

Employers facing up to the challenge of a transformed workplace

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The challenges posed to employers by the growth in remote working was a central theme at this year's Ibec virtual employment law conference, as speakers outlined the impacts on employers with a plethora of new employment legislation in the works.

Speakers also focused on the legislative pipeline which is viewed as packed, while a leading employment law expert, Des Ryan, BL, pointed to a "bumper year for case law."

Ibec director of employer relations, Maeve McElwee, touched on the challenges the wider HR community has faced in what has been a "real roller coaster of a year."

New laws need to be "future focused" and sensitive to challenges faced by employers

She expressed concern about the possibility of legislative overload. New legislation that is in the pipeline includes: gender pay gap reporting; statutory sick pay; the right to request remote work; additional family and parental leave and domestic violence leave.

All of these are complex and promise to add to the administrative burdens on business, she suggested. The proposed legislation needs to be "future focused", coherent and introduced in a staggered way that is sensitive to the challenges faced by businesses, said the Ibec director.

Pauline O'Hare, Ibec senior solicitor, detailed the proposals on remote working that are in train and the need for greater guidance to be provided to employers dealing with pandemic-related challenges and opportunities.

Whilst a new national remote working strategy was published in January, employers are still in need of guidance. The cost implications are obvious. Over 40% of employees welcome the enhanced flexibility. Employers agree with this view, she suggested.

The requirement on employers to keep records on employees working from home while monitoring their conditions was stressed. The employer is liable if the home-based employee works excessive hours.

RIGHT TO REQUEST

The implications of the *Kepak* decision of the Labour Court in 2018 (DWT1820) regarding the right of an employee to disconnect were considered. In that case a business development executive was awarded €7,500.

Also discussed was the ruling of the Court of Justice of the EU in *Deutsche Bank*, reiterating the employer's obligation to record time worked. Cost is no defence where time recording obligations have not been fulfilled, Ms O'Hare stressed.

There is also a data protection dimension to consider with home-based workers.

Employees are soon to be given the right to request remote working. One question put forward was whether employers open themselves up to age or gender-based discrimination actions where they decline a request, if younger employees or females are disproportionately impacted by the refusal

Firms could be faced with disproportionate costs where remote working leads to replication of facilities. This adds to the need for guidance "on the objective grounds for a refusal", said Ms O'Hare.

RIGHT TO DISCONNECT

Ms O'Hare said that she welcomes the fact that the code of practice on the right to disconnect has not introduced "unnecessary rigidity into an increasingly flexible workplace."

It is open to the employer to contact employees outside normal hours where circumstances dictate. The key point is that this must happen occasionally – not regularly.

A related development is the proposal for leave for employees enduring violence in the home. There is concern around the implications for employers on this as they could be left in an awkward situation: "What is a reasonable response? Do they call the Gardai? Could this aggravate the employee's situation?"

In a panel discussion, Joanne Redmond, head of employment law at Ibec, pointed out that the right to disconnect applies to all employees wherever they work.

Organisations need to cultivate a culture that allows employees to disconnect, and managers and staff need to be trained with this in mind. Employees need to be engaged with in what is likely to be a hybrid or blended workplace for the foreseeable future.

HEALTH AND SAFETY

Ibec executive, Elaine Bowers, highlighted the health and safety issues. While there has been focus on physical matters, such as upper limb disorders, the volume of mental health issues encountered has been unexpected.

There are financial implications, she warned: "It is important to ensure there is adequate insurance cover (for home working)." Clearly, the cover provided must be within reason. Employers cannot be held responsible when an employee slips on the stairs.

Companies that have done well have taken a multidisciplinary approach. Ms Bowers said that it "is not fair to give it all to HR. You need to get IT, Legal and Finance on board. Also, the Health and Safety people."

Keep a record of advice provided as the situation keeps changing, she advised. Regarding returns to the normal workplace, employers should not pretend that such will be risk-free, given the nature of the virus.

According to Claire Hellen, HR strategy specialist at Ibec, the drawbacks of remote working must be considered: "You miss out on body language, nuance. Your network gets quite small. You do not know colleagues outside your immediate team." Ms Hellen advised to put practices in place to counter this problem.

'BUMPER YEAR' FOR CASE LAW

Des Ryan, BL, Associate Professor, TCD, considered the top legal judgments of the past year.

The most significant is the ruling of the Irish Supreme Court on the constitutionality of the WRC in the *Zalewski* case. The Court upheld the constitutionality of the WRC by a four to three majority.

As Mr Ryan observed, even those in the majority have been very critical of aspects of the operation of the WRC. It has now been established that justice must be openly administered. The importance of fair procedures, including, in particular, the right to cross-examine witnesses, has been emphasised.

On February 16 last, Ms Justice Costello of the Court of Appeal issued a judgment on dismissals during probation which "settles this area of the law, in all likelihood."

Proceedings were brought against Over-C Technology Ltd by a chief financial officer, who sought an injunction to halt his dismissal while on probation.

The plaintiff secured an injunction in the High Court following his dismissal. The High Court had accepted the argument based on the reputational damage to the CFO resulting from such an abrupt termination. This Court's ruling had caused unease amongst employers.

However, the Court of Appeal overturned the High Court's ruling. The implications of the reversal by the Court of Appeal is that a probationer who is dismissed on the grounds of poor performance (as opposed to misconduct) is not entitled to the procedures available to employees with over one year's service.

Des Ryan does observe, however, that a line between performance and conduct, in such cases, is not always easily drawn.

Mr Ryan also considered a decision of the High Court in *Clarke v CGI Food Service* (2020 IEHC 368) to uphold a grant by the Circuit Court of an injunction to a group financial controller, who was dismissed after he investigated false invoices and the alleged misuse of company credit cards.

The employer had argued that the plaintiff failed to mention the 2014 Protected Disclosure Act until after the dismissal. This is not required where the Court is satisfied that the disclosure is protected, according to Mr Justice Humphries. "The Court is taking a common sense approach [...] this is the very important message from the CGI decision," says Mr Ryan.

MENTAL MUSCLE

Mental fitness expert, Neil O'Brien, offered some tips to those who may be finding the going hard, working away from the traditional office heartland. Mr O'Brien said he has worked from home for over 20 years.

He draws a distinction between tightly-bonded sports teams and much more loosely connected groups, such as athletes. He said many are experiencing a loosening in contacts: "We are all quietly a bit traumatised, experiencing a lengthening in the perils of low moods."

He points to the key components of mental fitness: mood and habit; resilience; aspiration; exercise & nutrition.

Tidiness and good organisation can be as important as exercise for mental wellbeing, he also noted.