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Collective Sectoral Regulation in Ireland

Dáire McCormack-George (Courts Service of Ireland) · Friday, June 18th, 2021

In a judgment published earlier today, the Supreme Court of Ireland has confirmed that some forms of collective agreements may be extended *erga omnes* across economic sectors, thereby helping to bring the benefits of collective bargaining to more people working in Ireland. This note gives a brief background to the colourful history of collective sectoral regulation in Ireland before considering the judgment of the Supreme Court and its potential future implications for collective bargaining in Ireland in the near future.

Background to Collective Sectoral Regulation

As my former colleague at Trinity College Dublin, Alan Eustace, has recently outlined in the *European Labour Law Journal*, sectoral bargaining agreements have a long history in Irish law. Since the establishment of the statutory tribunal known as the Labour Court in the mid-twentieth century (on which, see my previous post here), any party to a collective agreement could apply to the Labour Court to have that agreement "registered", resulting in it becoming binding on all parties operating in the relevant sector of the economy by incorporation into individual contracts of employment by operation of law. It was also possible for tripartite bodies known as Joint Labour Committees (a body operating under the auspices of the Labour Court) to produce sectoral agreements which were binding on all parties in the relevant sector.

However, a series of judgments of the Irish superior courts in the last decade largely deconstructed these regulatory mechanisms on the basis that they involved the creation of legislation by non-legislative bodies. Essentially, the courts held that these mechanisms breached the "non-delegation" doctrine emerging from the courts' constitutional jurisprudence on Article 15.2.1° of the Constitution of Ireland. Historically, this doctrine has prohibited undue delegation of legislative authority to regulators, other than the Irish Parliament, in the absence of clear "principles and policies" in primary legislation, such that all delegates need to do is "fill in details". Evidently, the recognition and enforcement of terms and conditions of employment in whole sectors of the economy involves more than merely filling in details.

The Supreme Court on Collective Sectoral Regulation

In *Náisiúnta Leictreach Contraitheoir Éireann Cuideachta Faoi Theoireann Ráthaíochta v. The Labour Court and Others* [2021] IESC 36, the Supreme Court had to consider, *inter alia*, the latest legislative response to the aforementioned series of cases concerning the constitutionality of collective sectoral regulation, namely, Part 2, Chapter 3 of the Industrial Relations (Amendment) Act 2015.

This chapter provides for Sectoral Employment Orders ("SEO")—secondary legislation created by the Minister for Business, Enterprise and Innovation which establish terms and conditions relating to remuneration, sick pay or pension schemes for workers in entire sectors of the economy based on a recommendation from the Labour Court. The Minister could only make an SEO if: the Labour Court, in making its recommendation, had adhered to a number of procedural safeguards, such as satisfying itself that the proposed SEO would be "likely to promote harmonious relations" between workers and their employers and having regard to considerations such as the impact of the SEO on levels of (un)employment and competitiveness; and the draft SEO adopted by the Minister was approved by a resolution of the Irish Parliament.

The Supreme Court, in determining that the collective sectoral regulation mechanism contained in the Act was constitutional, held, *inter alia*, that while setting minimum terms and conditions for employment in an economic sector might involve choices by the Labour Court, these choices were not legislative in nature, even if they involved complex questions and were likely to have significant legal and economic consequences when adopted by the Minister. There were appropriate procedural safeguards in place to ensure that the Labour Court had regard to relevant interests and that the order was approved by the Irish Parliament.

In addition and of particular interest to EU labour lawyers, MacMenamin J, who gave the leading judgment, had regard to the *Viking*/*Laval* quartet and subsequent case law of the CJEU, in particular Cases C-413/13 *Kunsten* and C-437/09 *Prévoyance*, confirming that: collective agreements intended to improve employment and working conditions do not fall within Art 101(1) TFEU; and that public authorities can extend a collective agreement *erga omnes* within an occupational sector. Immediately after citing these authorities, MacMenamin J noted that "the principles and policies in the [Act] were directed at a particular understanding of *competitiveness* (…) to be contrasted with *laissez-faire* free market competition". Finally, in concluding his analysis of the constitutionality of the relevant chapter of the Act, MacMenamin J referred to *Demir v. Turkey* and observed that "collective bargaining is now seen as a fundamental feature of the social market within the Union."

While the Court thus concluded that the relevant parts of the Act were constitutional, it nonetheless considered that the particular SEO at issue in the case was *ultra vires* the Minister and the Labour Court because the latter did not state its reasons for adopting its recommendation.

Reflections

A recent report published by FÓRSA, the leading public sector trade union in Ireland, noted that Ireland is an outlier in the EU when it comes to trade union density and collective bargaining coverage, the worst in Western Europe (except the UK) and joint worst performer (with Greece) among pre-2004 accession states in terms of representation and participation. The report suggests three reasons for Ireland's poor performance in these respects: the Financial Crisis; Irish constitutional jurisprudence ("the most significant challenge"); and its voluntarist model of industrial relations.

The judgment of the Supreme Court discussed in this blog may have the effect of nudging at least part of Ireland's constitutional jurisprudence towards a more collective bargaining-friendly regime. In particular, insofar as the judgment affirms the constitutionality of a statutory tribunal making recommendations concerning key terms and conditions of employment in occupational sectors, it stands to reason that legislation facilitating the introduction of such recommendations and

consequent SEOs on emerging labour law issues such as automation in the workplace, the platform economy and privacy, as well as more traditional problems concerning working time, fair procedures in the workplace and collective labour rights, may be constitutionally sound.

Admittedly, as FÓRSA's report notes, serious obstacles remain, such as the lack of any specific constitutional protection for collective bargaining and the absence of a constitutional obligation on employers to recognise or bargain with trade unions. Nonetheless, the overall tone of the Supreme Court's judgment—acknowledging the need to regulate a competitive labour market, the EU law background and the increasingly important role collective bargaining appears (rhetorically, at least) to be playing in the EU's current legal and policy work—is a welcome step in addressing "the most significant challenge" to Ireland's collective sectoral bargaining regulation system.

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