WILLIAM FRY

Legal News

Welcome to the October 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.

Employer Access to Instant Messaging – Barbulescu Revisited by the ECHR

The right of employers to access the private messages of their employees was clarified yesterday after the European Court of Human Rights (ECHR) overturned an earlier judgment of the Court on the issue.

In February and August of last year, we published articles on the judgment of the Fourth Section of the ECHR, sitting as a chamber (the "Chamber"), in the case of *Barbulescu v Romania* which involved the monitoring by a private company of an employee's electronic communications.

The case involved Mr Barbulescu, an engineer, whose employment was terminated after his instant messages were viewed by his employer.

The Chamber ruled in his employer's favour and, as a result, the Chamber's judgment had been heralded as *carte blanche* for employers to monitor the private messages of employees.

However, yesterday, the Grand Chamber of the ECHR (the "Grand Chamber") reversed the decision of the Chamber, ruling that the monitoring of Mr Barbulescu's messages amounted to a breach of his right to respect for private life and correspondence under Article 8 of the European Convention of Human Rights ("Article 8").

In January 2016, Judge Pinot de Albuquerque, in his dissenting opinion annexed to the Chamber's judgment, expressed that the ECHR had, at that time, overlooked an excellent occasion for the ECHR to develop its case-law in the field of protection of privacy with regard to employees' internet communications. The judgment of the Grand Chamber, therefore, provides a welcome clarification of the extent of the protections afforded to employees in this context.

Background to the Case

Mr Barbulescu was requested by his employer to set up a Yahoo messenger account to contact his employer's clients. Through spyware software, Mr Barbulescu's employer established that he was using the service to exchange messages with his fiancée and brother. His employment was subsequently terminated on the grounds of a breach of the employer's rules prohibiting the use of the employer's resources for personal purposes.

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The Chamber's Judgment

Having exhausted the avenues of redress in his home country of Romania, Mr Barbulescu took a case to the ECHR, arguing that the termination of his employment was based on a breach of his privacy rights and that, by not revoking that measure, the Romanian courts had failed to protect such rights.

In its judgment of 12 January 2016, the Chamber held that that the Romanian courts had struck a fair balance between the Mr Barbulescu's Article 8 rights and the business interests of the employer. The Chamber stated that "*it was not unreasonable to seek to confirm that employees were completing professional tasks during work hours*".

The Grand Chamber's Judgment

In a significant departure from the Chamber's judgment, the Grand Chamber held yesterday that Mr Barbulescu's right to private life and correspondence under Article 8 had been breached. The Grand Chamber's judgment is final.

In finding that Article 8 was applicable to the circumstances of the case, the Grand Chamber held that the right to a private life may include professional activities. It found that, as telephone calls made from or received on a business premises are covered by "private life" and "correspondence", emails sent from the workplace and information derived from the monitoring of a person's internet use enjoy a similar protection.

In assessing whether the national authorities had adequately protected Mr Barbulescu's rights under Article 8, the Grand Chamber considered the following factors:

1. Receipt of Prior Notice

The Grand Chamber found that the national courts omitted to ascertain whether Mr Barbulescu had received prior notice of the extent and nature of the monitoring measures implemented by the employer or of the possibility that the employer may have access to the actual contents of his communications.

The Grand Chamber considered that to establish prior notice, the warning from the employer had to be given before the monitoring began, particularly where it involved accessing the contents of the employee's communications.

2. Extent of Monitoring and Degree of Intrusion

The national courts failed to consider the scope of the monitoring and the degree of intrusion into the Mr Barbulescu's privacy.

3. Legitimate Reason for Monitoring

The Grand Chamber held that the national courts had not carried out a sufficient assessment of whether there had been legitimate reasons to justify the monitoring of Mr Barbulescu's communications. The national courts did not identify a specific aim justifying the monitoring.

The Grand Chamber found theoretical examples of the need for the company to prevent liability in the event of illegal activities online, disclosure of trade secrets or damage to the employer's IT systems did not amount to a legitimate reason where there was no suggestion that Mr Barbulescu posed such a risk.

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4. Less Intrusive Methods

It was found that the national courts had not examined whether the aim of the employer could have been achieved by less intrusive methods i.e. without directly accessing the full contents of the employee's communications.

5. Consequences

The Grand Chamber held that the domestic authorities failed to consider the seriousness of the consequences of monitoring and the disciplinary proceedings.

It also stated that consideration must be given to whether the employee has been provided with adequate safeguards, especially where the monitoring measures of the employer are intrusive. The Grand Chamber stated the safeguards should ensure that an employee is notified before an employer accesses the actual contents of an employee's communications.

The Grand Chamber held that the national authorities failed to strike a fair balance between Mr Barbulescu's right to respect for his private life and the interests of his employer. In doing so, the national authorities had failed to adequately protect Mr Barbulescu's rights which amounted to a breach under Article 8.

Notably, the judgment states that the finding of a violation of Article 8 was "just satisfaction" and did not award damages to Mr Barbulescu. Dissenting, Judge Karakas disagreed with this aspect of the decision, stating that the violation of Article 8 could not be satisfied by a mere finding that damage was sustained.

Conclusion

Given that Irish courts are guided by the principles laid down in ECHR case-law, this decision will strengthen the privacy rights of employees in Irish workplaces.

The factors laid down by the Grand Chamber provide a useful guide for employers engaged or intending to engage in the monitoring of employees' electronic communications. Employers are advised to review existing policies and approaches to monitoring of employees to ensure they are compliant with best practice.

Contributed by Emma Lavin.

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FC Barcelona Secure Domain Name Transfer

Futbol Club Barcelona (FC Barcelona) recently succeeded in arbitration proceedings concerning *"a clear case of cyber-squatting".* The domain name in question, <fcbarcelona.soccer>, was registered by a cyber-squatter who allegedly requested "assistance" of over $400,000 in return for transferring the domain name to the football club. An administrative panel ultimately found that <fcbarcelona.soccer> had in fact been registered for the primary purpose of selling it to FC Barcelona and, consequentially, ordered that it be transferred to the club.

The <fcbarcelona.soccer> Dispute

Ali Mohamedali of Dubai (the Respondent) registered the domain name <fcbarcelona.soccer> in August 2015. Correspondence between the Respondent and FC Barcelona followed, with the latter eventually issuing a "cease and desist" letter in April 2017. In reply, the Respondent allegedly sought "assistance" of between $400,000 and $450,000.

The Respondent, who had in fact registered two domain names containing the "FC Barcelona" brand name, allegedly claimed to have received offers of $190,000 from prospective buyers. While the Respondent later retreated from this position and requested that FC Barcelona pay only for his *"time and effort"*, the administrative panel found that he was still seeking to gain substantially more than out-of-pocket expenses.

On 30 June 2017, FC Barcelona submitted a complaint to the World Intellectual Property Organisation (WIPO), which in turn appointed an administrative panel to rule on the complaint. FC Barcelona claimed that:

- the domain name <fcbarcelona.soccer> was identical to its trade marks;
- the cyber-squatter had no legitimate interest in registering the domain name; and
- the domain name was registered in bad faith.

On 15 August 2017, the WIPO-appointed administrative panel ordered that <fcbarcelona.soccer> be transferred to FC Barcelona.

FC Barcelona is no stranger to domain name disputes. In 2004, it successfully challenged registrations for <fcbarcelona.net> and <fcbarcelona.org> under the Uniform Domain-Name Dispute-Resolution Policy (UDRP). It did not however succeed in 2014, when it sought to challenge the registration of <fcb.email> under the Uniform Rapid Suspension System (a fast–track procedure). In that particular case, FC Barcelona failed to make a clear and convincing case that the registrant (an FC Bayern Munich fan) did not have a legitimate interest in the domain name.

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ECJ Judgment Confirms That Ryanair Employment Disputes May Be Heard In Foreign Courts

The ECJ has ruled on 14 September 2017, in a case relating to six Belgium-based Ryanair employees, that a jurisdiction clause which sought to prevent the employees from bringing proceedings in the courts of the countries in which they habitually work, was not enforceable against those employees. This will not be a surprise to employment lawyers, however it is noteworthy that a majority of media reports have confused the concept of jurisdiction, which was the subject of this case, with that of governing law, which was not (see "Analysis" below).

Facts

The judgment follows a legal action taken by a group of six airline cabin crew employees who had employment contracts with Ryanair and Crewlink, a company which recruits cabin crew for the airline. All of the relevant employment contracts were in English, subject to Irish law, and included a jurisdiction clause providing that the Irish courts had jurisdiction as regards any disputes.

It was stipulated in the employment contracts that the work of the employees concerned, as cabin crew, was regarded as being carried out in Ireland, given that their duties were performed on board aircraft registered in that Member State. However, those contracts nevertheless designated Charleroi Airport in Belgium as the employees' "home base". The employees started and ended their working day at that airport, and they were contractually obliged to reside within an hour of that "home base".

The six employees concerned brought actions in respect of their employment rights before the Belgian courts in 2011. The Cour du travail de Mons in Belgium was uncertain as to whether it had jurisdiction to hear the dispute considering the contents of the employment contracts. Consequently, it decided to refer a question to the ECJ based on Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"). [1]

In particular, Brussels I designates employment contracts as being in a special category, and states that jurisdiction clauses are only valid if entered into after a dispute has commenced. Brussels I provides that an employer may be sued by an employee in: (i) the Courts of the Member State in which the employer is domiciled; or (ii) in the Member State where the employee habitually carries out his/her work; or (iii) if the employee did not habitually work in any one country, then in the Courts of the place where the business which engaged the employee was situated. This Ryanair case concerned the interpretation of the *"place where the employee habitually carries out his work"* in the specific context of the air navigation sector.

ECJ Judgment

The ECJ has followed the opinion of the Advocate General and determined than an employee's stated home base amounts to a *"significant indicator"* when determining the place from which an employee habitually carries out his/her work. The ECJ also pointed out that *"as regards disputes related to employment contracts, the European rules concerning jurisdiction are aimed at protecting the weaker party".*

The ECJ stated that an employee is entitled *"to sue his employer before the courts which he regards as closest to his interests, by giving him the option of bringing proceedings before the courts of the Member State in which the employer is domiciled or the courts of the place in which the employee habitually carries out his work".* In this instance the employees concerned habitually carried out their work from Charleroi Airport; it was their home base, and accordingly the Belgian courts had jurisdiction to determine the employment disputes. In the case of these employees, that means they can have their cases heard in Belgium notwithstanding that the employment contracts state that disputes should be heard in Ireland.

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Response

Ryanair has insisted that the ruling does not change the status quo of its thousands of crew members who work for the carrier under Irish contracts. It stated that it will continue to issue Irish law contracts of employment to all employees. It added that: *"Irish legislation has adopted all EU directives on employment rights, which are also covered in Ryanair contracts of employment, and in some cases offer better protection than some EU countries."*

Both the International Transport Workers' Federation (ITF) and the European Transport Workers' Federation (ETF) welcome the ruling stating that it "*is a defeat for Ryanair and a victory for workers' rights".*

Analysis

But which party really won? From an employer's perspective, the ruling upholds the principle in Brussels I (and the subsequent Recast Regulation) that employees can hold their employer to account in the country in which they habitually carry out their work. This will not be news to employment lawyers, but a worthwhile reminder nevertheless that multinational employers ought to be cognisant that jurisdiction clauses in employment contracts are typically not enforceable.

Of note though is the confusion in the media reporting of this ECJ decision. A large number of the media are reporting that Ryanair can no longer insist on Irish law being used in the employment contracts of foreign workers, and this is incorrect. This ECJ case concerned 'jurisdiction' only, i.e. which courts would hear the matter; it did not concern 'governing law', which is the applicable law when interpreting and implementing a contract. "Rome I" (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations) legislates for governing law, and it gives parties in Member States the ability to choose a governing law, and to stick to that governing law. It is important to note however that Rome I does not allow parties to derogate from the "mandatory laws" of a country. What this means in practice in the context of these Belgian workers is: their dispute can be heard in Belgian courts, but the courts must interpret and apply the Irish law contracts except to the extent that the mandatory employment laws of Belgium contradict the Irish employment contracts.

[1] Note: The relevant European legislation for proceedings commenced on or after 10 January 2015 is Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (often referred to as the "Recast Regulation"). This case was initiated before the Recast Regulation came into effect, however the result would not be any different.

Contributed by Catherine O'Flynn & Jeffrey Greene.

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Prince's Pantone Purple – Company Announces New Colour Shade in Singer's Honour

The Prince Estate recently teamed up with the Pantone Colour Institute ("Pantone") to create a standardised custom Pantone colour, Love Symbol #2, honouring musical and cultural icon Prince. While the Prince brand will not have to adhere slavishly to the new colour, the hue is set to be the 'official' brand colour going forward. Prince is deeply associated with the colour purple: his film 'Purple Rain' (featuring the famous eponymous song) came out in 1984; Prince also declared purple as his favourite colour, wore purple costumes, had purple concert sets, and the Pantone colour itself is based upon the shade of a customised Yamaha piano intended to go on a tour with the singer before his untimely death.

Pantone often create custom colours (Barbie's Pink, Tiffany's Robin Egg Blue, the US Army's Khaki), however it is unusual for Pantone to create a colour for a particular celebrity (although in 2007 Pantone did create a special pearly-blue Pantone colour for Jay-Z). Such colours are naturally extremely costly, are kept top secret and are not made available in swatches or Pantone colour guides for public consumption. However, the mere fact that these colours are incredibly exclusive does not mean that any intellectual property rights exist in them.

Purple is often referred to as Prince's 'trade mark' colour, in the colloquial sense that it is the colour with which he is commonly associated. However, it must be emphasised that the colour which a brand uses is separate and distinct from a 'colour trade mark'. Colour trade marks can only apply to very limited and unique situations for the practical reason that there would be a vast colour depletion if every business was allowed to own their brand's colour.

In the seminal Libertel case the European Court of Justice confirmed that a colour per se is not normally inherently capable of distinguishing the goods and services of a particular undertaking; this is because consumers do not usually make assumptions about the origin of goods based on their colour or the colour of their packaging in the absence of graphic and word elements. For this reason, an applicant for a colour mark will need to show that their colour mark is unusual or striking in relation to their specific goods or services – an example provided by the European Intellectual Property Office would be the colour black for milk.

Where the colour or combination of colours is commonly used in the relevant sector and/or serves a functional or decorative purpose, an application for such a mark will be refused. Of course, some brand owners do manage to register colour trade marks but this is always difficult as the brand owner will have to show that the colour for which it seeks protection essentially is its brand, that it is not merely functional or decorative in nature, and that it meets the threshold for being absolutely striking and distinctive. Furthermore, as an extensive monopoly over a colour is incompatible with a system of undistorted competition, colour trade marks, where successfully registered, will also only protect a brand in a particular market sector (for example, T-Mobile's magenta is protected only in the telecommunications sector; and Tiffany's robin egg blue is only protected for boxes and bags).

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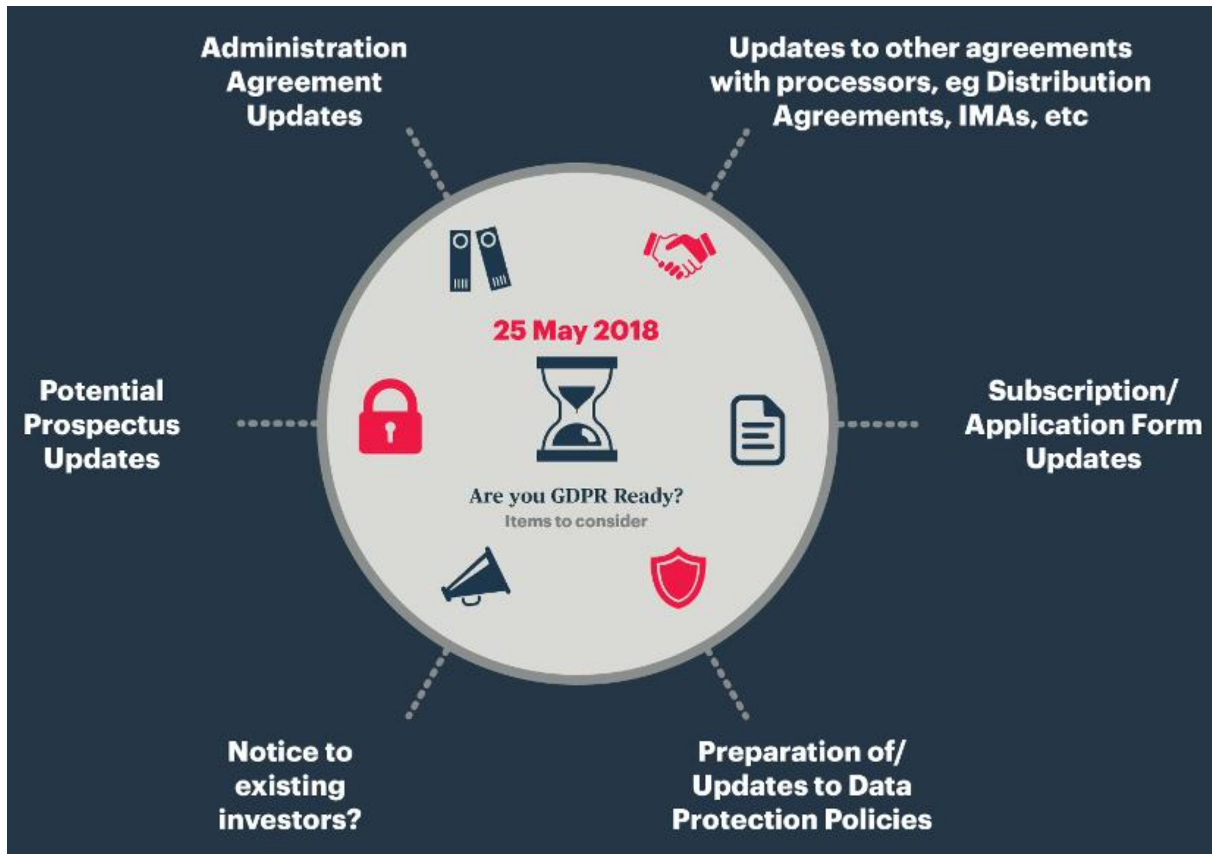
GDPR For Irish Funds - 8 Month Countdown

The EU General Data Protection Regulation (GDPR) will take effect on 25 May 2018 and has been described as the most ground-breaking piece of European Union legislation in the digital era. It aims to modernise the legal framework of data protection and privacy in Europe to ensure the consistent protection of personal data by making businesses more accountable for compliance. The implementation of the GDPR brings about a number of sweeping changes and investment funds, their administrators and other relevant delegates should prepare now for what will be the biggest change to data protection laws in over 20 years. Set out below is a summary of key GDPR-related matters set to impact the funds industry.



Direct Liability & Increased Penalties – Immediate Effect

Liability and penalties for breaches of the GDPR will be as high as €20m or 4% of a group's annual global turnover (whichever is greater) and individuals (eg investors) will have a right to sue for material and non-material damage arising from data protection breaches.

Accountability

The newly-introduced accountability principle will constitute a key aspect of GDPR for the funds industry. Accountability requires a board of directors to take a proactive and evidenced-based approach to compliance with data protection rules. As of 25 May 2018, every board must be in a position to demonstrate that appropriate governance measures have been implemented to meet the standards required under GDPR.

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Subscription Form & Prospectus Disclosures

Data protection disclosures in subscription forms and/or prospectus documents will require updating in line with GDPR, which prescribes various information to be provided to investors at the time of data collection.

Contracts with & Oversight of Administrators

New liability principles and a requirement for more detailed terms to be incorporated in contracts with processors will necessitate updates to existing agreements between funds and various of their service providers, including, most notably, administrators. There will also be a requirement for administrators to flow down these terms where they engage sub-delegates that will process personal data on their behalf. With most administrators in the market continuing to operate an outsourced business model for administration services such as transfer agency, boards of directors will need to examine the processes in place to ensure appropriate oversight of all delegated services which involve the handling of investor data.

Grounds for Processing Data

The legal basis upon which data is being processed must be identified to investors at the time of data collection and, if relying on consent as a legal basis, funds should note the increased consent threshold set by GDPR, requiring consent to be documented, specific freely-given, informed and unambiguous. It must also be easy for individuals to withdraw consent as it is for them to give it. This challenging threshold may result in funds moving away from consent as the primary legal basis upon which investor data is processed.

Enhanced Rights for Investors

New rights include the right to be forgotten, right to restriction of processing and right to data portability. These should be reflected din relevant service provider agreements, such as administration agreements as funds will require the co-operation of service providers to comply with these requests in certain circumstances. Information on how to avail of the new rights must also be provided to investors.

DPIAs (Data Privacy Impact Assessments)

DPIAs will be mandatory for high risk data processing such as profiling and large scale processing of special categories of data. For funds, this may be of particular relevance if introducing any new technology or undertaking any new project involving the collection of investor data.

Security Breach Reporting

The GDPR introduces a requirement to report to the Data Protection Commissioner within 72 hours where a risk arises to the rights and freedoms of individuals (such as investors). Funds must notify investors about any breaches to their personal data without undue delay where a personal data breach is likely to result in a high risk to their rights and freedoms. This will be in addition to applicable Central Bank of Ireland reporting requirements.

Records Management

GDPR introduces an obligation to maintain detailed records of processing activities for both controllers (ie funds) and processors (ie administrators). This will replace the obligation to register with the Data Protection Commissioner.

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One-Stop Shop

Organisations may be regulated by one supervisory authority if their main establishment is in the EU (meaning that they should only have to deal with one data protection and privacy regulator). This may, in light of Ireland's well-regarded "firm but fair" data protection regime, prove beneficial for Irish funds, eg in the case of claims under GDPR being taken by investors in other jurisdictions.

Territorial Scope

GDPR expands the territorial scope of data protection law such that certain non-EU funds may fall within its scope (eg where they process the personal data of EU citizens such as investors based in the EU).

Next Steps

Given the extensive impact of GDPR on the funds industry it is critical for all relevant stakeholders to commence preparation for 25 May 2018 at the earliest opportunity. Please contact your usual William Fry team or feel free to engage with any of our key contacts for assistance with GDPR matters.

Register for our dedicated GDPR website PrivacySource here.

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Courier Company Fails to Deliver on Gross Misconduct Threshold

The Labour Court, in its recent decision in the case of DHL Express (Ireland) Limited v Michael Coughlan, has held that the summary dismissal by DHL Express (Ireland) Limited ("DHL") of its employee, Mr Coughlan, was disproportionate and unwarranted.

Mr Coughlan, a courier/van driver for DHL, was dismissed without notice for gross misconduct where his driving was said to have caused €2,500 worth of damage to a DHL van.

At the initial hearing of the case, the Adjudication Officer (AO) found that the sanction applied to Mr Coughlan was disproportionate having regard to all the circumstances and directed Mr Coughlan's reinstatement.

On appeal, the Labour Court agreed with the AO and found Mr Coughlan's dismissal to be unfair within the meaning of the Unfair Dismissals Acts 1977-2015 (the "UD Acts"). The Labour Court varied the award of the AO and granted Mr Coughlan the maximum compensation available under the UD Acts of 104 weeks' compensation, amounting to €72,054.88.

In reaching its decision, the Labour Court highlighted the following shortcomings in the disciplinary process applied to Mr Coughlan's dismissal:

1. Gross Misconduct

The Labour Court stated that the law takes a very strict view as to what constitutes gross misconduct justifying summary dismissal. It referred to the decision of Lennon v Bredin in which the Employment Appeals Tribunal (EAT) found that dismissal, without notice, for misconduct *"applies only to cases of very bad behaviour of such a kind that no reasonable employer could be expected to tolerate the continuance of the employment relationship for a minute longer".* The EAT cited violent assault or larceny as examples of such behaviour.

The Labour Court held the basis for which the disciplinary hearing was established - the failure to protect and safeguard company property - did not meet the threshold for misconduct. The Labour Court took note of the fact that Mr Coughlan was permitted to continue driving for DHL for a number of weeks after the incident for which he was later summarily dismissed.

2. Grounds for Dismissal

The Labour Court found that Mr Coughlan was confronted with a number of additional grounds for his dismissal at the disciplinary hearing which he had not previously been advised of either during the investigation stage or in the letter inviting him to the hearing.

These grounds included protection of Mr Coughlan and others against any further lapses of judgement of Mr Coughlan in carrying out his duties as well as the previous warnings he received in respect of damage caused to company and customer property resulting from his driving.

DHL also referred to its duty of care to the public, other staff and Mr Coughlan himself when setting out the basis for upholding the finding of dismissal during the internal appeal of the Respondent's decision.

The Labour Court found that DHL had based its decision to summarily dismiss Mr Coughlan in part on these additional grounds.

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3. Proportionality of Sanction

Having concluded that the behaviour of Mr Coughlan could not be considered gross misconduct justifying summary dismissal, the Labour Court found that DHL's decision to summarily dismiss him was disproportionate and unwarranted in all the circumstances.

4. Failure to Consider Alternative Sanctions

The Labour Court found that DHL had failed to consider alternative sanctions before summarily dismissing Mr Coughlan. It noted in particular that Mr Coughlan was not given the opportunity to contribute to the cost of repairs to the company van and the evidence provided by witnesses for DHL made it clear that no lesser sanction was considered. It was noted that the DHL manager, who had conducted the disciplinary hearing, was not aware that the option of dismissal on notice was available to him.

5. Consideration of Previous Warnings

The Labour Court considered that undue weight was given to previous incidents involving Mr Coughlan's driving which had resulted in damage to DHL's company vehicle. Mr Coughlan received a written warning in 2012 and a final written warning in 2013. Both warnings expired 12 months from the date they were applied to Mr Coughlan.

The Labour Court found that the decision of DHL to dismiss Mr Coughlan was informed to a significant degree by these previous incidents when in fact the warnings should have been expunged upon their expiry.

Conclusion

The threshold for gross misconduct is extremely high and so summary dismissal will only be justified in instances of extreme conduct. In most cases, dismissal on notice should be the preferred route.

Employers should ensure that all the issues which the employer will consider during the disciplinary process are notified to the employee in advance of a disciplinary hearing.

Employers should also be mindful of relying on expired warnings in a subsequent disciplinary process.

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Third Country Delegation: European Commission Seeks Enhanced Role for ESMA

The European Commission (Commission) has recently proposed a number of legislative amendments aimed at further promoting supervisory convergence - one of the key tools in its Capital Markets Union toolbox. The proposals aim to provide the European Supervisory Authorities (ESAs) with strengthened powers. Players in the funds industry will have a particularly keen eye towards those proposals that seek to enhance ESMA's role in delegation and outsourcing.

As the threat of Brexit has already prompted moves by the ESAs to "avoid a regulatory march to the bottom", authorisation and supervision of relocating entities and delegation are key areas of focus for both regulators and industry participants. ESMA itself has issued a series of opinions in relation to outsourcing and issues of substance in delegation models in the context of potential Brexit relocations to the EU27. The Commission's latest proposals would see ESMA take a more direct supervisory role with regard to certain sectors and products, as well as an enhancement of its existing supervisory coordination role. This enhanced coordination function would see it take a more active part with national regulators in authorisation/registration applications involving outsourcing, delegation and/or the risk transfer of a material part of the applicant's activities to third countries.

ESMA's new coordination role would require the national regulator, such as the Central Bank of Ireland, to engage with ESMA when an applicant for authorisation or registration intends to outsource or delegate a material part of its activities or key functions to third countries. The national regulator would be required to provide a detailed notification to ESMA so that it can assess the application. If, upon assessment, ESMA is of the view that the proposed authorisation/registration is not in compliance with EU law, guidelines, recommendations or an opinion adopted by ESMA, then it can issue an opinion to the relevant regulator. If ESMA deems this opinion necessary, it will notify the national regulator within 20 days of receipt of the original assessment and provide its final opinion within two months. The authorisation/registration process must cease during the period between notification and delivery of the opinion. ESMA may then also issue recommendations to the regulator involved to review a decision or withdraw an authorisation. It would appear that these recommendations would apply on a "comply or explain" basis, as the new provision provides that where a competent authority does not follow ESMA's recommendations within 15 days of receipt of the recommendations, it should state its reasons for not doing so. Therefore, as currently drafted, the proposals are ambiguous in terms of what ESMA can do in such situations.

Nonetheless, the proposals are likely to prove contentious given that they seek to add a further administrative layer to a process, which appears to be functioning well at national level. However, it is important to remember that, as with all EU legislation, these proposals are subject to the ordinary legislative procedure, which can be lengthy and during which there will likely be much debate followed by compromise proposals. Additionally, there is an opportunity to provide feedback on the proposals to the Commission until 24 November 2017. Therefore, these proposals may be subject to change as they move through the legislative process, which should hopefully bring more clarity to the role ESMA will play in future authorisations/registrations where there is material delegation, outsourcing or risk transfer to countries outside of the EU.

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In Short: Legal Aspects of Building Information Modelling

Building Information Modelling (BIM) is increasingly in the spotlight as its use starts to increase around the world. The articles linked below analyses legal aspects of BIM in six different jurisdictions: Brazil, Canada, Denmark, Ireland, UK and the US.

Jarleth Heneghan, Construction & Engineering Partner, was one of six contributors to the articles below, the content of which was presented at the session on 'Building information modelling (BIM): progress in adoption and the legal and contractual implications' organised by the International Construction Projects Committee for the IBA Annual Conference held on 22 September 2016 in Washington.

These articles were first published in Construction Law International, Vol 11 Iss 4, December 2016, and Vol 12 Iss 1, March 2017 and is reproduced by kind permission of the International Bar Association, London, UK. © International Bar Association.

Please click on the links below to read the full piece:

- Legal Aspects of Building Information Modelling: a world view (Part I)
- Legal aspects of Building Information Modelling a world view (Part II)

In Short: Jockey Banned By Turf Club For Four Days For Punching Racehorse

Jockey Davy Russell was banned from racing for four days for punching the racehorse Kings Dolly on the back of the head at Tramore on 18 August 2017.

Mr Russell was initially cautioned by the Referrals Committee of the Turf Club for a breach of Rule 272(i) of the Rules of Racing and Irish National Hunt Steeplechase Rules (the "Rules") by acting in a way that was prejudicial to the integrity, proper conduct and good reputation of horse racing. In his defence, Mr Russell stated that the horse was not paying attention as it approached a trial hurdle before the start of the race. He stated that it would have been inappropriate to use his whip or to let the horse jump the trial hurdle as he would have been in breach of the rules. He stated that he used his fist to hit the horse on the soft part of the horse's neck just behind the head to make the horse concentrate. Mr Russell accepted his actions were inappropriate.

The Irish National Hunt Steeplechase (INHS) Committee lodged an appeal, as provided for by Rule 27(i) of the Rules, to review Mr Russell's sanction on the grounds it was unduly lenient. The Turf Club Appeals Body ("Appeals Body") met on 5 September 2017 to consider the appeal. Evidence was heard from Mr Russell and a transcript of the referral hearing and film of the incident were reviewed by the Appeals Body.

The Appeals Body imposed a four day ban from racing on Mr Russell having found that the offence was in the middle range. Having considered that the loss of four race days would have a significant financial impact on a jockey, the Appeals Body decided not to impose a fine on Mr Russell.

Contributed by Craig Sowman.

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