
COVID-19 and Gender Discrimination



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One of the most noticeable things about COVID-19 is how successful women leaders have been during this crisis, often described as decisive, firm and effective. Several of the leaders are actively parenting children as well as running their countries so it would be nice to believe that this would put the nail in the double coffin of workplace gender and family status discrimination, particularly that insistent strain of it which seems to present itself when employees get pregnant and/or return from maternity leave. This will require careful planning.

Having said this, in Ireland, the National Public Health Emergency Team – NPHET - charged with managing the response to COVID-19, including the Taoiseach, Minister for Health, CMO and HSE Chief Clinical Officer, are all men. While we are lucky to have such a committed and excellent team on many levels, it does mean that any statements on COVID-19 in the media at government level are made by men with a notable exclusion of a female voice in Ireland. The UN has highlighted the importance of inclusion of women in health decision making, which, at least optically (with the exception of Dr Catherine Motherway, President of the Intensive Care Society of Ireland), is seriously lacking in Ireland.

One positive of all of the changes that have been required to working arrangements as a result of COVID-19 is that employers may now become more open to flexible working arrangements, which may decrease pressures on working mothers when it comes to commuting, childcare arrangements etc. The grand home-working experiment, resisted by so many employers for so long, has now been forced upon them and the reality is that people can and do work effectively from their homes. This is something that employers are probably going to have to be more philosophical about during the transition period back to the office, while schools and creches etc are still being phased back in, or they could potentially face discrimination claims.

For the time being, one of the downsides to our current quasi-quarantine situation is that working women are very much impacted by the crisis where they are expected to home school and keep their work going. Then of course there is also a serious concern for women and families in a volatile relationship who are more exposed during lockdown where they are residing with a violent partner.

Further concern might be that the areas in which Ireland has been improving, according to the 2020 Women in Work Index released on International Women's Day just before COVID-19 struck, (i.e. female labour force participation, the gap between male and female labour force participation, female unemployment and female full-time employment rate) are likely to be negatively impacted by the job losses that will follow COVID-19.

With 600,000 people now in receipt of the special COVID-19 unemployment benefit from the Irish state (and 1.23 million workers relying on State support for all or part of their income), the effect of this pandemic on the Irish labour force is already significant. How it is going to affect workplace gender politics will be something to watch, particularly if (some) employers continue to take the view that women with children are somehow less profitable and/or less ambitious/focussed on their careers and, therefore, that those are the individuals to terminate/select for redundancy or simply demote in hopes that they move on. Bafflingly, that such employees might be more ambitious once they have to provide for families, and so even more efficient and valuable, does not seem to be considered as often as it might. Gender discrimination is still so engrained and insidious that it can be difficult to root out. For example, a recent study by the UK Law Society found that female solicitors are three times more likely to face workplace discrimination than their male counterparts.

Further, unthinking employers will still make restructuring decisions on the basis of spreadsheet views of productivity and/or profitability, which do not take into account an employee's inability to be either productive or profitable during maternity leave and so which ultimately penalise women for taking such leave. This is likely to make a female employee who had been on maternity leave more susceptible to being selected for redundancy. It is likely any such selection process could be challenged on the grounds of gender and family status discrimination. In the meantime, regrettably it seems likely that female employees will have to remain vigilant in guarding their employment rights when the dust starts to settle on the current crisis.

On a positive note, the necessity for flexible working arrangements occasioned by COVID-19 and the now clear evidence that employees work efficiently from home, will force employers to facilitate such arrangements going forward, which can only be to the benefit of female labour force participation. There are vague suggestions that creche fees might be significantly reduced going forward, which (if effected) should also help.

The Workplace Relations Commission/Labour Court approach to date on these issues can be demonstrated by the following case summaries. For example, in *Rental Company v General Manager* (ADJ-00013042), a general manager returned from maternity leave to be told that “there was big changes around here” as a result of which she was demoted to a position of general operative. The returning employee’s effective demotion is not necessarily always as glaring as this; in cases such as *Gardiner v Mercer Human Resource Consulting* (DEC-E2006-007) and *HR manager v Aviation recruitment and staff support agency* (ADJ-00023183), the employees retained their titles and the employers claimed that nothing had changed, but tasks were taken away, reporting lines altered, membership of leadership teams withdrawn, clarity about roles diminished, etc to the employees’ detriment.

Some women do not make it as far as maternity leave and are gone days or weeks after telling their employer they are pregnant. Sometimes a sudden and surprising downturn in business is the stated reason, whereas on other occasions such as *Manager v Other Services* (ADJ-00019047) and *A Deputy General Manager v A Hotel* (ADJ-00017826), hitherto unidentified performances suddenly arise, which apparently justify termination, even where there had been no significant mention of them before.

Employees who take maternity leave once without suffering any repercussions sometimes find that the second time is a not a charm for their employer. For example, in *A Marketing Director v a Telecom and Communications company*, a marketing director who announced her second pregnancy on 1 November 2018 was made redundant on 14 November 2018 and supplanted by the male employee who had originally been brought in to provide maternity cover during her first period of maternity leave. While 14 other people were also terminated on the same day, even so no satisfactory answer was given for why the claimant was terminated where her male colleague was not, and the adjudication officer was fairly confident that contractual maternity pay was the deciding factor.

By way of sign-off, it is worth noting that the 2020 Women in Work Index showed that Ireland’s overall ranking had actually fallen due to a widening of the gender pay gap from 5.9% in 2017 to 7.5% in 2018. The widening pay gap is worrying, especially where the Bill to introduce mandatory gender pay gap reporting here in Ireland seems to have been put on the back burner. Even after it is made law, it may be some time before regulations are put in place on foot of it, and of course employers will be given some lead-in time to gather figures, so it may be as far away as 2025 before a key measure to force employers to reassess their practices will take effect. We will address issues relating to gender pay in a later article.

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