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Trade union representation - did the Court "overstep" in Freshways case?

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A leading employment law professor has asked whether the Labour Court, in recommending that non-union employer, Freshways Foods, should provide for union representation in processing individual grievances - and for the utilisation of the State's dispute resolution machinery –overstepped the mark.

Professor Michael Doherty of the Law Department at Maynooth University, was addressing the theme, 'Individual Rights, Collective Bargaining, and Dispute Resolution' at the Resolve Ireland industrial relations conference last week.

Professor Doherty examined the only Labour Court recommendation – involving Freshways Foods and SIPTU - issued to date on collective bargaining since the passing of the Industrial Relations Act, 2015. The Act, which was the result of a key promise made by the Fine Gael-Labour coalition, addressed critical issues that arose out of the Supreme Court decision in the 2007 'Ryanair' case.

Clearly, this is how the Court has interpreted the code

The Supreme Court's ruling in the 2007 case had made the original 2001 legislation, which covers the right of workers to representation in non-union firms, unworkable from a trade union perspective.

In the Court's Freshways recommendation, which was the last issued by the recently retired former Court chairman Kevin Duffy, recommended that Freshways pay phased increases that would bring their hourly rate up to €11.50 an hour *(IRN 22 - 09/06/2016).*

This central pay element of the recommendation was criticised by employers body Ibec, but the aspects of the finding that may ultimately prove to be more controversial concerns the right of an individual to choose a union representative to help in grievance or disciplinary matters, and question of using the normal State's dispute resolution machinery

"AT THE LIMITS"

Professor Doherty touched on this aspect of the finding last week when he recalled that in regard to the *'Code of Practice on Grievance and Disciplinary Procedures (S.I. 146 of 2000)*', the Court recommended that regarding disciplinary matters, "where an employee wishes to avail of such representation and provide for the full utilisation of the normal State dispute resolution machinery (incl WRC and Labour Court)".

This part of the recommendation pushes "at the limits" of the legislation, Professor Doherty suggested.

In the recommendation, the Labour Court said that consistent with the code, the employer "should provide for trade union representation in processing individual grievances and disciplinary matters, where an employee wishes to avail of such representation".

The Court also said procedure should "also provide for the full utilisation of the normal dispute resolution machinery of the State, including the reference of disputes to the appropriate service of the Workplace Relations Commission and the Court".

The Court added that if there is any dispute in relation to the compatibility of the proposed procedures with the Code of Practice, the question may be processed under Section 43 of the Industrial Relations Act 1990.

DIVERGENT OPINIONS

However, some employers take the view that the code is meant to be flexible in practice, allowing a non-union company to argue that a colleague of a worker can act as a legitimate representative in a disciplinary case, and that there is no compulsion in regard to trade union representation.

According to this particular view, neither is there any obligation to attend a WRC or Labour Court process within the code.

But the counter argument is that it is not the right of the employer to decide who the worker's representative may be; it is up to the worker to make that choice.

Clearly, this is how the Court has interpreted the code.

Professor Doherty in raising this issue in such a delicate fashion has usefully put it out there for further discussion. *(See below for full wording of the original code*)*

"EVOLUTIONARY PATH"

Later, in a questions and answer session, the current Labour Court chairman, Kevin Foley noted that the original Industrial Relations Act, 2001 has been on an "evolutionary path", right though the 2004 amendment up to the 2015 Act.

He said a lot of issues were clarified in the new legislation. But he revealed that thus far, only three cases have made their way to the Labour Court stage, with two of them currently in process.

In general, Mr Foley, cautioned parties that the Labour Court does not engage in independent research; that it depends on the submissions that the parties bring before it.

It was important too, he said, that parties read the relevant legislation and make themselves familiar with what the law says. He also cautioned against anyone over-extrapolating in respect of particular cases.

Meanwhile, IRN understands that in the Freshways case, the company and the union were preparing this week to agree a local collective bargaining agreement.

*The relevant sections of the code (SI 146 of 2000) are as follows:

3.Good practice entails a number of stages in discipline and grievance handling. These include raising the issue with the immediate manager in the first instance. If not resolved, matters are then progressed through a number of steps involving more senior management, HR/IR staff, employee representation, as appropriate, and referral to a third party, either internal or external, in accordance with any locally agreed arrangements.

4.For the purposes of this Code of Practice, "employee representative" includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.

5.The basis of the representation of employees in matters affecting their rights has been addressed in legislation, including the Protection of Employment Act, 1977 ; the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations, 1980; Safety, Health and Welfare at Work Act, 1989 ; Transnational Information and Consultation of Employees Act, 1996; and the Organisation of Working Time Act, 1997. Together with the case law derived from the legislation governing unfair dismissals and other aspects of employment protection, this corpus of law sets out the proper standards to be applied to the handling of grievances, discipline and matters detrimental to the rights of individual employees.

6.The procedures for dealing with such issues reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include:

- *That employee grievances are fairly examined and processed;*
- *That details of any allegations or complaints are put to the employee concerned;*
- *That the employee concerned is given the opportunity to respond fully to any such allegations or complaints;*
- *That the employee concerned is given the opportunity to avail of the right to be represented during the procedure;*
- *That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.*