

Chapter 6

Posting of workers before Irish courts¹

Michael Doherty

Introduction

This chapter considers how the rights of posted workers have been addressed in cases before Irish courts and tribunals. As will become quickly apparent, the issue of posting rarely features in reported decisions. The various reasons for this include the relatively low numbers of workers posted to, and the destinations for workers posted from, Ireland (section 1); the manner in which the Posted Workers Directive was transposed in Ireland, particularly as it relates to the construction sector (section 1); and the nature of dispute resolution in Ireland in the employment sphere, which sees litigation as a 'last resort' (section 2).

Ireland presents an interesting case, as labour migration to the country, of any kind, is a relatively recent phenomenon. The approach taken to the regulation of posted workers' rights has very much been to insist on equal treatment for *all* workers, regardless of origin or worker status. Crucial to this has been the *erga omnes* (binding) extension of sectoral rights, agreed by the social partners, particularly in the construction sector. The chapter will argue that, while this approach has been relatively successful in protecting the rights of posted workers, the threat to sectoral standard-setting, both in the national and EU context, could significantly affect this in the future.

The chapter begins by looking at the legal context for posting in Ireland, before examining the (limited) case law, and concludes by considering possible future challengers for regulation in this sphere.

1. The legal framework for posted work and national debates on posting

1.1. The transposition of the Directive

The Posted Workers Directive was transposed into Irish law by Section 20 of the Protection of Employees (Part-Time Work) Act, 2001 (hereinafter referred to as 'the 2001 Act'), which simply extended *all* Irish employment protection measures to posted workers. Section 20 (2) extends all relevant 'enactments' to:

- (a) a posted worker (within the meaning of the Directive); and

- (b) a person, irrespective of his or her nationality or place of residence, who:
- (i) has entered into a contract of employment that provides for his or her being employed in the State;
 - (ii) works in the State under a contract of employment; or
 - (iii) where the employment has ceased, entered into a contract of employment referred to in sub-paragraph (i) or worked in the State under a contract of employment,

in the same manner, and subject to the like exceptions not inconsistent with this subsection, as it applies and applied to any other type of employee.

Therefore, workers posted to Ireland from outside the EU have the same labour rights as workers posted from another Member State. In the main, the word ‘enactments’ refers to employment legislation. In Ireland, collective agreements are not legally binding; they are voluntary agreements between representatives of employees, and representatives of one or more employers (with the exception of sectoral collective agreements, as discussed below).

The implementing measure is silent on a range of issues, including the definition of a posted worker (it simply refers to the Directive); the duration or temporary nature of the posting; the activities of the undertaking in the home state; the nature of services provided by the employer; or the fact that an employment relationship must be maintained with the home state employer. The protection offered to posted workers is not made dependent on the length of stay, but, in limited situations, the Irish legislation will require the employee to satisfy service requirements before protection kicks in. Most importantly, an employee must have one year’s continuous service with the employer before the Unfair Dismissals Acts 1977-2015 apply. No specific exemptions relating to initial assembly, postings of short duration, or non-significant work (under Article 3 of the Directive) have been applied.

The Irish legislation, therefore, could be said to both over- and under-transpose the Directive. By entitling a posted worker to *all* of the protections offered by Irish labour legislation, the 2001 Act would appear to provide a greater level of protection than that envisaged by the Directive. Back in 2003, the Commission warned that the Directive in no way permits Member States to extend all their legislative provisions and/or collective agreements governing terms and conditions of employment to workers posted on their territory, and that the application of such rules must be in compliance with the EU treaties, in particular Article 56 of the Treaty on the Functioning of the European Union (TFEU).² The Commission also censured Ireland, however, for not clearly defining the posting situations covered, and the rights deriving from the provisions of the Directive, and for not implementing the jurisdiction clause contained in Article 6 of the Directive.³

2. The Implementation of Directive 96/71/EC in the Member States COM (2003) 458 final.

3. Ibid.

1.2. National debates on posting

At the time the Directive was passed, the social partners seemed to believe that it would not have a huge impact in the Irish context (EIRO, 1999). However, the Construction Industry Federation (CIF), representing large construction employers, welcomed the Directive on the basis that it would help to facilitate a level playing field in construction by reinforcing the universal applicability of the Registered Employment Agreement (REA) for the industry. The Building and Allied Trades Union (BATU) also anticipated few problems with the Directive, given that relatively few construction workers were posted to Ireland by overseas employers. A follow-up European Observatory on Industrial Relations (EIRO, 2003) suggested that postings may be relatively common for Irish employees of multinationals based elsewhere. These would typically refer to relatively high-skilled and high-paid workers (many working in financial services, for example).

Until 2013, the Directive was not seen by labour relations actors as hugely significant in the Irish situation (although there was a small number of high-profile disputes involving posted workers, discussed in the next section).

This was due, to some extent, to Ireland's island status (workers can move more easily where land borders are shared), and to the relatively small numbers of workers covered. Figures from the Commission regarding A1 forms (which certify the applicable social security legislation for those whose work means they have connections to more than one Member State) indicate that between 2,000 and 3,600 Irish workers were posted abroad annually between 2011 and 2015 (this represents less than 0.1% of the population) and approximately 4,000 workers were posted to Ireland in 2015 (down from 6,000 in 2009). Most workers were posted from a country in the 'old' EU15. The vast majority of Irish workers posted abroad go to the UK, Germany, the Netherlands and France; more than 95% of postings from Ireland are to the EU15. This probably explains why there is no discussion, or case law, in Ireland concerning *outgoing* workers and their rights, as posted workers from Ireland tend to go to relatively high-wage destinations, which are geographically close, and, as English speakers, would generally not face many of the linguistic and cultural difficulties encountered by workers from other countries.

In the period since the Directive was transposed into Irish law, the economy, and especially the construction sector, saw an unprecedented boom in output and employment levels, then a subsequent collapse, and is currently experiencing a significant revival. One of the consequences of the boom was that the historical tradition of Irish construction workers travelling abroad was inverted, as more workers from other parts of Europe arrived in Ireland. Many of these, however, were *not* posted workers but workers who migrated to Ireland in search of employment opportunities. This was particularly the case following the accession of 10 new Member States (EU10) to the EU in 2004, and, to a much lesser extent, Bulgaria and Romania in 2007.

Most crucially, however, posted workers in Ireland (other than in high-pay occupations

such as financial services) were overwhelmingly located in the construction sector, and, in this sector, a legally binding collective agreement covered all workers. It is to this issue we now turn.

1.3. Collective agreements and posting of workers

As noted above, collective agreements in Ireland generally do not have legally binding status. However, for the purposes of this chapter, an important exception exists which has been the focus of most of the (limited) case law on posting of workers. Until 2013, under Part III of the Industrial Relations Act, 1946,⁴ collective agreements made between unions and employer(s) that were registered with the Labour Court⁵ were legally binding. While many of these were company agreements, they could be applied to *all* employers and employees working in a particular sector or industry, so long as the parties to such agreements were ‘substantially representative’ of workers and employers in that sector.⁶ The most important of these REAs were undoubtedly the REA for the construction industry and the separate but related REA for the electrical contracting industry. These set minimum levels of pay (which far exceeded the national minimum wage) and other terms and conditions for workers in these industries. Therefore, the legally binding REAs applied to all workers working in Ireland irrespective of nationality or status. This included agency workers (although, for this category of workers, this was not a universally accepted legal view).⁷

In 2013, the legislation underpinning the sectoral *erga omnes* extension of these REAs in construction and electrical contracting was declared unconstitutional by the Irish Supreme Court in *McGowan v Labour Court*.⁸ This led to widespread concern about the possibility of ‘social dumping’, where construction workers based in Ireland could be displaced by workers coming from low-wage destinations. This was because construction workers employed by firms based in Ireland would likely have their REA terms and conditions protected by contract law (the REA terms would likely be deemed ‘incorporated’ into the individual contract of employment),⁹ whereas firms, or temporary agencies, posting construction workers to Ireland would be legally bound only by the (lower) national minimum wage. Furthermore, certain aspects of the REA, notably the right to sick pay and pension rights, are not rights guaranteed by Irish employment legislation (but rather matters for negotiation between workers and employers).

4. All Irish statutes can be found on the Irish Statute Book website (www.irishstatutebook.ie).

5. Despite its name, the Irish Labour Court is not a court of law and is not part of the regular court system. It is a statutory employment tribunal. Its members are not judges (there is no requirement for members to have a legal qualification, although some do). The Labour Court sits in divisions of three - a worker member, an employer member, and an independent Chair. The Labour Court deals with a mix of cases; some are employment rights cases (since 2015 the Labour Court hears only appeals from the employment tribunals), and some are industrial relations cases. Depending on the nature of the dispute before it, the Court may grant legally binding ‘determinations’ (employment rights cases) or ‘recommendations’ (industrial relations cases), which are not legally binding.

6. Industrial Relations Act 1946, s 27.

7. *Construction Industry Federation v Irish Congress of Trade Unions* (LCR 19847/2010). All decisions of the WRC and the Labour Court can be found at www.workplacerelations.ie

8. [2013] IESC 21.

9. This legal opinion was never tested before the courts or tribunals, but would be the predominant view among legal practitioners and academics (including the author).

Ironically, the deep economic crisis in Ireland from 2008 to 2014, when virtually no large-scale construction projects were being undertaken, meant that these debates remained largely academic. It was notable that, in 2013, the then-Minister for Education and Skills introduced random audits on school building and third level education building projects funded by the Department of Education and Skills. All public works contracts included a clause specifying the payment of the appropriate REA rate. The insistence of the public works contracts to compel contractors to pay the REA rate was most likely in breach of the Court of Justice of the European Union (CJEU) decision in *Rüffert*,¹⁰ but no court challenges were taken.¹¹

Moreover, the government moved relatively quickly to reinstate the *erga omnes* system. The Industrial Relations (Amendment) Act 2015 provides for a new model of universally applicable sectoral terms and conditions in the form of Sectoral Employment Orders (SEOs). Applications to establish an SEO may be made by a trade union (alone, or jointly with an employer organisation) where the union is ‘substantially representative of the workers of the particular class, type or group in the economic sector’ concerned, and the employer organisation concerned is ‘substantially representative of the employers of the workers of the particular class, type or group in the economic sector’ concerned. The application is made to the Labour Court, which makes a recommendation to the Minister. The Minister must sign the SEO into law, with parliamentary approval. SEOs set legally binding minimum wages, and conditions of employment, for all workers in the sectors covered; any contractual term purporting to offer terms and conditions below those stipulated in the SEO will not be enforceable, and the terms of the SEO will be inserted by law into the contract. A new SEO for the construction sector was approved in November 2017, and updated in 2019, and a new SEO for the electrical contracting sector was approved in June 2019.

1.4. Enforcement of employment rights in Ireland

Directive 2014/67 (the Enforcement Directive) was transposed into Irish law by the EU (Posted Workers) Regulations 2016 (SI No 412/2016). Overall, the debate in Ireland has fundamentally focused on the enforcement of sectoral standards for *all* construction workers (be they Irish citizens, migrant workers, or posted workers). In this regard, the Enforcement Directive has been largely welcomed, although employers are concerned about the provisions on subcontracting liability (IRN 2016).

Claims for breaches of employment legislation, or legally binding SEOs, may be made to the Workplace Relations Commission (WRC) adjudication service.¹² Appeals are heard

10. Case C-346/06 *Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189.

11. As a result of the audits, five projects were referred to the Revenue Commissioners, one to the Department of Social Protection, and one to the Labour Inspectorate. These figures show the difficulty about compliance with employment regulations within the industry. No written decisions as regards the outcomes are available, and it is not known whether the cases involved posted workers.

12. The Workplace Relations Commission (WRC) is the statutory agency responsible for the oversight of employment relations in Ireland. It adjudicates on all statutory employment rights claims at first instance. The WRC also has a statutory duty to ‘promote the improvement of workplace relations, and maintenance of good

by the Labour Court. The WRC's Labour Inspectorate section has the power to impose fines on employers who breach employment legislation; these orders may be enforced through the 'regular' courts, notably, the regional district courts.

Claims for breach of contract may also be made to the 'regular' civil courts, but this is rare. The vast majority of employment law claims are heard by the WRC, at first instance, and the Labour Court, on appeal. This means that claims by posted workers can be made to the employment tribunals, rather than the regular courts, which is considerably faster, and less costly; there is no requirement to have legal representation before the tribunals, there are no fees charged for making a claim, and no costs are awarded.

Claims are generally brought by individual workers (there are no class actions and unions cannot bring claims in the names of members); trade unions do have a role in bringing cases in relation to the operation, enforcement, or interpretation of REAs and SEOs.

2. Case law

Very few cases regarding posted workers have been reported in Ireland. This chapter cites 13 reported decisions, many of which touch only tangentially on posted workers and their rights (there are, however, multiple decisions regarding two disputes involving Turkish company Gama and Portuguese/Irish consortium RAC). Therefore, what is discussed in this section are three categories of cases, all of which involve workers posted to Ireland, but some of which were never the subject of a court or tribunal decision.

2.1. Terms of employment

Disputes involving terms and conditions of employment involve multiple issues including underpayment of wages and social security contributions, difficulties with subcontracting arrangements, breaches of working time legislation, and inadequate record keeping.

In 2006, a dispute arose at a site for a refurbished power station at Moneypoint owned by the Electricity Supply Board (ESB), a semi-state company. The principal contractor, a German company called Lentjes, engaged a Polish subcontractor, ZRE Katowice. It was alleged that the latter was significantly underpaying 66 Polish workers and making them work a 52-hour week with no overtime *premia*. The workers received one trip home every six months, but this consisted of a flight to the UK, and a bus from there to Poland. They were all members of an Irish union, the Technical, Electrical and Engineering

workplace relations'. The WRC may provide such advice as it considers appropriate on any matter relating to workplace relations. The WRC provides advice and assistance for employers and employees in all areas of employment relations, including collective bargaining. In practice, the WRC often intervenes to help mediate, and conciliate, in collective and individual disputes. The WRC is also the 'competent authority' for the purposes of the Enforcement Directive (Directive 2014/67).

Union (TEEU). ZRE had previously worked on another project with the ESB, where allegations of underpayment had been published on an independent media website (indymedia.ie).¹³ The contract for ZRE Katowice Ireland was ultimately terminated by Lentjes, and the Irish subsidiary of the Polish company went into liquidation.

A dispute also arose between the ESB, the TEEU and an Irish main contractor, Laing O'Rourke Utilities, on another site over claims by the union that Serbian workers employed by a Belgrade-based subcontractor were being underpaid. After concerns were raised by the TEEU, a joint company/union audit was carried out, and a new agreement was signed in 2005 under which the workers received the correct rates of pay.

However, the most prominent case in Ireland to involve posted workers was that of a parent Turkish company (Gama Endustri Tesisleri Imalat Montaj A.S.) posting Turkish workers to its Irish subsidiary (Gama Construction Ireland Ltd.). In February 2005, it came to light that Gama was paying the Turkish workers, who had come to Ireland to work on a number of public projects, rates far below the REA minimum rate and, indeed, below the national minimum wage. These workers were accommodated offsite by their employers and spoke little or no English. Although the majority of the workers were members of Irish trade unions, it was Socialist Party Member of Parliament (TD) Joe Higgins who brought the issue to public attention. Following Higgins' claims the Department of Jobs, Enterprise and Innovation (DJEI) began an immediate investigation. The inspection uncovered a complex tale of destroyed work records and workers' money being paid, in some cases without their knowledge, into Irish, Turkish, and Dutch bank accounts. The inspectors found that Gama did pay workers less than the minimum construction rate, that workers not covered by the REA (caterers, for example) were paid less than the national minimum wage, and that while work records appeared to have been compiled on an informal basis, they had been destroyed. It also came to light that Gama had benefited substantially from a scheme whereby exemption from payment of social insurance for a period not exceeding 52 weeks can be granted in respect of the temporary employment of people who are not ordinarily resident in the state. Gama had employed 1,324 of the 1,867 workers covered by the scheme since it began in 2003. The company took legal action to restrain the publication of the DJEI's report.¹⁴ The Supreme Court held that the powers under which the inspectors had operated did not permit them to produce a general report, which could be circulated or published generally, but that a private and limited circulation of the inspector's report to the relevant statutory authorities (with a prosecutorial function in relation to the matters identified) was permissible.¹⁵ As a result, the report has never been made public and the information available has come from media or trade union sources.

13. http://www.indymedia.ie/article/70811?search_text=pa&&condense_comments=false

14. *Gama Construction & Gama Endustri v Minister for Enterprise, Trade and Employment* [2005] IEHC 210 (High Court); [2009] IESC 37 (Supreme Court).

15. Various bodies were named, including the Director of Corporate Enforcement, the Garda (Irish Police) Fraud Squad, the National Immigration Bureau, and the Revenue Commissioners.

A remarkable feature of the *Gama* case was the fact that the company had a fully unionised workforce, and was a member of the CIF. The unions became actively and visibly involved in the dispute as the facts came to light, particularly the State's largest union, the Services, Industrial, Professional and Technical Union (SIPTU), which adopted a fuller role in representation and negotiation on behalf of the 600 workers involved. The workers also took industrial action in pursuit of their outstanding monies. The *Gama* dispute, which eventually involved three trade unions and a protracted series of unofficial, and official, industrial action, was finally resolved in August 2005 through the intervention of the Labour Relations Commission (LRC), the State's third-party mediation and conciliation service,¹⁶ and the Labour Court. At this point, almost all of the original 600 workers had returned to Turkey, with only 83 left in Ireland. Following a Labour Court Recommendation,¹⁷ *Gama* agreed to pay these employees EUR 8,000 per year of service to cover overtime worked. The Turkish employees received the monies from the Dutch bank accounts and were also compensated for underpayments. In February 2011, the Irish High Court (applying the Brussels Regulations 44/2001) ruled that a claim against *Gama* Ireland on behalf of a further 491 named Turkish workers for EUR 40.3 million in unpaid wages should be heard in Ireland rather than Turkey, as the company had contended. Despite an appeal by *Gama* to the Court of Appeal, the High Court decision that the claim should be brought in Ireland was upheld.¹⁸

A second key dispute, known as the *RAC* dispute, has not yet been fully resolved. *RAC* Eire was made up of three Portuguese companies trading in Ireland as a partnership. *RAC* Eire also traded as a contractor or subcontractor to a consortium known as *Bóthar Hibernian*, itself comprised of one Portuguese and two Irish companies. In November 2006, *Bóthar Hibernian* was awarded a public works contract to design and build a new road. The workers, most of whom did not speak English, signed contracts in English stating that they would be paid in accordance with REA rates, and that working time and overtime would be in accordance with the REA in place. The contract also provided for deductions from pay for accommodation, meals, and laundry services. It seems the workers were not members of an Irish trade union, but a complaint was made nevertheless to the Labour Inspectorate by SIPTU in 2008, which led to inspections of the worksite and accommodation. In echoes of the *Gama* dispute, it seems work diaries and other employment records were falsified, the workers were significantly underpaid, and worked hours significantly in excess of their contractual hours. Their accommodation was found to be extremely substandard and to pose a health risk to inhabitants.¹⁹

16. The LRC has now been subsumed into the Workplace Relations Commission (WRC).

17. *Gama Endustri v SIPTU* (LCR 18214/2005).

18. *Abama & Others v Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS* [2011] IEHC 308 (High Court); [2015] IECA179 (Court of Appeal).

19. As Hogan J noted in the Court of Appeal: 'The issues presented in this appeal all have a distinctly Victorian feel to them and, indeed, the factual sub-stratum of the case – allegations of illegal deductions made by the employers of foreign and generally poorly educated construction workers – would have seemed familiar to late 19th century judges in different jurisdictions'; *Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors* (No.1) [2017] IECA 252, at para 2.

The Portuguese employers were convicted, under the Organisation of Working Time Act 1997, of the criminal offence of supplying misleading records. The conviction was in the District Court and this was upheld on appeal in the Circuit Court.²⁰ Upon conviction, the employers were fined EUR 1,000 and the costs of the prosecution.

In 2012, proceedings were initiated in the High Court for breach of contract in respect of 27 Portuguese workers (26 construction workers and one cleaner). In 2016, the High Court found that the workers had been significantly underpaid in breach of their contracts, that no deductions from the plaintiffs' wages for the provision of the accommodation or for the laundry services were justified, and that the workers were entitled to recover these amounts in full.²¹ On appeal in 2017, the Court of Appeal found that the employers *had* been entitled to charge for deductions in respect of accommodation. However, the Court also found that the workers were entitled to sue for damages for inconvenience, distress, and upset by reason of the substandard accommodation.²² In 2018, the matter returned to the High Court for assessment of damages, and 23 new plaintiffs also took claims for breach of contract.²³ Ultimately, the court awarded approximately EUR 1 million in damages to the workers, with individual awards ranging from EUR 3,500 to over EUR 60,000. Another hearing will be required before the precise terms of the final order can be made against the employers.

One reported case relates to unfair dismissal.²⁴ Here, the employer was a UK company, and the worker a UK national. The Employment Appeals Tribunal rejected the employer's argument that Section 20 of the 2001 Act was intended to deal only with the narrow range of issues referred to in Article 3 of the Posted Workers Directive, and intended further to specifically exclude Acts such as the Unfair Dismissals legislation. The Tribunal concluded that the Unfair Dismissals Act was applicable to posted workers.

2.2. The legal basis and sectoral standards

Posted workers have featured as an issue in the ongoing, and contentious, debate in Ireland about the desirability, and legality, of extending *erga omnes* sectoral standards to all employers and workers in construction and electrical engineering. There is no need to detail this debate in full (Doherty 2016; 2012), but some brief points can be highlighted. In 2009, a loose alignment of employers in the electrical contracting sector sought the cancellation of the REA for the sector.²⁵ The TEEU (the main union in the sector) and the main employer bodies argued that, in the absence of an REA, contractors from other EU States, where wage rates were significantly lower than in Ireland, would enjoy a considerable competitive advantage over Irish contractors. They argued that a major advantage of the REA was that it preserved a level playing field among contractors tendering for work. The Labour Court confirmed that the terms of

20. These are regional courts; the lower courts in the Irish legal system. Decisions of these courts are not reported.

21. *Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors* [2016] IEHC 152.

22. *Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors* (No.1) [2017] IECA 252.

23. *Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors* [2018] IEHC 732.

24. *Taylor v Daniel Lloyd Leisure* (UD2366/2009).

25. REP091/2009 (Labour Court).

the REA were applicable to, and could be enforced against, contractors based outside the State, and that nothing in the decision of the Court of Justice in *Laval (Case C-341/05)* would call into question the compatibility of Section 20 of the 2001 Act, which renders the terms of the REA universally applicable in domestic law, with any provision of EU law. The Court also found that it was reasonable to conclude that, in the absence of an REA, contractors from other Member States could exercise their freedom to provide services in Ireland at the same rates and conditions of employment as apply in their country of origin.²⁶ Depending on the country of origin, this could seriously undermine the competitive position of Irish contractors.²⁷

The case was appealed on a point of law to the Irish High Court. In *McGowan & Ors v Labour Court & Ors*,²⁸ the Court upheld the validity of the REA and specifically noted that the REA system was compatible with the *Laval* judgment. The Court reiterated that, in light of the existence in Ireland of universally applicable collective agreements, such as the REA, posted workers in Ireland in the electrical industry would enjoy the same terms and conditions as those to which domestic workers were entitled, meaning that foreign contractors from low wage economies could not undercut Irish contractors. The Court concluded that the cancellation of the REA would remove the protection for domestic contractors against being undercut by posted workers from low wage countries. The case was appealed again to the Supreme Court.²⁹ Here, the REA system was declared unconstitutional; however, the Court decided the matter on principles of Irish constitutional law, and there was no reference at all to posted workers.³⁰

2.3. When are workers 'posted workers'?

There are only two other reported decisions on posted workers. The first also related to the REA. In *Gor Don Construction*³¹ the company argued that it had been advised by the Construction Workers Pension Scheme (CWPS) that the employees in question were posted workers, and therefore did not need to be entered into the REA pension scheme. The Labour Court found that, although they were resident in Northern Ireland, the workers were not posted workers because they were employed by an Irish company and carried out work in Ireland, and that the REA applied to them based on Section 20(2)(b) of the 2001 Act. This is interesting, as, strictly speaking, the CWPS should apply, and contributions should be made for the duration of posting, unless it can be shown workers are covered by an alternative scheme with equivalent benefits.

26. This, of course, is questionable; such operators would be subject to minimum wage laws in Ireland.

27. This argument was made again, and again accepted by the Labour Court in LCR19847/2010 (included in the Annex).

28. [2010] IEHC 501.

29. [2013] IESC 21.

30. For this reason, I have not included the decision in the table of cases below (Annex IV). For an analysis of the decision see Doherty (2012).

31. REA1294/2012.

3. Analysis and conclusions

What this chapter has clearly demonstrated is that claims by posted workers before Irish courts and tribunals are very rare indeed. In this section, we can consider some possible reasons for this.

First, the phenomenon of workers being posted to Ireland (or indeed migrating to Ireland for work) is very recent, and the numbers of workers involved is very low. Large-scale labour migration to Ireland, and much more limited levels of posting, only began around 2004, in the context of an economic boom, and the accession of 10 new Member States to the EU. Most workers came from the countries that joined the EU in 2004, and, in particular, Poland and Lithuania. Outside of high-skill, high-pay sectors, the vast majority of workers posted to Ireland worked, and work, in construction. The boom dramatically ended in 2008, and posting has not been an issue of debate in the Irish labour relations arena since then. However, since 2015, the economy has been growing rapidly, unemployment has decreased dramatically, and the construction sector is experiencing a significant uplift. Therefore, we may soon see another increase in posting to Ireland.

Secondly, the nature of dispute resolution in Ireland, in the labour relations sphere, heavily reflects the ‘voluntarist’ tradition inherited from the UK. Even in cases such as *Gama*, where workers eventually did go to the courts and tribunals to enforce their rights, it was only after a multiplicity of attempts to settle the matter by industrial action, accompanied by negotiation and conciliation. This involved the unions, but, crucially, also the state dispute resolution agencies, now the WRC, and the Labour Court. There is a long tradition in Ireland of these bodies intervening in large-scale disputes (and posting situations will normally involve a group of workers), and their role and status is seen as very significant by the social partners, and Irish governments. Similarly, the Labour Inspectorate (now also part of the WRC) and other bodies, such as the Health and Safety Authority (HSA), have traditionally laid much more emphasis on employer compliance than on prosecutions and/or litigation. Thus, these agencies always seek to engage with employers on a non-litigation basis in the first instance in order to get employers to comply with labour regulations. Litigation is seen as a last resort.

Thirdly, trade unions have traditionally been relatively well organised in the construction sector. Thus, workers have recourse to trade union protection (the various disputes described in section 2 mostly resulted in some form of industrial action being taken), rather than needing to take claims to courts and tribunals. Even in the RAC dispute, where workers were not members of trade unions, it was a trade union, SIPTU, that made a complaint to the Labour Inspectorate about the working conditions.

Fourthly, a key theme of the chapter has been the strong commitment of trade unions, larger employers, and the state to sectoral regulation of labour standards in the construction sector. As we have seen, the social partners have continuously argued that such regulation is vital to prevent social dumping, and undercutting of (relatively high cost) Irish employers by (relatively low cost) employers from other jurisdictions. Although the REA system was struck down by the Supreme Court, a new system of

sectoral regulation has been quickly established (the SEO system). Sectoral standard-setting is seen as key to protection of both Irish employers and posted workers; the simplicity of a system where ‘one size fits all’ makes for easier monitoring of, and compliance with, labour standards. Somewhat controversially, as we have seen, the Irish transposition of the Posted Workers Directive has extended *all* protections of Irish labour law (not just the Article 3 protections) to posted workers, from inside, and outside, the EU, a position which has been consistently upheld by the courts and tribunals in Ireland.³²

However, challenges and dangers abound in all these areas. It is not clear to what extent the landscape awaiting workers to be posted from lower-cost jurisdictions to Ireland from now on has changed. Ireland is again experiencing rapid economic and employment growth, but in a context where Brexit looms. During the boom of the 2000s, posted workers had many employment opportunities, but there was also documented exploitation. The impact of the Enforcement Directive remains to be assessed.

Voluntarist solutions may work well in some scenarios, but more than a decade after the *Gama* and *RAC* disputes came to light, it is still unclear whether the workers in question have actually achieved a just outcome. Clearly, attempts to ‘cajole’ *Gama* into meeting its obligations did not work. Some of the workers sought to enforce their rights in the Turkish courts, with very limited success. In the Irish High Court, it was noted that the Turkish courts had demonstrated an inability to apply Irish law, an unwillingness to apply the rates under the REA, and had also failed to take into account the public policy concerns of the Irish authorities (regarding the extreme exploitation of workers). This was in addition to more pragmatic concerns about the translation of documentation into Turkish, and the availability of witnesses. Turkey, of course, is not a member of the EU, but the *Gama* case illustrates the difficulties for posted workers of enforcing rights before home state courts.

The *RAC* case (details of which first emerged in 2008) has not yet been brought to a conclusion. Some workers were denied recompense because they were unable to supply direct evidence to the Irish courts (in person or via video link), as Ireland does not permit class actions. Also, the judges in the case noted the obvious attempts by *RAC* to frustrate proceedings (at least five different legal teams were engaged by the defendants at various stages).

In both cases, the issues have been pursued as breach of contract cases. Given the vast sums of money involved this has meant both have had to be pursued in the Irish superior courts, with the inevitable costs and delays this involves, rather than as labour relations cases before employment tribunals.

32. ‘...[the requirement to comply with REAs] seems to me to reflect the legitimate public policy that, while proper competition on price and quality in the provision of public works services, subject to the principles of non-discrimination, transparency and equality enshrined in the TEU and TFEU Treaties, is both necessary and appropriate; it cannot be allowed to operate in an untrammelled way so as to diminish the employment law rights of workers. There should be no ‘race to the bottom’ where the rights and conditions of workers are concerned’; per Keane J in *Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors* [2016] IEHC 152, at para 126.

Unfortunately, the long-running sagas of both *Gama* and *RAC* also demonstrate the difficulties of pursuing a claim against the home state employer in the host state courts. Again, the effects of the Enforcement Directive remain to be assessed.

While Irish trade unions provided some protection to the posted workers in dispute in the cases outlined, ultimately, once the workers return home, the protection Irish unions can offer is limited indeed. Here, the development of more cross-national union co-operation is vital; but prospects for this do not appear particularly bright.

The importance of legally binding sectoral standards cannot be underestimated. There is admirable social partner and political commitment to these in Ireland. However, the system has come increasingly under threat from ‘rogue’ employers, generally smaller operators who are intensely anti-union, and see the system as unduly paternalistic, and, indeed, anachronistic (*McGowan*).³³

Furthermore, in its country-specific recommendations (CSRs), the Commission has been targeting measures of standard-setting that go beyond minimum legislative standards, particularly where these are arrived at by collective bargaining (Doherty, 2014). It is also arguable that Ireland has gone too far in extending all employment protections to posted workers.

Naturally, I will end by suggesting further research. The dearth of claims taken to the Irish courts and tribunals probably can be best explained by undertaking more qualitative research to get at the ‘reality’ behind the case law reports.

References

- Doherty M. (2012) Battered and fried? Regulation of working conditions and wage setting after the John Grace decision, *Dublin University Law Journal*, 35, 97-121.
- Doherty M. (2014) Back to the future of EU labour law, *Kings Law Journal*, 25 (3), 467-475.
- Doherty M. (2016) New morning? Irish labour law post-austerity, *Dublin University Law Journal*, 39 (1), 62-82.
- EIRO (1999) Posted workers and the implementation of the Directive. <https://www.eurofound.europa.eu/publications/report/1999/posted-workers-and-the-implementation-of-the-directive>
- EIRO (2003) Thematic feature- Posted workers <http://www.eurofound.europa.eu/eiro/2003/06/tfeature/ie0306202t.htm>
- European Commission (2017) Posting of workers: Report on A1 portable documents issued in 2015. <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7980&furtherPubs=yes>
- IRN (2016) Deadline missed for Posted Workers Enforcement Directive, *Industrial Relations News*, 26, 10-11.

33. Indeed, the Irish Supreme Court, in *McGowan*, stated (at Paragraph 8) that the (REA system) appears ‘somewhat anomalous’ today and gives rise to the ‘prospect of burdensome restraints on competition for prospective employers and intrusive paternalism for prospective employees’.

List of cases

Abama & Others v Gama Construction Ireland Ltd & Gama Endustri Tesisleri Imalat ve Montaj AS [2011] IEHC 308 (High Court); [2015] IECA179 (Court of Appeal).

Construction Industry Federation v Irish Congress of Trade Unions (LCR 19847/2010).

Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors [2018] IEHC 732.

Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors (No.1) [2017] IECA 252.

Da Silva & ors v Rosas Construtores S.A. & ors t/a RAC Contractors [2016] IEHC 152.

Gama Construction & Gama Endustri v Minister for Enterprise, Trade and Employment [2005] IEHC 210 (High Court); [2009] IESC 37 (Supreme Court).

Gama Endustri v SIPTU (LCR 18214/2005).

Gor Don Construction (REA1294/2012).

Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet ECLI:EU:C:2007:809.

McGowan v Labour Court [2013] IESC 21 (Supreme Court); [2010] IEHC 501 (High Court).

National Electrical Contractors of Ireland and others - and- TEEU/ Electrical Contractors Association and others (REP091/2009).

Taylor v Daniel Lloyd Leisure (UD2366/2009).