The ever-evolving industrial relations landscape in Ireland

Hello, and welcome to our ALG employment law podcast. I'm Triona Sugrue, knowledge consultant with the employment team, and today I am joined by my colleague Duncan Inverarity, partner on our employment team. Hello, everyone.

Today we are going to discuss the evolving industrial relations landscape in Ireland, with a particular focus on the impact of a key Supreme Court judgment called H.A. O'Neil and Unite the Union. Handed down last year, which has arguably reset the law when it comes to an employer's ability to seek an injunction to restrain industrial action.

We're also going to consider if the direction of travel has changed or is about to change when it comes to trade union activity, particularly in light of the EU Adequate Minimum Wages Directive.

For those not familiar with the Adequate Minimum Wages Directive, it provides that if an EU member state has less than 80% collective bargaining coverage, and in Ireland we have around 34%, the government must provide for a framework of enabling conditions for collective bargaining and an action plan. But more of that later.

Firstly, Duncan, can you set the scene on the right of workers to take industrial action in Ireland? Yeah, so the Industrial Relations Act in Ireland covers this issue, and it's a really important tool in the arsenal of trade unions taking industrial action.

It essentially provides protection for workers and trade unions who participate in industrial activity from being sued by the employer. So at a basic legal level, imposing industrial action is just quite frankly a breach of an employment contract.

And for those unions who facilitate the breach of that contract, they are also exposed to liability from the employer because they are in fact inducing the workers breach of their employment contract.

Now, industrial action covers all sorts of forms, from work to rule, to pickets, to strikes, which of course is the ultimate form of industrial action. And without that statutory protection, workers and trade unions would be massively exposed to significant costs and fines.

So, the protection in the Industrial Relations Act is key and has been the subject of litigation over many, many years. I do think it's fair to say when one reflects on the decisions that have been issued, particularly by the High Court, that it's not been easy or straightforward for the unions to rely on the provisions of the Act.

For example, they may not have complied with the ballot requirements, which is their own requirement. They may have not notified the employer of the industrial action, or the industrial action may in fact exceed what was balloted for.

So, for example, if a picket's put in place, which blocks the access and the egress to a work site, the High Court doesn't like that. That exceeds what industrial activity should be.

Now, there are many, many banana skins for workers and their unions in successfully implementing industrial action. And that gives employers an opportunity to go to the High Court and seek their intervention. And employers in doing so traditionally have been reasonably successful in obtaining injunctions.

And the consequence of obtaining an injunction is quite serious. For individual employees, it can mean attachment and committal, which of course means possible incarceration. And for trade unions, it means sequestration of their assets. So it's quite significant in the event that they do not have the statutory protection of the Industrial Relations Act.

So how has last year's Supreme Court judgment changed the landscape? So as I was saying Triona, the protection of the Industrial Relations Act has not been easy to come by for trade unions so spoiler alert, the Supreme Court decision refused to grant the injunction to the employer, H.A. O'Neil. So look, just to give some background as to what the dispute was about, it centered around the question of payment for travel time.

And that is the time spent by an employee traveling home to site and from the site to home. Now, a sexual employment order had been introduced in 2018, which had set terms of pay and pension, but it didn't address travel time.

It did contain a standard dispute resolution procedure, which means that it's the procedure that the parties are required to follow in terms of a dispute and it ends in a no strike clause, which means that the parties can't go on strike or more particularly the employees can't go on strike until the dispute procedure has been complied with.

Now, in February 2023, Unite gave notice of industrial action as per the Industrial Relations Act over the issue of travel time. And the industrial action was due to commence some 10 days after the notice was given.

The action involved targeted strikes on a rolling basis. So it was quite, it was was going to have significant consequences for the employer. Now, the employer, H.A. O'Neil, claimed that the no strike clause had been breached, but maintained that the SEO procedures didn't apply.

And we won't get into that, but there's some debate about whether an SEO can contain a disputes procedure. So H.A. O'Neil went off to the High Court in the normal path of looking for an injunction because of the fact that they claimed that the strike clause had been breached.

Now, on the 23rd of March, the High Court granted H.A. O'Neil the interlocutory injunction, but it didn't address the key statutory provision in the Industrial Relations Act of Section 19. Now, Section 19 is a critical section in the Industrial Relations Act in terms of the protections, because it provides it where a secret ballot has been held in accordance with the rules, and the outcome favors a strike or industrial action and the trade union gives the appropriate notice of not less than one week, a court shall not grant an injunction.

Now, that's a critical section of the Act and the union said we have complied with all those provisions, we've complied with all those requirements and therefore, you cannot grant the injunction.

Now, in the past, the High Court, I would say, has been somewhat more conservative on the application of the Industrial Relations Act and there was a requirement for the unions to really dot every i and cross every t. So the Supreme Court was being asked to consider the provisions of the Industrial Relations Act, and more particularly, whether or not those provisions do permit employees and the trade unions to take industrial action and to avoid some sort of legal suit from the employer.

Now, as a side note, prior to the matter coming before the Supreme Court, the SEO was in fact quashed in light of a previous Supreme Court ruling. So it's been quite a fertile area of litigation, just the fact of the SEOs and what they can contain.

However, a leapfrog appeal to the Supreme Court was nonetheless granted due to the importance of the issues involved. Now, the significance of the Supreme Court's judgment was that it represents a shift from the traditional approach to the application of the Act and has firmly established the principle that Section 19 is, on its face, an absolute bar to the grant of an interlocutory injunction.

Now, obviously, the conditions which are contained in Section 19 have to be satisfied by the union. But what the Supreme Court has said is, provided they do satisfy those criteria, they do have the protection of Section 19, which is a significant change, in my view, to what has gone before.

So the Supreme Court seems to have given effect to a provision that had been around since 1990, but that just hadn't been given enough weight or attention over the years?

True. And I think that's absolutely right. I mean, I don't want to, um, denigrate anything the High Court has done today. They've been very sound in their reasoning as well in terms of the decisions that they've made. But in my view, the Supreme Court supplied a, a more liberal interpretation of the provisions of Section 19, which significantly changes the idea of a right to take industrial action without implications, because prior to the Supreme Court judgment, I think employers, were more, would more, open to taking an injunction application because of the case history and the treatment of Section 19.

I think it's also important to say that in the Supreme Court's view, the case law up to the decision had given insufficient weight to the constitutional right of workers to associate and form a trade union.

The court was of the view that this right must be given real meaning, and that means that an entitlement to take part in industrial action. It's clear from the Supreme Court's judgment that the purpose of the 1990 Act is to protect unions and their members.

And I think that the Supreme Court has done that in the decision of H.A. O'Neil in Spades. Yes, to your point, it was noted in one of the judgments there were three concurring judgments delivered by the Supreme Court, that before the 1990 Act, unions facing injunctions to prevent industrial action faced an overwhelming challenge.

When the usual tests for such injunctions were applied, the balance of convenience favoured the employer, and an injunction invariably followed. It seems to me that the objective of Section 19 of the 1990 Act was just not achieved until the Supreme Court judgment.

What is the practical impact of the Supreme Court's judgment being, and are you seeing its effect in practice? So it might be the Supreme Court's judgment represents a significant shift from the historic view of the protections under the Act.

The normal tests which apply for injunctions, quite frankly, aren’t appropriate when it comes to injunction applications in the light of Section 19. I think what the Supreme Court has done has looked at the issues, particularly in regard to the impact and effect of Section 19, which clearly is the right thing to do.

Now, the shift that I think we will see following the Supreme Court judgment is to the benefit of trade unions and workers, and the right clearly to take industrial action. As I've said before, the reasoning and the logic of the Supreme Court is robust and very clear, and perhaps employers have had it their way for too long.

In terms of the practical impact of the judgment, I think it's just too early to tell what the impact will be and whether we'll see an increase in industrial action. So whatever you say about industrial action, particularly when it comes to things like withdrawal of labour, it has the effect of workers not being paid. So it's still a big decision for workers and trade unions to make to take the ultimate sanction of strike activity.

It's also important to acknowledge that we're enjoying a period of relative full employment. We've had improvement in salaries and conditions, and we've had relative industrial peace. So I think the effect and the true effect of the judgment won't become apparent until pressure builds in the labour market and industrial action becomes more commonplace. So I don't think we're there yet.

In terms of advice to employers, having regard to the judgment of the Supreme Court, I do think a more conservative approach will be taken on the potential of obtaining an injunction.

Now, I'm not saying an injunction won't be available and I think each dispute will have to be looked at. But I think where the conduct of the workers exceeds the industrial action that was balloted for or becomes violent or a health and safety issue, there may still be scope to bring an injunction. That said, I think it will be the exception, not the norm. And employers, I think, will be slightly applied to the High Court when faced with industrial action.

Duncan, you've advised on industrial disputes over a number of years. What would you advise an employer staring down the barrel of a dispute?

Look, it's an unfortunate reality of a working life that workers and employers often disagree on fundamental issues at work. The Irish industrial relations system is set up to facilitate resolution of an impasse through a state-sponsored conciliation process. We operate in a voluntary system, which is amazingly working particularly well.

So I'm certainly of the view, if it ain't broke, don't fix it. But in terms of the conciliation process that is available, if it's unsuccessful, the matter can be referred to the Labour Court. And as most people will know, a recommendation can issue if the matter remains unresolved.

I've been recently involved in a number of industrial disputes, and I must say, I think I need to give a shout out to the conciliation service. I think they've done a tremendous job, certainly within my experience of recent time, and the determination and enthusiasm of conciliation officers to broke a deal has been pretty impressive.

Our system, as I said, has stood us all in good stead for many years, and I think it works well. I think a dispute that ends up the subject of a recommendation is ultimately not in the best interests of either party, because you are effectively asking one party or one side to accept a recommendation that was arrived at not through a process of conciliation and agreement.

In direct answer to your question, should an employer be faced with the prospect of industrial action, I think there are a number of points which an employer should take into account. The channels of communication should remain open and active with unions and with workers.

And indeed, if there's a conciliation process underway with the conciliator. Now, that conciliation process is important in terms of trying to come to an agreed resolution. In terms of the communication, you can communicate directly with your employees through the trade unions or a combination of both.

And clearly, the most efficient route will depend on the relationships that you've been able to establish as an employer. I think it's also imperative to follow a disputes procedure should one exist.

Ideally, disputes procedures are agreed to between workers, employers and trade unions and it should be exhausted where possible. I think employers should avoid creating a situation where either party is backed into a corner.

There must be room for either party to see a way out and for a suitable resolution. As I say, backing someone into a corner never works particularly well. Should it be necessary and employers should refer a dispute to the conciliation service at the appropriate time.

As to what that appropriate time is, it's a matter of judgment. In order to avoid industrial action, it may be necessary to refer the matter sooner than anticipated so as to avoid any entrenched positions being formed.

Parties should be prepared to participate in the voluntary process and devote appropriate time and resources to resolve the dispute. Anyone who's been down to the conciliation service is aware that it can take a long time. You can be down there for

hours and there can be a lot of downtime, but it is very worthwhile but only worthwhile if people are prepared to put in the effort.

The final point I would make is that parties might want to consider private mediation to resolve the dispute. This is apart from the conciliation process that the state offers. The advantage of private mediation is that it can be done relatively quickly while still leaving a door open if necessary to engage the conciliation service. So hopefully there's a few pointers that people can take away. That's really good advice, thank you.

Turning now to the other trade union activity, collective bargaining. While the H.A. O'Neil judgments didn't deal centrally with collective bargaining, it does seem that trade union activity has been on the rise, in particular in new sectors like the tech sector.

I'm interested in your views on the direction of travel, especially against the backdrop of the Adequate Minimum Wages Directive. In discussing that Directive, it's important to note that pursuant to a case taken by Denmark, an Advocate General of the CJEU recently gave an opinion in which he said that this Directive should be annulled, on the basis that it is regulating wages directly, which is contrary to the treaty of the functioning of the EU. It remains to be seen whether the CJEU will follow that opinion when it issues its judgement later this year.

But in the meantime, we do have a firm commitment from the government, which has been outlined in their programme, that it will publish an action plan for collective bargaining in 2025 in line with its commitments under the directive.

Yeah, Triona, I'm not convinced that the Adequate Minimum Wages Directive is going to be a significant change to the Irish collective bargaining landscape. It does impose certain obligations on the government.

You've mentioned some, but it obliges the government or the Irish State to promote collective bargaining on wage settings to some extent, it's limited to wage setting at sector and cross industry level.

So it's quite narrow in its focus. The Irish government also has to encourage constructive, meaningful and informed negotiations on wages on an equal footing where both parties have access to appropriate information.

Again, we don't know what appropriate information is going to look like. So that's a fertile ground for lawyers I'm sure. And finally, it has to take measures as appropriate to protect the exercise of the right to collective bargaining.

I think those words as appropriate are notable in that there is such a degree of vagueness about this Directive that you've indicated that the program for government talks about publishing an action plan to achieve this. And this has to be done in 2025.

Now, the government has promised to do that. But this can be done either by law or consulting the social partners or by agreement. So again, noticeably vague. Now, the action plan will set out a clear timeline and concrete measures to progressively increase the rate of collective bargaining coverage.

I think you only need to look at the Minimum Wages Directive also in the context of the voluntary system that we operate in. So this is almost an anathema to the voluntary system where people are encouraged to engage in collective bargaining, but not forced to engage in collective bargaining.

So in terms of what I think this will mean for Ireland, probably not much is the short answer. The government have said that Ireland is not required to pass any legislation to transpose the Directive. And they've had advice from the Attorney General to that effect.

And if one looks at the Directive, that's probably right. Now, I bet probably unsurprisingly agree with that approach. There is no need for primary legislation, but it do have said that it is bizarre and incredible that the Directive does not require primary transposing legislation in Ireland. So I think there is a gulf between the social partners as to what the directive means and it will be interesting to see what Denmark do or that case before the CJEU, what the effect of that's going to be.

But I cannot see that there's going to be dramatic changes to collective bargaining in Ireland in the near future. Thanks Duncan. It certainly will be interesting to see what transpires in terms of the government's action plan and the CJEU's decision.

That concludes our podcast for today. As always we continue to provide updates via our insights which are published on our website and of course clients of ALG can access KnowledgePlus for further insights and access to our online recordings and presentations.

I'd like to thank you Duncan and thank our audience for joining us. Thank you Triona.