Ireland reviews its collective bargaining and industrial relations structures

A BEERG Commentary by Tom Hayes

The Tánaiste (deputy prime minister) and Minister for Enterprise, Trade and Employment, Leo Varadkar, T.D., has announced the establishment of a Working Group under the auspices of the Labour Employer Economic Forum (LEEF) to review existing collective bargaining and the industrial relations structures in Ireland.

The review will be chaired by Professor Michael Doherty of Maynooth University. He lectures and researches in the areas of employment and labour law, industrial relations law and policy, and EU law.

- Trade Unions will have three representatives on the working group: *Irish Congress of Trade Unions (ICTU) General Secretary, Patricia King,* along with the general secretaries of both *SIPTU and Fórsa, Joe Cunningham and Kevin Callinan.*

- Employers' groups also have three: *Danny McCoy, the CEO of Ibec,* Ireland's leading employers' representative body, will be joined by Ibec's *Director of Employer Relations, Maeve McElwee*, with the Construction Industry Federation (CIF) represented by its *DG, Tom Parlon*.

- For the government side, there are also three nominees: *Professor Bill Roche of UCD, Clare Dunne, Assistant Secretary, from the Department of Jobs, Enterprise & Innovation and a nominee from the Department of An Taoiseach.*

Announcing the initiative, the Tánaiste Leo Varadkar said:

> *"The approach to industrial relations in Ireland is one of voluntarism, whereby the State does not seek to impose a solution on the parties to a dispute but will, where appropriate, assist them in arriving at a solution. This approach has served us well for many years.*
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> *"However, whilst there is an extensive range of statutory provisions designed to back up the voluntary bargaining process, some of these are currently subject to legal challenge. In the light of this and international moves to look more closely at how employers and trade unions engage on matters of mutual interest, I now consider it timely to review collective bargaining and the industrial relations landscape in Ireland."*

The Group will:

- Examine the issue of trade union recognition and the implication of same on the collective bargaining processes.
- Examine the adequacy of the workplace relations framework supporting the conduct and determination of pay and conditions of employment, having regard to the legal, economic, and social conditions in which it operates.
- Consider the legal and constitutional impediments that may exist in the reform of the current systems. In doing so, the group will need to be cognisant of the individual employment rights frameworks and the EU context. It may wish to consider other models of employee relations and pay determination established in other Member States.

- Review the current statutory wage setting mechanisms and, where appropriate, make recommendations for reform. This aspect will commence following the Supreme Court ruling in the National Electrical Contractors Ireland case that is currently before the Labour Court - expected in Q2.

The group is to report quarterly to the Tánaiste and Minister for Enterprise, Trade and Employment, who will in turn update the LEEF. It will convene in mid-April with the aim of producing an interim report by the end of July 2021 and completing its work as soon as possible thereafter. Brian Sheehan, editor of *IRN* told BEERG:

> *This will be the first detailed examination by the social partners, through the LEEF, of this often-fraught area of industrial relations since the late 1990s. At the beginning of March, we in IRN reported that Ibec had agreed to be part of an exercise, which its CEO Danny McCoy, said would examine how collective bargaining "might be developed in a way that is consistent with Irish business competitiveness".*
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> *The involvement of Ibec, ICTU and the government in such the forum is a significant development, one that will be watched with considerable interest by both sides of industry, and by various state agencies and government departments, not to mention the multinational business community.*

The BEERG Perspective:

Why this review of Irish industrial relations law and practice now?

Why put the fraught issues of union recognition and collective bargaining rights back in play?

Why open this particular Pandora's Box at this time?

I suspect that the answer may be Brexit. Not in the sense that Brexit itself will have any direct impact on Irish industrial relations, save for those European Works Councils (EWCs) that were subject to UK law and have now found a new home in Ireland, a development that will require, as we have written before, an updating of the *Transnational Information and Consultation Act, 1996, as amended.*

But because Brexit takes the UK out of the European legislative game.

Brexit means that the UK no longer has a seat at the decision-making table in the European Union, no longer has a say on EU labour and employment law. Since the days of Margaret Thatcher, the UK has always acted as a brake on the developments of such laws, vetoing them in the 1980s and, when majority voting was adopted, working to water them down as best it could.

The 48-hour derogation from the Working Time Directive in a case in point, as was John Major's Maastricht social policy opt-out. Successive Irish governments have been happy to leave the running on such issues "to the Brits". One of the few times that Ireland broke from the UK was when the former Taoiseach, Bertie Ahearn, instructed Irish officials to stop blocking the Information and Consultation Directive, a piece of European legislation that, until now at least, has had little purchase in Ireland.

While the UK was at the table, the European Commission never openly pushed the promotion of collective bargaining as a policy objective, preferring instead to talk of "social dialogue" and "information and consultation". Now, in the past six-months have come a number of initiatives from the Commission that have collective bargaining at their heart.

One initiative is designed to make it clear that EU competition law cannot stand in the way of collective bargaining rights for gig economy and "solo self-employed" workers. When you consider the number of self-

employed IT contractors employed by major multinationals it becomes clear that this Commission initiative could have big implications beyond the gig economy.

A proposed Directive on gender pay equality says that where pay gap reporting by businesses reveals a gap of at least 5% which cannot be justified on objective, gender neutral grounds, employers must carry out an assessment in conjunction with workers' representatives.

What happens where there are no such representatives in a company? This is an issue that has already surfaced in Spain which adopted legislation on equality plans which took effect this January.

The Spanish solution is to require companies to engage with external unions in developing equality plans, even if those unions have no members in the company. The main Spanish employer federation is currently challenging this in the courts.

Most importantly, a legislative proposal on minimum wages would impose an obligation on Member State governments to submit corrective action plans to the European Commission if collective bargaining coverage falls below 70% of the workforce.

While the proposals on a European minimum wage formula may themselves be controversial, with Scandinavian governments and trade unions being bitterly opposed, there will be much less concern among EU Member State governments over the collective bargaining proposals, as collective bargaining is seen as the normal way of organising matters in key Member States. Even if the minimum wage Directive hits the wall, the direction of travel on collective bargaining as an integral part of the European social model is clear.

Ireland will be very much on its own in trying to defend a purely voluntarist model that leaves it entirely in the hands of the employer as to whether or not to engage in collective bargaining with a union in circumstances where the union does not have the economic leverage to force the employer to the negotiating table. Even the UK has legislation which allows unions to secure recognition when they reach certain membership levels in a bargaining unit.

The same applies in the US with the 1935 *National Labor Relations Act,* with Democrats now seeking to push through the *Right to Organize (PRO) Act* to correct what they see as weaknesses in the NLRA so as to strengthen the hand of unions in organising campaigns.

The "Irish problem" when it comes it union recognition and collective bargaining has always been the Supreme Court's interpretation of the constitutional provisions on freedom of association as also implying the freedom not to associate, interpreted as meaning that legislation forcing an employer to "associate" with a union through collective bargaining would be unconstitutional.

As the former chair of the Labour Court, Kevin Duffy, has previously pointed out, given the philosophical bent of the Supreme Court then, aside from a referendum to amend the constitution, the only way around the perceived block to statutory union recognition and imposed collective bargaining would be through EU legislation which would trump the constitutional bar.

The imminent possibility of such legislation may well be concentrating Irish minds. It was always only a matter of time before the Irish constitution positional ran into European law. Brexit may well have brought that time forward.

April 2021

There is a BEERG Bytes Podcast (#22) to accompany this paper

You can access it via www.beerg.com/beergbytes or, as a Podcast HERE, or by searching for: *BEERG Bytes #22* on your preferred Podcast server.

Appendix: Irish law[1]: The legal position on trade union recognition and collective bargaining in Ireland

In Ireland, workers have a constitutional right to form trade unions and have the right to join them. An employer who dismisses an employee for joining a trade union is automatically guilty of an unfair dismissal. However, an employer is under no legal obligation to recognize or negotiate with a trade union and can simply refuse to do so. The case law in this regard is well established. The Irish Constitution in Article 40.6.1(iii) guarantees:

> *"The right of citizens to form associations and unions'*

This constitutional right has been held by the Supreme Court (SC), in *Educational Company v. Fitzpatrick [1961] IR 323*, for example, to include the right of any citizen not to join associations or unions if they so wish.

The case of *Meskell v CIE [1973] IR 121* the SC ruled that to try to alter the constitutional rights of an employee retrospectively by enforcing a closed shop agreement on current employees was unconstitutional. This decision did not affect the rights of workers who join an employment which already has a pre-entry closed shop agreement as the employee will know in advance that trade union membership of a particular union is an employment requirement. Such a condition of employment is not regarded as unconstitutional as neither compulsion nor coercion on the employee is involved – though it must be said that these contentions have not been fully tested in the Courts.

However, the legal situation with regard to trade union recognition is that an employer does not have to recognize or bargain with a union.

In *Abbott and Whelan v ITGWU and the Southern Health Board (1982) 1 JISLL 56*, Mr. Justice McWilliams held that:

> *"The suggestion…that there is a constitutional right to be represented by a union in the conduct of negotiations with employers…in my opinion could not be sustained. There is no duty placed on an employer to negotiate with any particular citizen or body of citizens."*

In 1981, Mr. Justice Hamilton, in *Dublin Colleges ASA v City of Dublin VEC (1982) 1 JISLL 73*, where a number of teachers had formed a new union of their own and sought formal recognition said the plaintiffs naturally had a constitutional right of association:

> *"But (there is) no corresponding obligation on any body or person, such as the defendants herein, to recognize that association for the purpose of negotiating the terms and conditions of employment of its members, or for any purpose."*

The same point had been made in even stronger language by Mr. Justice Walsh in *EI & Company Ltd v Kennedy [1968] IR 69*:

> *"In law an employer is not obliged to meet anybody as the representative of his workers, nor indeed is he obliged to meet the worker himself for the purpose of discussing any demand which the worker may make."*

The position was summarized by the late Professor John Kelly in his authoritative work on the Irish Constitution. According to Professor Kelly:

> *"The right of association of employees does not imply any duty on an employer beyond respecting the right in itself, and of course discharging his side of any agreement with employees. In particular, it does not oblige him to negotiate with any association which employees may form".*

[1] This draws on a paper by Professor Ivana Bacik here