Stratis CONSULTING

Leading People Strategies

# The Journey Towards a 'World Class' Workplace Relations System – Where Are We?

**Stratis Consulting 'White Paper – 2020 Vision' Assessment**

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# Introduction

In planning for the **Stratis Employment Relations Summit - '2020 VISION' on 'Leading Employment Relations in a full Employment Economy**', on 28th November 2019, we considered it timely to consider the progress made in the journey towards a 'World Class' workplace relations system and to assess where are we now?

With effect from 1 October 2015, the Workplace Relations Act 2015 introduced widescale reforms to the long-established employment rights and industrial relations dispute resolution procedures. This established the Workplace Relations Commission (WRC) as the body of first instance and confirmed the Labour Court as having the sole appellate jurisdiction with a further appeal on a point of law only to the High Court.

This white paper considers several key issues of practice and the implementation of those reforms for the operation of the Workplace Relations Commission and the Labour Court. We have also set these issues in their wider context and in what should be a shared objective between stakeholders to support high quality employment. Our workplace relations system must operate successfully for all stakeholders and given the emergence of diverse engagement models.

We believe that in debating the issues raised in the paper, it will along with the views of others contribute to a wider and deeper understanding of:

1. Those changes which have had the most beneficial impact and those which have not had the impact as may have been intended

2. Those further reforms which may need to be considered if our third-party workplace relations system is to become 'world class'

3. Those other changes as may be needed outside of the practice and procedure of our dispute resolution bodies (i.e. the WRC and the Labour Court) to help shape a World Class Workplace Relations System.

I would like to extend my thanks to my colleagues Liam Doherty and Brendan McCarthy, Senior Partners for their hard work and collaboration in finalising this paper.

**Brendan McGinty**
Managing Partner

# The Journey Towards a 'World Class' Workplace Relations System – Where Are We?

## 1.0 Introduction

A shared goal of all stakeholders is to ensure Ireland is the preferred choice for employees to work and employers to do business. Our employment rights and industrial relations legislation along with the workplace relations dispute resolution system are critical success factors to enabling this goal. The framework must be adaptive to best practice and the changing factors that can influence our attractiveness as a location for investment whilst encouraging productive and innovative workplaces and responsiveness to change.

Stratis welcomes the progress made in delivering the reform of Ireland's employment rights and industrial relations bodies since 2015. Many of the changes effected make the system more user friendly with a simplified structure, shorter notification times and a single source of employment rights information. These are developments that are in everyone's interest.

However, many employers believe that the balance on employment legislation has begun to tip in the wrong direction, when we should be doing everything we can to retain labour market flexibility and support the capacity of Irish business to retain and create employment in the face of the many economic and other geo political challenges.

There is a growing frustration by employers with the effectiveness and fairness of employment rights procedures. The resolution of employment rights issues has become more legalistic with a preoccupation with procedural correctness over the weight of the substantive issues and consideration of the standard of what "a reasonable employer" would have done in the circumstances at issue. Furthermore, there is no justification for the Oireachtas to seek to criminalise employers in relation to general adherence to employment law.

## 2.0 The Economic Context

Ireland has enjoyed a strong economic performance over recent years, with record employment levels and unemployment down to levels not seen since 2005. The IMD's latest report ranked Ireland as the world's seventh most competitive economy (out of 63 economies assessed) and second most competitive economy in the euro area. However, recent revisions to the economic growth outlook have one thing in common. Forecasts are being revised down and the threats to Ireland's economic sustainability are growing. Slower growth internationally will have an impact and concerns about our rising labour costs have been set out by the National Competitiveness Council:

"The most concerning observation is that, after years of moderate growth, labour costs have increased by 2.9%, four times faster than average prices. Without similar increases in labour productivity, this increase in costs will simply put pressure on Irish prices, particularly for essential consumer products like housing and residential rent, and childcare costs". (Professor Peter Clinch, Chair National Competitiveness Council, April 2019.)

High and rising business costs (interest rates, business services, commercial rents and insurance), environmental sustainability, and increasing skills mismatches are impacting on Ireland's competitiveness, as is the uncertainty around Brexit.

### The Public Service

Based on the Estimates in Budget 2020, the public service pay bill is expected to increase from an estimated €18.7 billion (or some 1/3 of current expenditure) at the end of 2019 to €19.6 billion in 2020. Public service numbers are expected to reach 345,000 in 2020, up over 8,000 on 2019.

Despite the Governments reliance on volatile revenue, the public service pay bill (2018) has risen at a rate of more than three times that of other spending (c. 12.6% versus 4%). Ireland has recorded an 8th consecutive year of growth in 2018, yet the overhang of public debt remains significant. At end-2018, the stock of public debt amounted to €206 billion, equivalent to €42,500 for every person resident in the State. Relative to international peers, this level of per-capita debt ranks amongst the highest in the OECD.

Similarly, interest payments (at over €5 billion annually) are a significant drain on public finances and will remain elevated for many years ahead. In the 10 years since the onset of the crisis, we have paid c. €60bn in interest on our debt; in the previous 10 years we paid close to €20bn in interest costs. Even without the effects of Brexit, our debt servicing costs represent a significant burden for the State, with last year's annual payment close to the capital budget for 2018. Moreover, public debt levels leave us especially vulnerable in the face of any future crisis and there is little focus in Government or even public discourse about these issues. Public service unions have continued to successfully pursue significant pay claims regardless of public debt levels. The Public Service Stability Agreement 2018 – 2020 has been pushed to breaking point and there are mounting calls for a mid-term review of the Agreement.

All too often our dispute resolution bodies, notably the WRC and the Labour Court have been placed in an invidious position when dealing with public service disputes of national importance. The disputing parties expect those bodies to magic up solutions, within the constraints of existing agreements in circumstances where some are willing to jettison commitments under those agreements out of short-term self-interest. Such actions seriously devalue those agreements and oversight arrangements. Further, they put at risk the credibility of both the WRC and the Labour Court. With an election looming we should all be concerned that these pressures show little sign of abating.

**RECOMMENDATION**
**Ireland needs a new Independent Body to oversee public sector pay determination and to verify the delivery of commitments to productivity improvements, change and transformation. This would involve considering the job content of particular grades, the context (including both fiscal and economic) for setting the appropriate level of pay and all other elements of remuneration for any identified groups or categories based on appropriate criteria. This would underpin an analysis of the totality of remuneration; comparing public service and private sector remuneration; and assessing international comparisons of public sector remuneration. Any discussions on a new or successor agreement to the Public Service Stability Agreement should be preceded by an evidence-based assessment of the delivery of that agreement.**

## 3.0 Supporting High Quality Employment

Employees today have a better understanding of the challenges and opportunities that are facing their organisations. In many instances, trade unions are playing a constructive role, however, some still hold to the outdated 'them and us' mentality. The goal of ensuring Ireland is a preferred choice to invest and to work is a common goal for employers, employees and trade unions. Businesses must be successful to achieve these common goals. Where collective bargaining arrangements exist, employers, unions and workers must work together to drive necessary improvements in effectiveness and efficiency. Those employers, who prefer to practice direct engagement drive improvements directly and do so generally, by using progressive engagement methods to ensure the understanding and support of their employees.

One of the stated aims of Government is to make Ireland one of the best small countries in the world in which to do business. In effect this translates to being the preferred choice for employees to live and work and for employers to invest and to grow their businesses. Every decision that affects the workplace should be examined for its impact or likely impact on the achievement of that goal. This should require the application of a 'sustainable employment test' before legislative or regulatory changes are made. For this test to be of value it must be carried out by an independent Agency which could form part of and contribute to a 'Regulatory Impact Assessment' (RIA). This would allow officials and Ministers to address the real need and likely impact of proposals and in particular, to explain how any such proposals would contribute positively to the sustainability of employment or at worst to avoid any negative impact on the goal of making Ireland the best small country in the world to do business.

**RECOMMENDATION**
**– All elements of our employment law and industrial relations framework should be focussed on making Ireland the preferred choice for talent and business. A 'sustainable employment test' should be applied to the making of all employment regulation carried out by an Independent Agency and contribute to a 'Regulatory Impact Assessment' (RIA). It should also inform the determination of issues by all third-party dispute resolution bodies.**

## 4.0 Direct Engagement is Legitimate

An engaged workforce is a source of competitive advantage for any organisation. Most employees expect high levels of engagement and will not be motivated to work in an environment where this is a passing commitment. This can be achieved through a variety of different models, one of which involves unionised collective bargaining.

Too often our regulatory system ignores the legitimacy of the direct engagement model which is practised by most private sector employers. Our legal framework enshrines important constitutional guarantees, both the freedom of association and dissociation and the right of employers not to engage in collective bargaining.

The important role and function of trade unions in society and through voluntary collective bargaining at enterprise level is fully acknowledged. Current campaigns championing 'decent work', on tackling the housing crisis, childcare issues and climate change are only a few stand out examples of the contribution and influence of organised labour.

There are also many examples of enduring relationships between individual employers and unions fashioned through voluntarily agreed collective bargaining arrangements.

With the emergence of diverse engagement models, it seems that such trends have had little effect on the practical if not default position that for any union seeking collective bargaining in an employment, it may still expect to get a favourable Labour Court recommendation regardless of any other engagement model within that employment. This is most evident in recommendations arising under S.20(1) of the Industrial Relations Act, 1969 concerning union recognition claims.

**RECOMMENDATION**

**The important role and function of trade unions in society and at enterprise level is fully acknowledged through voluntary collective bargaining. However, our workplace relations system needs to acknowledge that where employers are implementing progressive HR practices with market based and competitive remuneration, they should not face a default outcome from third party processes to adopt a collective model of representation.**

## 5.0 The Workplace Relations Commission

"The core mission of the Workplace Relations Commission (WRC) centres around the promotion and improvement of industrial and employment relations generally, and the maintenance of proper employment standards which, in turn, contributes significantly to the architecture of economic and social development and growth."

Under its Statement of Strategy 2019-2022, the WRC has a vision to be "a world leader in delivering fair and compliant workplaces and the non-discriminatory delivery of services".

We, in Stratis Consulting, support this mission and see it being congruent with the goal of Ireland being the preferred choice of employees to live and work and for employers to invest and grow their businesses.

### 5.1 Early Resolution and Mediation Services.

The 'Early Resolution Service' has been an important innovation to encourage the early resolution of less complex employment rights matters as close to the level of the organisation as possible, and without recourse to costly and potentially divisive adjudication hearings. Stratis understands that an offer of assistance by the ERS is accepted about c 50% of the time and in over half of those cases, a mediated conclusion is achieved.

All too often, an employer may only know of an alleged breach of some aspect of employment law upon receipt of notification of a complaint from the WRC. This can happen without the employer having first had the opportunity to resolve the dispute directly with the complainant. Employees should be required to demonstrate they have exhausted all internal procedures prior to a case being listed by the WRC.

An offer of mediation by the WRC does not automatically arise currently or be made to the parties where the claimant has indicated a willingness to engage in mediation and where the employer is also willing to participate in mediation. A well-resourced mediation service for more complex cases has the potential to be of benefit across the full range of employment rights legislation. For this reason, the introduction of voluntary, confidential mediation in the form of the 'Early Resolution Service' is an important element that should receive even greater prioritisation, along with the resourcing of a more substantial Mediation Service drawn more on the available expertise from within the Conciliation service.

A growth in demand is evident as in 2018 the service doubled the number of face-to-face mediations provided compared with 2017 – an increase of some 360% on 2016. The mediation service provided assistance in 1300 cases in 2018 – an increase of 220% on 2017. This level of service provision stands as the target for 2019. Employees and employers should be required to give reasons where they refuse to participate in the Early Resolution and Mediation Services, which would be shared on a confidential basis with the relevant Adjudicator hearing the case.

**RECOMMENDATIONS**

- **Complainants who remain in employment should be required to exhaust any in house grievance / dispute resolution procedures before lodging a claim. No such obligation currently exists and if the internal procedures have not been exhausted then the WRC should allocate a period for the matter to be addressed locally.**
- **At present either party can object to mediation without providing a reason. Mediation services should always be proposed to the parties and a responsibility placed on either party to justify a refusal to mediate, with that reason being shared for the confidential information of the assigned Adjudication Officer.**
- **Cases where a complainant has opted for early-resolution or mediation but where no resolution is ultimately found should be given priority listing for adjudication over cases where the complainant has objected to early resolution or mediation.**
- **The considerable expertise and experience of Conciliation Officers should increasingly be deployed to lead the WRC Mediation service and targeted at SMEs.**

- **Mediators must be sourced from across both the Private and Public Sectors. To avoid any conflict of interest issues, mediators should be full time or exclusive and precluded from undertaking any other work outside the WRC.**

## 5.2 The Conciliation Service

Understandably the highest profile work done by the WRC is undertaken by the Conciliation Service. This excellent service provided by the WRC, has in addition to dealing with ongoing demands, had to facilitate the negotiation of the comprehensive public service agreement (PSSA) and several very complex and resource-heavy transport disputes. Impressively, in 2018 the WRC achieved the resolution of 85% of collective disputes referred to the WRC. This is an impressive success rate and this level of activity is expected to be maintained during 2019.

The resourcing of the Service should reflect the volume and complexity of IR disputes together with the contributions that staff of the Service can make to other services within the WRC. In fulfilling their mandate Conciliation Officers should be encouraged, where appropriate, to be more assertive with the parties in identifying the ambit of agreement on issues to encourage a conciliated outcome.

**RECOMMENDATIONS**

- **Resourcing levels should ensure the availability of highly experienced Conciliation Officers to handle complex IR disputes particularly those relating to transformation.**
- **Conciliation Officers should be encouraged, where appropriate, to be more assertive with the parties in identifying the ambit of agreement on issues.**
- **The WRC should be free to recruit experienced Officers from both within and outside the Public Sector and to build a career path for such Officers within the WRC, to reduce the risk of talent loss on promotion to other civil service posts.**

## 5.3 The Development of the 'Adjudication' Service

Over recent years, improvements in the adjudication service have taken place regarding:

- shortened hearing and decision times for cases, and
- the elimination of legacy industrial relations complaints.

By the beginning of 2019 the median time for a hearing was 16 weeks and it is planned to reduce this by 14 days over 2019. The service has an ultimate strategic goal of processing most cases within 6 months by 2022.

One cause of delay in processing claims is the scheduling of hearings requiring more than one sitting. A better assessment of claims in advance may help to improve scheduling so that more cases may be fully dealt with in a single hearing. Providing more details on the specific complaints and intentions in respect of how each party intends to run their cases, together with asking the parties for their expectations of time needed to present their cases, would be of assistance.

The Service has recruited a significant number of Adjudicators (most of whom are part time) to deal with increased demand. New Adjudicators come from many backgrounds, including Trade Unions, Employers and the Legal profession.

However, a number of Adjudicators maintain private practices and are only available when their private work allows. This raises questions about the potential for conflicts of interest in the exercise of their role as an Adjudicator.

Parties are often unclear of how an individual Adjudicator is going to conduct a hearing or even what standards they will follow. Adjudicators handle complaints over the entire spectrum of employment rights and industrial relations legislation. Equality and Discrimination, Unfair Dismissals, Industrial Relations cases are so diverse and require a completely different approach and set of competencies.

The adjudication service must continue to be made up of those with practical, industry led experience so that decisions are not made in a vacuum. Adjudicators should be recruited into a specialised area based on their backgrounds and competencies with greater input and oversight by the WRC Board. Adjudicators should be assigned by the WRC to more complex cases best suited to their competence and specialist areas of knowledge. Whereas now, assignments appear to be based more on a simple availability basis.

The approach and standards involved in the conduct of hearings should recognise that employers and employees are lay people and not legal experts. Adjudicators should exercise more control over witnesses and confine submissions and case presentations to the specific requirements of the relevant legislation and the specific issues that they need to hear in order to decide. Standards should be based on the "reasonable employer" test. In the conduct of hearings, more emphasis needs to be given to the substantive issue involved. It is our view that most cases under the Unfair Dismissals legislation are often focused on a legalistic micro review of procedures. Decisions arising from Adjudication should contain the reasoning for those decisions. This will assist the parties in deciding on the merits of an appeal and provide greater clarity to the Labour Court in the event of such an appeal.

AOs are required to act fairly and in accordance with the principles of natural justice. However, in our experience, there is a high level of inconsistency in the approach taken by individual Adjudicators, which maybe a reflection of their diverse backgrounds.

Adjudicators hearing cases under the Industrial Relations Act, 1969 should be free to engage with the parties to establish if an agreed resolution may be possible.

**RECOMMENDATIONS**

- **Adjudicators should be appointed on a full time or exclusive basis only and not be permitted to engage in other work, in parallel, including acting as advisors or representatives for employers or employees.**
- **In order to ensure the confidence of employers, workers and trade unions the balance of 'Adjudication Officer' appointments should continue to be drawn from an external panel but with a designated role for the Board of the WRC in formulating that panel and in determining the criteria for the assessment of candidates as regards knowledge, experience, qualifications, tenure and skills.**
- **Adjudicators should exercise more control over witnesses and confine submissions and case presentations to the relevant facts. AO decisions should be reasoned with findings of fact which would (i) inform the parties as to the reasoning for the decision and (ii) enable the Labour Court on appeal to identify the issues which were at the kernel of any dispute.**
- **It is correct that there is a separation of Mediation and Adjudication functions in Employment Rights cases, but this should not automatically apply in respect of Mediation and Adjudication Functions for IR Cases. The facility for Adjudicators to operate in a quasi-Med-Arb role should be re-introduced for IR cases.**

## 5.4. Multiple Claims

The Workplace Relations Act 2015 amended the Employment Equality Act, 1998, by inserting a provision that prevented taking both a discriminatory dismissal claim as well as an unfair dismissal claim (under the Unfair Dismissal Act 1977) on the same issue.

Some claimant representatives lodge multiple complaints under a variety of legislation with little intention of pursuing them to completion. In such cases the employer must prepare defences (for the stated legislation under which only the most general complaint has been made) and will be unaware of any detail or specific allegation. Where multiple claims are made, there should be a requirement for the claimant to be more specific and to select one form of redress. Where necessary this could be determined by the WRC or the Labour Court on application by the respondent.

**RECOMMENDATION**

**To avoid hearings of multiple claims arising from the same set of facts, a provision should be inserted in the Workplace Relations Act 2015 allowing the respondent to make an application to the WRC or the Labour Court, which could be empowered to issue a determination requiring the claimant to select one form of redress or in the alternative, to strike out certain claims.**

## 5.5 Inspection and Enforcement Services

The Inspection and Enforcement Division of the WRC has carried out targeted campaigns to address compliance in some sectors. It has initiated an "outreach" programme aimed at improving awareness among workers and employers in SME's of employment rights and responsibilities. The service completed over 5,000 inspections and achieved compliance in over 90% of completed cases in 2018 without recourse to enforcement.

The role of the inspection service is to ensure greater levels of compliance and recognition must be given to an employer who is working with the inspector to achieve compliance.

Where there is an industry level approach or practice, based on an interpretation of the legislation, on certain matters that the inspectors deem, in their interpretation, to be non-compliant, the matter should be taken up at industry level with a view to clarifying and agreeing what compliance means on those issues for that industry and a plan agreed to ensure compliance over a reasonable time frame.

This approach would ensure that all employers are treated in a similar manner. Where an industry level practice or interpretation exists that could be viewed as a non-compliance it is unfair to single out an individual employer. Our experience is that the Inspection and Enforcement Division can quickly switch from a supportive role to an enforcement role. The WRC must carefully balance its role of encouraging compliance and seeking enforcement. Building a culture of compliance benefits all parties, however where employers are not responding within a reasonable timescale or engaging in a meaningful way with the WRC, employers should fully understand that other options, including enforcement by the WRC, may be necessary.

- **The Inspection and Enforcement Division should deal with matters on a case by case basis. Sector level campaigns should initially be at the sector level with extensive engagement with industry representative bodies with follow up at the organisational level. Where this is done within an overall framework of building awareness it will help to support a culture of compliance.**
- **Where new legislation is adopted, Inspectors should engage with sectoral groups to explore interpretations of compliance and build a common understanding as to what amounts to compliance.**

## 5.6 Advisory Service.

The Advisory service, which now rightly comes within the remit of the Conciliation Service, aims to meet demand for enterprise-level "best practice" education (e.g. workplace procedures, communications, the mediation process, dignity in the workplace, dealing with conflict, etc.) and educative interventions where workplace relations may benefit from some external support. It is utilising the Frequent Users Programme to identify those parties who may be of benefit from interventions It continues to carry out important reviews of industrial relations, chair joint working parties, facilitate resolution of individual disputes including referrals under the Industrial Relations Act, 2015 involving non-union employers and those who are not engaged in the practice of collective bargaining.

Employers are keenly interested in the linkages between innovation, collaboration and engagement in delivering transformational change. Our industrial relations processes must keep pace with the realities of continuous change and flexibilities which the workplaces of the future require. The Advisory Service must be to the forefront of understanding these dynamics and of supporting workplace innovation, different models of employee engagement and problem-solving including recourse to procedures that deliver arbitrated or final outcomes.

Increasingly, employers, workers and trade unions are interested in alternative forms of dispute resolution. Importantly these trends should inform the work of the Workplace Relations Commission and the Advisory Service in supporting dispute resolution capacity and capability.

**RECOMMENDATIONS**

- **Our structures for delivering workplace innovation and sharing of best practice at the level of the enterprise require a step change in support and guidance. The Advisory Service should encourage and support workplace innovation along with the adoption and sharing of best practice at the level of the enterprise.**
- **Amidst a diversity of models of employee engagement, the pace of change demands greater recourse to arbitrated or final outcomes arising from the impact of major change and its implementation.**
- **There is a need for an extensive programme of development and capability building in workplace dispute resolution and workplace innovation.**
- **There is a requirement for dialogue between the state dispute resolution bodies and ADR practitioners on the appropriate intersection between ADR arrangements and the State system such that local ADR arrangements can be fully supported.**

# 6.0 The Labour Court

Decisions on industrial relations matters by the Labour Court should be guided by the strategic goal of making Ireland the preferred location for employers to invest and to grow their businesses and for employees to live and work. This can broadly be described as balancing the interests of parties in any industrial relations dispute utilising a sustainable and competitive employment test. As an elaboration of this approach, the Court should be required where relevant, when issuing a recommendation or making a decision, legally binding or otherwise, to:

- Consider the impact of the decision on wider economic considerations, such as Ireland's reputation as a place within which to do business;
- Align its decisions with the principles and policies of the Oireachtas;
- Consider the implications for maximising sustainable employment and the economic, commercial, and competitiveness issues for the employment concerned in a case.

The role that the Labour Court can play in bringing finality to disputes and in particular to disputes of interest between parties through arbitration should be an increasingly important part of its remit to encourage recourse to the Court by parties under S.20(2) of the Industrial Relations Act 1969. Referrals to the Court have more regularly taken place under S.20(1) of the Industrial Relations Act 1969, by the workers concerned or their trade union only, where they agree in advance to be bound by the outcome.

There is no corresponding provision in S.20 for referrals to be made by employers. This represents an anomaly and can

provide a veto to workers and their trade union. In the interests of equity, the section should be amended to allow for a referral by an employer or an employer body representing the employer on similar terms. This may be of value concerning the interpretation of an agreement or on the implementation of change.

As pointed out in 4.0 above, diverse engagement models exist across the private sector. Yet, a union seeking to secure union recognition in an employment, may still expect under S.20(1) of the Industrial Relations Act, 1969 to get a supportive Labour Court recommendation regardless of what other engagement model may be a feature of that employment.

**RECOMMENDATIONS**

- **The role that the Labour Court can play in bringing finality to disputes and to disputes of interest between parties through arbitration should be an increasingly important part of its remit.**
- **S.20 of the Industrial Relations Act 1969 should be amended to allow for referrals to be made by an employer or an employer body which may be of value concerning the interpretation of an agreement or on the implementation of change.**
- **There should also be a facility for either the employer or union, who are party to an established collective bargaining relationship in the employment concerned, to request the Labour Court to hear a dispute of interest and for the Court to issue a recommendation, where the other party has refused to participate in conciliation before the WRC.**
- **Where employers are implementing progressive HR practices with market based and competitive remuneration, they should not face a default outcome from the Labour Court which only supports a collective model of representation.**

## 6.1. Case Settlements

There is a need to give legal force to the terms of any settlement which would act as a deterrent to claimants who wish to seek to challenge the terms of a settlement agreement which has been reached leading to the withdrawal of an application, either at the preliminary process or substantive hearing.

**RECOMMENDATION**

- **Third parties should have the authority to issue a determination, by consent of the parties, confirming the fact that a settlement is reached, while respecting the confidentiality of the terms between the parties, which would have legal force to the terms of settlement.**

# 7.0 Disputes in Essential Services.

Strikes are always regrettable, and it is obviously preferable to solve disputes by negotiation. Over recent years, disputes in essential services have continued to occur, with significant impacts for the public, including by members of An Garda Síochána, those in our health services and public transport. Such disputes wreak havoc on the public, on the business community and damage the reputation of Ireland abroad.

In these disputes, the end cannot justify the means and there is an unacceptable trend where the overriding public interest is set aside, where ballots on industrial action, and actual industrial action are pursued where procedures have not been fully exhausted. There are many examples of ballots being taken prior to any WRC or Labour Court involvement and industrial action taking place prior to the WRC or Labour Court assisting in effecting a resolution. This is unacceptable and seriously damages Ireland's reputation.

**RECOMMENDATIONS**

- **In disputes in essential services, the legislature needs to significantly strengthen the statutory requirement to exhaust IR procedures, up to and including recourse to the WRC and Labour Court, prior to the taking of a ballot for industrial action and before a dispute can occur.**
- **There needs to be a clearer definition of what constitutes an 'essential service' and there should also be a requirement to ensure the maintenance of essential services to a minimum service level during any trade dispute. A "minimum service agreement" setting out the minimum services and emergency cover that would be provided in the event of industrial action should be agreed between the parties with a requirement that it be registered as an employment agreement with the Labour Court under the provisions of S.8 of the Industrial Relations (Amendment) Act 2015. The existence of such a registered minimum service agreement would also be a condition for the immunities contained in S. 10, 11, 12 & 13 of the**

Industrial Relations Act 1990 to apply to any industrial action that may follow. These immunities would not apply to industrial action which is in breach of the minimum service agreement.

- The legal requirement for any notice of taking industrial action should be a minimum of 14 days.
- Industrial action taken prior to the exhaustion of all agreed dispute procedures, up to and including recourse to the WRC and the Labour Court, should not enjoy the protections of immunity generally afforded to individuals and trade unions under S.10, 11, 12 & 13 of the Industrial Relations Act 1990.
- Even where such procedures are fully exhausted, there should be a required minimum but substantial 'cooling off' period to elapse between receipt of a Labour Court recommendation and a secret ballot on whether to accept or reject the recommendation. In the event of a rejection of a Labour Court recommendation a separate secret ballot on the question and form of industrial action should be held.
- Measures including recourse to binding arbitration and a no-strike policy to ensure essential services and those which are of strategic importance to the public are adequately maintained ought to be considered;
- The introduction of a "proportionality" test, to require that action taken (after procedures have been exhausted) is in furtherance of a legitimate aim, appropriate and not excessive to achieve that aim, and proportionate to the issue in dispute.

## 8.0 Effective Oversight is Needed

In this context, there is a gaping hole in our institutional arrangements, notwithstanding the excellent performance and leadership of the Workplace Relations Commission and the Labour Court. This relates to the national strategic approach to managing industrial peace and disputes of national importance. By way of example, the WRC cannot maintain effective oversight of an agreement or 'call out' a party to a dispute as operating outside the terms of that agreement when it is also expected to be an honest broker in any resolution of associated disputes.

**RECOMMENDATION**

- The availability of an oversight type body at national level to oversee industrial peace and good industrial relations, if it existed, could make an important contribution to finding a pathway to resolving disputes and in a manner, which is supportive of the role of the WRC and the Labour Court.

## 9.0 Regulation of Trade Disputes

The legislation relating to the conduct of industrial disputes is outdated and cannot be considered to be best practice. It is contrary to the goal of delivering a 'world class' workplace relations system and the national objective for Ireland to be the preferred location for employers to invest and to grow their businesses and for employees to both live and work. It must be remembered that industrial action will never be harmless. Industrial action is a serious matter and can have serious negative impact on the individual organisation and workers impacted.

The appropriate and balanced regulation of trade disputes in a modern and progressive open economy is therefore and essential enabler of delivering the policy goal of a 'world class' workplace relations system. The following changes will help to ensure that industrial action only occurs in disputes over which workers have a genuine grievance and where the issue is clear. It also ensures that more union members must vote in a scrutinised ballot and therefore, if the vote is 'yes' for industrial action, a stronger mandate is given. This will have occurred after IR procedures are exhausted and the state dispute resolution machinery are fully informed.

Stratis Consulting identifies the following priorities in respect of reform of this legislation.

**RECOMMENDATIONS**

- The risk should be eliminated which currently exists under the Industrial Relations Act, 1990 where industrial action may be triggered by a dispute in relation to someone who no longer works, or even who has never worked, for the employer. The right to take industrial action should be confined to employees of the organisation in question.
- The legal protection for industrial action should be contingent on a statutory requirement to exhaust IR procedures before a ballot for industrial action can be taken or action legitimately initiated.
- Currently industrial action is unfettered with no restrictions on proportionality. The law should require the workers or a union to demonstrate that the industrial action being taken is in furtherance of a legitimate aim, or where there were reasons of overriding public interest, and the action taken was appropriate and not excessive, to achieve that aim. The Labour Court through a specialist Division, should be empowered to determine the issue by way of a legally binding decision.

- Picketing currently can take place at any location where the employer carries out business and not necessarily where the employees in question carry out their duties. Picketing should be confined to the place where the employees work.
- Where there is a question over the legitimacy of a secret ballot, a remedy should be available in the Labour Court, on application by a union member or a relevant employer, which would result in a specific corrective action ( or in default of that the imposition of a fine) on a union which has been shown to be in breach of section 14 of the Industrial Relations Act, 1990.
- Any challenge to whether the ballot was 'secret' and the count independently verified. would also be referred to the special Division of the Labour Court. Breaches would allow for a specific corrective action or in default potentially claims for damages.
- The notice period for industrial action should increase from 7 to a minimum of 14 days after the completion of a ballot and the issue of notice to the employer which should contain explicit details of any proposed action(s) and the period(s) of such action.
- The conduct of a secret ballot should include the communication to those asked to vote, a summary of the dispute, the period(s) within which action(s) is expected to take place and the type of industrial action short of strike where relevant.
- The requirement for protected action should be raised from a simple majority of those voting to a higher threshold of there being both at least a 50% turnout of those eligible to vote and the ballot being supported by over 50% of the balloted workforce.
- Any legitimate ballot which gives rise to a mandate of industrial action should only be valid for a prescribed period, beginning with the date of the ballot (which is the date the ballot closes) and the issue of notice to the employer.
- Currently, a union must take reasonable steps to make known to its members who are entitled to vote in a ballot, the number of ballot papers issued, the numbers of votes cast, the number of votes in favour of the proposal and the number against and the number of spoilt votes. As part of the proposed reforms, notice should be given at least 7 days in advance of the taking of a ballot and the union ought to demonstrate that every effort was made to provide such notice to every member entitled to vote. This should include details on the issue involved and specifics on the timing, duration and type of action being contemplated.
- Greater transparency is needed for the conduct of a secret ballot and basic information should be available to all impacted parties. An employer of any union members who will be given entitlement to vote should receive a sample voting paper (and a sample of any variant of that voting paper) not later than three days before the opening day of the ballot. The ballot paper should include specifics on the type and timing of the industrial action. The outcome of the ballot with numbers voted, those in favour and those against should be communicated.
- All ballots for industrial action should be independently supervised by a specialist Division of the Labour Court.
- All notices of industrial action should as a legal requirement, be copied to the Director General of the WRC at the same time they are served on the employer.

## 10.0 Conclusion

Our work in Stratis is mainly focussed on supporting organisations who want to lead improvements in critical areas of employee relations, people strategy and workplace innovation. We are keenly aware of the many demands that are made of business and our aim is not only to support clients on these issues but also to contribute to the debate about employment policy and our workplace relations framework.

In building on the successful work to date of the Workplace Relations Commission and the Labour Court, there is an opportunity to build an employment rights and industrial relations framework which is more effective in its functions and robust in the face of challenge. We urge care and consideration of the suggestions made in this 'White Paper' as a contribution to debate and to ensure that those most affected by our employment and trade dispute legislation are fully engaged and supportive of a framework that is more fit for purpose for the future requirements of a modern economy. We must continue to review, learn and improve the workplace relations system to the benefit of all users.

## About Stratis Consulting

At Stratis, we support organisations who want to lead improvements in critical areas of Employee Relations, People Strategy and Workplace Innovation.

We bring our career experience, knowledge and insight to the full advantage of clients in leading people strategies and supporting senior leaders on any sensitive employment and people strategy issues.

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