

## **IRN Article 25 August 2011**

The 'action plan' for reform of the Joint Labour Committee (JLC) system, agreed by the Government last month, retains many of Minister Richard Bruton's original proposals, while including some important differences, such as scope for incremental pay rates.

Key elements retained in the plan include taking regard of competitiveness and wages in trading partners when setting pay rates, a provision for derogation from JLCs on economic grounds, the ending of the role of JLCs in setting Sunday premia and a reduction in the actual number of committees.

Among the notable changes is the possible inclusion of incremental pay rates to reflect experience and the removal of an exemption from JLC coverage by way of collective agreements. (see 'news' item in this week's IRN on collective agreements)

The plans for the Registered Employment Agreements (REAs) remain the same as those contained in the Minister for Jobs, Enterprise and Innovation's original proposals. (See IRN 20/11 for the original proposals)

Minister Bruton said: "Heads of Bill have been prepared by my Department, agreed by Government, and communicated to the Attorney General, and she has agreed to give the highest priority to drafting this legislation in the coming weeks."

"Preliminary discussions have been held with the EU/ECB/IMF on this action plan, and these discussions will continue as the drafting process continues. The intention is to have a Bill ready to introduce to the Oireachtas at the earliest possible opportunity next term so that workers can be protected and jobs created in these sectors with the utmost urgency."

### **LABOUR COURT REFERRAL**

In light of the decision of the High Court, which found that Employment Regulation Orders (EROs) were unconstitutional, the Government plan provides for legislation which will set down "principles and policies" to be observed in the making of EROs.

Under the plan and in light of the High Court judgment, "new proposals for ERO must be submitted by JLCs in accordance with the principles and policies to be set out in the new legislation".

The principles and policies "could include regard for competitiveness factors, average hourly rates set in comparable sectors in Ireland's main trading partners, employment and unemployment rates, etc".

If the JLC parties cannot agree on wage rates or other issues for the revised ERO, “new adjudication procedures will be applied by legislation”. In such a case the matter may be referred to the Labour Court for recommendation and the casting vote of the JLC chair must have regard to that recommendation. (Official sources says that the level of discretion of the JLC chairs in this matter has yet to be developed in the drafting of the legislation.)

Such an adjudication procedure was also part of the Minister’s May proposals and would mean a new role for the Labour Court in the JLC system.

When asked what would happen if an employer group decided not to participate in JLC negotiations on a new ERO, a spokesperson for Minister Bruton’s Department said that the 1990 Industrial Act (Fifth Schedule) sets out JLC procedures, which say that if employer and employee representatives are not equal in number, the group with the majority shall arrange for one or more of its number to abstain from voting, to preserve equality between the sides. Since some JLCs have more than one employer body represented, the remaining employer body or bodies could still negotiate with trade union representatives.

It appears from this, however, that on any JLC with only one employer body represented, it could effectively prevent an ERO from being negotiated, by simply not attending.

#### COLLECTIVE AGREEMENTS

A notable difference in the newly agreed plan is the absence of an exemption from coverage by a JLC for employers who have concluded a collective agreement at local level.

This proposal which was recommended in the Duffy-Walsh report was also part of Minister Bruton’s original proposals. It would seem now however that the Minister has taken a step back on this issue, perhaps wanting to avoid the potential mine-field of attempting to define what is considered a collective agreement and who may conclude such an agreement.

Such a move could have had potential implications for all employers in Irish industrial relations.

The definition of collective agreement, cited explicitly in the Duffy-Walsh report, is the same as that used in EU Charter of Fundamental Rights and several ILO conventions, which some may see as favouring trade unions. It is unlikely this definition would have been welcomed by the employer side.

#### INCREMENTS

A further change to the Minister’s first proposals means that in addition to setting one adult basic rate, each JLC will have “discretion” to set two additional rates to

reflect service and experience. Under the Minister's original proposal, the adult basic rate only was to be set by the JLC.

It would appear therefore that the discretionary increments will be open to the parties of the JLC to negotiate or agree. It is possible that such an issue may be referred to the Labour Court under the new adjudication procedures if the parties cannot agree on these rates.

The JLC will also set sub-minimum rates for workers under 18, first time job entrants and workers undergoing training. These will be a percentage of the adult minimum rate based on the percentages set down in the National Minimum Wage.

Sunday premium pay or any other employment conditions covered by existing legislation will not be covered by a JLC as in the Minister's original proposals. However, the new plan sets down that a Code of Practice on Sunday Working will be developed by the Labour Relations Commission.

This will "provide guidance to employers, employees and their representatives" in JLC sectors on arrangements to be put in place to comply with the Organisation of Working Time Act, 1997.

It will not specify levels of Sunday premium, but will set out procedures to be followed by employers in rewarding Sunday work, including the case of those part-time workers whose only or main income derives from Sunday and weekend work.

As in the May proposals, there will be standardisation of terms/benefits which are not covered in existing legislation – overtime, sick pay and pensions – across the JLC sectors. This will be by way of a national "Social Partnership protocol" which would give a key role on this issue to national union and employer bodies. If the social partners do not negotiate a protocol, there will be a "statutory Code of Practice".

Up to the striking out of all EROs last month, these benefits varied widely from one JLC sector to another. For example, some JLCs have sick pay schemes which vary in the level of benefit provided and others have no sick pay scheme. Some have unsocial hours payments (like Security), and death –in-service benefit (like Contract Cleaning), while others have no such payments.

Harmonising this in a single system across all JLC sectors will give rise to issues of whether the harmonisation should be upwards or downwards. If there is even one JLC without such schemes, there will be a level of increased costs for employers in those sectors.

This Code of Practice is also to deal with the issue of how the burden on employers of keeping records in relation to ERO compliance will be eased, as recommended in the Duffy-Walsh report.

In the case of Codes of Practice on both Sunday work and other benefits, these will be voluntary rather than legally binding. However, such Codes may be taken into account if a worker or group of workers was to take proceedings before the Labour Court, the LRC, the EAT, the Equality Tribunal or the Rights Commissioners.

### COMPETITIVENESS

The JLC parties will have to take into account “competitiveness factors, average hourly rates set in comparable sectors in Ireland’s main trading partners, employment and unemployment rates, etc.” when setting new ERO wage rates.

This leaves open the possibility that any new JLC wage rates might be below the adult minimum rates which were set out in the Employment Regulation Orders (EROs) prior to the High Court judgment which ruled them unconstitutional.

Minister Bruton said there was “an expectation that hiring costs will come down” under the new wage rate criteria but existing staff would be covered under their employment contracts. What impact any potential new lower wage rates might have on existing staff remains to be seen, however.

His statement referred to “joint initiatives” by the LRC and the National Employment Rights Authority (NERA), “to tackle breaches of contractual rights and boosting workers’ confidence in taking action through the industrial relation redress procedures”.

The comprehensive review of the scope and appropriateness of the JLCs, which was also in the Minister’s original proposals, will be legislated for and will be undertaken at regular intervals into the future.

### SIX JLCs

The number of JLCs is to be reduced from thirteen to six. The plan does not specify what JLCs will remain but Minister Bruton said the Labour Court would be asked to assist in the abolition and amalgamation process.

The Duffy-Walsh report had recommended that the Aerated Waters and Wholesale Bottling, Provender Milling and Clothing JLCs be abolished. Duffy-Walsh also recommended that the Contract Cleaning JLC become an REA – however it is unclear at this stage if the parties are in favour of this.

If, in addition to the above, the two Catering JLCs (which had identical EROs in any case since 2009) were to be merged, that would appear to leave seven JLCs

currently in operation; Agricultural workers; Catering; Hairdressing; Hotels; Law Clerks; Retail Grocery; and Security.

According to the figures in the Duffy-Walsh report, of these seven, the smallest in terms of worker coverage are the Hairdressing JLCs in Dublin and Cork. This could now be in danger if coverage/scope is used as criteria for abolition and the Duffy-Walsh report had said that “a strong case could be made for their abolition” due to their limited geographical application, although their important apprenticeship functions would have to be transferred elsewhere to maintain them.

Duffy-Walsh had also recommended against any geographical-based EROs. In the case of the Hotels ERO, which only covers areas outside the pre-1994 county boroughs of Dublin, Cork and Dun Laoghaire, Duffy-Walsh had said that because the Dublin JLC did not have an ERO, “discussions should be held between the parties represented on the Hotels JLCs so as to explore the possibility of bringing about the conditions in which unified regulatory arrangements can be put in place”. Given the strong opposition to EROs in the hotels sector, such discussions could be challenging.

However, official sources have told IRN that while the current level of JLCs will be reduced to six, the legislation will not provide for a limit on the number of JLCs and legislation will continue to allow for establishment of JLCs in the future, where appropriate.

## DEROGATION

The new plan will legislate for companies to derogate from the terms of EROs and REAs in cases of financial difficulty. The action plan refers to the ‘inability to pay’ mechanisms in both the national minimum wage legislation and those which existed in the national wage agreements.

When questioned on this point, the Minister said he would be looking to the model provided for under the national wage agreements and how that might be reframed for the purpose of derogation from EROs. The National Minimum Wage system was too inflexible, he said.

The National Minimum Wage system has many strict conditions and has almost never been used since it was enacted in 2000. By contrast, the system in national wage agreements was much more widely used and if this model was adopted, there would be a significant number of derogations. However, national wage deals since 2003 had used ‘assessors’ appointed by the LRC to issue reports on inability to pay claims by employers and it will be interesting to see if this model is also used in the new JLC legislation.

While some employers as well as unions in ERO sectors fear that ERO-compliant employers will have difficulty competing against employers who obtain

such derogations, official sources note that the Duffy-Walsh report also recommended that derogations should not be granted if they would have the effect of distorting competition or displacing workers.

To that end, the Minister's Department says provision is to be made in legislation to include safeguards against the dangers of unfair cost competition and their consequences for maintaining a level playing field, in sectors where wage costs are a major component of overall costs.

#### TEXT OF ACTION PLAN AGREED BY GOVERNMENT

“1. Reducing the 13 Joint Labour Committees currently in place to about half that number, through a process of abolition or amalgamation.

2. Making legislative provision for companies to derogate from the terms of EROs and REAs in cases of financial difficulty (“inability to pay” mechanism – a facility that exists in National Minimum Wage legislation and in past National Wage Agreements).

3. Legislating to permit JLCs to set a basic adult rate and two supplementary minimum rates to reflect varying levels of service. This would substantially reduce the number of rates applying across all EROs from over 300 different mandatory rates of pay while acknowledging the freedom of JLCs to establish two higher rates for experienced employees. Sub-minimum rates expressed as fixed percentages of the adult basic rate will apply, as in the case of the National Minimum Wage, to employees aged under 18 years, first time job entrants, and employees undergoing training. All other rates of pay e.g. for experienced workers with long service or for workers with particular skills, would be agreed at firm level, based on normal labour market rates and dynamics.

4. The standardisation of benefits in the nature of pay – including overtime – across sectors either by means of a nationally agreed Social Partnership protocol or, failing that, a statutory Code of Practice.

5. Legislating for a comprehensive review of the scope of each individual remaining JLC to be undertaken to ensure that the range of establishments to which they apply remains appropriate, with consequent changes to their Establishment Orders if necessary, with such reviews to be undertaken at regular intervals in future.

6. Legislating for new criteria to be observed in the making of EROs. These will take the form of principles and policies (having regard to the decision of the High Court in *John Grace Fried Chicken Ltd and others .v. The Catering Joint Labour*

Committee, The Labour Court, Ireland and the Attorney General, delivered on 7th July) and could include regard for competitiveness factors, average hourly rates set in comparable sectors in Ireland's main trading partners, employment and unemployment rates, etc. Whenever proposals for a variation of the ERO are made, these criteria must be used in determining the validity of any variation.

7. Legislating for changes in the decision making process of JLCs, including obliging the Chairman to have regard to a relevant Labour Court recommendation in the event of a casting vote being exercised.

8. Reducing the record-keeping requirements for employers under EROs and REAs.

9. Legislating to remove provision for a Sunday Premium and other conditions of employment that are already covered by universally applicable standards established under legislation from the scope of EROs while preserving workers' entitlements under Section 14 of the Organisation of Working Time Act, 1997.

In order to support the rights of workers employed in sectors covered by JLCs in relation to Sunday working the Minister will exercise his right under statute to request the Labour Relations Commission to devise a new Code of Practice on Sunday Working (similar to the 1998 Code of Practice on Sunday Working in the Retail Trade) to provide guidance to employers, employees and their representatives in sectors covered by Employment Regulation Orders on arrangements that may be put in place to comply with the options specified at Section 14 of the Organisation of Working Time Act, 1997. This Code of Practice would subsequently be given the status of a statutory instrument by the Minister.

The new legislation will refer to the new Code of Practice on Sunday Working and the Minister intends to advise JLCs that EROs applying in sectors characterised by Sunday working arrangements should include a reference, for information purposes, to the existence of this Code of Practice.

An employee, their Trade Union or an employer would be able to bring a complaint to a Rights Commissioner about any breach of the Code of Practice governing Sunday working, and to appeal to the Labour Court in the event of non compliance with a decision of a Rights Commissioner.

10. In the light of the decision of the High Court in John Grace Fried Chicken Ltd and others .v. The Catering Joint Labour Committee, The Labour Court, Ireland and the Attorney General, new proposals for ERO must be submitted by JLCs in accordance with the principles and policies to be set out in the new legislation. In the event that there is no agreement by both parties within the JLC on the content and rates proposed in a revised ERO, new adjudication procedures will be applied by legislation whereby the matter can be referred to the Labour Court

for a recommendation and the casting vote of the Chair of the JLC can only be exercised having regard to that recommendation.

And, specifically in relation to Registered Employment Agreements (REAs):

1. Establishing a time-bound process by which the terms of an Agreement may be varied in certain circumstances without necessarily obtaining the consent of all parties to the Agreement.
2. Defining more clearly what “substantially representative parties” mean in the context of being entitled to make such Agreements.
3. Clarifying circumstances when a Registered Agreement may be cancelled where either the trade union(s) or employer parties have ceased to be substantially representative of workers or employers in the sector concerned and/or for other reasons related to substantial change in the sector concerned such that the continued registration of an Agreement would be undesirable.”