Irish Congress Trade Unions

Observations and Recommendations for Amendment of the Industrial Relations (Amendment) (No.3) Bill 2011

January 2012

INTRODUCTION

The Irish Congress Trade Unions is the representative body for workers and their unions on the island of Ireland. The ICTU has 49 affiliated trade unions, directly representing almost 820,000 members from all sectors, industries, occupations and professions in the public and private sectors.

Congress' aim is to secure a stable, well-founded, legal underpinning for Registered Employment Agreements and Employment Regulation Orders to protect them from legal and Constitutional challenge. Therefore, Congress welcomes the publication of the Industrial Relations (Amendment) (N0.3) Bill 2011 and acknowledges the progress embodied in the Bill. Our analysis is that it provides the necessary legal framework to fully address the deficiencies identified in the High Court judgement in *John Grace Fried Chicken Limited and Others – v – The Catering Joint Labour Committee and Others* on 7th July 2011 and other concerns, raised by others, about the Constitutionality of such agreements. In fact, Congress view is that the Bill goes further than is required, especially in the way it treats Registered Employment Agreements.

Congress main concerns about the Bill arise in the following areas:

1) **The criteria for establishing wages and registering agreements;** the Bill requires, in Section 5 (c) (m) dealing with the setting the REA and in Section 12.6.b dealing with the setting of the ERO that, in certain circumstances, comparisons with wages in other States are to be made. Our view is that this is an excessive requirement and should be removed as wage comparisons can be misleading. Especially when comparative purchasing power, the availability of social security and public services and levels of taxation are not taken into account. If this provision is to remain in the legislation, it must be amended to include *'a fair and reasonable assessment of wages, with regard to the purchasing power, the level of social security and public services available in that State'.*
2) **There is a need to provide workers with a right to information, independent advice and protection for workers seeking it.** Workers, faced with employer requests to apply the inability to pay provisions must be provided with a right to information and independent advice, including from their trade union. The Bill (section 9 new 8(a)) requires employers to *'inform the workers concerned of the financial difficulties of the business'*. Congress is calling for amendments to improve the rights of workers to receive more complete financial information and to give them a right to independent advice on that information, including from a trade union. Otherwise, workers will be forced to rely on the employer for their interpretation of the financial situation. An indispensable condition under pinning 'agreement' is that workers and their unions have equal access to all relevant information and data and have the means and capacity to comprehend fully the implications of the different issues involved.
3) **There is a need to provide an Amicus Curia role for trade unions and employer organisations as parties to the agreement:** Section 9 of the Bill deals with an application for an agreed 'inability to pay'. The Bill provides (section 9- new 33A .6) that the Labour Court will *'convene a hearing of parties'* and goes on to provide that when dealing with non-agreed applications for inability to pay the Court shall *'establish its own procedures for hearing applications'* (section 9- new 33A.14). Congress is seeking amendments to the Bill to recognise the rights of trade unions (and employers representative organisations) to have a say in respect of how their agreements are being varied as such variations can have implications for the agreement as whole. Given the likely normative function of the variations, trade unions and employer organisations have a strong interest in how agreements are being varied, even, or more especially, in circumstances where there is no union or the employer is not a member of an employer's organisation. We are therefore

seeking amendments to include an *Amicus Curia* (friend of the court) role, with an automatic right to be informed, make submissions and be heard on ' inability to pay' applications. This will mean that issues can be brought to the attention of the Court, that may not otherwise be introduced, especially questions of how the inability to pay may impact on other businesses in the sector.

4) **Workers should not be under a threat of penalisation at all stages of the process.** Congress is seeking amendments to provide that workers are protected from penalisation and dismissal for seeking to establish an REA or ERO and for making requests for information, seeking advice or for refusing to agree the application of an inability to pay provision. In addition provisions should be made that the employer would meet 'reasonable' costs incurred with providing independent advice on the 'inability to pay'.
5) **Some changes sought to 'Substantially Representative'** - Congress supports the Bills approach in Section 5 to questions about whether the parties are 'substantially representative' however we would like bring to the Minister's attention that when it comes to the construction sector, for example, an employer could have literally hundreds of 'workers' but only a small number of 'employees'. We are recommending an amendment along the following lines to section 5.3A (ii) ...'or the number of workers employed *'and engaged'* by employers represented by a trade union of employers,' ...be included.
6) **Comments specific to 'Inability to Pay' an REA:** Congress fully supports and welcomes the protections afforded in the Bill i.e. that the inability to pay provisions only apply to the REA if the parties agree to include them as a term in the REA and that pensions always fall outside the inability to pay exemptions. However the safeguard, minimum thresholds for varying the pay terms as set out in the Bill are for minimum wage - this is too low and for two years -this is too long. Congress recommends that in circumstances where parties have agreed to include the inability to pay provisions as a term of the REA, the Bill should provide that it is open to them to set (in that REA) a minimum threshold at a rate higher (but not lower) than the minimum wage and to set a maximum period for variation at a period shorter (but not longer) than two years.
7) **Tendering for public procurement contracts on the basis of 'inability to pay exemptions' should be prohibited.** Section 9.15 provides that the Court shall establish and maintain a register of all exemptions. Congress' view is that as a matter of public policy, public procurement rules should prohibit tendering on the basis of an 'inability to pay' exemption of either EROs or REAs. It is unacceptable that viable employers will be undercut by others using an exemption, therefore the register of companies operating inability to pay should be automatically referred to Public Procurement Agencies and a prohibition on the use of inability to pay in tenders be set out in this Bill or Public Procurement rules as a matter of public policy.
8) **Consultation must not be used to undermine collective bargaining** The Bill requires the Court to have regard for *'(f) [the] benefits of consultation between worker and employer representatives at enterprise and sectoral level'* (page 5 line 37). Congress agrees with this, but we are also aware that 'consultation' needs to be supported with rights to information, representation and advice, otherwise there is a danger that it will be one way consultation, taking place under the domination and control of the employer without any right to advice or representation from the trade union.
9) **Clarification is sought on Section 6 'varying the terms of Registered Employment Agreements:** The current section 28, i.e. as it appears in the 1946 Act, begins 'If a registered employment agreement provides for the variation of the agreement...' Congress is requesting that the same language be used at the start of the amended Section 28, as this refers to REAs. (amend Page 7 line 7) to read 28.-(1) **If a registered employment agreement provides for the variation of the agreement and** subject to this section... Otherwise there

may be a danger that the section could be misinterpreted as applying to all REAs regardless of whether the agreement provides for such variations.

10) **There is a need to reinforce the investigation and enforcement mechanism:** Ultimately, the impact and usefulness of the legislation depends on whether the REA and ERO are paid. This, in turn, depends on the effectiveness of the enforcement mechanism. Penalties for violators, adequate compensation for workers whose rights have been breached and suitable resourcing of the enforcement authority, are all crucial factors. Congress is concerned that the role of the National Employment Rights Authority seems to be missing form the Bill. Given the past record of high levels of non-compliance in some sectors, this will need to be addressed. Congress view is that the Bill should provide stronger penalties for employers who do not keep and produce records.

Finally, when enacted the legislation would benefit from well-tailored, awareness-raising campaigns, run in cooperation with NERA and employers' and trade unions. This type of promotional activity will be beneficial to ensuring that the rights and obligations are fully understood.

Ends

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