



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Sent by email: minister@per.gov.ie

Paschal Donohoe T.D.
Minister for Finance
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2
D02 R583

27 May 2020

Re: the legality of the Temporary Wage Subsidy Scheme insofar as it relates to employees returning from maternity leave

Dear Minister,


Having regard to its functions under sections 10(2)(b) and (d) of Irish Human Rights and Equality Commission Act 2014, I am writing to you to express the Commission's concern in relation to the exclusion of women returning from maternity leave from the Temporary Wage Subsidy Scheme (the "TWSS"/"Scheme"), established by the Government to contribute to the wage costs of eligible employers adversely affected by Covid-19.

It is the Commission's considered view that there is a strong argument that the TWSS is contrary to the State's obligations under EU law:

- first, by its exclusion of women returning from maternity leave after February 2020, where those women had not been in receipt of any payment from the employer in the relevant payroll period; and
- secondly, by its less favourable treatment of women returning from maternity leave after February 2020 in the calculation of the subsidy, where those women had been on a reduced payment from their employer during leave.

16-22 Sráid na Faiche,
Baile Átha Cliath 7
16-22 Green Street, Dublin 7

Guthán/Phone + 353 (0) 1 8589601
Facs/Fax + 353 (0) 1 8589609
Íosghlao/Lo-call 1890 245 245

Ríomhphost/Email info@ihrec.ie
Idirlíon/Web www.ihrec.ie
 @_ihrec

More particularly, insofar as it excludes, or treats less favourably, women returning from maternity leave under the TWSS, section 28 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 (the “Emergency Measures Act”) appears to be inconsistent with Articles 4, 14 and/or 15 of Directive 2006/54, interpreted in light of Article 157 TFEU and Articles 21 and 23 of the EU Charter of Fundamental Rights.

In addition, it may be argued that section 28 of the Emergency Measures Act is inconsistent with Articles 10 and/or 11 of Directive 92/85 and, furthermore, with sections 22, 23 and/or 26 of the Maternity Protection Acts insofar as they give effect to EU law.

We trust that you, like the Commission, will appreciate the urgency of this matter for those employees who have/are ready to return to work, following completion of their maternity leave, but who now face significantly reduced payments (where they had been in receipt of a reduced payment from their employer during maternity leave) or the prospect of losing their jobs, where their employer is not able to access the TWSS for them.

While there has been some suggestion in public commentary that a legislative amendment is required to remedy this deficiency in the TWSS, the Commission considers that there is a powerful argument that the situation can, and ought to, be remedied immediately by the disapplication of the relevant provisions of the Emergency Measures Act, and the administrative measures adopted thereunder, insofar as they are contrary to EU law.

In this regard, we note that you confirmed before Dáil Éireann that it was *“of course the intention of the legislation was to treat all of our citizens and employees equally”*.

In case of a conflict between domestic law and EU law, the principle of primacy of EU law requires that EU law take precedence (Case 106/77, *Simmmenthal*).

As the Court of Justice of the European Union recently confirmed, the duty to disapply national legislation that is contrary to EU law:

“is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law”;

and

“the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules”;

(Case C-378/17 *Minister for Justice v. Director of Workplace Relations Commission*, paragraphs 38-39).

It follows that, insofar as the TWSS is inconsistent with EU law, the Minister for Finance and the Revenue Commissioners – as organs of the State - must give full effect to EU law and disapply any conflicting national law.

In other words, they are required to disapply the restrictive definition of *“specified employee”* in section 28 of the Emergency Measures Act insofar as this excludes or discriminates against employees returning from maternity leave. With respect to employees returning from maternity leave who have been in receipt of maternity benefit in the relevant payroll period for the purposes

of the TWSS, the restrictive conditions on the calculation of the subsidy – whether based on section 28 itself, the Ministerial determination under section 28 or the Revenue Commission’s Guidance – should be disapplied insofar as those employees are concerned.

While a legislative amendment putting the position beyond all doubt would be optimal, in accordance with the principle of primacy of EU law, the Government and the Revenue Commissioners must not await the setting aside or amendment of contrary legislation before giving full effect to EU law.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Frank Conaty', enclosed within a thin, hand-drawn oval border.

Dr Frank Conaty
Acting Chief Commissioner

cc: Niall Cody, Chairman, Office of the Revenue Commissioners
Email: ChairmansOffice@revenue.ie