WILLIAM FRY

Legal News

Welcome to the June 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.

A New Era – Corruption Legislation Passes Through the Irish Parliament

Following a momentous week in Irish politics, the Criminal Justice (Corruption Offences) Bill 2017 (the "Bill") was passed on 30 May 2018 by the Seanad (the Irish Senate), concluding its passage through the Oireachtas (the Irish Houses of Parliament). The Bill now goes to the President for consideration and signing into law within seven days.

The Bill was one of a number of measures introduced by the Government as part of its stated intention of tackling white collar crime and implementing recommendations made by the Mahon Tribunal in its report into planning matters and payments to politicians.

The Bill is intended to modernise and radically consolidate the law on corruption and bribery in this jurisdiction, repealing and replacing the existing piecemeal legislation in the area, part of which dates back over two centuries. In addition, the Bill is intended to assist Ireland meet its commitments under various international and anti-corruption instruments and incorporates a number of recommendations put forward by international bodies including, the OECD, the EU, the Council of Europe and the United Nations.

First published by the Government in autumn 2017 (following on from an earlier Heads of Bill published in 2012), the Bill has been subject to a number of amendments and revisions during the course of its passage through the Oireachtas.

Key aspects of the Bill (as now passed by the Oireachtas) are as follows:

- New offences of active and passive trading in influence;
- New offence of an Irish Official carrying out a corrupt act in relation to his or her office;
- New offence of giving a gift, consideration or advantage knowing that it will be used to commit a corrupt offence;
- New offences of creating or using false documents;
- New offence of intimidation where a threat of harm is used instead of a bribe;
- The extension of the *'presumption of corrupt gift'* to include connected persons;
- The expansion of *'presumption of corrupt donation'* to include failure to disclose or return a donation as a ground for the application of the presumption;

- New provisions for the forfeiture of public office and prohibition on seeking public office for up to ten years for a person guilty of an offence;
- Provisions for seizure and forfeiture of bribes;
- New strict liability offence for corporate entities where any individual connected with that entity has been found guilty of an offence. The penalty for this offence can be an unlimited fine; and
- Introduction of a new requirement for corporate entities to take reasonable measures to ensure that employees and other persons do not engage in bribery and corruption.

While no official indication has been given as to the likely commencement date for the legislation, the Government has previously indicated its intention to have the Bill enacted by June 2018 when Ireland faces a number of evaluations from a variety of international entities on preventing and tackling corruption.

As advised in our previous briefings, the wide ranging nature of the proposed provisions should trigger organisations to put in place anti-corruption policies or to review policies already in place. Such policies would almost certainly form the cornerstone of any defence to proceedings brought under this legislation. Given the proposed extension of liability to company directors and management, professional advice should be sought and an overview of all relevant policies and procedures conducted has a priority.

Contributed by Gerard James.

Artificial Intelligence in the Workplace (Part 2): AI-Assisted Recruitment and Employment Equality Law

As discussed in our opening article in the series "Artificial Intelligence in the Workplace - An Employment Law Perspective", Artificial Intelligence (AI) has already changed the recruitment process, making it more effective and this change will rapidly increase. Employment equality law will both be impacted by and will impact AI-assisted recruitment and it appears likely that Ireland's current employment equality legislation, the Employment Equality Acts 1998 – 2015 (the Acts), may have to be amended to reflect these changes.

Recruitment and AI

There are many examples of how AI has assisted employers and employees in the recruitment process. Prime examples include: Textio (an 'augmented writing' company that analyses and monitors job descriptions and suggests alternative wording to engage passive candidates, ensure a gender balance, eliminate unconscious gender bias and target the most qualified candidates); Headstart (a recruitment matching company based on algorithms); and Pañña (a video-interview platform company that indicates, amongst other things, when candidates are behaving strangely in interviews).

Leading AI in the workplace commentator, Peter Cosgrove, has explored the potential impact on recruitment by AI extensively. Peter believes that technology can be used to help both employers and employees in the recruitment process but technology will not in itself mean that the actual recruitment process is no longer important. He explains that *"like much technology, it is as much about the process and time put into it as it is about the product itself".*

This is equally true from an employment equality perspective. The traditional recruitment process will continue to be important. Technology will still need to be programmed by humans and this part of the process will leave room for bias to be inbuilt in the foundations of recruitment technology. As more and more companies use AI in the initial phases of recruitment, there is a danger that the negatives in the normal recruitment process will be normalised in AI-assisted recruitment with certain demographics unable to proceed to face-to-face interview stage and, ultimately, employment.

Simple changes by employers can assist in ensuring that the process is not compromised such as stress-testing the AI-recruitment process internally and appointing a human employee to audit various stages of the process. For AI to assist us in the recruitment process, it is vitally important that time and effort is put into how technology can be used and how it fits into an organisation's current process.

Diversity

Once problems in the process are identified and fixed, AI in the recruitment process can help to create a more diverse workforce and encourage equality. The Financial Times recently reported that BDO UK has replaced face-to-face interviews with recorded videos for graduate-level candidates in an effort to help less well-off students who may be unable to take time out of work and travel for interviews. Some candidates may also feel more comfortable in a non-traditional recruitment process and AI-assisted recruitment can help candidates with disabilities in many ways. If used correctly (with bias eliminated), the process can also be much safer and can protect against latent or inherent bias of humans.

Employment Equality Acts

The Acts currently provide that an employer may not discriminate against a prospective employee in any arrangement that it makes for the purposes of deciding to who the job should be offered. The legislative provision appears to be broad but it is uncertain if it is broad enough to include discrimination by AI in the recruitment process. For example, could an employer argue that, by using AI-assisted recruitment, it did not discriminate against a candidate and, in fact, the service provider did?

Comment

While AI has been proven to improve the recruitment process for employers through efficiency, speed and the circulation of roles to a more diverse grouping of candidates, there is also potential for discrimination in AI-assisted recruitment. While a case involving discrimination based on AI in a recruitment process has yet to arise, when it does so our current legislation will be put to the test and it is important that employers and the legislature consider these issues now.

In times where employers continue to explore the exciting world of AI in the workplace, we continue to explore its employment law possibilities and effects. In part 3 of our series we will investigate the potential impact of AI on gender equality.

For further information on AI in the workplace and the early employment law issues contact Catherine O'Flynn, Head of Department or Darran Brennan, Solicitor in the William Fry Employment & Benefits Department.

Contributed by Darran Brennan.

Data Protection Commission Publishes Report on Special Investigation in the Hospitals Sector

The investigation was conducted in 20 hospitals throughout 2017 by the Special Investigations Unit, spearheaded by Assistant Commissioner Tony Delaney. The focus of the investigation was *"to examine the processing of the personal data and sensitive personal data of patients in departments and areas of hospitals in Ireland to which patients and the general public have access*".

Unsurprisingly, hospitals deal with large volumes of sensitive personal data on a daily basis. This can be in the form of patient charts in the wards and on trolleys, private health insurance information and files from General Practitioners sent by fax, the use of which is still widespread in hospitals.

In total the report highlighted 35 risks and offered 76 practical recommendations to mitigate those risks and improve data protection and privacy.

A prevalent issue many patients or visitors to a hospital have encountered is the lack of speech privacy. When talking at a reception desk sensitive personal data is shared with and handled by receptionists, but this information can often be easily overheard by nearby third parties. In order to counteract this the DPC recommends simple but effective solutions such as putting line markings on the floor to ensure adequate space is given as well as the implementation of a ticketing system to control queues.

In relation to the storage of patient observation charts it was noted that these are often stored outside the door of a patient's room or on the end of their trolley. Such storage is not secure as third parties can easily access and read the medical details contained in the chart.

The DPC recommended that the charts instead *"be stored securely in a protected environment, in the immediate vicinity of the patient's ward or room if necessary, where they are accessible only to hospital staff who have a professional need to access them".* However, the DPC understands that in certain instances immediate access to a patient's chart will be necessary and so it is noted that hospitals should take steps *"to ensure that an appropriate balance is achieved between mitigating the data protection risks outlined above and mitigating risks to patient safety".*

Commenting on the report Tony Delaney stated that *"no similar data protection investigation on this scale across twenty hospitals has ever been undertaken in the State previously. As a result, several of the risks identified in the matters of concern are ones that may not have been pointed out before to the hospitals sector. Awareness of the data protection security risks that exist in an organisation is an important first step on the road towards compliance followed closely by an acceptance that remedial steps are needed to address the situation."*

The remedial steps recommended are divided into hospital specific and sector-wide categories. The DPC noted that *"the implementation of the recommendations will not be achieved by simply issuing reminders to staff or by creating standard operating procedures. Rather, it will be necessary for each hospital to support the implementation of the recommendations by putting in place the necessary infrastructure and resources that may be required as essential enablers."*

The DPC pointed out that the additional staffing resources they have received allowed them to fund and carry out this investigation. It seems likely that with further increased funding the DPC will carry out more sector specific special investigations.

The full report can be found here.

The Impact of GDPR on the Aviation Industry

On 25 May 2018, the General Data Protection Regulation ("GDPR") will come into force.

For the aviation industry, this means that data protection obligations will significantly expand under the regulation and companies operating in the industry must ensure they are compliant with their legal obligations by the May 2018 deadline.

Why should the aviation industry take notice of the GDPR?

The GDPR applies directly to companies in Ireland and to those with a presence in Ireland. The regulation has an expansive reach with the GDPR crucially expanding to cover non-EU companies.

This 'extra-territorial reach' is likely to have a far-reaching effect on airlines and aviation finance companies that conduct their business in Ireland where they process or handle personal data from stakeholders. For example, companies operating in the airline industry may process personal data in relation to customer data. This includes payment, passport and contact details of customers. With airline bookings being taken up to a year in advance of travel, the collection of personal data arising from this may mean a heightened GDPR impact for airlines. Airline booking websites, when taking payment and travel information from EU customers are bound by the GDPR even where they are based outside the EU, in, for example, the USA. Similarly, price comparison websites not based in Ireland will be subject to the GDPR when processing EU resident data.

Apart from this personal data that is unique to the airline industry, data is also processed by airlines and aviation finance companies in relation to employees and company officers, for example the following:

- Employees; with EU carrier airlines generally employing upwards of 10,000 employees, payroll details, performance appraisals, contact details and other sensitive personal data may be collected and processed by companies.
- Company Officers; directors and shareholder's personal data may be collected by aviation finance companies in relation to legislative and corporate governance obligations.

GDPR's potential to hit companies' bottom line

A key focus of the GDPR is the principle of transparency, and the regulation explicitly requires those companies processing data to notify data subjects about how they plan to process such data. Airline websites should for example, provide a data protection notice in a simplified and non-legalese way.

Companies operating in the aviation industry should be aware that the GDPR has strong punitive measures, and fines for failure to comply with the regulation are to be *"effective, proportionate and dissuasive"*. Infringements, depending on their classification, may attract fines of up to €20m or 4% of annual worldwide turnover of a company, whichever is greater. Therefore, penalties for failure to comply with the GDPR will be significant under the regulation, in addition to any reputational damage that will inevitably occur.

Ensuring Compliance with the GDPR

The Court of Justice of the European Union (CJEU), has indicated that it intends to pursue an expanded protection approach to data protection in recent cases preceding the GDPR.

Therefore, companies operating in the aviation industry which handle data must take steps to ensure compliance with the GDPR.

For further information, visit William Fry's dedicated GDPR website, Privacy Source which includes in-depth analysis and practical tips on preparing for the GDPR.

Contributed by Sarah Twohig.

Social Media and OTT Platforms Muscle in on Traditional TV Sports Broadcasting Market

Social media companies and over-the-top (OTT) subscription platforms are targeting the sports broadcasting market traditionally occupied by TV broadcasters.

Sky and BT have recently retained control of the main Premier League broadcasting packages for a reported £4.46 billion, with Amazon reportedly bidding for the remaining packages. Amazon's recently agreed five year deal to broadcast the US Open tennis tournament in Ireland and the UK is a notable example of social media companies entering the sports broadcasting market. As a significant source of income, it is important for sports organisations to maximise the value of their broadcasting agreements while taking opportunities to reserve certain media rights to exploit on their own platforms.

In a traditional broadcasting agreement, a sports organisation would grant an exclusive licence to one or more broadcast partners to broadcast live sporting events and would grant a separate licence to broadcast a highlights show, such as BBC's Match of the Day. However, sports organisations have increasingly sought to reduce the scope of traditional sports broadcasting agreements by reserving non-traditional media rights with the aim of producing their own content. For example, substantial video clip coverage on the official GAA Twitter account suggests that it has reserved certain video clip rights to leverage across its own platforms. Reserving rights for its own platform allows a sports organisation to raise the sport's profile by encouraging press coverage and grassroots participation, and by growing sponsorship revenue from increased exposure to its brand.

OTT subscription platforms have also emerged as an alternative way for sports organisations to exploit their own content, bypassing traditional TV broadcasters and allowing sporting events to be streamed directly to viewers. Traditional TV sports broadcasting rights are licenced separately in each territory. For example, RTE and Sky have exclusive rights to broadcast hurling and gaelic football matches in Ireland. However, an OTT platform can target markets other than those territories licenced under the traditional broadcasting agreement. GAAGO, a partnership between the GAA and RTÉ, is a subscription OTT platform which offers live streaming of hurling and gaelic football matches in over 180 territories outside of Ireland. An OTT platform, such as GAAGO, allows sports organisations to reach viewers worldwide without negotiating with TV broadcasters in each territory.

The emergence of social media and OTT platforms in the sports broadcasting market represent an opportunity for sports organisations to tailor its broadcasting offering while maximising revenue and exposure to its sport.

William Fry's experience in this area includes recently advising Horse Racing Ireland on a five-year agreement to broadcast Irish horse racing on Racing UK.

Contributed by Patrick Murphy.

Fair Dismissal Resulting From Failed Intoxicant Test

The dismissal of an employee following a failed random breathalyser alcohol test has been upheld by the Workplace Relations Commission ("WRC"). In the absence of a statutory duty for employers to carry out intoxicant testing, the decision is a useful indicator of how a dismissal resulting from the imposition of intoxicant testing in health and safety critical workplaces is likely to be viewed by the WRC.

Background to dismissal

The case involved a mechanical fitter (the "Complainant") and a leading service provider in the power generation, oil and gas industries (the "Respondent").

The Complainant worked for the Respondent on a series of short term contracts spanning a twelve year period. He travelled to the UK to carry out work at a client site. On arrival on a Sunday, he *"went out and had a few drinks".* He was required to attend induction training at the client site on Monday afternoon but was not due to work on site in his capacity as a mechanical fitter until Tuesday evening.

At the induction session certain workers were randomly selected for an alcohol breathalyser test. The Complainant, who had previously signed a consent form to take part in such testing, and who conceded at hearing that he was *"well aware of the possibility of a random test*", was selected. His breath alcohol measurement was over the level permitted to allow access to the site and he was refused entry and subsequently flown home by the Respondent.

The Respondent's Alcohol and Drugs Free Workplace Policy provided that *"a confirmed positive drugs and/or alcohol test shall result in disciplinary action, up to and including discharge from employment"* and the Complainant was subsequently dismissed for gross misconduct due to his failure to observe the health and safety rules of the Respondent and its client.

Legal arguments considered at hearing

The key issues considered by the WRC in rejecting the unfair dismissal claim was whether the complainant was at work and whether the sanction was proportionate.

At Work

The Complainant argued that as he was not at work at the time of the breathalyser test nor operating site equipment, he did not present a danger to himself or others. He argued that the breathalyser could have been retaken the following day prior to him commencing work.

The WRC found that the purpose of the induction session was to deliver a *"serious message"* to site users to prevent the occurrence of an accident. Compliance with health and safety measures is of *"paramount importance in the industry within with the Respondent operates"*. As the Complainant was paid to attend the induction, the WRC held that this demonstrated the high importance placed on the induction session by the Respondent.

The WRC concluded that the Complainant was reporting for duty at the client site at the induction session and accordingly should have considered there was a possibility he could have been selected for a random alcohol or drugs test.

Proportionate sanction

The Complainant argued that having regard to the fact that he was not at work, the Respondent failed to consider sanctions short of dismissal and that the termination of his employment was disproportionate. In considering whether the sanction was disproportionate, the WRC referred to the judgment of Noonan J in of *Bank of Ireland -v- Reilly* [2015] IEHC 241 in which he stated:

"The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned".

The WRC held that in all the circumstances of the case, the actions of the Respondent and the disciplinary sanction imposed were within the range of reasonable responses and substantial grounds existed to justify dismissal.

Legal basis for Intoxicant Testing in Ireland

The *Safety, Health and Welfare at Work Act 2005-2014* (the "SHWWA") imposes a duty on employees to ensure that they are not under the influence of an intoxicant (defined as alcohol or drugs or any combination of the two) to the extent that they are in such a state as to endanger their own safety, health or welfare at work or that of any other person.

The SHWWA also states that an employee may be required to submit to intoxicant testing by his or her employer. However, as this provision of the SHWWA is not yet operative, it cannot form the legal basis for conducting intoxicant testing in the workplace.

There are generally two types of intoxicant testing: "with cause" testing, which arises in circumstances in which an employee is perceived to be under the influence of an intoxicant; and random testing. The latter is typically carried out in safety critical work environments.

Whilst there is no legal requirement for employers to carry out intoxicant testing, many employers do so in practice, providing for this by way of relevant policy or under the contract of employment.

Lesson for Employers

Despite the arguments put forward by the Complainant about whether he was actually at work at the time, it appears the WRC will consider a dismissal based on a failed intoxicant test to be fair, against the backdrop of a safety critical workplace.

It is important for employers to ensure that if intoxicant testing takes place that it is provided for and dealt with in the correct manner. Employees should be clear that they may be required to submit to testing and should be advised that resulting disciplinary action may take place in certain circumstances. Testing should be carried out in line with recognised standards and best practice.

Contributed by Nuala Clayton and Emma Lavin.

Adverse Costs Awards: Ignore an Open Offer at your Purse's Peril!

In the recent case of O'Reilly & Anor v Neville & Ors [2018] IEHC 228, the plaintiffs and defendants were parties to a building agreement for a dwellinghouse. The plaintiffs claimed various defects in the building works and ultimately sought damages for breach of contract. Following the hearing of the eleven day trial, Mr Justice Binchy delivered a judgment on the substantive issues on 31 July 2017. He made an order for specific performance of the building agreement and ordered the defendants to pay the costs of the plaintiffs' alternative renting accommodation. This decision then related purely to the costs award of that case.

Normal rule: costs follow the event

Order 99, r.1(3) of the Rules of the Superior Courts lays down the "normal rule" that costs follow the event unless the Court, for special reasons, otherwise directs. The plaintiffs argued that as they had succeeded in the "event" in the proceedings they were entitled to an order for the costs incurred by them and that this was not a case which the Court should depart from the general rule.

Order 99, rule 1.A(1)(c): consideration of open offers

The defendants relied on various open offers made to settle the dispute (6 in total), to argue that throughout the litigation, the defendants tried, but failed, to engage with the plaintiffs to resolve the matters in dispute.

The defendants argued that Order 99, rule 1.A(1)(c) requires the Court, in considering the awarding of the costs of any action or application, and where it considers it just, to have regard to the terms of the offer in writing sent by any party to any other party offering to satisfy the whole or part of that other party's claim, counterclaim or application.[1]

Decision – Parties should be encouraged towards early resolution of litigation

The High Court held that in particular, the February 2016 offer letter should have been accepted, and by their failure to do so, the plaintiffs caused almost all of the costs that followed. In awarding the Defendants' their costs from February 2016 onwards, Binchy J. was emphatic that plaintiffs should not be free to refuse offers such as these "with impunity". He held:

"Parties to proceedings are to be encouraged and not discouraged from putting forward proposals which will lead to an early resolution of litigation with all attendant benefits, including significant savings of costs and court time."

Reminder to clients

Litigants should not presume that if they are successful at trial they will automatically obtain their party-party costs from the losing party. Parties should be mindful to properly engage with and consider any open offers made as the Court will assess the parties' open efforts to settle when making an award of costs.

[1] This rule does not apply to lodgements into Court or tender offers in lieu of lodgement which are dealt with in Order 22

Contributed by Richard Breen and Rebecca MacCann.

Labour Court Examines Constructive Knowledge Test for Employers in Case of Discriminatory Dismissal Based on Disability

The recent Labour Court decision in Swan O'Sullivan Accountants & Registered Auditors and Seamus Counihan offers a valuable lesson in relation to discriminatory dismissal claims based on disability.

Mr Counihan (the "Complainant") was engaged as a trainee accountant by Swan O'Sullivan Accountants & Registered Auditors (the "Respondent"). During his probationary period he suffered a seizure and was admitted to hospital. According to the Complainant, he was assessed as having probable epilepsy and was prescribed anti-epileptic medication as a precautionary measure. He spent the following week off work in order to get used to the new medication.

A few months later, the Complainant was dismissed on the basis of poor performance having failed to pass his probationary period.

The Complainant brought a claim for discriminatory dismissal on the basis of disability. His claim at first instance was dismissed by the Workplace Relations Commission ("WRC"). He appealed this decision to the Labour Court. Having heard the evidence of both sides, the Labour Court dismissed the appeal on the basis that the Complainant had not met the "well settled" test in relation to an allegation of discriminatory dismissal. The Complainant failed to establish a *prima facie* case of discrimination. Therefore "the onus of proving the absence of discrimination" did not shift to the Respondent.

Diagnosed Disability

The Labour Court enquired specifically about the Complainant's alleged diagnosis of epilepsy. The Complainant could not give precise details and told the court that it was a "default" diagnosis following his seizure, and tests had ruled out other possible conditions. The Complainant argued that the diagnosis was obvious from the seizure he experienced and the medication he was prescribed.

Knowledge of the Respondent

The Respondent submitted that it was not aware the Complainant suffered from epilepsy until the matter was referred to the WRC. His absences from work consisted of "a day here or there". On his return to work, and at periodic performance assessments, management expressed concern as to his wellbeing and he told them that he was fine. He never supplied the Respondent with a medical certificate, contrary to his employment contract and repeated requests to do so.

The Complainant submitted that he had discussed his epilepsy and medication with colleagues throughout this period and therefore the Respondent knew of his disability. The Labour Court took the view that this amounted to an assertion by the Complainant that, in the absence of actual knowledge, the Respondent had constructive knowledge of the Complainant's disability. It referred to the High Court judgment in *Somers -v- W* (1979) IR 94 in which Henchy J stated:

"*When the facts at his command beckoned him to look and enquire further, and he refrained from doing so, equity will fix him with constructive notice of what he should have ascertained if he had pursued the further investigation which a person with reasonable care and skill would have felt proper to make in the circumstances*."

The Labour Court concluded that the doctrine of constructive notice of the Complainant's disability did not apply in the circumstances. The Labour Court determined that the Complainant had not been diagnosed with epilepsy. At no point had he supplied his employer with a medical certificate nor did he discuss the management of his condition with his manager or colleagues other than to say that the seizure he suffered was a one-off occurrence, and despite queries being made regarding his health he was reluctant to discuss it.

The Court did not dispute that if the Complainant had epilepsy, this would almost certainly have come within the broad definition of disability under the *Employment Equality Acts 1998-2015* (the "EEA"). However, the Respondent "could not have had direct or constructive knowledge to indicate" that the Complainant "was suffering from an illness that amounted to such a disability".

Lesson for Employers

Whilst employers should ensure that adequate procedures are in place to manage sickness absence so that it can be shown that information is obtained about an employee's absence, it appears that employers will not be readily fixed with constructive knowledge of a disability in all circumstances. Employees will have to be prepared to overcome the well settled prima facie test in relation to discriminatory dismissal claims.

Contributed by Nuala Clayton and Karen Hennessy.

Lessee Beware: English Commercial Court upholds tough terms of aircraft engine lease

In the recent case of *Aquila WSA Aviation Opportunities II Ltd v Onur Air Tasimacilik AS [2018] EWHC 519*, the English Commercial Court ruled in favour of the Plaintiff, an Irish lessor of an aircraft engine, despite the fact that the engine it had leased to the Defendant had failed during use and was not fit for purpose.

The Court notably upheld the terms of the lease previously agreed between the parties and emphasised the importance of an acceptance certificate as a condition precedent to the engine's delivery.

Background to the dispute

On 11 September 2015, the Defendant, Onur Air Tasimacilik AS ("Onur"), entered into a 10 month lease with the Plaintiff, Aquila WSA Aviation Opportunities II Ltd ("Aquila") in respect of an aircraft engine. It was intended by the parties that the lease would provide short term cover for one of Onur's other aircraft engines while it underwent repair work.

However, on 22 December 2015 a major engine failure occurred and the relevant aircraft experienced a "surge event", following take off. This resulted in an emergency landing of the aircraft with 186 passengers and 10 crew members on board.

Following the incident, Aquila issued summary proceedings against Onur for in excess of US$90m which it argued was due under the contract to lease the aircraft engine.

The terms of the lease stated that the engine was to be delivered by Aquila and leased *"as is, where is"* and should comply with agreed delivery conditions. In addition, the terms also stipulated that once Onur signed the acceptance certificate and accepted delivery of the engine, it would be confirmed that Onur had inspected the engine and agreed to its condition on delivery.

In defending the action, Onur argued, amongst other things, that Aquila had breached the correct construction of the delivery conditions which provided that the aircraft engine had to be airworthy. It claimed that the cause of the engine's failure was a *"latent defect"* and as a consequence the engine was a *"ticking time bomb"* on delivery. Onur argued that Aquila had misrepresented the condition of the engine and therefore it could rescind the lease.

The Court's ruling

The Court ruled that while the engine was not fit for purpose, the acceptance certificate was a condition precedent and the Court upheld what the parties had contractually agreed.

The Court emphasised the importance of the acceptance certificate as a condition precedent to delivery which confirmed;

1. unconditional acceptance of the engine by Onur;
2. that Onur had inspected the engine and was satisfied with the state of the engine and the conditions of the lease; and
3. by signing the acceptance certificate, Onur waived its rights to make a claim against Aquila in relation to the engine’s delivery condition.

In delivering judgment, the Court followed the decision of *Olympic Airlines SA v ACG Acquisition XX LLC [2013] EWCA Civ 369* where the Court did not accept the lessee's argument that a leased aircraft was not in the required condition due to pre-agreed contractual terms.

The Court ruled that despite it being a *"tough contract"*, Onur should have carefully inspected the engine to ensure satisfaction prior to executing the acceptance certificate and it could not now argue a breach of contract by Aquila.

Commentary

The Irish High Court recently confirmed, in the context of an insurance dispute, that once a condition precedent has been agreed between parties, failure to comply with it is a ground for declinature of the contract[1]. The *Aquila* decision is likely to be persuasive before the Irish Courts as courts are reluctant to depart from what commercial parties have contractually agreed.

Therefore, parties should exercise caution when entering contracts and lessees in particular should carefully inspect aircraft or engines to ensure they are entirely satisfied with their condition before executing an acceptance certificate.

This case is an important reminder of the necessity of a well-drafted lease and acceptance certificate as a means of allocating risk between the lessor and lessee where aircraft or aircraft engines are involved.

[1] Kelly Builders (Rosemount) Limited v HCC Underwriting Agency Limited [2016] IEHC 72

Contributed by Sarah Twohig.

In Short: What Does Your Emoji Say About You?

In an ongoing UK case a defendant has alleged that the posting of a sad emoji face as part of an update to customers was a breach of contract.

Phones 4U Limited (in administration) v EE[1] Limited concerns a dispute involving the termination of a contract between mobile phone retailer, Phones 4U Limited ("Phones 4U") and mobile network operator, EE Limited ("EE"). As part of EE's counterclaim, it is alleging that the posting of a sad emoji face by Phones 4U as part of its service update to customers was a breach of contract.

Administrators were appointed to Phones 4U following confirmation that EE would not be renewing or replacing the trading agreement that was due to expire between the parties. The decision by EE followed other mobile network operators who had either not renewed or terminated their individual trading agreements already. Following the appointment of administrators to Phones 4U, EE terminated the trading agreement in advance of its expiration. Phones 4U subsequently issued proceedings against EE claiming for unpaid commission fees pursuant to the trading agreement and EE counterclaimed for damages resulting from the loss of bargain arising from the termination of the contract. Phones 4U was successful in its preliminary application for summary judgment dismissing the loss of bargain claim. As part of its judgment, the Commercial Court noted that EE are also pleading a breach of contract counterclaim alleging that Phones 4U made unauthorised, false or misleading representations when it posted a statement online explaining why Phones 4U were offline and concluding with a sad face emoji.

If this claim continues to be maintained by EE until the trial, this could be the first case that provides the UK courts with an opportunity to consider whether the use of an emoji constituted a breach of contract. Given the now prolific use of emojis in all aspects of life, it is likely that the legal effect of emojis will be ventilated before the Irish Courts in the not too distant future. The outcome of this case may have persuasive authority in Ireland and in any event could be illustrative of the approach the Irish Courts might take to such an issue. For further information please contact any of our key contacts or your usual William Fry contact.

[1] [2018] EWHC (Comm)

Contributed by Orla Shevlin.

In Short: Digital Age of Consent for Children's Data to Be Set at 16

The Irish government has been defeated on its proposal to set the digital age of consent for the processing of children's data at 13. We discussed this government proposal in a previous article. During a recent debate on the Data Protection Bill 2018, which is due to be signed into law shortly, an amendment to set the age at 16 was passed by 56 votes to 51. Additionally, a new Section 30 was added to the Bill which makes it an offence for companies to process the personal data of a child for the purposes of direct marketing, profiling or micro-targeting.

The digital age of consent refers to the age at which children may legally consent to services that process personal information without needing the explicit approval of their parent or guardian. This includes signing up for social media platforms such as Instagram or Facebook.

Article 8 of the General Data Protection Regulation (the "GDPR"), with effect from 25 May, provides for additional protections to be offered to children by limiting their ability to consent to the processing of their personal data without specific parental permission if they are under the age of 16. Article 8 allows Member States the option of setting the digital age of consent to a lower age not below 13. It was

expected that the Irish implementing legislation would set the age of digital consent at 13, as this approach was advocated by a working group that investigated this, as well as many children's rights organisations, as the most appropriate way to protect the interests of children online.

Amidst rising concerns that the Data Protection Bill 2018 would be amended at the final Dáil stages, the Ombudsman for Children, Dr. Niall Muldoon this month voiced his support for the digital age of consent to be set at 13, stating that *"providing for 13 years as the digital age of consent takes more appropriate account of young people's internet use" and "represents a more proportionate approach to balancing the opportunities and risks that the online environment presents to children".*

Despite the concerns raised, the final version of the Data Protection Bill approved by the Dáil and later by the Seanad sets the age at 16. The Bill has been passed by both houses and has been sent to the President for signing via the 'early-signature' mechanism allowed for under Article 25.2.2 of the Constitution. The digital age of consent in this jurisdiction is now clearly defined as 16 years and companies and organisations that process children's data will need to consider how this will impact the way in which they process online data relating to children.

Contributed by David Cullen.

In Short: Active Aging – Recently Published Guidelines on Retirement and Fixed-Term Contracts

As noted in our article outlining 2018 Irish employment law trends and our recent article discussing the Valerie Cox v RTÉ Workplace Relations Commission (WRC) decision, age in the workplace is a hot topic that will continue to be debated throughout 2018.

The recently published Retirement and Fixed-Term Contracts Guidelines (the "Guidelines") by the Irish Human Rights and Equality Commission (IHREC) add weight to the current debate and, more importantly, offer clarity to Irish employers on their rights and responsibilities around providing fixed-term contracts to employees beyond their retirement age.

The Guidelines clarify that fixed-term contracts can only be offered where an employee is actually subject to a mandatory retirement age. They also clarify the extent that the objective and reasonable justification exemption under the Employment Equality Acts 1998 – 2015 (the "Acts") can be used; firstly, to set the retirement age, and secondly, to provide fixed-term contracts post-retirement age under section 6(3)(c) of the Acts.

The Guidelines should be read in conjunction with the Code of Practice on Longer Working by the WRC which was enacted as a code of practice for the purpose of the Industrial Relations Act by SI 600/2017. This Code of Practice gives guidance to Irish employers on dealing with requests for working beyond the mandatory retirement age and on the introduction of pre-retirement HR procedures.

Comment

The Guidelines relate to a specific issue in the active aging debate but add to the commentary concerning active aging in the workplace and the mandatory retirement age in particular. With CSO research from 2016 indicating that just under one third of the Irish working population in 2026 will be aged 50 and over this is an issue which will continue to grow debate.

Contributed by Alicia Compton and Darran Brennan.