Riding the

If you're not in, can you still win anyway? Currently, non-union employees can benefit from collective agreements negotiated by trade unions, without paying a penny in subs. Anthony Fay looks at the concept of 'bargaining fees' in other jurisdictions and considers what is likely to happen in this controversial area here

MAIN POINTS

- Non-union employees
- Bargaining service fees
- Registered employment agreements

The last few months have been turbulent for industrial relations and social dialogue in Ireland, with several contentious issues hitting the headlines. These include SIPTU members taking industrial action over the proposed break-up of Aer Rianta and the Prison Officers' Association at loggerheads with the Department of Justice over overtime entitlements.

One controversial issue that exists in other jurisdictions – and which might well make its way here – is whether trade unions are entitled to seek reimbursement from non-union employees who avail of benefits under union-negotiated agreements. This phenomenon is known as 'free loading' and has been recognised in the USA, Canada and Australia. This article explores the issue from a legal perspective and points out the practical implications it could have for social partnership and other forms of collective agreements in Ireland.

Bargain hunt

In Australia, trade unions – including the Australian Council of Trade Unions (ACTU) – have attempted to impose on non-union employees a 'bargaining fee' for the costs of these negotiated agreements. The ACTU has recently claimed that the argument is particularly strong, given that the *Workplace Relations Act 1996* (the principal act currently governing industrial relations in Australia) prohibits the exclusion of non-members from union negotiated agreements.

The rationale behind this is that a union, employer or another party is not entitled to interfere with an employee's freedom of association or the converse right to dissociate. This is similar to the principles expounded in *Educational Company of Ireland Ltd and Ors v Fitzpatrick and Ors* ([1961] IR 323) and *Meskell v CIE* ([1973] 121), which recognised the unenumerated right of dissociation that arises in particular under article 40(6) of the constitution.

Traditionally, Australia operated under a system

coat tails

Turbulence: Aer Lingus cabin crew on strike at Dublin Airport last October

of awards that were industry-specific legal documents setting out an employee's minimum rights and entitlements within that industry, dependent on such things as length of service. The *Workplace Relations Act 1996* provided for the establishment of 'certified agreements' that are negotiated between an employer and employee(s), with or without the assistance of a trade union. These draft workplace agreements have to be approved by the Australian Industrial Relations Commission (AIRC). The result is that the terms and conditions of many Australians' employment contracts are either governed by the whole of a certified agreement, or in part as supplemented by the terms within the relevant industry award.

Compulsory fees

Since the introduction of the *Workplace Relations Act 1996*, Australian trade unions have sought to incorporate a bargaining service fee clause within these certified agreements. Section 170 of the act provides that for an application to be made before the AIRC for a workplace certification, there must be a written agreement about matters pertaining to the relationship between an employer and an employee.

In *Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited* ([2002] FCAFC 199), the Federal Court of Australia held that a bargaining fee clause may be incorporated on the basis that it '*might give rise to a matter pertaining to the relationship between Electrolux (an employer) and those employees, notwithstanding that the relevant union, and its members, will benefit from the imposition*'.

The ACTU welcomed the judgment, which it believed accepted the validity and enforceability of a bargaining fee clause in principle. However, in response, the federal government enacted the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003*. The key provisions of this act include a prohibition on conduct designed to compel people to pay bargaining service fees and a prohibition on the inclusion of bargaining fee clauses in certified agreements. The act most likely represents the political views of the Liberal Party-led coalition government as opposed to the union-supported Labor Party.

Bargaining fees in Ireland?

There does not appear to be similar Irish or EU legislation that specifically prohibits or prevents trade unions from making bargaining services

available to non-union employees and charging a fee. A bargaining fee clause for non-union employees would probably be of limited relevance in the context of the Irish model of free and voluntary collective bargaining at a national level. Collective agreements are generally not intended to be enforceable unless there is evidence to create legal relations between the parties (see *Kenny & Ors v An Post* [1988 IR 285]).

However, the *Industrial Relations (Amendment) Act, 2001* allows the Labour Court, under certain circumstances, to make a binding determination in respect of pay and conditions of employment where no collective bargaining arrangements are in place between the employer and employees. The inclusion of a bargaining fee would fundamentally alter the voluntary approach and prove difficult to enforce at a national level.

Registered employment agreements

There may, however, be some latitude under the provisions of part III of the *Industrial Relations Act, 1946* to incorporate a bargaining fee clause within a registered employment agreement (REA) as ratified by the Labour Court. REAs and employment regulation orders are workplace agreements that set out minimum remuneration rates and other employment conditions for a number of Irish industries and sectors.

The contents of an REA are comparable to the terms of an Australian certified agreement in that they are industry-specific legal documents. For example, the *Construction industry wages and conditions of employment* agreement contains provisions dealing with guaranteed working weeks, protective clothing, early starts and building site conditions.

The procedure for the registration of an agreement is set out in section 27 of the act. The effect of registration under section 27(3) is to make the provisions of an REA binding not only on the negotiating parties (trade union and employers), but also on parties not involved in the negotiation who are in categories covered by the agreement.

A trade union seeking to recover a fee from an existing non-union employee could be differentiated from the *Meskell* case, as there is no compulsion on the employee to associate/dissociate with a trade union. The bargaining fee clause, however, would have to be drafted taking into account the provisions of the *Payment of Wages Act, 1991*. In particular, section 5 of that act says that an employer shall not make a deduction from the wages of an employee unless the deduction is authorised by virtue of any statute or any instrument made under statute, the deduction is authorised under the employee's contract of employment or the employee has given his prior written consent. The Labour Court would need to decide whether the deduction was authorised under the statute (part III of the *Industrial Relations Act, 1946*).

The following clause could be drafted, based upon the standard clauses adopted by the US Federal Court of Appeals and Australian trade unions:

'No employee shall be required to become or remain a member of a trade union as a condition of employment. Each union member shall have the right to freely retain or discontinue his membership. The employer shall advise all non-union employees that a negotiating fee of X euro per month is payable to the union in consideration for its efforts in negotiating the agreement Y, and will facilitate individual employee authorisation for deduction of the fee from his or her wages. The employer agrees to deduct this fee from the wages of all employees on a monthly basis and forward it to the union'.

'A trade union seeking the inclusion of a bargaining fee clause within an REA ought to have realistic expectations in relation to an application before the Labour Court'

In relation to new employees, a bargaining fee clause could be incorporated into the contract of employment prior to the offer of employment being made to the prospective employee to ensure compliance with the 1991 act.

According to recent reports from the Labour Court and the Department of Enterprise, Trade and Employment, there were 44 REAs covering 80,000 workers at the end of 2000. Although REAs are of relatively minor importance in the current climate of social partnership, their prominence may increase in the event that there is no successor to the current *Sustaining progress* agreement, which expires in 2005.

Realistic expectations

A trade union seeking the inclusion of a bargaining fee clause within an REA ought to have realistic expectations in relation to an application before the Labour Court. The union would need to take into consideration the criteria to be met, in particular the possibility that the imposition of bargaining fees might be knocked back or curtailed to affect only new employees.

In essence, what is required of the Labour Court is to reformulate the traditional legal definition of the employer and employee relationship, which was based primarily on contract law. Part III of the *Industrial Relations Act, 1946* may provide sufficient scope for this interpretation.

Practitioners should also note that a bargaining fee clause is not confined to an REA and could possibly be used as a viable alternative where an employer no longer wished to operate a closed shop with a union or where a prospective employee did not wish to join the union (see also *Sigurjonsson v Iceland* [1993] 16 EHRR 4262, regarding the right of association under the *European convention on human rights*). In addition, a clause could be used by non-union employees who wish to enter into a separate agreement with a trade union to act on their behalf, for example, in relation to negotiations concerning an individual's employment contract. G

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