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Introduction

Research shows people living in poverty if their income and resources are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society. Additionally,

A person's status and security in society are determined by occupation and rights to bargain. *Occupation and bargaining power* determine one's place in society such as low paid employment, which is manifested in where one lives, the standard of living, access to services such as creches, education etc.

Women makeup almost 50% of the workforce and are clustered in traditionally low paid employment of caring and the health, sales and administration, catering, leisure activities, and services. Women are more exposed and vulnerable to short term employment and precarious contracts of employment and on average earn 14.5% less than men notwithstanding 5 decades of equal pay legislation.

The early history of state intervention through employment regulation in the employment relationship was mainly concerned with the protection of those sectors of the working population which were deemed to be in exceptional need of it. The focus of early state intervention through statuary regulation was in respect of women and children and their working conditions. In all other respects, the State stood aside in the employment relationship between employers and employees.

Pay and conditions of employment at the level of the enterprise was arbitrarily set by the employer through the offer of an employment contract. The exception to the unilateral establishment of pay and conditions of an employee was through the establishment of the trade unions and collective bargaining.

Collective bargaining is the process of negotiations between unions and employers to decide by collective agreement, wages, hours and conditions of employment. It is how workers can collectively determine their rights and interest in work.

Employment and Labour Law

The British Government originally declared a combination of workers for the purpose of collective bargaining to be 'illegal' (Combination Acts 1799) The Charter of 1871 removed the character of criminal conspiracy from membership of a trade union.

Unions in the 19th century were exclusively among the literate and better-paid craftsmen. The first unskilled unions emerged with the organisation of the London ***match girls and gas workers***.

In 1901 in the infamous Taff Vale judgement, the House of Lords allowed the Taff Vale Railway Company sue the Union for supporting their members in dispute with their employer. The right of trade unions to picket was only established in law by the passing of the Trade Disputes Act 1906.

At the turn of the 20th century, the only legal basis of organised labour in Ireland was based on the above British imperial legislation which recognises the right of trade unions to exist, but not the legal right to engage in collective bargaining.

The organisation of unskilled workers in Ireland (New Unionism) led by Jim Larkin and the ITGWU (1909) resulted in over 400 Dublin employers in 1913 attempting to break the rise of trade unions (supported by the State). The 1913 strike was one of the first national strikes in Ireland and England for the right of Irish workers to have the right to freely negotiate with their employers. The lockout/strike which commenced in August of 1913 did not end until January 1914.

The subsequent fight for Irish freedom and political emancipation in Ireland is inherently fused with the rights and aspiration of organised labour. The trade union movement played a key role in creating a sovereign, independent democratic state through its participation in the 1916 rising and subsequent political developments. Yet, ironically, the rights of organised labour to the right to freely negotiate on behalf of their union members are not explicitly recognised in Irish law or the Irish Constitution.

Irish Government 1922

In 1922, On the formation of the Irish Free State, labour legislation passed by the British Government prior to 1922 was transposed into Irish legislation including Trade Boards which had been established in 1918 to facilitate workers and employers in establishing collective bargaining. Up to 70% of workers covered by Trade Boards were women. The transposition of employment and labour law provided the statutory framework for trade unions i.e. the right to organise and the right to strike. However, it did not provide a statutory right to free collective bargaining.

Irish Constitution 1937

The Irish Constitution (Bunreacht nah Eireann) was enacted on 1st July 1937 and replaced the Constitution of 1922. Article 40.6.1. (iii) states:

' The right of citizens to form associations and unions'.

The Constitution goes on to state that, Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right and laws regulating how the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or ***class discrimination.***

The States intervention in industrial relations post the 1937 Constitution was to introduce legislation to regulate Trade Unions (Trade Union Act 1941) and industrial relations (The Industrial Relations Act 1946), which established the Irish Labour Court, Joint Labour Committees and the Making of Employment Regulation Orders.

The State, under pressure from public sector unions introduction a system Conciliation and Arbitration in the public sector (1951) as an independent means of regulating pay and conditions of employment.

All the foregoing gave State endorsement for a stable industrial relations environment predicated on the recognition of trade unions and the right of workers to collective bargaining, mediation and arbitration.

The State through its industrial promotion agencies also provided encouragement and persuasion to inward Multi-National Corporations to recognise trade unions and collective bargaining.

Irish Judiciary

Irrespective of the State's role in promoting good industrial relations through the establishment of the Labour Court and persuasion of union recognition and collective bargaining, the Irish Courts Since the passing of the Irish Constitution in 1937 have consistently interpreted the rights of private property over the rights of organised labour. The High Court and Supreme Court have interpreted Article 40.6.1.(iii) of the Irish Constitution

'that the rights of association do not oblige an employer to recognise a union for the purpose of collective bargaining'

The Irish judicial interpretation of Article 40.6.1. (iii), inter alia, confers on the employer the absolute right to refuse to recognise their workers right to be represented by their union based upon the principle of master and servant and the right of property over workers' rights.

The Irish Courts have consistently supported the employer class in striking down legislation in favour of workers' rights. The courts have struck down legislation for the recognition of collective bargaining (Industrial Relations Amendment Act 2001-2004) and sections of the 1946 Industrial Relations Act which established Joint Labour Committees and Joint Industrial Councils that regulated pay and conditions of hundreds of thousands of vulnerable workers.

The Courts have neutralised and undermined statutory protection for limited rights to collective bargaining, essentially, supporting the unilateral right of employers to determine pay and conditions of employment and in so doing, aiding and abetting employer hostility and avoidance of trade union recognition and the decline of trade union membership in the private sector. In the case of Ryanair vs. Impact, Mr Justice Geoghegan stated

"obiter dictum"

"As a matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling them to do so"

This aberration of the Irish Constitution and workers human rights is consistent with the ***British ruling Classes*** concession to trade union agitation, i.e., the right to exist, the right to strike but ***NO statutory right to free collective bargaining.***

This judicial interpretation of the law and Irish Constitution is at variance with the unique contribution of the Irish trade union movement in establishing the Irish State and its rejection of British Imperial jurisprudence and is at variance with the Irish Governments ratification of International Conventions such as The Universal Declaration of Human Rights, European Convention on Human Rights, Charter of Fundamental Rights of the European Union and ILO Conventions all of which underpin the right of workers to organise and the right to engage in collective bargaining, and affirm that collective bargaining is a Human Right (***Appendix 1).***

Ireland and the European Economic Community 1973

Prior to Ireland's entry to the European Economic Union (EEC), the Government's intervention in the employment relationship was through the Conditions of Employment Act 1936 and Factories Act 1955. which was internationally credited as a comprehensive Legislation. The Redundancy Pay Act 1967, the Minimum Notice and Terms of Employment Act (1973) and post-entry to EEC the Unfair Dismissals Act (1977).

Following Irelands entry into membership of the European Economic Union in 1973, the Government were obliged to introduce the Anti-Discrimination (Pay) Act 1974 and Employment Equality Act 1978, Equal Status Act 2000, Equality Act 2004, Maternity protection Act 2000, Organisation of Working Time Act 1997, Protection of Employees (Part-Time Work) Act 2001, Protection of Employees (Fixed-Term Work) Act 2003, Parental Leave, Transfer of Undertaking etc.

Notwithstanding the extensive statutory regulation intervention in the employer, employee relationship through the enactment of domestic and EU statutory entitlements in favour of workers the Irish Government pampered inward investment from Multi-National Companies in allowing the IDA to depart from its support in the late 1980s in promoting trade union

recognition and collective bargaining (pre-employment collective agreements) to inward MNC companies.

Ireland in 21st Century

Today, large Corporations maintain large Human Resource Department staffed by HRM specialist who is there to represent the interest of the employer. They craft conditions of employment individualising the relationship between management and worker, providing only token representational rights to their employees by curtailing the individual workers constitutional right to fair representation and natural justice, which inter alia provides an illegal barrier to workers exercising their right to the protection and promotion of EU and Irish statutory employment law.

Such unilateral power vested in management allows management a command power that curtails and restrict workers floor of rights exercised through control over the contract of employment and employer controlled Disciplinary Procedures and restricted individualised Grievance Procedures.

Many commentators attempt to perpetuate the fiction that the expansion of workers employment rights arising from our membership of the European Union (EU) protects workers employment rights in the absence of trade union representation.

Such arguments presuppose that regulatory law is an effective substitute for collective bargaining! Yet no one can explain how an individual worker in the private sector can vindicate their employment rights in the workplace when simultaneously their employer denies their Union recognition and their employees the right to collective bargaining and professional representation which is an essential process at the level of the workplace in ensuring implementation of statute rules of employment

As stated basic minimum legal rights are a fiction if workers don't have as a right access to collective bargaining and Fair Procedure in their workplace and a cursory examination of the WRC reports show that in the main, statutory rights are only vindicated following the termination of employment through claims at the Employment Appeals Tribunal and Adjudication post-employment with the Workplace Relations Commission.

The absence of trade union representation through the process of collective bargaining represents a repudiation of workers basic right to professional representation, fair procedures and natural justice and a level playing field in the employer, employee relationship.

Impact of Irish and EU Law on the contract of employment

It is contended that statutory law attempts to mould the contract of employment in the absence of collective bargaining, particularly in the area of Employment Equality, however, its capacity to be enforced at the level of the workplace is as stated a legal fiction as the remedies within the prescribed law and contract of employment is illusionary if not enforceable. Moulding the contract of employment through the incorporation of statutory obligations is a cut and paste process and a technique of growing importance

Put simply, the employer provides a contract of employment that incorporates employer statutory obligations such as, pay, minimum notice, annual leave, minimum terms annual, health and safety leave etc. That is ventilated through the fiction of Disciplinary and Grievance Procedures which may be viewed separately from the main contract through the company intranet. The individualisation of the contract is based on the fiction of equality between the parties and the presumption of a level playing field.

The contract of employment which in many instances is sent by E-mail for signature is unilaterally predetermined by management through its gatekeeping capacity to exclude trade unions and collective bargaining from its relationship and engagement with employees.

Workplace Relations Commission (WRC),

According to the Workplace Relations Commission (WRC), 'The Employment Equality Acts outlaw discrimination in work-related areas such as pay, vocational training, access to employment, work experience and promotion including harassment and victimisation at work and the publication of discriminatory advertisement'.

The WRC publication goes on to say:

'Discrimination is prohibited where it relates to gender, civil status, family status, sexual orientation, religious belief, age disability race, colour, nationality, ethnic or national origins and membership of the travelling community.

On the question of the enforcement of the foregoing legislation, the WRC state 'Complaints concerning the alleged contraventions of employment and equality legislation may be presented to the Workplace Relations Commission'.

As the law relates to individual rights as distinct from collective rights it obliges individual employees to make a claim.

Quite simply, if a non-unionised employee believes that their employer is not complying with their statutory obligations it is up to the individual employee to report their employers to the WRC! And the WRC will investigate the complaint. In other words, an individual employee is required to be their advocate in vindicating their employment rights within the workplace, this is contrary to the legal dictum, 'He who represents himself has a fool for a client'.

Management Resources

Management has their own Human Resource Professionals and Solicitors and Barristers to support them in defending their work practices. Collective bargaining provides workers with a cloak of anonymity in that no one individual can be identified by management in vindicating their rights and interest.

Collective barging and trade union membership makes it easier for workers to make and process claims in respect of their pay, and conditions of employment and to seek collectively issues in respect of their employment that is not adequately covered by legislation such as maternity leave and paternity leave supplements, improved sick and pension schemes,

subsidised crèche facilities etc. a negotiation process that is not readily open to an individual claims.

In the absence of trade union recognition and access to trade union representation management can impose who can attend with an employee in respect of Disciplinary or Grievance procedures. In many instances' management prescribe that an employee may bring a work colleague with them when the employee is being investigated or making a complaint.

Management can justify this erroneous position by reference to the WRC Code of Practice on Grievance and Disciplinary Procedures which inter alia states in section 3 'Procedures are necessary to ensure both that while discipline is maintained in the workplace by applying disciplinary measures in a fair and consistent manner, grievance is handled in accordance with the principle of natural justice and fairness.

The WRC publications go on to state, apart from considerations of equity and natural justice, the maintenance of good industrial relations atmosphere in the workplace requires that acceptable fair procedures are in place and observed'.

The WRC Code of Practice states 'that the employee concerned is given the opportunity to avail of the right to be represented during procedures' an 'employee representative includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise'.

According to the WRC Code of Practice, if a company excludes trade union representation an employee undergoing a Disciplinary or Grievance procedure internally within the enterprise is only allowed a colleague within the enterprise to accompany him/her.

Collective bargaining and the State

Ironically the Irish Government as the largest employer in the State (407,00 employees) recognise the right of its employees in all sectors of the economy to collective bargaining whilst ignoring in excess of 1 million private-sector workers the right to free collective bargaining contrary to the reality of the social partnership between the state and the trade union movement and the States international obligations to recognise the human rights of its citizens to free collective bargaining ***(Appendix 1).***

Article 40.6.1.(iii) of the Irish Constitution as interpreted by the High Court and Supreme Court has provided an insurmountable barrier to workers exercising their right as trade union members to engage as a right in collective bargaining with their employers which provides a constitution and judicial barrier to low paid workers access to collective bargaining and a level playing field with management.

The Supreme Court's interpretation that property rights trump workers' rights have denied more than 1 million private-sector workers having access as a human right to collective bargaining with their employer.

The Supreme Court's interpretation has consistently frustrated the Dail in crafting legislation in favour of conceding collective bargaining to its citizens and allowed the Courts to strike down laws that protected the most vulnerable workers in sweated industries which are defined as 'chronically low paid trades with inadequate union representation or No union representation' such as hotels, catering retail etc. A sector of the economy that is notorious for low pay and poor working conditions.

Article 40.6.1.(iii) of the Irish Constitution as interpreted by the Courts has nullified workers entitlement to the Constitutional protection of justice and fair procedures within the workplace and presented a barrier to workers collectively exercising rights-based legislation as prescribed by the Dail and EU. The effect of the Supreme Court judgement is to cancel out a worker's constitutional right to join a union for the purpose of collective bargaining.

The Irish trade union movement is the largest civil organisation spread across the 32 counties has been in the vanguard of recent referenda to amend the Irish Constitutional in defence of citizens human rights.

The trade union movement was to the forefront for constitutional protection for the Dissolution of Marriage, Marriage Equality, Repeal of the Eighth Amendment, etc, all of which has been overwhelmingly endorsed by the public and reflects a modern liberal state within the European Union free of the illiberal shackles of the past.

It is long passed the time when over 1 million private-sector workers and in particular the thousands of low paid female workers are given their Internationally recognised Human Right not only to join unions but to exercise their rights in work to trade union representation and collective bargaining.

It is high time that we marked the role of the Irish workers in creating and maintaining a strong democratic Republic by having a referendum to amending Article 40.6.1.(iii) to give unequivocal expression to the rights of organised labour to free collective bargaining with employers to protect their rights in work and to advance their interest.

Norman A. Croke

[redacted]

Appendix 1

International Conventions

The Universal Declartaion of Human Rights sets out fundamental human rights

(Article 23.4) 'The rights to join trade unions and right to collective bargaining'.

The European Convention on Human Rights

'Every one has the right of peaceful assembly and freedom of association with others including the right to form and join trade unions for the protection of his interest'

Article 28 of the Charter of Fundamental Rights of the European Union, the Solemn Declaration on Workers' Rights, Social Policy and other issues, and relevant ILO conventions

9.11 Article 28 of the Charter of Fundamental Rights of the European Union provides: -

—Workers and employers, or their respective organisations, have, in accordance with community law and practice, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflict of interest, to take collective action to defend their interests, including strike action||

ILO Conventions

There are three ILO Conventions which are of particular relevance in relation to collective bargaining. They are **C98 - Right to Organise and Collective Bargaining Rights Convention 1949, and C154 Collective Bargaining Convention 1981. The ILO Collective Bargaining Recommendation of 1951 (No 91) is also relevant.**

9.15 Article 4 of ILO Convention C98 provides: -

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.

9.16 Article 2 of Convention C154 provides: -

For the purpose of this Convention the term ***collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for—***

(a) determining working conditions and terms of employment; and/or

(b) regulating relations between employers and workers; and/or

(c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

Article 5 of Convention C154 provides: -

1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

(a) *collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;*

(b) *(b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;*

(c) the establishment of rules of procedure agreed between employers' and workers' organisations should be encouraged;

(d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;

(e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

Clause 2 of ILO Recommendation 91 of 1951provides the following definition of Collective Bargaining.

(1) For the purpose of this Recommendation, the term ***collective agreements means all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.***

(2) Nothing in the present definition should be interpreted as implying the recognition of any association of workers established, dominated or financed by employers or their representatives