youth (hereinafter referred to as "the Department") to participate in the framing of the General Scheme of a Work-life Balance Directive and Miscellaneous Provisions Bill 2022 (hereinafter referred to as the "General Scheme") on the transposition of EU Directive 2019/1158 on work-life balance for parents and carers (hereinafter referred to as "the Directive").

The Directive, arising from one of the deliverables of the European Pillar of Social Rights, aims to address the work-life balance challenges faced by working parents and carers, resulting in a further work-life balance initiative being transposed into national legislation. Although Ibec acknowledges the importance of work-life balance initiatives, it is the case that any further legislative measure will give rise to a cost and administrative burden for employers in what is already an over regulated environment. Ibec submits that it is imperative that the General Scheme does not go any further than necessary in transposing the minimum requirements of the Directive.

Part 2

Head 3 – Right to request flexible working arrangements for caring purposes

Article 9 provides that members states shall take the necessary measures to ensure that workers with children up to a specified age, which shall be at least eight years, and carers, have the right to flexible working arrangements for caring purposes. The General Scheme proposes to amend the Parental Leave Act to insert a new section 6(A) to transpose Article 9 of the Directive. Ibec submits that the General Scheme gives rise to the following concerns:

(i) Flexible working arrangements

Although the General Scheme provides for a right to request flexible working, the Scheme, unlike the Directive does not define what are "flexible working arrangements", referring only to an entitlement to request "changes to his/her working arrangement, work patterns or hours of work", which will apply for a set period of time. Article 2(f) of the Directive defines "flexible working arrangements" as "*meaning the possibility for workers to adjust their working patterns, including through the use of remote working arrangements, flexible working schedules, or reduced hours*". Having a definition open to interpretation, lacking precision and clarity will lead to ambiguity, resulting in a potentially wide and unintended remit of arrangements being requested. Ibec submits that there is an obligation on legislators to ensure that definitions are clear and precise, to avoid any unnecessary ambiguity.

Ibec submits that a reference to a right to change his or her "working arrangements" is too broad and would encompass numerous arrangements that not only give rise to significant challenges for employers but are simply not suitable to many employments, including remote working. It is the case, as recognised by the National Remote Work Strategy, that remote making is simply not compatible with many employments. Given the nature of their industry/sector, remote working simply cannot form part of their working arrangements. Furthermore, Ibec submits that the cost

impact is such that, for many employers, in the absence of financial support from the State, the feasibility of remote working as a flexible working solution will be greatly impacted. As the burden of many of the associated costs will fall to employers, appropriate supports must be put in place by Government. These supports must be easily and rapidly accessible and made available in step with the introduction of this proposed legislation.

Flexible working solutions are very much tailored to the individual requirements of the business and/or sector and not suitable or appropriate for all businesses. Therefore, it is essential where flexible working solutions are considered they are done at enterprise level and remain wholly at the employer's discretion. Given the impact of the pandemic on businesses, it is the case that many businesses, particularly SMEs and those within sectors detrimentally impacted by Covid, would not be in a position to offer flexible working arrangements including varying start and finish times, flexi-time, part-time and compressed hours. Arising from the pandemic, many businesses had no option but to effect redundancies in order to reduce costs and remain viable. With fewer employees, being able to facilitate flexible working solutions has been significantly curtailed.

Should an employee request flexible working arrangements in the form of part-time work, flexi- time or compressed hours, there is an inevitable cost for employers in excess of any administrative burden. Employers will incur significant cost in ensuring that any flexible working arrangement that is agreed does not adversely impact the competitiveness of the business or other employees. This will mean that where an employer accommodates flexible working in the form of, for example, part-time work, he/she will generally need to recruit to ensure that business needs and customer demands are met on the days that the employee is not working. Should a 4 day working week or compressed work schedule form the basis of a flexible working arrangement, the fact remains that for many companies, across a number of industries and sectors, a 4 day working week simply does not work. Similar to how certain roles cannot be carried out remotely, certain roles cannot be compressed into four days without reducing the corresponding service offering to four days, which for many businesses, organisations, clients and service users is simply not feasible. Even in sectors where a 4 day week would theoretically work, an employer will bear the cost of having to recruit to cover the fifth day in a traditional 5 day role, giving rise to a disproportionate cost burden. An employer will need to ensure the availability of staff to whom duties can be re-allocated during periods where employees are working in a flexible manner. Considering the rapid increase in leave entitlements in the last number of years, that burden has only been heightened for employers.

Although Ibec acknowledges the importance of work life balance initiatives, Ibec submits that any work-life balance initiative must not be based on a misplaced assumption that a one-size fits all, any such approach will give rise to a significant cost burden for employers and give employees an expectation that their role lends itself to a working arrangement that simply cannot be accommodated.

(ii) Age of the child before which a request can be made

Section 6A provides a right for parents of children, up to a specified age, to request flexible working arrangements. Article 6 of the Directive states that the specified age shall be at least eight years. Ibec notes from the Department's announcement of the publication of the General Scheme on 21 April 2022, that the proposed legislation will align with the Parental leave Act 1998, as amended, and allow parents of children up to the age of 12 to request flexible working arrangements. Ibec submits that transposing a requirement in excess of the minimum requirements of the Directive will give rise to an unnecessary and avoidable additional cost for employers, and respectfully submits

that the Department should provide for a right for parents of children up to the age of 8 years, in accordance with the Directive.

(iii) 6 month service requirement

Section 6(A)(4) states that a period of flexible working arrangements for caring purposes shall not commence before a time when the employee concerned has completed six months continuous employment with the employer from whose employment the leave is taken. Ibec submits that this provision raises significant concerns, as it requires 6 months continuous service before the flexible working arrangements can commence, rather than 6 months continuous service before the request can be made in the first instance. Ibec submits that the transposition is not aligned with the requirement as set out in Article 9 of the Directive and goes beyond what is required. Article 9 (4) states that "*member states may make the right to request flexible working arrangements subject to a period of work qualification or to a length of service qualification, which shall not exceed 6 months*". It is clear from Article 9(4) that the service requirement is a pre-requisite to requesting the arrangements, not the commencement of same.

Stipulating that the 6-month service requirement is a pre-condition to the commencement of the working arrangements, rather than the right to request, will have significant adverse consequences for employers. S6(A)(5) states that an employee who proposes to request flexible working arrangement shall, not later than 6 weeks before the proposed commencement of the set period, give notice in writing. Therefore, an employee could make the request having completed 4 and a half months of continuous employment, for those arrangements to commence after 6 months continuous service. Ibec submits that this is contrary to Article 9(4) and respectfully submits that the provision be amended to ensure that a request cannot be made until such time as the employee has 6 months continuous service.

Not only would that be in line with the Directive but Ibec refers to the recently published Right to Request Remote Working Bill 2022, provides, at Head 6, that " *an employee shall be entitled to submit a request for remote working when the employee concerned has completed at least 26 weeks continuous service with the employer from whose employment the employee is seeking the arrangement to work remotely*". It is the case that an employee will only be eligible to submit a request to work remotely once they have 6 months continuous service, which Ibec submits must be the same for a request to work in a flexible manner.

Ibec submits that a 6 month service requirement is the absolute minimum that is necessary before a request can be submitted. Probationary periods, which are at least 6 months in duration, are a key contractual mechanism to allow for a trial period in which an employer can evaluate an employee's suitability and compatibility for a role and allows employees the opportunity to also determine their own compatibility. Evaluating an employee's suitability within a role requires at least 6 months to enable employers to adequately onboard and train new starters and to give time to assess employees' performance and development. Importantly, it also allows employees the opportunity to integrate, onsite, within the organisation at a time when employees are returning to the workplace following the lifting of restrictions imposed by the Covid-19 pandemic.

Ibec refers to Article 8(1) of Directive EU 2019/1152 on transparent and predictable working conditions in the European Union, due to be transposed by August 2022, which requires member states to ensure that where an employment is subject to a probationary period, as defined in national law and practice, that it shall not exceed 6 months. Should the EU Directive harmonise probationary periods across the EU to 6 months, recognising that it takes 6 months to determine

one’s compatibility and suitability for a role, Ibec submits that an employee must have 6 months service to make a request to work flexibly in the first instance.

(iv) Time limits to respond to request

Section 6(A)(6) provides that once a request is received that an employer shall consider the request, and, as soon as reasonably practicable but not later than 4 weeks after such receipt, shall comply with the request or inform the employee of the grounds for refusal or, postponement. However, subsection (7) further provides that where the employer is experiencing “*difficulty in assessing the viability of a request*”, the 4-week period to return a decision may be extended by a further 8 weeks, “*with the agreement of the employee only*”. Although Ibec welcomes the fact that employers can extend the time period to respond by 8 weeks, Ibec is concerned that any such extension is wholly dependent on the employee’s agreement, which effectively amounts to no ability to extend at all.

Requiring an employer to respond to any request within 4 weeks of receipt of the request is hugely challenging for employers, in which time an employer is not only obligated to consider but must also consult with the employee as to the viability of the request. At a time where numerous forms of protected leaves are currently available to employees, it is the case that an employer may have a number of employees within a particular team absent on various forms of leave or, already availing of flexible work arrangements. Not only may an employer not be in a position to accommodate flexible working arrangements but assessing the viability of same within 4 weeks is entirely disproportionate. Determining the viability of a request, in light of business needs and operational demands, and ensuring the parties are available to engage within that timeframe is unrealistic. Ibec submits that providing for a 4 weeks response time will be ultimately detrimental to an employee, whereby an employer will consider and consult, but perhaps not to the extent desired, in order to meet the 4 week time limit. Ibec submits that employers must be given 12 weeks to respond to all requests, regardless of whether there exists a difficulty in assessing the viability of same.

Ibec refers to Head 10(2) of the Right to Request Remote Work Bill 2022 which states that “*an employer shall return a decision within a reasonable time period, and in any event the time period shall not exceed 12 weeks from receipt of the request”.* Ibec submits that if an employer has up to 12 weeks to respond to a remote work request, which the Bill recognises as a “reasonable” time period, then surely a 4 week period to respond to a flexible working arrangement request is entirely unreasonable. It is the case that a flexible working request could be more complex than a remote working request, given that remote working is just one form of flexible working, and therefore, Ibec respectfully submits that requiring an employer to respond within 4 weeks is simply unworkable for many employers. Ibec submits that a 12 week period, from the date of receipt of the request, that is not subject, in any way, to an employee’s agreement, is a reasonable time frame.

(v) No limitation on number of requests

The General Scheme provides an entitlement to parents and carers to request flexible working arrangements for caring purposes. However, the Scheme does not provide any limitation on how many requests can be made or, whether a period of parental leave or medical care leave must be taken in the first instance before a request can be made. Section 6(A)(1) states that an employee “*with an entitlement under section 6(1) may request, in accordance with subsection (5), changes to his/her working arrangements and/hours and/or patterns, for caring purposes, to apply for a set period of time*”. Therefore, should an employee have an entitlement to parental leave, rather than having taken a period of parental leave, they are entitled to make a request. Given that the

entitlement arises up until the child is 12 years old, Ibec questions how many times an employee can make a request.

It is imperative that a limitation is placed on the number of times a request can be made, to ensure a disproportionate administrative burden is not placed on employers. Ibec submits that the right to request should be limited to one request within a 12 month period. Ibec refers to Head 7 of the Right to Request Remote Work Bill 2022 which provides that an employee requires 12 months continuous employment following a previous request or, the outcome of an appeal process, whichever is later, before a further remote working request can be made. It is clear, as confirmed in the explanatory note of Head 7, that the "*intention is that an employee will not be able to submit constant requests and that where the employer has diligently completed the assessment process and any appeal that the employee will have to wait a period of 12 months to submit another request*". Ibec submits, that as provided for in the draft remote work legislation, that the General Scheme must provide a limitation on the number of flexible work requests that can be made.

Should it be a case that the employee can make a request having taken a period of leave of parental or medical care leave, Ibec submits that this also raises a number of concerns for employers given the fragmented manner in which both parental and medical care leave can be taken. Given that parental leave can be taken in a fragmented manner (as will also be the case with medical care leave), it would mean that an employee who takes, for example, every Friday as a period of parental leave could arguably request a change to working hours every Monday morning, which is a significant disproportionate burden on employers. This is currently the case with s15(A) of the Parental Leave Act 1998, as amended, which allows an employee to request a change to their working hours and/patterns "*following his or her return to work*". An employee taking every Friday, as "*a period of parental leave*", returns to work every Monday and therefore could, theoretically, make a request every Monday. Ibec submits that it is imperative that an employee can only make one request within a 12 month period.

(vi) Grounds for postponement and/or refusal

Ibec notes that section 6(A)(6) of the General Scheme states that an employer who receives a request shall consider the request, having regard to his or her needs and the employee's needs and, as soon as reasonably practicable, but not later than 4 weeks after such receipt, shall (a) comply with the request, (b) inform the employee in writing of the grounds for postponement of the commencement of the flexible working conditions, or (c) inform the employee in writing that the request has been refused and the grounds for refusal.

It is clear from the General Scheme and Article 9(2) of the Directive that an employer must provide written reasons for both postponing and refusing the request. Section 6(9) provides a number of grounds for postponing the commencement of a flexible working arrangement. However, despite being statutorily required to provide written reasons for refusal, the General Scheme provides no grounds upon which an employer may refuse. Ibec submits that it is imperative that the proposed legislation provides grounds upon which an employer can refuse, considering that an employer must give that reason in writing to an employee which may be open to challenge. Considering that the legislative proposal will provide a right to request rather than a right to flexible working arrangements, grounds for refusal that are fair, clear and objective must be provided.

Should "*changes to working arrangements*" include remote working, as anticipated by Article 2 of the Directive, resulting in an employee requesting to work from home, it is imperative that an employer can refuse the request where the employee's home, as a place of work, is not a suitable

place of work. Ibec submits that in requesting remote work, as a flexible work arrangement, an employee must propose a suitable place of work, including a self-assessment of the suitability of the proposed remote work location, compliant with data protection legislation, confidentiality and intellectual property, analogous to Head 8 of the Right to Request Remote Work Bill 2022.

Ibec submits that flexible working arrangements, including remote working, compressed hours, 4 day working week, simply cannot lend themselves to every industry/employment/role, and it is imperative that this is provided for in the grounds for refusal. Ibec refers to Head 12 of the Right to Request Remote Work Bill 2022, which allows an employer to decline a request where satisfied that the request is not suitable on business grounds. Head 12 (3) provides that the "business grounds" relied upon by the employer may include, but are not limited to:

a) The Nature of the work not allowing for the work to be done remotely

(b) Cannot reorganise work among existing staff

(c) Potential Negative impact on quality of business product or service

(d) Potential Negative impact on performance of employee or other employees

(e) Burden of Additional Costs, taking into account the financial and other costs entailed and the scale and financial resources of the employer's business

(f) Concerns for the protection of business confidentiality or intellectual property

(g) Concerns for the suitability of the proposed workspace on health and safety grounds

(h) Concerns for the suitability of the proposed workspace on data protection grounds

(i) Concerns for the internet connectivity of the proposed remote working location

(j) Concerns for the commute between the proposed remote working location and employer's onsite location

(k) The proposed remote working arrangement conflicts with the provisions of an applicable collective agreement

(l) Planned structural changes would render any of (a) to (k) applicable

(m) Employee is the subject of ongoing or recently concluded formal disciplinary process

Ibec submits that the above grounds are fair, objective and reasonable, and should be included in the General Scheme as grounds upon which an employer can refuse a request for flexible working arrangements. It is important to emphasise the need for employers to be given discretion to consider requests for flexible work in accordance with their own business needs, and to reject those requests which are not suitable for business and operational reasons.

Ibec submits that in addition to the thirteen grounds outlined above, Ibec submits that the following business and operational grounds for refusal should also be included to the aforementioned list:

- Seasonal variations in volume and/or demands of the business
- Number of employees already availing of flexible working arrangements
- Number of employees availing of periods of leave including sick leave and protected leaves
- Adverse impact on innovation, collaboration and/or productivity

Ibec submits that it is imperative that an employer can refuse a request where a number of other employees within the employment and/or relevant team are on various forms of leave. This is vital considering the numerous forms of protected leaves currently available to employees and those that will be made available[1] , in addition to the dramatic increase in the duration of numerous leaves in recent years, aimed at improving work-life balance. Ibec submits that it is the case that an employer may have a number of employees within a particular team absent on various forms of leave, many for an extensive period of time, and, as such, simply cannot accommodate a flexible work arrangement.

Although the grounds set out in the General Scheme upon which an employer can postpone a period of flexible working are limited business grounds, Ibec submits that the above mentioned, non-exhaustive list must also be the grounds upon which a period of flexible working can be postponed.

(vii) Challenging the grounds of postponement and/or refusal

Ibec notes that section 21 of the Parental Leave Act 1998 will be amended to ensure that a decision of the WRC "*may contain a direction*" relating a claim brought under the proposed Bill. Ibec submits that an employee's right to complain to the WRC must not extend to a right to complain in respect of the substance or merits of an employer's decision to decline a request or postpone the commencement of the flexible working arrangements, which would be entirely appropriate and in keeping with the purpose and intent of the legislation. The proposed legislation provides a right to request flexible working arrangements, not a right to flexible working arrangements and, therefore, any legislative measure that allows for the merits and validity of an employer's grounds for refusal or postponement to be challenged is not only entirely inappropriate but will provide a right that is not intended, nor can be provided for in the legislation. Ibec notes that the grounds for postponement are similar to those for postponing a period of parental leave. However, an employee who meets the pre-conditions of s(6) of the Parental Leave Act 1998, as amended, is entitled to parental leave, not just the right to request the leave. However, an employee has no entitlement to flexible working arrangements, only to right to request and therefore, an employer's grounds for refusal should not be the subject of challenge.

Should the legislation allow an employee to challenge the substantive grounds of an employer's decision to refuse a request, it raises significant challenges, mostly particularly for the Workplace Relations Commission (WRC). Should an employee be able to challenge the ground upon which the request has been refused, the WRC must determine whether that ground for refusal is with or, without merit. Where an employee requests remote working, as a flexible working arrangement, although remote work could be hub working, the proposed working location will be, for the most part, the employee's home. Determining whether an employer was unable to re-organise work among existing employees is one thing, but how could the WRC determine whether the employee's workspace is suitable on health and safety grounds, data protection grounds or, whether there are concerns for the internet connectivity in the proposed working location?

Although the proposed working location is a place of work, in accordance with the Safety, Health and Welfare at Work Act 2005, it is the employee's home, and the WRC has no jurisdiction to determine matters arising in the employee's private property including the suitability or, otherwise of that property. There are clearly significant difficulties with the WRC being able to objectively

[1] Introduction of medical care leave and flexible working arrangements in August 2022 on the transposition of the Work-Life Balance Directive and the further extension of parent's leave to 7 weeks in August 2022 and 9 weeks in August 2024, in addition to the introduction of statutory sick leave later this year

determine whether the employee's home poses any risk to the employer's intellectual property or whether the employee's home has sufficient safeguards to protect the confidentiality of the employer's property. How could the WRC objectively determine that is the case without having sight of the employee's home? If the WRC has no jurisdiction to determine the merits of the grounds for refusal that pertain to the employee's home, how can it determine whether that ground for refusal was valid or not? Not only is it imperative that the legislation does not allow the grounds for postponement or refusal to be challenged, but there is no jurisdiction, Ibec submits, for the WRC to do so.

Ibec submits that requiring an employer to consider the request and provide written reasons for refusal or postponement in writing is entirely sufficient and meets the minimum requirements of the Directive.

(viii) Right to return to original working arrangements

Section 6(A)(18) provides that "*on the expiration of the period of flexible working the employee concerned shall be entitled to return to the original working arrangements, hours or pattern, or all as the case may be, that he or she held immediately before the commencement of the period*." Ibec submits that the transposition must provide that where it is not reasonably practicable for the employee to return to their original working arrangements, that an employee can be offered a suitable alternative. It may be the case that where an employee requests flexible working in the form of reduced hours or, a 4 day week for an extensive period of time, that, when the period of flexible work expires, the original working pattern is simply no longer available due to business and operational reasons. Providing for a statutory entitlement to return to the original arrangement only will detrimentally impact an employer's ability to meet business needs and remain competitive. Even where an employee is on a form of protected leave, including parental, maternity, adoptive and carer's leave, employment legislation provides for a suitable alternative role, where returning to the original role is not reasonably practicable. Ibec submits that flexible working arrangements are not even a protected form of leave/arrangement, and, therefore, it is vital that an alternative is available, where returning to the original work arrangement is no longer reasonably practicable.

Head 4

Leave for medical care purposes

(i) Introduction of a new form of leave for medical care

Article 6 of the Directive requires member states to take the necessary measures to ensure that each worker has the right to carer's leave of five working days per year. Article 3 defines carer's leave as meaning "*leave from work for workers in order to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each member state*". Recital 27 sets down the basis for the entitlement as being to provide men and women, with caring responsibilities, with greater opportunities in the workforce.

The Department proposes to amend the Parental Leave Act 1998 by introducing section 13(A) to provide for a leave for medical care purposes, where for "serious" medical reasons the employee is required to provide personal care or, support to a person specified in s13(A)(2). Subsection (2) sets out a broad range of relatives and includes a person who lives in the same household as the employee.

Ibec submits that a leave to meet the minimum requirements of the Directive already exists. Section 6 of the Carer's Leave Act 2001 provides an entitlement to 104 weeks of state paid carer's leave for the purpose of providing full-time care and attention to a relevant person. Whether the person is a relevant person is a matter for the Department of Social Protection. Section 99(1) of the Social Welfare (Consolidation) Act 2005 defines "relevant person" as "*a person who has a disability that he or she requires full-time care and attention*". Notably, it is not a pre-requisite that the person must be a relative or a person within the same household, in order for an entitlement to carer's leave to arise, therefore section 6 already goes beyond the requirements of the Directive. The Directive requires the person who requires the care and support to have a "serious medical reason", which Ibec submits is already the case under the 2001 Act. Section 6 of the 2001 Act requires that the relevant person requires "full-time care and attention", which is defined by section 99(2) of the Social Welfare (Consolidation) Act 2005 as being where:

(a) the person has such a disability that he or she requires from another person
    a. continual supervision and frequent assistance throughout the day in connection with normal bodily functions, or
    b. continual supervision in order to avoid danger to himself or herself, and
(b) the nature and extent of his or her disability has been certified in the prescribed manner by a medical practitioner

Article 3(d) and (e) of the Directive requires the care and/or support for the significant medical reason to be "significant". Ibec notes that the General Scheme requires that the employee "*is required to provide personal care or support to a person*", and in doing so fails to require that the support and/or care is "significant", as required by the Directive. Ibec respectfully submits that the Scheme must be amended to require that the medical reason is "significant". Ibec submits that section 6 already provides a right to provide significant care and/or support to a person with a serious medical reason, and, therefore, no new leave is required to meet the minimum requirements of the Directive.

Ibec submits that the Carer's Act 2001 not only meets the requirements of the Directive but goes far beyond in providing for 104 weeks state paid leave to provide full time care and attention to a relevant person, which is in no way limited to a relative or a person in the same household. The Directive does not stipulate that the leave should be taken with no prior notice and with no service requirement, rather the Directive allows members states to determine additional details regarding the scope and conditions of carer's leave, in accordance with national law and practice. Ibec submits that carer's leave already exists to meet the requirements of the Directive.

(ii) No prior notice requirement

Section 13(A)(3) states that "*when an employee takes or intends to take leave for medical care purposes, he or she shall, as soon as reasonably practicable, give to his or her employer in writing, confirmation that he or she has taken or intends to take such leave*". Section 13(A)(3) does not require that prior notice of the leave is given. Ibec submits that allowing an employee to take a period of leave, of up to 5 continuous days, without any prior notice whatsoever, is entirely disproportionate and will have significant implications for companies, not least in replacing niche skills with little or, no notice. Although the Directive sets out that member states are required to transpose a leave for employees who need to provide significant care or support to a person with a serious medical condition, there is nothing within the Directive, binding or otherwise, that requires that such leave is one which must be given where no prior notice is required. Ibec submits that

requiring no prior notice at all should only arise where the nature of the leave is urgent and immediate, and Ibec submits that force majeure, a paid leave, already exists to meet that purpose.

Section 13 provides for an entitlement to force majeure leave which may be availed of in cases where a family member is ill or injured. It follows that, by virtue of its immediate and urgent nature, force majeure leave is applied retrospectively. Ibec questions why medical care leave could be applied retrospectively when there is no pre-condition of immediacy within the Directive or, the General Scheme. If the intention is that the proposed leave envisages an element of urgency, then Ibec submits paid leave in the form of force majeure already exists. If the proposed leave is not urgent or immediate in nature, as Ibec understands to be the case, then Ibec submits that carer's leave of up to 104 weeks already exists. Without prejudice to the aforementioned, should the Department introduce a new form of leave, it is vital that prior notice, of at least 4 weeks, is provided by an employee to avail of the leave.

Where an employee takes a period of leave, an employer often must put in place, with no notice, alternative arrangements for the performance of the employee's duties. This presents challenges in ensuring temporary cover is available at very short notice, the cost incurred in so doing and the inevitable fall in productivity or, output which can impact adversely on an employer's business. A number of factors will determine the alternative arrangements that an employer must make to cover the performance of the employee's duties whilst on statutory sick leave, including skills required ability to re-allocate duties, the nature of the role, and importantly the duration of the leave.

The General Scheme allows for the five working days to be taken in periods of not less than one day. Therefore, it is clear that the leave can be taken as a continuous period of 5 days or fragmented in periods of not less than one day. Should an employee take medical care leave in a fragmented manner as non-consecutive days, or indeed as a continuous period of 5 days, an employer must for each period of leave ensure that the employee's duties are re-allocated in a manner that reduces the impact on the business. In the current environment, it is the case that many employers are already facing challenges in replacing key skills and sourcing talent, putting huge pressure on costs, particularly where specialist skills are required.

Given the constraints on employers imposed by the Employment (Miscellaneous Provisions) Act 2018, which limits the flexibility by which employers can engage casual workers at short notice, the introduction of yet another statutory leave that requires little or no notice will have a significant impact on employers in many sectors, including retail, hospitality, health care and the disability sector, in their efforts to obtain replacement staff to cover periods of leave for employees who may only have been in their role for a matter of days or weeks.

(iii) No service requirement

Ibec notes from the Explanatory Note on Head 4, that an employee does not require any service before which he/she can avail of a period of medical care leave. Ibec submits that any such provision will have a detrimental impact on employers. Ibec recognises that force majeure leave, given its immediate and urgent nature, does not require any service requirement to be availed of. Although the process outlined in the General Scheme, for applying for medical care leave is analogous to force majeure leave, the fact remains that the leaves are different in nature. If medical care leave does not have an urgency or immediacy to it, as is clear from the Directive, Ibec questions why employees are not required to have a certain amount of continuous employment before being entitled to the leave, similar to other leaves including parental leave and carer's leave.

Leave for medical care reasons is yet a further measure being introduced to improve work-life balance for parents and carers, in addition to a number of generous statutory leaves that already exist and the imminent introduction of a right to request remote work. These leaves and/or arrangements require a minimum service requirement before the leave can be availed of, which is necessary to ensure that employers can meet their business and operational needs. Ibec submits that the proposed legislation will allow a situation whereby an employee could commence employment with an employer on 1 December and on 2 December, with one day's service, and with no prior notice whatsoever, takes 5 days medical care leave. This would have a detrimental impact on any employer across numerous industries, in replacing key skills at work notice, but would significantly impact those within critical skills sectors, disability and care sectors and those sectors responding to seasonal demand including retail and hospitality, where employers will face significant challenges in replacing staff with little or, no notice.

Head 5 of the General Scheme will amend section 14 of the Parental Leave Act to ensure that an employee who is on leave for medical care purposes is protected in line with Article 10(1) and 10(3), so that an employee shall be treated as if he or she had not been so absent, thereby treating the period of medical care leave as a period of protected leave, in the same manner as other statutory leaves including parental leave and carer's leave. However, both of those statutory leaves not only require a service requirement but require a service requirement of at least one year's continuous employment before a period of leave can be taken, which Ibec submits is a reasonable service requirement. Without prejudice to same, Ibec submits that at least 6 months continuous service is required before a request for medical care leave can be made.

Part 3

Head 10

Extension of breastfeeding breaks

The General Scheme proposes to amend section 2(1) of the Maternity Protection Act 1994 to define an employee who is breastfeeding as meaning *"any time an employee whose date of confinement was not more than one hundred and four weeks earlier, who is breastfeeding and who has informed his or her employer of his or her condition"*. Essentially, the amendment will extend the period of calculable breastfeeding from 26 weeks post confinement to 104 weeks post confinement. Ibec submits that the extensive unprecedented increase of the paid entitlement is disproportionate and will give rise to significant cost burden for employers.

The Maternity Protection (Protection of Mothers who are Breastfeeding) Regulations 2004 and s15B of the Maternity Protection (Amendment) Act 2004 provide that an employee who is breastfeeding shall be entitled, without loss of pay, to either breastfeeding breaks (where facilities for breastfeeding are provided in the workplace) or to a reduction in working hours. An employee is entitled to take one hour off from work each working day as a breastfeeding break which may be taken in the form of one break of 60 minutes, two breaks of 30 minutes each, three breaks of 20 minutes each, or in such manner as to the number and duration of breaks as may be agreed with her employer. These entitlements only apply for the first 26 weeks following the date of confinement. It is proposed that this paid entitlement be extended to 2 years from the date of confinement. Ibec submits that any such significant extension will have adverse implications for employers, given that currently most employees will have exhausted their entitlement to breastfeeding breaks before they return to the workplace, following a period of maternity leave.

S15B(2) of the Maternity Protection Act 1994[2], as amended, states that employers will not be required to provide facilities for breastfeeding breaks in the workplace where the provision of such facilities would give rise to more than a nominal cost. The words "*nominal cost*" are not defined in the 1994 Act but were used in s16 of the Employment Equality Act 1998 (prior to the amending Equality Act 2004) in terms of an employer's obligation to reasonably accommodate an employee with a disability. Case law suggests that the definition of "nominal" would not be the same for every employer, and much will depend on the size and financial resources of the company[3]. It will be the case that many employers, particularly SMEs, will simply not be in a position to provide facilities, and should they be required to do so it would be in excess of any nominal cost. Furthermore, the Act requires that facilities be provided but does not specific what facilities are required, or what would be deemed adequate or appropriate to be compliant with s15B of the 1994 Act. Should an employer not be in a position to provide facilities, he/she will be required to give an employee paid time off, which will now be up to 2 years from the date of confinement, which will be a significant cost burden particularly where the increase is not on an incremental basis.

The proposed extension of breastfeeding breaks from 26 weeks to 2 years will mean that an employee who works full time would have an entitlement to 5 hours paid time off a week for up to 2 years from the date of confinement, having returned from normal maternity leave up to 18 months earlier. To be required to provide 5 hours paid time off a week to an employee will be disproportionately costly for employers, which is only heightened by the proposed unprecedented extension to 2 years. Undoubtedly, there will be significant practical implications for employers including where employees work on shifts and being required to alter shift patterns to accommodate employees exercising their right to breastfeeding breaks or paid time off, and the difficulties that arise where no employees are available to cover, particularly in critical skills roles. It will be incumbent on employers to have employees available to cover those taking the paid leave which will not only give rise to a disproportionate cost burden but will give rise to various operational difficulties, at a time when employers are already faced with ongoing operational challenges arising from Covid-19. This is even more so the case where employees take the time off in a fragmented manner of up to 3 breaks of 20 minutes each per day.

Regulation 5(b) of the 2004 Regulations requires an employee who exercises her right to time off or to reduced hours to breastfeed to furnish, if requested by her employer, the birth certificate of the child. Should an employee be required to provide a child's birth certificate for the extended period of up to 2 years that will only establish the date of confinement, it does not establish that the employee is using paid time off for the purposes of breastfeeding.

The Safety, Health and Welfare at Work (General Application) Regulation 2007 requires a risk assessment to be carried out where an employee is breastfeeding and identify any hazards which may present a risk. Should a risk be identified, that cannot be eliminated, an employer should, in accordance with s150 of the 2007 Regulations, adjust working hours or working conditions or, both in order to reduce the risk and, if that is not possible, provide appropriate alternative work. Not only will employers be required to carry out a risk assessment but will be met with what can be the costly impact of eliminating or reducing any risks that arise and any failure to do so can give rise to significant liability, outside the remit of health and safety legislation, as recently highlighted by the Court of Justice of the European Union.

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[2] Hereinafter referred to as "the 1994 Act"

[3] An Employee v A Local Authority DEC-E2002-004

In the case of *Otero Ramos v Servicio Galego de Saude*[4], the CJEU held that failing to conduct an appropriate risk assessment specific to a breastfeeding mother was gender discrimination. In that case, the claimant, who was breastfeeding, worked as a nurse in the emergency unit of Respondent's hospital. She claimed that her role exposed her to health and safety risks arising from a complex shift system, healthcare associated infections and stress. The Respondent performed a risk assessment concluding that the employee's role was risk-free and there was no requirement to put any preventative measures in place. The risk assessment did not offer any explanation for how that conclusion was reached. Her request for an adjustment in her work pattern due to breastfeeding was declined. She brought a claim arguing that the vague risk assessment was in breach of the European Directive to improve the health of pregnant and breastfeeding workers[5] and also a breach of the Equal Treatment Directive[6]. The CJEU agreed, finding that if a breastfeeding or pregnant woman can show that the risk assessment was flawed, or not done at all, then that gives rise to gender discrimination. Therefore, should an employer fail to carry out a risk assessment or an appropriate risk assessment, specific to a breastfeeding mother, not only will he/she be in breach of the 2007 Regulations, but an employer will be liable for up to 2 years remuneration for gender discrimination under the Employment Equality Act 1998, as amended.

Ibec submits that should breastfeeding entitlements be extended, as proposed, it must be increased incrementally over a number of years as any proposal to now extend from 26 weeks to 2 years is wholly disproportionate, giving rise to a cost and administrative burden on employers. Ibec submits that should the Department extend the entitlements beyond 26 weeks that any such further extension should not exceed 52 weeks from the date of confinement. Ibec further submits that any extension beyond 52 weeks should be unpaid.

Conclusion

Ibec submits that it is imperative that the Department transposes the minimum requirements of the Directive in a manner that is not detrimental to an employer's need to sustain employment and remain competitive in what is becoming an increasingly overly regulated environment. Ibec would welcome the opportunity to engage further with the Department in the transposition of the Directive.

END

[4] C-531/15, 19 October 2017
[5] Directive 92/85/EEC
[6] Directive 2006/54/EC