WILLIAM FRY

LEGAL NEWS

Welcome

Welcome to the September issue of Legal News. For further information on any of the topics covered in this edition, please call or email any of the key contacts or your usual William Fry contact person.

Adam Synnott

Partner

Companies (Accounting) Bill 2016 – Major Changes to Companies Accounting Law on the Way

The Companies (Accounting) Bill 2016 (the "Bill") was published on 5 August 2016. Once enacted, the Bill will amend and supplement the Companies Act 2014 in a number of aspects.

Purpose

The main purpose of the Bill is to transpose the Accounting Directive 2013 (the "Directive"), which provides significant simplifications and reductions of administrative burdens with regard to the preparation of financial statements for enterprises, in particular SMEs. It also introduces mandatory requirements for large companies, large groups and "public interest entities" that are active in the mining and extractive industries or the logging of primary forests to prepare and file annual reports on payments made to governments.

In addition, the Bill makes a number of miscellaneous amendments to the Companies Act 2014 not related to the transposition of the Directive.

Non-filing structures

One of the most significant aspects of the Bill is that, when enacted, it will require a much broader scope of corporate structures to file financial statements than is the case at present. In particular, certain non-filing structures currently in use in Ireland using unlimited companies are unlikely to be effective once this section is commenced.

General accounting provisions

Thresholds

The Bill sets out new criteria for companies to qualify as "small", "medium" or "large" and introduces a new "micro" category of company. The current thresholds are indicated in brackets.

	Micro	Small	Medium
Net turnover	*€700,000*	*€12m (€8.8m)*	*€40m (€20m)*
Balance sheet total	*€350,000*	*€6m (€4.4m)*	*€20m (€10m)*
Average no. of employees	*10*	*50*	*250*

To qualify, a company must not exceed 2 of the 3 thresholds. Large companies are ones which exceed 2 of the 3 thresholds for medium companies.

A simplified regime for micro companies with regard to the preparation and filing of financial statements is proposed. Amongst other things, micro companies will be exempt from disclosing directors' remuneration in the financial statements and exempt from preparing a directors' report.

Change in financial reporting framework

At present, a company may only change financial reporting framework (i.e. from IFRS to Companies Act requirements and vice versa) if there is a "relevant change of circumstances". The Bill proposes that, in the absence of a relevant change of circumstances, a company should be permitted to change its financial reporting framework once every 5 years.

A new requirement to explain in the financial statements the reason for, and any impact of, a change in accounting policy, is introduced.

Exemption from obligation to prepare group financial statements

More companies will be required to prepare group financial statements as the exemption on grounds of size will only apply to small and micro companies. Such companies may still elect to prepare group financial statements if they wish.

Abridged financial statements

Only small and micro companies will be permitted to file abridged financial statements with the CRO. Medium sized companies will be required to file full financial statements.

Timing

It is not possible to say when the Bill will be enacted, although it is likely that it will be dealt with as quickly as possible in the Oireachtas given that Ireland is over a year late in transposing the provisions of the Directive. In any event, there will be no progress on the Bill until the Dáil and Seanad resume in late September.

The timing for when the new provisions will take effect and whether any transitional arrangements will be permitted remains to be seen and will be dealt with in the commencement order once the Bill is enacted. The Directive states that the new rules must apply for financial years commencing on or after 1 January 2016. There is discussion as to whether this could be extended to 1 January 2017 given the delay in transposing the Directive, but there is no clarity on this point yet.

With regard to unlimited companies filing financial statements for the first time following the introduction of the new rules, it is important to bear in mind that these financial statements must include comparisons to financial information for the previous financial year.

What should I do?

Companies concerned about the possible impact of the proposed changes, particularly in relation to non-filing structures, should contact us. We can assist in examining your existing corporate structure to determine whether it will come within scope of the expanded filing rules and to offer advice on how best to deal with the consequences for your business of a requirement to disclose sensitive financial information in future.

We will keep you updated on the progress of this Bill and the timing of enactment over the coming months.

Contributed by Aoife Kavanagh

Rare Win for Employee in Constructive Dismissal Claim

The Labour Court recently awarded €16,000 for constructive dismissal to an employee whose manager refused to allow him to return to work after experiencing mental health problems despite the fact his medical certificate said he was fit to work.

The facts

The case arose from an appeal by the respondent manager of the initial Adjudication/Equality Officer's decision, which upheld the complainant's claim that he was constructively dismissed.

The employee worked full-time as a barman. He had twice attempted suicide and was absent from work for a one-week period in order to undergo treatment in relation to his mental health. He met with a representative of his employer twice during this period of absence to provide updates on his condition and to seek to organise his return to work. The employer asked him to provide a letter testifying that he was "*100% sane*". The employee's doctor provided a letter to confirm he was "*fit to return to work*". Despite receiving this letter the employer refused to allow him to return to employment. As a result the employee considered that he was effectively dismissed.

The law

The Employment Equality Acts 1988 as amended (the "Acts") prohibit the treatment of one person less favourably than another on the basis of nine specific grounds including disability. Disability is defined as including a condition, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement, or which results in disturbed behaviour. The Acts prohibit discrimination in relation to access to employment; conditions of employment; training or experience for or in relation to employment; promotion or regrading; or classifications of posts.

Decision

Having heard both sides, the Labour Court considered the employee's evidence to be "*credible and consistent*" having also produced documents confirming his version of events. The Labour Court held that the employer was evasive with respect to how it handled both the complainant's disability and his desire to return to work. The Court found that instead of acting out of concern for the employee and trying to accommodate his disability (which the employer tried to suggest were its motivations), in reality the employer had delayed and frustrated the complainant's efforts to return to work.

Accordingly, the Labour Court upheld the decision of the Adjudication/Equality Officer in finding that the employee was discriminatorily dismissed due to his disability contrary to the Acts and awarded him the sum of €16,000. The Labour Court considered the effect of the discrimination upon the employee and the circumstances in which he now found himself.

Comment

It is generally difficult for employees to succeed in constructive dismissal cases as they must prove that they had *no option but to leave* their employment. In this case, however, given the employer's failure to allow the employee to return to work, and the obstacles it placed in the way of the employee's return, such as questioning a medical certificate which clearly stated his fitness for work, it was possible for the employee to succeed despite the fact that he had not brought a grievance complaint in relation to his discriminatory treatment.

The case illustrates the vital importance of active engagement with employees who are suffering from a disability to ensure their smooth transition back to work.

Our three top tips for employers

1. Put an appropriate absence management policy in place and make sure all employees receive a copy of the policy.
2. Include a provision that says employees may be referred to the company doctor regarding their fitness to return to work.
3. Remember that employees returning from a long-term illness or injury should be regarded as having a disability. As such the employee is entitled to reasonable accommodation on his/her return to work, e.g. to be allowed to work part-time initially and gradually build up to full-time work.

Contributed by Catherine O'Flynn and Aedín Brennan

Follow us on Twitter on @WFEmploymentlaw

First Statutory Injunction Granted under the Protected Disclosures Act 2014

The Protected Disclosures Act 2014 (the "Act") deals with the protection of employees who suffer a detriment as a result of disclosing wrongdoings, which have come to their attention in connection with their employment. While many employers will know that employees can be awarded up to five times their annual remuneration, what is probably less well known is that where an employee satisfies a Court that he or she has *substantial grounds* for contending that their dismissal was wholly or mainly due to the fact that they had made a protected disclosure, the employee can apply to Court for an interim order pending the determination of a claim in the Workplace Relations Commission (WRC).

The application is very similar to an injunction application. If the Judge decides that the employee has substantial grounds then it can invite the employer to say whether it is willing:

- to re-instate the employee; or
- if not, to re-engage the employee in another position on terms and conditions not less favourable than those which would have been applicable to the employee had he/she not been dismissed.

However, even if the employer agrees to either re-instate or re-engage the employee, the employee can object to either option. If the court thinks the employee's objection is reasonable, it can order that the employee's employment be continued until the employee's WRC claim is heard (i.e. he/she can effectively be on gardening leave until then). This is what effectively happened in the recent case of *Clarke & Dougan –v– Lifeline Ambulance Service Limited.*

The facts

Two senior managers (the "Plaintiffs") of Lifeline Ambulance Service Limited (the "Defendant") were purportedly made redundant by the Defendant in June 2016. They claimed that their dismissal was as a result of having made a protected disclosure to the Revenue Commissioners in January 2016 alleging that the Defendant paid their staff expenses in place of taxable pay. The Defendant claimed that the sole purpose of the disclosure was for the Plaintiffs to protect themselves against a threat to their positions because they knew that the company was conducting an external review that could lead to job losses. The Plaintiffs sought reinstatement to their roles or the continuation of their salary until their unfair dismissal claims are heard by the WRC.

In the course of the proceedings the Defendant offered re-engagement on 'gardening leave' to one of the plaintiffs and had offered re-engagement to the other working as a paramedic. The Court found that the Plaintiffs had met the threshold of establishing that "*there were substantial grounds for contending [their dismissal] was wholly or mainly due to the protected disclosure*". The Court ruled that the refusal of re-engagement by the Plaintiffs was reasonable. It ordered the Defendant to pay the Plaintiffs their salaries until their unfair dismissal claims are heard by the WRC on the basis that the Defendant was unwilling to reinstate the former employees.

Comment

This decision illustrates the considerable power given to the Court under the Act. Employers should note that the Court can essentially 'stop' a dismissal.

When one considers that it may take up to 6 to 9 months before an unfair dismissal claim is heard in the WRC from the actual date of dismissal, the implications of this decision are such that an employer, in dismissing an employee who has made a protected disclosure, may be ordered to continue paying a 'dismissed' employee's salary until the determination of the unfair dismissal proceedings, as well as being forced to allow that employee to continue accruing service.

In addition, if it is found by the WRC that the dismissal was due to the making of a protected disclosure, the employer may be ordered to pay the dismissed employee up to 5 years' remuneration as compensation. While there has been no case law on this point, it is assumed that any continuation order would be taken into account when calculating the amount of compensation owed to the employee. Employers should therefore exercise extreme caution when contemplating dismissing an employee who has made a protected disclosure.

Contributed by Boyce Shubotham and Aedín Brennan

Payments to Director of Insolvent Company Not Fraudulent Preference

A declaration sought by the Liquidator of an insolvent company that certain payments made to a director constituted fraudulent preference has been refused by the High Court in *FF Couriers Limited & Companies Acts: Keane -v- Day & ors [2016] IEHC*

The Liquidator alleged that the payments to the director were drawings to him in his capacity as a creditor of the company where the director had advanced a loan to the company. The Liquidator asserted that this was a preferential repayment of the director's loan to the company in priority to other creditors. However, the director claimed that he did not know the payments were being accounted as a repayment of the director's loan and that he had always believed the payments amounted to his monthly salary.

The Court recognised that the director was a 'connected party' to the insolvent company and therefore the onus of proof was on the director to rebut the assertion of a fraudulent preference. However the Court was satisfied that the payments were not made with a view to preferring the director, as a creditor, over other creditors of the company. The Court held that the payments received (which were modest amounts) represented payments of a monthly salary to the director rather than a repayment of a loan and accepted the director's evidence in this regard. The Court held that the presumption of fraudulent preference had been rebutted and refused to grant the declaration sought.

With the Court stating that: "*a careful application of the sometimes quite draconian provisions of our company law code is required if company directors are not to lose their good name*"; this case clearly demonstrates again the challenges that liquidators face in successfully prosecuting fraudulent preference claims and that every case will turn on the very specific facts in each instance.

Contributed by Craig Sowman

Jury Saves Google Nearly $10bn

A San Francisco jury has reduced damages payable by Google by approximately $9.3bn as a result of finding that it had not infringed Oracle's copyright in the development of its Android system.

The Oracle claim related to use by Google of the Java application programming interfaces (APIs), which are programs used to perform common computer functions. Oracle estimated the proceeds of this infringement to be in excess of $51bn since 2008 and claimed $9.3bn in damages and account of profits as a result.

Oracle purchased the Java APIs from Sun Microsystems in 2010 for $7.4bn. It claimed that Google had wrongfully profited from copying pages of library files, some 11,500 lines of code, stating that Google had taken a "shortcut at Oracle's expense". The jury, however, found that this was not the case and accepted Google's defence of fair use. This decision could open the door to 'free use' by software developers of APIs and limited ability for their creators to prevent this.

At first instance, in deciding for Google, the Judge ruled that APIs could never be the subject of copyright protection, a finding that was later overturned on appeal. Google could, however, rely on the fair use defence provided for in US copyright legislation. Although it would now seem that APIs can secure protection as copyright works, this is somewhat qualified by the fair use defence, which "sets a high bar for creativity before deserving protection".

Fair use decisions, however, are made on a case by case basis and cannot be relied upon in Ireland, where the relevant legal principles are very different. Developers in Ireland or anywhere outside the US, should seek expert advice before making use of and/or incorporating third party APIs.

With Oracle vowing to appeal, this is one program that the tech world will be watching!

Follow us on Twitter @WFIDEA

EU-US Privacy Shield Agreement Signed

The formal signing of the Privacy Shield marks a critical step in facilitating free-flowing, cross-border transfers of personal data for 4,500 large and small businesses in Europe and the US. The Privacy Shield aims to create a robust and living framework tailored to the digital ecosystem of transatlantic data transfers for businesses and European data subjects alike.

As we previously reported (see here and here), the Privacy Shield is the solution to a major challenge to transatlantic data transfers following the invalidation of the Safe Harbor programme by the Court of Justice of the European Union (CJEU) 8 months ago.

The Privacy Shield promises robust and effective changes to the way in which enterprises transfer personal data and the protections afforded to individual Europeans. Some of the key features of the new scheme include:

- **Ombudsman**: there will now be a US-based independent ombudsman devoted to the protection of personal data held by European businesses. It has been reported that US official Cathy Novelli will be the first such ombudsman. The ombudsman will invoke the rights of access, erasure and rectification of personal data on behalf of individuals. This is a game-changer for EU-US data flows and will seek to address the CJEU's concerns that 'Safe Harbor' did not provide adequate remedies for privacy violations.
- **Government oversight**: US companies will be in a position to apply to be registered as self-certified companies as of 1 August 2016 once they have met certain pre-conditions including having a dispute resolution mechanism and a compliant privacy statement in place. Crucially, they will also be regulated by the US Department of Commerce. An added advantage of this system will be that the data processing activities of US companies will be vetted independently, further cementing the protection of personal data protection.

- **Ongoing monitoring & reviews**: the Privacy Shield aims to provide an effective 'living' framework to safeguard data transfers from Europe to the US, allowing businesses to deal with the personal data of millions of individuals. It will also be subject to annual reviews by EU institutions and US officials to monitor the effectiveness of the mechanism and the commitments provided. European data protection authorities will also engage in ongoing monitoring on the effectiveness of this new framework.

The Privacy Shield will now be translated and published in the Official Journal of the European Union. However, the path ahead may not be straightforward as legal challenges are expected. It is likely that the Privacy Shield will be referred to the CJEU for an assessment as to the 'adequacy' of the Privacy Shield and whether it actually provides protection that is essentially equivalent to EU standards of data protection.

Businesses considering applying for the new scheme will be closely monitoring developments in the coming weeks and months particularly in light of the current Irish High Court case of Schrems II (see our previous article here).

Contributed by John Magee

Employment Appeals Tribunal Immune from Costs Orders

The Supreme Court has provided clarity as to whether tribunals involved in administrative decision-making, such as the Employment Appeals Tribunal (EAT), are entitled to immunity for costs for legal challenges made against their decisions.

Background

In Paul Burke v Stephen Miley, Stephen Miley and Devil's Glen Equestrian Centre Ltd., and Devil's Glen Partnership UD 926/2007, an employee (Mr. Burke) brought a claim against a number of respondents following the termination of his employment. The EAT held in favour of Mr. Burke determining that he had been unfairly dismissed and he was awarded compensation. However, the EAT did not make a determination as to who was Mr. Burke's employer.

The High Court decision

The respondents in the EAT case applied to the High Court for judicial review of the EAT's decision. The High Court quashed the EAT's determination and awarded the respondents the costs of the judicial review proceedings. The matter was then remitted back to the EAT for a new hearing. The EAT appealed the decision of the High Court to the Supreme Court on the basis that costs should not be awarded against it without evidence of mala fides or impropriety on its part.

The Supreme Court decision

The Supreme Court considered whether costs immunity extended to administrative decision-making tribunals and determined that the EAT had a function of decision-making in situations of conflict.

The Court applied the principles that were laid down in the case of *McIlwraith v His Honour Judge Fawsitt*, which set out the position that judicial bodies are immune from costs orders in judicial review proceedings, unless it can be shown that mala fides or impropriety had occurred on the judge's part.

It also considered the fact that the EAT did not file opposition papers to the application for judicial review, nor did it participate in the High Court proceedings until the application for costs was made against it and was therefore not a "*legitimus contradictor*". The Court accepted that the relevant EAT hearing was unsatisfactory and not conducted to the standard that is expected of such a body. However, it ruled that the conduct did not give rise to "*wholly unfit proceedings*" which could constitute mala fides or impropriety in the legal sense.

The respondents contended that where judicial review was not opposed by any of the notice parties and where they were successful in their application, but unsuccessful in an award of costs, they were therefore denied a tangible remedy and fair trial, which was contrary to Article 6 of the European Convention on Human Rights. The Court, however, held that the right to recovery of costs was not an essential feature of the Convention and this would only be breached in exceptional circumstances.

Consequently, the Supreme Court held that as a matter of public policy, the EAT should have immunity from cost orders except in cases where there was clear evidence of mala fides or impropriety.

Lessons

Following this case, the uncertainty around the issue of costs in judicial review proceedings has been clarified. Decision-making tribunals have clear guidelines on their position of immunity and the standard of proof of mala fides or impropriety is extremely high. The case demonstrates the measured and careful approach that all parties should take to any future legal challenges to determinations of an administrative decision-making body.

Contributed by Catherine O'Flynn & Aedín Brennan

Follow us on Twitter @WFEmploymentlaw

New Guidelines on Location Data

The Office of the Data Protection Commissioner (ODPC) has issued guidelines, for individuals and organisations, on the gathering and processing of location data. With the increased use of technologies that can track a user's location, this data, when used appropriately, can provide organisations with novel opportunities to enhance users' experiences. However, misuse of such data can reveal considerable detail about personal matters and pose unexpected risks to privacy.

The guidelines serve as a timely reminder that location data must be handled in accordance with the Data Protection Acts (DP Acts). Information about devices that can be tracked or located electronically should be treated as 'personal data' if it is possible to identify any person from the location data. In certain circumstances, even a broad indication of location may be enough to identify a person.

Location data which cannot be linked to a living person will not be governed by the DP Acts, for example, the collection and use of aggregated or anonymised location data for statistical or service monitoring purposes. In such cases, care should be taken that the technical processes used are effective to prevent individuals from being identified.

Sensitive personal data

Particular care should be taken where location data could constitute 'sensitive personal data'. This could comprise information about the religious or political beliefs of a person, physical/mental health or sexuality. Sensitive personal data can only be processed under special conditions specified in the DP Acts.

To reduce the risk of inadvertently gathering sensitive personal data, data controllers and processors should seek to minimise the amount of location data gathered about individuals. The more precise the location data gathered, the greater the risk.

Obtaining personal location data fairly

Very precise location data can be collected without an individual being aware of it. This may occur if individuals were never informed, or it was never made clear when or how location data would be collected and used. In order to collect personal location data lawfully, there must be an appropriate basis for doing so. Each user must be informed in advance and given the opportunity to opt in or out. A data controller or processor also has a duty to make it clear when location data are being collected. If it is collected on an ongoing basis, it is necessary to include periodic reminders.

Consent

Under the DP Acts, consent is a valid ground for processing personal data. Sensitive personal data may *only* be processed with the explicit consent of the data subject.

The recommended approach for processing other personal location data is to obtain the prior informed consent of the individuals concerned.

Consent to the processing of personal location data should be provided for by way of a clause specifically for that purpose and it should be separated from the general terms and conditions. It must also be easy to withdraw consent.

Retaining and deleting location data

Under the DP Acts, data controllers may only retain personal data for as long as is necessary for the purposes for which it was obtained, or any further permitted purpose. Timely deletion of unnecessary data is especially important in the context of location data and data controllers should avoid retaining personal location data unless absolutely necessary. In some cases, this may even mean deleting the information immediately after it has been processed.

Data subject/individual rights

Individuals have a right to know what information an organisation holds about them, to request access to that information, or have any personal information that is not required deleted. When providing the location data in response to such a request, the controller must provide the data in 'intelligible form'. This may mean plotting the location on a map.

Conclusion

The ODPC has made clear the obligations on data controllers in relation to personal location data and it is important that these guidelines are observed in order to ensure compliance with the DP Acts.

Contributed by David Cullen

In Short: Options for Conversion to a DAC After 31 August 2016

The deadline for existing private companies to convert to a designated activity company (DAC) by ordinary resolution has now passed.

However, it is still possible for a company to become a DAC before the end of the transition period (30 November 2016) by passing a special resolution of the members re-registering the company as a DAC and making the necessary amendments to the memorandum and articles of association of the company.

Alternatively, where the company has debt securities listed or admitted to trading on any market, it is possible to pass a resolution of the directors of the company, converting the company to a DAC and making the necessary amendments to the memorandum of association.

In both scenarios, the resolution and updated constitutional documents will need to be filed with the Companies Registration Office (CRO). The CRO will then issue a new certificate of incorporation to the company noting its status as a DAC.

Companies that have not applied to become either a DAC or a LTD during the transition period will be automatically converted to a LTD by the CRO after 1 December 2016.

The CRO expects to receive an influx of filings towards the end of the transition period and it is therefore advisable that companies apply to become a LTD or a DAC sooner rather than later to ensure that the CRO has time to process such applications. The CRO has stated that it is not guaranteed that applications received towards the end of the transition period will be processed before 30 November 2016. We would encourage companies to consider this matter at the earliest opportunity and take the necessary steps to begin the process.

Please contact your usual William Fry contact or one of the key contacts detailed here if you wish us to assist with drafting the documentation required to become a LTD or a DAC.

Contributed by Aoife Kavanagh

In Short: William Fry Mid-Year M&A Review

William Fry's Mid-Year M&A Review 2016, published in association with Mergermarket, details the key trends over the first half year.

This review provides a detailed insight into Ireland's M&A landscape to date this year, an examination of the emerging trends and opportunities in the current economic environment, as well as an outlook for the second half of 2016.

Click here to download the full review.