

EQUALITY BULLETIN

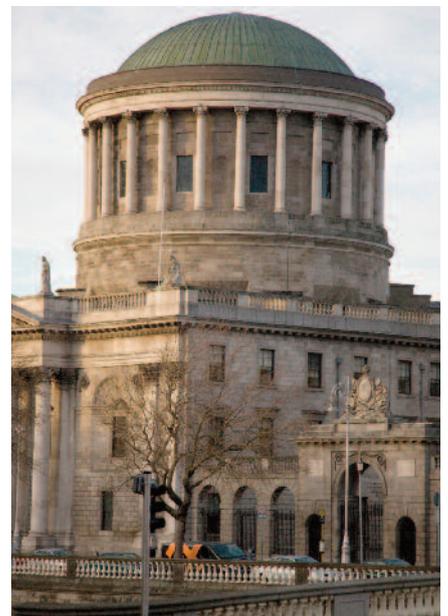


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**CIVIL PUBLIC &
SERVICES UNION**

High Court hears appeal in Garda Equal Pay case



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THE FINAL stage of the High Court Appeals process in the Garda Equal Pay Case was heard in the High Court, pictured right, on the 7th and 8th October 2013. This is an appeal on a point of law under the *Employment Equality Acts 1998 - 2004*.

The union won this claim for equal pay on behalf of seven claimants against the named Garda comparators before the Equality Tribunal in November 2005 but that decision was overturned on appeal by the employer to the Labour Court in July 2007.

The Labour Court gave three main reasons for their decision:

- The comparators were not representative of the Garda who were in the group assigned to designated clerical posts.
- Gardai are required to exercise police powers.
- In terms of industrial relations factors the Chairman of the Labour Court accepted that there were more gardai doing CO work than needed but Garda management were making a genuine effort to reduce this number through civilianisation and the only gardai left in these posts had police powers.

What this effectively meant was that the Labour Court did not accept the comparators were performing 'like work' or work of equal value with that of the claimants, even though they held that the comparators did not use police powers.

That there are objective grounds other than gender justifying why gardai are doing the work and that genuine efforts were being made by the employer to address the issue by

seeking to reduce the number of designated clerical posts from 354 to 219 posts.

The union did not accept the Labour Court decision and appealed it to the High Court on a point of law. There were a number of hearings in the High Court where our legal team successfully argued to have the legal issues in contention referred to the Court of Justice of the European Union (CJEU) for clarification.

The case was heard in the CJEU before a Court of seven judges (one of whom is deemed Advocate General) on the 12th July 2012 and the respective legal teams were each given a period of time to make an oral presentation of their arguments.

KEY CONCERNS

The key concerns for the union centre around the comparators we can use, whether or not the difference in pay between the claimants and the comparators is objectively justified in circumstances where prima facie indirect discrimination has been established and whether or not industrial relations agreements can be used as objective justification as a defence in this equal pay case.

The union position is that the comparators cited by the claimants in this case are the only appropriate comparator group and not the generality of the Garda as argued by the employer.

In terms of the difference in pay, the union believes that it is not possible for the employer to provide objective justification, as required by the legislation, in order to defend the discriminatory practice of the pay differ-

ential between the complainants and comparators. The employer believes that no such discriminatory practice exists as the practice complained of corresponds to a need on the part of the organisation and is appropriate to achieving that objective.

The employer has always relied on the fact that the pay system at issue is the result of an industrial relations agreement with the Garda representative bodies and is therefore justified by industrial relations concerns.

The union does not accept this argument, as to do so would mean that if industrial relations concerns are taken into account in assessing objective justification then this would attach greater importance to the interests of certain groups of workers at the expense of the right to equal treatment.

The opinion of the Advocate General (AG) was published on the 29th November 2012 and the judgment from the CJEU published on the 28th February 2013.

The final stage of the appeals process was a two-day hearing before the High Court on the 7th and 8th October 2013.

Over the course of the two days the union's legal team made compelling arguments to the High Court judge as to why we believe that

Equality & diversity survey

CPSU Equality and Diversity Officer Theresa Dwyer is currently preparing an Equality and Diversity Survey that will be issued to all members across the Civil Service in mid to late January 2014.

The purpose of the survey is to clearly establish what the issues are for members in terms of the union's equality and diversity agenda and how members see those issues in order of priority in their day-to-day lives.

Work has already commenced on this project and it is envisaged that members will have the option of



responding to the survey in a paper version or completing it online on our website. The data captured will then be analysed and a report prepared in time for a presentation to ADC 2014.

The information gathered in this survey will determine the union's equality and diversity policy for the future.

Garda Equal Pay Case

From Page 1

the clarifications from the CJEU support our view that the Labour Court erred in law in their decision of 2007 and that this case must be referred back to the Labour Court for re-hearing.

The legal team on behalf of the State also made their arguments with the judge drawing the hearing to a close on the second day, advising that he will make his decision in due course. This hearing was the final stage in the High Court appeals process and we must now await the outcome.

In the meantime, any queries in relation to this case should be sent, preferably by email, to Theresa Dwyer – tdwyer@cpsu.ie.

If your query relates to whether or not we received a claim form from you, please advise if your claim was made before or after September 2006, the name of the Department/Office you were working in and your grade at the time of the claim. This information will greatly assist with the checking process. All queries will be dealt with in due course.

Equality bodies issue reports

THE Equality Authority and the Irish Human Rights Commission (IHRC) have launched their annual reports for 2012. The organisations are to be merged to become the Irish Human Rights and Equality Commission next year. To read the Equality Authority and IHRC reports go to:

<http://www.equality.ie/en/Publications/Annual-Reports/Annual-Report-2012-Final-online-web-version-pdf.pdf>
http://www.ihrc.ie/download/pdf/ihrc_annual_report_2012.pdf

Referendum on Marriage Equality on the way...



Picture: stevebott (CC BY 2.0)

THE Convention on the Constitution was set up by a resolution of both Houses of the Oireachtas for the purpose of considering and, where appropriate, making recommendations on a number of issues that may in the future be amendments to the Constitution.

It is made up of 100 people selected from political parties and from the electoral register with a balance in terms of age, gender etc, and who are representative of all walks of Irish society.

The Convention met earlier this year in April to discuss the issue of same sex marriage and to report on recommendations to the Houses of the Oireachtas.

On the basis of a vote with 79% to 19% (1% had no opinion) in favour, the Convention decided to recommend that the Irish Constitution be changed to allow for civil marriage for same sex couples.

They reported on this recommendation to Government and a referendum looks likely in 2015.

Unions affiliated to the Irish Congress of Trade Unions – including CPSU and making up almost 800,000 people in workplaces across Ireland – are committed "...to the achievement of full equality for lesbians, gay men, bisexuals and transgender people in terms of legal equality, and also to challenge prejudice against LGBT people that remains in Irish society."

It is the view of Congress that an opportunity has been provided by the establishment of the Constitutional Convention to help make marriage equality a reality for LGBT members.

Check out: www.ictu.ie/equality



Women's Council of the Isles meets

I ATTENDED and gave a presentation at the Women's Council of the Isles meeting on the 7th and 8th November. The Women's Council of the Isles is an annual forum for women from the Congress of Trade Unions in Ireland, England, Scotland and Wales. In my presentation, above, I focused on the impact of the Haddington Road Agreement on Work Life Balance leaves in the Public Service.

Check out presentations at:

<http://www.ictu.ie/equality/2013/11/08/womens-trade-union-council-of-the-isles/>

PRSI and Worksharing

THE rules governing PRSI contributions require a person for whom a contribution is made to work at least one day in a PRSI contribution week. A PRSI contribution week is defined as each successive period of seven days starting January 1st each year.

Members who are on a reduced pattern of attendance under the Worksharing Scheme should note that their pattern of attendance may affect their PRSI contributions and consequently their entitlement to social insurance benefits.

For example, 1st January 2014 falls on a Wednesday, therefore the PRSI contribution week throughout 2014 is Wednesday to Tuesday. Members who Workshare on a pattern of a week on/week off or split week from Wednesday to Tuesday in 2014 will only work every second contribution week which

Shorter working year scheme

THE Shorter Working Year Scheme is covered under Circular 14/2009 and includes a provision for a review of the scheme. The Department of Public Expenditure and Reform have decided to extend the Shorter Working Year Scheme for a further year which means that the provisions of Circular 14/2009 will continue to apply in 2014.

means that they will have 26 contributions recorded as opposed to 52.

In the Civil Service, the union negotiated an agreement whereby members wishing to change their pattern of attendance in order to be PRSI compliant would be facilitated.

Members wishing to avail of this facility should submit their request in writing to their line manager as soon as possible.

Anti-bullying, harassment & sexual harassment policy is under review

THE Civil Service anti-bullying, harassment and sexual harassment policy, *A Positive Working Environment*, is currently being reviewed by the staff panel of unions at the Equal Opportunities Sub-Committee of General Council.

As part of this review, and at the request of the CPSU, a workshop took place in October 2013 which was attended by representatives from each of the staff panel of unions.

This was an opportunity to identify areas where the existing policy was not working or not user-friendly in terms of the process, timelines, the use of mediation etc. This is a very important piece of work and will feed into the overall discussions.

Legal spotlight: maternity leave

Can maternity leave be shared between parents?

QUESTIONS regarding the case of a father who is seeking to share the period of maternity leave, other than the compulsory maternity leave, that is available to the mother of his child has been referred by Spain's Social Court to the Court of Justice of the European Union.

While the questions that were referred related to the application of Spanish law, in this instance the CJEU understood that they were being asked to determine whether the Pregnant Workers Directive and the Equal Treatment Directive precluded a national measure which, apart from the period of compulsory maternity leave, entitled an employed father to share in the remainder of maternity leave in circumstances where the child's mother

was also employed or otherwise covered by a state social security scheme. (*Case-5/12 Montull -v- INSS*) (see link at end of article)

In their considerations, the European Court noted:

- The right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law.

- Pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave.

- That maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens of employment.

Therefore women workers are entitled to maternity leave as provided for in the directive and this leave cannot be taken from the mother and reassigned to the father unless the mother voluntarily surrenders that right.

On the other hand, the directive does not preclude the mother deciding that, apart from the compulsory maternity leave, she will

Continued on Page 4

Can maternity leave be shared between parents?

From Page 3

transfer all or part of her maternity leave to the father of the child. Members should note that there is a Bill in the Seanad, entitled *Parental Leave Bill 2013*, proposing that the current maternity leave arrangements be amended to allow a woman to transfer a portion of her 26 weeks paid maternity leave and

the related benefits to the father of the child. The Bill seeks to amend the *Maternity Protection Acts 1994 and 2004* to provide both maternity and paternity leave for parents of a new-born child but does so at a cost to the mother. The union fully supports the role of fathers in caring for a new-born child but believes this can best be achieved by the intro-

duction of an appropriate level of paid paternity leave and/or paid parental leave. Any attempt now to reduce the period of paid maternity leave to mothers by introducing a Bill that seeks to trade maternity for paternity leave would have to be carefully considered by all concerned. This issue has been raised with ICTU.

Check out Case-5/12 Montull -v- INSS at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=141784&pageIndex=0&doclang=en>



Legal spotlight: *surrogacy cases*

Conflicting views from CJEU

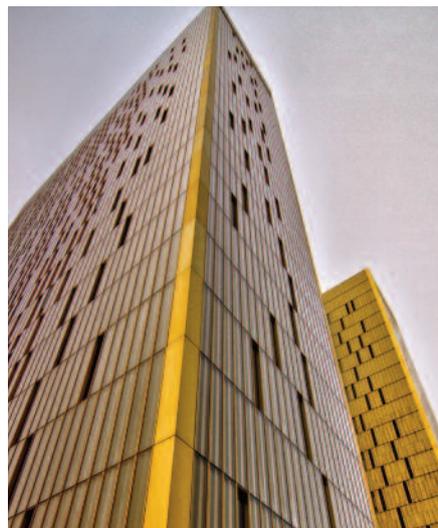
THERE are currently two cases before the Court of Justice of the European Union (CJEU), pictured right, regarding the provision of paid leave for a mother whose child was born through a surrogacy arrangement.

The Opinion of the Advocate General in each case has now been published and they have each given a different view.

The case of *CD -v- ST* (see link 1 below) refers to a woman and her partner who live in the UK, had a child by legal surrogacy after which the woman applied to her employer for paid maternity or adoption leave.

Her employer refused on the basis that she did not give birth or adopt a child. CD then brought her case before a UK court which in turn raised the question with the CJEU as to whether or not it was in accordance with EU law to pay a woman paid maternity or adoptive leave in circumstances where she had not given birth to the child.

In her opinion, Advocate General Juliane Kokott deemed that in such circumstances an intended mother has the right to receive paid maternity leave after the birth of the child and that the leave must amount to at least two weeks and any leave taken by the surrogate



Picture: Alastair Photography (CC BY 2.0)

mother must be deducted from the leave taken by the intended mother and vice versa.

However, in a separate case of *Z -v- Board of Management of a Community School*, (see link 2 below) a woman claimed a paid leave of absence after the birth of a child

through a surrogacy arrangement.

When her claim was refused she argued that she had been discriminated against and sought redress through the Equality Tribunal. The Equality Officer sought clarification from the CJEU as to whether the fact that the refusal of a paid leave of absence to a woman whose genetic child has been born through a surrogacy arrangement is in breach of EU law.

In his opinion Advocate General Nils Wahl deemed that this case did not fall within the scope of the Pregnant Workers Directive and that the special protections afforded to pregnant women cannot apply.

He dismissed the argument based on sex discrimination on the basis that the male parent of a child born through surrogacy would be treated in exactly the same manner.

Opinions of Advocate Generals are not binding on the CJEU and judgments in both cases are expected next year.

**Note: Surrogacy is an arrangement where a woman carries and delivers a child for another person or couple and while this is legal in some EU Member States it is not legal in Ireland.*

1. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=142184&pageIndex=0&doclang=en>
2. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=142181&pageIndex=0&doclang=en>