Revue de droit comparé du travail et de la sécurité sociale

4 | 2017
English Electronic Edition

Law on Collective Bargaining Rights

Michelle O'Sullivan

Electronic version

URL: <https://journals.openedition.org/rdctss/2538>
ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2017
Number of pages: 254-257
ISSN: 2117-4350

Electronic reference

Michelle O'Sullivan, "Law on Collective Bargaining Rights", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2017, Online since 01 November 2021, connection on 04 December 2021.
URL: <http://journals.openedition.org/rdctss/2538>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

MICHELLE O'SULLIVAN

UNIVERSITY OF LIMERICK

LAW ON COLLECTIVE BARGAINING RIGHTS

A long-standing issue in labour law in many countries concerns defining employment status. Employment status is critical to establishing who in the labour force is covered by employment laws. Case law continues to evolve on the classifications of employees, workers, self-employed and dependant contractors and employment status cases can raise issues of false or bogus self-employment. The increasing use of atypical work arrangements has added complexity to this area. Trade unions have been trying to organise atypical workers but law can also act as a barrier to collective bargaining. In Ireland, competition law introduced in 2002 forbids activities which prevent or restrict competition in trade so that trade unions have been prohibited from entering collective agreements for self-employed workers. Trade unions, particularly representing certain professions such as freelance actors and journalists, have long campaigned for changes to competition law. The President of the Irish Equity union argued that the prohibition on collective bargaining has resulted in deteriorating terms and conditions for freelance workers¹. Union lobbying has resulted in the introduction of The Competition (Amendment) Act 2017 which amends competition law so that certain categories of self-employed workers can be represented by a trade union and can engage in collective bargaining. Three categories of self-employed workers named in the new Act are voice-over actors, session musicians and freelance journalists. The Act also outlines a process by which trade unions, which represent a class of false self-employed worker or fully dependent self-employed worker, can apply to the Minister for Jobs, Enterprise and Innovation to have such classes also exempted from competition law for the purposes of collective bargaining. However, in making an application, a union must show that competition exemptions for a class of workers will result in no or minimal economic effect on the market in which the class operates or will not lead to significant costs to the State. These conditions would seem a high bar for trade unions to satisfy given that an outcome of collective bargaining is very likely to entail some economic effect on a market. It is important to highlight that this law does not provide a right to workers to union recognition or a right to have their terms and conditions negotiated by a union. There is no right to union recognition in Ireland, only a right to union membership.

The 2017 Act is also interesting because, for the first time, definitions of false self-employed workers and fully dependant self-employed workers are provided in labour law. The Act draws on the definition of false self-employed workers from ECJ case law in the Dutch Musicians case (C413/13 FNV Kunsten Informatie en Media V The State of the Netherlands) and the definition of fully dependant self-employed workers from the ILO. A false self-employed worker is defined in the Act as someone who performs the same

1 SIPTU (2017) Press Release. Unions welcome return of rights for freelance workers in Competition Amendment Bill. Available http://www.siptu.ie/media/pressreleases2017/fullstory_20440_en.html

activity as an employee for another person, is in a relationship of subordination, follows instructions, does not share in the other person's commercial risk, has no independence regarding work time or tasks and is an integral part of another person's undertaking². A fully dependant self-employer worker is defined as someone who performs services for another person under a contract and whose main income is derived from not more than two persons. Currently, Ireland has a binary system of employment protection so that workers are classified as either as employees or an independent contractor. Most employment legislation covers only employees and there is no developed 'worker' or intermediary category between employee and self-employed akin to what exists in other countries such as the UK, Germany or Canada. Disputes over the employment status of individuals can be decided separately on a case-by-case basis by civil courts, employment rights bodies or by social protection services. The definitions of false self-employed and dependent self-employed in the Act slipped into passage without much publicity so it will be interesting to see if they influence how different bodies decide on employment status cases, and whether it provides more impetus for individuals to seek employment and social insurance rights on the basis that they are misclassified as self-employed.

I - LEGALLY BINDING ORDER IN THE SECURITY SECTOR

A new legally binding order, known as an Employment Regulation Order (ERO), on pay and conditions for the security sector, was introduced in May 2017. The order provides for phased increases in minimum pay for security workers from the current rate of €10.75 to €11.65 by June 2019. The ERO is important in the Irish context for a number of reasons. First, the ERO provides for minimum pay rates above the national minimum wage (€9.25 per hour since January 2017) as well as overtime pay rates and other benefits that are otherwise not provided for in labour law such as sick pay, death in service benefit, bereavement leave and personal attack benefit. Second, the new ERO provides for minimum hours of work for security operatives. It states that workers who enter the industry will be offered a contract of employment with a minimum of 24 hours per week after 6 months' service. New employees may be employed on fewer hours if it can demonstrably be shown that the hours are not available. The ERO also provides for a minimum of four hours pay per shift. These two provisions are a significant departure in Irish labour law and are the first time minimum hours provisions have been included in sector-wide regulations in any industry. There is currently no legal employee entitlement to a minimum number of hours work per week or per shift. Indeed, the issues of minimum working hours have become very topical in the media and in public policy over the last three years. In the context of economic recession and recovery, trade unions have lobbied successive governments to introduce regulation

² The Competition (Amendment) Act 2017.

providing for minimum hours of work particularly in so-called 'zero hours' jobs and the government has announced that it will publish draft legislation in late 2017 with regulations on such work.

A third reason why the ERO is important is that it is one of the few examples of sector-wide employment regulation in Ireland. The terms of the ERO are negotiated by a Joint Labour Committee. A number of Joint Labour Committees exist in low paid sectors and these are statutory bodies comprised of trade unions and employer organisations. They propose a set of terms and conditions for employments in a sector, which are made legally binding by the Minister for Jobs, Enterprise and Innovation. The system of Joint Labour Committees was suspended in 2011 following a successful legal challenge by a fast food employer organisation. In 2012, the then government re-established the system through new legislation but, to date, only social partners in the security and contract cleaning sectors have successfully re-negotiated new EROs. In some other sectors, such as hotels and catering, employer organisations have refused to engage in negotiations as they oppose the setting of employment regulations beyond those set in labour law. Some employers in the security sector also oppose the new ERO and it is expected that they may launch a judicial review of it later in the year (Higgins, 2017).

II - A PROPOSED PUBLIC SECTOR COLLECTIVE AGREEMENT

The national system of social partnership, in which the government, trade unions and employer organisations negotiated agreements on pay and economic and social issues, collapsed with the onset of the economic recession. Since then, collective bargaining, where it exists in the private sector generally takes place at enterprise level. In the public sector, governments introduced a series of Financial Emergency Measures in the Public Interest Acts (FEMPI) which resulted in pay freezes, pay cuts of between 5% and 20% and the introduction of a pension related deduction worth, on average, 7% of salaries³. The government also introduced a freeze on recruitment and reduced total numbers employed in the public sector, introduced a reduction in pay scales for new employees and changed the pension scheme for new entrants so that their final pension will be based on their career average salary rather than their final salary. Since 2013, a number of collective agreements have been agreed between the government and trade unions. The first of these resulted in longer working hours, reductions in overtime pay and a deferral in the payment of increments. It is estimated that that €2.2billion per annum in savings were made due to the financial measures taken in the public sector⁴. Since then, the economic context has improved and trade unions have lobbied the government extensively to restore pay cuts and abolish the pension levy. The government established an independent Public Service Pay Commission in late 2016 to advise it on pay in advance of negotiations on a new collective agreement. One of the key findings of the Commission's report was that pre-2013 public sector workers have a pension scheme which is worth on average 12% more than private sector pensions and it recommended that public sector workers should pay more for their pension⁵. It recommended higher contributions from workers on so-called 'fast accrual' pension schemes such as the police, who have lower retirement ages. In the

3 Public Service Commission (2017) *Report of the Public Service Commission*. Available <http://paycommission.gov.ie/wp-content/uploads/PSPC-report-2017-WEB.pdf>

4 *Idem*.

5 *Idem*.

light of these findings, trade unions were unlikely to succeed to negotiating removal of the pension levy.

This was the backdrop to negotiations on a new collective agreement. A proposed agreement was reached between trade unions and the government in June to cover the period 2018-2020. One of the objectives of this Public Service Stability Agreement was to unwind the provisions of the FEMPI Acts. The new agreement provides for a restoration of pay cuts and adjustments to the pension levy which is worth between 6.6% and 7.4% over the lifetime of the agreement to workers⁶. As per previous agreements, trade unions have agreed to industrial peace and to the retention of additional working hours but they did not agree with government demands for greater use of outsourcing and the extension of the working week to include Saturday. A major issue of contention leading up to negotiations was that new entrants to the public service since 2011 were placed on longer pay scales and, teaching and nursing unions in particular, wanted this addressed. The agreement did not change pay scales but provided that there will be an examination of the salary scale issues in respect of post 2011 recruits within 12 months after which the government and unions will agree how the matter can be addressed.

The proposed agreement requires ratification by trade unions which will be done by a ballot of members. It appears many unions will recommend to their members a vote in favour of the agreement however members of the Irish National Teachers Organisation, representing primary school teacher, have voted against the agreement and two other teaching unions have recommended rejection of the deal to their members. The teaching unions argue that the issue of lower pay scales for new entrants was not adequately addressed in the proposed agreement. While some individual unions may reject the deal, it is the aggregate vote of unions within the union confederation, the Irish Congress of Trade Unions, that determines whether the proposed agreement will be ratified or not. The agreement may be ratified but if key unions, particularly in teaching, reject the deal, it may lead to industrial unrest and divisions with the trade union movement about how to progress outstanding grievances.

6 Workplace Relations Commission (2017) Public Service Stability Agreement 2018-2020. Available <http://www.per.gov.ie/en/public-service-pay-policy/public-service-stability-agreement/>