WILLIAM FRY

Legal News

Welcome to the May 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.

Artificial Intelligence in the Workplace – An Employment Law Perspective

Artificial Intelligence or AI is defined by the Oxford English Dictionary as *"the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perceptions, speech recognition, decision-making, and translation between languages*". The term is defined in popular culture, and in the eyes of employees the world over, as an ever-approaching threat. The World Economic Forum has discussed AI as a major element of the fourth industrial revolution (4IR) and something which will rapidly change our world and workplaces. Regardless of the definition, AI is coming into our workplaces and coming quickly.

As with any change to workplaces, employment law will follow. Employment lawyers and the Irish legislature need to consider how current employment law in Ireland may need to adapt to harness the full potential of AI for Irish businesses and, also, to protect employees. William Fry will investigate these issues in a series of articles in 2018, exploring how modern Irish workforces will be changed by AI and will analyse the employment law issues connected with these changes. This introductory article to the series focuses on the potential positives of AI in helping to solve some of Ireland's current employment law issues.

Recruitment

AI has already changed the recruitment process making it more effective. Such change will most likely increase rapidly. As this continues to develop, and perhaps reach the stage where the first stages in a recruitment process have little human interaction, it will be crucially important to ensure that Irish employment equality legislation is still respected. This includes programming the technology early on to respect the nine equality grounds and fixing any latent bias in technology. Of course, AI might also help employers to be more diverse in their recruitment process allowing candidates who fit criteria but who failed to reach interview stage because of a previous latent bias to overcome those hurdles.

Gender Equality

The gender pay gap and gender equality more generally, can stand to improve from the rise of robots too. This can come from recruitment as discussed above to bonuses, benefits and even pay being tracked by technology to actual output by employees. This has the potential to defeat any latent bias in an organisation and can stand to also defeat the sort of issues identified as a result of the first deadline of UK gender pay gap reporting. We identified in a recent article that the Irish legislature and Irish employers need to learn from the lessons of the UK before final gender pay gap reporting legislation is

adopted in Ireland. Making use of technology to accurately track pay in companies and then accurately report would provide better and more real data and help companies identify problems in their companies and seek to fix those problems more effectively.

Disabilities

The use of technology in harmony with human work can open new doors to helping employees with disabilities remain in or return to the workforce more easily than before. This would also help employers to honour their legislative responsibilities more easily than before and perhaps assist with reasonably accommodating more cost-effectively. Existing legislation could be reviewed to allow for greater connection between employees and technology including perhaps the need for employers to offer education as part of accommodation following serious illness or accident.

Inter-generational Adaptions

There has been much discussion recently on the future relationship between the various generations in Irish workplaces. Flexibility in the workplace has become a critical issue for younger generations, while legislation has adapted to enable Irish workers to remain in the workplace longer with a corresponding need for employers to respect active aging. We will soon have a generation of employees who have grown up forever connected to technology. All of this poses challenges for employers practically and for the legislature in providing legislation to seek to enable all these generations to work in harmony. AI, implemented correctly, has the potential to help Irish employers to solve these issues and to allow a greater harmony between generations working together.

Employment

The adaption of AI by Irish businesses is likely to have far-reaching impacts for the employment relationship. A point of discussion is how disruptive technology will become in the workplace and whether it will eventually replace humans as employees or create more jobs. Recent studies have often concluded that AI will eventually have a neutral, if not positive, impact on jobs (including 'The economic impact of artificial intelligence on Ireland's economy', PwC, November 2017). However, in the first years as companies adapt to the changing landscape, certain roles may become redundant as they are replaced in the most part by technology. The challenge for the Irish legislature and employers here is to prepare for this change in advance and perhaps redefine the current understanding of alternative roles by offering employees at risk of redundancy upskilling programmes to retrain for newly created roles.

Conclusion

AI is concerning for Irish employees and Irish employers alike and will carry heavy financial and social costs in the early years of adaptation. However, like the previous industrial revolutions, 4IR will begin to rapidly change workplace cultures and, as employees and employers adapt to this changing culture, new employment law issues will emerge. Like many others, we see these issues coming to the fore in 2018 and in the next few years. As we have explored in this article, AI can also be used as a positive tool to help solve some of our current employment law issues but we all must act now to harness that potential.

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 and Benefits Department.

Contributed by Darran Brennan.

Mining Big Data

As discussed in our previous article here the Department of Business, Enterprise and Innovation has put forward the Copyright and Other Intellectual Property Law Provisions Bill 2018 (the "Bill") which seeks to make a number of amendments to the Irish Copyright and Related Rights Act 2000 (the "Copyright Act").

One of the most notable amendments being proposed is the exception to copyright infringement for text and data mining. This exception was one of the recommendations made in the 'Modernising Copyright' report issued by the Copyright Review Committee ("CRC"). However, the wording of the provision is quite different to that proposed by the CRC.

In their report, the CRC noted that *"very significant social benefits stand to be gained from text-mining and data-mining"* given the potential for new discoveries from existing data.

What is data mining?

Data mining is essentially the process of analysing large data sets in order to try and identify patterns, trends, anomalies and establish relationships.

'Text and data mining' was defined in the draft EU Directive on Copyright in the Digital Single Market (the "draft EU Directive") as meaning *"any automated analytical technique aiming to analyse text and data in a digital form in order to generate information such as patterns, trends and correlations".*

We are now in the era of Big Data with an unprecedented amount of new data being created every day. Researchers cannot keep up with the level of data being created and therefore need to rely on technology to assist in analysing the data. Further as data mining identifies patterns, it serves as a foundation for Artificial Intelligence and machine learning. However, the existing exceptions under the Copyright Act do not provide protection for some of the activities being conducted by the relevant technologies. For instance, when large data sets are being analysed, copies of the data (a large proportion of which may be protected by copyright) are usually created/reproduced by the relevant software to allow the process to work. Often such copies are not temporary and may have an independent economic significance and therefore the exceptions to copyright infringement under the Infosoc Directive cannot be utilised.

What does the Bill propose?

The new Section 53 A provides:

- *Subject to subsection (3), the making of a copy of a work by a person who has **lawful access to the work** does not infringe the copyright in the work where the copy is –*
    - *made in order that the person may carry out a **computational analysis** of anything in the work for the sole purpose of research for a **non-commercial purpose**, and*
    - *is accompanied by a **sufficient acknowledgement.***

Therefore, the exception is only available:

- to a user who had lawful access to the work - It does not confer a right of access to a work where none existed;
- the user must be using the work solely for the purpose of research for a non-commercial purpose;
- there must be sufficient acknowledgement.

Section 53 A (2) goes on to provide that if the copy was made when the work was available without restriction, then it does not matter if access to the work is later restricted.

Section 53 A (3) puts in place safeguards regarding further use of copies made under the data mining exception. The copyright in the work is infringed where such copy is

- *transferred to any other person, except where the transfer is authorised by the copyright owner, or*
- *is used for any purpose other than the purpose referred to in subsection 1 (a).*

Section 53 A (5) provides that where the publication of the results of the computational analysis include the reproduction of extracts from a work, such inclusion shall constitute inclusion in an incidental manner if the extracts are not more than reasonably necessary to explain or to assist in explaining the results of the analysis.

It is important to note that Section 2 (10) of the Copyright Act already renders redundant any terms or condition in an agreement which try to override or restrict any of the legislative exceptions.

Bill is wider than exception currently proposed at EU level

The data mining exception proposed in the Bill is actually wider than that proposed by the EU Commission in September 2016 in the draft EU Directive (referred to above) wherein the data mining exception was only available to research organisations.

Research organisation was defined in that draft EU Directive as meaning *"a university, a research institute or any other organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services: (a) on a non-for-profit basis or by reinvesting all of the profits in its scientific research; or (b) pursuant to a public interest mission recognised by a Member State".*

Whilst the recitals to the draft EU Directive did not rule out public-private partnerships being able to avail of the exemption, it did provide that the exemption would not be available to such organisations where commercial undertakings have decisive influence or control over them.

The proposed data mining exception is a very welcome development which should assist in facilitating research inevitably leading to important and lifesaving discoveries in vast array of areas including medicine, sciences and technology.

Contributed by Colette Brady.

Proposed Amendment to Meaning of "Credit" in Credit Reporting Act 2013

Legislation presented to the Dáil last week proposes to amend the definition of "credit" in the Credit Reporting Act 2013 so that personal contract plans and hire purchase agreements fall within the ambit of that Act.

The Credit Reporting Act 2013 (the "Act") came into effect on 27 January 2014 and provides for the establishment, maintenance and operation by the Central Bank of a national database of credit information (Central Credit Register or CCR).

The Act imposes ongoing reporting obligations on relevant lenders to submit credit and personal information in relation to in scope credit applications and credit agreements to the CCR.

Definition of "credit"

Under the current definition of "credit" in the Act, personal contract plans (PCPs) hire purchase agreements and other similar arrangements are excluded from the ambit of the Act.

The government sponsored legislation presented to the Dáil on 10 April 2018 (the "Bill") proposes to refine the trade credit exclusion within the definition of "credit" under the Act to ensure PCPs, hire purchase agreements and similar arrangements fall within the definition of "credit" in the Act.

Broadly speaking, relevant credit will be trade credit if

- both the person by whom (the "first-mentioned person") and the person to whom the relevant credit is provided is each acting in the course of his or her business, trade or profession;
- the first mentioned person is not a regulated financial services provider;
- the terms of the relevant credit provide for repayment of the whole of the credit by a date no later than six months after the date of its provision; and
- the purpose of the relevant credit is to facilitate the purchase of goods or service from the person providing the relevant credit.

Impact of proposed change

If enacted as currently drafted, the narrower drawing of the trade credit exclusion within the definition of "credit" should bring hire purchase agreements, PCPs and leasing agreements (subject to their contractual terms) within the scope of the Act, the exclusion of which in the Act had been considered an inadvertent oversight. This proposed amendment to the Act has been anticipated for some time. The Bill is currently at the first stage of the legislative process and changes may be made to the text of the Bill as it passes through the various legislative stages.

Access the proposed legislation (Markets in Financial Instruments Bill 2018) here.

Other recent developments on the CCR

Regulations have been introduced setting out the fees payable, and exemptions from fees, for access to information held on the CCR. Individuals can access the first Credit Report in a given year for free. Access to additional Credit Reports will be subject to a fee.

Fees payable by relevant lenders will apply from 31 December 2018.

The Regulations can be accessed here.

One to Watch: Positive Reporting Obligation Declared Unconstitutional

The offence under s.9 (1)(b) of the Offences Against the State (Amendment) Act 1998 (the "1998 Act") of failing to comply with a positive obligation to report information that could lead to the prosecution of an individual for a serious offence was recently declared unconstitutional. This judgment could be of particular relevance to individuals that are subject to the Central Bank of Ireland's fitness and probity regime in light of the nearly identical provision contained in s.19 of the Criminal Justice Act 2011 (the "2011 Act"). It will be interesting to see if the Central Bank's approach will be impacted by this judgment.

Sweeney v Ireland, Attorney General and Director of Public Prosecutions [1]

A person charged with withholding information pursuant to S.9 (1)(b) of the 1998 Act after exercising his right to silence during an interview with An Garda Síochána has successfully challenged the constitutionality of this provision in the High Court in *Sweeney v Ireland, Attorney General and Director of Public Prosecutions*.

Failure to Disclose Information

Mr Sweeney was interviewed by An Garda Síochána as part of an investigation into a suspected murder. During the interviews, he exercised his right to remain silent. While Mr Sweeney was not ultimately charged with murder, he was charged with the offence of failing to disclose information pursuant to s.9 (1)(b) of the 1998 Act and sent forward for trial. He subsequently brought a constitutional challenge in respect of s.9(1)(b) of the 1998 Act.

Section 9(1)(b) of the 1998 Act provides that a person shall be guilty of an offence where he/she has information which he/she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of any other person for a *serious offence* (as defined in the 1998 Act) and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of An Garda Síochána.

Right to Silence v Obligation to Report

In her judgment, Ms Justice Baker confirmed that the right to silence is not an absolute right but that the extent of any interference to this right would depend on statutory protections in place to balance the competing rights. The Court found that s.9(1)(b) of the 1998 Act contained no such protections as it did not require a garda to inform or caution a person under questioning that the exercise of the right to silence itself could lead to a prosecution. The Court distinguished the facts of this case from other previous cases challenging the constitutionality of provisions relating to the drawing of inferences in circumstances where the right to silence is exercised. In those cases, there were sufficient statutory protections in place which ensured the right to silence was abrogated proportionally. The wide scope of s.9(1)(b) of the 1998 Act meant that the relationship between the right to silence and the offence in s.9(1)(b) was unclear and in the absence of statutory or regulatory protection, it was impermissibly uncertain and vague. As a result, s.9(1)(b) was declared as offending the constitutional right to silence. While this judgment in respect of s.9(1)(b) of the 1998 Act is currently under appeal, it should be noted s.9(1)(a) which concerns information that might be of material assistance in preventing the commission of an offence remains unaffected by this judgment.

Implications

Similar mandatory reporting obligations can be found dotted across the statute book including the obligation to report white collar crimes pursuant to s.19 of the 2011 Act. The wording of s.19(1)(b) of the 2011 Act is identical to s.9(1)(b) of the 1998 Act except that the 2011 Act applies to a "relevant offence" whereas the 1998 Act applies to a "serious offence".

The outcome of the appeal will be monitored carefully to assess what impact it may have on other similar reporting obligations. If you would like to discuss this further, please contact any of our key contacts or your usual William Fry team.

[1] [2017] IEHC 702

Contributed by Orla Shevlin.

State in Hot Water for Negligent Advice Given to Fishermen

The Supreme Court in *Bates v Minister for Agriculture Fisheries and Ors* [2018] IESC 5 has upheld a High Court decision finding the Minister for Agriculture, Ireland, and the Attorney General liable for damages for negligent advice given to commercial fishermen. The damages were to compensate the fishermen for economic loss caused by the negligent advice given to them by the Department of Agriculture (the "Department") which resulted in their arrest and a fine for engaging in commercial scallop fishing in the Bay of Biscay.

In 2000 and 2002, the Department granted two licences to the Plaintiff commercial fishermen to fish for scallops in certain areas of European Union waters. The fishermen, over a number of days between September 2002 and August 2003, fished for scallops in an area of the Bay of Biscay known legally as "area VIIIa". On 18 August 2003, a French fishery patrol aircraft made contact with the fishermen and informed them that they were fishing illegally for scallops in that area.

Phone call to Department of Agriculture

The fishermen left the area, but made contact with the Department to query whether it was lawful for them to fish in area VIIIa. By phone, and subsequently by fax, the Department confirmed that the fishermen were entitled to fish legally in area VIIIa and so they continued to do so.

On 19 August 2003, the Maritime Nationale arrested the fishermen's two boats in area VIIIa. The fishermen were required to lodge bonds of €27,000 to release their vessels. Fines, civil charges and costs of €67,500 were levied on the fishermen. The fishermen also suffered economic loss due to lost fishing days as a result of the arrest.

The Department was in fact mistaken in the advice it gave to the fishermen. The mistake arose due to the reliance of the Department on an English translation of a defective version of the relevant Council Regulation

Duty of Care Owed Because of Special Knowledge and Expertise

In the High Court, Ms Justice Laffoy found that a duty of care was owed by the State to the fishermen and that the Department had negligently given out information which resulted in a loss to the fishermen. Rejecting the fishermen's claim that earlier advice (pre-19 August 2003) had also caused economic loss, Ms Justice Laffoy awarded only the damages immediately consequent upon the advice given by the Department on 19 August 2013, the sum paid to the French Courts and the immediate loss of fishing days.

In upholding this decision, the Supreme Court commented that the duty of care arose from the fact that the fishermen held licences from the Department and were relying on the *"special knowledge and expertise of the officials of the department".* The duty of care required the officials, when furnishing information sought by the fishermen, to conform to a standard which would not expose the fishermen to unreasonable risks. It was found that *"some official"* in the Department of Agriculture had been negligent in failing to ensure that the version of the relevant Council Regulation available to be consulted by officials correctly reflected the Council Regulation as implemented.

The Supreme Court noted that there are a number of instances in which the Courts will not impose a duty of care on State organs. In this case however, the Department had voluntarily assumed responsibility to provide accurate information in circumstances where it was likely that the fishermen would rely on it. The Court noted that when the information was sought, the fishermen were in a situation of peril, that of imminent arrest.

In appealing the decision of the High Court, the State sought to rely upon a "floodgates" argument. The State argued that if the High Court decision was allowed to stand, any Department of State could be held liable in negligence for its casual conversations with members of the public.

This case highlights the fact that although the Courts will be slow to impose a duty of care on State departments, they will do so in certain situations and allow plaintiffs to recover damages as a result.

Contributed by Michelle Martin.

European Commission Proposes Legislation to Facilitate Cross-Border Distribution of Funds

On 12 March 2018, the European Commission published draft legislative proposals that are aimed at removing certain regulatory and administrative barriers to the cross-border distribution of investment funds within the EU. These legislative proposals consist of a proposed new directive (the "Amending Directive") that will amend the existing regimes relating to the cross-border marketing of AIFs and UCITS and a new regulation (the "Amending Regulation") that will seek to standardise national requirements relating to the cross-border distribution of funds within the EU.

The Amending Directive and Amending Regulation form part of the Commission's wider Capital Markets Union (CMU) policy initiative, which has the stated aim of encouraging the development of more unified, efficient capital markets within the EU.

Many of the proposed changes seek to address ambiguities identified by fund promoters in the existing fund distribution regimes in response to the Commission's 2016 consultation exercise in this regard. In particular, the proposals are clearly intended to improve the transparency of national requirements, the removal of burdensome requirements and the harmonisation of divergent national rules.

However, industry bodies such as EFAMA and ICI Global have been strongly critical of the Commission's proposed changes, arguing that the proposals fail to live up to the ambitions of the CMU project and that the reforms will do little to ease distribution, lower investor costs or increase investor fund choices. While the objectives of the proposed legislative changes are certainly laudable, the scope of the changes are relatively modest and, in some cases, may actually be counter-productive.

The Commission is inviting feedback from interested parties on its legislative proposals within an 8-week period, ending on 10 May 2018.

Summary of Key Proposals:

- Clarification that host member states can apply fees and charges in connection with marketing;
- New provisions regarding the cessation of marketing;
- New requirements for marketing communications;
- Permissible "pre-marketing" by an AIFM is defined;
- New provisions relating to marketing by an AIFM to retail investors; and
- Amendment of provisions affecting the cross-border activities of UCITS managers.

Ability of National Regulators to Apply Fees and Charges

The Amending Regulation will clarify that national competent authorities (both home and host state regulators) may levy fees or charges on AIFMs or UCITS managers for the purpose of authorisation or registration or the exercise of supervisory powers under AIFMD or the UCITS Directive, provided these are proportionate to the regulator's costs. National regulators are required to publish all applicable fees and charges on their websites and to notify ESMA of this information so that it can publish an interactive database containing this information.

The level of fees imposed by certain national regulators was previously identified by fund promoters as one barrier to cross-border distribution so these transparency and proportionality requirements, while modest, should be welcomed.

Cessation of Marketing in a Member State

Precisely when an EU AIFM or UCITS manager can be considered to have ceased marketing in a Member State, so that it can withdraw a notification about exercising the marketing passport in that jurisdiction, is an area of ambiguity in the current AIFMD and UCITS Directives.

The Amending Directive will seek to address this issue by inserting a new provision into the AIFMD, with an equivalent provision into the UCITS Directive, to the effect that the AIFM or UCITS manager may only discontinue marketing units of an EU AIF or UCITS in a jurisdiction in which it has exercised a marketing passport if the following conditions are met:

- there is a maximum of 10 investors in the relevant Member State, holding up to 1% of the AUM of the AIF or UCITS;
- the AIFM or UCITS manager has made a blanket offer to redeem, free of any charges or deductions, all units in the AIF or UCITS held by investors in the relevant Member State; and
- the AIFM or UCITS manager has published its intention to cease its marketing activities in that jurisdiction.

These requirements (and particularly the requirement to buy out remaining investors) may well cause fund promoters to think very carefully about whether they wish to exercise a marketing passport in jurisdictions where they may only attract relatively modest additional net assets.

Permissible "Pre-Marketing"

Another area where divergent views at a national level are evident is precisely when "marketing" for the purposes of the AIFMD is deemed to have commenced. This is particularly important because the existing AIFMD passport only applies to activities that fall within the definition of "marketing" and therefore the extent of promotional activities, falling short of "marketing", that may be undertaken in different Member States may vary.

The Amending Directive seeks to address this issue by introducing a new definition of "pre-marketing" as follows:-

"… direct or indirect provision of information on investment strategies or investment ideas by an AIFM or on its behalf to professional investors domiciled or registered in the Union in order to test their interest in an AIF that is not yet established."

Accordingly, if an activity does not fall within this narrow definition of "pre-marketing" the implication is that it should be treated by Member States as "marketing".

A new provision will be inserted into AIFMD that would require Member States to ensure that an authorised EU AIFM may engage in pre-marketing within the EU without having to make passporting notifications for individual Member States, provided the information given to professional investors does not:

- relate to, or contain any reference to, an established AIF;
- enable investors to commit to acquiring units or shares of a particular AIF; or
- amount to a prospectus, constitutional document of an AIF which has not yet been established, offering document, subscription form or similar document, which is in draft or final form, which would allow an investor to make an investment decision.

These new requirements will mean that circulating draft offering documents or constitutional documents will constitute AIFMD marketing. This will represent a significant change from the current approach in certain EU jurisdictions (most notably, the UK) where the circulation of draft, "path finder" documentation, which does not involve an offer to an investor to enter into a binding agreement, is not generally considered AIFMD marketing.

New Requirements for Marketing Communications

The Amending Regulation will introduce new requirements for all marketing communications made to investors by an AIFM or UCITS manager. These communications must:

- be identifiable as marketing communications;
- be fair, clear and not misleading; and
- present risks and rewards of purchasing units or shares of a fund in an equally prominent manner.

AIFMs and UCITS managers must also ensure that any marketing communications do not contain statements that contradict or diminish the significance of any information disclosed in a prospectus, key information document or required disclosure document for the relevant fund.

The Amending Regulation will empower national regulators to require notification of marketing communications which UCITS managers intend to use directly or indirectly in their dealing with investors and which AIFMs intend to use directly or indirectly in their dealings with retail investors.

Under the proposed legislation, national regulators will not be permitted to make any such notification a pre-condition of marketing. However, national regulators will have up to 10 working days following receipt of a notification to inform the relevant manager of any request to amend a marketing communication.

Marketing to Retail Investors

AIFMD currently permits authorised AIFMs to exercise a passport to market to professional investors but leaves the regulation of marketing AIFs to individual Member States.

The Amending Directive will introduce requirements into AIFMD that will apply where any AIFM is marketing units in an AIF to retail investors. In such circumstances, an AIFM is required to put facilities in place in the relevant Member State to perform the following tasks:

- processing investors' subscription, payment, repurchase and redemption orders in connection with units in the relevant AIF;
- providing investors with information on how subscriptions can be made and how redemption proceeds will be paid;
- handling information relating to the exercise of investors' rights arising from their investment in the AIF in that jurisdiction;
- making available to investors copies of the AIF's rules or instruments of incorporation and its latest annual report; and
- providing investors with information, in a durable medium, relevant to the above tasks being performed by the facilities put in place.

Importantly, the proposed Amending Directive expressly provides that the facilities do not need to amount to a physical presence in the relevant Member State (i.e. the AIFM could provide the facilities through online means or over the telephone). However, the AIFM must ensure that the facilities perform the tasks in the official language(s) of the relevant Member State. In addition, the facilities must be provided either by the AIFM itself or by a third party that is subject to regulation governing the tasks to be performed and is appointed by way of written contract.

Proposed Changes to the UCITS Regime

Currently the UCITS Directive provides that a UCITS manager is required to maintain facilities in any Member State in which a UCITS is marketed for making payments to unitholders, redeeming units and making available any required investor information. The Amending Directive will delete these provisions

and substitute requirements for UCITS managers to maintain facilities that essentially mirror those described above that will apply to AIFMs that are marketing to retail investors.

Currently a UCITS manager is required to give prior notice when it is making changes to its marketing arrangements as set out in a marketing passport notification. The Amending Directive will amend this requirement to clarify that this written notification must be given at least one month prior to implementing the proposed change or immediately after implementing an unplanned change.

Timing

The precise timeline for the entry into force of these proposals remains unclear. The consultation period runs to 10 May 2018 and it could be reasonably expected to take some time to finalise drafts as between the EU Commission, EU Parliament and Council of Ministers. Thereafter, there will be a two-year period from the date of publication for implementing the Amending Directive at a national level and the Amending Regulation also provides for a two-year period before certain provisions come into effect (notably those relating to Member States' obligations to publish their marketing rules and certain of the rules on marketing communications).

In GAA We Trust

A recent decision of the Irish Patents Office has highlighted the importance of ensuring that the correct proprietor of the trade mark is named on the Register.

In *Savanagh Securities Limited t/a T-Rex Clothing* (the "Applicant) v *Cumann Lúthchleas Gael* (the "Proprietor") the Applicant sought to invalidate the GAA word mark (the "Registration") on the basis that the proprietor lacked the legal entitlement to own property, as it is an unincorporated association.

Legal arguments

The Applicant (who was alleged to be infringing the Registration) relied, inter alia, on the following legislative provisions to try and invalidate the Registration:

- The Registration is in breach of Section 8 (3) (a) of the Trade Marks Act 1996 (the "Act") as it was contrary to public policy because unincorporated bodies cannot own personal property;
- The Registration is in breach of Section 8 (3) (b) of the Act as it is *"of such a nature as to deceive the public, for instance as to the nature, quality or geographical origin of the goods or services"* –the Registration in the name of an unincorporated association deceives the public into believing that the Proprietor is legally entitled to be registered as the proprietor of the Registration when it is not;
- Section 30 (1) of the Act provides that no notice of any trust (express, implied or constructive) should be entered on the Register. Accordingly he noted whilst it is customary for trustees to hold property for the benefit of an unincorporated association, neither the Proprietor nor its trustees could be listed as the proprietor of the Registration.

The Hearing Officer held that the provisions of Section 8 of the Act had no application as they are concerned with the content of the mark itself.

Cannot own property

The Hearing Officer agreed that it was well established law that an unincorporated body could not own property (such as a trade mark) and therefore there was an administrative error in the name of the proprietor of the Registration.

He said that this did not justify invalidating the Registration. He noted that there was no provision in the Act or the Trade Marks Rules 1996 to refuse an application or to invalidate a registration on the grounds of the lack of a legal entitlement to own property. He said this error in the name of the proprietor could be corrected.

Trustees

With respect to Section 30 of the Act, the Hearing Officer said that the purpose of this provision had been misconstrued by the applicant. He said that the purpose of Section 30 was to ensure that only the legal owner of the trade mark may be recorded as the proprietor on the Register. Section 30 does not mean that trustees cannot be legal owners.

The intention of Section 30 was to avoid, for instance, entries such as *"Held in trust by Joe Soap, on behalf of Sean Soap"* because in this example Joe Soap is not the legal owner of the trade mark.

The Hearing Officer noted that the name of the proprietor of the Registration should be changed on the register to the following *"the Trustees for the time being of the GAA"*.

All practitioners and brands owners should be mindful of this when filing trade marks for unincorporated bodies. A cursory view on the relevant Registers would appear to indicate that it is a common occurrence.

Contributed by Colette Brady.

High Court Reverses Circuit Court 'Right to be Forgotten' Determination

The High Court has ruled in favour of the Office of the Data Protection Commissioner (ODPC) and Google Ireland Inc. (Google) and overturned Ireland's first judgment on the 'right to be forgotten' delivered by the Circuit Court in December 2016.

What is the Right to be Forgotten?

The 'right to be forgotten' is a legal remedy permitting, among other things, individuals to request that their personal data are delisted so that they no longer appear in results generated by search engines.

The right is likely to apply in cases where the results returned by search engines are inaccurate, excessive or no longer relevant.

The right was first recognized in the seminal 'Google Spain' decision.

Background to Proceedings

In 2014, the plaintiff lodged a complaint with the ODPC requesting the delisting of certain details posted about him on Reddit, an online discussion forum.

The link to the post in question contained language that referred to the plaintiff as *"North County Dublin's Homophobic Candidate"* and appeared in Google's search results when a search was carried out against the plaintiff's name.

The plaintiff argued that the link to the Reddit page breached the Data Protection Acts 1998 and 2003 (the DP Acts) on the basis that it contained inaccurate information and presented him as a homophobe without any qualification. In particular, while the plaintiff accepted that the Reddit thread constituted free speech, he argued that the lack of qualification or parenthesis gave credence to the assertions contained in the Reddit thread.

The ODPC concluded that there had been no contravention of the DP Acts and was of the view that the Reddit user was expressing a personal opinion on the plaintiff based on the election material rather than a finding of fact. Further, the ODPC held that any user seeking out facts on any topic is unlikely to consult an online discussion forum such as Reddit as a source of verified facts.

Circuit Court Judgment

The plaintiff appealed the ODPC decision to the Circuit Court which, as previously reported by us here, ruled in the plaintiff's favour finding that it was likely that internet users would consult an online discussion forum such as Reddit as a source of verified facts.

The Circuit Court ordered that the information contained in the link to the Reddit thread be edited and presented in search results such that the comments appeared as opinions of the individual posters rather than as facts. The ODPC appealed this decision to the High Court.

High Court Judgment

The High Court, in overturning the decision of the Circuit Court, ruled that the appropriate legal test had not been applied.

The High Court noted the importance of considering the Reddit post in its entirety rather than considering the public's perception of a google search result in isolation. If this analysis had taken place, the High Court argued that it would have been clear that the posts were statements of opinion rather than statements of fact.

The High Court placed particular emphasis on the fact that, in order for Google to comply with the Circuit Court determination, Google would have to engage in editing functions beyond those contemplated by the Google Spain decision e.g. carrying out daily reviews of discussion forums and placing statements of opinion in parenthesis.

The High Court agreed with the ODPC's initial finding that Google's refusal to remove the link from its search results did not contravene the DP Acts.

The Right to be Forgotten and the GDPR

The General Data Protection Regulation (the GDPR) which enters into force on 25 May 2018, requires member states to place the right to be forgotten (now referred to as the right to erasure) on a statutory footing and provides for certain circumstances in which a refusal to comply with a request for erasure might be justified. One such exception is connected to the right to exercise freedom of expression and information.

This High Court determination may, therefore, serve to inform the courts as to the circumstances in which it will be appropriate to grant data subject requests for erasure having regard in particular to competing interests such as freedom of expression and public interest.

Contributed by Anna Ní Uiginn.

Bridging the Gap – The UK Experience

The UK deadline for company reporting on the gender pay gap passed on 4 April with much media attention and scrutiny. It is reported that over 10,000 companies reported before the deadline. However, the UK Equality and Human Rights Commission has reported that 1,557 companies missed the deadline.

Amongst those companies who reported, the median pay gap is 9.7%. However, according to the UK Office of National Statistics, the gap is much higher at 18.4%. The UK media has criticised this apparent difference and the methods used by some companies to report.

The UK introduced gender pay gap reporting under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. This legislation requires organisations with 250 employees or more to publish data on the pay of their male and female employees in respect of differences in mean and median hourly pay, bonuses and the proportion of men and women in each pay quartile. This data must be published once annually by all private companies meeting the threshold.

As we have commented on previously (in December 2017 and March 2018), Ireland is set to introduce gender pay gap reporting under the Irish Human Rights and Equality Commission (Gender Pay Gap Information) Bill.

It was reported last week that this legislation may be enacted before the summer recess with some amendments to the current Bill with a view to gender pay gap reporting being in force in Ireland by the end of 2018.

Comment

The experience of the UK gender pay gap reporting will give the Irish legislature food for thought with regards to enforceability, meeting deadlines and encouraging accurate gender pay gap reporting in Ireland by deadline day.

The UK experience will also give Irish companies much to consider in preparation for gender pay gap reporting. It is very clear that the figures will be closely scrutinised, possibly resulting in negative media attention for companies and with the knock-on effect of negative morale amongst employees. Gender discrimination is often a basis for claims in the Workplace Relations Commission, and with the heightened awareness this year of potential gender disparities in the workplace, more claims are likely over the next few years.

Irish companies can take the lessons learned from their UK counterparts and begin to assess the gender pay gap in their own companies now well in advance of legislation being enacted allowing them the opportunity to mitigate risks.

Contributed by Darran Brennan.

CPD for Pension Scheme Trustees – Qualification, Experience & Professional Development Requirements Proposed in Government Reforms

The IORP II Directive (the "Directive") has been a catalyst for the re-assessment of training and qualification requirements for the role of a pension scheme trustee. The Directive requires Member States to ensure that "persons who effectively run" a pension scheme (i.e. trustees) are "fit" and "proper". The fit requirement necessitates that trustees have qualifications, knowledge and experience that is collectively adequate to allow them ensure sound and prudent management of the scheme, whereas the proper requirement necessitates that they be of good repute and integrity. The Directive has to be transposed into Irish law by 13 January 2019.

On 28 February 2018 the Government published its much anticipated pension reform agenda ("A Roadmap for Pensions Reform 2018-2023") (the "Roadmap"). This gives some insight into how Irish legislation will likely interpret and apply the fit and proper requirements for Irish scheme trustees. Among the reforms proposed are the following measures:

- a set of new professional standards for trustees to meet the "fit" requirements;
- a requirement for a trustee board to have at least 2 trustees, and for a corporate trustee to have at least 2 directors:
    - one trustee/director to have a mandatory trustee qualification; and
    - the other trustee/director to have at least 2 years' experience as a trustee;
- new standards for trustee professional development (including annual CPD requirements); and
- the Pensions Authority will be given power to remove a trustee who does not meet these new standards.

Comment

The term "*collectively*" was inserted into the "fit" requirements in the drafting of the Directive due to concerns about a total professionalisation of pension scheme trustees. Nonetheless the proposals will be a new standard for trustees to meet. This may lead to a reduction in the number of lay trustees taking up roles on trustee boards. The Roadmap commits to publishing draft legislation to transpose the Directive by 1 October 2018. This should provide more concrete detail so that trustees can prepare for the changes.

Contributed by Jane Barrett & Michael Wolfe.

Global Guide to Tax Litigation – Irish Chapter

Brian Duffy, Fergus Doorly and Sonya Manzor have authored the Irish chapter of the Global Guide to Tax Litigation, which has been published online by the legal information provider, Thomson Reuters Practical Law.

The guide is written in a question and answer style and provides a high level overview of the key practical issues in Irish civil and criminal tax litigation, including: pre-court/pre-tribunal process, trial process, documentary evidence, witness evidence, expert evidence, closing the case in civil and criminal trials, decision, judgment or order, costs, appeals, and recent developments and proposals for reform.

Please click here to access the Irish chapter.

