



Universal Periodic Review (UPR)

Stakeholder Submission

IRISH CONGRESS OF TRADE UNIONS

Submission to the United Nations

Twelfth Session of the UPR Working Group

Human Rights Council

6th October 2011

Submitted on 21st March 2011

Submission sent to uprsubmissions@ohchr.org.

Executive Summary

1. The Irish Congress of Trade Unions (ICTU) is the representative voice of trade unions in Ireland. There are 55 unionsⁱ affiliated to Congress, with a total membership of 797,289 of whom 579,578 are in the Republic of Ireland and 217,711 in Northern Ireland (www.ictu.ie). In addition there are 33 Trades Councils, representing groups of unions at local/regional level, affiliated to Congress covering both the Republic and Northern Ireland. In addition, the Congress Centres Network operates 25 local outreach centres, offering advisory and other services at community level.
2. This Stakeholder Report is made by the ICTU in respect of the Republic of Ireland. The key points the ICTU wishes to focus on are that Ireland is failing to secure proper observance of:
 - i. **The right to join trade unions and the right to collective bargaining** :*Everyone has the right to form and to join trade unions for the protection of his interests - (article 23.4); and*
 - ii. **The right to effective remedies** – *Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law (article 8).*

Conclusions

3. Ireland is a champion of human rights abroad yet fails to adequately promote and protect human rights at home. Trade union rights are fundamental human rights but the trade union-human rights of all ‘workers’ is not properly respected. On foot of a problematic interpretation of Freedom of Association by the Irish Supreme Court in *Ryanair*, anti trade union activity, once the preserve of a few anti-union companies is now becoming widespread, jeopardising the basic human right of workers to organise in trade unions for the protection of their interests.
4. Domestic legislation is needed to protect the trade union-human rights of workers in a manner consistent with (i) the Universal Declaration of Human Rights, (ii) recent rulings of the European Court of Human Rights in *Wilson, Demir*ⁱⁱ and *Enerjii* (iii) EU Charter of Fundamental Rights, (iv) obligations under International Labour Organisation Conventions to which Ireland is a party (v) the International Covenant on Economic, Social and Cultural Rights, (vi) the International Covenant on Civil and Political Rights and (vii) Council of Europe’s Social Charter and (viii) the EU Charter of Fundamental Rights.
5. The ICTU welcomes the recognition of the new coalition Government that Ireland needs take action to properly protect trade union human rights. In their programme for Towards Recovery they pledge ‘*We will reform the current law on employees’ right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2001), so as to ensure compliance by the State with recent judgments of the European Court of Human Rights.*’
6. **Recommendation: Enact legislation to underpin the right of all workers to collective bargaining through their trade unions in line with the State’ international commitment. This requires a legal framework that :-**
 - a. Ensures that the right of all ‘workers’ to Freedom of Association, the Right to Organise and Collective Bargaining is guaranteed and properly respected;

- b. Prohibits any adverse treatment, prejudicial act and any less favourable treatment arising from the exercise of these human/trade union rights;
- c. Provides for enhanced protection, that is available rapidly, and in a manner that guarantees to prevent any adverse treatment from occurring, by providing for injunctions along with dissuasive sanctions and improved redress;
- d. Safeguards against anti-union activity and prohibit ‘interference’ which includes the use of ‘inducements’ or other measures, policies, acts calculated to induce workers not to join or to give up their trade union membership or to not exercise their trade union rights including the right to collective bargaining;
- e. Provides a definition for ‘collective bargaining’, ‘collective agreement’ and ‘collective action’ in line with ECtHR and ILO standards;
- f. Sets out the legal obligations on parties to participate in collective bargaining and the facilities and arrangements to be put in place to ensure ‘good faith’ in the collective bargaining process;
- g. Establishes the parties to collective bargaining, in line with ILO definitions to ensure the rights of freelancers and safeguard against the use of non-union representatives to undermine the position of trade unions;
- h. Sets out the institutional machinery to facilitate negotiations and the settlement of disputes;
- i. Clarifies the legal effect of collective bargaining agreements and the extension of collective agreements;
- j. Re-establishes fair employment rules.

Previous unfavourable comments on Irelands’ Human Rights Record in respect of trade union rights

7. Despite being a party to six core human rights treatiesⁱⁱⁱ and having ratified all of the Core ILO Conventions very few of the ‘right to organise and collective bargaining elements’ of these international instruments have been incorporated in Irish law. This makes them effectively unenforceable in the Irish courts. The test of whether Irelands’ legal system, institutions or organizations live up to their human rights obligations is not just simply whether they acknowledge the existence of human rights but also the extent to which they have in place laws and sanctions to effectively protect those human rights.
8. The Universal Declaration on Human Rights requires governments to take certain protective actions to ensure that all workers are free, without fear of reprisal, to exercise their human-trade union rights. Proper respect for human-trade union rights gives rise to a corresponding duty on employers to recognise and bargain collectively with the workers in their trade union but Ireland is failing in this regard.
9. Ireland has already been subject of unfavourable comment on its human rights record in respect of trade union rights. In 2002, the Committee on Economic, Social and Cultural Rights the Committee in their concluding observations found that Ireland needed to in place a legal framework to ‘**adequately protect in law and practice**

trade unions' rights to conduct collective bargaining'(para 29)(Ireland. 05/06/2002).^{iv}

10. Ireland does not proactively set out to prepare legislation to positively implement and promote human rights standards. Regulatory Impact Analysis (RIA), which civil servants must carry out in advance of drafting legislation does not include a requirement to have regard for human rights and our experience is that the Attorney General Office is more likely to be consulted on areas of possible incompatibility as a reason to halt development on laws to protect trade union rights rather than seeking advice on how to promote trade union and other human rights.
11. It is an issue of serious concern to the trade union movement in Ireland that human rights are considered to be subject to economic concerns. As far back as 2003 the (then) Minister for Justice, Mr Michael McDowell, TD^v, claimed that human rights adversely affect the “entrepreneurial spirit” because they dictate standards with which to comply. More recently (2010) IBEC the national representative body for business employers set out strong opposition to legal underpinning for a right to collective bargaining saying that any move in that direction would act as a major disincentive to foreign direct investment^{vi[3]}.
12. The framework for promotion and protection of trade union rights on the ground is absent and weak. Recommendations from the various Treaty Monitoring Bodies are rarely implemented and there are no institutional mechanisms for follow-up. Concluding Observations are not widely disseminated nor are they regarded as binding by Government Ministers.

Every human rights treaty recognises the right to organise in trade unions as a fundamental human right.

13. Article 23.4 of the Universal Declaration of Human Rights ‘*Everyone has the right to form and to join trade unions for the protection of his interests*’
14. The International Covenant on Civil and Political Rights elaborates further the civil and political rights and freedoms listed in the Universal Declaration of Human Rights Art.22 guarantees ‘*Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*’ Art.22.3 explicitly refers to the International Labour Organisation Conventions 87 and 98 of 1948-1950 relating to the right to freedom of association, the right to organise and the right to participate in collective bargaining.
15. The right to collective bargaining has been held to be an essential feature of the right to freedom of association. The European Court of Human Rights has now said that freedom of association (Article 11 of ECHR) must be read to mean that it includes the right of trade unions to bargain collectively and the right of trade unions and workers to take collective action (i.e., to strike) In so holding the ECtHR held that the substance of these rights must be consistent with the minimum standards laid down by the ILO and the Council of Europe in its Social Charter of 1961^{vii}. Article 11 of the European Convention on Human Rights specifies trade union membership as an important political right essential to democracy: *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*”

16. The right to organise and to bargain collectively with employers is enshrined under membership (Parts I and II) of the International Labour Organisation. Ireland has ratified the Core Conventions No 87 concerning Freedom of Association and Protection of the Right to Organise (1948) and No 98 concerning the Application of the Principles of the Right to Organise and Collective Bargaining Convention 1949;
17. Articles 5 and 6 of the Revised European Social Charter protect the right to organise and join trade unions. Specifically:-

Article 5 - The right to organise

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations....

Article 6 - The right to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

to promote joint consultation between workers and employers;

to promote, where necessary and appropriate, machinery for voluntary negotiations 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;

to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:

the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

18. The right to strike is also recognised in the International Covenant on Economic, Social and Cultural Rights, (ICESCAR) 'Everyone has the right to form and join trade unions, the right to strike.' The explicit right to strike is also recognized in (ILO Conventions 87 and 98, and the European Social Charter 1961) and the EU Charter of Fundamental Rights.

19. Following the entry into force of the Lisbon Treaty (TFEU) 2009 the EU Charter of Fundamental Rights has the same legal value as the European Union treaties. **Article 12** 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests' and **Article 28 Right of collective bargaining and action** Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels

and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Problems arising on foot of problematic interpretation of the meaning of Freedom of Association by the Irish Supreme Court

20. The Irish Constitution was adopted prior to the founding of the UN and does not reflect the full panoply of universal human rights standards. Bunreacht na hEireann, Ireland's Constitution is silent on the right to join unions and other trade union related human rights. The Constitution in Article 40, guarantees the right of citizens to form unions and associations subject to certain limitations, specifically:-

Article 40 '6. 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality...

(iii) The right of the citizens to form associations and unions.

21. The Irish Supreme Court has narrowly interpreted this provision and has so far only held that workers have the right **not** to join a trade union (Meskell v CIE)^[2]. This interpretation of the right not to join was taken a step further by the Supreme Court in *Ryanair*. This case began in December 2004 when Ryanair began the conversion of its Dublin fleet. A number of the pilots sought to have their union negotiate with Ryanair in relation to the resulting changes to their terms and conditions. Ryanair refused to negotiate with the workers' trade union. The company argued that it did not engage with trade unions and this recognized as a 'right' and was upheld by the Supreme Court.
22. This has caused confusion about proper respect for trade union rights certainly in relation to the right to organise and collective bargaining in Ireland. Indeed, the recent trend reflected in High Court and Supreme Court decisions shows that many employers are to a large extent seeking to ignore trade unions and are having the right to do so recognised at least partially by Judicial determination. It is worth recalling here that the responsibilities to respect the rights to collective bargaining fall onto the Judiciary as an arm of the State.
23. The decision of the Supreme Court in *Ryanair* has had a serious and enduring impact on the proper observance of freedom of association, the right to organise and the right to collective bargaining in Ireland. There are three aspects of the Supreme Court decisions which strike at the heart of the Universal Declaration of Human Rights these are as follows:
- (i) The Supreme Court upheld the operation of the Ryanair Employee Representative Committee, which operates under the control and domination of the employer to exclude a bona fide trade union, and aimed at preventing a trade dispute being processed under the Industrial Relations Act 2001; this is a violation of rights under the UDHR and the core ILO Conventions to which Ireland is a party;
 - (ii) The threat made to the pilots that if their trade union IALPA/IMPACT was recognised within a period of 5 years, the pilots in question would then be required to pay training costs incurred by the company, this being claimed elsewhere to be €15,000 per person. This is due to the absence of laws to

prevent interference, inducements or victimization of workers exercising their rights under the UDHR and core ILO Conventions;

(iii) The implicit acknowledgement in the Industrial Relations Act 2001 (as amended) and the express acknowledgment by in the following passage from the Supreme Court that a company is perfectly entitled to operate union free. According to Geoghegan J in the Supreme Court:

‘as a matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so. There is an obvious danger however in a non-unionised company that employees may be exploited and may have to submit to what most reasonable people would consider to be grossly unfair terms and conditions of employment. With a view to curing this possible mischief the Industrial Relations Acts, 2001 and 2004 were enacted. Given their purpose they must be given a proportionate and constitutional interpretation so as not unreasonably to encroach on Ryanair’s right to operate a non-unionised company’.

24. The issues identified above raise serious questions about the compatibility of Ireland’s laws with the UDHR and the other Treaties and Conventions mentioned above. Case law on foot of this decision has worsened the situation.
25. The Communications Workers Union (CWU), an affiliate of the ICTU reports that the Global Agreement with ‘[a major telecommunications supplier](#)’ Telefonica O2 Ireland, (this Agreement includes clauses guaranteeing to respect freedom of association) will not apply in Ireland.
26. Like wise MANDATE trade union an affiliate of the ICTU representing retail workers report that IKEA a major international furniture retailer are refusing to recognise trade unions in Ireland. The rationale for this is that the non observance of trade union rights is acceptable as it is compliant with Irish law. Even though IKEA recognises its sister union USDAW, 100 miles away in Belfast as it is legally required to do under UK legislation.
27. The right to collective bargaining comprehends more than mere negotiation or consultation on individual employment related issues. In the human rights context in which the term is commonly used it connotes a process by which employers or their representatives negotiate with representatives of a group of workers for the purpose of concluding a collective agreement for the protection of their interests. The process is characterised by the involvement of a trade union representing workers and an essential characteristic of collective bargaining, properly so called is that it is conducted between parties of equal standing who are independent in the sense that one is not controlled by the other.
28. The TEEU an affiliate of the ICTU complained to the Labour Court about an inherent and manifest inequality of negotiating capacity between the employee and management representatives (Bell Security vs TEEU). Professional H.R. specialists and senior managers represented the Company. Electricians who had no training or skills in negotiation or bargaining represented the employees having been refused the right to be represented by their trade union the TEEU. The Labour Court found that on the evidence the practice was ‘collective bargaining’ for the purpose of the Act.

29. Mr Kevin Duffy Chairman of the Labour Court, restricted by the Supreme Court ruling found “*If the Court were considering the factual matrix of this case in an industrial relations context it might take a different view. However it must apply the law as it finds it and following the decision in Ryanair there can be no doubt as to the correct legal approach to the questions arising in this case. ‘Accordingly, the Court must hold that it is the practice of the Company to engage in collective bargaining negotiations in respect of the grade group or category who are party to the dispute. In consequence the Court has no jurisdiction to investigate the dispute.*”
30. Increasingly companies in an attempt to ignore trade union rights and undermine the principles of collective bargaining create an organisation under their domination and control to ‘represent’ the interests’ of workers.

Insufficient and ineffective protection from reprisals, victimisation and other prejudicial acts

31. No person should be prejudiced in his or her employment by reason of practicing their human rights. A fundamental principle of freedom of association is that workers enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. The guarantee of such protection in the case of trade union workplace representatives is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom.
32. In Ireland there is no legal protection from discrimination, demotion, transfers and other less favourable treatment of workers on grounds of their membership or trade union activities and this violates the principles of freedom of association and the explicit right to unionise recognised in Article 23 of the UDHR and case law of the ILO(Case No. 1510, para. 94.)
33. There is no prohibition on the practice of ‘blacklisting’ in Ireland. The ILO has held that ‘All practices involving the "blacklisting" of trade union officials constitute a serious threat to the free exercise of trade union rights and governments should take stringent measures to combat such practices.(See the Digest of 1985, para. 564; and 295th Report, Case No. 1732, para. 357.)
34. There is no prohibition on the use of inducements and interference by employers contrary to the ILO Conventions 87 and 98 and the ECtHR in *Wilson*^{viii}. Where the ECtHR held that the action of Associated Newspapers Limited in offering an inducement to its employees - a 4.5% pay increase for journalists who signed and accepted de-recognition of the union amounted to a violation of Article 11 ECHR, regarding both the applicant unions and the individual applicants.
35. Only those workers who have been dismissed have some protection under the Unfair Dismissal Acts 1977- 2007 . A dismissal is considered to be automatically unfair if the employee is dismissed for membership or proposed membership of a trade union or engaging in trade union activities, whether within permitted times during work or outside of working hours. But with the growth in precarious and third party agency contracts this leave large parts of the workforce nervous about joining a union. These types of temporary, one step removed contracts, potentially denies them basic employment rights that would protect them from unfair dismissal that might arise.

36. There are also unacceptable delays in proceedings contrary to Article 8 UDHR, delays of 2 years are common and on appeal can take up to four years. The most common remedy is compensation - up to a maximum of two years lost remuneration – but compensation is not acting as a dissuasive sanction as the award will be on the basis of earnings which have actually been lost during the period spent attempting to secure alternative employment. There is a duty at law to mitigate or reduce the loss of earnings claim by obtaining or endeavouring to obtain alternative employment meaning that the compensation can be very limited. Given that job loss in Ireland can mean ruin for families the remedies need to be more immediate.
37. Ireland does not recognise a right to strike and there is no legal entitlement to strike. Instead Ireland has a system of ‘immunities’ that apply in certain circumstances when the collective action is in furtherance of a ‘trade dispute’. Increasingly employers are turning to the courts to seek injunctions to halt the strike action. This gives power to employers to disrupt, curtail, delay and halt strikes. There are no restrictions on the use of alternative or agency labour during a strike. Contrary to the right to strike as enshrined in Article 28 EU Charter and the basic principles of the ILO (ILO.1996d, paras.473-475)

Ban on union activity for freelance actors, musicians and journalists

38. The Competition Authority (an organ of the Irish State) has made unlawful the collective agreement made between SIPTU/EQUITY, a trade union of workers and the IAPI an association of employers. The agreement applied to all workers within the particular categories (voice over actors). The (unlawful) agreement deals with matters applicable to employees, such as, hourly, daily and half daily rates of pay (fee’s) including the payment of overtime along with the length and frequency of the breaks to be provided.
39. This prohibition represents a violation of the rights set out in the UDHR and as explicitly set out in the ILO Convention on Freedom of Association and Protection of the Right to Organise No. 87. This Convention recognises the right of all workers to form and join organisations of their own choosing, without prior authorisation, and it lays down a series of guarantees for the free functioning of organisations without any interference by public authorities. Article 2 of the Convention provides that the right to organise is to be granted to “**all workers without distinction whatsoever**”. Echoing the UDHR approach of rights applying everywhere, to everyone and all of the time.
40. The decision by the Competition Authority in 2004 and still in force in 2011 and has effectively restored the Combination Acts that outlawed trade union activity in Britain and Ireland over 100 years ago as far as actors, musicians, film technicians and freelance journalists and other self employed workers are concerned.
41. Following on from this ruling by the Competition Authority, suspicion was thrown on other agreements concluded by ICTU affiliates including by the NUJ, who represent self employed freelance journalists were undermined, exposing atypical workers in vulnerable sectors to exploitation.

Restrictions on Freedom of Association placed on Police

42. There is no legal instrument at international or European level that requires Member States to prohibit members of the police force from belonging to trade unions or from associating with national confederations such as the ICTU.
43. Ireland has freely ratified a number of International and European Treaties and Conventions that carry a strong presumption against interference by governments; some regulation and restriction on police trade unions is permissible, but it cannot be such that it completely denies police officers their trade union rights.
44. Ireland is a member of the Council of Europe, and as such has ratified the (Revised) European Social Charter (ESC). Article 5 ESC only allows a restriction of trade union freedom for members of the armed forces, (i.e. the army not the police). Further the ECtHR has found that any restrictions must be "necessary" and 'proportionate' to the aim pursued by their imposition.
45. It is difficult to see what aim is being pursued by prohibiting the AGSI from associating with ICTU and its constituent trade unions. The Minister for Justice has not provided reasons to justify the 'necessity' of the restrictions on collective bargaining in Section 18 of an Garda Síochána Act 2005. Further, it is far from certain that Ireland will be able to justify the prohibitions on the AGSI and its members are proportionate, justified and necessary. At EU level, EUROCCP (the representative body for police in Europe) is a member of the ETUC (the representative body for trade unions in Europe). The AGSI is a member of EUROCCP and the ICTU is a member of the ETUC further demonstrating the arbitrary nature of the prohibition on the AGSI affiliating to the ICTU.
46. The AGSI claim they are suffering 'unnecessary' 'disproportionate' and 'unjustified' restrictions on their fundamental trade union rights to freedom of association and collective bargaining.

Conclusion

47. Ireland is a champion of human rights abroad yet it is failing to adequately promote and protect human rights at home. Trade union rights are fundamental human rights but the trade union-human rights of all 'workers' are not properly respected. Following from a problematic interpretation of the Supreme Court in *Ryanair*, anti trade union activity, once the preserve of a few anti-union companies is now becoming widespread, jeopardising the basic human right of workers to organise in trade unions for the protection of their interests.
48. Domestic legislation is needed to protect the trade union-human rights of workers in a manner consistent with (i) the Universal Declaration of Human Rights, (ii) recent rulings of the European Court of Human Rights in *Wilson*, *Demir*^{ix} and *Enerjii* (iii) EU Charter of Fundamental Rights, (iv) obligations under International Labour Organisation Conventions to which Ireland is a party (v) the International Covenant on Economic, Social and Cultural Rights, (vi) the International Covenant on Civil and Political Rights and (vii) Council of Europe's Social Charter and (viii) the EU Charter of Fundamental Rights.

Recommendation: Enact legislation to underpin the right of all workers to collective bargaining through their trade unions in line with the State' international commitment.

ⁱAppendix 1 for details of affiliated trade unions.

ⁱⁱ *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008,

^{iii[1]} ICCPR; ICESCR; CRC; CEDAW; ICERD and UNCAT.

^{iv} Concluding Observations of the UN Committee on Economic, Social and Cultural Rights: Ireland, 5 June 2002, E/C.12/1/Add.77, at para 29.

^v Source: Beesley, (24 May 2003) "McDowell attacks „rights-based society", *Irish Times*.

^{vi[3]} Brendan McGinty IBEC Director, '... a legal right to collective bargaining would not create a single job in this economy and would instead threaten many thousands of jobs by damaging our capacity to attract and retain inward investment...'. I <http://agenda.ibec.ie/1dhl3ywowzz>

^{vii} European Court of Human Rights (ECtHR) in *Demir and Baykara v Turkey*, which reversed earlier jurisprudence to hold (i) that the right to collective bargaining is 'an essential element' of the right to freedom of association in Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and (ii) embedded the jurisprudence of the International Labour Organisation and the European Social Charter into that right. See Ewing and Hendy, The Dramatic Implications of *Demir and Baykara* *Industrial Law Journal*, Vol. 39, No. 1, March 2010 © Industrial Law Society; http://www.oldsquare.co.uk/pdf_articles/3100179.pdf

^[2] Educational Company v. Fitzpatrick [1961] IR 323

^{viii} *Wilson, National Union of Journalists and Others v. United Kingdom* [2002] [ECHR 552](#) (applications nos. 30668/96, 30671/96 and 30678/96)

^{ix} *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008,