The Information and Consultation Directive – a new era in industrial relations?

Killian O'Reilly, Partner (Commercial Litigation Department)

One of the most fundamental changes to Irish industrial relations culture in decades is now on the doorstep of employers. The EU Directive on the provision of information and consultation of employees ("the Directive") was due for implementation in Ireland by the end of March. This deadline has not been achieved, and at the time of going to press, it was expected that the Bill would be introduced before the Dáil summer recess.

Currently, employers are obliged to inform and consult with employees only on a limited range of issues such as transfers of undertakings, collective redundancies and Works Councils (in the case of trans-national companies). This is about to change dramatically.

Once the Directive is part of our national body of law, all employers who have over a specified number of employees will be obliged to put in place structured mechanisms for informing and consulting with employees on a wide range of issues which affect their jobs and future employment prospects.

Who will it affect?

The new regime will initially apply to companies and organisations in the private and state sectors with more than 150 employees. The EU has allowed Ireland and the UK to implement the Directive on a phased basis, so that from March 2007 it will apply to all undertakings with 100 or more employees and from March 2008 to all undertakings with 50 or more employees.

As we have yet to see the implementing legislation, we don't yet know whether it will apply to either "undertakings" or "establishments" (a choice given to Member States in the Directive). This will be a crucial selection.

The Directive defines an "undertaking" as "*a private or public undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States*". This definition is not confined to companies alone and will encompass entities such as semi state bodies which carry out an economic activity, partnerships, co-ops, charitable foundations etc.

An "establishment" is defined as a "*unit of business defined in accordance with the national law and practice, located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources*". This definition could apply to a unit of a larger entity such as a branch or subsidiary i.e. a group of companies. It may not have to be a separate legal entity.

Regardless of the definition selected, the legislation is set to affect a huge number of organisations including, but not limited to, the following:

- Practically all limited and unlimited companies
- Local authorities, Government departments, state agencies and semi state bodies
- Partnerships – including professional firms
- Joint ventures
- Sole traders
- Educational institutions, hospitals, etc
- Charities
- Sporting bodies

The legislation will confer rights on all employees including part-time and fixed term workers and apprentices. Certain temporary agency workers may yet be excluded from its provisions.

Requirements of the Directive

Employers who are familiar with the Trans-National Information and Consultation of Employees Act, 1996 will already be familiar with the concept of a Works Council. Many comparisons have been drawn between the provisions of the new Directive and Works Councils. However, the Directive goes much further in its scope and application.

The broad thrust of the Directive (which will apply automatically to businesses meeting the headcount threshold) is to provide a general framework to ensure employee input into the making of managerial decisions.

It is anticipated that the Irish Government will include a "trigger" requirement. In effect, this means that the requirement to inform and consult will not operate automatically. The UK has implemented the Directive so that the employers' obligation to put procedures in place for establishing information and consultation arrangements will only come into operation if the employer or 10% of the employees trigger the provisions. It is not yet known how the Irish legislation's trigger mechanism will operate.

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Licensing law changes
The recently published General Scheme of the Intoxicating Liquor (Codification) Bill proposes wide-ranging reforms to Ireland's liquor licensing regime, all of which are based on policy considerations to attempt to introduce a cultural shift in the approach to alcohol consumption and related anti-social behaviour. Plans to introduce a café bar licence have now been abandoned and instead it is proposed to allow restaurants to have a full liquor license. The Minister is seeking the views of the public and interested parties on the Bill.

Financial Services Ombudsman
The Financial Services Ombudsman Bureau opened for business on 1 April 2005. The Bureau will ensure that all unresolved complaints from customers of financial services institutions are investigated, mediated and adjudicated fairly. Joe Meade (previously Data Protection Commissioner) has been appointed as the first Financial Services Ombudsman.

Compliance statements
The Minister for Trade and Commerce has referred the obligation to prepare annual compliance statements to the Company Law Review Group. The Group will investigate the appropriateness and proportionality of the obligation to prepare the statements and their impact on costs and competitiveness. They are due to report back by the end of July.

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There is no possibility for the employer to unilaterally opt out of the Directive. An employer may reach agreement with employee representatives on customisation of the Directive and if such alternative arrangements are agreed in advance, it may prevent the consultation requirements being triggered in the first place.

Nature of information and consultation

The Directive requires that employers provide information about the business to employee representatives and consult with them on certain business decisions. The Bill is also likely to lay down minimum guidelines for election of employee representatives.

The Directive seems to contemplate that information and consultation requirements may be triggered at any time where certain events occur or are in the offing, which require information and consultation. The provisions require that information only be given "*on the recent and probable development of the undertaking's activities and economic situation*" and that consultation take place on "*the situation, structure and probable development of employment within the undertaking and on any anticipatory measure envisaged, in particular where there is a threat to employment*". Consultation includes "*consultation with a view to reaching an agreement on decisions likely to lead to substantial changes in work organisation or in contractual relations*".

Pending publication of Irish implementing legislation we can only guess the scenarios where information and consultation with employees will be required but they are likely to include the following:

- Business developments
- Employment developments – particularly any potential threats to employment
- Any decision likely to lead to substantial changes in work organisation, contractual relations etc.

The Directive envisages consultation with employee representatives "*with a view to reaching an agreement*". While there is no provision in the Directive that requires negotiation, what is required is dialogue and a genuine exchange of views.

It is likely that employers will be obliged to inform and consult with employees on the following issues (amongst others):

- Recruitment of new employees
- Redundancies (compulsory and voluntary)
- Staff turnover
- Structure of employment
- Geographic locations of employees
- Reorganisation of posts within an organisation, redeployment of staff or transfer of posts.

Trade Unions

Without doubt, the Trades Union movement are keen to embrace the provisions of the legislation to ensure that they play a vital role in the industrial relations mechanisms of the future. As the legislation will also apply to those work forces which are currently non-unionised, it offers an opportunity to put in place a mechanism to ensure employee consultation which, if effective, may obviate the need for Trade Union involvement.

Conclusion

The Directive represents new challenges for employers in collective work-place representation. One area of uncertainty, (and of major concern to both employers and employees), is the potential impact on current industrial relations mechanisms, as the Directive gives little or no guidance on delivery mechanisms. However, one thing is certain; that by taking a speedy and pro-active stance, employers will be better placed to harness the benefits of the Directive and minimise its negative implications.

Once the implementing legislation is published we shall return to this important topic. In the meantime if you have any queries please contact Killian O'Reilly.

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Appointments

Claire McCormack has recently been appointed as a Partner to the firm's Commercial Property Department and is a manager of the firm's Private Clients Department.

Chris Sayer has been appointed Senior Associate in the Conveyancing Department of our Leeds Office.

Keith Smyth has joined the firm as Senior Associate in our Commercial Department. Keith previously worked in Arthur Cox.

A second bite of the cherry

Jane Miller Hurley, Solicitor
(Litigation Department)

Marriage breakdown is unfortunately a fact of life in Ireland. When married couples make the difficult decision to go their separate ways there are a number of options available to them for bringing a legal conclusion to their relationship. These include a formal separation either by separation agreement, judicial separation or, if applicable, divorce.

Achieving certainty and finality is important for couples going through separation or divorce, but this is not always possible. Some issues in family law cannot be finalised for good by the courts, most notably in the area of maintenance and financial relief.

Clean breaks?

Irish law does not allow for 'clean break' divorces. This means that both parties can revisit the whole issue of financial provision and maintenance at a later date.

However, this situation may not be clear cut, particularly for those parties who have ample resources. In the last few years a number of cases have demonstrated the Supreme Courts' willingness to facilitate 'clean breaks' in what have come to be known as 'big money' divorce cases.

In *T v T*, the Supreme Court upheld a High Court decision to award a wife a lump sum payment of €6.35 million along with a monthly maintenance payment for the youngest child of the marriage. The Court said that in cases where there are ample resources available that it should go beyond what is thought to be sufficient for the parties reasonable requirements and should attempt to effect a fair distribution of assets.

In another case (*K v K*) which involved 'big money' the Supreme Court also ordered that a wife be paid a lump sum of €511,000 in addition to an annual maintenance payment of €40,000. In this case, the parties had separated in 1982 and the Court found that the agreement did not make adequate financial provision for the wife, who often found herself in financial difficulties. The Court pointed out that it will revisit and review earlier separation agreements to ensure that the parties are provided for properly, particularly for wives who adopt the traditional role of homemaker and custodian of the children. This is particularly the case where the husband's (or one of the parties') financial situation has improved after the deed of separation has been executed.

Revisiting financial orders

Even in cases where ample resources or 'big money' are not involved, the courts will review and revisit financial provision and maintenance orders. However, there is no guarantee that the courts will make orders to increase financial relief.

In *W. A. v A.A.* a husband and wife entered into a Deed of Separation in 1993. Both parties had intended that the separation agreement would be full and final, and a provision was also included that if either of them wanted a divorce that the other party would not stop them. Both the husband and wife received a substantial settlement in the separation agreement. The husband later sought a decree of divorce and the wife made a counterclaim, but she also sought further orders for maintenance, a pension adjustment order and other financial reliefs. Even though the parties had envisaged that the separation agreement would be full and final, the wife was still entitled to seek further financial relief in the divorce proceedings.

Having reviewed the separation agreement, the Court was satisfied that proper provision had been made for both parties. However, the Court identified that the husband had managed his assets well since the separation and had prospered and made much from his share. On the other hand, the wife's position had worsened and she was not as well off as she had been. Her losses were due to bad management on her part and were not attributable to other factors such as ill health or physical incapacity. Even though her position had worsened she had at no stage contacted her husband for further financial support prior to the issuing of proceedings.

The Court considered that it would not be just to make any further financial orders against the husband as it felt that the wife had been provided for in an adequate financial manner.

Conclusion

This is an important case which illustrates that either party is entitled to review financial provision by the other spouse in the proceedings. It does not follow that the courts will grant further financial relief, provided that the applying spouse had been properly provided for together with any dependant children. However, it is safe to infer from this case that, if the wife had suffered ill health or any other unforeseen circumstance, the court may have taken a different view.

Even where a divorce decree has been granted a party may revisit the issue of financial relief if the circumstances have changed to the detriment of the applying party. However, the courts shall not make a Financial Compensation Order if the applicant spouse has already re-married!

Divorce and separation statistics

The Courts Service has recently published its Annual Report for 2003. Statistics included in the report show that:

- 3,733 divorce applications were received in the Circuit Court in 2003
- 2,929 divorces were granted
- 5 applications for divorce were refused
- Of the divorces granted, 1,130 applicants were male while 1,799 applicants were female
- 1802 applications for judicial separation were received by the Circuit Court
- 1,206 judicial separations were granted
- 328 of these were made by male applicants whereas 878 applications were made by females.

Occupiers' liability: a slippery slope?

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The Occupiers Liability Act, 1995 was introduced as a result of lobbying by farming organisations who were concerned with the recreational use of agricultural property. The Act imposes a common duty of care upon an occupier to take reasonable care that those visitors on his land or premises do not suffer injury or damage due to any danger on the property. The definition of 'premises' is broadly drafted so that it includes, not only fixed but also, movable structures. The occupiers' duty of care is reduced in relation to trespassers and recreational users.

Within the last six months the Irish courts have delivered decisions in two interesting cases, both of which have significantly clarified the issues surrounding occupiers' liability. While the first of those cases (*Hall v Meehan)* concerned an accident which occurred before the Act came into operation, it nonetheless throws light upon the topic and provides a useful backdrop to the Act. The more widely publicised case of *Weir Rodgers v SF Sun Trust Ltd* deals directly with the interpretation of the Act and offers clarification of the law to those who own land and premises.

Weir Rodgers v The S.F. Sun Trust Ltd

In this case, the Supreme Court clarified the issue of occupiers' liability in relation to *recreational users* of property. This aspect of law deals specifically with incidents that befall those while on another persons' premises or land with or without the occupier's permission, but excluding:

- Someone who is a member of the occupier's family who is usually resident on the premises, or
- Someone who is present at the express invitation of the occupier, or
- Someone who is present with the permission of the occupier for social reasons connected with the occupier.

The High Court had found in favour of the plaintiff and attributed liability to the occupier. However, the Supreme Court earlier this year dismissed the action and overturned the judgment of the High Court.

The facts

In April 1997, the plaintiff (Ms Weir Rodgers), was walking along an embankment with a group of friends leading to a beach in Co. Donegal. She later sat on a grassy area overlooking a stony gradient to watch the sun set. When she stood up her foot slipped and she began to slide on the debris down the slope which caused her to fall into the water. She sustained serious injuries to her left shoulder, elbow, hip, pelvis, ankle and foot. The issue arose then as to whether the occupier of the unused land (a division of the Franciscan Order) should have erected a fence or alerted the public to any probable danger by way of warning signs.

The plaintiff instituted proceedings in the High Court to recover damages on foot of injuries she sustained on the defendant's unused land. She claimed that the defendants were negligent and in breach of a duty owed to her under Section 4 of the Occupiers Liability Act, 1995 ("the Act") in her capacity as a recreational user. The High Court agreed with this contention and awarded her damages of €113,000. The Court went on to find the plaintiff guilty of contributory negligence to the extent of 25% and the damages were reduced to €84,666.

The defendants appealed the judgment to the Supreme Court where the scope of an occupier's liability was discussed in reference to the Act.

The Act recognises three categories of entrant onto land:

- visitors
- trespassers
- recreational users

Under the Act a *recreational user* includes an entrant who is on the land for the purpose of engaging in recreational activity with or without the occupier's permission. The duty owed to trespassers and recreational users is a limited duty and is less comprehensive than that owed to visitors.

Section 5 of the Act allows landowners to restrict or even exclude their liability towards visitors. This restriction, however, cannot be enforced against recreational users and trespassers. The Act favours these categories by ensuring that a minimum level of protection is provided by the landowner (namely not to injure them intentionally or to act in reckless disregard for their person or property). This idea of recklessness denotes an objective standard and one which is open to interpretation by the courts. Any efforts by an occupier to undermine the protection afforded to recreational users and trespassers will be void. The extent of the occupier's liability toward visitors can be restricted or excluded by express agreement or by putting up a notice. The notice must be prominently positioned at the usual means of access and must be reasonable in the circumstances. This is an attempt to mitigate the responsibility of the landowner.

The Supreme Court contended that at a cliff edge it is reasonable to expect inherent danger. Furthermore, the occupier of the land could not be held liable for not putting up a warning notice. The Supreme Court referred to the UK decision of the House of Lords in *Tomlinson v Congleton Borough Council* where the Court acknowledged the common sense expectations of persons engaged in outdoor activities. This view is further endorsed in *Hastie v Magistrates of Edinburgh* where it was held that the risks of such activities are "as a result of the world as we find it".

The Supreme Court referred to the realities of engaging in activities that involve sitting near a cliff edge and stated that such a person must be prepared for "oddities in the cliff structure" and that he/she assumes any risk involved. In overturning the previous judgment of the High Court, the occupier was absolved of any liability.

Hall v Meehan

This case concerned injuries sustained by a pupil of a school in Dungloe, Co. Donegal in June 1992. The boy sustained injuries as a result of collision with another pupil in the schoolyard where he fell backwards onto a row of sharp edged breeze blocks, which were present in the playground. Unlike the case of Weir Rodgers, the plaintiff here was deemed to be an "invitee" (akin to the concept of "visitors" under the 1995 Act) on the defendant's school premises and therefore the occupier owed a higher standard of care to the pupil than they would have to a trespasser or recreational user. A key element in this case was that the breeze blocks were of a makeshift variety and brought onto the premises as a result of voluntary work carried out by parents of the school. Expert witnesses confirmed that the kerbing was sub-standard and unsuitable for a playground where children would be playing. In awarding damages of €40,000 to the plaintiff, the Court found the defendant guilty of negligence and breach of duty in failing to provide a reasonable standard of care to prevent damage from an unusual danger of which he knew or ought to have known.

This case illustrates the differing standards of care owed by occupiers to invitees and recreational users, the standard of care being more onerous to the former category than the latter.

Conclusion

The Supreme Court's decision in Weir Rodgers is a welcome clarification to the law surrounding recreational users and occupiers' liability. The tug of war that exists between landowner's rights and those of recreational users, such as hill walkers, is still very much in existence. The balance for the moment seems to have been tipped in favour of landowners. The implication, therefore, is that recreational users, such as cliff walkers, should exercise caution when deciding to avail of local amenities.