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Services Industrial Professional & Technical Union

Modelling a New Collective Bargaining Framework

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A New Collective Bargaining Framework

- It is a long-standing goal of the trade union movement to establish a statutory right to collective bargaining. However, there has been little discussion of how that right should operate in practice.
- The issue is gaining some urgency given the EU Directive on Minimum Wages and the requirement that Governments develop policies to raise collective bargaining coverage to 80 percent of the workforce.
- An Ireland Thinks poll commissioned by the Financial Services Union showed 75% support for the proposition that employers should be legally required to bargain with a trade union if employees wish them to do so. The Citizens' Assembly on Gender Equality made a similar demand for collective bargaining rights.
- The UCD Working in Ireland Survey, 2021 found that 44% of non-union members would vote to establish a union in the workplace, rising to 66% among young workers.
- The following attempts to outline the concrete form that a statutory right might take. This is only intended to start that conversation.

A One-Sided 'Voluntarist' System

- Ireland's IR system is described as 'voluntarist'. This is only half true. It provides a voluntary approach for employers but denies it to employees.
- Collective bargaining can be described as a group of people choosing an agency (or agencies) to bargain on their behalf. Employers and employees are treated differently in this respect.
- **Employer**: Owners and directors collectively bargain with employees. Management bargains with employees on behalf of owners, directors, 'the company'. Management can, in turn, delegate bargaining to another agency (e.g. employer organisation). In short, employers can choose to bargain collectively. And they can deny that same right to employees.
- **Employee**: employees must gain the consent of their employer to bargain collectively. They cannot voluntarily choose to bargain as such.

Outline of Presentation

- In effect, vindicating the right of employees to bargain collectively is merely taking the same right that employers enjoy and extending it to employees.
- It should be emphasised: the right to collective bargaining is not a trade union right. It is a right that belongs to each and every employee.
- The following presentation will focus on three areas to show how the extension can be achieved.

1) Firm-level collective bargaining
2) Sectoral collective bargaining
3) Right to Organise

1. FIRM-LEVEL COLLECTIVE BARGAINING
Recognition of Employees' Agency

- There are two requirements in order to vindicate employees' right to collectively bargain at firm level.
- First is the **recognition of employees' choice of agency** to bargain on their behalf
- Employers would be required to recognise the agency that employees select for the purposes of collective bargaining; that is, an authorised trade union(s).
- The number of union employees needed for recognition would be 'substantial' (in current practice, 30% has been applied to a grade, group or category of workers).
- Once that number has been established – either to the satisfaction of the employer, or per finding by an IR agency – then the union(s) would be authorised to bargain on behalf of its members.

Firm-Level Collective Bargaining
Good Faith Negotiations

- Secondly, just because a union has been recognised as the negotiating agency doesn't automatically result in collective bargaining between employees and employers (e.g. the employer doesn't show up).
- We need an additional requirement at firm level to ensure the goal of collective bargaining is not defeated. One option is to require employees and employers to engage in '***good faith negotiations***' (GFN) when 30% of employees select a union to represent them.

What Constitutes Good Faith Bargaining

- Once a union has been authorised as a negotiating agency, parties would be required to engage in GFN. Examples of GFN:

➢ attending, and participating in, meetings at reasonable times;

➢ disclosing relevant information in a timely manner;

➢ responding to proposals made by other bargaining representatives for the agreement in a timely manner;

➢ giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

➢ refraining from *capricious or unfair conduct* that undermines freedom of association or collective bargaining;

‘Capricious or Unfair Conduct’

- Capricious or unfair conduct would be a breach of GFN. This would include:
- ➢ Failure to recognise a bargaining representative
- ➢ Not permitting an employee who is a bargaining representative to attend meetings or discuss matters with fellow employees relating to the agreement
- ➢ Dismissing or victimising an employee because she or he is a bargaining representative or is participating in bargaining
- Other examples include: delaying tactics, deliberately misleading the other party, surface bargaining (i.e. merely listening with the pretence of bargaining), “boulwarism” (take it or leave it approach), receding horizon bargaining (i.e. withdrawing matters already agreed on) and offering unreasonable terms.

Code of Conduct or Mandatory

- GFN does not require parties to reach an agreement or make concessions. However, it does require parties to act in '*good faith*'.
- The question is whether GFN provisions are 'voluntary' through a Code of Conduct, or 'mandatory' through statutory provision.
- If mandatory, what happens when a party violates GFN provisions? One option: the aggrieved party can apply for a *bargaining order* that specifies the action to be taken to meet the GFN requirements. Failure to comply with a bargaining order can attract penalties.
- If the breach is '*serious and sustained*' the IR tribunal could make a '*serious breach declaration*'. This could lead to the tribunal making a '*binding workplace determination*', dictating the contents of the agreement to be applied to the workplace. In addition, there could be a role for a '*dispute resolution*' process to be introduced where there is a failure to agree.

2. SECTORAL COLLECTIVE BARGAINING
The New Zealand Example

- New Zealand is introducing a new system of sectoral collective bargaining – Fair Pay Agreements (FPAs). This system would be revolutionary in the Irish context. The following is a brief summary:
- Unions (and only unions) can initiate a FPA in a sector, defined either by industry or occupation. They need to show that they have a density of at least 10% of the covered workforce or 1,000 members - whichever is lower.
- Having achieved this requirement, employers are required to engage with the union(s). Further, both sides are required to come to an agreement on statutory-defined terms, while they are required to discuss (but not come to an agreement) on a number of other specified terms.

NZ Mandatory Terms

Mandatory to Agree	Mandatory to Discuss
Base wage rates	Redundancy
How wage rates will be adjusted during the term of an FPA.	Leave
Whether employer superannuation contributions are included in base wage rates	Skills and Training
Ordinary hours, overtime, shift pay	Health and Safety
Coverage	Flexible Working
Duration of FPA	
Governance arrangements (such as what, if any, ongoing responsibilities bargaining parties have)	

Democratic Innovation 1: All Employees and Employers Vote

- The parties (representatives of employees and employers) are governed by good faith negotiation requirements. Once the parties have concluded an agreement, that agreement is put to a vote among all employees and employers.
- **Employees**: all employees (not just union members) in the industry or occupation that are covered by the agreement have a vote.
- **Employers**: all employers have a vote – with the number of votes based on the number of employees. For example, a firm with 30 employees has 30 votes; a firm with 100 employees has 100 votes. There is a slight skewering in favour of small firms. For example, a firm with five employees has 9 votes.
- If either side rejects the agreement, the process starts again with the parties required to conclude a new agreement which, in turn, is put to a vote – again - among all employees and employers.

Mandatory Arbitration

- What happens if the bargaining parties fail to conclude an agreement or such agreements are rejected twice?
- The IR Tribunal (in NZ's case, the 'Employment Rights Authority), will make a *determination*. They will determine the content of the agreement, covering the mandatory terms (per above – basic pay rates, overtime and shift pay, duration of the pay deal, etc.). This determination will apply to all employees and employers in covered industry or occupation.
- In effect, this means '*binding arbitration*'. The NZ government has argued that this arbitration does not undermine the 'voluntarist' system as it only applies where collective bargaining has failed.
- The main difference between this model and the one outlined for firm-level bargaining is that at firm-level, there need not be a conclusion as neither party is required to accede to an agreement. However, under this sectoral bargaining model, once the process is started, there must be a conclusion.

Democratic Innovation 2: Right of Access and Communication

- The second innovation of the NZ system is that during the vote:
- Employers are required to pass on the contact details of each employee to the bargaining unions so that they can contact them regarding the vote. Workers may decline to have their details passed on. Non-union members' contact information can only be used by unions for FPA-related communication. However, so long as the primary purpose of the communication is FPA-related, unions can include other messages in the communications.
- Employers must allow workers two 2-hour paid meetings with the representative union to discuss the proposed FPA agreement. Unions have a right of access to a workplace if there are employees in coverage and the visit relates primarily to FPA matters. A union does not need employer consent to enter the workplace though rules regarding disruption of business will apply.

Relationship Between Firm-Level and Sectoral Bargaining

- A sectoral agreement establishes a floor for wages and working conditions in the covered industry or occupation.
- Therefore, no firm-level agreement can undermine the floor established at the sectoral level (if one exists). However, firm-level bargaining can improve on sectoral provisions.
- Employees would be able to negotiate firm-level improvements in sectors covered by a collective agreement. This would ensure that employees can make claims on additional profits generated. This would also be needed to counter-balance any employer '*inability to pay*' clause. Further, sectoral bargaining can hollow out employee activity if there is little incentive for employees to organise at firm level.

3. RIGHT TO ORGANISE

- The *Right to Organise* has come to mean a range of measures that remove barriers to employee activity in the workplace, facilitate communications, provide access rights to union officials and prohibit victimisation of union members and activists. This gives concrete expression to the constitutional right to join a union.
- For example, under Australian law union officials apply for a permit to enter the workplace. With a permit they can investigate any alleged breach of statutory protections or collective agreement and meet with employees for purposes of advice and recruitment. Legal right of entry exists in various forms in many EU countries.
- Such access is not unknown in Ireland. For example, the Agriculture JLC agreement 2010 provided for union access to workers on site.

Right to Organise Measures

Robust protections against victimisation for union membership/activism	Right to discuss pay and working conditions with colleagues
Right of union officials to enter the workplace to meet with members and employees	Right to have union subscriptions deducted at source
Right to distribute union literature in the workplace both physically and electronically	Right to hold meetings in the workplace with co-workers
Right to attend union training and attend union conferences / events	Right to hold union inductions of new colleagues

Implementing Right to Organise Measures

- There are three channels through which these and other measures can be implemented:
- **Local agreement / sectoral agreement**: these measures would be adopted under collective agreements, both firm-level and sectoral-level. However the overwhelming number of private sector workplaces do not have collective agreements.
- **Code of Conduct**: a Code of Conduct could be agreed at WRC level that would address these measures. However, if voluntary, the code merely sets out (best practice) guidance to employers and employees and is not enforceable in the case of a breach.
- **Mandatory**: these measures could be introduced via statute, or based on an agreed Code of Conduct. The rights and prohibitions listed above would then be enforceable with penalties for breaches.

Issues to be Considered

Firm Level	**Sectoral**
Level of density needed to be recognised as a bargaining agent	The level of density needed to initiate sectoral collective bargaining.
Should '*good faith negotiations*' be mandatory, with penalties for breaches; and should there be *mandatory determination* in the case of serious and chronic breaches?	What terms must be concluded and what must at least be discussed.
Right to Organise	Should there be a vote and, if so, among whom: union members only or all workers in the covered sector?
Should Right to Organise measures be introduced via local (or sectoral) agreement, a voluntary Code of Conduct, or binding statutory instruments?	If there is no agreement (whether at bargaining or ratification stage), should a determination of the agreement by an IR tribunal be mandatory?

A New Framework

- Firm-level and sectoral bargaining, along with Right to Organise measures, constitute a new IR framework, vindicating the right to collective bargaining for employees.
- It will be difficult to negotiate these proposals within the current framework. Institutional and industrial-cultural inertia, along with current economic power relationships militate against progressive change.
- In the first instance, a new framework is an issue of political economy and requires significant government intervention to establish a new IR narrative. Within that new framework, details could be negotiated between the stakeholders.
- But that framework must be politically constructed. This, therefore requires trade unionists to campaign for political parties who support this new framework in the hope they will form the next government and implement those reforms.

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