Local union organisations can be captured by “culture of negativity” - O’Connor

BRIAN SHEEHAN

The trade union organisation in a company can sometimes be captured by a culture of “short-termism and negativity”, at odds with the best interests of both the employer and union members, a leading trade union leader told an industrial relations conference last week.

Jack O’Connor, the soon-to-retire general president of SIPTU, said that where this happens the outcome becomes newsworthy, to the detriment of the hard work done by officials in the majority firms.

The union leader said the movement should face up to this problem, “not to be nice” (to the employer) but in the interests of workers themselves. “(This) requires strong leadership at the head of the union. That is (about) knowing your industry, knowing it well and making sure the leadership cadre know it too”, he said.

The union challenge is to connect with the under 35s

For union officials to meet these standards, the SIPTU president said this also requires a level of competence and professionalism, “not telling people what they want to hear, but knowing the law as well as any lawyer and knowing the people (on the ground).”

Being a union organiser is a tough job, he said, adding that “it will always be so”.

Mr O’Connor was addressing the Resolve Ireland employment relations conference at the IMI.

FDI STANDARDS ‘GOOD’

On collective bargaining rights, O’Connor said that foreign direct investment (FDI) firms are not worried about the Industrial Relations Act, 2015. Employees in these companies are “less likely to seek to organise because terms and conditions are ‘quite good’” in the FDI sector.

But he said this is used as a means of denying the right to organise, to the benefit of ‘bad employers’ who, for the most part, are not part of the FDI sector.

On the right to representation provisions of the 2015 Act, O’Connor said that its effectiveness is limited by section 34(b), which requires pay and conditions in companies where there is no collective bargaining to be taken into account. He suggested that this would dilute the provisions of the legislation.

Asked to address the theme, ‘The Challenges for Trade Unions in Ireland: Balancing employee interests and rights’, he said he doesn’t believe there is a conflict between the two.

He instanced examples of where people and institutions act against either the general interest, or their own interests. The behaviour of the banks was a good example of the former, while voting

for Brexit was a good example of the latter. And sometimes working people inside trade unions can also vote against their best interests, he said.

TARGET GROUP FOR UNIONS

Mr O'Connor pointed to OECD figures that he said show that Ireland has one of the highest levels of low pay in the developed world, with 35% of employees earning less than €400 a week. He also cited a Eurofound study, which concluded that 46% of people under-35 at work in Ireland have non-standard contracts. Meanwhile, 53% of workers have no pension provision.

The SIPTU leader wondered how many of the 46% on non-standard contract workers are also among the 30% of households that rent accommodation.

This presents a challenge for the trade unions. The group of people he described are in a "trap"; they are not heard from, largely because they are not organised (in trade unions). Civil society, O'Connor argues, has developed no other vehicle for this group.

The trade union challenge, therefore, was to connect with these people, "supporting them and developing new mechanisms … and organising to win a better place". This, he added, was a "profound issue for the trade union movement".

Social Partnership could meet challenges facing country, says O'Toole

BRIAN SHEEHAN

Ireland has a chance of coming through the urgent challenges now facing the country, but only if we take seriously the need to create public institutions that address peoples' real concerns.

One way of doing that may be through the resurrection of social partnership, award winning journalist, Fintan O'Toole, told the Resolve Ireland industrial relations conference last week.

O'Toole, observing that social partnership was "ditched" when the crisis struck in 2009, said it was the only process where "large scale social actors were involved in large scale social thinking". The Dail is not good at this, he said, referencing various crises, like those in health and housing.

He said our democratic institutions were generally poor at thinking about larger policy issues. It was worth asking what kind of institutions we need "to animate our short, medium and long term thinking to create a narrative for people".

DECISION TIME

Addressing the theme, 'Ireland's place in the world, post Brexit and Trump – is it still a choice between Boston and Berlin?', O'Toole said that Brexit is forcing us to choose between the two. We have been pretty good so far at "riding these two horses", while getting the benefits of both, but also the "weaknesses of both".

O'Toole said it is getting harder to do that now, but choosing Europe is a bit like moving from the frying pan into the fire. Europe may no longer provide us with the anchor we need.

A trawl through some of the political developments in Europe makes this clear.

Are we even fit enough to make the mind shift required? "The fact is we are seen as a rogue state in Europe", though he acknowledged that description is a little unfair. But we need to consider a new era where tax policy isn't the main driver of our economic development.

On climate change, O'Toole observed that although we say we are committed to it, "we do nothing about it", adding that we are "closer to Saudi Arabia than Slovenia" on this issue. "We need to be seen as responsible members of the European and Global community".

'LIKE WARTIME'

Regarding our institutional capacity – or lack of it – to cope with challenges facing the country, O'Toole said we need to treat the current situation like it was "wartime". But he is not convinced that our institutions are fit for purpose.

However, we are lucky in some respects. Comparing Ireland with nationalist movements elsewhere, including English nationalism and US nationalism today, he said we have evolved a "decent and sophisticated nationalism".

O'Toole believes that this will be an advantage when it comes to managing the challenges posed by Brexit and Northern Ireland. But while "negative nationalism" is limited here at this time, we must guard against complacency.

Another positive is that we have no far right party, which is unusual in Europe, if not unique. This is partly due to our "strange historical weaknesses", meaning that it is hard for a far right party to emerge in a country with our emigration/migration profile. Illustrative of this is the fact that 17% of our population was born outside the state, while 17% of persons born here currently reside outside the state.

"So we have strengths, but we don't have the institutions to put forward a credible narrative in regard to equality issues".

While social partnership had got a "bad reputation" and was dropped when the Celtic Tiger collapsed, O'Toole concluded that while "not perfect", it could do what the Dail is not good at, which is some "large scale social thinking".

New ‘bargaining’ law may not suit our voluntarist system conference told

BRIAN SHEEHAN

An employment law specialist has said he is unsure about how comfortable some of the collective bargaining provisions of the Industrial Relations Act, 2015 sit within the voluntarist principle that underpins our industrial relations system.

Barrister Mark Connaughton referred to what he suggested was the “somewhat questionable justification for the provisions of the Industrial Relations (Amendment) Act 2015”, which purported to give the Labour Court “a separate binding authority to set terms and conditions of employment for workers in a particular employment”.

Upon a plain reading of the relevant part of that Act, the well known barrister said it represents a form of “statutory endorsement of collective bargaining and arguably a move away from the so-called voluntarist principle”.

That said, he recognised that there are other views, which hold that the Act does not go far enough.

Addressing the theme ‘Balancing rights and interests in collective bargaining and trade disputes’ at the recent Resolve Ireland conference, Mr Connaughton said it was “probably not an overstatement to suggest that ‘so-called social partnership’ is “largely an ambition within the public sector”, where union representation is still strong.

But it was very clear that there appears to be “little appetite in the private sector for involvement in national level pay negotiations”, he said. This was not surprising given the relatively low level of union membership and the “very different dynamic in that sector”.

“ALL THE MORE SURPRISING”

The senior counsel suggested it was “all the more surprising” that the legislature “has seen fit to implement the changes comprised in Part 3 of the Industrial Relations (Amendment) Act, 2015”.

Mark Connaughton explained that relevant sections have eased the burden for a trade union representative of a significant body of a workforce trying to establish a foothold in individual employments. Those provisions “specifically target deficiencies in the earlier legislation” that were identified in *Ryanair Ltd v The Labour Court* (2007) but, in his view, three tensions are still evident:

First, he pointed to the constitutional guarantee afforded by Article 40.6.1(iii). (i.e. the right of association)

Second, the question whether, in light of developing jurisprudence in the European Court of Human Rights (ECtHR), Ireland sufficiently respects the rights espoused in Article 11 of the European Convention on Human Rights and the right to engage in collective bargaining.

The third tension “arises from the dissatisfaction of the private sector with the adoption by the Labour Court of a quasi-judicial role in determining pay and conditions”, which he describes as “a profound move away from its central role in an otherwise largely voluntarist system”.

Mr Connaughton recalled that the first decision by the Court under the amended (2015) Act, *Freshways Food Company v SIPTU*, demonstrated – in his view - that the Labour Court “considers itself empowered by the amended provisions”.

He noted that the Court’s findings in *Freshways* have been criticised by the main employers’ organisation, Ibec, “as displaying both an absence of any rationale for the increases recommended and the pursuit of a policy with respect to the implementation of the so-called living wage that was not appropriate”.

‘TRADE UNION MINDSET’

Another criticism that he suggests might be levelled, is that the Labour Court “has not taken on board the observation of the Supreme Court in Ryanair that its Recommendation in that case betrayed a mindset”.

In *Freshways* the Labour Court adopted what Mark Connaughton described as a “very particular approach, guided by what it would expect in a unionised environment”, in deciding that the staff representative group could not be an excepted body within the definition in the Act.

“Its reasoning was arguably rather cursory, sweeping and dismissive of the group established within the company whereas the Court is required to ensure that its construction of the Act is consistent with the principles laid down in *Ryanair*”, he opined.

In this regard, the senior counsel quoted Geoghegan J in the famous (*Ryanair v The Labour Court*) 2007 case:

‘[T]he relevant legislation is intended to deal with problems arising in a non-unionised company. It is not in dispute that 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 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 Act of 2001 and the Act of 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.’

CONSTITUTION ‘TRUMPS’ HUMAN RIGHTS COURT?

In Mr Connaughton’s view, it is important to also bear in mind recent developments in the jurisprudence of the Court of Justice (CJEU) and the European Court of Hum Rights (ECtHR) that could have a bearing on the conduct of employee relations with a collective aspect.

Through the European Convention on Human Rights Act 2003, he said that Ireland is obliged to give effect to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. Although the manner of expression of the right to form and to join trade unions contained in Art 11 of the Convention is “not very different from the guarantee given by our Constitution”, the jurisprudence of the ECtHR has developed the right of collective bargaining a good deal further.

Demir and Baykara v Turkey is a striking example, he said, with its emphasis on the right to engage in collective bargaining and "indeed the duty to take steps to promote that right". While he noted that Redmond and Mallon in their work (Strikes: An Essential Guide, 2010) had acknowledged that the decision requires a re-examination of jurisprudence on trade union rights associated with collective bargaining, they also suggest that:

'The pre-eminence of the Constitution in Ireland may mean that its significance is limited.'

Connaughton further notes that Tony Kerr, "another respected commentator on the Industrial Relations Acts", has queried whether the decision of the ECtHR in *Demir and Baykara* should also be treated as conferring a right for a trade union to be recognised for the purpose of collective bargaining.

"It seems to this writer to be the next logical step in the reasoning displayed in that case but it remains undecided. In Ireland, where the implementation of the European Convention on Human Rights by the 2003 Act is subject to the Constitution, the Courts are obliged to uphold the constitutional right of employers not to recognise trade unions", Mr Connaughton said.

Discuss possible redundancies in good time, conference advised

BRIAN SHEEHAN

An employer should discuss strategic decisions with the workforce that may involve redundancy at a time when consultation may still make a difference to the outcome, according to senior counsel, Mark Connaughton.

Such consultations should occur when the information given to the employees might still affect the employer's decision as to whether there will be redundancies or not.

Referring to a recent Court of Justice case (Ciupa and others), Mr Connaughton, speaking at last week's Resolve conference, said what the European Court appears to be saying is that in regard to collective redundancies, consultations need to take place in good time.

These consultations should also include possible ways of averting redundancies, or limiting the number of those affected, as well as "mitigating the consequences" of such strategic business decisions.

Mr Connaughton acknowledged that this raises issue regarding managerial prerogative, and whether an employer is entitled to say that strategic decisions emanate from the employer alone. Posing the question as to whether the *Ciupa* case places this in doubt, he said this is still unclear.

Labour Court's advice: give it your best shot and be reasonable

BRIAN SHEEHAN

The Labour Court has cautioned parties to "stick to the real substance" of their case when appearing before it - and not try to "defend the indefensible".

Meanwhile, drawing up a poor submission and "complaining when you get the wrong answer" makes little sense and should be included in a 'don't do' list when preparing for a Labour Court hearing.

Deputy chairman, Caroline Jenkinson, said the Court cannot consider what is not before it: Don't "keep something back" and "articulate all relevant factors" and consequences, she said.

Ms Jenkinson also cautioned the parties, that when appearing before the Court in pay claim cases, to know the full cost of the claim. The claim must not be exaggerated; details of pay in the company should be supplied, as should details of competitors in the industry in question.

Possible knock-on implications should be advised to the Court, and if a company is pleading 'inability to pay', then it must supply financial information to explain its case.

The Court will also want to hear that employees have been consulted and, where a pay freeze is being sought, for example, whether other measures have been considered instead.

An outcome can also depend on both sides advising the Court of their real positions.

Ms Jenkinson said the voluntarist system hinges on effective engagement and genuine efforts to resolve disputes, "otherwise a revolving door syndrome" would be in play. Moreover, she said the Court is not a step in the negotiation process.

"If the system grows another limb the institutional framework becomes devalued", she cautioned. To diminish the concept of last resort "would be most serious, undermine the credibility of the systems", she added.