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NEW TECHNOLOGIES, PRIVACY AND WORKING TIME

I - THE PERSONAL LIFE OF THE WORKER

The impact of technology on employees' working lives is receiving increasing attention. Developments in technology influence how we work in a number of ways including how work tasks are undertaken (shaped by automation and digitization possibilities) how employers monitor, control and evaluate work and increasingly, when and where we work. While advancements in technology can have many positive benefits in relation to flexible working and can provide opportunities to balance work and life responsibilities, there is growing unease particularly among employee representatives that the divide between work and non-work time and activities is increasingly blurred. Rather than balancing work and life activities, technology has in many instances tipped the balance distinctly toward more work activity leading to increased levels of stress and other negative health outcomes for workers as a result of an « always on » culture. Many employees are under pressure either directly from employers' expectations or due to workload to make themselves available or to complete work tasks during their free time. Technological developments including advances in smartphone technology, more sophisticated software tools and in particular constant access to workplace email have facilitated this. Such developments have significant implications for the personal life of the worker while also raising challenges for the interpretation and application of labor law in new contexts. Of particular significance in this regard is the application of working time legislation.

II - ORGANISATION OF WORKING TIME ACT 1997

Irish working time regulations in relation to developments in the Horse racing industry were discussed in a previous edition of *Revue de droit comparé du travail et de la sécurité sociale* (September 2018 - February 2019)¹. The level, recording (and accuracy thereof), and control over working time remains a contentious issue within the Irish industrial relations landscape. A significant development in this area which links developments in technology and working time regulations involves a case taken by a business executive against the organisation Kepak Convenience Foods (known colloquially as « the Kepak case »). The case relates primarily to breaches of Irish working time regulations as set out in the Organisation of Working Time Act (OWTA) 1997. The main provisions of this Act include employees'

¹ M. O'Sullivan, « Actualités juridiques internationales », *Revue de droit comparé du travail et de la sécurité sociale*, no. 2018/3, p. 178.

right to 11 consecutive hours daily rest periods; a right to 24 consecutive hours' rest in each 7-day period (normally following the 11 hours) and a maximum of an average of 48 hours in a working week. The Kepak case centred on the employees' claim that her rights under the Act were breached as she told the Labour Court she worked 60 hours per week in order to complete her work at the company. Her work involved travelling between customer sites across a particular region of the country and she was contracted work 40 hours per week².

The employee had to record her work activity on Kepak's computerised reporting system. This proved an important point in the case as it was determined that the organisation was fully aware of the number of hours the employee was working and that they were excessive but that the employer did not take any steps to curtail her working hours to within the legal limits.

In a landmark ruling, which raises a number of important issues in relation to when and how employers and employees utilize technology for work purposes, the Irish Labour Court determined that the employee be compensated €7,500. Of critical significance in this case was the determination by the Labour Court that responsibility for ensuring that employees avail of adequate rest periods as set out by the minimum requirements in the legislation lies with employers. This is a particularly important development given the pervasiveness of technology in our working (and personal) lives. The employer had argued that the employee *chose* to spend additional hours working and that it was possible for her to complete the work assigned to her in a shorter period of time (which would not have been in breach of the working time regulations). Crucially however the complainant in the case provided evidence of emails sent by the employer to her and received by the employer from her outside of normal working hours including some past midnight and before 8am.

The Labour Court therefore determined that « by failing to keep proper records of her working hours and its failure to monitor and curtail her excessive working hours, Kepak permitted her to work in excess of the statutory maximum working hours ». The Court also noted that the company could not claim to be unaware of the employees' working hours given the nature of emails sent and the records on its own reporting system.

III - THE SIGNIFICANCE OF THE « KEPAK CASE »

The ruling the Kepak case has prompted much debate in Ireland in relation to excessive working hours, an « always on » working culture and the responsibilities of employers for employees' health and safety and quality of working life. While the case draws attention to the need for employment legislation to keep pace with changes in work organisation and contemporary work activities, it also highlights the need for engagement between employers and employees to best harness the capabilities of technology and flexible working for the benefit of both. In responding to the case, the Irish Congress for Trade Unions' (ICTU) General Secretary Patricia King noted the following: « With the constant development of new and innovative technology... it is essential now that employers continue to engage with their employees through their trade unions in order that we can

2 A. Prendergast, « Food company ordered to pay former executive for overworking », *Industrial Relations News*, 2018, p. 31.

secure decent pragmatic agreements... which honour the rights of workers to adequate time off »³.

The Director for Employee Relations at the Irish Business and Employers' Confederation (IBEC) Maeve McElwee pointed to the importance for businesses to avail of flexible working arrangements in order to communicate with colleagues internationally and across time zones. However, she noted « that flexibility whether for personal or business needs is still subject to the requirements of the OMTA »⁴. What is perhaps the most significant outcome of the case is that the reason for employees working excessive hours is in many respects not relevant. That is, it does not matter if the employee chooses to work hours in excess of those provided in the Act or if the employer compels the employee to work. In either case, the employer is liable for breaches of the Act in line with their responsibility to ensure Health and Safety for workers. Recent developments in this area have seen a campaign for legislation to address the Right to Disconnect.

IV - THE RIGHT TO DISCONNECT CAMPAIGN

Outside of legislation, there are steps that organisations can take, if they choose or are pressured to do so, which alleviate the expectations and demands on employees' time outside contracted working hours. The overall value and success of an optional system to an employee will however largely rely on the organisational culture and expectations of the employer in relation to technological engagement and availability outside working hours. Light-touch approaches include policies encouraging employees not to communicate with each other via email outside working hours, or reminders to take a digital detox while on leave⁵. More forceful examples include default mechanisms that restrict users ability to send emails or set up meetings outside of working hours⁶. However, in line with other countries, Ireland is now moving towards the introduction of additional legislation to govern this issue.

In October 2019, the Financial Services Union (FSU), which is the representative body for those working in the banking, finance and investment fund management sectors, launched a campaign for formal legislation governing the « right to disconnect » to be introduced in Ireland⁷. The union launched the call on foot of research it conducted with workers in the sector which revealed that 25 percent of respondents felt their employer expected them to answer calls or emails outside of work hours, and just 7 percent of respondents felt that their employer had engaged in efforts to prevent overuse of technology⁸. The type of legislation which the union is calling for mirrors the kind of « right to disconnect » laws such as that which was introduced in France in 2017, and similar legislation in Italy requiring contractual clarity with regard to an employee's responsibility to communicate outside of

3 « Smartphones exposing many to longer working hours, ICTU says », *The Irish Times*, 3/08/2018: <https://www.irishtimes.com/news/ireland/irish-news/smartphones-exposing-many-to-longer-working-hours-ictu-says-1.3585569>

4 *Id.*

5 Deloitte (2018): <https://www2.deloitte.com/us/en/insights/focus/behavioral-economics/negative-impact-technology-business.html>

6 *Id.*

7 Union reiterates call for right to disconnect : <https://www.fsunion.org/updates/newsreleases/2019/11/08/union-reiterates-call-for-right-to-disconnect-legi/>

8 <https://www.fsunion.org/updates/2019/10/10/union-calls-for-right-to-disconnect-legislation-on/>

general working hours. The laws have received much attention internationally since initial inception.

Essentially, the right to disconnect is defined as the right for the employee to not be connected to a digital professional tool (such as a smartphone) during time off. Arguably, the Irish OMTA 1997 does provide clear guidelines on how employees' time off should be provided for and managed. However, much as has been the case in other countries, the changing nature of work, increased connectivity and enhanced technology have blurred the lines around working time, resulting in opaqueness in interpretations of the OMTA where work outside the workplace is concerned (as illustrated in the *Kepak* case discussed earlier). In some aspects the term « right » is misleading in its use in the « right to disconnect ». In essence what the right to disconnect provides for is a right to negotiation in regards to how technological and connectedness aspects of work are managed. The central premise of right to disconnect legislation is to provide for a legal right that employee contracts must include a negotiation of the obligations that are required of an employee regarding how connected they are (for work purposes) outside of office hours. Therefore, the legislation itself does not completely restrict after-hours work communication, instead it obliges organisations to negotiate terms of contact clearly with employees. One potential way of managing the process is through collective bargaining and negotiation between unions, and employers as suggested by the ICTU General Secretary following the *Kepak* case to guarantee the right is in line with both employees and company needs. However, in Ireland, collective bargaining coverage is relatively low, therefore any regulation introduced around the right to disconnect would need to be robust in ensuring that it does not weaken the employee position and enhances rather than detracts from existing working time regulations.

In late 2019, the Minister for Business, Heather Humphreys announced that the Department are engaged in the development of a national flexible working policy. The policy will take into account the needs of families, individuals, employers and the broader economy in line with the *Future Jobs Strategy, Preparing Now for Tomorrow's Economy*. The remit of the work is to establish the potential impact of changes in technology, the workplace, the family and society on the types of flexible working arrangements available to employees and the potential obstacles that may exist for small, medium and large employers when facilitating flexible working arrangements. While the national flexible working policy does not explicitly refer to a right to disconnect, the Minister has eluded to hoping to cement its inclusion in some form⁹, and a commitment, to the formation of a consultation on the topic of the Right to Disconnect with employer and employee representatives was announced in December 2019¹⁰. The impact of these developments on the personal life of the worker in relation to working time remain to be seen.

9 Minister is hoping to bring forward a policy on a « right to disconnect » for workers within the next few months: <https://www.newstalk.com/news/minister-hoping-bring-forward-right-disconnect-policy-within-next-months-922554>

10 <https://dbei.gov.ie/en/Publications/Publication-files/Remote-Work-in-Ireland.pdf>