IRISH ASSOCIATION FOR INDUSTRIAL RELATIONS

The Eleventh Countess Markievicz Memorial Lecture

1986

The Crisis of Collective Bargaining

John M. Horgan

The Countess Markievicz Memorial
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The Eleventh Countess Markievicz Memorial Lecture

Charles McCarthy, RIP

A Tribute by Tadhg O Cearbhaill

IT IS AN HONOUR to be invited to direct the mind of this audience, for a short while, to one who did so much for this series of lectures.

It started about twelve years ago and those who were involved in those days will remember how influential was the persuasive advocacy of Charles McCarthy in having the Markievicz Memorial Lectures established. The objective was to provide opportunities for significant discussion on ideas and developments in industrial relations.

Charles contributed to these discussions most handsomely; he was prominent in all the debates; and he himself delivered the third lecture of the series in 1978. As in the case of every cause he championed, his participation was wholehearted, enthusiastic and persistent.

The reason for his interest is easy to see. To him the industrial relations process was not something mechanical or mechanistic to be put in motion to solve some particular problem and then set aside until required again. Rather did he see it as an essential part of a permanent edifice maintained for the purpose of helping everyone in the world of work to achieve a happy and rewarding life while making a worthy contribution to the shared effort.

To fulfill such a purpose there would have to be structures, including *the institutions of the middle ground,* the term he like to apply to the agencies of conciliation and other forms of intervention in the field.

He saw, in turn, that the wider the spread of knowledge and understanding among those who had recourse to them, the better would these institutions be; and it was in that light that he viewed this series of lectures and the publication of the texts by the Irish Association for Industrial Relations.

Charles McCarthy had not even started at the National School when Madame Markievicz died in a public ward in Sir Patrick Dun's Hospital in Dublin.

He therefore never knew her; but if he had, he would have found

much that would be congenial to him. She was lively, bright and intelligent; and good companion; a great conversationalist. She devoted much of her time to the arts. She wrote plays and acted in the Abbey where Charles was to become so deeply involved in his time. She was also an active trade unionist, even though this came late in her career.

Remarkably, they both shared a vision of this life as a stage on the way to the hereafter. Readers *of The Distasteful Challenge* will have been struck by the deeply moving passage about the conquest for the human spirit, about man transforming a mortal illness into an opportunity for his greatest freedom. It is the freedom that Charles himself now enjoys.

Madame looked forward to the hereafter for a different reason. She wanted to settle unfinished business with some who had gone before.

And this is a pointer to one outstanding difference between them. Charles, while confident of his own stance in an argument, was always open to the views and opinions of others. In the parlance of his native Cork, he was "a thorough gent".

Madame, on the other hand, had a habit of sticking hard to her own point of view. She saw herself, in the polemics of her Labour Ministry days, as a champion of the right. "She was blinkered to the opposing point of view'" says her biographer Ann Marnecco, who goes on:

> "The intricacies of industrial bargaining were not her forte, but there is no doubt she inspired the Ministry of Labour with her fighting spirit".

It may not be too fanciful — nor do I think it disrespectful — to picture them together at this time preparing, like us here, to listen to the 11th lecture in the series, she asserting some strongly held views and he reasoning gently with her: "Now Constance, let us hear the arguments first".

In token recognition of Charles' magnificent contribution to the enlightment of all concerned with the life of work and solution of its problems, you are invited to stand for a few moments in silence.

ELEVENTH COUNTESS MARKIEVICZ MEMORIAL LECTURE

"The Crisis of Collective Bargaining"

JOHN M. HORGAN

I HAVE ENTITLED MY lecture this eveing "The Crisis of Collective Bargaining", not because I feel that the whole edifice of collective bargaining is about to collapse or disappear before our eyes but because there are developments in industrial relations which are best understood by looking at their impact on collective bargaining, developments which might, in time, have grave and, as yet unforeseen, consequences for the conduct of industrial relations. It is not part of my thesis that these developments are catastrophic in themselves nor is it necessary that I convince the audience that the changes which are taking place amount to a crisis. I will have achieved my objective in this lecture if my listeners agree that there are serious alterations taking place in the industrial process and that these changes ought to be planned and channelled and not simply allowed to happen in an uncontrolled way.

This year is the 40th anniversary of the establishment of the Labour Court and it is therefore appropriate in what I have to say I should emphasise the role of the Court in the industrial relations process in the intervening period. In 1946 the average earnings of male adult wage earners were £3.16.6d per week, and while 45.6% of men earned over £4 per week only 1.6% of women earned that amount. There were 105 strikes, 45 of which involved pay, and 150,000 man-days were lost.

In 1946 also, John von Neuman set out the framework of the ideal computer and although it was not to be built for another twenty years of so, it still remains the model for all modern digital computers. Linking those ideas, it would be seen that if all the wage slips for all workers in the economy had been submitted to a computer each week since 1946 the overriding impression to be drawn from such a set of figures would be one of the relative immutability of the structure of gross earnings in our society. Real gross wages have risen, in line not only with the growth in national productivity but also in more recent years in line with the growth in international transfers to the Irish economy as a result of EEC

membership. Those at the bottom of the wage structure have over the period gained as much as but not more that those at the top. In fact the main relative gains in gross incomes have been made by those who are completely outside the wage structure itself, most notably persioners and others who are dependent on state transfers.

This is not to deny that contractions or expansions in the wage structure can take place as a result of collective bargaining practices or policies. However an overview of the last forty years would suggest that the effect of such policies tend to be short lived. The process by which original relativities become re-established was analysed in some detail by McCarthy, O'Brien and Dowd (1) in an ESRI paper in 1975. An examination of the period since then would suggest that their findings remain valid and that any differentials which were compressed during national wage agreements have since been expanded.

My point is that collective bargaining and the expressed intentions of the parties to it has had little long term effect on the *structure* of gross earnings compared to the effects of the pressures of domestic and international economic forces. One major exception to the apparent long term stability of the wage structure is the significant shift in male/female differentials which took place in the 1970's. It is noteworthy that this shift took place as a result of legislative changes, which altered the ground rules within which collective bargaining took place — not as a result of changes in collective bargaining practices per se. Indeed the need for equality legislation must be seen as an admission of the inability of collective bargaining to obtain the desired objectives.

The last point one would notice from our hypothetical computer analysis of wage slips is that for most of the last forty years the structure of net earnings moved broadly in line with the structure of gross earnings. This has not been true of the more recent past when in a short number of years changes in the level and the progressivity of taxation have done more to shift the distribution of relative net earnings than collective bargaining policies have managed over a quarter of a century or more.

Establishment of the Labour Court

The most important feature of the industrial relations system is not the number of strikes or even the high level of unionisation by comparison with other countries, but the fact that almost all disputes are referred to third parties prior to strike action being taken. The establishment of the Court and its continued operation over the last forty years is therefore a key feature which must be

considered in any discussion of the development of collective bargaining and labour law. Any discussion of the Court must however be based firmly on a true understanding of the processes of the Court and the ways in which it has attempted to fulfill its role.

Speaking on the second stage debate in the Dail in 1946, Sean Lemass explained that the whole Bill had been drafted only after discussions with unions and employers. He explained that during the war "citizens could not have the information which would enable them to regulate their personal and sectional interests in accordance with the general interest even assuming that everyone was willing to do so" but that once it was possible to do so it is desirable that people be given back responsibility for "such intimate personal concerns ... as the wages of workers". He went on to say that this was especially true of this country where the trade unions occupy a position of power and influence, and where under responsible leaders the unions would fully understand the consequences to their members and to the community generally of their actions. The whole edifice of the Labour Court and conciliation service with its attendant provisions for Joint Labour Committees and registered agreements was designed to facilitate agreement between unions and employers in the settlement of their differences and it was framed in that way because that was the way they wanted it to be framed.

There was no element of compulsion in the use of the procedures of the Court. In line with this thinking it was decided that the Court should operate and be controlled by the two sides of industry through their full time nominees on the Court and that the role of the Chairman and Deputy Chairmen should be subservient to the agreed wishes of the two sides of industry as represented in the Court. The means of ensuring this were furthermore enshrined in the voting procedures which the Court itself must use in reaching decisions under the 1946 Act.

The Role of the Labour Court

In speaking about the part which the Labour Court has played I am obviously far from being an impartial commentator and if I praise the Court more than is called for, it is because of a genuinely held belief in the value of the Court and an acknowledgement of the contribution which my colleagues and their predecessors have made over the last forty years to improving industrial relations.

How can one explain the success of an institute which, if it had not been created in 1946 but rather was being proposed now, would, I suspect, never see the light of day? Such is the innate conservatism of unions and employers. I have already referred to the superior

role which the ordinary members play in the decision making process of the Court, superior in the role, that is, to the role played by the independent Chairman. No doubt that is one of the key factors in its success. Another is that described by the first Chairman, RJP Mortished, speaking on the 20th March, 1947 to the Statistical and Social Inquiry Society of Ireland, when he announced that although the 1946 Act required the Court to take account of the public interest, and the promotion of industrial peace, fairness and acceptability in reaching its decisions, the Court would not be bound by its own precedents. He recognised that it would not be easy to reconcile those considerations in any particular case, and that the Court would not take the easy course of applying hard and fast rules to its decisions. The criteria referred to by Mortished were later removed by the 1969 Amendment Act. There is no evidence that the Court ever codified its approach to the problems which were set before it. Since 1969 when the Act was amended it has been customary to say that the Labour Court looks at each dispute on its merits. In practice the Court takes account of a great variety of criteria in deciding on any particular case. The primary guide which the Court uses in reaching its recommendations are the arguments put forward by the parties to the Court at the hearings. Although the requirement to take account of the public interest was removed by the 1969 Act, the Court is still free to do so and in fact where the situation demands, the Court will and often does take account of the public interest. But, and it is important to stress this, the perception of the public interest which the Court uses is its own and not necessarily the public interest as defined by Government from time to time.

The flexibility with which the Court can take decisions and alter the basis on which it takes its decisions accounts for the fact that it has maintained its relevance in industrial relations throughout its life.

Members of the Court have continually stressed that it is not a court of law and although it resembles ordindary courts in some respects, particularly in its independence, it does not have the power to lay down the law. It operates almost entirely within a voluntary system and though on occasions unions and employers are bound to accept its industrial relations recommendations or decisions, that can only arise where the parties to agreements have voluntarily agreed to be so bound.

The decision by the Court not to attempt to build a body of case law or precedent and described by the first Chairman as the "easy way" which the Court would not follow, had momentous consequences, not just for the Court but for the whole tenor of industrial

relations. There was an opportunity at that stage for the Court to begin a systematic codification of good labour practices and procedures which it could perhaps have promulgated. There was ample scope within the legislation for such a development but the opportunity was not taken. It is intriguing to think what might have happened if a different approach had been taken and whether the Court would have been as successful or indeed would have survived the attempt at all.

Ideology

At this stage I should state my ideological position, or as others will call it, my prejudice. I am wholly committed to the concept and practice of collective bargaining in both the public and private sector of employment. It is, I believe, a matter of fundamental importance to the human condition that we should, as far as possible, have control over our own destinies including, and perhaps most importantly, the way in which we contribute to the welfare of others. In a complex industrial society where production must, for reasons of efficiency, be carried out in large enterprises it is inevitable that work be carried out by men and women in large groups. The logistics of such enterprises mean that the individual freedom of action must be severely curtailed and a certain amount of decision—making centralised within bureaucratic structures. It is simply not possible for everyone to be in control; order is necessary and the only way in which any effective control can be exercised by workers is through participation in collective decision—making with other workers and ultimately with management through collective bargaining.

My approach is different from that of some management philosophies which see trade unions as an unfortunate fact of life brought about by envy or greed or simple misunderstanding. This view of industrial relations emphasises the conflict of interest between management and worker or labour and capital. That, however, is not my approach.

Still others would see the emergence of trade unions as an inevitable reaction to the harsh conditions under which work was and is performed, and that collective bargaining is only one of the functions of trade unions while waiting for a new order of things in which the workers will somehow control the complete production process. In this view the existence and survival of trade unions are objectives in themselves. I do not subscribe to that view either.

My view would be that trade unions are essential for the smooth functioning of collective bargaining and not, as many would say,

the other way round. This is the perspective which I bring to bear on the field of labour law and on the developing crisis in collective bargaining.

Duality

Ideas of labour law have traditionally been based on a dual view of the components of the relationship between the employer and the employee. There is the individual contract of employment on the one hand and the collective agreement on the other. The relationship between the two in law has remained unclear. The individual contract of employment, to which most employers and workers are entirely oblivious, is set against the collective agreement between the union and employer which is familiar to both but unknown to the lawyers. Is it not somewhat strange that after so many years the simple questions 'Is a collective agreement legally binding and does it necessarily form part of the individual's contract of employment' remain unanswered? This ambiguity is the source of much practical difficulty in labour law and if it were resolved, many longstanding questions could be resolved.

Discussion in the UK and continental Europe on the role of labour law is centred not, as one might expect, on deregulation but on the concept of juridification. The idea of "juridification" (2), so called by Spiros Simitis the Professor of Law at the Goethe University in Frankfort, has been widely commented on (3), and I propose here to deal with it. Simitis has not given a clear definition of what he means by juridification; he explains it as a process whereby the legal framework is reformulated to adjust to an industrialised society.

It is a generalised process, and, as Simitis points out, labour relations is only one aspect of it. However, labour law presents a classic example of the process of juridification, and the concept can he feels be easily understood by looking at the development of labour law.

In the area of Industrial Relations juridification is the transition which is made when the laws of the State cease concentrating on the protection of the individual contract of employment, and instead set down binding requirements to which all labour agreements must conform. According to Simitis, with the transition to an industrialised economy, all alternatives to the juridification of labour relations are excluded.

Some may doubt that any state would be so insensitive to the wishes of individuals as to prescribe in any detail the kinds of agreements which individuals may or may not make with each other. Others will recognise that not only is the State capable of

doing so, but that it has gone so far as to set down the minimum and necessary conditions for infinitely more important and intimate contractual relations between men and women. There is only one allowable form of marriage and it is dictated by the State and no deviations or modifications are allowed to suit the wishes of the parties. It is an all or nothing choice. You are either married and stay so on the terms set down by the State, or you are not married at all. We have not yet reached that degree of juridification in labour relations. But we need not, I think, doubt that it is possible. The question which Simitis poses is whether we are moving in that direction.

While juridification follows different paths in different countries, in each it has tended to be regarded as something that is typically or even exclusively a product of the national culture. And while most continentals have regarded juridification as a characteristic which distinguished the development of labour law on mainland Europe from that in Great Britain, Professor Simitis has no difficulty in pointing out that Britain is not an exception: "The long way from the Factory Act of 1831 to the Employment Act of 1982 is a single manifestation of the gradual increase of juridification". (4)

It is therefore a transnational phenomenon and each step "signals first and foremost a change of attitude that leads to an increasing regulation of labour relations in order to fulfil the process of an interventionist policy. The state establishes a detailed legal regime of these relations in order to ensure adjustment to a series of specific economic and social goals". (5)

Whatever the differences the result is the same "Substantial elements of labour relations are, one after the other, subjected to conditions included in a scheme imposed by the State, deliberately interfering with individual relationships and displacing personal agreements by mandatory rules of behaviour". (6)

Simitis describes the phases of juridification and in a more elaborate study one could follow the stages in an Irish context. Here, however, I would just like to mention some of the legislation which typifies our contribution to the process of juridification in industrial relations.

The first example would be the Truck Acts which were laws designed to eliminate or curb certain excesses of the employment contract with regard to payment. The Acts represent a major intervention by the State, which was justified on social grounds.

The step from the Truck Acts of 1743 to the Maternity Protection Act of 1981 is a long one, but what emerges is a process of juridification in the area of pay, reflecting not only the growth of an industrialised society, but also the growth of the female workforce

within that society. The latter Act is perhaps the best example we have of the culmination of a juridification process in industrial relations. Prior to its enactment the payment of wages to women while on maternity leave was increasingly being a subject for collective bargaining. Since its introduction paid maternity leave has disappeared from the negotiating table; it is now generally accepted practice that the provisions of the Act apply, and no others.

The same is not true of all labour legislation. The Holidays (Employees) Act, for example, lays down minimum levels of annual leave, but these minimum levels are improved upon in practice in direct negotiation. In such cases the law is said to provide a floor for collective bargaining; the legal minima are then improved upon in collective bargaining.

The Unfair Dismissals Act and the equality legislation both operate on the basis of an interference by the legislature in the individual contract of employment. Such laws undoubtedly represent an incursion by the State into areas which were formerly exclusively the preserve of industrial relations. Whether the incursion amounts to juridification is questionable, however. Is the State actually dictating what employers are to do? In the case of the Unfair Dismissals Act, the answer must be in the negative, in so far as the Act provides an alternative form of redress to a person dismissed. As Frances Meenan has pointed out in her paper (7) the Unfair Dismissals Act was designed to provide redress for people who had been unfairly dismissed, and does not operate to prevent an employer from dismissing an employee, nor to strengthen the position of employees. What was hoped for and intended by the legislation was that it would remove the incidence of arbitrary dismissal from industry. Perhaps in that latter respect, one could say that the Act represents an incident of juridification since it has removed the automatic right to dismiss from the employer and encumbered him with justifying a dismissal.

As an aside it seems strange that many commentators say that this and similar Acts elsewhere have failed to achieve their objectives on the basis that the proportion of claimants who are awarded reinstatement is minimal. If the secondary objective of the Act of removing the incidence of arbitrary or unfair dismissal is met, then every claimant would lose his case. The statistics show only the cases which get to the Tribunal, not the dismissals which have not occurred because the Act restrains the employer. And those cases which come to the Employment Appeals Tribunal are those in which the employer can justify, or believes he can justify, a dismissal.

The equality legislation is another area of industrial relations law where one can interpret the legislation as an extension of legalism into an area where the law did not intrude before. On the other hand one can also say that rather than imposing duties on the employer, the legislation guarantees certain rights to the employee — and the effect on employers is only felt if the employee sets out to punish the employer for failure to respect those rights.

In any event, whether the process is one of juridification or not, we now have a great deal of legislation affecting labour relations, much of which has replaced or institutionalised the bargaining process, and if Simitis is to be believed, there is more on the way.

Collecting Bargaining Over Forty Years.

I want to now look at the way collective bargaining has developed over the last forty years and where it has led us to.

Collective bargaining was not an invention of the Labour Court. In 1946 there already existed a well developed trade union structure and although employers generally were not as well organised as they were to become, the concept of collective bargaining was well established and accepted. In 1946 Joint Industrial Councils existed for flour milling, Dublin printing, bacon curing, woollen worsted, tanning, and since 1941, rosary beads. For most commentators on industrial relations it seemed unquestionable that collective bargaining should be extended not only to cover larger numbers of workers and employers but also that the level at which bargaining took place should be elevated so that it became more and more remote from the workplace. Indeed it seemed as though the ultimate level of sophistication would be that representative groups of unions and employers should meet and determine all wages and conditions for all workers in one central agreement. While there was considerable success in establishing industrywide negotiation the movement towards centralisation never encompassed more that one industry at a time. During the 1970s a new form of agreement emerged in response to the threatened imposition of a statutory incomes policy by the Government of the day; and it was referred to as national wage bargaining. National wage bargaining is not in any sense to be seen as a continuation of the trend towards centralisation inherent in the other movements. The important difference is that industry—wide collective bargaining attempted to regulate pay and conditions of employment within industries. National wage bargaining had the more modest aim of regulating the increase in the level of wages already established by industry wide bargaining. The fact that national wage agreements

reached their ultimate or as others might describe it, their "reduc-tio ad absurdum" in two so called National Understandings has obscured what I think will eventually be seen as a far more important development which occured simultaneously. That change was the reversal for the first time of a trend which had been progressing virtually without interruption since the turn of the century. I am referring here to the dissolution of virtually all the industry—wide bargaining structures which had been built up so painstakingly over the previous 100 years.

In his paper "Wage Inflation and Wage Leadership" (1) Jim O'Brien and his co—authors list some 202 bargaining groups. That list included all the important multi—employer bargaining units and virtually none of them is now operating. There is no longer, for example, industry—wide bargaining for creameries, bacon curing, maintenance craftsmen or oil workers. Over the past forty years national agreements have come and gone on numerous occasions, and may return again. What is, I think, more significant is that for the first time there has been a reversal in the trend away from industry level bargaining which leaves only the option of bargaining at the level of the firm.

One of the old chestnuts of commentators on industrial relations is the problem created by multi-unionism and no doubt it does create its own difficulties. What I want to suggest here is that in effect the problems of collective bargaining over the last forty years have been the problems of multi-employer negotiating units. In the ESRI study already referred to (1), the authors identified five key wage bargains each of which represented "a significant upward departure from a pre-existing pattern of wage increases and which has a disproportionate influence on the expectations, claims and settlements of other bargaining groups" (8). It is interesting that all of these groups involved bargaining by large numbers of independent employers. They were the Building Settlements of 1964 and 1969, the Maintenance Craftsmens Settlements of 1966 and 1969 and the Electrical Contracting Settlement of 1968. The fast that national wage agreements and understandings of the 1970s and early 1980s failed to achieve their objectives has often been attributed to lack of discipline on the part of trade unions and their inability to control the actions of their members. But as was pointed out (9), the employers organisations, FUE and CII are incapable of controlling the actions of their members also. What I am suggesting therefore is that problems in collective bargaining have arisen because we have attempted to reach agreements at bargaining levels which were inherently unsuited to the substance of the deals being made and that our problem is not too many unions but too many employers bargaining at once.

The IDA Survey

In a major survey conducted by Sean Murray on behalf of the IDA in 1984, a sample of firms in manufacturing industry was divided into those considered to have a successful industrial relations record and those which he categorised as not so successful. The criteria for assessing success were interesting because they covered a wider area than simply the absence of strikes.

The results were quite startling and would merit much greater consideration than it is possible to give them here tonight. The distinguishing feature between the two groups was the emphasis which was placed on the broader concept of employee relations in the successful companies. The features that distinguished the successful companies were first that they had a corporate policy of their own and would not simply follow trends elsewhere. There was a high emphasis on equal status amongst different categories of employees, and managers ability to handle employee relations figured prominently as a factor in reviews of the managers own salary. The companies had been careful in the selection of their employees initially and almost none engaged in industry—wide bargaining, preferring instead to negotiate directly with the union at local level. They made comparatively little use of the Labour Court or other third parties. Not surprisingly they also devoted a high priority to the training of managers in employee relations techniques. Their approach towards employees was to involve them, and their style of management was participative.

It is suggested in some quarters that the new style of management often referred to as Human Resource Management is hostile to trade unionism and is somehow inconsistent with collective bargaining. It has achieved this reputation perhaps because many of the companies which do no recognise trade unions also adopt a Human Resource Management approach to employee relations.

My experience, which is limited obviously to those companies which have had recourse to the Labour Court, is that there is no necessary connection between an active employee relations approach and a healthy collective bargaining environment. The two are compatible.

Let me suggest one reason why this might be so. In many other countries there are strictly laid down rules for the recognition of trade unions. These rules are laid down by law and their implementation is often supervised by industrial relations agencies attempting to act independently.

The procedures may involve ballots of employees both unionised and others not yet unionised. The result is a declaration by the

independent third party that the case has been won or lost, i.e. that the employer must recognise the union for all his employees or the union must withdraw from the employment for a stipulated time.

One of the consequences of not having a legal obligation on employers to recognise trade unions or to negotiate is that such issues have fallen to the Labour Court. The view taken by the Court is, I suggest, a sensible one and is one which unions and employers can understand and accept.

The solution which the Court has put forward in almost all cases of recognition is that the employers should recognise the union as speaking on behalf of its members and that the union should not seek to negotiate on behalf of employees who are not members, it being understood that membership is voluntary and the non-unionised employees are to be subject to no more than normal peer pressure to join the union. This solution has worked well over the years and has meant that it has not been necessary to engage in the degree of interference found necessary in other countries on this matter.

Recognition of trade unionism is not therefore enforceable on any employer and all those who do recognise unions do so either because they recognise the desirability from their own point of view of doing so and not because some court had directed that they must do so on pain of legal penalties.

It has also been pointed out that Human Resource Management undermines one of the foundations on which trade unionism was built, i.e. the tendency of management to mismanage its workforce and to treat labour as a commodity. It was interesting to hear Mr. Bill Attley, General Secretary of the FWUI, point out at the most recent Annual Conference of the Institute of Personnel Management that no union in Ireland had a full—time official devoted to recruitment. There was no need for one, in his view, because there were hundreds of personnel managers daily doing the job for the unions and doing it for free.

This is not the case, however, with the new breed of management. After years of preaching that the workforce was a Company's greatest asset, some managements are now behaving as though they believe it and employees do not object to being treated as a commodity provided they are treated as expensive commodities.

A closer look at the techniques of Human Resource Management reveals that there is nothing essentially new in this approach except perhaps that it is much more closely integrated into a strong corporate philosophy. What is new however is that it is finding its way into some of the traditional industries as well as the new unionised multi—nationals.

Minister's Proposals

Let me turn now to comment on the proposals for the Reform of Industrial Relations put forward by the Minister for Labour, Mr. Ruairi Quinn. I do not wish to make a comprehensive comment on all the proposals; that really is a matter for unions and employers, and I would not wish to be seen to interfere in that process. However, I think it is right that I should point out the implications for the Minister's proposals of what I have already described as key problems.

In the context of ridding labour law of all unnecessary interference in the affairs of employers and unions it is clear that I am in favour generally of the introduction of a positive rights based system in place of the present system of immunities.

The Commission on Industrial Relations considered this question and, by a majority only, favoured the retention of the present system.

As one who is involved day by day in assisting the parties to disputes to resolve their differences without recourse to law, it appears to me that the adoption of a system based on positive rights would do much to bring home to parties their rights and responsibilities in any given situation.

The system of immunities appears to me to be based on the notion that the collective agreement is somehow inferior legally to the individual contract. The law itself would be more relevant if it were more realistic and recognised that there is a right to strike, that it does not exist because the law says so, but because it is a fundamental necessity for the smooth functioning of a democratic industrialised society.

I have not argued that the law must be excluded completely from industrial relations. There is a place for it. In this respect the proposal that the Labour Court is to be given a role in the interpretation but not the enforcement of labour law is to be welcomed. Under the proposals, parties who wished to have clarification as to how labour law should be applied to particular situations would be free to refer the matter to the Labour Court for interpretation. The Labour Court could then simultaneously give an opinion on the legal point in question and attempt to resolve the matter in an industrial relations context.

This provision would perhaps go some way towards alleviating the problem which Mr. Justice Walsh sees as a problem for courts of law. In the preface to Kerr and Whyte's book on Trade Union Law, Mr. Justice Walsh of the Supreme Court complains that "The Courts are in danger of being brought into disrepute by the way in

which some injunctions, properly granted, are subsequently used by the persons who obtained them. Frequently they are simply used as bargaining counters and the person who has obtained the injunction will often stand by and allow the Order of the Court to be openly flouted without any effort to refer the matter back to the Court". (10) Mr. Justice Walsh acknowledges it may not be expedient to refer the matter back to the Court, it would be better that it be so referred back rather than the Court suffer the disrespect which it does when its injunctions are not obeyed. For a court of law the primary consideration appears to be that it should uphold the law and the dignity of the Court itself. I do not quibble with those objectives for a court of law. They are not however the objectives of the Labour Court. The Labour Court must not allow a legitimate concern for its own dignity stand in the way of its effectiveness as a service to the two sides of industry.

The development which I am welcoming and which is contained in the Minister's proposals allowing the Labour Court a role in the interpretation of the labour law is not without historical precedent.

To give the Labour Court the power to interpret labour law might be likened to the creation of a new "equitable" jurisdiction. Before equity hardened into law, and the chancery jurisdiction was finally fused with the common law system by the Judicature Acts of 1873 and 1875, the essential distinction between the Courts of Chancery and the common law courts was that Chancery was a court of conscience not so much concerned with rules as with individual cases. The Chancery received petitions, the determination of which was a function of the King's duty to do justice rather than a function of the common law; no one was left without a remedy in Chancery. The chancellors who issued decrees in chancery were ensuring "that justice was done in cases where shortcomings in the regular procedure, or human failings, rendered its attainment by due process unlikely. They came not to destroy the law, but to fulfil it".

The Courts of Chancery did not have the procedural formalities of regular courts; pleadings were informal, the hearings took place anywhere convenient, lawyers were not essential. They provided fast inexpensive justice, each case turning on its own facts. The decrees were binding on the parties involved, but not on anyone else.

Already the Labour Court has many resemblances to the early Chancery Courts. We try to keep the formalities to a minimum. We sit all over the country in an informal setting; often we visit the workplace to see for ourselves the nature of the work which is the subject matter of a dispute. Our decisions are not binding except on the parties themselves in certain instances. We do not set pre-

cendents with our decisions, but look at each case on its own facts trying to achieve a just and workable solution for the parties.

Under the Anti—Discrimination (Pay) Act, 1974 and the Employment Equality Act, 1977 the Labour Court was given a role which brought it closer than ever before to the role normally reserved for legal tribunals or courts of law. This was an unusual departure and it is noteworthy that the Employment Equality Agency, after considerable debate, has come to the conclusion that it would prefer that the final decision on points of fact in equality cases should rest with the Court, and not be transferred to the more legally expert forum of the Employment Appeals Tribunal.

Conclusion

I think that to give the Court certain additional powers for the interpretation of labour law, would be to build up its existing "equitable" type jurisdiction and would enhance and increase respect for labour law in our community. It might also ensure that the rigidity which is an inherent part of the juridification process might be ameliorated by the application of common sense.

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