IRISH CONGRESS TRADE UNIONS

INTERIM REPORT

Regarding the Implementation of Recommendation
No 107.46 received by Ireland

Universal Periodic Review

May 2014

Irish Congress of Trade Unions
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The Irish Congress Trade Unions (ICTU) welcomes the opportunity to contribute to the review of progress made on the implementation of the recommendations adopted at the United Nations Human Rights Council, Universal Periodic review in respect of IRELAND.

In this report, the ICTU is commenting specifically on Recommendation (No.107.46) ‘Enact legislation to make the right to collective bargaining through trade unions in the line with international commitments’.

The ICTU analysis is that while slow, significant progress has been made towards the achievement of the Recommendation. Effective consultations have taken place between trade unions (employers groups) and Government. These have resulted in the Government adopting a framework for amending legislation to be brought forward during 2014. However the final determination on progress and compliance with the Recommendation can only be made when the legislation is brought forward, enacted and shown in practice to properly protect workers and promote their right to effective collective bargaining.

The ICTU will keep the UN informed of progress.

BACKGROUND

In March 2011, the Irish Congress Trade Unions prepared a Shadow Report (under the UPR Process) in respect of the failure of Ireland to properly respect the right to collective bargaining (copy attached). The two key points were that Ireland was failing to secure proper observance of:

i. **The right to join trade unions and the right to collective bargaining** : *Everyone has the right to form and to join trade unions for the protection of his interests* - (article 23.4); and

ii. **The right to effective remedies** – *Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law* (article 8).

The Government of Norway supported the concerns raised by the ICTU and took these up during the Universal Periodic Review process. Consequently a Recommendation No 107.46 was adopted namely that the Government would ‘Enact legislation to make the right to collective bargaining through trade unions in the line with international commitments’.

In accepting the Recommendation the then Minister for Justice, Mr Alan Shatter, stated

‘While Article 40 of the Irish Constitution guarantees the right of citizens to form associations and unions, it has been established in a number of legal cases that the constitutional guarantee of the freedom of association does not guarantee workers the right to have their union recognised for the purpose of collective bargaining’.
There is a commitment in the Programme for Government to ensure that Irish law on employees’ right to engage in collective bargaining is consistent with recent judgments of the European Court of Human Rights. This process will require consultation with stakeholders, including employer and worker representatives, and a review of the experience of the operation of the existing legislative framework and the consequences of recent litigation. The review will be undertaken during 2012.


SIGNIFICANT PROGRESS MADE BUT NECESSARY LEGISLATION NOT YET IN PLACE

The Irish Government has been involved in consultations with the Irish Congress Trade Unions and employer groups (IBEC and the American Chamber of Commerce) on a framework for amending the legislation to bring law and practice in line with human rights commitments.

These consultations have resulted in a Cabinet decision on the 13th May 2014 to amend the legislation governing the right to collective bargaining at the level of the enterprise. A framework for the legislation was announced by the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton, TD. A copy of the announcement is attached.

Trade unions have responded favourably to the announcement, with the ICTU welcoming this development as representing an important step towards the delivery on a political commitment given and key issues and concerns of workers and their trade unions.

Caution has to be expressed as the legislation has not yet been published and it is only when this is available that a detailed analysis of the proposals can be made on the extent to which Ireland will be in conformity with human rights obligations, specifically the right to collective bargaining.

It is hoped that the legislation will be available in June/July 2014.

The ICTU will keep the UPR updated on progress.

Ends
Esther Lynch
Legislation and Legal Affairs Officer
Irish Congress Trade Unions
May 2014
Government agrees to reform the Industrial Relations (Amendment) Act 2001 to deliver on Programme for Government commitment

13th May, 2014

The Minister for Jobs, Enterprise, and Innovation, Richard Bruton TD today (Tuesday) secured Cabinet approval to reform the Industrial Relations (Amendment) Act 2001 to legislate for an improved and modernised industrial relations framework that will provide more clarity for employers and more effectiveness for workers.

This reform continues Minister Bruton’s wider modernisation agenda in the enterprise area which has seen a significant overhaul of policy, agencies and legislation over the last three years.

When enacted, this legislation will mark the fulfilment of an important commitment in the Programme for Government. It will provide a clear and balanced mechanism by which the fairness of the employment conditions of workers in their totality can be assessed where collective bargaining does not take place. It will provide clarity and certainty for employers in managing their workplaces over the years ahead.

The Minister acknowledged the contributions of key actors from both sides of industry to date who, he said, have come to these discussions with well-articulated positions of what they would like to see in terms of an outcome. The Minister will continue to consult with stakeholders in drafting the Heads of Bill.

The proposals are derived from a lengthy consultation process involving extensive engagement with stakeholders with a view to arriving at broadly acceptable proposals that will operate effectively in practice.

The main provisions include:

- A definition of what constitutes “collective bargaining”;
- Provisions to help the Labour Court identify if internal bargaining bodies are genuinely independent of their employer;
- Bringing clarity to the requirements to be met by a Trade Union advancing a claim under the Act;
- Setting out policies and principles for the Labour Court to follow when assessing those workers' terms and conditions, including the sustainability of the employers business in the long-term;
- New provisions to ensure cases dealt with are ones where the numbers of workers are not insignificant;
- Provisions to ensure remuneration, terms and conditions are looked at in their totality;
• Provisions to limit the frequency of reassessment of the same issues;

• An explicit prohibition on the use by employers of inducements (financial or otherwise) designed specifically to have staff forego collective representation by a trade union;

• Enhanced protection for workers who may feel that they are being victimised for exercising their rights in this regard by way of interim relief in the case of dismissal [See notes to editors for further detail on specific measures].

Minister Bruton said: “In developing these proposals, I have been keen to respect the positions of both sides of industry. They will retain our voluntary system of industrial relations, but also ensure that workers have confidence that where there is no collective bargaining, they have an effective system that ensures they can air problems about remuneration, terms and conditions and have these determined based on those in similar companies and not be victimised for doing so”.

The Minister concluded by saying that he is confident that the legislation when enacted will be framed in such a way as to fit our constitutional, social and economic traditions, our international obligations, and to ensure continued success in attracting investment into our economy and support Irish companies to grow.

Minister of State for Research and Innovation, Seán Sherlock TD, said: “In agreeing this reform of our industrial relations legislation this Government has delivered on its commitment to people at work once again. I am confident that this legislation will not only restore the rights contained in the original 2001/2004 Industrial Relations Acts, but will be an improvement on that legislation and will ensure that all workers who do not have a collective voice in their company will have a transparent, fair and effective means of having their terms and conditions assessed. I want to pay tribute to all those who participated in a spirit of cooperation in reaching this point in the process, from both the employer and the union side”.

Ends.

For more information contact: Department of Jobs, Enterprise and Innovation Press Office,
Ph. 631 2200 or press.office@djei.ie

Notes for Editors

Programme for Government, Ryanair and ILO

The proposals for legislation are in fulfilment of the Programme for Government Commitment to “reform the current law on employees’ right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2001), so as to ensure compliance by the State with recent judgments of the European Court of Human Rights”. In addition, the ILO, in 2012 issued its report in response to a complaint referred to it by ICTU and IMPACT arising from the 2007 Ryanair Supreme Court judgment. As part of the Government’s response to the ILO Report, it indicated that these matters would be addressed in the context of the Programme for Government commitment.
Overview

The proposals respect Ireland’s voluntary IR system but ensure that where an employer chooses not to engage in collective bargaining either with a trade union or an internal ‘excepted body’ the 2001 Act will be remediated to ensure there is an effective means for a union, on behalf of members in that employment, to have disputed remuneration, terms and conditions assessed against relevant comparators and determined by the Labour Court if necessary.

It will also ensure that if an employer chooses to collectively bargain with an internal ‘excepted body’, as opposed to a union, that body must pass tests as regards its independence.

Provisions are included to ensure the Act is used appropriately. There are provisions to ensure cases dealt with are ones where the numbers of workers are not insignificant; provisions to ensure elements of remuneration, terms and conditions are not challenged without regard for the totality of remuneration, terms and conditions; provisions to manage the frequency of reassessment of the same issues.

Additional protection by way of interim relief is proposed where a union member, identified in the course of use of the process under the Act, is to be dismissed. A number of further related matters are to be dealt with such as clarifying inducement to forego collective bargaining rights is prohibited in accordance with the ECHR Wilson case. Some time frames will be extended under the Code of Practice on Voluntary Dispute Resolution to enhance the opportunity to resolve the matters at issue voluntarily.

Specific Provisions

Definition of Collective Bargaining

In the Ryanair case, the Supreme Court found that the Labour Court cannot conclude that a trade dispute is in existence without first establishing that collective bargaining is in place and that internal machinery (if any) for resolving the perceived problem has been exhausted. In looking at how the case had been progressed, the Supreme Court found that the Labour Court had erred in law in its construction of the relevant provisions of the 2001 Act and the hearing of the case had been procedurally flawed.

As there was no definition of collective bargaining in the Act, as part of the decision, the Supreme Court found that the Labour Court was in error in utilising the “industrial relations” concept of collective bargaining and that instead, an ordinary, dictionary definition should apply. To address this lacuna the following definition will apply for the purposes of the Industrial Relations Act 2001 (as amended).

For the purposes of this Act, collective bargaining comprises voluntary engagements or negotiations between any employer or employers’ organisation on the one hand and a trade union of workers or excepted body on the other, with the object of reaching agreement regarding working conditions or terms of employment or non-employment of workers.
Excepted Body

Under industrial relations legislation it is not lawful for a body to bargain collectively unless it has a negotiation license (e.g. a trade union of employers or employees). The Trade Union Act 1941, in introducing “excepted bodies”, provided for a situation where both employer and employees in an individual firm wanted to negotiate terms and conditions in a situation where the employer or employees would not be acting illegally for not having a negotiation license under that Act.

It is not proposed to amend the definition of excepted body other than, for the purposes of the 2001 Act (as amended) to reflect the concept of voluntary negotiations or engagements as contained in the collective bargaining definition above.

However, the legislation will address the status of the “excepted body” insofar as ensuring that it is genuinely free of employer influence in terms of negotiating and agreeing on wages or other conditions of employment. The following legislative provision will address this:

In determining if the body is an excepted body within the meaning of the 2001/2004 Acts the (Labour) Court shall have regard to the extent to which the body is independent and not under the domination and control of the employer or trade union of employers with which it engages or negotiates, in terms of its establishment, functioning and administration. In this regard, the Court shall take into account;

a. The manner of election of employees,

b. The frequency of elections of employees,

c. Any financing or resourcing of the body beyond de minimus logistical support, and

d. The length of time the body has been in existence and any prior collective bargaining between the employer and the body.

Remove Right of Access for Excepted Bodies

Given that excepted bodies, by their nature, are involved in collective bargaining as defined above, they will no longer have a right of access under the Act. This in effect means that it will be a matter for a trade union alone to initiate the processes under the legislation.

Establishing Trade Dispute and Access to Labour Court

While restoring and improving the operation of the Acts, it is recognised that the processes under this legislation are not appropriate to disputes involving very small numbers of workers. For this reason the legislation will ensure that the Court shall decline to conduct an investigation of a trade dispute under the Act where it is satisfied that, in the context of the dispute, the number of workers party to the trade dispute is insignificant.
To avoid a situation arising where, in the context of the totality of terms and conditions having been recently assessed by the Labour Court it is proposed that, other than in exceptional circumstances, the Labour Court shall not admit an application by a group, grade, or category of worker to which the trade disputes applies where the Court has made a recommendation or determination in relation to the same group, grade or category of worker in respect of the same employer in the previous 18 months.

**Initiating Process**

For the purpose of initiating a process of establishing the position when referring the matter to the Labour Court the following process will apply:

A statement made under the Statutory Declarations Act 1938 by the General Secretary or equivalent of the trade(s) unions concerned, setting out the number of its members and period of membership in the group, grade or category to which the trade dispute refers and who are party to the trade dispute, shall be admissible in evidence without further proof.

This brings clarity to the process and obviates the need for protracted procedures early in the process and removes the need for workers to be identified at an early stage.

**Proof that Collective Bargaining with an Excepted Body is Taking Place**

In the course of the consultations there was all party agreement that bringing further clarity to the above process could help avoid lengthy and potentially acrimonious hearings at the Labour Court. The following provision will assist in this regard:

Where an employer asserts to the Labour Court that it is the practice of the employer to engage in collective bargaining with an excepted body in respect of the grade, group or category of workers concerned, it is a matter for the employer to satisfy the Labour Court that this is the case.

**Labour Court: Policies and Principles in Context of Establishing Terms and Conditions**

Related decisions of the High and Supreme Courts indicated that further guidance to the Court was needed by way of primary legislation in terms of what the Court should take into account when looking at terms and conditions of the workers party to the trade dispute. Accordingly, the legislation will specify that:

When examining the terms and conditions of any employer the Labour Court will take into account:

- The totality of remuneration and of terms and conditions of employment, and

- Comparators (both internal and external), where available, which will comprise both unionised and non-unionised employers.

In addition, in making any recommendation or determination under this Act, the Labour Court shall have regard to the sustainability of the employer’s business in the long-term.
Inducements

Having regard to recent judgments of the European Court of Human Rights, the legislation will remove any doubt as to Ireland’s full compliance with the *Wilson* judgment as regards inducement of workers to relinquish trade union representation.

Accordingly, the Code of Practice on Victimisation (Declaration) Order 2004 (S.I. No. 139 of 2004) will be amended to explicitly prohibit such inducements.

Victimisation of Workers in Context of 2001 Act (as amended)

The legislation will enhance protection for victimisation of individuals who are victimised as a result of invoking through the trade union, or acting as witness, comparator for the provisions of the 2001/2004 acts will be incorporated in the legislative changes proposed.

Employment Termination

This protection will be provided by way of allowing interim relief to be applied for in the Circuit Court in circumstances where a dismissal is being challenged on the grounds of unfairness arising from an individual believing that he/she is being victimised as a result of invoking through the trade union, or acting as witness, comparator for the provisions of the 2001/2004 Acts.

Where such relief is granted the case itself will be dealt with by the Adjudicator arm of the Workplace Relations Commission that is to be established in the near future.

Victimisation” in Context of Ongoing Employment Relationship

In many cases “victimisation” does not result in employment termination; it may witness reduced access to particular work, training opportunities, shift work, overtime etc.

Remediating the ongoing and/or proven victimisation where the employment relationship has not been terminated will be dealt with in the context of enhanced and more robust enforcement of the current sections 9, 10 and 13 of the IR Act 2004.
Universal Periodic Review (UPR)
Stakeholder Submission
IRISH CONGRESS OF TRADE UNIONS

Submission to the United Nations
Twelfth Session of the UPR Working Group
Human Rights Council

6th October 2011
Submitted on 21st March 2011

Submission sent to uprsubmissions@ohchr.org.
Executive Summary

2. The Irish Congress of Trade Unions (ICTU) is the representative voice of trade unions in Ireland. There are 55 unions affiliated to Congress, with a total membership of 797,289 of whom 579,578 are in the Republic of Ireland and 217,711 in Northern Ireland (www.ictu.ie). In addition there are 33 Trades Councils, representing groups of unions at local/regional level, affiliated to Congress covering both the Republic and Northern Ireland. In addition, the Congress Centres Network operates 25 local outreach centres, offering advisory and other services at community level.

3. This Stakeholder Report is made by the ICTU in respect of the Republic of Ireland. The key points the ICTU wishes to focus on are that Ireland is failing to secure proper observance of:

   i. The right to join trade unions and the right to collective bargaining - Everyone has the right to form and to join trade unions for the protection of his interests - (article 23.4); and

   ii. The right to effective remedies – Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law (article 8).

Conclusions

4. Ireland is a champion of human rights abroad yet fails to adequately promote and protect human rights at home. Trade union rights are fundamental human rights but the trade union-human rights of all ‘workers’ is not properly respected. On foot of a problematic interpretation of Freedom of Association by the Irish Supreme Court in Ryanair, anti trade union activity, once the preserve of a few anti-union companies is now becoming widespread, jeopardising the basic human right of workers to organise in trade unions for the protection of their interests.

5. Domestic legislation is needed to protect the trade union-human rights of workers in a manner consistent with (i) the Universal Declaration of Human Rights, (ii) recent rulings of the European Court of Human Rights in Wilson, Demirci and Enerjii (iii) EU Charter of Fundamental Rights, (iv) obligations under International Labour Organisation Conventions to which Ireland is a party (v) the International Covenant on Economic, Social and Cultural Rights, (vi) the International Covenant on Civil and Political Rights and (vii) Council of Europe’s Social Charter and (viii) the EU Charter of Fundamental Rights.

6. The ICTU welcomes the recognition of the new coalition Government that Ireland needs take action to properly protect trade union human rights. In their programme for Towards Recovery they pledge ‘We will reform the current law on employees’ right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2001), so as to ensure compliance by the State with recent judgments of the European Court of Human Rights.’
7. Recommendation: Enact legislation to underpin the right of all workers to collective bargaining through their trade unions in line with the State’ international commitment. This requires a legal framework that:

- a. Ensures that the right of all ‘workers’ to Freedom of Association, the Right to Organise and Collective Bargaining is guaranteed and properly respected;

- b. Prohibits any adverse treatment, prejudicial act and any less favourable treatment arising from the exercise of these human/trade union rights;

- c. Provides for enhanced protection, that is available rapidly, and in a manner that guarantees to prevent any adverse treatment from occurring, by providing for injunctions along with dissuasive sanctions and improved redress;

- d. Safeguards against anti-union activity and prohibit ‘interference’ which includes the use of ‘inducements’ or other measures, policies, acts calculated to induce workers not to join or to give up their trade union membership or to not exercise their trade union rights including the right to collective bargaining;

- e. Provides a definition for ‘collective bargaining’, ‘collective agreement’ and ‘collective action’ in line with ECtHR and ILO standards;

- f. Sets out the legal obligations on parties to participate in collective bargaining and the facilities and arrangements to be put in place to ensure ‘good faith’ in the collective bargaining process;

- g. Establishes the parties to collective bargaining, in line with ILO definitions to ensure the rights of freelancers and safeguard against the use of non-union representatives to undermine the position of trade unions;

- h. Sets out the institutional machinery to facilitate negations and the settlement of disputes;

- i. Clarifies the legal effect of collective bargaining agreements and the extension of collective agreements;

- j. Re-establishes fair employment rules.

Previous unfavourable comments on Irelands’ Human Rights Record in respect of trade union rights

8. Despite being a party to six core human rights treaties and having ratified all of the Core ILO Conventions very few of the’ right to organise and collective bargaining elements’ of these international instruments have been incorporated in Irish law. This makes them effectively unenforceable in the Irish courts. The test of whether Ireland’s legal system, institutions or organizations live up to their human rights obligations is not just simply whether they acknowledge the existence of human rights but also the extent to which they have in place laws and sanctions to effectively protect those human rights.
9. The Universal Declaration on Human Rights requires governments to take certain protective actions to ensure that all workers are free, without fear of reprisal, to exercise their human-trade union rights. Proper respect for human-trade union rights gives rise to a corresponding duty on employers to recognise and bargain collectively with the workers in their trade union but Ireland is failing in this regard.

10. Ireland has already been subject of unfavourable comment on its human rights record in respect of trade union rights. In 2002, the Committee on Economic, Social and Cultural Rights the Committee in their concluding observations found that Ireland needed to in place a legal framework to ‘adequately protect in law and practice trade unions’ rights to conduct collective bargaining’ (para 29) (Ireland. 05/06/2002).

11. Ireland does not proactively set out to prepare legislation to positively implement and promote human rights standards. Regulatory Impact Analysis (RIA), which civil servants must carry out in advance of drafting legislation does not include a requirement to have regard for human rights and our experience is that the Attorney General Office is more likely to be consulted on areas of possible incompatibility as a reason to halt development on laws to protect trade union rights rather than seeking advice on how to promote trade union and other human rights.

12. It is an issue of serious concern to the trade union movement in Ireland that human rights are considered to be subject to economic concerns. As far back as 2003 the (then) Minister for Justice, Mr Michael McDowell, TD, claimed that human rights adversely affect the “entrepreneurial spirit” because they dictate standards with which to comply. More recently (2010) IBEC the national representative body for business employers set out strong opposition to legal underpinning for a right to collective bargaining saying that any move in that direction would act as a major disincentive to foreign direct investment.

13. The framework for promotion and protection of trade union rights on the ground is absent and weak. Recommendations from the various Treaty Monitoring Bodies are rarely implemented and there are no institutional mechanisms for follow-up. Concluding Observations are not widely disseminated nor are they regarded as binding by Government Ministers.

Every human rights treaty recognises the right to organise in trade unions as a fundamental human right.

14. Article 23.4 of the Universal Declaration of Human Rights ‘Everyone has the right to form and to join trade unions for the protection of his interests’

15. The International Covenant on Civil and Political Rights elaborates further the civil and political rights and freedoms listed in the Universal Declaration of Human Rights Art.22 guarantees ‘Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.’ Art.22.3 explicitly refers to the International Labour Organisation Conventions 87 and 98 of 1948-1950 relating to the right to freedom of association, the right to organise and the right to participate in collective bargaining.
16. The right to collective bargaining has been held to be an essential feature of the right to freedom of association. The European Court of Human Rights has now said that freedom of association (Article 11 of ECHR) must be read to mean that it includes the right of trade unions to bargain collectively and the right of trade unions and workers to take collective action (i.e., to strike). In so holding the ECtHR held that the substance of these rights must be consistent with the minimum standards laid down by the ILO and the Council of Europe in its Social Charter of 1961. Article 11 of the European Convention on Human Rights specifies trade union membership as an important political right essential to democracy: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”

17. The right to organise and to bargain collectively with employers is enshrined under membership (Parts I and II) of the International Labour Organisation. Ireland has ratified the Core Conventions No 87 concerning Freedom of Association and Protection of the Right to Organise (1948) and No 98 concerning the Application of the Principles of the Right to Organise and Collective Bargaining Convention 1949;

18. Articles 5 and 6 of the Revised European Social Charter protect the right to organise and join trade unions. Specifically:

**Article 5 - The right to organise**

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations....

**Article 6 - The right to bargain collectively**

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

- to promote joint consultation between workers and employers;
- to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
- to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise;
- the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.
19. The right to strike is also recognised in the International Covenant on Economic, Social and Cultural Rights, (ICESCR) ‘Everyone has the right to form and join trade unions, the right to strike.’ The explicit right to strike is also recognized in (ILO Conventions 87 and 98, and the European Social Charter 1961) and the EU Charter of Fundamental Rights.

20. Following the entry into force of the Lisbon Treaty (TFEU) 2009 the EU Charter of Fundamental Rights has the same legal value as the European Union treaties. **Article 12** ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests’ and **Article 28 Right of collective bargaining and action** Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

**Problems arising on foot of problematic interpretation of the meaning of Freedom of Association by the Irish Supreme Court**

21. The Irish Constitution was adopted prior to the founding of the UN and does not reflect the full panoply of universal human rights standards. Bunreacht na hÉireann, Ireland’s Constitution is silent on the right to join unions and other trade union related human rights. The Constitution in Article 40, guarantees the right of citizens to form unions and associations subject to certain limitations, specifically:

Article 40 ‘6. 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality…

(iii) The right of the citizens to form associations and unions.

22. The Irish Supreme Court has narrowly interpreted this provision and has so far only held that workers have the right not to join a trade union (Meskell v CIE) [2] . This interpretation of the right not to join was taken a step further by the Supreme Court in Ryanair. This case began in December 2004 when Ryanair began the conversion of its Dublin fleet. A number of the pilots sought to have their union negotiate with Ryanair in relation to the resulting changes to their terms and conditions. Ryanair refused to negotiate with the workers’ trade union. The company argued that it did not engage with trade unions and this recognized as a ‘right’ and was upheld by the Supreme Court.

23. This has caused confusion about proper respect for trade union rights certainly in relation to the right to organise and collective bargaining in Ireland. Indeed, the recent trend reflected in High Court and Supreme Court decisions shows that many employers are to a large extent seeking to ignore trade unions and are having the right to do so recognised at least partially by Judicial determination. It is worth recalling here that the responsibilities to respect the rights to collective bargaining fall onto the Judiciary as an arm of the State.

24. The decision of the Supreme Court in Ryanair has had a serious and enduring impact on the proper observance of freedom of association, the right to organise and the right to collective bargaining in Ireland. There are three aspects of the Supreme Court decisions which strike at the heart of the Universal Declaration of Human Rights these are as follows:
i. The Supreme Court upheld the operation of the Ryanair Employee Representative Committee, which operates under the control and domination of the employer to exclude a bona fide trade union, and aimed at preventing a trade dispute being processed under the Industrial Relations Act 2001; this is a violation of rights under the UDHR and the core ILO Conventions to which Ireland is a party;

ii. The threat made to the pilots that if their trade union IALPA/IMPACT was recognised within a period of 5 years, the pilots in question would then be required to pay training costs incurred by the company, this being claimed elsewhere to be €15,000 per person. This is due to the absence of laws to prevent interference, inducements or victimization of workers exercising their rights under the UDHR and core ILO Conventions;

iii. The implicit acknowledgement in the Industrial Relations Act 2001 (as amended) and the express acknowledgment by in the following passage from the Supreme Court that a company is perfectly entitled to operate union free. According to Geoghegan J in the Supreme Court:

‘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 an 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 Industrial Relations Acts, 2001 and 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’.

25. The issues identified above raise serious questions about the compatibility of Ireland’s laws with the UDHR and the other Treaties and Conventions mentioned above. Case law on foot of this decision has worsened the situation.

26. The Communications Workers Union (CWU), an affiliate of the ICTU reports that the Global Agreement with ‘a major telecommunications supplier’ Telefonica O2 Ireland, (this Agreement includes clauses guaranteeing to respect freedom of association) will not apply in Ireland.
27. Likewise MANDATE trade union an affiliate of the ICTU representing retail workers report that IKEA a major international furniture retailer are refusing to recognise trade unions in Ireland. The rational for this is that the non-observance of trade union rights is acceptable as it is compliant with Irish law. Even though IKEA recognises its sister union USDAW, 100 miles away in Belfast as it is legally required to do under UK legislation.

28. The right to collective bargaining comprehends more than mere negotiation or consultation on individual employment related issues. In the human rights context in which the term is commonly used it connotes a process by which employers or their representatives negotiate with representatives of a group of workers for the purpose of concluding a collective agreement for the protection of their interests. The process is characterised by the involvement of a trade union representing workers and an essential characteristic of collective bargaining, properly so called is that it is conducted between parties of equal standing who are independent in the sense that one is not controlled by the other.

29. The TEEU an affiliate of the ICTU complained to the Labour Court about an inherent and manifest inequality of negotiating capacity between the employee and management representatives (Bell Security vs TEEU). Professional H.R. specialists and senior managers represented the Company. Electricians who had no training or skills in negotiation or bargaining represented the employees having been refused the right to be represented by their trade union the TEEU. The Labour Court found that on the evidence the practice was ‘collective bargaining 'for the purpose of the Act.

30. Mr Kevin Duffy Chairman of the Labour Court, restricted by the Supreme Court ruling found “If the Court were considering the factual matrix of this case in an industrial relations context it might take a different view. However it must apply the law as it finds it and following the decision in Ryanair there can be no doubt as to the correct legal approach to the questions arising in this case. ‘Accordingly, the Court must hold that it is the practice of the Company to engage in collective bargaining negotiations in respect of the grade group or category who are party to the dispute. In consequence the Court has no jurisdiction to investigate the dispute.

31. Increasingly companies in an attempt to ignore trade union rights and undermine the principles of collective bargaining create an organisation under their domination and control to 'represent' the interests' of workers.

**Insufficient and ineffective protection from reprisals, victimisation and other prejudicial acts**

32. No person should be prejudiced in his or her employment by reason of practicing their human rights. A fundamental principle of freedom of association is that workers enjoy adequate protection against all acts of anti-union discrimination in respect of their employment, such as dismissal, demotion, transfer or other prejudicial measures. The guarantee of such protection in the case of trade union workplace representatives is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations shall have the right to elect their representatives in full freedom.
33. In Ireland there is no legal protection from discrimination, demotion, transfers and other less favourable treatment of workers on grounds of their membership or trade union activities and this violates the principles of freedom of association and the explicit right to unionise recognised in Article 23 of the UDHR and case law of the ILO (Case No. 1510, para. 94.)

34. There is no prohibition on the practice of 'blacklisting' in Ireland. The ILO has held that 'All practices involving the "blacklisting" of trade union officials constitute a serious threat to the free exercise of trade union rights and governments should take stringent measures to combat such practices. (See the Digest of 1985, para. 564; and 295th Report, Case No. 1732, para. 357.)

35. There is no prohibition on the use of inducements and interference by employers contrary to the ILO Conventions 87 and 98 and the ECtHR in Wilson v. Ireland. Where the ECtHR held that the action of Associated Newspapers Limited in offering an inducement to its employees - a 4.5% pay increase for journalists who signed and accepted de-recognition of the union amounted to a violation of Article 11 ECHR, regarding both the applicant unions and the individual applicants.

36. Only those workers who have been dismissed have some protection under the Unfair Dismissal Acts 1977-2007. A dismissal is considered to be automatically unfair if the employee is dismissed for membership or proposed membership of a trade union or engaging in trade union activities, whether within permitted times during work or outside of working hours. But with the growth in precarious and third party agency contracts this leave large parts of the workforce nervous about joining a union. These types of temporary, one step removed contracts, potentially denies them basic employment right that would protect them from unfair dismissal that might arise.

37. There are also unacceptable delays in proceedings contrary to Article 8 UDHR, delays of 2 years are common and on appeal can take up to four years. The most common remedy is compensation - up to a maximum of two years lost remuneration – but compensation is not acting as a dissuasive sanction as the award will be on the basis of earnings which have actually been lost during the period spent attempting to secure alternative employment. There is a duty at law to mitigate or reduce the loss of earnings claim by obtaining or endeavouring to obtain alternative employment meaning that the compensation can be very limited. Given that job loss in Ireland can mean ruin for families the remedies need to be more immediate.

38. Ireland does not recognise a right to strike and there is no legal entitlement to strike. Instead Ireland has a system of ‘immunities’ that apply in certain circumstances when the collective action is in furtherance of a ‘trade dispute’. Increasingly employers are turning to the courts to seek injunctions to halt the strike action. This gives power to employers to disrupt, curtail, delay and halt strikes. There are no restrictions on the use of alternative or agency labour during a strike. Contrary to the right to strike as enshrined in Article 28 EU Charter and the basic principles of the ILO (ILO.1996d, paras. 473-475)

**Ban on union activity for freelance actors, musicians and journalists**

39. The Competition Authority (an organ of the Irish State) has made unlawful the collective agreement made between SIPTU/EQUITY, a trade union of workers and the IAPI an association of employers. The agreement applied to all workers within the particular categories (voice over actors). The (unlawful) agreement deals with matters
applicable to employees, such as, hourly, daily and half daily rates of pay (fees) including the payment of overtime along with the length and frequency of the breaks to be provided.

40. This prohibition represents a violation of the rights set out in the UDHR and as explicitly set out in the ILO Convention on Freedom of Association and Protection of the Right to Organise No. 87. This Convention recognises the right of all workers to form and join organisations of their own choosing, without prior authorisation, and it lays down a series of guarantees for the free functioning of organisations without any interference by public authorities. Article 2 of the Convention provides that the right to organise is to be granted to “all workers without distinction whatsoever”. Echoing the UDHR approach of rights applying everywhere, to everyone and all of the time.

41. The decision by the Competition Authority in 2004 and still in force in 2011 and has effectively restored the Combination Acts that outlawed trade union activity in Britain and Ireland over 100 years ago as far as actors, musicians, film technicians and freelance journalists and other self-employed workers are concerned.

42. Following on from this ruling by the Competition Authority, suspicion was thrown on other agreements concluded by ICTU affiliates including by the NUJ, who represent self-employed freelance journalists were undermined, exposing atypical workers in vulnerable sectors to exploitation.

Restrictions on Freedom of Association placed on Police

43. There is no legal instrument at international or European level that requires Member States to prohibit members of the police force from belonging to trade unions or from associating with national confederations such as the ICTU.

44. Ireland has freely ratified a number of International and European Treaties and Conventions that carry a strong presumption against interference by governments; some regulation and restriction on police trade unions is permissible, but it cannot be such that it completely denies police officers their trade union rights.

45. Ireland is a member of the Council of Europe, and as such has ratified the (Revised) European Social Charter (ESC). Article 5 ESC only allows a restriction of trade union freedom for members of the armed forces, (i.e. the army not the police). Further the ECrtHR has found that any restrictions must be "necessary" and 'proportionate' to the aim pursued by their imposition.

46. It is difficult to see what aim is being pursued by prohibiting the AGSI from associating with ICTU and its constituent trade unions. The Minister for Justice has not provided reasons to justify the ‘necessity’ of the restrictions on collective bargaining in Section 18 of an Garda Siochana Act 2005. Further, it is far from certain that Ireland will be able to justify the prohibitions on the AGSI and its members are proportionate, justified and necessary. At EU level, EUROCOP (the representative body for police in Europe) is a member of the ETUC (the representative body for trade unions in Europe). The AGSI is a member of EUROCOP and the ICTU is a member of the ETUC further demonstrating the arbitrary nature of the prohibition on the AGSI affiliating to the ICTU.
47. The AGSI claim they are suffering ‘unnecessary’ ‘disproportionate’ and ‘unjustified’ restrictions on their fundamental trade union rights to freedom of association and collective bargaining.

Conclusion

48. Ireland is a champion of human rights abroad yet it is failing to adequately promote and protect human rights at home. Trade union rights are fundamental human rights but the trade union-human rights of all ‘workers’ are not properly respected. Following form a problematic interpretation of the Supreme Court in Ryanair, anti-trade union activity, once the preserve of a few anti-union companies is now becoming widespread, jeopardising the basic human right of workers to organise in trade unions for the protection of their interests.

49. Domestic legislation is needed to protect the trade union-human rights of workers in a manner consistent with (i) the Universal Declaration of Human Rights, (ii) recent rulings of the European Court of Human Rights in Wilson, Demir and Enerjii (iii) EU Charter of Fundamental Rights, (iv) obligations under International Labour Organisation Conventions to which Ireland is a party (v) the International Covenant on Economic, Social and Cultural Rights, (vi) the International Covenant on Civil and Political Rights and (vii) Council of Europe’s Social Charter and (viii) the EU Charter of Fundamental Rights.

Recommendation: Enact legislation to underpin the right of all workers to collective bargaining through their trade unions in line with the State’ international commitment.

Appendix 1 for details of affiliated trade unions.

Demir and Baykara v Turkey, Application No 34503/97, 12 November 2008,

Wilson, National Union of Journalists and Others v. United Kingdom [2002] ECHR 552 (applications nos. 30668/96, 30671/96 and 30678/96)

Demir and Baykara v Turkey, Application No 34503/97, 12 November 2008,