

Consultation on Developing a Code of Practice on the ‘Right to Disconnect’

Submission to the Workplace Relations Commission by the Citizens Information Board

Introduction

The Citizens Information Board (CIB) welcomes the opportunity to make a submission to the Workplace Relations Commission on developing a Code of Practice on the ‘Right to Disconnect’. CIB has previously made a submission to the Department of Enterprise, Trade and Employment on the matter of guidance for employers and employees on remote working.¹

CIB funds and supports Citizens Information Services (CISs) and the Citizens Information Phone Service (CIPS) which provide information, advice and advocacy on people’s entitlements and rights, including employment rights. In 2019, there were over 70,000 employment rights queries to CISs. The Board also supports the nationwide Money Advice and Budgeting Service (MABS) and the National Advocacy Service (NAS) for people with disabilities.

The need for clear guidance for both employees and employers on the right to disconnect has come very much to the fore during recent months. There is a clear focus on better work-life balance in the Programme for Government with a commitment to bringing forward proposals for a right to disconnect in the context of an increase in remote, flexible and hub-working arrangements to promote a better work-life balance.²

The development of a new Code of Practice on the ‘Right to Disconnect’ is essential in order to ensure that both employers and employees are aware of requirements and entitlements under both existing legislation and any new legislation that may be introduced. A Code of Practice, apart from providing practical guidance, would clearly be an important resource in the context of investigations by the Workplace Relations Commission and the Labour Court relating to alleged breaches of employment law.

The right to disconnect

The Organisation of Working Time Act 1997 (OWTA) provides a significant avenue of redress for

¹ CIB also made a submission to the WRC in 2020 in respect of a consultation on remote hearings during Covid-19.

² While an Interdepartmental Steering Group is examining the right to disconnect as part of an overall review of work-life balance and issues such as flexible working hours, job-sharing and remote working, information on the work of this group or on progress to date does not appear to be publicly available.

many users of Citizens Information Services seeking to enforce their employment rights.³ The Act states that the maximum average working week for many employees cannot exceed 48 hours with the provision that the average may be calculated over specific periods (4 months for most employees). The legislation also lays down rules for night workers, minimum breaks and rest periods and there are also special provisions in relation to Sunday working. For many employees, the hours of work are specified in their contract of employment. If a person is required to work additional hours, their employer must give them 24 hours' notice except in exceptional circumstances.

The right to disconnect refers to a worker's right to be able to disengage from work, including from engaging in work-related electronic communications, such as emails or other messages, during non-work hours. While current Irish legislation does not explicitly refer to a 'right to disconnect', the OMTA does give workers some protection, with workers having an implied right to switch off under this legislation. Employers cannot permit employees to work more than a maximum of 48 hours per week on average, except in very limited circumstances.⁴

The 1997 Act also sets out the minimum requirements for daily and weekly rest periods for employees. Under the Act, employees must be given a 15-minute rest break every 4.5 hours and a 30 minute break every 6 hours. In addition, employees are entitled to 11 hours' consecutive rest every 24 hours. Employers also have an obligation to monitor and maintain records of working hours of their employees to ensure the maximum working week limit and daily and weekly rest periods are adhered to.

Under the 1997 Act, employers can be held liable if an employee suffers an injury or illness due to work related stress. For example, if an employer knowingly allows an employee to consistently work long hours or work late they could be held liable if reasonable efforts are not put in place to avoid work related stress. The employer would be expected to put measures in place to reduce that risk for the employee. This would have particular relevance in ensuring that people do not remain work-connected for longer than appropriate.

In looking at the question of legislative provision in Ireland for the 'right to disconnect', it should be noted that the 1997 Act was created at a time when the workplace and working practices were vastly different to how they are now. The 1997 Act could not have foreseen the diverse technological working environment currently in place. Therefore, from the perspective of a right to disconnect digitally, there are inevitably some gaps as work has become more accessible in terms of how, when and where people can work. While in 1997 it was easy to record employees working time, as it was mostly performed on site or at an office, it is more difficult to monitor and manage if work is conducted out of hours, at various times, and locations and on various devices.

It is not entirely clear whether or not new legislation will be required in this area. CIB notes that there are different views about whether a code goes far enough to protect employees or whether or

³ See , for example, *Employment Rights that Work for All* [CIB Social Policy Series Report: Employment Rights that work for all - a Citizens Information Perspective](#)

⁴ Unlike the UK, there is no opt-out option for an employee in Ireland.

not the provisions of the 1997 legislation provide adequate protection for the right to disconnect from the workplace.

The Department is currently examining the 1997 Act in the context of the right to disconnect, to consider deficiencies in the legislative framework that should be remedied. The Minister for Enterprise, Trade and Employment has stated that some legislation will require amendment, including the OWTA and that provisions in other comparable jurisdictions are being examined in order to establish whether their laws have actually made a difference.

CIB notes that IBEC has expressed⁵ the view that there is no need for additional legislation in that the OWTA already provides for an effective right to disconnect which is enforceable through established employment rights bodies. According to IBEC, before any additional legal measures are proposed, better communication of the existing legislative framework relating to working time and the obligations it imposes should be considered, arguing that this is evidenced in statistics from the Workplace Relations Commission on the enforcement of working time legislation. Under the 1997 Act, it is not a defence for an employer to say that they did not know that the employee was working excessive hours unless the employer had in place some system by which hours of work could be monitored and appropriate corrective action taken if needed.

A decision by the Labour Court in 2018⁶ clearly illustrates the relevance of the 1997 legislation to the right to disconnect. The case concerned an employee who was found to have worked excessive hours, in breach of the Act, and who was awarded compensation by the Workplace Relations Commission (WRC). This was a significant case in that it highlighted the fact that it is in breach of legislation for employers to allow employees to work excessive hours during evenings and weekends, with no records on file and no action taken to address these practices.

In order to address a perceived legislative deficit, two Private Members Bills, primarily focusing on making an employee's right to disconnect a statutory right were introduced in 2020 – the Organisation of Working Time (Amendment) (Right to Disconnect) Bill and the Working from Home (Covid-19) Bill.

The first Bill proposes to amend the Terms of Employment (Information) Act 1994 to require employers to provide a policy in respect of employee use of electronic devices to send or receive work-related communications outside the hours of work. It broadly proposes that employers shall not require an employee to access any work-related electronic communications during the period between an employee's regular finishing time and the employee's next starting time of work. The Bill provides that any time spent considering and responding to emails during this time will be considered working time for the purposes of the 1997 Act and will require that the minimum requirements for rest periods, breaks, working hours and annual leave under the 1997 Act are fully implemented in order to protect the safety and health of workers. The Bill requires employers to set out what their policy is in relation to out-of-hours communication in order to ensure that employees are not penalised for failing to respond to emails or other communications outside of office hours.

The Working from Home (Covid-19) Bill seeks to address the issue of out-of-hours communications and to create a legal right to disconnect in Ireland and to place an obligation on employers to have a right to disconnect policy in place. This Bill also proposes a right for employees not to be penalised if they disregard a work-related communication sent after their normal working hours but it is not

⁵ [Ibec - Is there a need for "a right to disconnect"?](#)

⁶ *Kepak v O'Hara* [The Irish Times: Executive awarded €7,500 for having to deal with late night emails](#)

clear what sanctions would be imposed on an employer, in the event of penalisation. The Bill seeks to regulate excessive out-of-hours contact between employers and staff via email, messaging apps or phone, and essentially gives them a legal right to disconnect, or switch off from work.

Relevant initiatives in Ireland and in comparable jurisdictions

In Ireland, AIB has introduced its own 'right to disconnect' policy in collaboration with the Financial Services Union. This is reported in the media⁷ as covering areas such as emails, meetings and calls (including virtual ones), and sets guidelines on when people should arrange online meetings to avoid interfering with a worker's personal time. It also emphasises the right of workers to make themselves unavailable during breaks, when they finish work or when they have time off.

The policy also encourages employees not to send or check emails outside of normal working hours, to ensure staff have downtime in the evenings. It has been reported that some AIB staff members who are working flexible hours have chosen to include a message below their email signature, which reads: *"I am currently working flexible hours, so while it suits me to send this email now, I do not expect a response or action outside of your own working hours."*

Internationally, some countries or group companies have taken a more pro-active approach to the right to disconnect than in Ireland. For example, in Germany, some companies have a history of implementing a right to disconnect through their employment policies.⁸ Regulation was introduced in France in 2017 which mandated companies with more than 50 employees to develop a charter defining employees' right to switch off and setting out the hours when staff are not expected to send or answer emails. Italy, Spain, Belgium and Portugal have also implemented similar legislation. CIB notes that MEPs have called on the European Commission to propose an EU Directive on the right to disconnect from work under EU law.⁹

Excessive working hours

An employee opinion survey on remote working conducted by Fórsa in 2020¹⁰ found that 42% of respondents stated that it would be harder to disconnect from work calls or email in a home working context. The WRC Annual Report 2019¹¹ indicated that complaints in relation to working hours are now the most prevalent, with 30% of all complaints received in 2019 relating to this issue. The Report further states that the 6,266 complaints in relation to working hours it received last year represents a three-fold increase on the number received in 2018 (2,026).

Queries about employment rights and conditions to Citizens Information Services (CISs) include issues about leave and holidays, contracts of employment, pay, enforcement and redress and hours of work.¹² Manipulation of averaging in the calculation of working hours and lack of entitlement to flexible work hours also feature regularly in queries. These areas also tend to be the main subjects of

⁷ RTE: [Switching off: Do workers have a 'right to disconnect'?](#)

⁸ Volkswagen implemented a policy in 2011 to stop email servers from sending emails to the mobile phones of employees between 6pm and 7am. Other German companies have similar policies in place to limit the number of work-related digital connections employees have after working hours.

⁹ [MEPs adopt resolution calling for right to disconnect from work \(siliconrepublic.com\)](#)

¹⁰ [DBEI-consulation-august-2020.pdf \(forsa.ie\)](#)

¹¹ [WRC Annual Report 2019](#)

¹² Employment Rights that Work for All [CIB Social Policy Series: Employment Rights that Work for All - A Citizens Information Perspective](#)

social policy returns (SPRs), i.e., indicative cases relating to infringement of rights or policy gaps. The incremental effect of these employment rights enforcement issues are likely to be relatively significant in a home working context and are also likely to be compounded by any lack of clarity about the legal right to disconnect.

Guidance on 'Right to Disconnect'

Existing Guidance on Working from Home provides a useful starting point for developing more detailed guidance on the 'right to disconnect'. For example, DPER Guidance on Working from Home during Covid-19 for Civil Service Organisations¹³ refers to the need to have a homeworking policy clearly setting out employer and employee obligations. It is stated that this policy should set out the criteria and requirements for when employees work from home. This policy should also include information on the arrangements put in place by the employer to assess risks and responsibilities of employees to report risks and work-related accidents to the employer. The Guidance states that employees and managers have a responsibility to ensure that they operate within the requirements of the OWTA taking adequate breaks, not working excessive hours and maintaining a healthy work-life balance, setting boundaries in relation to working hours in order to facilitate disconnection from work outside of these hours.

HSA Guidance on Working from Home for Employers and Employees¹⁴ refers to the need to have a homeworking policy clearly setting out employer and employee obligations.

What the Code of Practice on 'Right to Disconnect' should contain

Each employer should be required to have a Right to Disconnect Policy which prevents employees from working excessive hours – this should include an ICT acceptable usage policy relating to the usage of emails and mobile phones for work purposes.

Employers should be required to have in place appropriate guidance and related mechanisms to fulfil their responsibilities under working time legislation relating to home working time. This should include clauses in employees' contracts requiring them to clearly record their home-working hours so as to assist the employer in complying with their obligations under the legislation.

Given the practical difficulties in complying with working time legislation in a home working context, new and innovative methods would need to be developed by employers to record working-at-home, particularly where there are flexible working hours, in order to ensure that they comply with the legislation.

The implications of current legislation in relation to the right to disconnect should be outlined clearly by employers in order to minimise opportunities for non-compliance with the legislation by either employers or employees.

The Code of Practice should set out the need for clear policies and best practice and approaches to employee disengagement outside normal working hours. A Global Union 2019 publication,¹⁵ suggests the following text as guidance in relation to the right to disconnect.

"The employer recognizes that employees have a right to disconnect from work and are under no obligation to answer phone calls, emails, or messages outside normal working hours. They shall

¹³ [DPER: Working from Home during Covid-19: Guidance for Civil Service Organisations](#)

¹⁴ [HSA: Guidance on Working from Home for Employers and Employees](#)

¹⁵ [The Right to Disconnect - Best Practices](#), UNI Global Union Professionals and Managers, 2019

*not be reprimanded or otherwise subjected to disciplinary action for failing to do so, or rewarded for staying connected."*¹⁶

The following are identified by CIB as areas¹⁷ where clear guidance is required in relation to the right to disconnect.

- ✓ Equipping employees to manage workloads
- ✓ Realistic allocation of work relative to working time
- ✓ A clear statement on the right (and duty) to disconnect in all employment contracts
- ✓ Provision for in-house employer-staff discussions and related training around the right to disconnect and its implications for planning, time and workload management
- ✓ Enshrining the right to disconnect as a mutual obligation on staff and employers
- ✓ Provision for automatic out-of-hours responses that highlight that employees are not required to respond outside working hours;
- ✓ The specific procedures the employer has put in place to facilitate and support staff disconnecting
- ✓ Managing customer and client's expectations in respect of receiving responses outside of normal office hours
- ✓ A strict requirement for employers to maintain up to date and accurate records of all working time in off-site work environments
- ✓ A clear directive to all employees that they are not required to answer emails or phone calls outside of agreed and specified working hours
- ✓ Mechanisms for employers to support people in knowing when to step away from their desk or work station.
- ✓ Clarity about when the working day begins and ends

The Guidance should encourage people working from home to switch off from work and to have defined 'core work hours' which are understood and acknowledged by employers, managers and work colleagues. There should be some flexibility in situations which clearly require some out-of-hours working by some employees depending on the service being provided and the needs of customers/clients.

In order to comply with the legislation, employers may need to consider adapting their current employment policies to ensure they cover working from home as well as in the office or on-site and to enable and support workers to disconnect.

There will be a need to make some distinction between the position of a small employer with a few workers and larger employers – in some instances, the survival of the business may require some electronic or telephone engagement outside of agreed work time.

Summary of key points

While guidance for employees on maintaining boundaries and switching off from work is clearly required, creating a culture of trust which encourages work/life balance will be equally important. Enacting additional legislation on the right to disconnect is likely to be of limited value unless clear guidance is provided to employers and employees to ensure a broader recognition of the

¹⁶ *Ibid.* p.7

¹⁷ This does not purport to be an exhaustive list.

importance of disconnecting from work, in terms of complying with working-time limits and health and safety obligations.

Employees enjoy strong protections under the OWTA in that employers cannot 'permit' employees to work excessive hours. However, a review of the Act would be useful to establish if any amendments or further legislative provisions are required to strengthen the Right to Disconnect for employees and/or whether detailed guidance on how to navigate the existing OWTA in a home working scenario would be sufficient.

CIB is of the view that a Code of Practice and related guidance based on existing working time legislation will be a significant first step. Issues relating to disconnection from work would be handled under the OWTA which provides employees with a method to report unacceptable usage of electronic communications with them outside of agreed work time and provides legal sanctions against employers for such conduct.

In the longer-term, additional specific provision needs to be made in legislation for a permanent work disconnection standard whereby employers would have some flexibility in meeting these standards based on the particular circumstances and needs of their workplaces and industries.

Anti-retaliation legislative provisions would be helpful in establishing that employees could not be penalised for filing either internal or external complaints about excessive and unhealthy management practices relating to out-of-hours electronic communications.

Guidance on disconnecting/working hours should be flexible to accommodate companies and employees operating across time zones. Similarly, flexible systems for logging in and out of work over a longer period of time will be necessary in order to accommodate employees with caring duties.

Apart from providing practical guidance, a Code of Practice on the 'Right to Disconnect' would almost certainly have considerable standing in the context of the resolution or investigation by the WRC and other industrial relations bodies on employment rights disputes. Such a Code would also be of significant benefit to CISs and other NGOs providing independent advocacy support to workers relating to employment rights enforcement.

As more ambitious targets for remote working are put in place into the future following, for example, a commitment in the Programme for Government that 20% of public sector employees will be able to work remotely, it is critical that there is a clear requirement on all employers (public and private) to have a Code of Practice and a related 'Disconnect from Work' Policy in place.