



Employment Law Update

December 2009

Boston Scientific employees trigger information and consultation requirements

Background. Directive 2002/14/EC which was implemented in Ireland by the Employees (Provision of Information and Consultation) Act 2006 (the Act) established a general framework for consulting and informing employees. The Act was enacted on a phased basis and now applies to undertakings with 50 or more employees. An undertaking is broadly defined as a public or private undertaking carrying out an economic activity, whether or not it is operating for gain.

The Act provides a general right to information and consultation for employees from their employer on matters which directly affect them. Under Section 7 of the Act negotiations to set up a structure for information and consultation must be put in place if there is a written request from 10% of employees of the undertaking, subject to a minimum of 15 employees and a maximum of 100 to either the employer or the Labour Court.

In June 2009 133 employees at the Irish operation of the US multinational Boston Scientific (which is non-unionised) sent a petition to the Labour Court under Section 7. We understand that this is the first time this provision has been triggered by Irish employees. Boston Scientific in response stated that their joint information and consultative forum was constituted prior to the Act but complied with it and is the way in which it informs and consults with its employees.

Under the Act pre-existing agreements must be in writing, dated, signed by the employer; approved by the employees, applicable to all employees to whom the agreement relates; and available for inspection. Where there is no valid pre-existing agreement the company must negotiate an agreement with employee representatives within three months of the petition or adopt the Standard Rules in Section 10 and Schedule 1 of the Act.

Comment. Although the Act does not impose an automatic requirement on employers to set up information and consultation arrangements, once activated by the requisite number of employees, an employer must comply with its obligations and set up and operate an information and consultation structure. It will be interesting to see whether other groups of employees in the private sector will seek to invoke the information and consultation procedures, in particular, in organisations where there is a communications deficit with employees.



Collective redundancy consultation: ECJ decision

Background. Article 2(1) of the Collective Redundancies Directive (98/59/EC) (the Directive) states that “Where an employer is contemplating collective redundancies, he shall begin consultation with the workers’ representatives in good time with a view to reaching agreement.” Article 2(3) lists certain information, including the reasons for the projected redundancies and the numbers and categories of employees concerned, which the employer must provide “in good time during the course of the consultations.” The Directive is implemented in Ireland by the Protection of Employment Acts 1977-2007.

In Ireland a collective redundancy arises if, during any period of 30 consecutive days, the employees being made redundant amount to at least: five out of a workforce of between 21-49; ten out of a workforce of between 50-99; 10% out of a workforce of between 100-299; or 30 out of a workforce of 300 or more employees. In these situations the employer must provide the Minister for Enterprise, Trade and Employment with certain information about the redundancies at least 30 days before the first redundancy; permit the election of employee representatives (if there are none) and consult with those representatives. The consultations must consider whether there are any alternatives to the redundancies, must take place at the earliest opportunity and at least 30 days before the notice of redundancy is given.

Decision. On 10 September 2009 the European Court of Justice (ECJ) held that the duty to consult under the Directive is triggered where strategic decisions or changes of activities are taken which compel an employer to contemplate or plan collective redundancies. The ECJ further stated that where a parent company contemplates redundancies within its group, the duty to consult only arises once the parent company identifies the subsidiary that will be affected and is not dependent on the subsidiary employer supplying all the relevant information to employee representatives. However, the subsidiary employer must finish the consultation procedure before the parent company makes the final decision on collective redundancies.

Comment. In practice it is difficult to decide when an employer must commence consultation. An employer that is “contemplating collective redundancies” has a duty to consult. However, it is not necessarily required to start consulting straight away as it depends on the exact circumstances.

Redundancy and race discrimination

Background. Direct and indirect discrimination and discrimination by association is prohibited on any of the nine grounds of gender; marital status; family status; sexual orientation; religion; age; disability; race; or membership of the Traveller Community under the Employment Equality Acts 1998-2004. Discrimination is defined as the treatment of a person in a less favourable way than another person is, has been or would be treated in a comparable situation on any of the above nine grounds.

Facts. The complainant, a Russian national, was employed in an administrative role involving payroll duties in the employer company, Goode Concrete. She also provided translation services in employee disciplinary hearings as there were a number of Russian employees. The company allegedly dismissed her on grounds of redundancy in 2007 due to a need to outsource the payroll function. The complainant argued that no redundancy situation existed as the payroll function was not outsourced and that her dismissal followed from an argument with the managing director about her increasing workload. An Equality Officer found that she had been selected for dismissal on grounds of her nationality and that this constituted race discrimination and awarded her €20,000. The company appealed to the Labour Court.



Decision. The court found that the complainant had a good work record and took on duties above and beyond the terms of her employment contract. It also concluded that there was no redundancy situation in existence as the proposal to outsource the payroll never materialised and that no evidence suggesting that consideration was given to making any of the other Irish employees in administration redundant. The court found that, on the facts, there was a presumption of race discrimination. The onus was therefore on the company to disprove discrimination by showing that the principle of equal treatment was not infringed. The court was satisfied the company had failed to prove the complainant's dismissal was unrelated to her nationality and its appeal was therefore dismissed.

Case: Goode Concrete and Shaskova Determination No.EDA0919, 7 October 2009

New Directive on parental leave

Parents will have the right to longer parental leave, under a new Directive agreed by EU ministers on 1 December 2009. It will replace Directive 96/34/EC which first established minimum standards on parental leave for the EU.

The main changes in the new Directive are:

- Longer leave – each parent will be able to take four months off per child (previously three months). The extra month cannot be transferred from one parent to the other, thereby encouraging fathers to take their leave. In the past many working fathers have transferred their right to leave to the mother.
- No discrimination – an employee applying for or taking parental leave will be protected from any less favourable treatment for doing so.
- Temporary changes to work schedules – employees returning from parental leave will have the right to request changes to their working hours for a limited period. In considering such requests, employers will be obliged to balance the needs of the employee as well as the company.
- Parents of adopted children and children with a disability or long-term illness – governments and employers/unions will be obliged to assess the specific needs of such parents.
- Work contracts – the new rights will apply to all workers, regardless of their type of contract (for example, fixed-term, part-time, agency workers); however the possibility of a qualification period of maximum one year is maintained.

The new Directive will be formally adopted in the coming months and member states will then have two years to transpose the new rights into national law.

Employment and Benefits

Dermot Casserly (Head of Employment and Benefits)
Mark Heslin
Dairine Walsh

d.casserly@beauchamps.ie
m.heslin@beauchamps.ie
d.walsh@beauchamps.ie

Claire Callanan
Madeleine Delaney
Sinead O'Brien

c.callanan@beauchamps.ie
m.delaney@beauchamps.ie
s.obrien@beauchamps.ie

If you do not wish to receive the Employment Law Update in the future, please email employment@beauchamps.ie to unsubscribe.

Beauchamps Solicitors

Riverside Two, Sir John Rogerson's Quay, Dublin 2
Tel +353 (1) 418 0600 Fax +353 (1) 418 0699
email info@beauchamps.ie web www.beauchamps.ie

This ezine is for general information purposes only and does not comprise legal advice on any particular matter. You should not rely on any of the material in this ezine without seeking appropriate legal or other professional advice. While every care has been taken in preparation of this ezine, we are not liable for any inaccuracies, errors, omissions or misleading information contained in it.