Trade Unions – To Recognise or Not To Recognise?

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The recent revelation by IRN that Tanaiste Leo Varadkar was set to announce the setting up of a High-level Working Group under the auspices of the Labour Employer Economic Forum (LEEF), to review collective bargaining and the industrial relations landscape in Ireland, marks the latest twist in the long running saga of collective bargaining coverage and trade union recognition in Ireland.

This week's recent decision to establish a study on collective bargaining under the auspices of the LEEF, follows the release of an EU draft directive obliging member states with collective bargaining coverage below 70%, to put in place a framework that enables such bargaining. But surprisingly perhaps, the LEEF study is a 'home grown' initiative by the social partners.

They may feel that a 'local' approach, which takes account of the peculiarities of our industrial relations system and the legal precedents established in our courts, is a better option than waiting passively on a Directive that must come up with measures that somehow accord with a diverse and often incompatible set of IR systems.

It won't have escaped attention that Sinn Fein's and Labour's manifestos commit to a legal right to union representation

Notably, in response to the draft EU Directive last October from the President of the European Commission, Ursula von der Leyen, the Tanaiste joined eight other member states in a letter to her, contending that a '*recommendation*' would be a 'better legal instrument' on the matter than a legally-binding instrument. Notwithstanding same, Ibec's CEO has alerted members that there is a search on for a forum that *'can best be described as one to deliver collective agreements' which 'we in Ibec will engage on over the next year'.*

Pertinently, Mr McCoy also reminded members that the 2020 Irish general election saw *'most of the now opposition parties'* advocating for a constitutional referendum in support of collective bargaining rights.

THE HISTORY

The status of trade unions in Ireland has fluctuated considerably over time, from centuries when they were wholly illegal, to many years sitting at the highest table in the land as part of the social partnership process. Whilst currently grappling with the various vicissitudes of the 21st century, a priority concern for the movement continues to be that of recognition.

Failure on this front across the Irish private sector undermines their strength and status, whereas any such success is perceived by many employers as an unacceptable infringement on their freedom to manage.

When it comes to trade unions, employers in this jurisdiction have 3 basic options. That is, they can work with them, they can try to edge them out or they can manage without them.

RELEGATING IR

The main advantages for an employer opting to work with unions is that they become an integral part of the communications' process, helping to 'legitimise' and enable 'better' decisions.

Where unionisation is an inevitable outcome, it makes sense for the employer to try and shape the nature of that relationship (e.g. recognising the preferred union).

In contrast, employers opting for a more direct method of employee involvement not involving trade unions can relegate industrial relations to a less important role in human resource policies and practices.

In some scenarios, the process is often for the employer to push the 'negotiations' process down to 'consultation' and thereafter down to 'communication', with an eye on the ultimate goal of eventual derecognition.

'DIRECT ENGAGEMENT'

The third common category is non-union status – which is extensive across the private sector and has been the subject of some high profile (recognition) disputes, at organisations like TK Maxx, Coca-Cola, Stobart Air, Stryker, Lloyds Pharmacy etc.

Notably, in the course of a Labour Court hearing in the latter case (which recommended that the parties 'engage'), the company explained that it had a: *'history of progressive H.R. practices and direct engagement with colleagues', whereas a union would 'work against the culture which has developed over many years and restrict the company's ability to communicate directly with colleagues.'* This 'direct communication' line was also taken at TV3 around the same time, in the face of a protest by unionised staff, when the station stated that it: *'can build a more successful TV operation through dealing directly with all our people'.*

Non-union status has been a key characteristic of modern Irish industrial relations since the 1980s. As early as 1994, research at the University of Limerick found that more than half of the companies employing over 100 workers that had recently established greenfield operations, had opted for a non-union policy, rather than agreeing a 'pre-production' union recognition arrangement.

'RIGHT TO BARGAIN'

However, enabled by the social partnership process, in 2001 the Industrial Relations (Amendment) Act was introduced, providing for a 'right to bargain'. Rather than a 'right to recognition' (as provided for in many comparable jurisdictions), this enactment gave the Labour Court statutory powers to investigate a dispute and to issue a determination in respect of *'the totality of remuneration and conditions of employment'*. Under the enactment, the 'punch line' was that should a decision from the Court fail to be implemented by the employer, recourse could be taken to the Circuit Court for enforcement purposes.

However, to the relief of some employers, the Supreme Court allowed an appeal by Ryanair against a High Court Order upholding a decision of the Labour Court made under the aforementioned Act (and the Industrial Relations (Miscellaneous Provisions) Act, 2004). The effect of the Supreme Court's judgement was to quash the original decision of the Labour Court and to remit the matter back to it for a rehearing. In effect, this made the 'right to bargain' legislation redundant.

As far as the Supreme Court's judgement was concerned, the nub of the matter was that the Labour Court should have investigated whether there was an internal process within Ryanair to resolve problems and whether that process had been exhausted. Related thereto, the Supreme Court refused to accept that simply because employees abandoned an internal collective bargaining arrangement, that this meant that there was no collective bargaining process.

Thereafter, in pursuit of recognition claims, trade unions had – with significant success – recourse to Section 20(1) of the 1969 Industrial Relations Act. Indeed, as noted by the IRN last year, *'the Labour Court heard some 25 cases over the past four years where a trade union was seeking recognition for the purposes of collective bargaining. The route chosen by the union in each case was via section 20(1) of the Industrial Relations Act, 1969'* (www.irn.ie/article/25392).

ROUTE PERSISTS

However, under this Act, the Court's decision is only binding on the union taking the case, as opposed to the employer who is the subject of the claim. Notably, this route persists, despite the fact that as part of a Fine Gael-Labour government pact, in 2015 the Industrial Relations (Amendment) Act was introduced. It was heralded as a major development, with significant capacity to change the Irish industrial relations landscape. The practical upshot of this enactment was that trade unions could now refer valid trade disputes with non-unionised employers to the Labour Court for adjudication (via the Industrial Relations Act 2001-15).

This is exactly what SIPTU did in 2016, when seeking a binding Court decision in the Freshways Foods dispute. The Court's decision offered a notable benchmark in terms of the requisite number of employees that need to be in union membership for a case to proceed. Of the 250 employees, 170 were described as 'general operatives', of whom 63 were union members, prompting the Court to issue what was perceived as a favourable recommendation (for the union) on pay and related matters, as it concluded that the number in dispute *'is not insignificant relative to the total number of general operatives employed'.*

Notably, the recommendation also relied upon the *Code of Practice on Grievance and Disciplinary Procedures (S.I. No. 146 of 2000) to recommend that: 'the employer should provide for trade union representation in processing individual grievances and disciplinary matters, where an employee wishes to avail of such representation'.*

This latter point was a very significant feature of the recommendation, one with wider ramifications. The Court, in what might be called 'traditional' union recognition cases taken under the 1969 Act, now regularly recommends a right to individual representation by someone of one's own choosing, and that can be a trade union. Some employers take the view that the code (S.I. No. 146 of 2000) is actually meant to be flexible, allowing a non-union company to argue that a colleague of a worker can act as a legitimate representative in a disciplinary case. But this does not appear to be the view taken by the Court.

COMPARATORS

Thereafter, the Communications Workers' Union (CWU) followed suit, taking a case under the same enactment against the non-union company Conduit Enterprises (now known as the Emergency Call Answering Service (ECAS)). Both cases caused some controversy in respect of how the Court used 'comparator firms' in their analysis. That is, the Court admitted evidence in respect of organisations with employees doing *'comparable work'*, prompting Ibec to complain that (in the Freshways case) the pay increases recommended were *'totally out of line with market increases'.*

Notably, the Court pointed out that in its choice of comparators, the Act's guidance in relation to the type of work performed was heeded. In the ECAS case, eyebrows were raised when the Labour Court factored in (the competency skill-set of) public sector comparators as proposed by the CWU. The Court justified its approach, noting that it was not entitled to conclude that: *' ... the legislation is to be interpreted in such a way as to mean that it is inoperative in all circumstances where the disputing workers are employed in the private sector and the comparator employment is a public sector employment.'*

ANALYSIS

According to analyses by the IRN, based upon the first 4 (of a total of 5) cases processed under the 2015 enactment (i.e. Freshways, Conduit, Enercon and Zimmer), prior to using the Act, unions must consider:

(i)Their membership level, which would appear to be a minimum of ~30% of the relevant cohort. Note that in 1 of the 4 cases (i.e. Zimmer), it was held that the union failed to meet the requisite level, as the Court concluded that the union had not discharged the burden of proof imposed by the Act, in providing that the number of workers party to the dispute was not insignificant (i.e. it had 53 members out of a total of 410 employees).

(ii)The 'collective bargaining' test (i.e. does the employer already 'negotiate' with what may be classified as an 'excepted body'?). The onus of proof resides with the employer to show that there is real and repeated negotiation with an appropriately comprised forum. In the Scruttons case (also taken under the 2015 Act and reported on in 2020), the Court found against the employer, who *'was unable to place details as regards significant aspects of the establishment, functioning and administration'* of such a forum.

(iii)The issue of appropriate 'comparators', when assessing the merits of a claim (n.b. such comparators don't need to be 'identical', just 'comparable' - to be in similar employment to those relied upon as comparators). Notably, the Labour Court held in the Enercon case that the union didn't have *'sufficient information or evidence'* enabling it to conclude on the comparability of the nominated employers and roles (where considerations such as comparable skills, responsibilities, physical and mental efforts featured). It is also relevant that employers are entitled to cite other non-union organisations' in evidence.

Reviewing the scenario, research recently undertaken by a coalition of industrial relations experts found that the *'burden of proof around comparators and case duration'* inhibits the process from a trade union perspective (*www.irn.ie/article/26459*). Arising therefrom, trade unions have concluded that the 2015 Act has also failed to deliver real collective bargaining.

SEARCHING AROUND

There is also a fear that – like in the aforementioned Ryanair saga – the Supreme Court will eventually adjudicate on this enactment, serving to make it redundant. This is also a factor in the ICTU Private Sector Committee's exploration of a host of other routes toward recognition rights.

These include a constitutional amendment, a test case to the EU Court of Justice, election lobbying, use of the European Court of Human Rights judgement in the 2002 'Wilson case', more extensive use of (now redundant) Sectoral Employment Orders and Public Procurement obligations. However, despite the public's predominantly favourable view of unions – as indicated by successive studies undertaken nationally and internationally – given the various pitfalls associated with each of these options, none looks likely to turn the tide, at least in the short-term.

As a result, unions have returned to the aforementioned 1969 Act, under which the Labour Court tends to support their recognition claims. However, given the limited enforcement scope of such recommendations, some employers opt not to attend these hearings (e.g. most recently in the 2021 *Philips Medisize* case). This position was aptly summarised in a case last year, when whilst fending off encroachment efforts, the employer complained that the Labour Court *'finds in favour of the union irrespective of the specific circumstances of companies, the cases they make and whether they attend the hearing or not ... the Labour Court will recommend that the company recognise (the union) irrespective of what case we put before them and whether we attend or not. That is why we will not be attending …'.*

Notably, late last year, in the face of a (failed) Sinn Fein attempt to impose a legal obligation on employers to recognise unions, the Minister of State alluded to the aforementioned 2015 Act, explaining that the law *'provides a clear and balanced mechanism by which the fairness of the employment conditions of workers in their totality can be assessed in employments where collective bargaining does not take place and brings clarity and certainty for employers in terms of managing their workplaces in this respect'.*

'HALF-WAY' HOUSE DEALS

One of the more practical by-products of the changing terrain in this area has been the emergence of 'stability agreements' or 'fair engagement frameworks', most notably in the pharmaceutical, chemical and medical devices sector.

For example, in 2017, when GE Healthcare was facing the prospect of a 'right to bargain' claim, it secured an arrangement with SIPTU for a new joint forum under an independent mediator, with a series of safety nets ensuring that any industrial dispute could be resolved before becoming injurious. *(See 'GE Healthcare – pay harmonisation for SIPTU operators is framework's latest dividend' in IRN 33 - 13/09/2018)*

Looking forward, it is also pertinent that Ibec has previously warned that recognition rights run counter to the objective of making Ireland *'the best small country in the world in which to do business'*, with implications for foreign direct investment centred around a refusal to hand over *'management decisions to a third party'.*

Despite this longstanding concern, it is notable that the aforementioned research recently undertaken by a coalition of industrial relations experts found that this *'high level concern'* is not easy to explain. On the same theme – and the aforementioned Labour Court role – Stratis Consulting contends that to ensure Ireland remains the *'preferred choice … where employers are implementing progressive HR practices with market based and competitive remuneration, they should not face a default outcome from third party processes to adopt a collective model of representation'.*

Turning to the prospect of EU intervention, Stratis also reminds parties that the Treaty on the Functioning of the European Union and *'different European Court of Justice rulings affirm that the EU has no competence to introduce a binding legal instrument on the level of pay'*, whilst definitions such as collective bargaining, collective agreement and collective bargaining coverage *'should be set at national level, or left to social partners to decide'*.

GETTING AHEAD OF THE CURVE?

Of course, given the changing international and national political contours, it won't have escaped the notice of interested parties that the EU has just issued a draft Directive of direct relevance to the topic, whilst Sinn Fein's and Labour's last election manifestos committed to a legal right to union representation and negotiation.

Though such a development would be anathema to many – and would likely have to hurdle the Irish judiciary's consistent position that the right to associate (in unions) does not grant a corresponding right to recognition - the cold reality for unions is that their relative demise in terms of membership density can also be attributed more to structural changes in the world of work, rather than any absence of recognition and negotiation rights (e.g. the growth of the services sector and non-standard employment forms).

Like Covid-19 and its variants, it looks like this subject is going to run. This was evident yet again this month, when the European Commission initiated a consultation process pertaining to bargaining rights for the 'solo self-employed'. Indeed, one could conclude that finding vaccines for the virus was easier than giving effect to LEEF's task on how collective bargaining might be developed in Ireland in a manner that is consistent with competitiveness.

In conclusion, the choice now remains as to whether parties will continue to 'agree to disagree', or take action via conciliation and compromise to pre-empt what could prove to be more unpalatable interventions.

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Further reading:

- New ICTU policy on collective bargaining aspires to EU Directive. *IRN 25 - 04/07/2019*.
- Labour's policy on collective bargaining would bring us "closer to Northern European norms". *IRN 41 - 14/11/2019*.
- Ireland's conundrum on union bargaining rights: assessing the Industrial Relations Amendment Act 2015. *IRN 44 - 03/12/2020*
- 'Ibec ready to engage in social partner forum on collective bargaining.' *IRN 09 - 04/03/2021*