

INDUSTRIAL RELATIONS (AMENDMENT) (No. 3) BILL 2011

Regulatory Impact Analysis

1. Policy Context /Background

The main purpose of the Industrial Relations (Amendment) (No.3) Bill 2011 is to implement reform proposals in line with the commitment in the Government's Programme for National Recovery, 2011-2016, to reform the Joint Labour Committee (JLC) system and to provide for the more comprehensive measures required to strengthen the legal framework for the Employment Regulation Orders and Registered Employment Agreement sectoral wage setting mechanisms, under the Industrial Relations Acts 1946 to 2004 in the light of deficiencies in the original legislation identified in the High Court judgment in *John Grace Fried Chicken Limited & Others -v- The Catering Joint Labour Committee & Others* of 7 July 2011. The Bill gives effect to the Minister's Action Plan endorsed by the Government on 26 July 2011 and builds on the recommendations of the Independent Review of Employment Regulation Orders and Registered Employment Agreements Wage Setting Mechanisms, the terms of reference of which had been the subject of agreement with the European Commission Services under the terms of the EUIMF Programme for Ireland.

The terms of reference of the Independent Review had, inter alia, the review to address:

- The shared employment maintenance and creation objectives, of the Government, employers and trade unions, both within the regulated sectors and in the wider economy; and the possible renewal of the Private Sector Protocol by IBEC and ICTU.
- The common desire to see the continued orderly conduct of industrial relations across the economy and the relevant sectors; the continued protection of employee rights and interests;
- The current levels of domestic competition and international competitiveness of the sectors covered by EROs and REAs; price and wage movements in the economy and in major trading partners; and the impact of EROs and REAs on labour market flexibility and sustainable employment across the economy.
- Independent external economic and labour market evidence.

2. Statement of Objectives

2.1 General reform objective

The Programme for Government provides for a commitment to reform the JLC system, including the appointment of independent chairpersons to JLCs who will retain a casting vote. Other reform options requiring examination included the rate of pay for atypical hours, such as Sunday premia.

Together with the restoration of the National Minimum Wage to €8.65 per hour with effect from 1 July 2011, the reform of the statutory wage setting machinery operating at sector level, and putting the JLC and REA systems on a more secure legal and Constitutional footing, represents a significant commitment by the Government to protect the lowest paid and most vulnerable workers.

On 24 May 2011, the Government published the Report of the Independent Review of Employment Regulation Orders and Registered Employment Agreements Wage Setting Mechanisms. The Report's overall finding is that the current JLC and REA systems require radical overhaul so as to make them fairer and more responsive to changing economic circumstances and labour market requirements.

2.2 Immediate Objectives of the Reform of the JLC and REA systems

The publication of the Bill before the end of 2011 is a requirement of the State's labour market structural reform commitments under the EU/IMF Programme of Financial Support for Ireland. The proposed reform of the legal framework for Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs) is aimed at increasing employers' ability to retain and employ workers, in particular in sectors hard hit by the prevailing economic circumstances, and to facilitate necessary cross-sector adjustment. More specifically, the Bill has been framed to take account of the High Court Judgment that found certain provisions of the Industrial Relations Acts in relation to EROs to be contrary to the Constitution. The proposed reforms involve

- Greatly streamlining the number of different minimum wage rates set under EROs that have to be applied by employers;
- Ensuring that JLCs and the Labour Court must have regard in formulating and approving proposals for new EROs to economic conditions such as employment and unemployment; and the general level of wages in comparable sectors, including wage trends in comparable competing sectors in other relevant jurisdictions;
- Providing for Oireachtas oversight of EROs and variations thereof;
- Allowing greater flexibility for employers facing financial difficulties to obtain temporary exemptions from EROs in certain circumstances;
- Precluding JLCs from setting Sunday premium rates, but allowing compensation for Sunday working to be assured under the Organisation of Working Time Act 1997;
- Introducing a time-bound process by which the terms of an REA may be varied by the Labour Court in certain circumstances without necessarily obtaining the consent of all parties to the REA;
- Putting REAs on a more legally and Constitutionally secure basis by clarifying "substantially representative parties" and providing for Oireachtas oversight of REAs.

3. Identification of Choices/Options

3.1 Option 1 Remove all statutory wage-fixing machinery at sector level

The significance of JLCs has undoubtedly altered since the introduction of the National Minimum Wage and the development of an extensive floor of statutory

individual employment rights over recent decades. JLCs and REAs, however, continue to provide a mechanism for setting pay and certain working conditions for large numbers of workers in an orderly way for perhaps up to 250,000 people. In the light of the Government's commitment to reform the JLC system and the observance of international conventions and collective bargaining norms, Option 1 would at this juncture be an unjustifiable reversal of Government policy. The absence of mechanisms such as EROs and REAs would result in more individualised claims on employers and grievances/disputes which would require to be adjudicated by the State's employment rights machinery.

3.2 Option 2 Do Nothing

The High Court judgment of 7 July 2011 declared sections 42, 43 and 45 of the Industrial Relations Act 1946 and section 48 of the Industrial Relations Act 1990 to be invalid having regard to the provisions of Article 15.2.1 of the Constitution. As a consequence, all of the 17 Employment Regulations Orders (EROs) in place on 7 July 2011 ceased to have statutory effect from that date.

The “*do nothing*” option would permit an unacceptable legal vacuum to continue as regards the obligations of employers towards existing employees as compared with new employees. In the interest of legal clarity, harmonious industrial relations and establishing a less restrictive and more responsive regulatory framework, the Government resolved to end the legal vacuum by proceeding with comprehensive reform legislation as the implications of the High Court Judgment of 7 July are not confined to the JLC system and EROs. Only a comprehensive reform Bill as proposed can address all of the recommendations for reform that were put forward by the Independent Review Report on these statutory wage-setting mechanisms.

3.3 Reform Agenda

The Programme for Government provides for a commitment to reform the JLC system, while maintaining the appointment of independent chairpersons to JLCs, who will retain a casting vote. Providing for the retention of the JLC and REA systems, subject to the necessary reforms to enable them to be placed on a more secure legal and Constitutional footing, is the preferred Option as that will ensure that (i) all EROs will be revised using new criteria which better reflect ongoing economic circumstances and labour market requirements; and that (ii) the process for the confirmation, variation and cancellation of REAs will have regard to the relevance, fairness and the impact on employment of the REAs. The Bill also clarifies who are the “substantially representative parties” entitled to make and maintain REAs.

4. Other Impacts

4.1 National Competitiveness

The economic case for reform of the statutory wage fixing machinery is based on the following key factors:

1. Ireland has experienced a very sharp increase in unemployment in recent years, with little prospect of improvement in the short term;
2. Irish wage costs grew quickly and remain high in key sectors where sectoral agreements are prevalent, relative to those in competitor countries;
3. Wages account for a relatively high proportion of costs in key sectors where sectoral agreements apply.

In October 2010 the FORFÁS Review of Labour Cost Competitiveness estimated that between 170,000 and 300,000 workers were covered by either Employment Regulation Orders (EROs) or Registered Employment Agreements (REAs) regarding the terms and conditions of their employment. In many cases, those covered by EROs and REAs overlap with those earning wage levels within 1.5 times the National Minimum Wage (NMW). The additional conditions of employment covered by EROs and REAs (such as travel to work costs, Sunday working rates etc.) can have a significant impact on employment costs. An examination of the hourly rates guaranteed by EROs suggests that these agreements are offering a premium of approximately nine percent over the NMW rate. REAs also provide for a wage rate in excess of the hourly minimum wage. REAs are predominantly related to the construction sector (others relate to the printing industry, for example) and guarantee hourly or weekly rates well in excess of the NMW.

4.2 Service Business Costs

The proposed reforms are expected to have a positive impact on costs for service businesses. The sectors where the greatest job losses have occurred (i.e. hospitality, retail, and construction) are the sectors where statutory sectoral wage-fixing continues to apply over and above the universally applicable national minimum wage. While demand in these sectors is clearly a key factor for survival and growth, their wage costs represent a relatively higher proportion of total costs than for other sectors generally.

4.3 Service Business Employment

The proposed reforms in the statutory wage-setting mechanisms would be expected to have a positive impact on employment in the sectors concerned. These are the very sectors that have experienced some of the greatest competitive pressures, including in the hospitality sector, which is central to the Government's aim to secure Ireland's position as a top tourist destination.

4.4 Socially excluded or vulnerable groups

Those persons most at risk of poverty are recognised as those who have just lost, or are just about to lose, a job. The risk of a person who is unemployed being in serious poverty is ten times greater than a person who has a job. Crucially, every worker who goes back to work in the sectors covered by JLCs – and especially in the retail and hospitality and other services that have been targeted under the measures in the Government's Jobs Initiative – will contribute approximately an additional €20,000 to the economy through decreased social welfare payments, increased tax receipts and increased consumer demand.

4.5 Gender Equality

It could be expected that any reduction in income for workers covered by the Joint Labour Committee system could impact more heavily on women than men, as women tend to be disproportionately represented in lower paid service employment where the JLC wage rates predominate. However, to the extent that existing jobs in struggling sectors can be retained through greater wage cost competitiveness, this will benefit women to a greater extent than men as will any increased employment opportunities arising from increased employment in tourism and catering. The majority of workers covered by REAs in the construction and electrical contracting sector are men.

4.6 Economic Markets/Consumers and Competition

The Bill does not involve a policy change in the economic market. It will require the parties involved in the determination of statutory minimum wages and conditions at sector level to have regard to economic conditions such as the levels of employment and unemployment and the general level of wages in comparable sectors, including wage trends in comparable competing sectors in other relevant jurisdictions. Employers will be able to derogate from EROs in cases of financial difficulty if the Labour Court agrees to the application, but the Labour Court will be required to consider whether granting an exemption would have an adverse effect on employment levels and distort competition in the particular sector to the detriment of employers not party to the exemption sought.

4.7 Rights of Citizens protected

The proposed reform of the JLC and REA wage-fixing systems will reinstate a legally and Constitutionally robust system of protection for workers and employers in these sectors concerned in the aftermath of the High Court judgement of 7 July 2011 in *John Grace Fried Chicken Ltd and Others v. The Catering Joint Labour Committee, The Labour Court, Ireland and the Attorney General*.

4.8 Compliance Burden

The reform of the JLC and REA systems will bring about a significant simplification of compliance requirements as follows:-

- The number of JLCs will be reduced from 13 to 6;
- All remaining JLCs will be comprehensively reviewed to ensure their ongoing validity in terms of the type establishments to which they apply and the workers covered by their scope;
- JLCs will set only a basic adult rate and two higher increments to reflect longer periods of service.
- Record-keeping requirements for employers in these sectors will be reduced.
- Replacing the burdensome requirement for the posting of notices in workplaces by simply obliging employers to provide employees with clearer details of employment terms and conditions;
- JLCs will no longer set Sunday premium rates, but compensation for Sunday working will continue to be assured through the Organisation of Working Time Act 1977;
- EROs will in future reflect a standardised approach to the determination of benefits in the nature of pay – including overtime – across all sectors;
- Sub-minimum rates for employees aged under 18 years, first time job entrants, and employees undergoing training will follow the standardised fixed percentages of the adult basic rate, as in the case of the National Minimum Wage;
- Companies will be able to derogate from EROs in cases of financial difficulty;

5. Consultation

5.1 An Independent Review of the JLC and REA wage setting mechanisms was initiated on 8 February 2011 and was undertaken jointly by Kevin Duffy, Chairman of the Labour Court acting in an ad hoc capacity and Dr Frank Walsh, School of Economics, UCD, under specific terms of reference. The conduct of the

review was a commitment under the EU/IMF programme, which provided not only for agreement on the terms of reference but also the programme of actions arising. The report of the Independent Review Team was published on 24th May, 2011. The terms of reference of the Independent Review, as agreed between the Government and the European Commission Services in February 2011 required the review to take account of the views of Members of the Houses of the Oireachtas and of stakeholders including IBEC, ICTU and the CIF, and of all of the parties directly involved in the current mechanisms in the context of evolving private sector pay policy. The Independent Review invited interested parties to make written submission to the review. Over 360 submissions were received from a variety of bodies and individuals. The Independent Review Team met with many of the organisations that made submissions and afforded them the opportunity to make additional oral submissions. The Report of the Independent Review provides details of all of the organisations and individuals that made submissions as well as those who met with the Review Team.

5.2 Subsequent to the publication of the Report, the Minister for Jobs, Enterprise and Innovation entered into consultations with the national representatives of employers and trade unions to hear their views on the Report and to outline the Minister's preliminary proposals to address the Report's recommendations and other issues raised in the report. Consultations were also held with the employers involved in the service sectors covered by statutory wage-fixing mechanisms. As required by the EU/IMF programme, there have been detailed discussions on the preparation of the Bill with representatives of the troika.

6. *Enforcement and Compliance*

6.1 Up until the High Court Judgment of 7 July 2011, the National Employment Rights Authority (NERA) conducted inspections of employers' records in sectors governed by EROs or REAs in relation to the provisions stipulated in these industry-specific orders and agreements. The High Court Judgment of 7 July 2011 precludes NERA inspectors from enforcing the minimum pay and conditions of employment prescribed in EROs which that judgment invalidated.

6.2 The Bill provides for the retention of the JLC and REA systems, subject to the detailed reforms designed to place them on a more secure legal and Constitutional footing and so will allow NERA inspectors to inspect employers' records to establish whether or not the new EROs to be made under the Bill when enacted are being complied with by employers and if not to take appropriate action. The Bill (Section 13) provides for the straightforward enforcement of EROs by civil proceedings in the Circuit Court, as for REAs, in lieu of the power to bring criminal proceedings which the High Court Judgment of 7 July 2011 invalidated.

6.3 Additionally, Section 18 of the Bill strengthens the obligation on employers under section 3 of the Minimum Notice and Terms of Employment (Information) Act 1994 (No.5) to provide details of any applicable ERO or REA in the Written Statement of the Terms of Employment to be given to each worker. Also, NERA inspectors will be empowered to secure prompt rectification of any errors or omissions in such Statements at workplace level, thus avoiding resort to Rights Commissioners or, on appeal, to the Employment Appeals Tribunal, with attendant delays unnecessarily burdening those bodies.

Department of Jobs, Enterprise and Innovation,
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