Code of Practice on the Right to Disconnect:

Submission on behalf of ICTU

January 2021

Introduction

The Irish Congress of Trade Unions is pleased to accept the invitation to share our recommendations on the design of a Code of Practice on the Right to Disconnect.

Congress is the umbrella body for 44 unions and the largest civil society organisation on the island of Ireland. We represent the interests of some 700,000 workers and their families in all sectors of the economy both in the Republic and Northern Ireland.

Congress has long advocated for concrete actions to achieve work-life balance including the regulation of hours of employment. Winning the short working day was one of the earliest and most far-reaching achievement of the trade union movement. It has benefited generations of workers. However, existing checks on excessive working hours have become increasingly strained by advances in information communication technology, an always-on work culture and boom in remote working.

Congress supports in principle the introduction of new provisions on workers' right to switch off from work outside of working hours without suffering any negative consequences for doing so. However, going further and adopting specific right to disconnect legislation, as is already the case in a few Member States, should not be ruled out if a Code proves unsuccessful in protecting workers against the negative effects of ICT and modern work practices.

Our recommendations in this paper aim to deliver a fit-for-purpose Code of Practice - one which will preserve workers' hard-won rights to leisure time, improve working conditions and safeguard workers' health and safety; and reflect the new realities in the way we work.

The key features of a Code of Practice for Congress can be categorised under a number of headings:

I.   Legally admissible

II.   Approach collectively

III.   Describe the what and the why

IV.   Determine the causes and not only the effects

V.   Perform situational analysis and set indicators

VI.   Define normal working hours

VII.   Keep an equalities perspective

VIII.   Engage and communicate to all staff

IX.   Train and support managers

X.   Enlist technical solutions

XI.   Monitor the code regularly

Given the quick turnaround for comments, this list and the issues raised below are preliminary.

Context

Developments in technology and its easy availability have made it possible for a great many desk jobs to be performed outside of an employer's premises, for part or all of the working week. However, it took a pandemic to fully awaken us to the potential for remote working.

Before Covid-19 struck, just under one in 20 (4.9%) workers worked mainly from home. In policy circles, remote working was viewed as one in a suite of flexible working arrangements for attracting and retaining mothers, carers and people with a disability in the workforce.

With the arrival of Covid-19, remote working went mainstream. Over a matter of days, tens of thousands of employers moved their staff to work remotely from home to help slow the spread of the virus. Almost 40% of paid hours worked in the economy were preformed from homes around the country during the first lockdown as the number of remote workers skyrocketed to more than one in four (27.6%) of those in employment. For the vast majority this has been a positive experience and they wish to continue to work remotely after the Covid-19 restrictions end.

While successive governments since the 1990s have supported remote working, the pandemic has catapulted it up the list of policy priorities, as evident in the current Programme for Government.

Unions are not looking to hold back the tide of progress. There is a huge appetite for remote working among our members. Working from home or remotely from another location near to home, such as a digital hub or co-working space, has the potential to improve workers' work-life balance, make them happier and more productive. Our concern is with ensuring workers' hard-won rights are preserved when working remotely and that protections keep pace with changes in ways of working.

Much of the same technology that enables us to work remotely also makes us easily reachable outside of working hours. When the occasional intrusion on personal time becomes the norm this becomes a health and safety issue. An overtired worker is a danger to themselves and others. While the issue of digital rights for workers pre-dates the pandemic, the impact of the Government's guidance to work from home in response to the virus has brought the topic very much to the fore.

Although there is no formal right to disconnect under Irish or European law, the 1997 Organisation of Working Time Act obliges employers to curtail working patterns if they breach maximum working hours and minimum requirements for rest periods. However, there is growing recognition, both at home and aboard, of the need for decades-old working time legislation, which pre-dates the smartphone, to more accurately reflect the realities of current ways of working.

Following on from a commitment in the Programme for Government and subsequently in the National Strategy on Remote Working, the Tánaiste and Minister for Employment, Leo Varadkar requested the Workplace Relations Commission draft a Code of Practice on the Right to Disconnect which: "will set out guidance for employees and employers with regard to best practice and approaches to employee disengagement outside normal working hours."

Congress agrees in principle with the introduction of provisions on the right to disconnect, viewing protections for workers as vital to the success of remote working and modern work practices.

Based heavily on research analysis of laws and collective agreements on the right to disconnect in Western European countries in 2019, commissioned by our colleagues in UNI Global Union, the key features of a Code of Practice for Congress are as follows:

Legally admissible

A Code of Practice on the Right to Disconnect must go beyond providing practical guidance on managing working hours. Congress recommends a Code be admissible in evidence in proceedings before a court, the Labour Court of a WRC Adjudication Officer.

Approached collectively

Working arrangements often include starting and finishing times outside of a business's standard hours. Congress recognises the potential benefits of flexible working time and remote working for workers, such as to allow for school drop offs, and for employers. We accept that different working arrangements will work for different workers and roles and for different businesses and sectors. However, the right to be able to maintain clear boundaries between work and leisure is universal.

Rather than the WRC prescribing a one-size-fits-all protocol, Congress recommends employers be required to collaborate with employees and their representatives to develop a set of rules that suits the business and the workforce, in compliance with working time legislation, with a clear obligation on the employer for the right to disconnect to be effectively safeguarded.

Describe the what and the why

Congress recommends a Code of Practice clearly defines what the right to disconnect means and why it matters.

In brief, the right to disconnect has three main elements:

I. The right of an employee to *not* perform work outside agreed working hours.

II. The right to *not* suffer any negative consequences for doing so.

III. The duty to respect others' right to disconnect (e.g. by not emailing or calling out-of-hours).

It does *not* imply an automatic obligation to disconnect from work; employees can use digital tools and perform other work after hours in exceptional circumstances, as long as such circumstance have been previously defined (discussed below).

The health and safety basis of the right to disconnect must be emphasised in a Code as well as the risks for the employee's wellbeing and the business's performance if the right is not upheld. Merely referring to a legal obligation on maximum working time is likely to cause some to view the right to disconnect as only having formal purpose without any substantive objective.

Determine the causes and not only the effects

If out-of-hours work and communication is the norm, employers must identify the root cause. For example, is it the result of a too heavy workload; due to actual or perceived pressure from a manager; a fear of signalling a lack of commitment to the employer; a mismatch between agreed working hours and the needs of the business.

Congress recognises that a right to disconnect cannot fix all organisational issues, but introducing the right without due regard to its context risks having only marginal positive effects, if at all.

Perform situational analysis and set indicators

Congress recommends addressing a right to disconnect in the workplace be based on accurate data on what kind of out-of-hours communication or work is currently taking place. For example, how many emails, calls and other messages are sent after hours or during holiday periods? Are there differences between different departments, or between different groups of employees? Is it a permanent feature, seasonal or linked to certain events such as campaign or product launch?

Based on this initial data, indicators can then be developed specific for that workplace as a whole and/or for different teams and departments.

Define normal working hours

Congress recognises that varying solutions may need to be developed and agreed upon for different roles and may need to allow variation in exceptional times or circumstances. Congress recommends particular attention should be given to employees who work with others in different time zones.

Negotiations between the employer and employees and their representatives to define what constitutes normal working hours and for clarifying rights and expectations outside of normal hours are crucial. Without this, employees may not be able to effectively exercise the right.

Keep an equalities perspective

Workers with caring responsibilities and some workers with a disability may need more flexibility to reconnect. Equally, they may not be in a position to stay connected outside the working day even if they wanted to. This is particularly the case for workers parenting alone, for whom a right to disconnect is likely to be most beneficial.

Congress recommends a Code be gender and equality proofed to maximize the benefits, to avoid unintended negative consequences, and to promote family co-responsibility.

Engage and communicate to all staff

As with any change programme, clear communication and inclusive engagement will be critical to its legitimacy, take-up and success.

Congress recommends the employer, with the involvement of workers and their representatives, develops a comprehensive communication strategy to inform the workforce before the introduction of a code of practice on the right to disconnect and during its development, so that everyone understands the rationale for the cultural change. Once the Code has been finalised, further communication will be needed so that everyone understands their rights and responsibilities.

It is vital that the communication strategy is clear and unambiguous regarding the Code's purpose or method of implementation. The communication must reach all levels of the company, from junior staff members to senior managers. Regular reminders of the Code will also be required.

Train and support managers

Managers, especially senior management, will be critical to the successful implementation of a Code. If a manager continues to send communications out-of-hours and expects an immediate response from team members, then that action will be more influential in defining employees' behaviour than any code of practice.

Congress recommends training be provided to managers on the right to disconnect, the correct use of digital tools and to help them manage any challenges it may pose to them in order to ensure that a Code is followed.

Enlist technical solutions

Congress recommends technological interventions be embedded in a Code to encourage the desired behaviour. These can include automatic reminders or warning messages to users looking to email out-of-hours that they are non-compliant with the Code; delay delivery of email sent at night or over the weekend, or setting up automatic out-of-hour replies that also list who is contactable.

Monitor the code regularly

Congress recommends an oversight committee, consisting of the employer and workers and their representatives, to review the impact of the Code and to address any issues and adjust the Code as necessary. Employees should be provided with reports at regular intervals on the collective and their individual use of digital tools and adherence to the Code.

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