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ICC/11/1

RECOMMENDATION NO. RIC111

SECTION 15(1), EMPLOYEES (PROVISION OF INFORMATION AND CONSULTATION) ACT, 2006

PARTIES :

HSE
AND
IRISH BUSINESS AND EMPLOYERS' CONFEDERATION

- AND -

IRISH NURSES AND MIDWIVES ORGANISATION
SERVICES INDUSTRIAL PROFESSIONAL TECHNICAL UNION
PSYCHIATRIC NURSES ASSOCIATION

DIVISION :

Chairman : Mr Hayes
Employer Member : Ms Doyle
Worker Member : Mr Shanahan

SUBJECT:

1. Removal of Payment for Pre Registration Nurses and Midwives

BACKGROUND:

2. This case concerns a dispute relating to an instruction from the Department of Health, issued to the Health Service Executive, to reduce the pay of pre registration nurses and midwives while they are working on placement, under contracts of employment, in the

final year of their training. The Unions contend that the employers failed to enter into discussions with them on the proposed reductions despite being party to the Health Services Information and Consultation Agreement.

The matter was the subject of a conciliation conference under the auspices of the Labour Relations Commission yet agreement was not reached. The case was subsequently referred to the Labour Court in accordance with Section 15(1) of the Employees (Provision of Information and Consultation Act), 2006. A Labour Court hearing took place on the 1st November, 2011.

UNION'S ARGUMENTS:

3 1 Management was obliged to consult wth the Trade Unions before submitting recommendations to the Department of Health relating to the proposed cuts. This is a clear breach of the Health Services Information and Consultation Agreement previously concluded between the parties.

2 The Unions do not accept that management were not party to discussions with the Department of Health in relation to the proposed cuts. It is clear that discussions did take place and that the Unions were not party to them.

MANAGEMENT'S ARGUMENTS:

4 1 Managment were not obliged to consult with the Unions at the time as it was involved in internal discussions with the Department of Health in relation to possible changes but that there were no final proposals in place.

2 The decision to reduce the pay of the staff in question was not made in consultation with the employers. It was a Government decision and was not based on or influenced by any input from the HSE.

RECOMMENDATION :

This case was referred to the Court pursuant to Section 15(1) of the Employee (Provision of Information and Consultation) Act 2006 (the Act). The dispute concerns the interpretation and operation of an Agreement on Information and Consultation made between the health services management and trade unions working under the auspices of the Health Service National Partnership Forum, dated 1st September 2006 (the Agreement). This is a pre-existing agreement within the meaning of s9 of the Act. The substance of the complaint is that the HSE contravened the Agreement in failing to consult with the Trade Unions in relation to a decision taken by Government to reduce the pay of final year student nurses and midwives whilst on rotation in hospital settings. Student nurses and midwives must complete a minimum number of hours in theoretical and clinical instruction in order to qualify for registration with An BordAltranais the professional regulation body within the state.

The Union contends that the reduction in pay arose primarily out of a series of submissions the HSE made to the Department of Health in October/November 2010

canvasing such reductions. The Unions contend that they were entitled under the Agreement to be consulted about those proposals when they were being canvassed with the Department and that failure to do so constituted a breach of the Agreement and by extension the relevant Act and Directive.

Management contends that the decision to reduce the pay of student nurses and midwives was taken by Government independently of any submissions made by the HSE and that they were not required to consult with the Unions on the internal discussions they were having with the Department of Health as no decisions had been made at that time. Management contends that they became aware of the Government Decision on 21 December 2010, immediately notified the Unions of the detail of the decision and were required by law to implement it on 1 January 2011. The Government Decision provided for a phased reduction and ultimate elimination of pay for student nurses and midwives over a four year period. After the introduction of the initial reduction on January 1 2011 discussions on the arrangements for future years began between the parties and final proposals emerged 28th October 2011 that substantially mitigate the severity of the original decision.

The provisions of the Agreement which are material for present purposes are at Clauses 12 and 19 and at Appendix 5

Clause 12 provides: -

> *Dealing With Unexpected Circumstances.*
> *It is recognised that some changes and associated decisions need to be made in an expeditious and timely fashion, in order to respond effectively to unexpected circumstances and compromise may be necessary on some of the rigour of this agreement. All employees and their union representatives should be informed of such circumstances at the earliest possible date.*

Clause 19 provides:-

> *Subject of Consultation*
>
> *Consultation (meaning the exchange of views and establishment of dialogue between the employees' representatives and the employer) shall take place on all issues relating to ;*
>
> > *Probable developments of the activities of the relevant health service organisation(s)*
> > *Probable development of employment within the health service or any measure envisaged, in particular where there is a threat to employment*
> >
> > *All decisions likely to lead to substantial changes in work organisation or in contractual relations (ref Article 4.2 of Directive, copied at Appendix 2)*
>
> *Reflective of the intent of the EU Directive (Article 4.4) and the Act, such consultation shall be with a view to reaching agreement on such decisions. A more comprehensive list of areas for information and consultation is set*

out at appendix 5

Appendix 5 sets out an indicative list of examples what are to be regarded as significant issues on which consultation is required.

The Act and the Agreement are intended to give effect to the rights and responsibilities of the parties arising from Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community. Accordingly the Agreement must be interpreted and applied in the light of the wording and purpose of the Directive in order to achieve the objective pursued by the Directive (see the Decision of the ECJ in Case 14/83*Von Colson and Kamann v Land Nordrhein-Westfalen*[1984] ECR 1891.

Article 4.2 of the Directive provides

2. Information and consultation shall cover:
(a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
(b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
(c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).

The HSE contends that when it was advised of the Government decision on 21 December 2010 it immediately notified the Unions of the impending pay reduction due to take effect on 1 January 2011. However it contends that it was required by law to give effect to the Government decision. It relies on the provisions of Section 12 of the Agreement and contends that this was an external event that was outside the control of the employer and is precisely the kind of circumstance that Section 12 is designed to deal with.

The Unions submitted that as the reduction in pay had been canvassed by the HSE itself in October/November 2010 it was instrumental in bringing it about and could not rely on the provisions of Clause 12 in those circumstances. It further contended that the decision to seek permission to introduce pay reductions for the grades affected come within the ambit of Clause 19 of the Agreement and should have been the subject of consultation and information.

Conclusions of the Court.

There is no serious conflict between the parties as to the salient facts of this case. The net issue for consideration by the Court is whether or not the HSE was an influencing agent in the process bringing about the reductions in pay that are the subject matter of this case.

Reviewing the evidence presented to it the Court finds that the HSE did engage in discussions with the Department of Health in October and November 2010 regarding cost reductions in the nurse training budget. Neither party presented details of the

precise nature of those discussions. However the Court is satisfied that on 6th December the National Director of Human Resources in the HSE wrote to the Secretary General of the Department of Health and Children raising for consideration a reduction in the allowances paid to student nurses and midwives undergoing their final year hospital rotation. However the Court notes that the Secretary General of the Department responded to that letter on 13th December 2010 confirming that the Government had, on December 2nd, four days before the HSE letter was sent, made a decision to initially reduce and over a four year period progressivelyphase out student nurse payments completely. This decision went far beyond that submitted for consideration by the HSE and on the balance of probability the Court finds that it was taken independently of any submissions made by the HSE.

Accordingly the Court finds that the decision to reduce the pay of this group of workers was taken by Government and not by the employer. The Court notes that the Government is neither the employer nor a party to the Agreement and consequently is not subject to its provisions. Accordingly the Court is satisfied that it was an "unexpected" event that fell to be dealt with in accordance with Section 12 of the Agreement.

The Court therefore must consider,and come to conclusions on, the actions of the HSE in the context of Section 12 of the Agreement.

Section 12 states

> *Dealing With Unexpected Circumstances.*
>
> *It is recognised that some changes and associated decisions need to be made in an expeditious and timely fashion, in order to respond effectively to unexpected circumstances and compromise may be necessary on some of the rigour of this agreement. All employees and their union representatives should be informed of such circumstances at the earliest possible date.*

In this context the HSE contends that it first became aware of the Government Decision by way of a circular letter issued by the Department of Finance dated 21 December 2010. It says it forwarded a copy of the letter to the Trade Unions on 22nd December and engaged with them immediately upon the resumption of work after the Christmas holiday. It refers to a letter it sent to the Unions on 7 January 2011 clarifying certain aspects of the Circular letter of 21 December 2010.It says it was required by law to give effect to the reductions in pay with effect from 1 January 2011 and that it notified all relevant parties of developments at the "earliest possible date"

The Court finds on the evidence before it that the National Director of Human Resources became aware of the Government decision by way of a letter dated 13th December 2010 some seven days before the circular letter was issued by the Department of Finance. In that letter the Secretary General of the Department of Health and Children effectively questioned the feasibility of the HSE proposals on Student Numbers and on the so called Sponsorship Scheme and then went on to advise the National Director that the Government had, on 2 December, made a decision to *"reduce*

the payment to current student nurses undertaking the fourth-year rostered placement progressively over the next four years, and to abolish the payment altogether for students entering the undergraduate programmes from next year".

He went on to say;

"Students who undertake the next rostered placement commencing in January 2011 will be paid at 76% of the minimum of the reduced staff nurse scale for new entrants. The Department will shortly be issuing revised Consolidated Salary Scales to reflect these budgetary changes."

This is the date on which the HSE became aware of

"decisions likely to lead to substantial changes in work organisation or in contractual relations (ref Article 4.2 of Directive, copied at Appendix 2)"

In accordance with Section 12 of the Agreement it came under an obligation to so advise the unions and all those affected "at the earliest possible date". In the event it waited until the letter of 21 December was issued by the Department of Finance before notifying the Unions or the people affected. The Court finds that this delay amounted to a breach of the obligations set out in Clause 12 of the Agreement.

The Court found that the changes giving rise to this dispute did have a significant effect on staff. It had the effect of overturning a collective agreement freely entered into by the employer and of reducing the pay of student nurses and midwives that were due to take up employment in a very short period of time and who had been led to believe they would be paid at a higher rate of pay.

In the Court's view the combined effect of Clauses 12 and 19 of the Agreement and Article 4.2 of the Directive creates an obligation to inform and consult of sufficiently wide application to cover the type of developments which arose in this case.

The Court is also of the view that that obligation in Section 12 of the Agreement to inform and consult at the "earliest possible opportunity"is particularly important in circumstances where adverse changes originate externally and must be implemented at very short notice. Accordingly any avoidable delay in so informing and consulting becomes that much more serious a breach of the Act and the Directive.

The Court accepts that the obligation to consult does not provide the parties to be consulted with a right of veto. Nor should it be seen as inhibiting the right or duty of management to take appropriate action to deal with changing circumstances. However, the Agreement (and consequently the Act) required the HSE to inform and consult with the unions in respect of the imminent changes. That required the HSE to provide the unions with an opportunity to seek clarification and tease out the complexities of the mandated changes in the time available to the HSE to address these issues

Having regard to all the circumstances of this case the Court must conclude the Unions' complaint is not well founded in relation to Section 19 of the Act; that it is well-founded in relation to Section 12 of the Act and that the HSE contravened the Agreement by its

failure to inform and consult with the Unions when it became aware on 13 December 2010 of the decision to make changes to the pay and conditions of student nurses and midwives.

The Court recommends that the HSE should assure the Unions that should the need for a similar initiative arise in the future timely consultation will take place.

The Court does not consider it appropriate to make any further recommendations in this case.

Signed on behalf of the Labour Court

Brendan Hayes

24th November 2011
AH

Deputy Chairman

NOTE

Enquiries concerning this Recommendation should be in writing and addressed to Andrew Heavey, Court Secretary.