

Mulvey, Kieran

**Working Paper**

## Ireland, the United Kingdom and the legal and voluntary framework for dispute

Warwick Papers in Industrial Relations, No. 90

**Provided in Cooperation with:**

Industrial Relations Research Unit, Warwick Business School, University of Warwick

*Suggested Citation:* Mulvey, Kieran (2009) : Ireland, the United Kingdom and the legal and voluntary framework for dispute, Warwick Papers in Industrial Relations, No. 90, University of Warwick, Industrial Relations Research Unit, Coventry

This Version is available at:

<https://hdl.handle.net/10419/48541>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*

**Ireland, the United Kingdom and the Legal and Voluntary  
Framework for Dispute Resolution**

Kieran Mulvey

**WARWICK PAPERS IN INDUSTRIAL RELATIONS**

**NUMBER 90**

**May 2009**

**Industrial Relations Research Unit  
University of Warwick  
Coventry  
CV4 7AL**

**Ireland, the United Kingdom and the Legal and Voluntary  
Framework for Dispute Resolution  
The Annual Warwick-ACAS Lowry Lecture, London, March 2009**

**Kieran Mulvey, Chief Executive, Labour Relations Commission  
(Ireland)**

Editor's Foreword

The Warwick Papers in Industrial Relations series publishes the work of members of the Industrial Relations Research Unit (IRRU) and people associated with it. Papers may be of topical interest or require presentation outside of the normal conventions of a journal article. A formal editorial process ensures that standards of quality and objectivity are maintained.

This paper publishes the text of the eighth Warwick-ACAS Lowry Lecture, given to an invited audience in March 2009 by Kieran Mulvey, Chief Executive of the Labour Relations Commission in Ireland at the headquarters of the Engineering Employers Federation (EEF) in London.

The annual lecture is organised in honour of Sir Pat Lowry. A former chair of ACAS, Sir Pat was for many years an Honorary Professor at the University of Warwick, a long-standing member of the Business School's Advisory Board, and a source of valued counsel to IRRU in its work. His outstanding contribution to the practice of industrial relations commenced when he joined the EEF in 1938. He went on to become the Federation's Director of Industrial Relations. He left in 1970 to join British Leyland as Director of Industrial Relations. In 1981, Sir Pat was appointed as Chair of ACAS. He stepped down six years later with ACAS' reputation for impartial and constructive advice enhanced, in the face of an often turbulent industrial relations landscape.

Kieran Mulvey's lecture ranged widely over the development of employment standards in currently challenging economic contexts. Crisis seems likely to deepen

and accelerate current trends towards 'juridification', the ever closer involvement of the state and judicial bodies in dispute resolution in the workplace. These are apparent throughout Europe, in different ways and from different starting points. It is necessary to ensure, however, that developing systems remain fit for purpose in that they are streamlined, simple to use, and thereby effective. Of particular importance to public policy is the balancing of collective and individual entitlements, something that the law and legal reasoning finds difficult, a theme Kieran Mulvey illustrates with reference to current case law.

Trevor Colling

## **Introduction**

Dear Friends and Colleagues, I am deeply privileged to be invited to present this lecture to you this evening. When we originally discussed the issues to be addressed by me, who would have anticipated the scale and depth of the global changes which have engulfed and cascaded down upon us? These events have happened with truly extraordinary rapidity and have threatened and continue to challenge the very economic and social basis of our respective societies and with greater implications for many who are less fortunate beyond these islands.

Professor Christopher Hill described the turmoil of the period of the English Civil War in the middle part of the 17<sup>th</sup> century as “the world turned upside down” (Hill 1975). We live today again in a world that is similarly *turned upside down*. These are very challenging times the nature of which has known only one major historical parallel in our modern financial history. This new age of uncertainty has affected us through its universal and global impact and to different degrees and levels. As yet, it has undefined and undetermined political, economic or even personal consequences. Most citizens of the world in one way or another will live, exist or indeed subsist for some time with the effects of this economic and financial tsunami.

I have laboured in this vineyard of industrial relations for almost 35 years and I have seen and tasted the good years and the bad. This year, and I fear for years to come, through some poor soil cultivation and very severe pruning it will be the grapes of wrath that we will be harvesting. So much for the Irish viticulture industry!

As the great Irish poet and Nobel Laureate, W.B. Yeats stated almost a century ago at the commencement of another revolutionary event, Easter 1916, “ All changed, changed utterly: A terrible beauty is born.”

## **Current Crisis**

If I may dwell awhile on current economic circumstances and events, it is because I believe that the significance of these events will present a major challenge to all of us here this evening in our working and professional lives. It will change and reshape the

nature, structure, form and type of the employment relationship in our respective economies and beyond and for the unforeseeable future.

There now exists, at a global and indeed at some national levels, a deep seated crisis with dimensions in banking; public finances; economies; and reputations. Of particular concern must be the real potential of a developing *social* crisis as unemployment begins to climb inexorably in both percentage and numerical terms – not alone in Ireland and the UK, but also throughout the US, the European Union and further afield. In the majority of countries the present economic situation is officially classified as *bad*. Everyone, especially governments, seem to wish to avoid the words “recession” or “depression” to describe our current predicament. I believe the emerging levels of GDP decline, public budgetary challenges and the lack of consumer confidence is edging us closer to an international emergency. The ILO predicts that there will be 51 million job losses in 2009 alone. I fervently hope the forthcoming G20 Summit in London this week has some of the answers but I am not altogether confident given the disparities of the policy approaches of the largest trading nations. But then thankfully I am not an economist!

In July 2008, the eight year long Doha Round of multinational trade negotiations collapsed in Geneva and some countries have since moved in the light of the current crisis to revert to national protectionist measures to protect high employment and key and export generating industries e.g. the “*Buy American*” campaign - the French, German and American car industries, the nationalisation of banks and building societies, and the other more discreet subsidies to SME’s, manufacturing industry, farmers and producers. The internal competition rules at European level are coming under severe strain as are the targets of the Growth and Stability Pact for many of the E.U. member states themselves.

### **The Banking Culture/Virus**

Against this background is the significant and somewhat scandalous venality of some financial and business executives and their egregious nature, the scale of which has been commented upon adversely in many jurisdictions in language of criticism rarely heard from our political leaders. New revelations occur or are highlighted on an almost daily basis with even deeper ramifications for the body politic. Public anger is

gathering momentum in response to these continuing revelations. There exists the potential and tangible expressions of social unrest in various countries and this is manifesting itself in many industries arising from increasing unemployment and the contractions in public expenditure.

In relation to these activities by the few and financially influential, and which have become the genesis for the subsequent economic and political fallout, almost weekly emergency measures are being announced by governments and international institutions. The fiscal corrections being invoked by individual governments; the International Monetary Fund (IMF); the European Central Bank (ECB); the Federal Reserve; and the Bank of England beggar belief and are now simply incomprehensible except to the “experts” in monetary policy. I pose a simple question; do we really believe these experts anymore? Or do we just sardonically observe, as a friend of mine recently did in a “limerick” competition on these developments;

“The world stock exchanges – pose a simplistic task  
We can rhyme the whole lot....the Iseq and the Dax  
We can play Footsie with CAC or Dow Jones now and then  
And if we feel really murderous we can always Hang Sang!”

I cannot improve upon the observations of Lord Acton – “the magistrate of history”, (1834-1902) when he stated over a century ago; “The issue which has swept down the centuries and which will have to be fought sooner or later is the people versus the banks.” A century earlier, John Adams (1739-1826), 2<sup>nd</sup> President of the USA had observed, “Banks have done more injury to the religion, morality, tranquillity, prosperity, and even wealth of the nation/than they can or ever will do good” Prescient observations in current circumstances you will agree? Or to summarise by reconstructing a Churchillian pronouncement “Never has so few owed so much to so many!”

Of equal concern for those of us who operate in the political or public service milieu is the abject and complete failure of the “light” regulation model

## **Implications for the Industrial Relations Environment**

Where then within this firmament of global change and crisis stands the landscape of industrial relations and human resource management? What is the future for employment law and regulation, the statutory mechanisms and institutions of industrial dispute resolution and the future nature of the employment relationship between employers and employees, between unions and employers and the role of individual/European governments themselves? I intend to address some of these questions in the course of my address this evening.

### **Employment Law Developments**

The last 20 years have seen considerable enhancement of employee rights and individual rights. Apart from some specific Irish and UK legislative changes, the central and primary thrust of these employment rights advances have derived from policy decisions at European Union level. These have then been implemented either through the transposition of specific European Directives into domestic law, their interpretation by the European Court of Justice (ECJ); the decisions on Fundamental Rights and Freedoms by international courts; and the application of European wide collective bargaining agreements at European Trade Union Confederation (ETUC)/ Business Europe level e.g. Teleworking (2002) Stress at Work (2006) Parental Leave (1996) Combating Violence and Harassment at Work (2006)

The initial positive and Europe-wide effects of the European Directives on the Transfer of Undertakings (2001/23/EC) (Acquired Rights); on Working Time (93/104/EC); On Fixed-term Work (99/70/EC); and on Equal Treatment (2000/78/EC) have now created a substantial corpus of employment law and precedents throughout member states of the European Union. They have in some cases created also a legal minefield for both public and private sector employers in terms of their interpretation of the plethora of employment rights, contract types, specific terms of employment, treatment in employment, work practices, the maintenance of records, the application of remedies and on atypical employment.

A number of complex issues have arisen also in the resultant case law within member states. In regard to particular employments and the “emanations of the state,” what is



meant by the concept of “working time” and how the issues of rest periods, Sunday work and the determination of weekly hours have been approached in the different EU jurisdictions is a substantial work in progress. The importance of the provision of the terms of employment and information by an employer, zero hour contracts and the right to paid holidays have all manifested themselves in many of our national employment rights bodies and tribunals and with some quite extensive and expensive salutary costs and effects.

In many cases these Directives and their judicial interpretation present formidable challenge for trade unions both in their corporate relationship with their member and their representation objections towards individual members. Sometimes these negate the purpose of collective agreements and their intent. Increasingly they represent a substantial shift from the “common good” of collective bargaining agreements towards the assertion of the individualisation of the contract relationships. In some cases the issues which arise inevitably overlap into matters affecting health and safety at work, human rights legislation and the attendant potential for further expensive litigation and considerable penalties by way of remedy.

There is in addition, the precedential determination of the Irish Supreme Court in *Ryanair V the Labour Court*<sup>1</sup> that, though a trade union has a statutory right to bring a complaint on behalf of an employee, where evidence is required to be given, it must be given by the employee in question and cannot be given solely by a trade union representative acting on their behalf. This decision has overturned years of practice in Irish dispute resolution bodies.

In more recent times the inadequate transposition of Directives such as the Posting of Workers and Agency Workers by some member states has permitted the ECJ, in the opinion of the ETUC, to threaten the established rights of workers and their domestic/national collective agreements. A linked series of high profile cases, *Laval-Viking-Rüffert-Luxembourg*<sup>2</sup>, have caused some alarm bells to ring in trade union headquarters certainly, but in some multinational boardrooms as well. A level

---

<sup>1</sup> Ryanair -v- The Labour Court, [2007] IESC 6 (2007)

<sup>2</sup> Laval C-341-05; Viking C-438/05; Rüffert C-346/06; COM v LUX C-319/06

competitive business field is of vital interest to all good employers throughout Europe – the good employer too needs protection from the “fly by night operator” as well, particularly when the latter has no long term commitment to national labour law; culture of industrial relations; or time honoured collective bargaining agreements and custom and practice.

According to the analysis of the pollster *Millward Browne*, the negative reaction of Irish workers to the above referenced judgments played no small part in the rejection of the Lisbon Treaty in the recent Irish referendum. This has led subsequently to the Irish Government making specific commitments towards enhancing employment rights through the transposition or amendment in Irish Law of European Directives as part of the national Social Partnership structure.

Neither does the continuing debate within the E.U. over amendments or “opt outs” to the 48 hour working time limit reassure us that a voluntary and common approach by EU member states to EU law is a racing certainty. There is a general perception also, in the light of the ECJ’s determinations that as a result of “on call time” being required be counted within the 48 hour cap that most EU states are in breach of the Directive and open to litigation on its continued non-application. The Irish Health Service Executive is engaged currently with non-consultant hospital doctors (NCHD’s) in litigation on the application of this precise Directive in the Irish Courts after the suspension of negotiations on the issue at the Labour Relations Commission.

In regard to the *Luxembourg* case, Professor Catherine Bernard of the University of Cambridge made the recent observation that Ireland, the UK, Italy and Belgium are at risk of European Commission infringement proceedings in relation to the application/interpretation of the Posted Workers Directive. In very recent times a degree of tension has arisen also between the European Commission and the Parliament regarding the ECJ judgments on these cases.

### **The Reviews of Employment Rights Bodies/Agencies/Tribunals**

The European Commission has set out some tentative observations and questions in its Green paper on “Modernising Labour Law” (EC 2006).

Amongst these observations were:

(i) “the traditional model of the employment relationship may not prove well-suited to all workers on regular permanent contracts facing the challenge of adapting to change and seizing the opportunities that globalisation offers. Overly protective terms and conditions can deter employers from hiring during economic upturns. Alternative models of contractual relations can enhance the capacity of enterprises to foster the creativity of their whole workforce for increased competitive advantage” (*ibid.*: 5).

(ii) “Collective agreements no longer play a merely auxiliary role in complementing working conditions already defined by law. They serve as important tools adjusting legal principles to specific economic situations and to the particular circumstances of specific sectors” (*ibid.*: 6).

(iii) “Fixed term contracts, part-time contracts, on-call contracts, zero-hour contracts, contracts for workers hired through temporary employment agencies, freelance contracts etc, have become an established feature of European Labour Markets” (*ibid.*: 7)

(iv) “there is evidence of some detrimental effects associated with the increasing diversity of working arrangements. There is a risk that part of the workforce gets trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position. Such jobs may however serve as a stepping-stone enabling people, often those with particular difficulties, to enter the workforce” (*ibid.*: 8).

And finally the “core” question,

(v) “Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What would be the impact of such minimum requirements on job creation as well as on the protection of workers?” (*ibid.*: 12).

## **The United Kingdom, Northern Ireland and the Republic of Ireland**

In recent years each of the above jurisdictions have had occasion to revisit its procedures, practices and institutions for the investigation of alleged breaches of employment rights. These range from the Gibbons Review (2007) in the UK, to the “*Review of Employment Rights Bodies in the Republic of Ireland*” (2008) and to the current “*Resolving Workplace Disputes*” in Northern Ireland. (Department of Employment and Learning)

Of central concern in all of the above reviews is the search for cost effective and timely investigation of individual employment rights. This search is not unique to these islands but is a feature of similar reviews/institutional changes in other English speaking jurisdictions of what we term the broad “Anglo-Saxon” model – from Canada to Australia and from New Zealand to South Africa.

Access to quality, timely, independent, user friendly and at minimal or no cost individual dispute resolution is essential. It relies primarily on the principle – “justice delayed is justice denied”. This principle applies with equal effect to employers. What employee wants to wait unendingly for a determination on an unfair or constructive dismissal case or what employer wishes to engage in costly litigation on similar cases? As Mrs Justice Cox (EAT/UK) stated recently “delay is always the enemy of fair dispute resolution in the workplace.”

I have believed consistently that conciliation and mediation are invaluable and essential tools in the process of both individual and collective dispute resolution. We can dress the “ADR” model in many different costumes and in many employment related dramas, but the actors and techniques remain largely the same but with some individual interpretations from time to time.

Detailed “Practice Directions”, precedents and sometimes unnecessarily complex and legally based adversarial procedures intimidate employer and employee alike and place undue constrictions on the vindication or investigation of alleged breaches of employment rights and the good advocacy of well meaning employment/employer practices. Does the current process and procedure itself suffer from the cardinal

requirement of “just getting it right in procedures” rather than settling the case between the parties on its respective merits. I know I tread on sensitive legal eggshells here but does not the concept of equity and fairness not justify the ends rather than the means in such cases? The Employment Act 2008 goes takes the UK some way toward the latter aspect of this fundamental tenet in providing for pre-conciliation with the assistance of ACAS. Other jurisdictions and even the Commercial Courts themselves are becoming converts to the concept and practice of mediation and conciliation in order to effect mutual settlements and minimise both the time and cost to the parties.

The Republic of Ireland has a most unique and effective employment rights investigation system entitled the “Rights Commissioner Service”. It was established under the Industrial Relations Act, 1969 and now operates under the aegis of the Labour Relations Commission – established in 1991. The Service is a quasi-judicial system and hears cases under 23 separate employment laws/regulations, including all the primary European Employment Directives except those dealing with anti-discrimination legislation – this is the preserve of the Equality Tribunal/Labour Court. Rights Commissioners function and act independently and are appointed by the Minister on the recommendation of the Board of the Commission and are selected from nominations from the national representative body for employers (Irish Business and Employers Confederation) and trade unions (Irish Congress of Trade Unions) under agreed criteria/competencies. Commissioners have been described by Professor Paul Teague (Queens University Belfast) as having a “double-barrelled role of problem solving and vindicating employment rights”

In a recent study of the system, “*Enforcing Individual Employment Rights: Lessons from the Rights Commissioners in the Republic of Ireland*” Professor Paul Teague (QUB) and Ms Deborah Hahn (QUB and Manchester Business School) concluded that the Rights Commissioner Service has a number of appealing qualities.

“ On the one hand it has a range of formal powers. It possesses a convening power that obliges employers to answer claims of breaches of employment rights and standards. This ii has legal back bone that marks it off from an arbitration services. On the other hand, it prefers to carry out its tasks in an

informal manner, which marks it off from the increasingly legalistic employment model of resolving disputes.”

The combination of its informality and accessibility makes it particularly suitable for vulnerable workers who are on the rise in modern labour market markets. The exploitation of the low paid and migrant workers has led to legislative and institutional action to curb unfair employment pay and practices. The establishment of the National Employment Rights Authority (2007) in Ireland; the determination of a national minimum wage by the Labour Court; and the recent expansion in the labour and health and safety inspectorates mirror similar developments in the UK and for similar reasons. They undertake comparable functions to the Low Pay Commission, the Gangmasters’ Licensing Authority, the Employment Agency standards Inspectorate and the Health and Safety Executive in the UK. In Northern Ireland the Industrial Tribunal and the Fair Employment Tribunal are involved in similar and like work.

In taking an overview of these developments, I am inclined however to agree with *Professor Linda Dickens*, University of Warwick, when she observed at last years Warwick-ACAS lecture, that the establishment of some of these agencies,

“...is indicative of an approach which addresses an immediate problem with a once off solution rather taking a broader strategic look: Even in combination the remit of these bodies is far from comprehensive in terms of rights and areas of activity. The result is incompleteness, fragmentation and complexity.”

Currently in the Republic of Ireland a review for the Government is being undertaken arising from the OECD study “*Towards an Integrated Public Service*” and on all State quangos. I await their deliberations with some interest particularly in regard to my own view on attempting to establish a comprehensive Employment Relations Authority which could in some way establish better synergies in the dispute resolution community and initiate the process of a consolidation of our labour law statutes.

In the area of employment dispute resolution I have consistently argued that the proliferation of agencies (largely as a result of the Social Partnership process) is not

conducive to the “better regulation” of business between trade unions and employers and between employers and employees. The duplication of functions; the myriad of statutory/non-statutory institutions (8); the proliferation and complexity of employment law; is serving neither employees nor employers. It does serve however for a boom in the activity of employment lawyers and which will increase if we do not consolidate and streamline our dispute resolution bodies and their procedures. Of continuing concern are the confusing and sometimes controversial decisions of the dispute institutions themselves and also of the civil courts in employment/collective bargaining issues. For those in the field of human resource management and industrial relations this scenario represents a daunting and ongoing employment relations minefield.

### **The Challenge for Interest-based Collective Bargaining**

Trade union density in the industrialised nations has continued to fall;

Republic of Ireland - from 68% in 1984 to 32% in 2007

UK – from 51% in 1978 to 28% in 2007

US – from 31% in 1960 to 11.6% in 2007

Australia – from 50% in 1975 to 18.5% in 2007

And these figures have been used as a continuing reason for reductions in collective bargaining structures and the collective regulation of pay norms and practices.

The age profile and the industries and services in which union members are organised are obviously matters of concern for trade unions. It is perhaps seen also as a time of opportunity for some employers. Current economic pressures are undoubtedly being used by some opportunistic employers (even Governments) to reduce or remove many of the premium pay arrangements and pay levels of employees. It is being used also to reduce both the level of employment in certain enterprises/services and their attendant work practices. It applies to the longevity of contracts and forms of employment as well. Whereas some of these measures are genuinely born out of necessity due to significant business or public expenditure pressures, others are of a less benign intent and are being used for short-term profit or gain. After all it took almost a hundred years to achieve the introduction of a national minimum wage. Should that “floor” now be wiped out to meet new economic circumstances?

Headlines such as, “industry opts to freeze pay in effort to halt redundancies” (*Financial Times*, 09/03/09) are not unusual. Neither are reductions in pay, shorter working hours or cuts in employment levels. Others comment that individual parliaments across the European Union have enacted a raft of legislation that “makes the life of an employer more complex, more expensive, more restrictive, less flexible and generally more problematic. Human resources has become a frightening maze of regulations that are an intolerable burden on the private sector” (Luke Johnson, Channel 4 Chairman, *Financial Times*, 8/10/08).

On the other hand, France, Spain, Italy and Portugal have gradually reduced employment protection at the margin by “liberalising” the use of temporary contracts while not reducing the protection level associated with permanent contracts.

It is Imperative to balance the need to be competitive and profitable with the human requirement for basic and decent standards of living and adequately paid and fair employment practices. Traditionally, the greatest concentration of union members is in the public sector, in traditional manufacturing industries, the automotive/aviation industries, retail, construction, banking and insurance. These are the very sectors and industries under most threat currently. In some cases they are in the throes of radical restructuring, reconfiguration or indeed decline. In the UK only 36% of the workforce is covered by collective bargaining. Union density in the US is 12% - the same as in 1930! Union membership in these and similar economies reflect the same disparity and unevenness of representation between the public and private sectors in terms of union density.

Unions and union leaders and national/traditional union centres in most jurisdictions have sought to modernise their organisations with new and imaginative campaigning and recruitment strategies. They face an uphill struggle which has only been exacerbated by the recent global turbulence and upheaval.

The losers in today’s economy have the most interest in and need for trade unions and the welfare state, not least because they cannot readily imagine taking themselves and their labour anywhere else. That is the reason why fundamentally the continued existence of trade unions will remain essential and necessary in a representative



democracy. On a personal note in recent weeks I have had the opportunity to attend the centenary celebrations of two trade unions in Ireland – one to which I was affiliated, the other which I served as General Secretary. Given the enthusiastic participation in the celebrations I do not see them disappearing any time soon! A consolidated and representative employer view is necessary too if we are to avoid fragmentation of the “employer voice” at a national level.

## **The Challenge for Europe**

The Lisbon Treaty contains many important provisions on Fundamental Rights and the continuing development of the original Social Chapter. A key component of the institutions which give meaning, purpose and expression of these aspirations/rights is the role and actions of the Social Partners at European Level. How better can we promote the European Project of a better standard of living for all its citizens and unite the variations of the written Constitution of the Republic of Ireland, the parliamentary traditions of the UK, the social democratic traditions of Scandinavia, a “Christian” democratic ethos in Italy, the “social-market” Germany and the providential tradition and Napoleonic Code of the French Republic, than by the active engagement of the representatives of civil society.

Europe is facing real problems and these are reflected in each member states of the Union. There is great pressure now on the Growth and Stability Pact, particularly in a number of countries and the IMF is having an increased influence in Central and Eastern Europe. Pensions, social expenditure, training and regional funds are likely to contract while billions will go to shore up “toxic debts”, “bail outs” and meet the inevitable demand for unemployment benefits and private sector subsidies. Parallel to this is the fall in European birth rates, an aging population and an increased migrant and transient and mobile workforce.

Eurofound’s, European Restructuring Monitor (ERM) Report for 2008, acknowledges that “while there are more opportunities for women and a shift towards the knowledge economy, creating more and better jobs throughout the European Union, the downside was a diminishing market for low skilled workers or workers displaced in declining industries.”

In the current economic circumstances this situation has changed considerably with stagnating employment growth at both ends of the labour market and a potential “deflation” in the skill base for access to available employment opportunities.

This and other factors lead me to the view that now is the time to be alert to the threats to what we have achieved in the European employment law and industrial relations experiment rather than assume that these rights and gains will be there for the future and are irreversible or immutable.

As Edmund Burke astutely observed; “All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter.” Given the exposure and the global detrimental effects of the virtual collapse of the international banking system, the threat to pension schemes, the rise in unemployment and the potential for significant reduction in public services and living standards is it not now time to re-visit the principles which made us a society rather than an economy?

Interestingly the first legislative enactment of President Obama was a labour law – *the Lilly Ledbetter Fair Pay Restoration Act*. The net effect of the Act is to remove limits on the length of time a worker has to file a wage discrimination lawsuit. The law counteracts a Supreme Court decision. President Obama has referred quite recently also to revisiting and reshaping the tenets of the “market economy” with a greater degree of public and government control.

The recent summit of the European leaders made tentative suggestions in that direction at their meeting in Brussels on March 19<sup>th</sup>. Subsequently, the EU heads of state confirmed that the crisis will be managed while taking account of the opinion of European employers’ and union organisation. While the European Social Partners are placing the emphasis on job retention, job creation and strengthening training opportunities, the ETUC again called for “a European framework for fair and decent wages (citing the posted workers directive) because wage moderation is only part of the problem”, while Business Europe called for an “acceleration of structural reforms and the adaptability of labour markets.”

If we are to create a real commonwealth and a fairer distribution of the value of labour and the appropriate returns on entrepreneurship, then surely at enterprise level the well established methods of information, consultation, negotiation and agreement will require to be renewed; reshaped; and in some cases re-established. Primarily this is a matter for the domestic social actors but such endeavours require reinforcement, support and assistance from the institutions of the European Union. It would appear that more than ever we are all in the same boat together even if some of us appear to be in lifeboats! The mobile labour force – its nature, form and origin may not be the same as before (low skilled) and may not be confined to, as it was in recent years to Central and Eastern Europe, Africa and Asia. Already Irish skilled professionals are looking again towards the emigrant path – this time to Canada and Australia.

Some of the most eminent academic commentators on industrial relations on these islands – Professor William Brown – (Master of Darwin College, Cambridge) and Professor William Roche of the (Smurfit Business School, U.C. Dublin) and Professor Paul Teague (Naughton Chair of Management, QUB)– have recently written of the robust nature of the voluntary collective bargaining process and its resurgence on an international level. Professor Roche talks about a growing “divergence and diversity” in the voluntarist model and employment relations continuing in a series of “parallel landscapes”. Mind you in some disputes in which I am involved you sometimes have the perception that the parties involved operate in “parallel universes!”

Professor Roche quite rightly queries whether the perceived “demise of voluntarism” is in fact a reality when compared to developments under the Information and Consultation Directive; the continuing proliferation of national or bilateral partnership models; and the modification of the adversarial model by agreed and independent arbitration and adjudication models under long established and successful statutory conciliation/arbitration institutions – “the institutions of the middle ground”.

Professor Brown has lauded the increasing return to “best practice” employment relations which can be achieved by changing behaviours on both sides of industry and less reliance on resolving disputes, “by judgements according to some legal code or abstract principles of justice or precedent.” He champions the increased activities of statutory dispute resolution bodies on “more focused advisory work, on improving

employment practices, and on facilitating co-operative approaches to collective bargaining.” He observes, “that this is best carried out by agencies that are perceived to have both expertise and independence.” This is not the glamour side of dispute resolution – the “up all night/all weekend” to avoid some major or pending industrial relations disaster but the continuous development of an informed management and workforce working together to be more competitive, conscious of better public service delivery and ultimately both absolutely and strategically focused on their targets and goals. A more “mutual gains” approach founded on the principles of transparency, information, consultation and where required negotiation and agreement needs to be reinforced in all our enterprises.

Paul Teague (QUB) observes:

“Greater co-ordination has to occur among the dispute resolution agencies...New closer methods of working with firms are required so that they can establish clear ground rules on what constitutes acceptable and unacceptable practice in relation to particular employment rules. Working closer with firms will allow them to identify and get a better insight into high performance dispute resolution policies. These revisions are not beyond the capabilities of the dispute resolution bodies.”

In achieving these purposes strategic alliances are necessary between dispute resolution bodies, employer bodies/trade unions/and professional training/research institutions. This is how between us we can reshape in a positive way the future of employment and employment relationships and by building better enterprise and national social partnership models. Thankfully in Ireland the Government, employers and unions have at least decided to once again to return the negotiation table in an attempt at achieving a common national recovery plan before the emergency budget scheduled for April 7<sup>th</sup> 2009.

From the Agency perspective, the case for effective co-operation is clear. I agree with the sentiment of Professor Paul Teague and Dr Damien Thomas (2008) effective modern approaches to dispute resolution require the, “building of more collaboration between the Agencies, but collaboration should not be developed for collaboration’s

sake”. A clear focus on effective service delivery by the wide range of Agencies operating in the employment arena in Ireland requires at a minimum a collaboration designed to enhance the client experience. I have already argued earlier that this focus on enhanced service delivery brings into consideration the question of Agency rationalisation, and in the Irish case, the possible design of a Employment Relations Authority encompassing a range of services currently dispersed across a range of organisations.

## **Conclusion**

The continued juridification of employment practices is inevitable but I do not anticipate that such a development will lead in any way towards the diminution of the need for robust independent and statutory dispute resolution agencies. After all who could have made the difficult call on the recent oil refinery strikes but a respected, professional, autonomous and independent agency such as ACAS.

When the quantitative easing has settled on the global economies, will the previous, current and future employment paradigms be significantly different? Inevitable there will be some changes – more regulation and oversight being one – greater corporate governance and “ethics based” decision-making being another – and a potential greater fragmentation of the individual employment relationship being a further potential outcome.

Will trade unions, employees (in their many contractual guises) have a more legal arrangement with the/their employers? Perhaps, but is a fragmentation of the employment relationship of real benefit and use to the good and committed employee, the progressive and thinking trade union, and to the fair, good and innovative employer.

The original idea of a “floor” or indeed “threshold” of employment rights may be the answer and where everything else within the employment relationship is negotiable either by individual arrangement with the dispute resolution safety net or by collective bargaining at national or at European level.

One thing is certain that in this, “age of uncertainty” all of us here if we choose the path of reinvention, we will be in business for the foreseeable future.

I am reminded of the quotation of *Eric Hoffer*, the famous longshoreman and philosopher when he warned us that, “in times of change, learners inherit the earth, while the learned find themselves beautifully equipped to deal with a world that no longer exists”

Finally I would like to finish on a somewhat whimsical note with three quotations. In *The Strange Death of Liberal England* (1935: 209), George Dangerfield has this wonderfully poignant passage on George Askwith (later Lord) – Chief Industrial Commissioner in the Board of Trade in the early decades of the 20<sup>th</sup> century.

“...there was the figure of Mr Askwith, gliding unobtrusively from one camp to the other, and somehow keeping the peace. There is nothing in Mr Askwith’s character and intelligence to call forth exclamations of rapture or astonishments; indeed there is something about the position of arbitrator in such a conflict which seems – to our different eyes today – singularly uninspiring. But Mr Askwith, so equable, so tactful and so just seems to have embodied, in a special manner, the spirit of “Compromise”, which is a very English spirit.” (p209)!!

The second comes again from my old faithful limerick rhymer on last Cheltenham Racing week;

“Celtic Tiger” is a non-runner...that stallion of great renown,  
He was over extended in a previous race...and had to be put down!  
Another horse comes from a thoroughbred line...he is an impressive gelding  
Out of “Financial Regulator” and “Very Suspect Lending”,  
So that’s it from noisy Cheltenham.... the din here would leave you deaf,  
The winner is “Bail Out” in the bumper, sponsored by the IMF.

And finally, Lord Askwith again; a headline from the New York Times – July 31<sup>st</sup> 1919. (letter to the London Times)

“Attacks premier for British unrest; Lord Askwith, Chief Industrial Commissioner - charges waste and extravagance “SYSTEM OF OPPORTUNISM” - “An orgy of expenditure is the fashion”, he says – urges a new gospel of thrift in the economy”

“Let Lloyd George tell the people the real situation and preach to them the necessity of economy and thrift and above all act upon it himself. Let him put the settlement of industrial disputes on a sound footing to be dealt with between employers and employed only lending aid if necessary and in the event of a deadlock.”

Now that’s what I call a career ending statement from a career public servant!

Let us keep the faith in the meantime and set our minds to the employment relations landscape which will be necessary in the future.

Thank you for being here this evening.

## **References**

European Commission (2006) *Modernising Labour Law to Meet the Challenges of the 21<sup>st</sup> Century*. Com – 2006/ 708 Final.

Gibbons, M. (2007) *Better Dispute Resolution: A Review of Dispute Resolution in Britain*. London, Department of Trade and Industry.

Hill, C. (1975) *The World Turned Upside Down: Radical Ideas During the English Revolution*. Harmondsworth, Penguin Books

Teague, P. and Thomas, D. (2008) *Employment Dispute Resolution and Standard Setting*. Dublin, Labour Relations Commission, 2008