Employment Update

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Industrial Relations: The Consultation Directive

Directive 2002/14 (otherwise known as the "Consultation Directive") has been in force in Ireland since 23 March 2005 though legislation has not yet been enacted to transpose it.

The Directive sets out the minimum requirements for employees to be informed and consulted by their employer regarding developments in their business. Currently the Directive applies in Ireland to undertakings with at least 150 employees or establishments with at least 100 employees. From 2008 onwards, the Directive will apply to undertakings of at least 50 employees or establishments of at least 20 employees.

Article 4 of the Directive provides *inter alia*:

"2. Information and consultation shall cover:
   (a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
   (b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
   (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).
   [***Note***—this relates to provisions on collective redundancy, transfer of undertakings and European Works Councils]

3. Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

4. Consultation shall take place:
   (a) while ensuring that the timing, method and content thereof are appropriate;
   (b) at the relevant level of management and representation, depending on the subject under discussion;
   (c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;
   (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
   (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2c."

The Minister for Labour Affairs published the Employees (Provision of Information and Consultation) Bill 2005 at the end of July 2005. This is the first draft of legislation to implement the general provisions of the Directive listed above. In s 7 of the Bill, the onus is placed on employees to trigger a request that an employer sets up an information and consultation procedure. Once ten per cent of employees (subject to a minimum of 15 and a maximum of 100) make such a request, an employer must enter into negotiations to agree an appropriate procedure with employees. The parties have six months to conclude a negotiated agreement, after which the "standard fall-back rules" apply if no agreement is reached. The standard rules in the Bill prescribe the procedures to be followed in setting up an "information and consultation forum". This forum must comprise elected employee representatives.

Industrial Relations Act 2001–2004

Ryanair v Labour Court, unreported, High Court, Hanna J, 14th October 2005

Prior to 2001 trade disputes were investigated by the Rights Commissioner or the Labour Court. The term "trade dispute" was given a wide interpretation and encompassed almost any grievance an employee or a group of employees had in relation to the employment. The only problem with bringing such a claim was that it was not enforceable.

This problem was remedied by the Industrial Relations Act 2001 where it is now possible to bring a trade dispute before the Labour Court, provided certain conditions are met, which can result in an enforceable order. The most important condition is that "it is not the practise of the employer to engage in collective bargaining".

Under the legislation, for instance, a group of employees could bring an action that their pay is not in line with the pay of comparable employees who work for an employer who engages in collective bargaining (who negotiates with unions). In cases CD 04/364, CD 04/362, CD 04/414, the Labour Court made orders in favour of employees under the Acts 2001–2004 to provide for better pay. This line of authority has posed a serious threat to companies that do not engage in collective bargaining.

The position in Irish law has long been that while an employee has a constitutional right to join a union he does not have a constitutional right to have that or any union recognised.

In *Ryanair v Labour Court,* IMPACT, a trade union acting on behalf of pilots, wrote to the chief executive of the respondent seeking written particulars of the contract of employment for pilots, details of the principles to be applied in the event of redundancy affecting pilots, and arrangements for pilot movement to other aircraft. Much of the dispute surrounded the decision of the applicant to change its fleet of aircraft, which would require many of its pilots to undergo additional training at their own cost if they did not remain with the company for five years. The applicant refused to deal with the union in respect of the matters raised. As a result of that refusal, IMPACT referred the dispute to the Labour Court under the Industrial Relations Amendment Act 2001.

As a preliminary issue, the applicant argued before the Labour Court that the Court did not have jurisdiction to hear the dispute in particular that the conditions in s 2 of the Act of 2001 were not met. The Labour Court held, in a decision reported at *Irish Municipal, Public and Civil Trade Union/Irish Airlines Pilots Association v Ryanair* [2005] 16 ELR that it had jurisdiction to investigate the dispute.

The applicant sought to judicially review this decision. The applicant argued, *inter alia*:

(1) that the applicant ran employment relations committees (ERCs). Therefore it was the employer to engage in collective bargaining. Therefore the respondent was incorrect in finding the precondition in section 2.1.a was met;
(2) The respondent had not used fair procedures. In particular it did not require the individual pilots to appear before the Labour Court and give oral evidence. It relied on documentary evidence presented by IMPACT which was not formally proven.

The High Court refused the application. In relation to (1) above, the court stated that the ERC forum did not constitute collective bargaining since such a body did not carry a trade union negotiation the employees had indicated a preference to negotiate through a trade union with such a licence—that union being IMPACT.

In relation to (2) above the court stated:

> "In my view, the Labour Court is entitled to manage its own affairs and to conduct proceedings before it as it sees fit provided it so conducts itself within the limits of the statutory provision for which it derives its authority ..." *and* "[N]ot only was the applicant the author of the essential documentation relied upon by the respondent in coming to its conclusion but, furthermore, it was fully aware that such documents were before the respondent and the applicant had every opportunity of addressing the Labour Court on them."

Stress at Work

Maher v Jabil Global Services Ltd, unreported, Clarke J, 12 May 2005

The principles for stress at work cases were laid out in UK law in *Sutherland v Hatton* [2002] 2 All ER 1. These were adopted by the Irish High Court in *McGrath v Trintech Technologies Limited* [2005] 16 ELR 49.

The principles have been applied again in *Maher v Jabil Global Services Limited* (unreported, Clarke J, 12 May 2005) the plaintiff claimed damages for stress. He claimed two matters caused the stress. First, that he took up a position of shift manager and after two months in employment, he had to take sick leave for approximately two months. He argued he was subjected to unreasonable pressure during this period. Second, that on his return he was moved to a different role. Three months later he went out on sick leave. He then resigned from the post seven months into this period of sick leave. He argued that this was effectively a "non-job" which exposed him to humiliation amongst his fellow workers to whom it would be obvious, in his case, that he had been, in effect, demoted.

The Court refused to award damages on either ground despite being satisfied that he had suffered personal injury, which had been caused by his work environment. This was after a trial of some seven days before the High Court. Effectively the Court applied the principles to find that it was not reasonably foreseeable that the employer's action would cause the damage complained of.

The test the court applied was as follows:

(a) Has the plaintiff suffered an injury to his or her health as opposed to what might be described as ordinary occupational stress?

(b) If so is that injury attributable to the workplace; and
(c) If so was the harm suffered to the particular employee concerned reasonably foreseeable in all the circumstances.

The court concluded that the on the test identified and having regard to the facts of that case, the "objective threshold" for foreseeable harm caused was not met. The court could not identify evidence that the plaintiff's workload was unusual or that the employer should have know that the plaintiff would find it so. In so finding the court had regard to the demands made on other employees in comparable jobs and such evidence as suggested that those employees did not find it unduly stressful. The court specifically had regard to the level of sickness and absenteeism in this regard.

The court concluded on the facts that there was not any concerted plan on the part of the employer to seek to exclude the plaintiff from his employment. Although he made complaints these were not as frequent as originally suggested by the plaintiff. The court took into account Item 11 of the practical propositions set out in *Hatton* which indicates that an employer who offers a confidential advice service, with referral to appropriate counselling or treatment services, is unlikely to be found in breach of duty. In doing so, the court indicated that this proposition is subject to a caveat that if the court was satisfied that notwithstanding the provision of such a service the truth was that an employer was intent on removing an employee the availability of such a service might be regarded as being more a matter of form than substance ("going through the motions").