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Abstract

Trade unions in the private sector and the commercial semi-states have rejected voluntarist Labour Court recommendations in the industrial relations arena in a significant number of high-profile cases in recent times. Conversely, in parts of the public sector, there has been a move towards the adoption of binding dispute resolution systems. Brian Sheehan suggests that respect for the state's dispute resolution agencies and need for expertise and experience in dispute management is as great as ever.

Introduction

In the private sector and in the commercial semi-state sector, trade unions have always rejected a small number of Labour Court recommendations, while employers have generally accepted them. This pattern has been a reliable rule of thumb in Ireland's voluntarist industrial relations system, within which Labour Court recommendations on collective bargaining issues are non-binding. In the past 12-18 months, however, there have been a number of high profile cases where unions have seemed to routinely reject these recommendations, a development that would be a cause of some concern were it to develop into a pattern.

In the public service and the commercial semi-state sector the reverse has been happening: a move toward binding outcomes.

In the public service, the economic crisis appears to have ushered in a new era of dispute settlement, with binding outcomes the new norm, resulting in speedier outcomes than hitherto.

In a growing number of some commercial semi-state companies, meanwhile, there has been a renewed interest of late in internal disputes bodies, often involving binding outcomes.

It must be understood that 'binding' in all of these cases, means binding in a voluntarist sense; none of these 'systems' have much in common with the legalistic approach to dispute resolution found in Europe.

This article looks at each of these sectors in turn, and seeks to identify where there are commonalities and where there are differences of approach. Is what we have witnessed in recent times in dispute resolution here a case of 'old wine in new bottles', or is something more significant going on? Moreover, are there lessons to be learned, which would help improve our industrial relations dispute resolution systems in the medium to longer-term?

Rejecting Labour Court Recommendations

The tradition of employers accepting Labour Court recommendations, is largely intact. Companies that attend the Court, still overwhelmingly back its recommendations. Refusing to attend hearings is another matter entirely, but it has always been thus.

Unions can be very critical when employers break this 'rule', but decisions by unions themselves in several key private and semi-state sector disputes during 2016 and 2017, suggest that the union movement needs to carefully consider the potential risks of rejecting recommendations, especially in very high profile cases that emerge from the state's foremost industrial relations 'court of last resort'.

The following is short-list of significant cases where Labour Court recommendations were rejected by unions in 2016, and thus far in 2017:

- **Tesco (ongoing dispute):** The trade union, Mandate, rejected a Labour Court recommendation on the basis that the result would still mean the imposition of wage cuts for longer serving staff in the context of a broader restructuring of the wage system. Dispute still unresolved/subject to independent external review.
- **Edenderry Power (subsidiary of state-owned Bord na Mona):** union rejection of a binding (in voluntarist industrial relations terms) of a Labour Court recommendation.
- **STT Risk Management:** SIPTU rejection of Labour Court recommendation.
- **Bausch & Lomb:** SIPTU rejection of a Labour Court recommendation. WRC proposals later resolved dispute.
- **Mondelez:** SIPTU and Unite rejection of Labour Court recommendation. Dispute resolved at WRC level.
- **Permanent TSB:** Unite union voted to take "limited industrial action" following the rejection by members of a Labour Court recommendation on pay. Dispute settled at local level.
- **LUAS:** SIPTU rejection of a Labour Court recommendation; Court issued second recommendation, which settled strike.
- **Dublin Bus (state-owned):** Trade unions rejected a Labour Court recommendation.

Dispute settled at WRC level.

Industrial Muscle, Policy Issues

In some of these cases, trade unions were able to secure higher settlements by rejecting recommendations, using their evident industrial muscle to lever better deals (e.g. Luas, Dublin Bus, Bausch & Lomb).

Such tactics can work where the union and its members exploit their strength, but can fail miserably in situations where misjudgements are made.

In the Tesco case, for example, the dispute remains in limbo despite weeks of industrial action and an agreed ongoing review, whereas in Luas and Bausch & Lomb, militant approaches paid dividends although these raised issues for management, unions and the IR system. A closer look at these three disputes suggests that they each carried a high-level of risk for the trade unions) involved, and in addition required skilful dispute management by the state's dispute resolution agencies or by third party experts.

Luas – All Hands On Deck

In the 2016 Luas dispute, the Labour Court, perhaps anticipating that any proposals it issued initially would face rejection, boxed clever. It crafted what might be described as its very own industrial relations 'revolving door', a recommendation so broadly-based that it allowed the parties to come back for a second 'go' at settling what the Court, from extensive experience, knew was going to be a serious strike. This is it did to good effect, following an initial intervention by the Workplace Relations Commission. An important behind-the-scenes scoping role was also played by the Irish Congress of Trade Unions (ICTU) in the lead up the second move by the Court, thereby enabling all of the skilful players on the national IR stage to get involved.

In this case, the union itself needed assistance because it was having great difficulty in persuading militant shop stewards in the tram company to bring the dispute to a head, and end what had turned into an 'on/off' war of attrition, a tactic that impacted to the minimal possible extent on workers, while hurting the company and the customers. The end result was a pay deal that the union claimed was above prevailing pay norms, a claim the company said was untrue as didn't factor in a lengthy pay pause. What can be said with certainty is that the strike achieved more that IR observers expected, and while it was effectively led by shop stewards, it took an experienced SIPTU official, the Labour Court (twice), ICTU, a former Ibec IR expert and a 'hands on' company CEO, to bring it to a conclusion that should stand the test of time.

Bausch & Lomb – Playing For High Stakes

In the Bausch & Lomb dispute, the pragmatism of Irish industrial relations was also strongly in evidence, but the way a deal was crafted in this instance raised questions that received little attention. Compared to the enormous coverage generated by the Luas strike, the Bausch & Lomb affair was largely ignored in the national media. The dispute never developed into a strike but it was a very close run thing. In this case, unusually, the WRC was cast in the role as a sort of 'court of last resort', by arriving at new proposals after the rejection of a formal Labour Court recommendation. WRC Head of conciliation, Anna Perry, successfully managed a very tense situation at the Waterford-based multinational, and succeeded in brokering an above average pay deal in the face of a strike threat.

The Bausch & Lomb story showed that a high-risk union strategy could work, but only if the management is sufficiently invested - as it was in this case – and strongly believed in the business. US management backed their investment decision in new plant (a total of €123m), sticking with a facility where they had negotiated a tough restructuring deal in 2014.

Retrenchment measures agreed at the time were critical in shaping employee responses in 2016, and in informing company management and union officials. The union involved, SIPTU, had worked hard for a settlement based on the original Labour Court recommendation, which was defeated when more militant local shop steward voices won the day. In response to this, the union took the decision to up the ante and back a threat of industrial action, despite the risks involved. It made the calculation that a long drawn out affair would be much more damaging than a short, sharp move that focussed minds, especially the minds of its own members.

The assessment the union made was that an unsentimental US management, which was solely interested in concluding a deal that would secure its investment, would put its full deck of cards on the table. The union knew from the 2014 negotiations that 'saved' the facility, that top management wasn't opposed to recognising trade unions in the way many US multinationals tend to be. Rather, they were hard-nosed pragmatists, seeking cost certainty and industrial peace. Faced with the threat of industrial action, the company warned that the future of its plans could be jeopardised, but it also put a generous offer on the table. The final offer was ahead of prevailing private sector pay norms. The company also knew from the 2014 restructuring, that the union leadership in this instance wouldn't have backed a threat of industrial action unless it felt that this was necessary to bring the dispute to a head, secure final agreement – and lock down industrial peace for the three years of the proposed agreement.

Yet, the outcome, while it pleased all sides, also carried a warning. Such tactics might not always work; indeed, the union leadership only adopted a higher risk approach when a moderate one had failed. The lesson, therefore, is not that Labour Court findings can be dismissed as merely a rung in the IR disputes ladder, rather it is that it would be very easy to make one slip on that ladder and end up in a 'lose, lose' scenario. In this case, skilful trade unionism and hard-headed management overcome very real difficulties, but they may not always be able to do so.

Tesco – A Rescue Effort

The current dispute in Tesco may be a case in point, with the company and the Mandate union – it too rejected a Labour Court recommendation – requiring the assistance of ICTU and Ibec to help avert further industrial action. Again, pragmatism was to the fore, with a helping hand needed in a strike that saw workers in about half the multinational's stores reject the option of going out in support of striking colleagues.

This was a case where rejecting a Court recommendation left workers and the union with view viable options. A special review process is currently underway, but it is unclear how the union will be able to improve on terms that have already been rejected. One of the ironies in this dispute is that Tesco, although a very powerful multinational, it does engage in collective bargaining. The multinational may be acting tough by altering the cherished terms and conditions of established long-serving staff, but it operates DAS (deduction of union dues at source), and attends and adheres to recommendations made by Ireland's dispute resolution bodies. Many large multinationals don't do anything like that. Clearly, the risky tactic of rejecting a Court recommendation in this case has not paid off for Mandate, but fortunately for all concerned the situation may be 'rescued' by IR experts. We won't know for some time how this dispute ends, or what its implications are, but from a union perspective it is hard to make a case at this point that it has been a success.

Hostage To Fortune?

The wisdom or otherwise of trade unions routinely rejecting Labour Court recommendations is one of the issues raised in these cases. Were employers to start routinely rejecting Labour Court proposals, trade unions might live to regret encouraging such a development. To maintain the integrity of the voluntarist system, there needs to be a high degree of acceptance of Court findings by both parties. External 'experts' can play important roles as we have seen, but their use needs to be judicious, especially at a time when there is no formal national-level social partnership 'trouble shooting' body around, like the former National Implementation Body or the long defunct Employer Labour Conference.

If the recent spate of Labour Court rejections develops were to become than a 'blip', then unions might live to regret encouraging a trend that could undermine a key stabiliser of the current industrial relations system. The Labour Court and the dispute resolution system generally, is something that the trade union movement fought hard to establish in the first place.

Public Service – The Move Towards Certainty

In the public service, the economic crisis of recent years has led to something which would probably have taken years to formally negotiate, and which has gone unheralded outside of industrial relations circles. This is the adoption of a system of binding decision-making in respect of disputes that arise within the confines of public services like the Croke Park Agreement, the Haddington Road Agreement (HRA) and the current Lansdowne Road Agreement (LRA). This trend started with the Croke Park Agreement in 2010. Seven years

on there has been very little criticism of this development; it appears to suit public service management and the trade unions.

Combined with this use of binding arbitration, a toughened-up Oversight Body was also developed under the Lansdowne Road Agreement. This Body can assess whether claims or disputes are in conformity with the terms of the agreement.

Between the use of binding decisions and the Oversight Body, therefore – both initiatives born in a crisis – dispute resolution in the public service has taken on an element of compulsion than hitherto, albeit within the voluntarist tradition. This has enhanced those important political intangibles, confidence and stability, elements that policy makers regard as vital ingredients when it comes to attracting inward investment.

Two examples suffice to illustrate how this new 'tighter' system of enforcement works on a practical level. The first concerns the HSE and how its HR department decided when the Croke Park Agreement (CPA, 2010-2013) was signed that it would maintain a corporate policy of accepting all third-party decisions related to any aspect of that agreement, and all subsequent central public service agreements. The second concerns the role of the new oversight mechanism (the Oversight Body), operated by the parties themselves, which 'polices' the Lansdowne Road Agreement, sometimes issuing stern advice, where appropriate.

Hse's Marker Role

The HSE provides a good example of how seriously the CPA binding mechanism was taken by a key public service employer.

This can be illustrated by examining a dispute between the SIPTU trade union and the National Ambulance Service in 2013. The union wrote to employee relations management in HSE at the time, insisting that the employer accept a binding Labour Court recommendation under the Haddington Road Agreement. In a letter to a Mr Finlay in HSE's senior management, the union attached an article that appeared in the weekly Industrial Relations News (IRN) which, the union quoted as saying, "that Mr Barry O'Brien (Head of HR, HSE) will accept the binding recommendation on redeployment in the Ambulance Service". In the article in question, IRN stated that there were "some initial doubts about whether the employer would abide by the decision", but that Barry O'Brien "confirmed to IRN this week" that they (HSE) would be accepting the Court's recommendations, "whatever challenges may be involved because (binding decisions) are an integral part of the HRA". When contacted, Mr O'Brien re-affirmed to IRN that this remained the HSE's position. However, the union was advised by another HSE manager that the ambulance service was not in a position to act on the recommendation, for budgetary reasons. The union followed up by asking HSE that this stance be withdrawn and that the stance adopted as HSE policy by Mr O'Brien, be adopted and confirmed. Mr O'Brien did re-affirm the HSE's positon, namely that the Executive would abide by all recommendations that related to the public service agreement, "whatever challenges may be involved because (binding decisions) are an integral part of the HRA".

LRA Oversight Body

More recently, the Oversight Body for Lansdowne Road Agreement (LRA) showed its 'teeth' by advising one of the ICTU's more powerful unions, the Irish Nurses and Midwives Organisation (INMO) that the union would place itself outside the LRA if it failed to abide by the binding disputes process laid down in the LRA. The INMO heeded the warning and the issues in dispute went forward to be dealt with in national-level negotiations.

This strengthened Oversight Body had emerged in the wake of the special deal for the Gardai in late 2016, a deal that triggered a related agreement for all public servants, in January 2017. The idea behind this 'beefed up' oversight system was to engage unions and public service management directly in an element of 'self-policing' their own agreement. This was to try and ensure that individual groups did not threaten to disturb the delicate balance between the 20 or more unions that sign up to these agreements. It was also to ensure adherence to the peace clause of the LRA, an element that the Government regards as an essential quid pro quo for its participation in any centralised arrangement.

In the aforementioned case, the Oversight Body told the INMO that the issues the union had raised, which related to recruitment and retention measures, should be dealt with according to procedures laid down under in the LRA. The parties (INMO and HSE) were told they should immediately enter an engagement on the issues at WRC level and, if necessary, the matter should be referred onward to the Labour Court for "binding arbitration". The Oversight Body recommended that, in accordance with the LRA, proposed industrial action, that had been scheduled by the union for March 7, should be deferred to allow this engagement to take place.

Furthermore, the Body warned the INMO that, "Failure to abide by the processes to resolve disputes set out under the Agreement, would leave the party concerned in breach of the Lansdowne Road Agreement".

Subsequently, an agreement was concluded with the assistance of the WRC, and following a ballot of union members after a strong recommendation from the INMO's national executive. The Oversight Body had sought to lay down a marker, a warning to trade unions that they couldn't go about lodging claims that would, if conceded, amount to cost increasing concessions. This was also an acknowledgement that a critical element of the LRA is concerned with ensuring that the administration adheres to budgetary rules, which are laid down by the EU.

The Semi-States

Turning to semi-state sector, it should be clarified that like the private sector firms discussed earlier, the companies also attend the Labour Court. Unions in this area, as mentioned, have of late rejected number of important Labour Court recommendations (Dublin Bus, Bus Eireann, Bord Na Mona).

To set developments in dispute resolution in context for this sector, pay for these companies was treated in the same manner as it was for private sector companies for the lengthy period

of social partnership (1987-2009). During this period pay was negotiated centrally, and was adhered to in the vast majority of cases.

Save for a number of high profile strikes in the early 1990s and restructuring disputes in the former national airline, Aer Lingus, the partnership years were largely peaceful. The main exceptions were: a lengthy strike in the national broadcaster, RTE, and more seriously, in the electricity utility, ESB. In the latter case, a 5-day strike by ESB electricians in 1991 involved an unsuccessful attempt to breach the second of the social partnership agreements (the Programme for Economic & Social Progress, PESP).

One of the outcomes of the RTE dispute was an agreement by its unions and management to establish an internal industrial relations tribunal, not dissimilar to the much respected ESB Joint Industrial Council. The RTE tribunal was marked by one key innovation, in that recommendations on specific IR issues would henceforth be binding.

These two cases – RTE and ESB – stood more or less alone, however, until the impact of the fiscal and economic crisis in 2008/2009 washed over industrial relations in the semi-state sector, ushering in an unexpected interest in similar internal tribunals in several other semi-states. The trigger for this development may well have been due to the fact that once partnership collapsed in 2009, these companies were left somewhat isolated. On pay, the Government interfered during the crisis, as it had done in the years before social partnership (pre-1987). Influenced by the public's reaction to the prospect of any publicly owned business or service awarding employees a pay rise or bonus payments, the semi-states not only had to formally cap the salary of their chief executives, they were also expected to impose pay freezes. The trade union response was largely muted; in face of redundancies in the private sector, unions were content to 'hold the line' in the semi-states.

These developments had consequences, however, with implications not just in respect of pay. There was no longer a central agreement to 'moor' these large, heavily unionised companies, with their traditional IR practices. When the economy recovered, where would they stand? The simple answer is that no-one knows; they have been allowed to decide for themselves to some extent, albeit with one eye to the relevant line Minister. Without formal guidelines, it is "understood" that they shouldn't breach private sector pay averages, nor better public service redundancy settlement terms.

Some of them decided to look to the sort internal tribunal system long established in ESB and RTE, establishing their own disputes mechanisms, using independent chairs, with a strong element of binding arbitration. It is early days in some of these companies. For example, in the Irish Aviation Authority the new system has been in place for some time, while in others, like Aer Lingus, it is only starting. Few if any forecasted that the internal tribunals would make a resurgence, but they have; the tentative conclusion being that because the semi-state sector lost the ballast provided by centralised agreements, they started to look toward internal dispute resolution mechanisms to provide some of the certainty lost in the economic crisis and through the demise of social partnership.

Arguably, it is unfortunate that such mechanisms have not been developed in the CIE companies, which have been marked by a series of strikes in recent times. In-house tribunals certainly do not ensure industrial peace, or any certainty that findings will be accepted. However, they can do serious preparatory work, which means that when a dispute arrives at a third party like the WRC or the Labour Court, these bodies are not starting from scratch. Moreover, the IR specialists and trade union officials in these state-owned transport companies may come to realise that a settlement assisted by their own internal tribunal could deliver more tailored outcomes.

Concluding Remarks

At a national policy level, the question of whether we should move away from the voluntarist tradition and lean more toward legally binding outcomes is one that tends to arise when major national disputes impact on public services. As the memory of major disputes dim, however, this debate – such as it is – tends to die down until the next dispute comes along.

The social partnership years generally rendered this question redundant, because by and large there was strong adherence to the various 3-year agreements and their attendant industrial disputes clauses. When disputes did erupt, 'key players' from Government, ICTU and Ibec would come together in some form (such as the National Implementation Body, NIB) to "guide" parties towards a peaceful resolution, while protecting the integrity of the agreements.

There have been calls in recent times from the trade union side, indeed also from Ibec, for a revival of the Employer Labour Conference (ELC), or indeed a single-issue 'trouble-shooting' disputes body like the NIB. Despite the best of intentions, the NIB took on far too many cases during its short 8/9 year lifespan (2000-2009). On occasion, it became the first port of call, when it was meant to be the last resort in intractable national level disputes. Despite the great care that the NIB took in observing correct IR protocols, by pointing the parties in dispute back towards the WRC or the Labour Court, such overuse of the NIB tended to undermine the standing of the WRC and the Court. This prompted now former WRC director general, Kieran Mulvey, to warn against its re-establishment of a new NIB or ELC type body, shortly before his retirement in 2016.

Whether an extra semi-informal rung in the dispute ladder is a good thing or not, will remain a subject of debate in industrial relations circles. On one matter, all serious practitioners are sure to agree on however, namely the tendency toward 'revolving door' syndrome must not be encouraged. This suggests that 'final' solutions in IR disputes must be encouraged in the clear majority of cases, with recourse to outside agencies or specialists remaining the exception rather than the norm.