CorporateLiveWire

LABOUR & EMPLOYMENT 2020

VIRTUAL ROUND TABLE

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Introduction & Contents

The Labour & Employment Roundtable discusses the latest trends and interesting developments from around the world such as the recent EU changes to parental leave, the role immigration plays in addressing labour shortages and skills gaps, and the problem of 'death by overwork' in Japan. Other notable topics include: the termination process, effective dispute resolution methods, the gender pay gap, and automation.

James Drakeford
Editor In Chief

Meet The Experts

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Kaoru Haraguchi, founding partner, dedicated himself to not only studying everyday, but also playing ping-pong as a player representing Tokyo (the best rank was 2nd in Tokyo) when he attended Komaba Toho High School, dreaming to beat Chinese players.

In those days, Mao Ze Dong, who specified ping-pong as the national sport, agitated the Great Cultural Revolution. As a result, Chinese strong players like Zhuang Ze Dong and Li Jing Guang were forced to disappear from the world stage and Japanese players once again reached the top of the world. In a short time, however, Chinese players came back to fight for the top of the world with Japanese players. (For example, one Japanese player who participated in inter high school tournament in Fukuoka later beat a Chinese player to be a champion in World Cup.)

However, Japanese got to know the fundamental power of China. The Socialist country China increased the population of ping-pong players up to 100 million and sought excellent players nationwide to enhance national dignity. They invented "quick attack in front (rallying in front line, sticking to the table) and developed no-revolving rubber racket with assistance of sport scientist to deprive a title of "kingdom of ping-pong" and widen the gap with Japan.

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Michael Møller Nielsen is an employment law expert and partner in Lund Elmer Sandager. Michael has solid experience with negotiation of collective bargaining agreements, bonus schemes and collective redundancies on behalf of companies acting especially in the aviation, food and technology industries. He also takes on litigation on behalf of senior managers.

Michael has a very international profile, and his client portfolio thus includes publicly listed companies in different jurisdictions and clients outside Denmark.

Furthermore, Michael has broad experience within dispute resolution, corporate law, marketing law, litigation and due diligence in connection with transactions and outsourcing.

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Lisa Felix represents corporate and educational clients who seek to hire or transfer foreign employees, as well as foreign individuals seeking employment in the United States as scientists, highly skilled professionals, executives, managers, and artists. She advises employers on immigration compliance, responding to government investigations, and immigration strategy and planning.

Lisa has experience representing individuals in self-sponsored immigration matters based on professional qualifications and business development, as well as personal matters including naturalization, family-based immigration matters, consular processing and asylum claims.

Before practicing as an attorney, Lisa worked extensively in higher education, providing immigration services to students, faculty, researchers, and administrators at the University of Pennsylvania, the State University of New York at Buffalo, and at Southern Illinois University–Carbondale's branch campus in Niigata, Japan. As a Designated School Official and Alternate Responsible Officer, she advised academic and administrative departments, foreign faculty, and students in the areas of hiring, enrollment, non-resident tax compliance, and academic, cross-cultural and personal concerns.

Meet The Experts

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Andrea is the Managing Director of NDA Law and has an extensive practice in tax and superannuation law, commercial law and estate planning.

Andrea is the Chairman of the Commercial Law Committee of the Law Society of South Australia (LSSA), a member of the LSSA Council, Chairman of the Family Business Australia (FBA) Adviser Subcommittee (SA), member of the FBA State Advisory Committee (SA) and a member the Tax Institute's Tax Reform Committee. Andrea is a member of the ATO Legal Practitioners' Roundtable. She is also a member of the Australian Institute of Company Directors (AICD) and the SMSF Association and sits on various boards.

Andrea provides advice for a diverse range of clients ranging from family businesses to not for profit organisations. Andrea acts for clients in restructures, business sales and acquisitions and succession planning. She particularly enjoys helping family businesses and SMEs. Andrea also has significant expertise in state taxes, asset protection, SMSFs, trusts and corporate governance.

Every client is different and Andrea's practical approach means she takes the time to work out exactly what each client needs. She works closely with clients to determine their objectives and plans for the future in order to provide advice that fits with their commercial and personal goals.

For the past three consecutive years, Andrea has been recognised by Best Lawyers in Australia in the areas of Taxation Law, Wealth Management and Succession Planning.

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AOC Solicitors, provides dedicated expert employment law advice tailored to each client's unique requirements. Working with employers, employees and consultants, the firm offers an array of services, advising private and public sector companies, international clients and individuals in contentious and non-contentious employment law issues.

Representing clients before employment law statutory bodies, regulatory boards, the Civil Courts and at Mediation the firm is ranked as a Leading Irish Employment Law Firm by Legal500 and has won numerous awards to include Irish Employment Law Firm/Team/Lawyer of the Year 2019.

The Firm offers clear advice and concise guidance, proving themselves to be a truly invaluable asset to every client.

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Roy A. Ginsburg is a Partner in Jones Day's L&E practice. Roy, who has practiced for 38 years, and three other Partners started Jones Day's Minneapolis office in June 2016. It has since grown to 38 attorneys.

Roy's national defense practice encompasses all types of employment litigation and related business torts (including fiduciary duty and trade secret litigation). Roy is a two-time selectee as a Minnesota Attorney of the Year, and has received many other awards (Client Choice Award, "Author of the Year, General," "Author of the Year, L&E,." He is listed in Chambers USA, Best Lawyers, Super Lawyers, the Legal 500 and other comparable publications.

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Employment related legal issues and workplace strategic areas, addressing both contentious and non-contentious matters. In particular for newly incorporated companies and foreign investments in Malaysia, she advises on the drafting of employment agreements, policies and handbooks. She also trains employers to manage misconduct issues and poor performance in employees, advises on issues relating to employee stock option schemes, share awards, prepares panel members for domestic inquiries and trains personnel on how to conduct domestic inquiries.

For corporate acquisitions and mergers, Suganthi provides strategic guidance in dealing with the employment issues that arise. She provides legal counsel in relation to business acquisitions, reorganisations, and voluntary and mutual separation schemes, harmonisation of employment terms and retention of key management. In relation to workplace risk management and safety, she provides legal advice on occupational health and safety issues as well as sexual harassment policies and procedures. She also handles trade union recognition issues, labour disputes and strikes.

Q1. Can you outline the current labour market conditions in your jurisdiction?


Michael Moeller Nielsen

Nielsen: The Danish labour market model is known as the "flexicurity" model. This is due to the combination of a relatively high social benefit protection for each individual and a high degree of flexibility with respect to termination of employment and mobility between employers.

Blue collar workers are to a large extent covered by collective bargaining agreements. In fact, the Danish labour market is characterised by a long tradition of employers and trade unions negotiating and entering into collective bargaining agreements for blue collar workers. Certain groups of non-academic salaried employees (primarily office and administrative staff as well as sales assistants) are – depending on the industry – in most cases covered by collective bargaining agreements.

In general, the Danish labour market model is characterised by the terms of employment, such as salary and salary-related benefits (e.g. additional holidays, pensions, regulation of overtime work and other specific terms of employment) which are established and agreed between the Danish labour market organisations without interference from the state or governmental bodies.

The overall framework of the governing matters, such as work environment-related issues and entitlement to statutory holidays, leave in connection with childbirth and (for salaried employees) the entitlement to pro rata bonus in case of resignation, is settled by Danish legislators.

In 2020, the employers and trade unions will negotiate the conditions for the collective bargaining agreements for the next validity period, which will approximately be a three-year agreement from 1 March 2020 to 28 February 2023.

The Salaried Employees Act contains mandatory rules on length of notice periods, compensation in case of unfair dismissal, severance pay, sick pay and maternity leave entitlements.

Additionally, restrictive covenants are regulated in the Danish Act on Restrictive Covenants.

All employees are also protected by the Danish Holiday Act which grants 2.08 days of paid holiday per month of employment and the entitlement to take 25 days holiday per annum.

Furthermore, working time regulation sets a maximum average working week of 48 hours based on a consecutive four-month period.


Lisa T. Felix

Felix: Regular reports and statistics confirm that the U.S. labour market is strong overall. In fact, the U.S. Department of Labor reported that the unemployment rate had fallen to 3.7% in June 2019. My work focuses on employment-based immigration and we continue to see strong demand from our clients for highly skilled employees in the tech industry, medical, pharmaceutical, and health fields, finance, and business. This is consistent with reports of unfilled demand from employers in other sectors, such as the building trades and manufacturing.

Despite the demand for workers, the employment-based immigration outlook for the United States has actually tightened in the past two years under the Trump administration. Employers and their foreign employees are experiencing long processing delays, significant changes and inconsistency in the policies and requirements regarding employment-based immigration, highly publicised worksite audits and raids, unaddressed quota backlogs, and considerable travel and entry restrictions. It is much more onerous and expensive for a U.S. employer to sponsor a foreign worker in the current environment. The climate for the business community is one of uncertainty and unpredictability when it comes to being able to find and hire the workers they need.

While family separation, child detention, and asylum policies have stolen headlines in recent months, there has also been quiet movement by the current administration to discourage legal, employment-based immigration, promulgated largely through executive orders and revisions to policy, not regulations. While the laws have not changed, these orders and policy revisions (whether announced publicly, or implemented without notice) have radically transformed the USCIS's approach to adjudicating employment-based immigration cases. These changes are viewed as part of an effort to build an "invisible wall," with the overarching goal of limiting legal immigration. The effect has been to make the immigration climate harsher for companies that rely on skilled and legally employed foreign nationals, and uninviting for those foreign nationals to continue to live and work in the United States.

Q2. Have there been any recent regulatory changes or interesting developments?


Karou Haraguchi

Haraguchi: *Karoshi* – meaning 'death by overwork' – was brought into the urgent attention of the Japanese government following the suicide of 24-year-old Matsuri Takahashi on Christmas Day in 2015. Matsuri was an employee of Dentsu, a leading adverting agency in Japan, and had worked more than 100 hours of overtime in the months prior to her death.

The "Work Style Reform Law" was passed on 29 June 2018 and has been effective since April 2019 (dates vary according to amendment and size of employee). The law introduced a maximum cap on permitted overtime of 100 hours per month (and 72 hours/year) for busier months. However, the law will generally limit overtime to a maximum of 45 hours per month (36 hours/year).
The Health, Labour and Welfare Ministry believes it is necessary to prevent *Karoshi* by limiting overtime to 80 hours per months. This cap is effective April 2019 for large companies and April 2020 for small and medium-sized companies.

Upon the implementation of the overtime cap under the Work Style Reform Act, the employer is required to amend the rules of employment and other internal regulations. In addition to the formal amendment of its regulations, the employer is required to amend the work assignment of the employees and change the unlimited overtime culture, once encouraged and highly appreciated in the companies in Japan.


Michael Moeller Nielsen

Nielsen: The European Parliament and the European Council adopted a directive on work-life balance in April 2019. According to this, two months of the total parental leave is earmarked for the father of the child. If the father does not exercise his right to paternity leave, it will not be possible to transfer the related financial support for the earmarked paternity leave to the mother.

This directive thus reduces the maximum period for which the mother is entitled to receive financial support during her maternity leave. Denmark is expected to implement earmarked parental leave for fathers in the near future.

"In 2020, the employers and trade unions will negotiate the conditions for the collective bargaining agreements for the next validity period, which will approximately be a three-year agreement from 1 March 2020 to 28 February 2023"
- Michael Moeller Nielsen -

Q2. Have there been any recent regulatory changes or interesting developments?


Anne O'Connell

O'Connell: There have been a lot of interesting developments in terms of case law and some of these are summarised in a later question below. There has also been a lot of movement in the area of working hours/work patterns.

The Employment Law and Miscellaneous provisions Act 2018, which was signed into law on 25 December 2018, made significant changes to Irish employment law including but not limited to changes in respect of working hours. In particular it introduced the following changes:

- It bans zero hours working practices in certain circumstances and it provides for minimum payments in certain other circumstances. However, "as and when" contracts (i.e. contracts where the employee can freely accept or reject the offer of work without consequence) are not prohibited.
- In so far as variable working hours are concerned, it provides for banded hours.
- It also provides that employers must provide employees with five core terms of employment in writing within five days of commencement of employment. It further provides that failure to provide this within one month of commencement of employment is a criminal offence.

The Parental Leave (Amendment) Act 2019 was also signed into law. This allows employees to take increased levels of parental leave. Furthermore, while Parental Leave was previously completely unpaid, a new entitlement to two weeks Parent's Benefit from the state has been introduced.


Lisa T. Felix

Felix: The majority of recent changes in employment-based immigration have been driven by Executive Order 13788, titled "Buy American and Hire American" (BAHA), issued in April 2017, just three months into the Trump administration. The American Immigration Lawyers Association has stated that since BAHA's issuance, the order and its effects have collectively had a "significant impact on [the United States'] ability to attract innovators, and the ability of U.S. employers to supplement their workforces with foreign high-skilled workers."

BAHA's professed objective is to raise wages and employment rates for American workers, and to rigorously enforce and administer the laws governing foreign workers. The Secretaries of State, Labor, and Homeland Security, and the Attorney General were directed to propose new rules and guidance to implement BAHA. In particular, reforms to the H-1B visa program were solicited to ensure that visas are awarded only to the most-skilled and highest-paid foreign workers. By the end of 2017, the rate of requests for additional evidence (RFEs) and denials for H-1Bs and L-1 visas (for intracompany transferees) had started to surge and today are more than double what they were two years prior.

To implement the objectives of BAHA, the USCIS has enacted the following changes:

- Policy memo rescinding prior guidance that USCIS should generally uphold their previous decisions for applications for extensions for the same employee, in the same job, when the key elements of the position remain the same. The new policy requires USCIS adjudicators to apply the same scrutiny to routine extensions as they do to new petitions.
- Policy memo rescinding previous guidance that recognised computer programming as an occupation that would generally qualify for an H-1B visa.
- Policy memo restricting the TN visa for Canadians and Mexicans in the economist profession to a much narrower range of jobs.
- Policy memo heightening evidentiary requirements for H-1B petitions for workers, such as consultants, who perform some or all of their duties at client sites.
- Policy memo giving USCIS adjudicators discretion to deny a petition without first requesting the deficient information or evidence from the petitioner.
- On-and-off suspension of the fee-based expedited "premium" processing option for many H-1B petitions, while at the same time delaying adjudications by as much as 11 months or more.
- New requirement for in-person interviews for employment-based permanent resident applicants.
- Redefining "unlawful presence" to trigger three and 10-year bars for student violations of status.
- Delaying and dismantling the International Entrepreneur Rule, known as the "start-up visa." This rule would have allowed admission to entrepreneurs who had secured significant U.S. investor financing, or who demonstrated promise of innovation and job creation through development of new technologies or the pursuit of cutting edge research.

Q3. Are you noticing any new or current trends in employment disputes?


Karou Haraguchi

Haraguchi: In order for an employer to terminate an employee's contract for punitive reasons, the reason must be clearly stipulated in the rules of employment. However, the language of the rules of employment is becoming more problematic in Japan as the number of foreign employees increases.

The rules of employment must be submitted to the Labour Standard Administration Office in Japan and therefore the original of the rules of employment of the employee shall be written in Japanese. In Japanese subsidiaries of international companies there are a lot of foreign employees who are not expected to read and write who are not expected to read and write Japanese provided they can communicate with his/her international colleagues in English. These employees will be given the English translations of their rules of employment. It is however not well noted that the rules of employment of the Japanese original and the English translation is often quite different. In particular, the definition of the sexual harassment and power harassment in the rules of employment becomes more sensitive which is not easily translated into English.

Recently there is an argument as to whether the definition of sexual harassment of the original rules of employment in Japanese should be applicable to a foreign employee who is not expected to read and write Japanese as long as he/she speaks English. Based on the due process of law to be applicable to the punitive dismissal, English translation of the rules of employment would be applicable or prevailing to the punitive dismissal of the foreign employee. In this regards, the employer of many foreign employees who are not expected to read Japanese, should carefully draft the definition of the reasons for the punitive damage in the rules of employment and carefully check the English translation to be the precise translation of the sensitive part of the definition, such as the definition of sexual harassment.


Suganthi Singam

Singam: There is a wave of retrenchment claims for the oil and gas industry, the banking sector and the airline industry. To minimise the impact of poor economic conditions, companies that are suffering losses had terminated some employees and outsourced those job functions to third parties in order to reduce costs.

Generally, the selection process in identifying employees to be retrenched should be in accordance with the established industrial principle of "last-in-first-out") ("LIFO") which requires the employer to select the more junior employee in the category of employment for retrenchment.

The potential danger of losing workers with key skills who have joined corporations/companies recently is a business disadvantage when LIFO is used. Hence, there have been departures from LIFO by companies in favour of their own selection criteria. Courts nowadays are beginning to move from the strict adherence to the LIFO principle towards the acceptance of companies' own selection criteria.

Q4. Have there been any noteworthy case studies or recent examples of new case law precedent?


Karou Haraguchi

Haraguchi: A recent court case ruled on the issue of whether the settlement figure in relation to the termination of an employee's contract should be subject to taxation. The settlement figure is normally paid without taxation in Japan because it is considered to be a compensation of damage (monetary or emotional damage caused by the employer) which is not subject to taxation. However, as the nature of the settlement is not explicitly clarified as compensation of damage, the national tax office recently began challenging the settlement figure, claiming it should be subject to taxation.

The court upheld the position of the national tax office ruling that the company and tax payer does not clarify the nature of the settlement amount as the compensation of damage, thus confirming its subjection to taxation.

Based on this case, it is now important to clarify the nature of the settlement amount, otherwise the national tax office could successfully challenge the settlement fee paid to the employee upon the termination of the employment agreement as a retirement allowance as it is paid to the employee upon leaving the company for good, and is thus subject to taxation.


Anne O'Connell

O'Connell: Yes, the superior courts in Ireland have handed down a number of landmark decisions on employment law matters in recent times. Most recently, the Supreme Court decision in *McElvey v Irish Rail [2019] IESC 000* which upheld a decision of the Irish Court of Appeal in respect of whether there is an entitlement to legal representation as part of an internal disciplinary process. In summary, the Court held that "legal representation is only required as a matter of fairness in exceptional cases."

Another important Supreme Court decision recently handed down was the decision in the long running employment equality case of *Nano Nagle School v. Marie Daly [2019] IESC 63*. The judgement centred around the interpretation of Section 16 of the Employment Equality Act which deals with the nature and extent of an employer's obligations in certain cases including when determining the capacity of a person with a disability to do a job and the duty to provide that individual with reasonable accommodation.

The Supreme Court took the view that there is no reason in principle why certain work duties cannot be removed or "stripped out" as part of providing reasonable accommodation. However, it clarified that this is subject to the condition that it does not place a "disproportionate burden" on the employer, and this is a very key point.

The Supreme Court strongly emphasised that its conclusions should not be understood as requiring a situation where the duty of an employer is understood as having to provide an entirely different job. In fact, the Supreme Court commented that a requirement to provide an entirely different job would almost inevitably impose a disproportionate burden on the employer.

Another case of interest is the Court of Appeal decision in *Kearney v Byrne Wallace 2018 IECA 206 (23 July 2019)* which involved an application for an injunction in respect of a redundancy related dismissal. The Court of Appeal reaffirmed that the appropriate route in which to ventilate a complaint regarding redundancy is the Workplace Relations Commission as opposed to the civil courts.

Q5. How are equal opportunities afforded in your jurisdiction? What discrimination challenges still exist?


Michael Moeller Nielsen

Nielsen: Most of the equal treatment regulation in Denmark is largely based on EU directives prohibiting discrimination.

The Differential Treatment Act prohibits employers from direct or indirect differential treatment of employees or job applicants on the grounds of age, disability, race, skin colour, religious beliefs, political orientation and national, social or ethnic origin.

According to the Equal Treatment Act, an employer is prohibited from discriminating on the grounds of gender in relation to working conditions, including termination of employment. The act provides for the possibility of annulment of dismissals conducted on the grounds of pregnancy, maternity leave or adoption, or payment of compensation for acts of discrimination in contravention of any protected criterion. Any employee associated with someone with protected characteristics is also protected. Victimisation of employees who have acted to enforce their rights is prohibited. From the outset, the employer is responsible for workplace harassment.

Under EU law, atypical workers are protected against discrimination where they are:

- part-time workers;
- fixed-term workers; or
- employed through a temporary agency.

The pro rata temporis principle applies for all part-time workers. This means that part-time workers must enjoy the same employment conditions as comparable full-time employees on a pro rata basis. Fixed-term employees may not be treated less favourably than permanent staff. In general, a fixed-term contract may, from the outset, be extended only once; although where there are objective grounds to do so, it may be successively extended.

Temporary agency workers are entitled to protection with regard to working time, overtime, breaks, resting periods, night shifts, holiday, bank holidays and pay, at least at the same level as those employed directly by the employer making use of the temporary agency workers. The employer shall inform the temporary agency worker of positions available at the company. Exceptions apply where collective bargaining agreements are applicable.

Despite the above, studies show that discrimination challenges still exist in relation to people with immigrant backgrounds. Effort is though made in solving these challenges, particularly by changing personnel policies and recruitment strategies.


Anne O'Connell

O'Connell: The primary piece of law targeted at ensuring equal opportunities in Ireland is the Employment Equality Acts 1998-2015. These prohibit discrimination on nine specific grounds in respect of access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading, or classification of posts. The nine protected grounds are gender, disability, age, race, family status, civil status, sexual orientation, religion and membership of the travelling community.

Where an employer is found to have breached the Employment Equality Acts in respect of any of the above matters the Workplace Relations Commission has jurisdiction to award the wronged employee up to two years remuneration by way of compensation.

The issue of a gender pay gap is a very hot top in Ireland at present with significant movement on the issue last year in circumstances where the Gender Pay Gap Information Bill 2019 was presented to the Dail in April 2019. The general principles of the bill were debated and it moved forward to committee stage in May 2019.

Q5. How are equal opportunities afforded in your jurisdiction? What discrimination challenges still exist?

The plan is to follow in the footsteps of the UK in imposing mandatory gender pay gap reporting in this jurisdiction. This is viewed by many as a very positive development. However, it is important for employers to bear in mind that the task of preparing for gender pay gap reporting once it is implemented will bring with it many challenges particularly to the larger Organisations who are likely to be caught by the mandatory reporting obligation in the first instance. The common message by all practitioners advising in this area (from lawyers to PR experts alike) is that preparation will be key and employers should actively engage in that preparation at the earliest opportunity as opposed to leaving it on the back burner.

There have also been significant developments in the area of disability discrimination with a landmark decision having been handed down by our Supreme Court in respect of the interpretation of the duty on an employer to provide "reasonable accommodation" to employees with disabilities. This decision (i.e. *Nano Nagle School v. Marie Daly [2019] IESC 63*) is discussed in more detail in an earlier question.

On the question of disability discrimination generally, anecdotally a lack of transparency in terms of how many employers deal with the question of an employee's disability seems to fuel a lot of disputes on the issue. This is something which can be effectively managed with open communication and good processes.


Andrea Michaels

Michaels: The gender pay gap is one of the biggest issues affecting women today. In Australia, men's average annual remuneration for full-time work is currently around AUD $25,000 more than women working the same hours. This is largely because women take on most of the responsibility for unpaid caring roles and take long breaks out of the workforce, but there is also a lack of workplace flexibility to accommodate women coming back into their positions after having children.

Through the Financial Education for Women programme, I work as a mentor for other professional women who are seeking advice in this area. I think it is important to educate women about taking charge of their financial lives. Older women retire with less than half the amount of superannuation compared to men. That's a huge problem when you consider the fact that women live a lot longer and might often be single for much of their old age. Many women like me run their own firms and they need to pay more attention to their own personal financial plan. It's important to be looking after yourself and your future.

I've been campaigning for better policies around this recently from a tax perspective, but also to address the gender inequities in our profession. Although more than 60% of law graduates are women, a recent Law Partnership survey published in the Australian Financial Review found only 27.4% of partners overall are female. In addition, too many women drop out altogether mid-career as they feel it's too hard to combine family and work.

I think the legal profession needs to have a good look at itself and to change fast in order to keep up with other sectors of the business community. I'm passionate about this and striking out on my own to establish NDA Law was a direct move to address the problems I saw. Flexible work should be a requirement, not a luxury. It will help to keep more women in the profession. Diversity in leadership has also been proven to deliver better results.

" Flexible work should be a requirement, not a luxury. It will help to keep more women in the profession. Diversity in leadership has also been proven to deliver better results."
- Andrea Michaels -

Q6. What impact are automation, digitisation and artificial intelligence having on the workplace?


Michael Moeller Nielsen

Nielsen: Automation, digitisation and artificial intelligence have become increasingly important and are some of the main reasons why The General Data Protection Regulation (GDPR) was developed.

GDPR regulates the processing of personal data, including an employer's processing of the employees' personal data. Employees have the same rights as other data subjects according to the GDPR, including the right to access personal data processed by the employer, the right to deletion, the right to restriction of processing and the right to data portability.

Employees also have the same right as other data subjects to be informed about the employer's processing of personal data according to Articles 13 and 14 of the GDPR.

The Danish Data Protection Act supplements the GDPR and – in certain areas – provides for even greater protection of personal data, including in relation to the processing of social security numbers, which generally requires consent unless the processing is required by law.

It is a general principle in both the GDPR and the Danish Data Protection Act that the employer – as the controller of employees' personal data – must have a legal basis for processing employees' personal data, and that the employer must process such data in accordance with the general data processing principles according to Article 5 of the GDPR.

As a main rule, it is lawful for an employer to process employees' personal data where the processing is necessary for the employer to fulfil its obligations according to the employment contract and its duties according to applicable legislation.

It is recommended that the employer inform all employees about its use of control measures and processing of personal data relating to use of email, internet, telephone and other systems in its HR policy and/or privacy policy.


Andrea Michaels

Michaels: Technological change is happening at a fast pace. Advances in artificial intelligence risk making many legal tasks obsolete. I don't think this is anything to be scared of as change is inevitable – but we should take note and view it as an opportunity to adapt. Access to new ways of working could also be an opportunity. We need to embrace technological changes that will ultimately help us to make services more efficient and accessible.

Q7. What role does immigration play in filling labour shortages and skill gaps in your jurisdiction?


Karou Haraguchi

Haraguchi: Population is a central problem confronting Japan. A falling birth rate and an ageing population mean that the country has far too few young, productive workers. One of the solutions to the population issue is hiring young and skilled employees with strong academic background outside of Japan.

Japanese Diet has passed a new law introducing a new visa status to accept more immigrants who are "specified skilled." The new system determines "type 1" immigrant workers as those who attend "work which requires considerable knowledge or experience" in 14 types of industries such as the construction and automobile maintenance industry. "Type 2" workers attend only to the construction and shipbuilding industry. This law has been enforced since 1 April 2019. Some Japanese companies have already taken procedures to accept immigrants to their company based on the new visa system.


Michael Moeller Nielsen

Nielsen: In Denmark, there has recently been a lack of engineers and IT specialists. Some Danish industries are therefore in a combined effort putting pressure on the Danish Parliament to make it easier for companies to recruit foreigners and integrate them at the workplace and in Danish society in general.

During recent years, large-scale global non-US corporations have penetrated the Danish market at a faster pace than previously experienced. These corporations typically base their business case in Denmark on making use of non-Danish manpower, for instance Indian or Chinese specialists. This development has led to a large intake in Denmark of particularly these two groups of nationalities. These corporations wish to be heard by the lawmakers as well.


Anne O'Connell

O'Connell: Immigration plays a huge role in filling labour shortages and skills gaps in certain sectors of the Irish economy. For instance, the IT sector in particular has a very large number of roles filled by persons from other jurisdictions. Similarly in the health care sector, numerous positions are filled by persons from other jurisdictions.

Persons from outside the EEA require an employment permit to come and work here. A lot of work has been undertaken in recent years to upgrade the employment permits application system and make it more efficient. Most applications are now made online. However, the process can in some cases still be quite tedious.

Having said that, there has been a trend in recent years to try to make the process somewhat less convoluted. For example, in 2019 the government introduced changes to the employment permits system to allow spouses and partners of Critical Skills Employment Permit Holders and Researchers under a hosting agreement to have immediate and full access to the Irish Labour Market without the need for an employment permit.

It is also noteworthy that a high court decision issued late last year, demonstrated a level of criticism for an overly technical approach by the Minister to the processing of a particular employment permit related case. This decision provides a helpful legal precedent to employment permit applicants.

"The IT sector in particular has a very large number of roles filled by persons from other jurisdictions. Similarly in the health care sector, numerous positions are filled by persons from other jurisdictions."
- Anne O'Connell -

Q8. What legal issues do employers often overlook during a termination process?


Karou Haraguchi

Haraguchi: An employer cannot easily terminate the employment agreement in Japan. It is commonplace for an employer of the subsidiary or branch office of an international foreign financial institution to fail in its effort to terminate an employee contract due to insufficient effort to avoid the termination. It seems that the management of the subsidiary or branch office does not recognise how the employee is protected under the labour laws of Japan.

In Japan, the termination of the employment contract has been called a death penalty for a long time. Even in hard economic times, the employer should try to find a position for the employee either within the company or elsewhere. The intent behind the labour laws of Japan is perhaps based on the lifetime employment system which has been widely accepted for a long time in Japan.

This intent, however, might not be applicable to employees of financial institutions that have crossed borders to find the most lucrative job. The Labour Tribunal committee in Japan understand that this sometimes renders a compromised ruling. In this instance, the labour tribunal committee issue a ruling to accept the termination of the employment contract with a large amount of settlement money, such as two years or more of the salary of the employee giving enough time for him/her to find a new job and compensating his damage of illegal termination by the employer.

In other words, the termination of the employment contract without trying hard to avoid the termination would render it invalid under the labour laws of Japan and the termination cost would become very high, even if termination is possible.


Michael Moeller Nielsen

Nielsen: Generally, in order to ensure that a termination is to be deemed fair when the reasons relate to the employee, a warning is often required, in particular if the reason for termination is lack of performance or collaboration. The employee must be given the opportunity to adapt to the workplace requirements, including improving performance or collaboration vis-á-vis colleagues and management before dismissal is enacted.


Anne O'Connell

O'Connell: Most frequently overlooking due process and fair procedure is what causes issues for employers going through termination processes with employees. In Ireland employees have very robust constitutional rights to due process and fair procedure. There is a vast and rich body of case law from the highest civil courts in the country which underpins these rights. Therefore where an employer breaches they can often be at risk of litigation by the aggrieved employee up to and including injunction applications to the civil courts.

In addition to this there can also be a misconception that employees who do not have 12 months service cannot sue following the termination of their employment because they do not have the protection of the Unfair Dismissal Legislation. While it is true that this protection does not kick in until 12 months service has accrued, taking a blinkered approach like this can cost an employer dearly if they have failed to identify that the employee in question has the status of a whistle blower or comes under one of the nine categories of persons protected under the Employment Equality Acts.

In those circumstances, while the person may not have the protection of the unfair dismissals legislation they will still have a valid legal claim if they are in a position to establish a causal link between their protected characteristic or their whistle blower status and their dismissal.

Q8. What legal issues do employers often overlook during a termination process?


Suganthi Singam

Singam: In misconduct cases, employers sometimes fail to properly draft the charges of misconduct that are being levelled against the employees. The charges should be as detailed as possible, particularly in respect of the description of the alleged misconduct as well as the time and day of the offence. It is important that the employee understands the nature of the allegation against him, so that he is able to respond to the same.

Another issue is that the employer sometimes fails to consider that not all misconduct warrants the extreme punishment of dismissal. Prior to taking the decision to terminate an employee, the following factors must be considered:

- Gravity and seriousness of the misconduct;
- Length of service;
- Past disciplinary record;
- Consistency of punishment meted out to the other employees committing the same misconduct.

The issue of proportionality of punishment is an important matter because after establishing the misconduct, employer must also establish that the dismissal is proportionate to the misconduct committed by the employee.

For poor performance cases, the employer may overlook certain issues to be complied with, such as there must be a warning issued to the employee and sufficient opportunity has been accorded to the employee to improve on his performance. If the employer terminates the employee for poor performance without complying with the foregoing, it may result in the Industrial Court holding the dismissal as without just cause or excuse.


Roy Ginsburg

Ginsburg: Employers often fail to recognise that procedural fairness is likely to be just as important to a jury adjudicating a wrongful discharge or discrimination claim as the substantive correctness of the discharge decision. In other words, a company may have an entirely justifiable basis for terminating an employee, from an hourly worker to a senior executive.

But, if procedural fairness considerations are ignored, jurors often question, or even disregard, the underlying validity of the termination decision. For example, if an investigation was incomplete, or failed to include an interview of the employee accused of wrongdoing, the fact-finder may conclude (erroneously) that adequate grounds for the decision were lacking. For example, if a company places an employee on a Performance Improvement Plan (PIP) but terminates the employee before the end of the period provided in the PIP, a jury may well conclude that the underlying reason was pre-textual or that the company had made the discharge decision before the PIP even commenced.

To some extent, this reflects a difference between employment litigation and many other types of litigated disputes – jurors bring a vast wealth of personal experience into the courtroom when adjudicating an employment dispute. Invariably, they ask themselves the Golden Rule type question – is this the way I would have liked to have been treated? If they answer that question negatively, the trial outcome may disappoint the employer.

Another mistake too commonly made by employers in the termination process is the failure to understand fully the distinctions of the law in the jurisdiction where the termination takes place. In the U.S., there are parallel statutory schemes (federal and the relevant states) with which the employer must be familiar.

Increasingly, local ordinances also come into play, as cities have become more active in regulating the workplace. Similarly, of course, there are critical common law distinctions that vary from state-to-state. Three quick illustrative examples:

- In Minnesota, the state Supreme Court some time ago recognised a cause of action for "self-defamation," a legal theory that eliminates the publication element of a defamation claim. If an employer makes an untrue statement to the employee in a discharge context (e.g., we're firing you for theft), that may create a cause of action even if the employer told no one of this reason beyond the discharged employee.

- In Massachusetts, the age discrimination law contains a rebuttable presumption that there was no discriminatory animus if the replacement employee was less than three years younger than the discharged employee.

- In California, North Dakota, and a few other jurisdictions, post-employment restrictive covenants (non-competition agreements) are precluded, except in very limited circumstances. Companies that do not know the significant differences in the statutory and common law of various jurisdictions risk creating problems that could have been easily avoided.

Q9. Which dispute resolution method do you find are most commonly recommend to employers and why?


Karou Haraguchi

Haraguchi: I recommend using or participating in Labour Tribunals. Prior to the establishment of labour tribunals, labour disputes had become very time consuming for both employers and employees. The average process of a labour dispute through litigation takes multiple years as opposed to 75 days via the labour tribunal.

Although, some HR departments – particularly in foreign financial company's subsidiary or branch in Japan – still believe litigation is useful, as the discharged foreign employee would be intimidated by the prospect of lengthy litigation without a job. Based on these considerations, it is recommended that the discharged foreign employee in the financial institutions to compromise the terms and conditions suggested by the Labour Tribunal Committee in the Labour Tribunal.


Michael Moeller Nielsen

Nielsen: Any disagreement between the parties, including the reason for termination, is often initially dealt with through out-of-court negotiations either between the parties directly or between the employer and the employees' union. However, out-of-court negotiations are not mandatory.

Arbitration is rarely included in employment contracts and only in agreements with top executives. The ordinary courts have jurisdiction over all disputes, however, if the employment is covered by a collective bargaining agreement, and the employee is a member of the trade union being a party to the specific collective bargaining agreement, the Labour Court and the Industrial Tribunals have sole jurisdiction over the matter.

Currently, case processing before the ordinary courts is lengthy. It takes between 12 and 18 months from submission of the claim before the actual court hearing is conducted. Case processing before the industrial tribunals is somewhat more expedient, but can vary from three to 12 months, and in some cases even more.

Many Danish companies have implemented their own individual guidelines on how to prevent and handle harassment, bullying, victimisation and so on in the workplace. This is highly recommended, since it can lead to both temporal and financial savings.

Q9. Which dispute resolution method do you find are most commonly recommend to employers and why?


Anne O'Connell

O'Connell: In respect of employment disputes where lawyers have become involved, those disputes tend to be most commonly resolved through without prejudice lawyer to lawyer discussions. Part of the reason for this, is that direct discussions between HR/management and employees are not privileged discussions in this jurisdiction even if they are labelled "without prejudice" or "off the record".

Second to that, mediation is probably the most commonly recommended dispute resolution method to Irish employers. There tends to be two primary types of employment related mediations. The first being a work place dispute type mediation where the employer for example appoints a mediator in respect of an on-going internal dispute between two workers. The second common type of employment related mediation often happens after a dispute has become litigious and/or after the employee has engaged a lawyer.

Mediation can be highly effective in an employment context as is it allows both parties to air their issues on a without prejudice and confidential basis and in many cases will result in the parties arriving at a mutually agreeable solution (whether that be an exit agreement, settlement agreement or agreed set of steps to be taken in order to move forward in the employment relationship).

It has been our experience that mediation can be a highly effective form of dispute resolution in an employment law context both for employers and employees alike.

In circumstances where neither without prejudice discussions or mediation have/can resolve the matter the parties tend to be left with no option but to litigate the matter before the Workplace Relations Commission Adjudication service and/or before judges in the civil courts.


Suganthi Singam

Singam: The most commonly recommended dispute resolution method is alternative dispute processes such as mediation and conciliation due to the deficiencies of litigation such as delay, expense, the public effect of litigation and court award. The main advantage of alternative dispute processes is the ability to get fast access to a process that may produce a satisfactory outcome for the parties in a short space of time. The process is focused on the interests of the parties rather than on their legal rights alone and incorporates a more 'reflective' approach to solving disputes as it provides parties with an opportunity to focus on the issues in dispute and consider the true economic costs and risks.


Roy Ginsburg

Ginsburg: There currently is an infatuation with arbitration, as opposed to a judicial resolution of a dispute. While arbitration may have some advantages – principally, the avoidance of class action, collective action, or multi-party claims, and increased confidentiality – arbitration may not be the dispute resolution panacea many suppose. While reasonable minds may differ on this issue, there are also advantages to the judicial resolution of disputes, which companies should not disregard.

The Federal Rules of Civil Procedure (or their state court counterparts) are a roughly 300-page compilation of rules that have been developed over decades to ensure fairness and clarity in resolving disputes. Arbitration rules are set forth in a two-page arbitration agreement, perhaps backed by a brief set of rules presented by the arbitral body (American Arbitration Association, JAMS, or other private arbitration entities).

Judges have a public decision-making record that can be researched and evaluated. That is not usually true for arbitrators, in part because of the confidentiality obligations associated with arbitrations.

In the judicial forum, a particularly critical component of an employment dispute is a dispositive motion (i.e., a motion to dismiss or a motion for summary judgment). Judges, often with very demanding, heavy dockets, have an interest in disposing of a meritless case. Arbitrators, in contrast, have an interest in continuing a case through the hearing – their compensation is directly linked to the hours they invest adjudicating the dispute.

While arbitrations are intended to be more efficient and expeditious than their judicial alternatives, this may not always be true. A common challenge to a company's motion to compel arbitration is that the arbitral proceeding unduly circumscribes discovery. To avoid the consequences of that challenge, many companies have essentially agreed to allow the same types and amounts of discovery in an arbitration that would be permissible in state or federal court. As a consequence, some of the anticipated efficiencies evaporate.

Another anticipated benefit associated with arbitration is that it is designed (at least hypothetically) to be less expensive. But, this benefit is often unrealised. Judges are paid by the state or federal governments. Arbitrators are paid by the parties. Often the defendant company is responsible for paying the arbitrator's entire fee, inasmuch as another standard challenge to a motion to compel arbitration is the undue expense a plaintiff-employee may incur in arbitration. Particularly when combined with the point above (i.e., no discovery limitations), the hoped-for cost savings may not exist.

Finally, when juries or judges get it wrong, companies have the right to appeal an adverse, erroneous decision. For all practical purposes, if an arbitrator decides against a company, the right for a meaningful appeal is non-existent.

Q10. What is the key to a successful company culture?

Suganthi Singam

Singam: The key to a successful company culture is to define what you want your company culture and values to look like and ensure that the values are part of the everyday fabric of employee experience. The hiring process needs to be optimised to ensure that companies are bringing in the right people – it is important to hire candidates who appreciate the company's culture and values. Apart from that, open and candid communication is a strong foundation for a thriving culture there should be effective communication in communicating news, changes, goals, and successes throughout ranks and inclusiveness in soliciting feedback as well as providing opinions. Companies also need to invest time in building their talent brands. It is vital for companies to have programs and initiatives in place that regularly reinforce the core values that make up the central tenants of the company culture such as awards and team-building.

Roy Ginsburg

Ginsburg: There are likely as many credible responses to this enquiry as there are responders. Each person addressing this question undoubtedly would emphasise certain cultural attributes and nuances they deem most critical to a company's success. For me, based on my observations about the many extraordinarily successful companies I've had the opportunity to represent, I would point to three critical variables.

Leadership: By "leadership," I mean a genuine commitment to the success, not just of the enterprise itself, but to the individual employees who compose the company's workforce, from the C-Suite to the hourly worker. Moreover, the authentic leader takes responsibility for the successes and failures of the company, without taking all credit for the former and without making excuses for the latter. As employees recognise these characteristics in the leadership of the company, these attitudes will permeate the entire organisation.

Openness and Transparency: The vision and strategy of the company's leadership should be known to all who are collectively devoting their efforts to the company's success. A company should strive for a "no surprises" environment, particularly in the employment arena. While this aspiration may not be achievable in every instance, it is a goal worth pursuing.

Inclusiveness: A diverse workforce, where the employees know that their individual and collective contributions are highly valued, can achieve greatness.

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