

# **Union sundown? The future of collective representation rights in Irish law**

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This article examines recent developments concerning employee and trade union rights to collective negotiations with employers. It considers the extent to which the constitutional guarantee of freedom of association is protected by the present legal framework. Ireland's "voluntarist" system of industrial relations is considered in the light of the enactment of the Industrial Relations (Amendment) Acts 2001–2004, and the recent interpretation of the legislation in the case of *Ryanair v The Labour Court* [2007] I.E.S.C. 6. The article also looks at the future role of the Labour Court, the State's main industrial relations tribunal and a key plank of the voluntarist system.

## Introduction

Ireland has traditionally maintained a “voluntarist” system of industrial relations under which the industrial relations actors (employers and trade unions) conduct their relationship, by and large, in the absence of legally imposed structures. While Art.40.6.1.iii.of the Irish Constitution protects the right of freedom of association, unlike many other Western democracies, trade unions in Ireland have no right to be recognised for bargaining purposes by an employer. Thus, while employees are free to join a trade union, they cannot insist their employer negotiate with that union regarding their pay and conditions. Employees and trade unions have traditionally gained the right to negotiate collectively with employers through the use, or threat, of collective action. This, of course, depends to a large extent on trade unions mobilising a “critical mass” of employees to join, and to participate, in trade union action. In the context of declining trade union density in the 1980s and 1990s, the issue of *statutory* recognition rights for trade unions became a key point of discussion during social partnership talks. Under the fourth social partnership agreement, *Partnership 2000*, a high level group comprising trade union and employer representatives was set up to examine the issue.

What emerged from the partnership process were the Industrial Relations (Amendment) Acts 2001–2004 (hereinafter “the Acts”). Under the Acts, an employer may be compelled to grant union representatives the right to represent unionised employees on workplace issues relating to pay, and terms and conditions of employment. The Labour Court can make a determination with regard to these matters, and to dispute resolution and disciplinary procedures, in the employment concerned. However, the Acts explicitly rule out granting trade union recognition rights; s.5(2) of the 2001 Act provides that the Labour Court cannot provide for arrangements for collective bargaining. (For a fuller outline of the legislation see Ryan, “Leaving it to the Experts-In the Matter of the Industrial Relations (Amendment) Act 2001” (2006) 3 (4) I.E.L.J. 118.). The Labour Court

has a key role under the Acts in investigating disputes, making recommendations and, if necessary, making binding determinations.

This article looks at the degree to which the legislative framework in place adequately protects the constitutional guarantee of freedom of association contained in Art.40.6.1.iii (and under European and International law), particularly in relation to employee rights to collective negotiation of pay and working conditions. It also considers the future role of the Labour Court in relation to protecting collective negotiating rights. Both of these issues have recently been thrown into sharp focus by the decision of the Supreme Court in *Ryanair v The Labour Court* [2007] I.E.S.C. 6.

The *Ryanair* case centred on a dispute between a number of pilots, members of the Irish Airline Pilots Association (IALPA, a branch of the Irish Municipal Public and Civil Trade Union, IMPACT), who sought to have the union negotiate with Ryanair about various issues on their behalf. Ryanair refused to negotiate with the union and, as a result, the union invoked the procedures under the Acts. When both the Labour Court and the High Court found against it, Ryanair appealed to the Supreme Court. The Supreme Court decision (see Turner, "Cases and Comment: *Ryanair v The Labour Court and Irish Municipal Public and Civil Trade Union (IMPACT)*" (2007) 4 (1) I.E.L.J. 24) is extremely significant in its treatment of the two key issues discussed above. I will look at, in turn, the future role of the Labour Court, and the current state of play in respect of the collective representation rights of Irish employees.

### **(Don't) leave it to the experts?**

A central plank of Ryanair's complaint to the Supreme Court was that the Labour Court hearing of the company's case had been fundamentally unfair. In particular, the company complained that, while two of its senior officers had given

oral evidence at the hearing, no employee gave evidence and, indeed, none of the pilots involved was at any stage identified.

At several points in his judgment Geoghegan J. referred to the informal procedures adopted by the Labour Court (for example, the fact that no sworn evidence of any kind had been taken). In particular, the fact that neither a single pilot nor any other employee of Ryanair was called by the union to give evidence to the Labour Court meant, given the particular issues at stake in the case, that it was not open to the Labour Court to reach the conclusions which it did reach in the absence of such oral evidence.

The Supreme Court held that the Labour Court did not adopt fair procedures, firstly, by permitting complete non-disclosure of the identity of the persons on whose behalf the union was purporting to be acting and, secondly, by disbelieving the oral evidence of two senior management figures in Ryanair (who maintained at all stages that appropriate bargaining procedures were in place, see below) in the absence of hearing evidence from at least one relevant pilot who was an employee of Ryanair. The Labour Court had decided the issue against Ryanair to a large extent on foot of omissions in Ryanair documentation and on foot of a view put forward by the union that the company did not engage in collective bargaining; this, according to the Supreme Court, did not amount to sufficient evidence to justify the finding.

This aspect of the Supreme Court's judgment is surprising, as the Superior Courts have traditionally been quite deferential to the Labour Court's expertise with regard to industrial relations issues. A recent strong vindication of the latter's role was seen in the judgment in *Ashford Castle v SIPTU* [2006] I.E.H.C. 201, where Clarke J. noted that the Labour Court was an administrative body which was required, when exercising its role under industrial relations legislation, to bring to bear its own expert view on the approach to take to the issues. He held that "a very high degree of deference indeed needs to be applied to decisions

which involve the exercise by a statutory body, such as the Labour Court, of an expertise which this Court does not have". This echoed a view expressed by Butler J. in a case involving workers in Jury's Hotel Group that "industrial relations cannot be resolved in a court of law" (Sheehan, "Judge Quotes Larkin, Says IR Dispute Not For Courts" (2006) *Industrial Relations News* 29, p.24). Indeed, in the *Ryanair* case itself Hanna J. in the High Court ([2006] I.E.H.C. 118) had also endorsed this view. He was satisfied that the Labour Court did have material before it, which enabled it to come to the conclusion reached:

"The Labour Court is very much in charge of its own procedures. It has provided over many years a vital and invaluable service to the State in the often fraught area of industrial relations. It is not a court of law and the practice and procedure which it has evolved over the years, understandably, necessarily involved pursuing a less ritualistic and formalistic path than might be the case before these courts."

In fact, as Hanna J. pointed out, the present case was somewhat noteworthy in that lawyers, who rarely attend sittings of the Labour Court, did attend on behalf of the applicant in this case. The Supreme Court laid great stress on the failure of the Labour Court to hear oral evidence from any of the pilots involved in the dispute. On that issue, Hanna J. noted that the bulk of the documentation to which the Labour Court referred in its decision emanated not from some "absent third party" but from Ryanair itself. Its authenticity, therefore, could not be challenged. He went on to point out that whether or not oral evidence is offered in a case is a call made on a daily basis before courts by advocates, and that in a more formal setting parties are free to offer *viva voce* evidence, or not, as the case may be. He went on to observe that, while there might be circumstances in which the Labour Court might take a more "activist role" in determining what oral evidence it might wish to hear (for example, where there is a marked imbalance of "fire power" in the representation of the parties before it), this was not such a case.

The Supreme Court's criticism of the procedures adopted by the Labour Court will likely have the effect of encouraging a greater formality in respect of Labour Court hearings and perhaps encourage a further "juridification" of the process (Browne, *The Juridification of the Employment Relationship* (Avebury, Aldershot, 1994)). The Labour Court has already drawn up a list of the key issues that arise out of the judgment and has laid down a set of guidelines that it will follow in future hearings (Sheehan, "Labour Court's Guidelines for 2001-2004 Cases in Wake of 'Ryanair' Judgment" (2007) *Industrial Relations News* 14, p.1). The guidelines state that where there is a question over whether the union represents employees of the employer, this will have to be resolved on evidence, usually requiring the disclosure of the identity of at least one of its members who are party to the dispute. Factual issues, which are in dispute, are to be resolved on oral evidence from parties who can give first hand evidence. In general, the Labour Court will need to apply the best evidence rule. This requires that the primary source of information relied upon should be available to the Court, and that direct evidence on any issue is generally preferred to a legal submission, an opinion or references to documents unsupported by direct evidence.

The result of all this will most likely be more lawyers, more delays and more costs. Already the Irish Business and Employers' Confederation (IBEC) has called for the procedures relating to the Acts to be revised, as it believes the time frames under which cases are to be processed are now too tight, given that a greater level of procedural and evidential formality will need to be introduced into Labour Court hearings. The union movement may find it difficult to take on the legal firepower of some employers on these terms, and members may be frustrated by the longer time it will take to process claims. In addition, the fact that employees may now be compelled to give evidence in such cases also means that many are likely to be discouraged from pursuing claims under the legislation, particularly if their employer displays a Ryanair-like aversion to trade unions. There are separate anti-victimisation procedures in existence under the Acts (ss.8 and 9 of the 2004 Act), which have rarely been used. If unions have to

reveal their members to take a case, these provisions may become more important.

A further ramification of the Supreme Court's finding in *Ryanair* might well be the extension of higher evidential standards into other cases heard in the Labour Court (individual employment rights cases, for example). Again, this could make Labour Court hearings more legalistic and more akin to ordinary civil court actions. The Supreme Court declined to lay down precise criteria for the Labour Court to follow in its hearings, which may result in further challenges to Labour Court decisions even after new standards have been introduced. It may be the case that legislative intervention is required here.

One of the most controversial, and potentially far-reaching, aspects of the Supreme Court decision was its criticism of what it referred to as the Labour Court's "mindset", which favoured the way particular expressions are used and particular activities are carried out by trade unions. Noting that the purpose of the legislation was to avoid the danger that, in a non-unionised company, employees may be exploited and may have to submit to unfair terms and conditions of employment, Geoghegan J. at several points of his judgment seemed concerned that the legislation was being used to encroach on Ryanair's right to operate a non-unionised company. Most explicitly, he referred, with disapproval, to a view hinted at by the Labour Court that collective bargaining in a non-unionised company must take the same form and adopt the same procedures as would apply in collective bargaining with a trade union. This has been a common criticism of the approach of the Labour Court to the 2001 and 2004 Acts; that its expansive rulings seek to impose "union conditions" on non-union companies (Doherty, "Ryanair Ruling Serious for Labour Court Role", *Irish Times*, February 2, 2007). Nonetheless, the Supreme Court's comments can be seen as further evidence of a move away from the courts' traditional deferential approach to the State's main industrial relations tribunal.

## **The interpretation of the legislation**

The interpretation given to the right to bargain legislation by the Supreme Court in *Ryanair* will have highly significant implications for Irish industrial relations practice, as well as for the rights of employees to negotiate collectively with employers. As the Supreme Court pointed out, the legislative regime in question was enacted in order to prevent unfair dealings on the part of an employer with employees in non-unionised companies. The legislation provides that employees in such a situation may have ultimate recourse to the Labour Court, where there are not in place reasonable arrangements for resolving problems with the employer on a collective basis. Before going on to analyse the position that now pertains in relation to collective representation in Irish law, I will first outline how the Supreme Court, in their construction of the right to bargain legislation, diverged from the Labour Court in three key areas.

### ***Practice***

The first relates to s.2(1) of the 2004 Act whereby, in order to exercise jurisdiction, the Labour Court must be satisfied that it is “not the practice of the employer to engage in collective bargaining negotiations in respect of the relevant grade, group or category of workers who are parties to the trade dispute”. Ryanair outlined the system that the company contended amounted to “collective bargaining”. Employees, including pilots, elect employee representatives to Employee Representative Committees (ERCs). The various ERCs then negotiate directly with the company on an ongoing basis in relation to all terms and conditions of employment. It was accepted that the Dublin pilot representatives had withdrawn from the ERC in August 2004 and no new representatives had been appointed. This withdrawal gave rise to a discussion by the court of what was meant by “practice” in this context. The view accepted by the Labour Court was that if a group of employees unilaterally withdraws from the internal negotiating procedures, it could not thereafter be said that the employer had a practice of engaging in collective bargaining with them. The Supreme

Court found that this was a mistaken interpretation of the Court's decision in *Iarnród Éireann v Holbrooke* [2001] 1 I.R. 237. The literal interpretation, given the words by the Labour Court, would have the effect of allowing a category of employee (like the Dublin pilots) to invoke the Labour Court simply by deciding to boycott whatever collective bargaining machinery the company had put in place. That, the Court found, would be a serious infringement of the right of an employer to maintain its own internal negotiating machinery. The Supreme Court was sympathetic to the company's argument that, in so far as negotiations with the Dublin pilots were not, in reality, taking place, this was only because the pilot representatives had themselves withdrawn.

The Supreme Court interpreted the provision as requiring a decision on whether or not there was in place any permanent machinery for collective bargaining negotiations, which would have obliged the management of Ryanair to sit around the table with representatives of the Dublin pilots and discuss matters of pay and conditions. Such machinery would need to have been established, in place and not *ad hoc*. Once that requirement was fulfilled the fact that the category of employees may not have availed of such machinery was irrelevant. This was a fact-finding exercise that the Labour Court had failed to carry out correctly (due largely to the procedural and evidential failings outlined above).

The Labour Court should have been addressing its mind to whether there were in place adequate collective negotiation procedures, giving an ordinary meaning to that expression, within Ryanair. It is to the thorny issue of the "ordinary" meaning of collective bargaining I will now turn.

### ***Collective bargaining***

The Labour Court laid down its definition of collective bargaining in the *Ashford Castle* case, noting that the expression is not defined in industrial relations legislation and that it is not a legal term of art. Thus, the Labour Court decided

that the expression should be assigned the meaning which it would normally bear in an industrial relations context:

“Collective bargaining comprehends more than mere negotiation or consultation on individual employment related issues including the processes of individual grievances in relation to pay or conditions of employment. In the industrial relations context in which the term is commonly used it connotes a process by which employers or their representatives negotiate with representatives of a group or body of workers for the purpose of concluding a collective agreement fixing the pay and other conditions of employment applicable to the group of workers on whose behalf the negotiations are conducted.

Normally the process is characterised by the involvement of a trade union representing workers but it may also be conducted by a staff association, which is an excepted body within the meaning of the Trade Union Act, 1941, as amended. However 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.”

The Supreme Court in *Ryanair*, however, objected to the view “arguably hinted at” in the definition that collective bargaining in a non-unionised company must take the same form and adopt the same procedures as would apply in collective bargaining with a trade union. The court reiterated that if machinery existed in Ryanair whereby the pilots had their own independent representatives who sat around the table with representatives of Ryanair with a view to reaching agreement if possible, that would seem to be collective bargaining within an ordinary dictionary meaning. The fact that Ryanair had, from an administrative perspective, organised the elections to the ERC, and had a rule against renewal of a term for a representative, did not in any way mean that the pilots acting through the committee were doing so anything other than independently. As to whether the ERCs operated as a potential basis for collective bargaining negotiations or not, was really the key issue, and one which the Labour Court had failed to determine.

The Supreme Court criticised the Labour Court for acknowledging a special trade union meaning of the expression “collective bargaining negotiations” and held that the phrase should be given simply an ordinary meaning and not any distinctive meaning as understood in trade union negotiations.

### ***Excepted bodies***

The final issue I will consider is the company’s contention that the pilots, as a category, constituted an “excepted body”. “Excepted body” is defined by s.6(3)(h) of the Trade Union Act 1941 (as inserted by s.2 of the Trade Union Act 1942) and refers to “a body all the members of which are employed by the same employer and which carries on negotiations for the fixing of wages or other conditions of employment of its own members (but no other employees)”. In *Ryanair* the Supreme Court decided that if it could be demonstrated that the ERC was an instrument in place whereby pilots could enter into collective bargaining negotiations with Ryanair, then it would constitute an excepted body. Again, the Labour Court had misinterpreted the decision of Fennelly J. in *Holbrooke*. Fennelly J., giving judgment in the *Ryanair* case, explained that *Holbrooke* applied only to the situation where an *employer* refuses to negotiate. It was not relevant to a situation where a particular category of *employees* was unwilling to avail of internal machinery for negotiation within a non-unionised company where the machinery is fair and reasonable and there is no unreasonableness on the part of the company. The purpose of the legislation was to deal with a situation where both employer and employees in a small firm wanted to negotiate terms and conditions in a situation where the employees would not be acting illegally for not having a negotiation licence under the 1941 Act. What is required under these statutory provisions is simply that the employer has in place an appropriate system for such negotiations to take place.

## **Individuals at work? The state of collective representation in Irish law**

The *Ryanair* judgement draws attention to a number of issues that arise in relation to the right to bargain legislation, and that derive, in part, from its genesis as a compromise position arrived at during social partnership talks. In deciding not to go down the route of statutory trade union recognition, but at the same time moving away from a purely “voluntarist” approach, the social partners agreed on a half-way house solution, which has now been shown to be somewhat problematic.

### ***What is collective bargaining?***

As outlined above, the Supreme Court did not endorse the Labour Court’s definition of collective bargaining, finding it to be too narrow. A collective bargaining unit can, it seems, amount to any group of employees as long as the group is recognised for this purpose by the company concerned. The expression “collective bargaining” must be given its ordinary meaning, and not any meaning particular to trade union negotiations.

However, as has been pointed out by D’Art and Turner, such an approach tends to ignore International Labour Organisation (ILO) Conventions and Declarations to which Ireland is a signatory (D’Art and Turner, “Ireland in Breach of ILO Conventions on Freedom of Association, Claim Academics” (2006) *Industrial Relations News* 11, p.33). For example, Art.2 of Convention 98 explicitly excludes the notion of employer dominated bodies or company unions being considered as mechanisms for collective bargaining (*ILO Convention No.98 Concerning the Application of the Principles of the Right of Organise and to Bargain Collectively*). In addition, it seems that dictionary definitions of collective bargaining may not throw much light on the matter. The Oxford English Dictionary definition is “a mode of fixing the terms of employment by means of

bargaining power between an organised body of employees and an employer, or association of employers”. The common understanding of the expression is, undoubtedly, bound up in its usage with a particular model of industrial relations that generally includes trade unions.

Although there is no European Union (EU) definition of collective bargaining, it may also be the case that the Supreme Court’s interpretation in *Ryanair* could be contrary to the spirit and objectives of the Treaty of Rome. Article 140 of the EC Treaty allows the European Commission to co-ordinate Member State actions in relation to the “right of association and collective bargaining between employers and workers”. Article 28 of the Charter of Fundamental Rights provides that “workers and employers, or their respective organisations, have, in accordance with Community 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”. It is interesting to note in this context that the Taoiseach was embroiled in some controversy in June 2007 about whether Ireland, like the UK, had sought to negotiate the right to “opt out” of the charter of fundamental rights in the context of the reform treaty negotiated to replace the failed European Constitution (Smyth “State Gets Opt-out Clause in EU Rights Charter”, *Irish Times*, June 26, 2007).

Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) must also be considered (see Ewing, “*The Implications of Wilson and Palmer*” (2003) I.L.J. 34, 1). This provides for the right to freedom of association with others, including the right to form and join trade unions for the protection of one’s interests. In the *Wilson and Palmer* case (*Wilson & the NUJ, Palmer, & Others v The UK* [2002] I.R.L.R. 128) the European Court of Human Rights held that Art.11 did not include a right to collective bargaining. However, the court (laying considerable stress in its ruling on ILO conventions and the EU Social Charter) also found that “employees should be free to instruct or permit

their union to make representations to their employer or to take action in support of their interests” (Para. 46). The court went on to say that if workers were prevented from so doing, their freedom to belong to a trade union became illusory and that it was the “role of the State to ensure that trade union members were not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers” (para.46).

Ultimately, it may be that legislative intervention will be required to give a legal definition of collective bargaining. This, logically, would seem to be something that could be thrashed out in the social partnership process. Employers groups, however, may be quite resistant to such a move, particularly were it to re-balance the Supreme Court test in favour of a “trade union” based interpretation of the expression.

### ***What would constitute an “Employee Council”?***

The Supreme Court in *Ryanair* ruled that, where an employer has an internal non-union collective bargaining unit in place, this might satisfy the requirements of s.2 of the 2004 Act. The Supreme Court did not, however, set down precise rules or offer guidelines for the operation of such a unit. What, then, are the minimum requirements for such a body (to which I will refer, for convenience, as an “Employee Council”) to be acceptable to the court?

It is clear from the Supreme Court judgment that employers would be free to determine the form, structure and organisation of any internal collective bargaining units, as long as these have a degree of permanency and are not *ad hoc*. Thus, if an employer were to set up an Employee Council, it could presumably decide on issues such as how employees would be elected or chosen to be members, the remit of the Council, and the terms of office of its members. While the Council would need to operate in a fair and reasonable manner, and this would need to involve a clearly defined set of rules and

procedures, the nature and extent of these remain in question. A crucial issue would be the extent to which the Council would be merely consultative, or whether negotiations would need to be with a view to reaching agreement on wages and conditions (see below). A further issue would be the extent to which the Council could seek independent advice from an “outsider” third party, like a trade union.

One possible guide to what such a Council would look like might be derived from looking at the Employees (Provision of Information and Consultation) Act 2006 (for a discussion of the main features of the Directive on which the Act is based see Hayes, “Informing and Consulting Employees—Irish and EU Developments” (2005) 2 (3) I.E.L.J. 89). This requires employers (although only if requested to do so by 10 per cent of the workforce) to put in place mechanisms to inform employees on a range of issues to do with the recent and probable development of the undertaking’s activities and economic situation. Employers are to inform *and* consult with employees, firstly, on the situation, structure and probable development of employment within the undertaking and, secondly, on decisions likely to lead to substantial changes in work organisation or in contractual relations (in the latter case, this is with a view to reaching agreement). The Act provides a template of sorts in its “standard fall-back provisions”, which contain rules of procedure, rules on the election of employee representatives, rules on the structure of any information and consultation body to be set up and rules governing complaints and disputes. Section 6 defines “employees’ representatives”. They must be employees of the undertaking, elected or appointed for the purposes of the Act, and the employer is obliged to arrange for the election or appointment of representatives. Indeed, it should be noted that where it is the practice of the employer to conduct collective bargaining negotiations with a trade union or excepted body that represents 10 per cent or more of the employees in the undertaking, the 2006 Act provides that employees who are members of that trade union or excepted body are entitled to elect or appoint from amongst their members one or more than one employees’

representatives. Thus, if a body like the Employee Council posited here were in existence, a certain number of its members would automatically become members of any alternative information and consultation forum.

The problem, of course, is that the information and consultation legislation reflects and promotes a continental European model of works councils. Works councils tend to deal more with information and consultation over qualitative non-pay issues. It is questionable whether such a body would be the correct mechanism to also deal with negotiation (collective bargaining) over quantitative pay and conditions. Crucial is the distinction between “consultation” and “collective bargaining”. It should be remembered that the European Court of Justice (“ECJ”) in Case C–188/03 *Wolfgang Kühnel v Junk* [2005] 1 C.M.L.R. 42 gave quite an expansive interpretation to what is to be understood as “consultation”. The ECJ found that consultation “imposes an obligation to negotiate”, thereby driving home the point that consultation “with a view to reaching an agreement” envisages compromise and change; employers who have a rigid agenda that they want to impose on the workforce without engaging in meaningful consultation will be in breach of their obligations (O’ Mara, “Calling Time on Collective Dismissals-the Junk Case” (2005) 2 (2) I.E.L.J 68). The ECJ stated that:

“[t]he effectiveness of such an obligation (to consult) would be compromised if an employer was entitled to terminate contracts of employment during the course of the procedure or even at the beginning thereof. It would be significantly more difficult for workers’ representatives to achieve the withdrawal of a decision that has been taken than to secure the abandonment of a decision that is being contemplated.”

Is it to be presumed that “collective bargaining” of the type envisaged by the Acts amounts to something more than consultation, as defined by the ECJ? If so, a question mark arises over whether members of an Employee Council would be sufficiently independent from the employer to fulfil such a function. This has been already the subject of some debate; the extent to which “excepted bodies” of the

type envisaged by the Supreme Court offer employees a sufficient counterbalance to employer power, rather than being simply a “creature of the employer”. D’Art and Turner (see above) have strongly criticised the Supreme Court’s decision as being in breach of ILO Convention 98, which categorises any worker’s organisation established under the control and domination of the employer as an interference with the right of freedom of association. They argue that worker representatives (whether elected or appointed) are employees of the undertaking and therefore dependent on the goodwill of management for their employment and prospects of promotion. As a result, such representatives cannot act with the same independence and freedom as can officials of a trade union. They conclude that such a body would be akin to a “company union”. A further issue, that they do not address, is the rights and status of such a body (an Employee Council). Could it, for example, take industrial action? Would the traditional “immunities” conferred on trade unions be available in that event?

## **Conclusions**

The decision in the *Ryanair* case has raised considerable challenges for the industrial relations actors in the State to meet. The Labour Court will now have to re-evaluate its approach to hearing cases and its unique status as an expert industrial relations body, with more informal rules of procedure and evidence, has been questioned. It may, indeed, require legislative intervention to clarify the court’s role.

Whether the Acts will now play much of a role in future disputes is also open to question. On one level, the Acts perhaps point to the pitfalls of enacting legislation on the basis of social partnership negotiations; the inevitable compromises required do not make for sound legislative certainty. More seriously, perhaps, the Supreme Court’s view of what constitutes “collective bargaining” and what can amount to an employee collective bargaining unit and “excepted body” raises concerns about the extent to which the rights of trade

unions and the constitutional guarantee of freedom of association are protected. These concerns are compounded by several references by the Supreme Court to Ryanair's "right to operate a non-unionised company". At one point in his judgment, Geoghegan J. appears to question the constitutionality of any possible legislation on statutory trade union recognition rights, saying that "it is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so".

If this is the case, it would place Ireland in a unique position within the Anglo-Saxon industrial relations world. Statutory recognition legislation already exists in the United Kingdom, as well as in the United States, where the House of Representatives has recently passed the Employee Free Choice Act 2007, which will strengthen employee rights to have unions negotiate on their behalf. In addition, the Canadian Supreme Court has recently ruled in *Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia* [2007] S.C.C. 27 that the collective bargaining rights of workers are protected by the 1982 Charter of Rights and Freedoms and are also a fundamental aspect of Canadian society predating the Charter. The Canadian Supreme Court noted that collective bargaining complements, promotes and enhances fundamental Charter values such as equality and democracy and that the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada had ratified, including various ILO Conventions.

The Labour Court re-hearing of the *Ryanair* case, if it goes ahead at all, is unlikely to be the end of the matter. Whatever way the decision goes, it is likely that further challenges to hearings under the Acts will be taken. Ultimately, it may well be that a pilots' dispute over pay and conditions will end up with the precise import of the Irish constitutional guarantee of freedom of association being determined.