Working Towards Equality:
The Obstacles Faced By Migrant Workers to Achieving Equality with Irish Nationals in Employment in Ireland

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### Abbreviations

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<td>AIB</td>
<td>Allied Irish Bank</td>
</tr>
<tr>
<td>BIMCO</td>
<td>Baltic and International Maritime Council</td>
</tr>
<tr>
<td>CERD</td>
<td>International Convention on the Elimination of all Forms of Racial Discrimination</td>
</tr>
<tr>
<td>CIF</td>
<td>Construction Industry Federation</td>
</tr>
<tr>
<td>EAT</td>
<td>Employment Appeals Tribunal</td>
</tr>
<tr>
<td>EC</td>
<td>European Community</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EEA</td>
<td>European Economic Area</td>
</tr>
<tr>
<td>EEC</td>
<td>European Economic Community</td>
</tr>
<tr>
<td>EHRR</td>
<td>European Human Rights Reports</td>
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<tr>
<td>ETUC</td>
<td>European Trade Union Confederation</td>
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<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FSU</td>
<td>Finnish Seamen’s Union</td>
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<tr>
<td>IBEC</td>
<td>Irish Business and Employers Confederation</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>IFA</td>
<td>Irish Farmers Association</td>
</tr>
<tr>
<td>IHRC</td>
<td>Irish Human Rights Commission</td>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>ISF</td>
<td>International Shipping Federation</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>ITF</td>
<td>International Transport Workers’ Federation</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<tr>
<td>NCCRI</td>
<td>National Consultative Committee on Racism and Interculturalism</td>
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<tr>
<td>NERA</td>
<td>National Employment Rights Authority</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal</td>
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<tr>
<td>REC</td>
<td>Recruitment and Employment Confederation</td>
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<tr>
<td>S.I.</td>
<td>Statutory Instrument</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<tr>
<td>SFA</td>
<td>Small Firms Association</td>
</tr>
<tr>
<td>SIPTU</td>
<td>Services, Industrial, Professional and Technical Union</td>
</tr>
<tr>
<td>TD</td>
<td>Teachta Dála</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TUC</td>
<td>Trade Union Congress</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNCMW</td>
<td>United Nations Convention on the Rights of Migrant Workers and Members of Their Families</td>
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<td>USA</td>
<td>United States of America</td>
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Abstract

The exploitation of migrant workers exists in all sectors and stages of employment in Ireland. The thesis determines that this is largely due to the variety of legal obstacles facing migrant workers during recruitment, employment and in accessing justice. Other factors, such as the general vulnerability of migrant workers arising from a language barrier, lack of knowledge of rights and social isolation, also contribute to the levels of exploitation. While these latter factors play a significant role in the exploitation of migrant workers, this thesis will examine the more tangible obstacles that exist within the legal realm as these are capable of being removed through the reform of legal processes.

Throughout the thesis, the issue of corporate mobility, the corporate quest for profit and the needs of corporations to retain their competitiveness are all factors that are considered in seeking legal solutions to the obstacles faced by migrant workers in Ireland. The thesis attempts to balance these interests against the interests of migrant workers in seeking equality with Irish nationals throughout the employment process.

Section I - Recruitment for Employment

The first Section of the thesis examines the recruitment of migrant workers in Ireland and the processes by which migrant workers can arrive for work in Ireland. Chapter 1 provides a general introduction to recruitment methods and
identifies the recruitment agency as the most popular and problematic of recruitment methods. Chapter 2 details the international and national history of the regulation of recruitment agencies and reveals the first legal obstacle faced by migrant workers, namely, that recruitment agencies no longer operate through fixed establishments that are easy to regulate and monitor. Provision must now be made for developments in technology and the effects of globalisation on the recruitment industry. Chapter 3 examines the more specific regulations that could be adopted to protect migrant workers from the actions of those recruitment agencies that maintain a role in the lives of migrant workers once in the State and in employment.

**Section II – Avoiding Legal Duties**

Section II identifies the potential obstacles that can occur during the employment relationship. Chapter 4 takes as a specific example the situation that arose in Irish Ferries in November 2005 and the concept of the flag of convenience as an avoidance tool used by corporations to cut costs and reduce the protection of migrant workers. This case study demonstrates very effectively the effect of corporate mobility and the corporate quest for profit on the most vulnerable of migrant workers. Chapter 5 challenges the theory that the elimination of such avoidance schemes is inconsistent with the protection of competition and examines both the reaction of the State and the future role of trade unions in the aftermath of the Irish Ferries case. Chapter 6 presents a shared response to the phenomenon of the flag of convenience specifically. It looks at the responsible parties involved in the employment of migrant workers on shipping vessels,
including the state of beneficial ownership, the flag state, the port state and the market state. At the current stage of international law there is no agreed point of responsibility and this has hampered the protection of migrant workers. The shared responsibility of all these stakeholders is considered vital in protecting the interests of migrant workers.

**Section III – Access to Justice**

This Section looks at the obstacles faced by migrant workers when they seek access to justice for employment disputes in Ireland. Chapter 7 examines the preliminary requirements that have to be met by migrant workers and finds that these requirements often exclude some of the most vulnerable migrant workers from seeking justice. In particular, the Chapter looks at the situation of irregular\(^1\) migrant workers in Ireland and challenges the view that such workers should not have access to any services in Ireland, including access to employment dispute resolution procedures. Chapter 8 looks at the structure of the employment dispute resolution process and argues that the current complex system is an obstacle to accessing justice in Ireland. Finally, in Chapter 9, the lack of availability of remedies under the current system for migrant workers is examined, and the role of delay in the employment dispute resolution process analysed. Methods of alleviating delay within the current system are put forward.

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\(^1\) Also referred to as “illegal” or “undocumented” migrant workers.
Conclusion

Migrant workers are experiencing exploitation in Ireland and this thesis concludes that this is due in part to the obstacles that are currently operating under the employment system in Ireland. The obstacles that operate during recruitment, employment and in accessing justice are preventing migrant workers from achieving equality in employment law with Irish nationals. Until a more equitable employment process is developed, migrant workers will continue to face the dangers of exploitation that the GAMA and Irish Ferries situations presented in Ireland.
Introduction

Every day across the world people move in search of a better job, a better standard of living and ultimately a better life. Each year migrant sending states benefit from the repatriated wages and the improved skills of their citizens working all over the globe. Migrant receiving states see an increase in revenue and profits as a result of immigrant labour. Employers in receiving states have a wide source of labour to source better skilled and hard-working employees. These are the positive attributes of migration.

However, there is a downside to migration. Migrant sending countries often suffer from the problem of “brain drain” as a result of increased emigration. Migrant receiving states often complain about the dangers associated with the “flooding” of the labour market and the need to introduce integration strategies and immigration controls. Employers feel that increased migration means increased regulation of an already overly regulated sector. However, it is migrant workers that are subjected to one of the gravest dangers migration has to offer – exploitation.

There are few who will seek to protect the rights of such workers. Migrant sending states are protective of the revenue generated from repatriated profits. Migrant receiving states are equally protective of the revenue generated from the cheap migrant labour. Few employers will complain about the migrant worker

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2 This Introduction is published in part as a Chapter, “Obstacles Faced by Migrant Workers in Ireland” In Marco Aparicio Wilhelmi, Mariona Illamola Dausà, David Moya Malapeira, Susana Rodera Ranz (Coord.), Las fronteras de la ciudadanía en España y en la Unión Europea (Spain: Documenta Universitaria, 2007).
who is willing to work for longer hours at a reduced rate of pay. Indeed, there are many migrant workers who are willing to embrace this role and for whom such conditions of employment are not only acceptable but also preferable to conditions in their country of origin. The author is aware of this reality. However, in order to prevent a “race to the bottom” in the working conditions of both national and migrant workers and to prevent exploitation of some of the most vulnerable sectors of our society, it is necessary to find a common ground upon which all parties can seek a solution to the dangers associated with migrant worker exploitation.

Globalisation has had a significant impact on the Irish legal landscape. The increase in migration brought about by the phenomenon of globalisation has major consequences for the development of employment legislation and other legislative initiatives in the Irish context. The thesis demonstrates very clearly the various effects of globalisation on different aspects of the migration experience at a national level. The recruitment industry has been opened up in recent years as migrants are now more often recruited through recruitment agencies operating in other jurisdictions or even over the internet. Similarly, avoidance schemes such as the flag of convenience are proliferating in this global climate. Finally, the increase in illegal migration can also be related to an increase in the ease with which individuals can move and travel globally.

3 Sideri has defined globalisation as “essentially a process driven by economic forces”. Sideri, “Globalisation and regional integration” (1997) 9 European Journal of Development Research 38 at p. 38.

4 Buckley notes that labour markets are “functionally separate at the national level” and integration is largely resisted by national governments. Buckey, Clegg, Forsans, and Reilly, “Increasing the size of the country: regional economic integration and foreign direct investment in a globalised world economy” (2001) 41(3) Management International Review 251 In Buckley and Ghuari, “Globalisation, economic geography and the strategy of multinational enterprises” (2004) 35(2) Journal of International Business Studies 81 at p. 82.
While the thesis presents an insight into the impact globalisation has on the national legislative regime, it also presents simple recommendations for dealing with these issues. The thesis views globalisation as a necessary and positive phenomenon and encourages the development of international and regional solutions to many of the problems presented as opposed to the development of unilateral action on the part of states. Where the thesis suggests internal solutions, these are based upon international or regional developments and, in many cases, the thesis encourages the State to be more proactive in its involvement in international and regional agreements dealing with migration. Similarly, the thesis acknowledges, particularly with reference to the *Viking Line* case, that “labour can be strengthened by international solidarity, bringing resources and pressure to bear beyond particular regional or national issues”\(^5\).

One of the most significant developments in recent years in relation to migration and employment is the UN Convention on the Rights of Migrant Workers and Members of their Families\(^6\). The Convention sets out a bill of rights for migrant workers, including irregular migrant workers,\(^7\) and refers in particular to employment rights. This Convention has the potential to alter the manner in which states view migration and proposes a number of unique methods for dealing with migration. The Convention aims to meet a number of significant objectives. Nafziger and Bartel identify the four general purposes of the Convention as the unification of the body of law applicable to migrant workers, the fact that the

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\(^7\) The definition of migrant worker is the most comprehensive definition to date and include frontier workers, seasonal workers, seafarers, workers on offshore installations, itinerant workers, project-tied workers, specified-employment workers and self employed workers. (Article 2) It also include irregular migrants (Article 5).
Working Towards Equality

Convention will complement other instruments, the improvement of the distinctive situation of migrant workers and their families and the reduction of clandestine trafficking.8

The most important aspect of the Convention is that it regards all workers, regardless of their migratory status, as a necessary part of the labour market who are deserving of respect and encouragement. This shift in the manner in which migration is viewed will have a significant impact on the protection of migrant workers globally and has the potential to remedy some of the problems raised by globalisation such as the growth in irregular workers, the denial of rights to such workers and the prevention of exploitation brought about by the increase in avoidance schemes and exploitative recruitment methods and the inability of certain migrant workers to access justice.

Irish employment law is based on the premise that all workers, regardless of their migratory status, are equal. However, it has become clear that migrant workers are not treated equally with their co-workers. Recent experience has demonstrated that migrant workers in Ireland work longer hours, are paid less and are subjected to terms and conditions of employment that national employees would not accept. While this may be due in part to the vulnerabilities of migrant workers, in terms of their language abilities and knowledge of employment rights, this thesis will demonstrate that there are legal obstacles facing migrant workers that do not face national workers and that these obstacles increase the vulnerability of migrant workers to exploitation. The thesis examines methods of reducing this

vulnerability while attempting to balance the very different competing interests involved in migration.

The introduction will begin by laying out the history of immigration in Ireland, including the level and type of immigration. It will discuss the exploitation of migrant workers and demonstrate the extent and type of exploitation suffered by migrant workers on a daily basis. Furthermore, it will introduce the three main Sections of the thesis. It will also identify the obstacles existing in the Irish employment regime and will provide an overview of the potential solutions discussed.

1. The Level of Immigration in Ireland

The movement of migrant workers across the world in search of work is “at an all-time high”9 and it has been estimated that there are approximately 191 million migrants10 worldwide. Ireland has also shared in this experience and has become a country of immigration in recent years.11 The most recent National Census published in 2006 by the Irish Central Statistics Office estimates that there are 419,73312 non-Irish nationals in Ireland.13 66% of these migrants are nationals of the European Union14, the majority being nationals of the United Kingdom15. Approximately 34% originate from countries outside the EU, including the USA.

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10 This includes both economic and non-economic migrants. Martin and Zürcher supra n. 9 at p. 4.
11 Martin and Zürcher supra n. 9 at p. 4.
12 Central Statistics Office Census Report 2006. 45,597 people did not specify a nationality so some of these may also belong to this category.
14 Hereinafter referred to as the “EU”.
15 Hereinafter referred to as the “UK”.

9
It is estimated that non-national migrant workers now make up almost 8% of the Irish labour force.\textsuperscript{16}

2. The Types of Migrant Workers in Ireland\textsuperscript{17}

There are many types of migrant workers in Ireland whose rights and entitlements differ depending on their migratory status. This status determines their right of access to the labour market, the areas of employment they are entitled to work in and their rights to residence, family reunification and other important rights.

2.1. EU, European Economic Area Nationals and Swiss nationals

EU and European Economic Area\textsuperscript{18} nationals are entitled to free movement throughout the EU and so are not required to possess any authorisation to look for a job in Ireland, to work in Ireland, to reside here while working, to remain here after working and to equal treatment in respect of access to employment, working conditions and all other advantages which will assist the worker to integrate in Ireland.\textsuperscript{19} Swiss nationals are also entitled to work in Ireland without prior


\textsuperscript{17} An excellent description of the types of migrant workers in Ireland can be found in the Immigrant Council of Ireland, \textit{Labour Migration into Ireland} (Dublin: Immigrant Council of Ireland, 2003) at Chapter 3. However, readers should be mindful that as the book was written in 2003 many of the provisions have now changed and so it should be read with this in mind.

\textsuperscript{18} This refers to the European Economic Area (hereinafter referred to as the “EEA”), consisting of the 15 EU Member States along with Norway, Iceland and Liechtenstein.

\textsuperscript{19} This is the effect of Article 39 EC which provides that “freedom of movement of workers shall be secured within the Community. (2). Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. (3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in
authorisation under the European Communities and Swiss Confederation Act 2001 (Ireland).\(^{20}\)

2.2. Accession Country Nationals

Nationals of the Accession states that joined the EU on the 1\(^{st}\) of May 2005 have been granted full access to the Irish labour market under the Employment Permits Act 2003 (Ireland).\(^{21}\)

Nationals of Bulgaria and Romania do not have full access to the Irish labour market. However, they are entitled to what is referred to as “preferential access” which effectively means that the Minister for Enterprise, Trade and Employment is required when determining applications for employment permits to give preference to Bulgarian and Romanian nationals.\(^{22}\) Exceptions are made for Bulgarian and Romanian nationals who have been resident in the State for an uninterrupted period of 12 months or longer on an employment permit expiring on the 31\(^{st}\) December 2006.\(^{23}\) Such persons do not need an employment permit. Similarly, if a Bulgarian or Romanian national is the spouse/dependant of a EU national,\(^{24}\) such a national will not need an employment permit.

\(\text{accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission. (4) The provisions of this article shall not apply to employment in the public service.}^{\text{\textasciitilde}}}\)

\(^{20}\) Section 3(2) EC and Swiss Confederation Act, 2001 (Ireland).
\(^{21}\) Section 3 Employment Permits Act 2003 (Ireland). However, provision is made for re-introduction of employment permits during the 7-year transition period if labour market conditions so require.
\(^{22}\) Section 2(10) and (11) Employment Permits Act 2003 (Ireland) as amended by section 3 Employment Permits Act 2006 (Ireland).
\(^{23}\) Section 2A Employment Permits Act 2003 (Ireland) as inserted by section 3 Employment Permits Act 2006 (Ireland).
\(^{24}\) This includes a Bulgarian or Romanian national who does not require an employment permit.
Five years after joining the EU, nationals of Bulgaria and Romania will be entitled to full access to the labour market. This can be extended to a maximum of seven years. The Minister for Enterprise, Trade and Employment may at any point decide to allow full access to the labour market to nationals of Bulgaria and Romania.

2.3. Turkish Nationals

Turkish nationals under the European Association Agreement of 1963 and the Additional protocol of 1970 have free movement to work throughout the EU and must be treated without discrimination where they have been admitted to Ireland to work. However, they are required to get the requisite permission to work in Ireland similar to third country nationals. The main benefit of the 1963 Agreement is that a Turkish national has a right to a residence permit which allows him/her to continue in employment for a further three years, unlike employment permit holders who only have a right of residence dependent upon the duration of their employment permit. After the fourth year a Turkish national in this situation acquires a right to a residence permit, which will allow him/her to take up any employment in the State.

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27 Section 3A(1) Employment Permits Act 2003 (Ireland) as inserted by section 3 Employment Permits Act 2006 (Ireland).
28 Decision 1/80 issued under the authority of the Turkish Association Council.
2.4. Third Country Nationals

Non-EEA nationals and non-Swiss nationals may not work in Ireland without the permission of the Minister for Enterprise, Trade and Employment, subject to certain exceptions. There are four distinct types of working permission that a migrant worker may apply for.

2.4.1. Green Card Permit

A Green Card Permit may be granted to a migrant worker who is intending to work in occupations where high-level strategic skills shortages exist. The Green Card Permit is simply an employment permit issued to the employee that allows him or her to work in Ireland with a named employer and in the occupation specified on the permit. No labour market needs test is required prior to making the application. The issuing of a Green Card Permit is subject to a bona fide job offer from an employer in Ireland.

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29 Section 2 Employment Permits Act 2006 (Ireland).
30 The following non-EEA nationals may seek employment in Ireland without prior authorisation:
   - a non-EEA national who has obtained explicit permission from the Department of Justice, Equality and Law Reform to remain resident and employed in the State.
   - a non-EEA national who has been granted refugee status
   - a non-EEA national who holds appropriate business permission to operate a business in the State
   - a non-EEA national who is a registered student working less than 20 hours a week. See Department of Enterprise, Trade and Employment website www.entemp.ie [last checked 15th September 2008].
31 These have been made by the Minister for Enterprise, Trade and Employment under sections 14 and 15 of the Employment Permits Act 2006 (Ireland).
33 A labour market needs test requires an employer to prove to the State that there is no Irish or EU national with the skills required available to work for the employer.
34 The Guidelines state that the employer must be registered with the Companies Registration Office and the Revenue Commissioners and trading in Ireland. The job offer must be on company headed paper, dated within the previous 60 days, must be of 2 or more years duration and must specify the full description of the job, starting date, annual salary (excluding bonuses), information in respect of qualifications, skills or experience that are required for the employment.
Either the employer or the employee can apply to the Department of Enterprise, Trade and Employment for a Green Card Permit. Applications can only be made in respect of occupations where the annual salary is €60,000 or more and where the salary range is between €30,000 and €60,000 for a restricted number of strategic occupations as specified by the Minister for Enterprise, Trade and Employment. The current fees for a Green Card Permit are €1,000 for a new permit that is valid for a 2-year period and €1,500 for a renewal. The renewed permit is valid indefinitely.

2.4.2. Employment Permit

Employment permits can be obtained in two specific circumstances. Firstly, it can be obtained where the annual salary for the occupation is €30,000 or more and where a Green Card Permit is not available. Secondly, it can be obtained in limited circumstances where the salary for the occupation is below €30,000. A labour market needs test must be carried out in respect of employment permits. This requires the employer to advertise the vacancy with FÁS and EURES employment networks and additionally in local and national newspapers for three days. Where no suitable Irish or EU/EEA national is available to fill the position, an employment permit may be obtained. Evidence of this must be included with the application for the employment permit.

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35 These are specified in Appendix A of the Guide supra n. 32 at p. 11. These include IT professionals, healthcare professionals, professional engineers and technologists, construction professionals, researchers and natural scientists, business and financial professionals and associate professionals and specialist managers.
36 Ireland’s National Training and Employment Authority.
37 The European Job Mobility Portal.
38 This is provided for in Regulation 8, S.I. No. 683 of 2006 Employment Permits Act 2006 (Prescribed Fees and Miscellaneous Procedures) Regulations 2006 (Ireland).
An employment permit may be granted to the employee to work for a specified employer in a specified occupation.\textsuperscript{39} It is issued for an initial period of 2 years and can be renewed for a further 3 years. After 5 years, the employment permit can be renewed indefinitely. A new employment permit for a period of 6 months will cost €500 or €1,000 if issued for a period of between 6 months and 2 years. The renewal fee is €1,500. However, there is no renewal fee if the renewal is for an indefinite period.

2.4.3. Intra-Company Transfer Scheme

The intra-company transfer scheme is designed to facilitate the transfer of senior management, key personnel or trainees who are third country nationals from an overseas branch of a multinational corporation to its Irish branch. The permits are limited to those earning over €40,000 annually and those who have been employed for 12 months or more in the overseas branch prior to transfer. Applications can be made for a period of up to 2 years that can be extended to a maximum stay of 5 years. The permit holder is not entitled to work for any other employer and must return to their country of origin once the intra-company transfer permit has expired.

2.4.4. Spousal/Dependant Permits

A spouse or dependent under the age of 18 of a green card/employment permit holder who is legally resident in the State is entitled to apply for an employment

\textsuperscript{39} The following job categories are considered to be ineligible for an employment permit, see Department of Enterprise, Trade and Employment, \textit{Guide to Work Permits} (Dublin: Government Publications, 2007) at Appendix A. All clerical and administrative positions, general operatives and labourers, operator and production staff, sales staff, transport staff, childcare workers, all hotel, tourism and catering staff except chefs and certain craft workers are ineligible for employment permits.
permit. The procedures are exactly the same as that required for a green card/employment permit except that there is no need for a labour market needs test and the application is exempt from a fee.

2.4.5 Graduate Scheme

A legally resident third country national who has acquired a primary, masters or doctorate degree from an Irish third level institutional establishment will be granted a six month non-renewable extension to their student visa. The purpose of this is to give such persons time to apply for an employment permit or green card. During these six months, the graduate is entitled to work up to 40 hours a week without an employment permit.

2.5. Irregular Workers

An irregular person is one who is in the State other than in accordance with the permission given to him or her by the Minister for Enterprise, Trade and Employment. However, the concept of an “irregular worker” is somewhat wider and includes those who could be defined as irregular persons who are engaged in employment and those persons who are present in the State with the permission of the Minister for Enterprise, Trade and Employment but who are acting outside the scope of this permission.

3. The Exploitation of Migrant Workers in Ireland

\[40\] Immigration Act 2004 (Ireland), section 5(2).
\[41\] This includes persons who are working on employment permits, visas or authorisations, asylum seekers and refugees.
Migrant workers, whatever their status may be, are a particularly vulnerable class of workers due to a variety of factors. Language is a major issue for many migrant workers and one of the consequences of poor language skills is that migrant workers are often not aware of their legal rights and entitlements and are often subjected to malpractices in employment. Poverty, poor education, social isolation and lack of integration can also contribute to the increased vulnerability of migrant workers. Racism also plays a large part in the exploitation of migrant workers in Ireland.42

3.1. The Extent of Migrant Worker Exploitation in Ireland

Despite reams of domestic legislative enactments,43 European initiatives44 and international conventions45 establishing and/or calling for effective judicial and administrative procedures to be introduced to guarantee the principle of equality, there has been a marked increase in the number of cases of migrant worker

42 See section 3.2. below.
43 See for example the Equality Acts 1998-2004 (Ireland) establishing the Equality Tribunal and setting out its jurisdiction.
45 See the prohibition on discrimination on grounds of race in the Charter of the United Nations (1945), Article 1(3); UDHR (1948), Article2(1); CERD (1966), Article 5; ICCPR (1966), Article26; ILO Convention No. 111 (1958), Article1(a); and on the grounds of nationality in UNCMW (1990), Article7.
exploitation heard by domestic employment tribunals in Ireland recently and reported in the media.\textsuperscript{46}

While it is difficult to ascertain from the case reports whether the complainant in employment cases is a migrant worker or not\textsuperscript{47}, an examination of the cases heard on the ground of race\textsuperscript{48} does provide some insight into the extent of migrant worker exploitation in Ireland. The race ground accounted for almost one quarter of all the cases dealt with by the Irish Equality Authority\textsuperscript{49} in 2006\textsuperscript{50} amounting to 103 of the 404 case files\textsuperscript{51} dealt with by the Authority that year. This indicates that 25.5\% of all those who contacted the Authority suffered or perceived they were suffering from some form of discrimination on racial grounds. The figures emanating from the Equality Tribunal also reflect a high level of racial discrimination. In 2006, there was a 78\% increase in the number of cases brought on the race ground.\textsuperscript{52} In 44\% of the cases, the complainant was successful in establishing discrimination on grounds of race.\textsuperscript{53}


\textsuperscript{47} Decisions reported by the Equality Tribunal and the Employment Appeal Tribunal are often reported in a manner that does not identify the applicant. Thus it is difficult to ascertain whether the applicant is a non-Irish national.

\textsuperscript{48} The race ground is defined as “a different race, colour, nationality or ethnic or national origins” s 6(2) Employment Equality Act 1998 (Ireland).

\textsuperscript{49} The Equality Authority has a remit under the Employment Equality Act 1998 and the Equal Status Act 2000 to select casefiles for the provision of legal advice and assistance. The Equality Authority has an in-house Legal Service that may, at its discretion, where the case has strategic importance, provide free legal assistance to those making complaints of discrimination under the Employment Equality Act 1998 and the Equal Status Act 2000.


\textsuperscript{51} Only 280 out of the 404 cases made it to a substantive hearing. 26 were seeking advice only, 9 were appealed, 1 was appealed on a point of law, 5 were case stated, 1 involved enforcement proceedings and 82 were enquiries only. Equality Authority Report \textit{supra} n. 50 at p. 74.

\textsuperscript{52} The figures rose from 82 in 2005 to 146 in 2006. \textit{Equality Tribunal Annual Report} (Dublin: Equality Tribunal, 2006) at p. 7.

\textsuperscript{53} Equality Tribunal \textit{supra} n. 52.
Media reports have also highlighted a number of serious incidents of migrant worker exploitation. Recently, a migrant worker was awarded €116,000 in the Labour Court for breaches of employment law. The case involved a Pakistani man who was working over 60 hours a week for just under €50 a week. After the migrant worker complained, his employer terminated his employment. The newly established National Employment Rights Authority has been successful in raising these issues in recent months and it is expected that more cases of employment discrimination will be brought to light as a result of its investigations and other activities.

3.2. The Exploitation that Occurs at each Stage of the Employment Lifecycle

The exploitation of migrant workers in Ireland can range from low wages and poor working conditions to difficulty in accessing employment, promotion and training and unfair dismissals on grounds of race.

3.2.1. Exploitation in Accessing the Labour Market

In 2006, the Equality Authority dealt with 20 cases of race discrimination in accessing employment. Most of these cases relate to the non-appointment of the

<table>
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<tr>
<th>Year</th>
<th>No. of Cases</th>
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<tbody>
<tr>
<td>2006</td>
<td>20</td>
</tr>
<tr>
<td>2005</td>
<td>25</td>
</tr>
<tr>
<td>2004</td>
<td>Not available</td>
</tr>
<tr>
<td>2003</td>
<td>22</td>
</tr>
</tbody>
</table>

55 Hereinafter referred to as the “NERA”. NERA was set up under the Social Partnership Agreement “Towards 2016”. NERA will be formally established under the Employment Law Compliance Bill 2008 (Ireland), section 6 of which provides for its establishment and its functions. The main functions of NERA are to promote, encourage and secure compliance with employment legislation (section 6(2)).
migrant worker by the employer on grounds of race. Migrant workers complain that they are often not called for interview, or even if they are called, interviews are not conducted in an appropriate manner. Migrant workers also face discrimination in the selection process even though he/she may well be the most qualified candidate. In one particular case, the Equality Tribunal found an interview process to be discriminatory where the interviewers had raised issues of assimilation, integration and cultural differences on an ongoing basis for the complainant to address.¹⁷ Discrimination during advertising also featured prominently as a source of discriminatory treatment.

3.2.2. Exploitation in Accessing Promotion and Training

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
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<tbody>
<tr>
<td>2002</td>
<td>18</td>
</tr>
<tr>
<td>2001</td>
<td>12</td>
</tr>
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</table>

See cases Mujegu v. Headway Ireland DEC-E2006-011 (A claim that the employer did not interview the complainant fairly when they noted his race and gender in the interview – not upheld); A Prospective Employee v. Health Services Executive and a Recruitment Agency (2006) Equality Authority Annual Report at 41 Annual Report at p. 41; Dr. Ronaldo Munck v. National University of Ireland Maynooth DEC-E2005/030 (Complainant held that he had not been selected for a position, even though he was the most qualified candidate on grounds of race - claim upheld) (See “Hospital Appeals Ruling of Racial Discrimination” (2002) Irish Times, May 15 2002); Complainant v. A Health Board DEC-E2004-010 (the complainant felt that he had been discriminated on grounds of race at the interview. The Tribunal held that discrimination on the grounds of race had occurred and that victimisation and harassment had also occurred) as examples of race discrimination in access to employment.¹⁷ Complainant v. A Health Board DEC-E2004-010.

¹⁷ There were 3 cases in 2006. See Equality Authority Annual Report 2006 supra n. 50 at p. 63.
Access to promotion\textsuperscript{59} and training\textsuperscript{60} also presents difficulties to migrant workers in the labour market. In one particular case involving a promotion, the Equality Tribunal held that discrimination on the grounds of race had occurred where the interview panel were allowed a large measure of discretion in the manner in which they conducted the interview, resulting in the creation of an opportunity for discrimination to occur.\textsuperscript{61} No training had been given to the interview panel, no criteria for the post had been set in advance of the interviews and the employer was unable to explain how the criteria by which the candidates were assessed related to the job description. The Equality Tribunal found that as a result of this, the employer was unable to rebut the presumption that discrimination had occurred.

3.2.3. Exploitative Wage Levels

\textsuperscript{59} Access to promotion was one of the top four grounds. (The other three grounds were access to employment, dismissal and working conditions) in 2006 with 10 cases. Equality Authority Report \textit{supra} n. 49 at p. 63. See Equality Authority Reports 2005-2001.

\begin{tabular}{|c|c|}
\hline
Year & No. of Cases \\
\hline
2006 & 10 \\
2005 & 20 \\
2004 & \textit{Not available} \\
2003 & 1 \\
2002 & 1 \\
2001 & 3 \\
\hline
\end{tabular}

See cases \textit{Finlay v. Quinn Direct} DEC-E2004/055 (This claim involved a native of Northern Ireland who felt that he had been demoted as a result of his race. The claim was not upheld); \textit{Alderdyce v. Donegal Co. Council} DEC-E2005-052 (this claim involved a citizen of the UK who claimed that she was not promoted as a result of her race. The Equality Authority upheld her claim) as examples of race discrimination in access to promotion.

\textsuperscript{60} There was one case involving access to training in 2006. Equality Authority Report \textit{supra} n. 49 at p. 63. See Equality Authority Reports 2005-2001.

\begin{tabular}{|c|c|}
\hline
Year & No. of Cases \\
\hline
2006 & 1 \\
2005 & 0 \\
2004 & \textit{Not available} \\
2003 & 3 \\
2002 & 4 \\
2001 & 2 \\
\hline
\end{tabular}

See cases \textit{Amrabure v. IBM International Holdings BV} DEC E2003/033 as an example of cases involving discrimination in access to training.

\textsuperscript{61} \textit{Alderdyce v. Donegal Co. Council} DEC-E2005-052.
Many non-nationals complain that they do not receive equal pay with Irish nationals\textsuperscript{62} and this is substantiated by the decisions of the Equality Tribunal, the Employment Appeals Tribunal and the Labour Court. The Migrant Rights Centre Ireland recently reported\textsuperscript{63} that migrant workers who are irregular or in breach of their entry status are the most prone to exploitation, but were also able to point to migrant workers who were fully compliant with the conditions of their immigration status and also experienced wages which were below the minimum wage.\textsuperscript{64} Another report demonstrated that on average immigrant workers earn 18\% less that native workers and that the gap is even greater for immigrants from non-English speaking countries.\textsuperscript{65} The most recent report from FÁS\textsuperscript{66} reveals that workers from the 2005 accession States earn significantly less that their Irish counterparts. This trend appears to be global, with migrant workers being included consistently among the lowest wage earners in employment surveys.\textsuperscript{67}

3.2.4. Exploitative Terms and Conditions of Employment

\textsuperscript{62} This accounted for 6 of the cases taken on race discrimination grounds in 2005. Equality Authority Report \textit{supra} n. 49 at p. 55.
\textsuperscript{63} Migrant Rights Centre Ireland, \textit{Realising Integration: Migrant Workers Undertaking Essential Low-Paid Work in Dublin City} (Dublin: Migrant Rights Centre Ireland, 2007).
\textsuperscript{64} Migrant Rights Centre Ireland \textit{supra} n. 63 at p. 27.
Race discrimination accounted for the largest number of cases taken to the Equality Authority in respect of working conditions in 2006.\textsuperscript{68} In one case involving a promotion to a permanent position, the complainants, 16 Filipino nurses, were ranked below the Irish candidates, merely because they were working on employment permits.\textsuperscript{69} Other forms of discrimination including harassment on racial grounds were also prominent.\textsuperscript{70}

Racial remarks are a common source of complaint. Comments such as “as useless as an African”\textsuperscript{71} and “the black boy must go”\textsuperscript{72} are just some of the remarks that have been considered discriminatory. Victimisation\textsuperscript{73} often arises involving migrant workers. Failure to provide references and failure to inform the

\begin{table}[h]
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\begin{tabular}{|c|c|}
\hline
\textbf{Year} & \textbf{No. of Cases} \\
\hline
2006 & 40 \\
2005 & 43 \\
2004 & Not available \\
2003 & 77 \\
2002 & 31 \\
2001 & 10 \\
\hline
\end{tabular}
\caption{Number of cases taken to the Equality Authority in respect of working conditions.}
\end{table}

See cases Buenaventura and 15 others v. The Southern Health Board (2006) Equality Authority Annual Report at 46; Tsourova v. Iron Clinical Research DEC-E2005/027 (claim involved a number of comments and actions made to the complainant. The claim was not upheld).\textsuperscript{69} Buenaventura and 15 others v. Southern Health Board (2006) Equality Authority Annual Report at p. 46.\textsuperscript{70}

\textsuperscript{68} In total 40 cases were brought for race discrimination involving working conditions. Equality Authority Report \textit{supra} n. 49 at p. 63. See Equality Authority Reports 2006-2001.

\textsuperscript{69} See cases \textit{Buenaventura and 15 others v. The Southern Health Board} (2006) Equality Authority Annual Report at 46; Tsourova v. Iron Clinical Research DEC-E2005/027 (claim involved a number of comments and actions made to the complainant. The claim was not upheld).

\textsuperscript{70} In 2006, the Equality Authority reported that 2 cases were dealt with under this ground. Equality Authority Report \textit{supra} n. 49 at p. 63. See also cases: Scanlon v. St. Vincent’s Hospital DEC-E2007-011 (claim failed); (In this case the applicant, of West Indian origin, was referred to as being “as useless as an African”. The claim was upheld. Cf: A Claimant v. A Technology Co. Dundalk Co. Louth DEC- E2005-043 where the applicant had comments written about them on a toilet wall; A Claimant v. A University Dublin DEC-E2005-037 where the applicant alleged that he/she was racially harassed by management – claim failed; Mr. A v. Electronics Company DEC-E2004-065; G v. A Hotel Reservation Agency DEC-E2005-053; Puga v. UCD DEC-E2005-037; Mr. Sergides v. Feehily’s Pub DEC-E2002-022; Ogobamidele v. Iron Technologies DEC-E2005/043 where all the applicants experienced racial comments. Other cases include Hazra v. Waterford Regional Hospital DEC-E2003/044.

\textsuperscript{71} Persaud v. Shelbourne Hotel DEC-E2004-075. The claim was upheld.

\textsuperscript{72} A Claimant v. A Technology Co. Dundalk Co. Louth DEC- E2005-043. The claim was upheld.

\textsuperscript{73} In 2006 only 2 cases of victimisation on the ground of race were heard. Equality Tribunal Legal Review 2006 at p. 63. See Dridi v. Robertino’s Restaurant (Wexford) Ltd. DEC-E2006-003 (Tunisian national who was not given a reference after dismissal – no victimisation found); Mr. Tsvetko Mitov v. Irish Society of Chartered Physiotherapists DEC-E2004-044; Ms. Venera Ilieva v. Irish Society of Chartered Physiotherapists DEC-E2004-051.
complainant of important information\textsuperscript{74} where the complainant has made a claim under employment legislation have all been held to amount to victimisation.

3.2.5. Exploitation and Termination of Employment

Discriminatory dismissals\textsuperscript{75} naturally generate a large amount of case files for the Equality Tribunal. In many cases, workers are subjected to derogatory remarks, different treatment, demotion and often dismissal without explanation.\textsuperscript{76}

The first three reported cases dealt with by the Equality Tribunal in 2008 relate to alleged discrimination on grounds of race. The first relates to the discriminatory dismissal of a Chinese national who was accused of theft. The Equality Tribunal found that the respondent did not follow fair procedures as it did not carry out an investigation and denied the complainant the opportunity to seek representation,

\textsuperscript{74} Mr. Tsvetko Mitov v. Irish Society of Chartered Physiotherapists DEC-E2004-044. In this case, the Irish Society of Chartered Physiotherapists failed to inform the complainant of the outcome of the assessment of relevant information provided to them by the complainant at their request merely because the complainant had made a complaint under the Employment Equality Act 1998 (Ireland).


\textsuperscript{76} Nyamhovsa v. Boss Worldwide Productions DEC-E2007-072.
prepare a defence and attend a disciplinary hearing.\textsuperscript{77} The second case concerned a Serbian national who was not paid the same as her Irish counterparts as she “\textit{was not from here}”. The Equality Tribunal found that there were other factors influencing the decision of the employer to pay the employee less than the comparators.\textsuperscript{78} The most recent case involved an English national who was allegedly dismissed on grounds of race where the employer replaced him after four months with a longer term employee from another construction site. However, the claimant failed to establish discrimination on the race ground.\textsuperscript{79}

4. The Obstacles to Equality during the Employment Process

The subject matter of this thesis focuses on the reasons for the level and extent of exploitation faced by migrant workers in Ireland today. The International Labour Organisation\textsuperscript{80} has been instrumental in establishing core norms for the protection of migrant workers based on the simple rationale that “\textit{human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity}”\textsuperscript{81}. This guarantee would indicate that migrant workers have a right to search for employment in other states and to seek this employment in conditions which assure them freedom, dignity, economic security and equal opportunity. While the current legislative system in Ireland reflects a

\textsuperscript{77} \textit{Ms. Ning Ning Zhang v. Tower Trading} DEC-E2008-001.
\textsuperscript{78} \textit{Spasic v. Dyflin Media} DEC-E2008-002.
\textsuperscript{79} \textit{Khumalo v. Cleary & Doyle Ltd.} DEC-E2008-003.
\textsuperscript{80} Hereinafter referred to as the “ILO”.
\textsuperscript{81} ILO, Declaration concerning the aims and purposes of the ILO (Declaration Of Philadelphia) 1944, part II, paragraph (a).
commitment to the protection of migrant workers,\textsuperscript{82} it has become increasingly obvious that the legislative, judicial and institutional legal regimes are operating so as to deprive migrant workers of these inherent rights by placing obstacles on their paths to achieving equality with nationals.

The recent examples of migrant worker exploitation in Ireland, such as the situation of the Turkish GAMA construction workers\textsuperscript{83} and Filipino seafarers on board Irish Ferries vessels\textsuperscript{84}, and the successful attempt by Irish Ferries to replace its Irish seafaring crew with agency workers from Eastern Europe by employing a flag of convenience on its vessel, are all indicative of this trend.

4.1. Section I: Recruitment for Employment

In the first Section of the thesis, the obstacles faced by migrant workers during the recruitment process are identified, analysed and appropriate reforms are proffered. The Section begins with an analysis of the various methods of recruitment in

\textsuperscript{82} The Protection of Employees (Part-Time Work) Act 2001 (Ireland) section 20 (2) provides that “.every enactment referred to in subsection 3 that confers rights or entitlements on an employee applies and shall be deemed always to have applied to…. - (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 contract of employment has ceased, entered into a contract referred to in subparagraph (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.” Similar protections exist in international law. See Appendix A.


\textsuperscript{84} See O’Connor “Migrant workers suffer most because of a poorly resourced labour inspectorate”\textit{SIPTU News Online}, Dublin, 28 October, 2004; Dooley, “Worker to stay on board ferry pending agreement”\textit{Irish Times}, Dublin, 26 March, 2005 for more information.
Ireland, their current regulation and the benefits and disadvantages of each. Recruitment agencies are identified as the most popular and most problematic of recruitment processes and therefore become the focus of Chapter 2 where the regulation of recruitment processes is discussed.

Chapter 2 examines the historical regulation of recruitment agencies and the manner in which recruitment agencies have been regulated over time. The Chapter concludes that systematic regulation by the State is the most effective method of achieving the balance between economics and worker protection. Secondly, the Chapter considers the present State regulation of recruitment agencies in Ireland and concludes that the current regulations do not meet the needs of Ireland’s diverse migrant population due to the lack of regulation of recruitment agencies operating outside the State and over the internet. As a solution to this problem, the Chapter suggests the regulation and registration of both domestic and international agencies that send migrant workers to Ireland. However, in order to maintain the balance between worker protection, costs to industry and Ireland’s commitments under EU law, the solutions proffered are those that have already been tested in other jurisdictions within the EU and which have not caused economic difficulties.

Chapter 3 addresses the present burdens that face migrant workers in the current recruitment system once the migrant worker has made the decision to migrate. Recruitment agencies present migrant workers with significant challenges due to the potential for exploitation which exists at this stage of employment. The Chapter discusses the position of temporary agency or leasing agency workers and
the difficulties they face in identifying their employer. Secondly, the Chapter focuses on the terms and conditions of employment of the migrant worker. It examines the potential financial implications of utilising recruitment agencies such as excessive fee-charging and methods of reducing misleading or incorrect information in relation to employment. Finally, the Chapter examines the type of information a migrant worker requires to be informed adequately prior to their arrival in Ireland and how this information should be transmitted.

The aim of this Section of the thesis is to find a method of reinstating transparency back into the recruitment process by codifying the position of the migrant worker, the recruitment agency and the employer in such circumstances. The author suggests that it is only through the integration of such information into the recruitment process that the system will become truly transparent and will allow migrant workers to access an exploitation free recruitment experience.

4.2. Section II: Avoiding Legal Duties

During the employment relationship, under our existing employment protections, it is presumed that workers are protected against exploitation. The events at Irish Ferries in November 2005 prompted much debate on the interplay between corporations, employment rights and avoidance schemes and revealed a distinct lack of protection for migrant workers arising out of avoidance schemes such as the flag of convenience phenomenon. This Section utilises the Irish Ferries situation to examine the effect of avoidance schemes on workers and to develop methods of ensuring a fair balance between free movement and labour protection.
This Section seeks neither to condemn nor condone the actions of such employers but merely seeks to restore the balance between the protection of workers and the right of companies to free establishment.

Chapter 4 examines the concept of the flag of convenience and the simple manner in which such a flag can be obtained. In this respect, the chapter examines the technicalities of how to re-flag an Irish shipping vessel with a flag of convenience. The benefits to ship-owners of the flag of convenience phenomenon are espoused through an examination of the open registry of Cyprus and the benefits it offers to potential businesses. The effect on workers is then examined through the use of the Irish Ferries story. The dangers inherent in the phenomenon become more pronounced when one considers that in November 2008, the protective agreement negotiated between SIPTU\(^\text{85}\) and Irish Ferries for the agency workers on board the vessel will expire and Irish Ferries, despite being an Irish company, will be entitled to impose unregulated terms and conditions of employment on their workers.

Chapter 5 presents an analysis of the reaction of the Government and the future role of trade unions in the aftermath of the Irish Ferries dispute. The Chapter examines the introduction by the State of legislation in the aftermath of the Irish Ferries dispute to reduce the effects of corporate mobility on labour. While the effects of that legislation on the particular situation of seafarers are minimal, the Chapter demonstrates that solutions already exist in the current redundancy legislation that could adequately protect such workers against exploitation. The

\(^{85}\) Services, Industrial and Professional Workers Union.
reaction by the State demonstrates that the introduction of protections for migrant workers is not necessarily inconsistent with competition and corporate mobility. The Chapter also examines the role that trade unions can play in such circumstances. The recent decision of the ECJ in *Viking Line*[^86] will have an affect on trade union activities in the area of migrant worker protection and the Chapter analyses the future role of trade unions in this area.

Chapter 6 discusses the potential solutions to the complex legal arguments that arise as a result of the Irish Ferries dispute. Consideration is given to the imposition of responsibility on various parties, beginning with the state of beneficial ownership of the vessel. This would involve a reinforcement of the genuine link requirement that exists in international law but recognises the difficulties which have arisen in this area in recent years. For this reason, the Chapter considers the possibility of lifting the flag of convenience and imposing responsibility on the state of beneficial ownership only in cases where the corporate veil could be lifted in a company law situation such as where there is fraud or where the company is attempting to avoid existing legal obligations.

The chapter also considers the role of the flag state in the protection of migrant workers and in particular the potential for states to refuse to de-register a vessel where that vessel proposed to re-flag with an open registry. The Mercantile Marine *(Avoidance of Flags of Convenience)* Bill 2005 (Ireland) which proposed this form of protection is considered. Similarly, the flag state could also seek to impose the transfer of undertakings legislation on vessels intending to move flag

[^86]: Case C-438/05 *The International Transport Workers’ Federation and the Finnish Seamen’s Union v. Viking Line ABP and OU Viking Line Eesti*. 
to an open registry. While at present such legislation does not apply to seafarers there is much to be said for the incorporation of such workers into the legislation as a protective move by the flag state.

The imposition of responsibility on the port state is also considered through the use of improved inspection mechanisms, while market state control, as proposed by the most recent draft EU Directive in this area, is also considered. The importance of trade unions to the process is also asserted. The Chapter concludes that it is difficult to impose complete responsibility on any one of these actors considering the present state of international law. However, with states sharing these responsibilities it may be possible to at least improve to some degree the situation of migrant workers in international law.

4.3. Section III: Access to Justice

This Section begins in Chapter 7 with an examination of the situations where workers are excluded from the employment protection regime. In particular, the Section examines the manner in which the most vulnerable of migrant workers, the irregular worker, is denied access to the employment dispute resolution process, despite the fact that corporations and the State profit from the fruits of their labour. It will be argued that although there are policy justifications for refusing irregular workers the right to access justice these are not justified in all cases, particularly where the worker is not morally culpable for their actions. Allowing irregular workers to enforce their employment rights will in fact reduce irregular working and will improve the functioning of the labour market. This is due to the fact that the benefits of hiring irregular workers will be diminished,
reducing the pull factors that entice irregular workers to Ireland, as employers will have less desire to hire irregular workers.

Chapter 8 will examine the employment dispute resolution procedure in Ireland. The complexity of the current system is an obstacle to migrant workers in attempting to seek solutions to workplace exploitation. The Chapter examines the processes in operation in other jurisdictions and advocates a single employment dispute resolution process with statutorily prescribed jurisdiction and the introduction of alternative dispute resolution processes. Recent developments in the UK suggest that the most appropriate system is one that allows for alternative dispute resolution alongside the more adversarial procedures.

In the final Chapter the remedies that are currently available in the employment dispute resolution process are examined. It is found that migrant workers are often denied the remedies of reinstatement and re-engagement where they have been dismissed. The loss of a job may mean that for financial or legal reasons the migrant worker can no longer remain in the State. This will mean that even if the migrant worker has been unfairly dismissed their only remedy will be compensation. In many cases this will not be a satisfactory remedy. Solutions such as employment injunctions, fast-track procedures and bridging permits are all examined as a solution to this problem. The introduction of such processes should open up the employment dispute resolution process to migrant worker on equal terms to nationals in Ireland.

87 Where a third country national migrant worker is dismissed, their permission to remain in the State is terminated.
5. Research Question and Methodology

The research question centres on the legal reasons for migrant worker exploitation in Ireland. Despite the large amount of employment legislation in existence to protect migrant workers, migrant workers continue to be exploited at all stages of employment. The thesis determines that the reason lies in a number of legal obstacles in the recruitment and employment of migrant workers and in accessing justice. These obstacles make migrant workers more vulnerable to exploitation than Irish nationals. The thesis develops this theory through the doctrinal legal analysis of statutes, case law and international and regional legal instruments. The thesis also utilises a comparative law analysis and examines legislation and case law from jurisdictions such as Sweden, Germany and the United Kingdom. An empirical analysis of research undertaken in the area of migration and employment law is also undertaken in order to assist in the development of the thesis and the arguments presented.

Conclusion

The thesis will conclude that there are obstacles at all stages of employment in Ireland that are preventing migrant workers from achieving equality with Irish nationals in employment. These obstacles do not cause exploitation on their own but in combination with other issues such as language difficulties, lack of knowledge of employment rights, poverty and desperation make migrant workers very vulnerable to exploitation. This thesis will describe potential solutions that can be developed at a national level to protect migrant workers from this form of inequality. The author acknowledges that national solutions face many difficulties in a world that is becoming increasingly interdependent and reliant on other states.
However, small measures either unilaterally or between states working together will make a significant difference to the lives of migrant workers globally.
SECTION I: RECRUITMENT FOR EMPLOYMENT

Chapter 1: The Recruitment Process

Introduction

The process of migration signifies for many migrant workers the end of an old life and the beginning of a new one. For most this alteration in their lives is a step that they choose to take in order to improve their own standard of living and to take part in the higher standards of living enjoyed by others in the host state. The experience of recruitment for employment can have a significant impact on the entire migration process. The reality for many migrant workers is that the experience of recruitment for employment is often characterised by exploitation and in many cases the entire migration process can be affected by this experience. Exploitation can arise as a result of certain obstacles in the recruitment process which essentially means that migrant worker are at a disadvantage to national workers in employment and are treated unequally.

2 In a recent Report on the experiences of Polish migrant workers in Ireland, this was one of the main reasons workers left Poland to migrate to Ireland. As one construction worker noted “I love my country. If only it could offer me a little more money, a little better life conditions…If I could have such life in Poland I wouldn’t have gone abroad”. (Male aged 28). See Kropiwiec and Chiyoko King-O’ Riaín, Polish Migrant Workers in Ireland (Ireland: NCCRI, 2006) at p. 28.

3 This occurs by virtue of various recruitment malpractices that are utilised by those parties involved in recruitment for employment. Such malpractices can range from “wholesale fraud” and “exorbitant fees” to “non-existent jobs, and often poor or even dangerous working conditions”. Cf: ILO (ILO), Private Employment Agencies Send Millions Overseas to Work, (ILO/97/9) (Geneva: International Labour Organisation, 2006).
This Chapter will outline the four traditional recruitment models currently operating in Ireland. These are the processes of government sponsored migration, recruitment agencies, direct recruitment and chain migration. All of these processes operate together to provide a very wide and diverse recruitment landscape. International and national regulations govern the different models to varying extents depending on a variety of factors. Some recruitment processes have a reputation for the use of recruitment malpractices and as such are subject to more stringent regulation. Other recruitment processes are completely unregulated because of the manner in which they operate. This Chapter will therefore outline these four recruitment processes and the extent to which they are regulated at a national and international level.

Secondly, it will be identified that one of the most popular recruitment models in Ireland is the recruitment agency. It will be demonstrated that even though there are other methods of recruitment available to migrant workers, the majority of migrant workers end up utilising a recruitment agency at some stage. Even government sponsored migration in Ireland makes use of the services of

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4 The actors in the recruitment process are outlined in an interesting study undertaken by the ILO in four European states (Belgium, Germany, the Netherlands and Spain) into the effect race has on an employer’s decision to recruit a worker and the terms and conditions of employment which they offer that worker. See Zegers de Beijl (ed.), Documenting Discrimination Against Migrant Workers in the Labour Market: A Comparative Study of Four European Countries (Geneva: International Labour Office, 2000) at pp. 31-32.

5 See Section 1.1.

6 See Section 1.2.

7 See Section 1.3.

8 See Section 1.4.

9 Recruitment agencies, for example, have always been the subject of stringent regulation at both a national and international level because of the fact that they deal in human labour and the potential for exploitation is, therefore, substantially higher than other recruitment processes. See Chapter 2 for an examination of the national and international regulation of recruitment agencies.

10 For example, it is very difficult to regulate chain migration as that occurs where a migrant worker already working the host state brings their family or friends over with them and finds them work without using any formal recruitment channels.
recruitment agencies. Therefore, recruitment agencies will be the focus of the discussion in relation to the obstacles identified in the recruitment process.

Finally, the Chapter will identify the major obstacles facing migrant workers who utilise recruitment agencies in Ireland or overseas. These obstacles stem from the lack of regulation of recruitment processes in Ireland, the inequality that develops between the parties involved which increases the general vulnerability of migrant workers and the lack of transparency of recruitment practices in Ireland. Further discussion of these issues can be found in Chapters 2 and 3.

1. The Traditional Recruitment Models

There are many different routes through which migrant workers can seek, locate and take up employment in another state. Recruitment for migration can be defined generally as the engagement of a person in one territory on behalf of an employer in another territory or the giving of an undertaking to a person in one territory to provide him or her with employment in another territory. This definition is capable of including various recruitment processes and is not confined to direct recruitment of migrant workers by an employer. Indeed this inclusive definition is also capable of application to third party intermediaries such as recruitment agencies. Recruitment may occur through government

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11 See Chapter 2.
12 See Chapter 3.
13 The most common four methods of recruitment in Ireland are government sponsored migration, recruitment through a recruitment agency, direct recruitment by the employer and chain migration. See Zegers de Beijl (ed.), Documenting Discrimination Against Migrant Workers in the Labour Market: A Comparative Study of Four European Countries (Geneva: International Labour Office, 2000) at pp. 31-32.
14 It is defined in the Migration for Employment Convention (Revised) 1949, ILO No. 97, Article 2, Annex I as including “the engagement of a person in one territory on behalf of an employer in another territory” (paragraph (a) (i)) or “the giving of an undertaking to a person in one territory to provide him with employment in another territory” (paragraph (a) (ii)).
sponsored migration or through more informal means such as replying to an advertisement in a newspaper or on the internet\textsuperscript{15} or through friends or relatives already settled in another state.\textsuperscript{16}

While all of these processes of recruitment are specifically disparate, they do share two important characteristics. Firstly, they all cause a similar result – the recruitment of a migrant worker from a sending state to a receiving state. Secondly, and perhaps more significantly, all these processes carry with them a serious potential for exploitation of the migrant worker by various actors.

This section of the Chapter will define the various recruitment processes operating in Ireland and analyse the present national and international regulation of these recruitment processes.

1.1. Government Sponsored Migration

Perhaps the most formal, yet not necessarily the most common,\textsuperscript{17} method of recruitment is the process of government sponsored migration.\textsuperscript{18} This practice has been utilised increasingly in recent years, particularly in developed countries with

\textsuperscript{15} This is more usually described as direct recruitment by the employer as there is no third party intermediary involved in the recruitment process. Cf: ILO Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide, Booklet 3: Recruitment and the Journey for Employment Abroad (Geneva: Gender Promotion Programme, International Labour Organisation, 2005).

\textsuperscript{16} This is commonly referred to as chain migration because it involves a flow of information from a migrant worker in a host state through friends and relatives to a potential migrant worker in the sending state.

\textsuperscript{17} Bobeva and Garson note that the largest labour movements between countries take place outside the channel of bilateral agreements. Bodeva and Garson “Overview of Bilateral Agreements and Other Forms of Labour Recruitment” In OECD Migration for Employment: Bilateral Agreements at a Crossroads (Paris: OECD, 2004) at p. 12. This is, for example, the case in Ireland, where the majority of migrant workers come from within the EU and those that do not, can apply through the employment permit system.

\textsuperscript{18} This form of recruitment for employment in Ireland is relevant specifically to third country nationals from outside the EU.
aging populations, which require large numbers of migrant workers to meet certain shortages in the labour market.  

Government sponsored migration frequently operates through the adoption of bilateral20 or multilateral agreements21 between states.22 Durand23 has commented that such agreements aim to achieve a great number of objectives24. Such agreements facilitate the recruitment of migrant workers to meet labour shortages (whether short, medium or long term), aid states in the control of both regular and irregular migration and enhance the development of cultural ties with other states.25 One of their most significant objectives, in the present context, is the protection,26 which can be afforded to the migrant workers during the recruitment

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19 Ireland is a good example of one such developed nation that has required large numbers of migrant workers to sustain its economy.  
20 Other names for such agreements include employment treaties, labour agreements, recruitment treaties, migration agreements or agreements for the exchange of labour. Bodeva and Garson supra n. 17 at p. 11.  
21 The Private Employment Agencies Convention, 1997 ILO No. 181, Article 8(2) states that “where workers are recruited in one country for work in another, the Members concerned shall consider concluding bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment”. Cf: Article10 ILO Convention No. 97 Migration for Employment Convention (Revised) 1949. However, the use of the term “consider” expressly allows states to take part in government sponsored migration outside the realm of bilateral and multilateral agreements.  
22 Bodeva and Garson note that more than 176 bilateral agreements and other forms of labour recruitment are currently in force in OECD countries. Bodeva and Garson supra n. 17 at p. 12.  
23 Durand “Conclusions” In Bodeva and Garson supra n. 17 at p. 217.  
24 Most commonly, the provision of workers to fill labour shortages in the host state.  
26 Bilateral and multilateral agreements can govern issues such as the process of selection and recruitment of migrant workers, the employment contract, the method of transport to be used, the grievance and dispute resolution procedures, the protection of basic rights and the right of the migrant worker to social security, family reunification and the right to return. See Tripartite Meeting of Experts supra n. 3 at paragraph 2.1.
process. Such treaties can, in many cases, amount to a “bill of rights, as it were, of the nationals of each country in their dealings with the Government, authorities and private concerns in the territory of the other”.

Bilateral agreements therefore address a broad spectrum of issues, including the protection of migrant workers during the recruitment process. However, there are a number of difficulties, which prevent the realisation of the full benefits of such agreements.

Firstly, it is important at this juncture to distinguish workers from EU states from workers originating in third countries. While government sponsored migration programmes are of relevance to migrant workers from third countries, such programmes have little application to workers from states within the EU, who benefit from the principles of free movement. As a recruitment model therefore, it is of little benefit to EU countries in dealing with the migration of EU workers.

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27 For example in the Philippines, there is a Migrant Workers and Overseas Filipinos Act of 1995 (Philippines) that was enacted specifically for the purpose of establishing “a higher standard of protection and promotion of the welfare of migrant workers, their families and overseas Filipinos in distress”. (See Preamble). The Act states in section 4 that the State will only deploy migrant workers to countries where their rights are protected. The conclusion of a bilateral agreement with the Philippines is one way of demonstrating that a state will protect the rights of its citizens (Section 4(c)).

28 Mr. McBride (Minister for External Affairs), Dáil Éireann, Volume 122, 12 July 1950 referring to the Treaty of Friendship, Commerce and Navigation between Ireland and the United States of America – Motion of Approval. However, as will later be elucidated, the rights often guaranteed in such bilateral and multilateral agreements rarely cover employment rights.

29 They still hold some relevance in relation to the new accession states that have not been granted full freedom of movement rights in many states. See for example Ireland’s stance on Romania and Bulgaria (Employment Permits Act 2006, section 3 (Ireland)) where the development of bilateral or multilateral agreements may still be relevant. Section 3 amends section 2 of the Employment Permits Act 2003 (Ireland) to the effect that nationals of Bulgaria and Romania must apply for employment permits as if they were a third country national. See the Introduction of the thesis (section 2.2.) for further information on this issue.
Secondly, where agreements are relevant, the protection of migrant workers during recruitment is not usually a feature of such agreements, particularly where they are drafted by receiving states themselves. Such a feature would act as a guarantee on the part of the receiving country to the protection of overseas workers. In the Irish context, agreements concluded with third countries usually refer to different employment sectors or flexible working arrangements and rarely, if ever, refer to the employment rights of migrant workers. Many of these agreements would, therefore, be specific to seasonal employment, project based workers, guest workers, apprentices, cross-border employments, working

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30 This is the case under the Migrant Workers and Overseas Filipinos Act of 1995 (Philippines)-Republic Act No. 8042 section 4(c) which states that the “State shall deploy overseas Filipino workers only in countries where the rights of Filipino migrant workers are protected. The government recognizes any of the following as guarantee on the part of the receiving country for the protection and the rights of overseas Filipino workers:…(c) It has concluded a bilateral agreement or arrangement with the government protecting the rights of overseas Filipino workers”.

31 Section 4(c) Migrant Workers and Overseas Filipino Act 1995 (Philippines) (as quoted supra n. 30).

32 For example, in the Treaty of Friendship, Commerce and Navigation, with Protocol between Ireland and the United States of America 1950, the only reference to employment rights is in Article 4 which refers only to the right of recovery for injury or death arising in the course of employment or due to the nature of employment and to a right to compulsory insurance against loss of wages or earnings due to old age, unemployment, sickness or disability or against the loss of financial support due to the death of father, husband or other person on whom such support had depended. (Article 4(2)). Agreements with other states tend to refer only to the technicalities of the exchange of labour such as visas and rights to social security.

33 This is defined as an agreement which concerns “stays ranging from three months to a year, and are usually limited to sectors with a high variation of employment over the year, such as hospitality, catering, agriculture or construction” Bodeva and Garson supra n. 17 at p. 12. For example, Austria has seasonal employment agreements with Canada. Ireland does not have any at present. Bodeva and Garson supra n. 17 at Annex 1 A.

34 This is defined as an agreement to “cover foreign workers who are directly employed, either by a foreign based company or by a domestic firm carrying out work abroad” Bodeva and Garson supra n. 17 at p. 13. See for example the agreements between Spain and Morocco. Ireland does not have any project based agreements at the present time. Bodeva and Garson supra n. 17 at Annex 1 A.

35 Germany has utilised guest-worker programmes, in particular with Turkey. Ireland has never had a guest worker programme. Bodeva and Garson supra n. 17 at Annex 1 A.

36 These are similar to modern guest worker schemes and “aim to enhance the professional training of young workers or help students complete their studies through work experience abroad” Bodeva and Garson supra n. 17 at p. 13 and Annex 1 A.

37 The UK, for example, has concluded a bilateral agreement with South Africa to facilitate the education, practice and mutual access to training of health care professionals. See Mafubela, Using Bilateral Agreements to Manage Migration of Healthcare Workers: the case of South Africa and the UK (Geneva: Seminar on Health and Migration, 9-11 June 2004) Section III B.
holiday makers and many others. A good example of the manner in which these agreements work is the Irish agreement with Canada in relation to trainees and apprenticeships. The agreement deals with issues such as the duration of the apprenticeship, the age limits and the specifications for the particular scheme. The only employment rights which such agreements provide for are rights to equal treatment with respect to statutory compensation for disease, injury or death arising out of employment and compulsory insurance claims providing for old age and unemployment.

Thirdly, the agreements, which are generally drafted by receiving states, are usually concluded with other developed states rather than developing states. This occurs despite the fact that the majority of migrant workers in need of protection through the use of bilateral or multilateral agreements originate from developing countries. An examination of Ireland’s commitments under certain bilateral agreements would appear to provide evidence of this trend. Most of these agreements are concluded with other developed nations. Ireland has concluded bilateral agreements with Canada, the United States of America, New 

38 See Bodeva and Garson supra n. 17 at Annex 1A.
39 Other agreements include agreements for certain employment sectors. See the recent bilateral agreement between Germany and Poland in relation to the construction sector 2006.
41 This agreement allows for a 12 month traineeship followed by a 12 month extension where appropriate.
42 The age limit is set at the ages of 16-28 years.
43 See for example the Agreement on Social Security between Ireland and Canada, Ottawa, 29 October 1990 (Treaty Series no. 14 of 1992); the Understanding on Social Security between the Government of Ireland and the Gouvernement du Quebec and Administrative Agreement, Quebec, 6 October 1993 (Treaty Series No. 20 of 1994). See Bodeva and Garson supra n. 17, Annex 1 A.
Zealand, Australia and Switzerland. It is interesting to note that Ireland does not have labour migration agreements with developing countries. Ireland has a significant Filipino population, most of who were recruited to fill shortages in the healthcare industry. However, the practice of concluding bilateral and multilateral agreements with the Philippines has not been adopted. Instead, potential employers are mandated by the State to contact recruitment agencies to source employees in the Philippines. While the ILO does not encourage the carrying out of government sponsored migration by private recruitment agencies due to the substantially higher risks of exploitation where private agencies are used, it is generally not prohibited by any international conventions. The reality is that the mass recruitment of migrant workers by many developed receiving

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46 See Agreement between Ireland and Australia on Social Security, Canberra 8th April 1991 (Treaty Series No. 3 of 1993). See also Bodeva and Garson supra n. 17 at Annex 1 A.

47 See Exchange of Notes between the Government of Ireland and the Government of Switzerland in regard to the Exchange of Employment Facilities, Dublin, March 14, 1949 (Treaty Series No. 3 of 1949). See also Bodeva and Garson supra n. 17 at Annex 1 A.

48 Interestingly, the largest immigrant groups from third countries outside the EU to be granted employment permits in Ireland in 2006 were the Philippines, India, Ukraine and South Africa. For example, the number of Filipinos working in Ireland has increased from just 18 in 1998 to 5,679 in 2005. This in no way corresponds to the states with whom Ireland has bilateral agreements despite the fact that it would be more efficient to have agreements with states whose immigration levels are higher.

49 In 2002, there were 3,900 Filipino residents in Ireland, which will only have increased in recent years. Central Statistics Office, “Persons, Males and Females, usually resident and present in the State on census night, classified by nationality” (2002) Census Report. According to the Philippine Overseas Employment Administration, this had increased to 5,679 in 2005. See Philippine Overseas Employment Administration, Deployed Land based Overseas Filipino Workers by Destination, Ireland (2005) available at www.poea.gov.ph [last checked 15th September 2008].

48 The government sponsored recruitment of Filipino health-care workers has been increasing in recent years. This is not covered by any bilateral agreement. See number of Filipinos in Ireland according to the Central Statistics Office supra n. 49.

50 The advice given by the State to employers seeking healthcare workers from third countries is to seek workers through overseas recruitment agencies. See Department of Health and Children, The Nursing and Midwifery Resource: Guidance for Best Practice on the Recruitment of Overseas Nurses and Midwives (Dublin: Government Publications, 2001) at p. 14.

52 See for example the Migration for Employment Convention (Revised) 1949 ILO No. 97, Art. 3(3) (b), Annex II which allows the use of recruitment agencies in certain circumstances.
states is usually governed only by voluntary codes of practice which often promote the ethical recruitment of migrant workers\(^{53}\) but which have no legal or practical effect on the protection of third country national migrant workers.

The ILO and general academic opinion suggest that where “the State directly organizes recruitment of its nationals for employment abroad, there would be little risk of fraud or abuses”\(^{54}\). However, this does not take into account the fact that where labour receiving countries fail to enter into negotiations for bilateral and multilateral agreements with developing countries or where they fail to include protections for migrant workers,\(^{55}\) the effect of such agreements is extremely limited. In a recent study into the condition of migrant workers from the Philippines,\(^{56}\) one of the largest labour-exporting regions in Asia,\(^{57}\) it was noted that although many bilateral and multilateral agreements had been signed between the Philippines and receiving states, those receiving states with the worst records for exploitation and with the largest concentrations of Filipino migrant labour,\(^{58}\) have refused to enter into negotiations for the development of a bilateral agreement governing labour recruitment. It was also discovered that those states that do agree to enter into bilateral negotiations, were generally reluctant to


\(^{54}\) ILO supra n. 15 at p. 10. The ILO appears to lay responsibility strictly at the door of the sending State, presumably not wishing to damage the potential relationship with receiving states.

\(^{55}\) Ireland has consistently failed to do this.


\(^{57}\) Bodeva and Garson supra n. 17 at p. 11.

\(^{58}\) For example, Saudi Arabia, Japan and South Korea.
introduce measures governing the terms and conditions of employment of nationals.\textsuperscript{59}

The reality, therefore, is that many receiving states consider bilateral agreements to be an ineffective way of improving conditions for migrant workers.\textsuperscript{60} In many cases, these states find that such means of recruitment are in fact too expensive and lengthy and prefer to source their labour through more cost-effective and efficient methods.\textsuperscript{61} Generally, receiving states prefer to seek out cheaper methods of recruitment so as not to make migrant labour undesirable to employers.

1.2. Direct Recruitment by an Employer

Direct recruitment occurs where migrant workers reply personally to offers of employment in local, national or international media services or over the internet. As with all forms of recruitment, there is a significant chance that exploitation of both EU and third country nationals will occur during this form of recruitment. This could, for instance, be caused by the publication of a false advertisement, which entices a migrant worker to apply for a job. Similarly, the employer may determine the terms and conditions of the employment unilaterally without consultation with the migrant worker, leaving the worker exposed to exploitation. There is a distinct lack of any national or international regulation in this area. This is because of the inherent difficulty involved in regulating the unilateral decision of a migrant worker to take up a post offered to them directly.

\textsuperscript{59} This is particularly so in the seafaring industry where agreements governing the recognition of the seafarers’ certificates of competencies are readily signed but those governing terms and conditions of employment are not.

\textsuperscript{60} Durand, \textit{supra} n. 23 at p. 219. Cf: Bodeva and Garson, \textit{supra} n. 17 for a detailed analysis of bilateral agreements, their functions and their success internationally.

\textsuperscript{61} Such as recruitment agencies. See ILO \textit{supra} n. 15 at pp. 10-11.
The dangers of exploitation during the process of direct recruitment by the employer are perhaps best illustrated by the case of Turkish migrant workers employed by GAMA Construction Ireland Limited. In November 2000, after a successful tender to the Irish Government, GAMA Construction Ireland Limited, a subsidiary of GAMA International Building Contracting Incorporated, was established to coordinate and carry out the construction of various infrastructural projects around Ireland. GAMA Construction Ireland Limited (“GAMA”) employed over one thousand Turkish workers in Ireland as well as three hundred Irish workers. Prior to their departure from Turkey, the migrant workers were requested to sign their contracts of employment for work in Ireland. Few, if any of the workers had any knowledge of the English language, yet their contracts of employment were detailed entirely in English. It later transpired that these contracts contained clauses, which empowered GAMA to transfer the wages of each employee into an account in their names to a bank in the Netherlands. The workers knew nothing of these accounts or their contents and certainly never had any access to them.

GAMA Construction Ireland Limited claims that the company take “every required precautionary step to protect workers’ health and to provide job safety”. Despite these broad assurances, however, the conditions of work of its Turkish employees in Ireland were undoubtedly exploitative. It emerged that

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63 O’Connor “Migrant Workers suffer most because of a poorly resourced labour inspectorate” (2004) SIPTU News Online, 28th October.
workers were being paid a wage of between €2 and €3 an hour. Often employees worked 80-87 hours a week with no overtime pay.\textsuperscript{65} These rates of pay and hours of work operated for just over three years, despite the fact that such conditions were illegal under Irish employment law, where the minimum wage was over €7 an hour at that time\textsuperscript{66} and the maximum working week was forty-eight hours.\textsuperscript{67} Most employees worked for over a year before any holidays were given, even though by law employees are entitled to four weeks annual holidays a year.\textsuperscript{68} The scheme established by GAMA, whereby the wages of the employees would be transferred to a bank account in the Netherlands, was also contrary to Irish employment legislation. Yet despite the existence of provisions under the Payment of Wages Act 1979 (Ireland) which insists upon employee consent to a payment\textsuperscript{69} where payment is made otherwise than in cash, GAMA operated the scheme for over three years, without consultation with their employees and without experiencing any inquiries into their employment practices.

It was not until 2005, after an ad hoc visit by a local politician\textsuperscript{70}, that the situation of the Turkish migrant workers was uncovered. This is perhaps the most disturbing aspect of the controversy. No complaints were received from the workers prior to the investigation of their circumstances. While this was in part due to their lack of knowledge of their rights and entitlements, the employment permit scheme under which they operated provided them with little room to question the practices of their employer. It was the employer who applied for the

\textsuperscript{67} Organisation of Working Time Act 1997, section 15 (Ireland).
\textsuperscript{68} Organisation of Working Time Act 1997, section 19 (Ireland).
\textsuperscript{69} Payment of Wages Act 1979, section 2(1) (Ireland).
\textsuperscript{70} Mr. Joe Higgins (Former T.D.), Socialist Party.
permit on behalf of the worker and who kept it once it was issued.\textsuperscript{71} The employee was therefore effectively tied to the employer for the duration of their employment\textsuperscript{72} with all the potential for exploitation that this entailed. It would have been possible for an employer to threaten an employee with the termination of their employment permit to prevent the employee from complaining about their terms and conditions of employment.\textsuperscript{73} Over two hundred Turkish workers returned to Turkey during the dispute.\textsuperscript{74}

Upon termination of their employment, the workers at GAMA found themselves once again in a precarious situation. The Minister for Social and Family Affairs in Ireland had granted an exemption to GAMA from liability to pay PRSI employment contributions which would otherwise have been payable. This can be achieved pursuant to S.I. No. 312/1996\textsuperscript{75}, which allows an exemption to be granted for a period not exceeding fifty-two contribution weeks, where the employees are in temporary employment and are not ordinarily resident in the State and where the employer is not ordinarily resident in the State. GAMA received exemptions for a total of 1,416 employees, almost 60\% of the total

\textsuperscript{71} This has recently been replaced by the Employment Permits Act 2006, section 5(1)(a) and section 9(1)(a) (Ireland) which provides that the employee can apply for their own employment permit subject to certain conditions and the original permit is then given to the migrant worker, while the employer is provided with a copy of the permit.

\textsuperscript{72} Under the most recent Employment Permits Act 2006 (Ireland), an employment permit cannot be granted for a period exceeding two years. Section 8 Employment Permits Act 2006 (Ireland). After this the migrant worker must apply for a renewal or return to their sending state.

\textsuperscript{73} As Mary Robinson (Former President of Ireland and United Nations High Commissioner for Human Rights) has noted “Immigrants cannot afford to lose their job, as their residency in the State is tied to that specific employer. Workers may be paid way below the minimum wage, subjected to abuse, including sexual abuse and harassment, and required to work illegally long hours in unsafe conditions. Workers are often afraid to report their employers for these abuses for fear of losing their job and their entitlement to stay in the country.” Robinson, “Immigrants Valuing Diversity” paper given by Mary Robinson, Ethical Globalisation Initiative, New York at the ICI Conference: Immigration, Ireland’s Future, 11\textsuperscript{th} Dec 2004.


\textsuperscript{75} S.I. No. 312/1996 Social Welfare (Consolidated Contribution and Insurability) Regulations 1996, Article 97 (Ireland).
exemptions granted since 1996. Usually, before an exemption is granted, the Department of Social and Family Affairs will request from the company a signed declaration to the effect that social security contributions are being paid in the sending state. In “randomly selected cases, independent confirmation is sought from the authorities in the employee’s home country that social insurance payments have been made”. However, the inadequacy of this system is highlighted by the failure of the Turkish authorities to respond to a request for information from the Irish Government concerning the social security contributions of forty randomly selected GAMA workers. It was discovered upon termination of the employment contracts that social security contributions for each of the employees had not, in fact, been paid in their sending state.

This case of exploitation stems specifically from a lack of regulation in the process of direct recruitment for employment. The Irish Government has promised to address some of the problems faced by the migrant workers at GAMA in the most recent Social Partnership Agreement. The State is contemplating the introduction of certificates of compliance with employment legislation for all capital works projects in excess of €30 million and with

78 This will include the relevant Registered Employment Agreements, existing statutory requirements under employment legislation, legally binding determinations under the Industrial Relations Acts, Health and Safety legislation and Equality legislation relating to employment. Department of An Taoiseach supra n. 77 at paragraph 20.1 (a).
contract duration in excess of 18 months and the introduction of standard form contracts in the construction sector.

The new employment permit scheme introduced in 2006 has also reduced the potential for exploitation that existed prior to the GAMA case. The main motivation behind the legislation was to give the State greater control over the labour market. This is reflected in the provisions relating to the obligation to source the potential employee within Ireland and where unsuccessful, within the EU first prior to recruiting a migrant worker. This requirement has little to do with protecting the migrant worker but in reality is a precautionary measure to prevent increased unemployment of the domestic workforce.

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79 Where no certification is received, the public contracting authority would then be entitled to withhold payment in respect of the non-compliant contractor or subcontractor. Department of An Taoiseach, supra n. 77 at paragraph 20.1(b).

80 Department of An Taoiseach, supra n. 77 at paragraph. 20.1.


82 The Long Title states that the Act is concerned with the “grant of employment permits to certain foreign nationals for the purpose of permitting them to be in employment in the State, to enable the Minister for Enterprise, Trade and Employment to make, having had regard to certain criteria, regulations imposing a limit on the number of such permits that may be granted in a particular period and imposing certain other restrictions with regard to the grant of such permits”.

83 This is usually conducted through the Irish public employment service, FÁS, who will advertise the vacancy for four weeks in Ireland, followed by similar advertisements in the EU. A letter from FÁS to the effect that the position has been advertised is usually sufficient to satisfy the conditions on the Employment Permit Application Form. This has now been codified in the Employment Permits Act 2006 (Ireland), section 10(2). Where an employer applies for an employment permit on behalf of a foreign national, it shall not be granted unless “he or she has taken all such steps as were reasonably open to him or her to offer the employment in respect of which the application is made to a citizen or a foreign national referred to in any of paragraphs (a) to (d) of section 2(10) of the Act of 2003 or to whom section 3 of that Act applies, and at the time of the application more than 50 per cent of the employees of the applicant are nationals of” the EEA or Switzerland. Paragraphs (a) to (d) of section 2(10) of the Employment Permits Act 2003 (Ireland) apply to certain exempted persons, for example, refugees. Section 3 of that Act applies to the accession states of the EU in 2003.

84 In fact the ILO has encouraged the use of such provisions, not as a protective measure for migrant workers, but as a means of reducing the effects of brain drain on sending states and the effects of increased unemployment on nationals of receiving states. See ILO Convention No. 97 Migration for Employment Convention (Revised) 1949, Annex II, Article3(b).
However, there are some protective measures in the legislation. The conditions of employment\textsuperscript{85} of the migrant worker must be in compliance with Irish employment legislation. Mention is made in the Long Title of the Act to the States’ concern with providing certain protections for third country nationals in employment in the State.\textsuperscript{86} The employer is also requested to make a declaration to the effect that they understand that the employee is entitled to the full benefits of employment rights under Irish law and to receive the same wages as Irish nationals.\textsuperscript{87} The employer is also prohibited from charging the employee with any fees arising from the recruitment process\textsuperscript{88} and must sign a declaration to the effect that he/she will pay any fees due to the migration cost.\textsuperscript{89}

While an employer may still apply for an employment permit on behalf of a foreign national, foreign nationals may now also apply on their own behalf for an employment permit.\textsuperscript{90} Importantly, the foreign national is the grantee of the permit in all cases, which removes much of the criticism that surrounded the older employment permit system.\textsuperscript{91} The employer must provide a much wider range of information than they previously were required to do with section 6 of the 2006

\begin{footnotesize}
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\item The former Irish employment permit application form prior to the most recent changes requested details of wage rates and the working hours of the employment. Similarly, in the UK details are also requested from the employer as regards the wage rates but not as regards the hours of work.\textsuperscript{85}
\item Employment Permits Act 2006 (Ireland), Long Title states that the Act is to “provide certain protections for foreign nationals in employment in the State”.\textsuperscript{86}
\item See Employment Permit Application Form available on the Department of Enterprise, Trade and Employment Website – www.entemp.ie [last checked 15\textsuperscript{87} September 2008].
\item Employment Permits Act 2006 (Ireland), section 5(2).\textsuperscript{88}
\item This provision reflects the commitment in international law to the prohibition on fee-charging. See ILO Convention No. 97. Annex II, Article 4(2) and the European Convention on the Legal Status of Migrant Workers 1977, Article2(2).\textsuperscript{89}
\item As long as they have a written offer of employment in the State. See section 4(1) and (3) Employment Permits Act 2006 (Ireland).\textsuperscript{90}
\item Section 5 Employment Permits Acts 2006. Under the old regime, the employer was in control of the employment permit at all times which gave the employer a large degree of control over the employee. On many occasions, the employer was found to be threatening employees with the termination or refusal of renewal of their employment permits where the employee sought to complain about their terms and conditions of employment.\textsuperscript{91}
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Act requiring that the application for an employment permit be accompanied by information detailing the employment and the terms and conditions of that employment.\textsuperscript{92} This information will be available to the migrant worker when they finally receive their employment permit. Where the migrant worker applies for their own employment permit, they are requested to furnish the State with similar information regarding their offer of employment.\textsuperscript{93}

However, these piecemeal reforms in the long term will do little to protect the large and growing number of migrant workers in various sectors of the Irish economy. Where a migrant worker does fall within the scheme, there is no system in place to ensure that the migrant worker or the employer do not deceive the State by asserting that certain terms and conditions are in force when in fact they are not. There are penalties\textsuperscript{94} in place under the most recent Employment Permits Act 2006 (Ireland) for those who furnish the Minister for Enterprise, Trade and Employment with information that is false or misleading in a material respect knowing that it is so false or misleading or being reckless as to whether it is so false or misleading.\textsuperscript{95} However, the question of how this will be enforced must be raised. There are no provisions in the legislation, which allow for inspection of the employment contracts of third country nationals.

\textsuperscript{92} This includes information on the qualifications, skills or experience needed to carry out the employment concerned (section 6(b)), the qualifications, skills or experience of the foreign national (section 6(c)), the place at which the employment concerned is to be carried out (section 6(d)), the remuneration and any deductions for board and accommodation (section 6(e)), and information about the foreign national themselves (section 6(f)) Employment Permits Act 2006 (Ireland).

\textsuperscript{93} Section 7 Employment Permits Act 2006 (Ireland).

\textsuperscript{94} Section 32(1) provides that a person who is found guilty of an offence will be liable in (a) summary conviction to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

\textsuperscript{95} Section 25 Employment Permits Act 2006 (Ireland).
It is hoped that the new Office of Director of Employment Rights Compliance and the recently established NERA\(^96\) will have a positive impact on this area. The NERA has been established on an interim basis and is due to be placed on a statutory footing in 2008\(^97\). It has five areas of concern – information, inspection, enforcement, prosecution and protection of young persons. The NERA is expected to be comprised of 90 inspectors who will have the authority to inspect for breaches of a wide range of legislation. During 2007, the inspectors carried out targeted inspection campaigns in different employment sectors\(^98\) including an inspection of the national minimum wage, protection of young persons in employment and construction and mushroom picking sectors. This resulted in 98 files being sent to the Chief State Solicitors Office for prosecution. The NERA recovered in the region of €2.5 million from employers for employees.\(^99\) This system, in association with the new employment permit system, will have a very important impact on the protection of migrant workers who are recruited directly by employers in Ireland and will fill an important gap where protection previously was non-existent.

1.3. Chain Migration

Chain migration occurs where a migrant worker obtains information about and takes up foreign employment opportunities through personal networks.\(^100\) It is usually associated with female migrant workers who “are more likely than men to

\(^96\) National Employment Rights Authority.
\(^97\) The Employment Law Compliance Bill 2008 (Ireland) provides for the establishment of NERA (section 6).
\(^98\) The most recent target is the security sector.
\(^100\) Durand, supra n. 17 at p. 24.
move as part of chain migration, following their sisters or other relatives who are already working overseas.” 101 This is possibly due to the fact that women “rely more than men on informal social networks”. 102 However, in Ireland the general experience would be that both men and women rely on informal social networks including members of the family or “persons related by other affiliation ties that involve reciprocal obligations including kinship and friendship ties among persons sharing a common social community of origin, culture or religion”. 103

Ireland has experienced an increase in the amount of workers arriving on foot of chain migration in recent years. 24% of migrant workers surveyed for a recent report cited the availability of family and friends in the country as a reason for moving to Ireland. 104 It is particularly popular with those arriving from the new accession states to the EU, especially Poland. 105 A recent report 106 highlights the reasons why chain migration is so popular among Polish workers. Firstly, many of the Polish workers in Ireland are drawn by the availability of accommodation and jobs among friends already in Ireland. Secondly, the possibility of reuniting with their partner who is already in the State is also a large pull factor for many Polish workers. Finally the opportunity of staying with

101 ILO supra n. 15 at p. 13.
102 ILO supra n. 15 at p. 13. For example, chain migration is the most popular form of recruitment for Filipino domestic helpers in Hong Kong – see Vasquez, Tumbaga and Cruz-Soriano Tracer Study on Filipino domestic workers abroad (Geneva: International Organisation for Migration, 1995) at p. 30.
103 ILO supra n. 15 at p. 13.
104 Migrant Rights Centre Ireland, Realising Integration: Migrant Workers undertaking Essential Low-Paid Work in Dublin City (Dublin: Migrant Rights Centre Ireland, 2007) at p. 23.
105 This appears to be the chosen method of recruitment for many low-skilled workers and seasonal workers. In the Polish community many workers will not look for jobs before they leave but will look for jobs once they arrive in Ireland. See Case Study: Implications of Recent Migration from Poland to Ireland In Kropiwiec and Chiyiko King-O’ Riaian, Polish Migrant Workers in Ireland, (Dublin: National Consultative Committee on Racism and Interculturalism, Community Profile Series, 2006).
106 Kropiwiec and Chiyiko King-O’ Riaian, supra n. 105 at p. 30.
107 Kropiwiec and Chiyiko King-O’ Riaian, supra n. 105.
friends and family who “help soften the landing and make the start abroad easier”\textsuperscript{108} is also a determining factor in choosing a destination country. The popularity of this form of recruitment for employment can be explained, therefore, by the various benefits afforded to migrant workers by it. The idea of having a trustworthy family member or friend to guide a migrant worker in their search for work and to be there for them on arrival in the State is very appealing.

This form of recruitment is also a favourite of employers who commonly invite migrant workers to seek friends and family in their sending state who wish to work in Ireland.\textsuperscript{109} As recently acknowledged in the mushroom picking industry in Ireland,\textsuperscript{110} employers realise the benefits of sending hard working migrant workers to search for other hard working friends and relatives. Not only is this a cheap form of recruitment but also it is also very reliable.

The conditions experienced by migrant workers recruited through chain migration are similar to those of migrant workers hired directly by their employer, though possibly isolation will not be as pressing an issue with those recruited through a chain of friends and relatives. The potential for exploitation still remains substantially high due to the fact that there is no national or international regulation of such recruitment. It should be recognised that the situation of the friends and relatives in the receiving state is also a vulnerable one and their bargaining power and their ability to ensure exploitation does not occur is

\textsuperscript{108} Kropiwiec and Chihiro King-O’ Riaian, \textit{supra} n. 105 at p. 30.

\textsuperscript{109} Francisco Arqueros, National University of Ireland, Maynooth “Low Wages, Migrant Labour and Politics in the Irish Mushroom Industry” Paper presented at “Three Years On: The 2004 EU Enlargement and European Migration to the UK and Ireland” Saturday 21\textsuperscript{st} April 2007 at De Montfort University, Leicester.

\textsuperscript{110} Francisco Arqueros \textit{supra} n. 109.
extremely limited. There is also the possibility that when large groups of migrant workers from one sending state work and live together, they will fail to integrate with the national workforce causing inevitable social tensions. This often prevents migrant workers from engaging in trade union activities.

1.4. Recruitment Agencies

Recruitment agencies generally provide three different types of services, with the agency offering either one or all of these services. Depending on the type of services, which they provide, recruitment agencies are subject to certain forms of regulation at both a national and international level. This section will outline three particular forms of recruitment agencies and the services that they provide.

1.4.1 Matching Agencies

Matching agencies provide migrant workers with “offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom”.111 This is perhaps the most typical form of recruitment agency, providing potential migrant workers and employers with a medium through which they can both seek and advertise employment. Strict regulation of such agencies exists at both international and national levels due to the potential for exploitation, which may arise where such advertisements do not reveal the actual nature of the work advertised or the terms

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111 Private Employment Agencies Convention, ILO No. 181, Article 1(1)(a) which states that “for the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:...(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom”.

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and conditions of employment offered. At an international level, the ILO has regulated such agencies since 1933 and continues to encourage strict regulation today. Most states that have ratified the ILO Conventions on fee-charging employment agencies will regulate this type of agency to some extent. In Ireland, this is achieved by the introduction of the Employment Agency Act (Ireland) in 1971, although the age of the statute in itself suggests that amendments are now due to keep such agencies operating within the standards promoted at an international level.

1.4.2. Leasing Agencies

The second type of recruitment agency is often referred to as a leasing agency, because of the type of service it provides. This type of agency actually employs workers “with a view to making them available to a third party, who may be a natural or a legal person…which assigns their tasks and supervises the execution of these tasks”. A triangular relationship develops between the three parties to the agreement: the worker, the agency and the user-enterprise. In effect, what actually occurs is that the agency becomes the “surrogate employer” of the

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112 See Fee-Charging Employment Agencies Convention, 1933 ILO No. 34, Article 1(1)(a); Fee-Charging Employment Agencies Convention (Revised), 1949 ILO No. 96, Article 1(1)(a) and the most recent Private Employment Agencies Convention, 1997 ILO No. 181, Article 1(1)(a).

113 Ireland ratified ILO Convention No. 96 in 1972 but has yet to ratify the new ILO Convention No. 181. The UK has never ratified any of the Conventions on private employment agencies. Despite the lack of ratification of the Conventions, both of these states have maintained some regulation of private recruitment agencies. In the UK, this type of recruitment agency is regulated by the Employment Agency Act 1973 (UK), section 13(2). It is described as the business “of providing services…for the purpose of finding persons employment with employers or of supplying employers with persons for employment by them”. See Deakin & Morris, Labour Law (London: Butterworths, 2nd ed., 1998) at p. 179 n. 6.

114 Matching agencies are defined in section 2(a) of the Employment Agency Act 1971 (Ireland) as the business of “seeking…on behalf of others, persons who will give or accept employment”.

115 ILO Convention No. 181, Article 1(1)(b).
migrant worker.\textsuperscript{116} This has caused much controversy in common law jurisdictions where the dual concepts of the traditional employment relationship, which generally operates on the basis of privity of contract between the employer and the employee, and the free market concept of voluntarism have hampered judicial attempts to come to a definitive conclusion on the identity of the employer in these relationships and thus the person who can be held responsible for ensuring compliance with employment statutes governing the employment rights of migrant workers.\textsuperscript{117} Given the potential for exploitation that may develop between the parties due to this anomaly in the law, this type of recruitment agency has been the subject of strict regulation at both international\textsuperscript{118} and domestic levels\textsuperscript{119}.

1.4.3. Information Agencies

Finally, some recruitment agencies seek only to provide services to the migrant worker, such as information provision. They do not become involved in any matching or leasing process.\textsuperscript{120} Due to the fact that these agencies are not directly involved in any placing process for migrant workers, international and national


\textsuperscript{117} Lobel \textit{supra} n. 116 at p.109. Lobel places her discussion of recruitment agencies and leased workers in terms of contingent workers in the national work force. However, similar principles also apply to migrant workers who become leased workers.

\textsuperscript{118} See ILO Convention No. 34, Article 1(1)(a); Convention No. 96 Article 1(1)(a); Convention No. 181 Article 2(1)(b).

\textsuperscript{119} Both Ireland and the UK regulate this type of agency. In Ireland, the Employment Agency Act 1971 (Ireland) section 2 (a) regulates agencies that are in the business of “obtaining and supplying for reward persons who will accept employment from or render services to, others”. Similarly, in the UK, the regulation of what are know as “employment businesses” is carried out under the Employment Agency Act 1973 (UK), section 13(3). The Irish Government is hoping to redefine this type of agency as an “employment business” as is the case in the UK. See Department of Enterprise, Trade and Employment, \textit{Review of the Employment Agency Act, 1971}; White Paper, June 2005 at pp. 4-5. See Deakin & Morris, \textit{Labour Law} (London: Butterworths, 2nd ed., 1998) at p. 179 n. 6.

\textsuperscript{120} These types of agencies are defined in ILO Convention No. 181, Article 1(1)(c).
regulation of such agencies was initially scarce. In 1997, however, the ILO introduced a new Convention on Private Employment Agencies, which sought to impose certain regulations even on those agencies that were not involved in any placement services.\textsuperscript{121} In a similar manner, such agencies were also excluded from domestic regulation.\textsuperscript{122} States now intending to ratify the most recent ILO Convention on recruitment agencies\textsuperscript{123} will have to ensure national legislation regulates such recruitment agencies also.\textsuperscript{124}

2. A Case Study of Recruitment Agencies

2.1. The Popularity of Recruitment Agencies

The use of third-party intermediaries, known as recruitment agencies, has always been one of the most popular choices for all parties in the recruitment process.\textsuperscript{125} The use of recruitment agencies directly by both EU and third country nationals means that this form of recruitment continues to grow in popularity. Migrant workers, states and employers all enjoy the benefit of the range of services

\textsuperscript{121} There is no mention of this type of agency in either ILO Convention No. 34 or No. 96.

\textsuperscript{122} In Ireland, no provision is made in the Employment Agency Act 1971 (Ireland) for the regulation of such agencies. The UK does include provision for the regulation of information-providing services in their legislation. See the Employment Agency Act 1973 (UK), section 13(2) (UK).

\textsuperscript{123} ILO Convention No 181 of 1997 on Private Recruitment Agencies.

\textsuperscript{124} In order for Ireland to ratify the most recent ILO Convention No. 181 it will need to revise its definition of recruitment agencies so as to include this type of agency within its parameters. The Department of Enterprise, Trade and Employment’s White Paper on the reform of the Employment Agency Act 1971 (Ireland) proposes to include a new definition of “work-finding services” in any new legislation. Department of Enterprise, Trade and Employment supra n. 119 at pp. 4-5.

\textsuperscript{125} A recent Report suggests that recruitment agencies are a popular choice for the recruitment of both EEA and non-EEA nationals. See Diversity At Work Network, Chambers of Commerce of Ireland, Institute of Technology, Blanchardstown and the National Consultative Committee on Racism and Interculturalism, \textit{Managing Diversity in the Workplace Handbook: Focusing on the Employment of Migrant Workers} (Dublin: Diversity At Work Network, Chambers of Commerce of Ireland, Institute of Technology, Blanchardstown and the National Consultative Committee on Racism and Interculturalism, 2004) at p. 7.
recruitment agencies provide to help in the reduction of cost, inconvenience and burdensome administrative practices involved in recruitment for employment.

There is also a strong link between the other forms of recruitment. Recruitment agencies often play a large part in the direct recruitment, chain migration and even government sponsored migration. Migrant workers recruited directly by employers may have utilised a recruitment agency over the internet such as FÁS or other information providing agencies to source potential employers. Indeed, even migrant workers who come to Ireland on foot of chain migration will often use the bulletin boards and chat rooms operated by recruitment agencies to source work prior to or after arrival in the State. In the case of government sponsored migration, employers are encouraged to source potential migrant workers through recruitment agencies in Ireland. Therefore, while it may appear that recruitment agencies directly account for a small part of the recruitment of migrant workers in Ireland, there are a large percentage of migrant workers who utilise recruitment agencies more informally or indirectly in seeking employment in Ireland.

2.2. The Potential for Exploitation

Recruitment agencies are the most regulated form of recruitment process due almost exclusively to their reputation for recruitment malpractices and the potential for exploitation that may arise as a result. This section identifies three distinct obstacles in the Irish recruitment agency landscape that migrant workers have to transcend. These will be addressed in greater detail in Chapters 2 and 3.
2.2.1. There is no Effective Regulation

It can be seen from the description of the traditional recruitment models currently operating in Ireland that some form of regulation of all recruitment processes is essential to the protection of migrant workers. This concept is a key element of many industrial codes of practice developed by private recruitment operators\(^{126}\) and the Conventions and Recommendations of the ILO\(^ {127}\). The requirement of regulation extends beyond mere registration and naming of such recruitment models but should also include restrictions on the types of recruitment models that should be allowed to operate in a state.\(^ {128}\) Other Conventions impose more stringent regulations on certain recruitment models.\(^ {129}\) Whatever the specific conditions of the regulations which should be imposed, the most important issue is that there is some form of regulation over the recruitment model and that this regulation is effective in protecting migrant workers against exploitation. An analysis of the current regime of recruitment agency regulation in Ireland in Chapter 2 will reveal that the present system of regulation presents obstacles to migrant workers and specific reform measures are required to rectify the current regime.

\(^{126}\) See for example the UK Regulatory Authority, The Recruitment and Employment Confederation, *REC Code of Professional Practice* (London: REC, 2007) at Principle 1 which notes that respect for the relevant legislation, statutory and non-statutory requirements and official guidance is essential.

\(^{127}\) See for example the Fee-Charging Employment Agencies Convention, 1933 ILO No. 34; Fee-Charging Employment Agencies Convention (Revised), 1949 ILO No. 96 and the most recent Private Employment Agencies Convention, 1997 ILO No. 181.

\(^{128}\) See ILO Recommendation No. 86 1949 at section 2 and 3. The most recent United Nations Convention on the Rights of All Migrant Workers and Members of Their Families at Article 66 also advocates restrictions of the types of recruitment models that should operate in a state. For example, it states that the recruitment of migrant workers in another state shall be restricted to public services or bodies and should take place within the remit of bilateral and multilateral agreements. It does state in section 66(2) that certain other forms of recruitment are allowable as long as they are subject to “authorisation, approval and supervision” by the public bodies of the state concerned.

\(^{129}\) See Section 1 above for information on the international regulation of recruitment processes.
2.2.2. There is an Inequity Between the Parties

One of the most important aspects of any recruitment process is that the process itself does not burden any of the parties to the relationship to such an extent that it leaves one party in a vulnerable position vis-à-vis the other party. A practice often used in the recruitment of migrant workers and which can burden migrant workers considerably is fee-charging. Where a migrant worker is charged excessive fees during the recruitment process, the potential for exploitation is very high due to the fact that the migrant worker will be working merely to pay back the fees and not for their own benefit. This issue has been raised by numerous international conventions dealing specifically with recruitment agencies.\textsuperscript{130} However a more general analysis of the phenomenon of fee-charging in other recruitment models has not been widely addressed since 1949 and the introduction of the ILO’s Migration for Employment Recommendation (Revised).\textsuperscript{131}

Secondly, there are administrative burdens facing migrant workers where recruitment agency personnel are not adequately qualified to provide migrant workers with information about the recruitment process and the job for which the migrant worker has applied. This can lead to problems for migrant workers where the information is misleading, inadequate or in many cases false. It adds to the vulnerability of migrant workers during the recruitment process and exposes them to potential exploitation.


\textsuperscript{131} This Recommendation (No. 86) states that the administrative costs of recruitment, introduction and placing shall not be bourse by the migrants. See Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons at Article 6(4) (ILO).
Thirdly, migrant workers also experience remedial burdens in seeking reparation from recruitment agencies for malpractices, misleading or inadequate information and the exploitation suffered as a result. Migrant workers have no specific right to reparation at present.\textsuperscript{132} As a result, there is nothing deterring recruitment agencies from adopting exploitative practices.

\textbf{2.2.3. There is a Lack of Transparency}

In order to ensure that migrant workers can “\textit{take full advantage of their rights and opportunities in employment and occupation}” a migrant worker should always be informed of all the relevant information in relation to their employment during the recruitment process.\textsuperscript{133} Relevant information includes information relating to the remunerated activity in which they may engage\textsuperscript{134}, the location of their employment and the authority to which they must address themselves for any modifications in their conditions of employment.\textsuperscript{135} This latter point is especially important in the case of workers employed as contractors or subcontractors or by

\textsuperscript{132} The same difficulties arise for national workers but as migrant workers are more vulnerable to exploitative practices such issues can often be more pressing for them.
\textsuperscript{133} ILO Recommendation No. 151 Migrant Worker Recommendation 1975 at Article 7 (ILO). See also the Department of Health (UK), \textit{Code of Practice for the International Recruitment of Healthcare Professionals} (UK: Department of Health, 2004) at p. 11 which states that the migrant worker should receive information on the job description, person specification, grading structure and salary. The Irish Department of Health and Children Code of Practice \textit{supra} n. 51 also refers to the importance of giving the migrant worker a job description at p. 22.
\textsuperscript{134} United Nations Convention on the Rights of Migrant Workers and Members of their Families (hereinafter referred to as the “UNCMW”), Article 17. See also the Department of Health and Children (Ireland) \textit{supra} n. 51 at p. 23 which insists that the migrant worker be informed as the place of employment, whether that place be an organisation, a hospital or a health authority. The REC Guidelines at \textit{supra} n. 126 Principle 7 also refer to the importance of supplying the migrant worker with full details of “the work, conditions of employment, nature of the work to be undertaken, rates of pay, method and frequency of payment, and pay arrangements in accordance with requirements of current legislation”.
\textsuperscript{135} See UCMW at Article 17. The importance of knowing the role of the recruitment agency and the employer in the recruitment process was thought essential by the Department of Health and Children (Ireland) \textit{supra} n. 51 at p. 23. Reference to this is also made in the REC Guidelines \textit{supra} n. 126 at Principle No. 7 which details the importance of the respect for the “certainty of engagement”.
recruitment agencies as leased workers. Such workers often have difficulty enforcing their employment rights, as they cannot identify their legal employer. Other information in relation to the employment is also relevant particularly as migrant workers in Ireland are often faced by the possibility of contract substitution, which means that their terms and conditions of employment are substantially different to those that they agreed prior to migration. Therefore, when one considers the potential for exploitation, which may occur when incomplete information is made available to migrant workers, the provision of accurate and honest information is essential to a safe and effective recruitment process. This will be dealt with further in Chapter 3.

**Conclusion**

As the ILO has noted, “Workers considering taking up employment in a country which is not their own are often, due to geographical distance as well as to the nature of the occupations they tend to undertake, in a disadvantaged position to determine reasonable terms and conditions of work in the country of employment prior to departure”.  

Therefore, the method of recruitment that migrant workers choose to take is extremely important as it often determines the manner in which the entire migratory experience will progress. There are a variety of methods by which migrant workers can enter a country for work, whether they do so under a monitored government sponsored migration scheme, through intermediaries such as recruitment agencies or friends and relatives or through direct recruitment by an employer. The manner in which this recruitment occurs will determine the

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136 ILO *supra* n. 3 at paragraph 150.
entire migratory experience and therefore it is essential that these recruitment processes conform to international best practice.

This Chapter identifies recruitment agencies as the most popular form of recruitment for employment in Ireland. Recruitment agencies are commonly used directly by EU and third country national migrant workers as well as being used more indirectly by the State and employers. For this reason, the remainder of this Section on Recruitment for Employment will focus on the obstacles faced by migrant workers when utilising recruitment agencies. The solutions proffered will also have relevance to other forms of recruitment.

The Chapter identifies three specific obstacles facing migrant workers in Ireland arising from the operation of recruitment agencies. The first obstacle relates to the effective regulation of recruitment agencies in Ireland. As Bodeva and Garson comment, “The recruitment arrangements that function best in practice appear to be those with a formal structure in place, ensuring that all the key players are engaged and fully committed to the process”¹³⁷. Chapter 2 asks three general questions relating to the over arching principle of regulation: should recruitment agencies be regulated, how should this be achieved and whether any such regulation should extend to recruitment agencies operating outside the State.

The second obstacle relates to the inequality which often develops between the parties to the recruitment process as a result of excessive fee-charging, as well as administrative and remedial burdens that arise from the lack of regulation of

¹³⁷ Bobeva and Garson, supra n. 17 at p. 17.
recruitment agencies. Thirdly, this Chapter identified the issue of the lack of transparency as impacting significantly on the vulnerability of migrant workers during the recruitment process. Chapter 3 takes a more specific look at the particular aspects of the recruitment relationship that should be regulated to ensure an effective and appropriate process for migrant workers and employers.

The introduction of such proposals emphasises a shift from the usual “protest” against exploitation, common in many receiving states, to “proposals” for reform.\textsuperscript{138} This author contends that this model should represent the new dynamic of receiving state responsibility in international and national law to ensure the protection of migrant workers during the recruitment process. It is during this process that the future course of the migratory experience will be mapped out for the migrant worker. The experience can be a pleasant one or it can be one shaped by non-consensual migration and employment. Receiving states, like Ireland, now have the opportunity to change the dynamic of recruitment for employment, making it a process from which benefits can flow to all the actors in the recruitment process: the employers, the recruitment agencies and the migrant workers.

\textsuperscript{138} Somavia In \textit{supra} n. 17 who advocates for a modernisation of the thinking of trade unions in relation to the protection of migrant workers.
Chapter 2: The Regulation of Recruitment Agencies and the Effect of Globalisation

Introduction

This Chapter will focus specifically on the issue of regulation and how it may impact on the efficacy of the recruitment process. The Chapter will examine the recruitment agency sector, as it has been identified in the previous chapter as the most popular form of recruitment in Ireland and the method of recruitment that presents the greatest potential for exploitation. The international regulation of recruitment agencies by the ILO has had a major influence on the national regulation of matters relating to the recruitment of migrant workers. The international regulation of fee-charging recruitment agencies was and still is based upon a firm conviction that the business of recruitment agencies is “subject to grave abuses; involving frauds and impositions upon a peculiarly helpless class; among which the exaction of exorbitant fees was perhaps the least offensive”. ¹

This has also been reflected at a national level.

¹ Ribnik v. McBride (1928) 277 U.S. 350 (per Mr. Justice Stone (dissenting)) at p. 361. This case concerned the constitutionality of a Statute, which regulated the fees, which could be charged by an employment agency. It was held that under the due process clause of the fourteenth amendment a State could not fix the fees, which an agency may charge for its services. This decision was, however, overturned in the case of Olsen v. Nebraska (1941) 9 U.S. Law Weekly 4291. As Mr. Justice Brandeis once commented there were many evils associated with private recruitment agencies which included:

1. Charging a fee and failing to make any effort to find work for the applicant.
2. Sending applicants where no work exists.
3. Sending applicants to distant points where no work or where unsatisfactory work exists, but whence the applicant will not return on account of the expense involved.
4. Collusion between the agent and the employer, whereby the applicant is given a few days work and then discharged to make way for a new workman, the agent and employer dividing the fee.
5. Charging exorbitant fees, or giving jobs to such applicants as contribute extra fees, presents, etc.
6. Inducing workers, particularly girls, who have been placed, to leave, pay another fee and get a “better job”.” Adams v. Tanner (1917) 244 U.S. 590 (per Mr. Justice Brandeis) at p. 601 quoting a 1912 U.S. Bureau of Labor Report entitled United States Bureau of Labor Bulletin No. 109 at p. 36.
The first question that arises in any discussion surrounding regulation is who should regulate the recruitment process? Should the state introduce such regulation? Can recruitment processes be deregulated to allow the market to regulate itself? Or should certain recruitment processes, such as recruitment agencies, be prohibited altogether so as to remove any danger of exploitation occurring? The Chapter will elucidate the advantages and disadvantages of each of these systems through an examination of the history of regulation of recruitment agencies both internationally and in a domestic context. It will be determined that none of these systems on their own provide effective protection against exploitation. However, they do reveal various factors, which can be used to develop a fairer system of regulation for both employers and migrant workers. This Chapter will conclude that a balanced system of state regulation supports the best outcome for both migrant workers and employers.

Any form of regulation introduced should be effective in its protection of migrant workers, recruitment agencies and employers. However, this does not always sit easily with the concepts of corporate mobility and the quest for profit. In fact, recruitment agencies have found ways of circumventing state regulation by operating outside the jurisdiction of laws regulating recruitment agencies. So how can such regulation be achieved? The Chapter considers the current state of Irish law regarding the regulation of recruitment agencies and identifies the issues of corporate mobility and globalisation as central to the problem of migrant worker exploitation during the recruitment process.
The Chapter goes on to discuss how states can extend their jurisdiction beyond recruitment agencies operating in the state to overcome the problems presented by corporate mobility and globalisation. It identifies three potential solutions to this particular dilemma: the extended jurisdiction approach, the domestic agency responsibility approach and the information approach. It concludes that the extended jurisdiction approach could be successfully adopted in Ireland and outlines measures that could be taken to introduce legislation on the issue. Regard must be had to the need to ensure compliance with the free movement of services. The approach advocated in this Chapter attempts to strike a fair balance between the freedom of corporations to move and make a profit and the right of migrant workers to be protected against exploitation.

1. How Should Recruitment Agencies Be Regulated?

An examination of the system of regulation of recruitment agencies internationally is instructive. Many states have chosen to deregulate the recruitment industry and allow it regulate itself\(^2\), while others have chosen to implement an outright prohibition of all forms of recruitment agencies because of the dangers inherent in their operation.\(^3\) This section will look at international practice and the manner in which recruitment agencies are regulated in order to determine the most effective strategy for ensuring an efficient and safe recruitment process in Ireland.

\(^2\) See the situation in the UK and in Sweden discussed in Section 1.1 of this Chapter.
\(^3\) See for example the situation of Sweden up until 1993.
Recruitment agencies developed as a response to the strict regulatory regimes imposed by legislators on employers. This purpose remains just as valid today with employers freely admitting that the utilisation of recruitment agencies reduces their obligations under employment law. Attempts to regulate the recruitment agency sector have been met with harsh criticism by employer’s bodies, employers and recruitment agencies. Any changes to the current system of regulation must strike a balance between preserving their special place in the functioning of the labour market and the necessary protection of migrant workers.

This section will analyse the Irish approach to regulation against the international trends to date. The Irish approach to the regulation of recruitment agencies reflects a commitment to the general international trend of a balanced and moderate regulatory regime. However, this has not always been considered the most appropriate form of regulation.

1.1. The Case for Prohibition

The international community, including the ILO, has demonstrated a significant commitment to the regulation of recruitment agencies. One of the first international labour recommendations was concerned solely with the prohibition of fee-charging recruitment agencies. This particular recommendation sought the outright prohibition of such agencies in cases where this was practicable. Where

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5 Vosko, “Regulating Precariousness? The Temporary Employment Relationship Under the NAFTA and EC Treaty” (1998) 53 Industrial Relations 1 at pp. 8-10 for a detailed examination of the treatment of temporary leasing agencies by the ILO.
6 ILO Recommendation No. 42 of 1933, Employment Agencies Recommendation.
such agencies already operated relatively freely in other states, the recommendation proposed that these agencies be operated only under strict government supervision, by the adoption of a licensing system\(^7\) and measures should be taken to ensure their progressive abolition.\(^8\) This prohibitive formulation has been repeated throughout various ILO Conventions\(^9\) and, until 1997, was considered to be the most effective method of protecting migrant workers against exploitation by recruitment agencies.

There are many who would support this concept of prohibition. In 1935, Sweden, in line with its commitments under the ILO,\(^10\) sought to and succeeded in abolishing all recruitment agencies completely.\(^11\) However, this was not as successful as was hoped at the time and eventually Sweden opened up its market and chose to deregulate the recruitment agency sector. As a result, Sweden was forced to denounce its commitments under the ILO.

So why did Sweden take such an unusual step? There are significant benefits generated by such agencies for all the parties to the recruitment process, including migrant workers.\(^12\) Migrant workers, as one of the potential beneficiaries of recruitment agency services, are often the beneficiaries of the fruits of recruitment

\(^7\) As was achieved in Ireland under the Employment Agency Act 1971 (Ireland).
\(^8\) ILO Recommendation No. 1 at paragraph 1.
\(^9\) ILO Convention No. 34 Fee-Charging Employment Agencies, 1933, Article 2 (now shelved) and ILO Convention No. 96 Fee-Charging Employment Agency Convention, 1949, Article 2.
\(^10\) In particular, ILO Convention No. 34 on Fee-Charging Recruitment Agencies.
\(^12\) Galinou details four specific benefits of recruitment agencies. Firstly, recruitment agencies are helpful in sorting out shortages in permanent staff or a temporary increase in workload. Secondly, such agencies provide workers with a means of gaining access or returning to the labour market. Thirdly, employers have an increased need for qualified workers with a wide range of skills on a temporary basis. Finally, the legislative framework is far more flexible because agencies promote flexibility in the labour market. Galinou, “Legal Borrowing: Why some legal transplants take root and others fail” (2004) 25 Comparative Labor Law and Policy Journal 391 at p. 395.
agencies, particularly where the recruitment agency provides leasing services. Such agencies offer flexible work packages, which give workers the freedom to enjoy family commitments, pursue leisure activities and experience various work environments.\textsuperscript{13} Employers also benefit from the skills, flexibility and lower costs that emanate from the use of recruitment agencies.\textsuperscript{14} Indeed many commentators\textsuperscript{15} reject the regulation of recruitment agencies\textsuperscript{16} on the grounds that protecting workers from their own decisions should not constitute a function of the labour market.\textsuperscript{17} There is also the danger that increasing the regulation of recruitment agencies may in fact only seek to make recruitment agency workers less attractive to hirers\textsuperscript{18} and thus reduce their chances of contributing economically and socially to the labour market.

These comments are made in the context of the labour force as a whole and do not refer specifically to the situation of migrant workers. It is probably true that


\textsuperscript{15} See Hylton, “Symposium: The Case Against Regulating the Market for Contingent Employment” (1995) 52 Washington and Lee Law Review 849 at p. 853 and Kalleberg, “Part-time Work and Workers in The United States: Correlates and Policy Issues” (1995) 52 Washington and Lee Law Review 771 at pp. 776-777. Please note that both these authors were not speaking about protection of migrant workers but were referring more generally to contingent workers in the labour market. Contingent workers have been defined as including a range of workers in flexible work arrangements that have been developed to meet employers’ perceived need to reduce labour costs. Grunewald, “The Regulatory Future of Contingent Employment: An Introduction” (1995) 52 Washington and Lee Law Review 725.

\textsuperscript{16} Kalleberg and Sukert supra n. 13.

\textsuperscript{17} Hylton and Kalleberg supra n. 15.

\textsuperscript{18} Spooner infra n. 28 at p. 7155.
migrant workers fear being made less attractive to hirers. However, it is questionable whether many migrant workers utilise recruitment agencies with the intention of receiving flexible work times so as to pursue family or leisure commitments. On the whole, migrant workers utilise recruitment agencies as a quick and effective route into the labour market. Nevertheless, these arguments are advanced time and time again when protections for migrant workers are advocated.

Therefore by prohibiting recruitment agencies, Sweden faced a dilemma. What would replace recruitment agencies? Recruitment agencies play a very important part in the labour market and have to be replaced by another form of organisation that would provide workers, including migrant workers, with offers of, and advertisements for, employment. The danger that arises is that this replacement could be operated on the black market, thus making the protection of workers very difficult to achieve and the original benefits of prohibition futile.

Where prohibition is encouraged, so too is the replacement of recruitment agencies with alternative bodies. Silverstein and Goselin suggest the replacement of present recruitment agencies with newer recruitment agencies run entirely by trade unions that could train, protect and bargain on behalf of their employees. Silverstein and Goselin note that trade unions already have “access to qualified personnel, knowledge about the skills needed to perform diverse jobs, the ability

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19 Polivka comments that while some workers are “involuntarily in such arrangements, as a proportion of the employed, they are relatively few”. Polivka, “Into contingent and alternative employment: by choice?” (1996) Monthly Labor Review 55 at p. 55.
21 Silverstein and Goselin supra n. 20 at p. 38.
to monitor performance and accounting departments to handle billing and payments”.

Many migrant workers would prefer to work through their trade union as the trade union could provide them with training, pension and medical schemes and would have the know-how in crafting packages and plans for their employees.

Silverstein and Goselin have indeed recognised the core problem faced by states when considering how to regulate recruitment agencies. The desire and the necessity for recruitment agencies are too great to seek to abolish them altogether. However, the solution proffered by the authors, with respect, raises a significant number of potential difficulties. The central tenet of trade unionism is the protection of the rights of their employee members. The reality of the solution proffered by these authors is to turn this basic premise around and to potentially endanger the protection heretofore offered by trade unions. The union will no longer be acting on behalf of the employee but will have become an employer, motivated by the same desires of profit production and a reduction in cost. As an employer, the union will, despite its best motivations, need to make a profit so as to ensure the continuity of the enterprise and this could lead to the leasing of employees on whatever terms and conditions are appropriate to achieve this aim, which may not necessarily be protective or beneficial.

Another solution proffered lies in the development of publicly funded recruitment agencies as an alternative to the private sector. These state-run recruitment agencies...
agencies could provide essential employment services which private recruitment agencies provide today, without the dangers of exploitation inherent in the private sector. The ILO in its Conventions on Private Employment Agencies has advocated this approach to replace the prohibited private recruitment agencies.\textsuperscript{25}

However, even publicly funded employment services do not always reduce the potential for exploitation. Despite being state-owned and operated, the Irish public employment service, FÁS, freely admits that as it operates on an entirely self-service basis and it has “\textit{no mechanism for establishing the bona fides of companies or jobseekers}”\textsuperscript{26} who are entering advertisements on their website. Therefore the potential for exploitation will not be reduced significantly unless they too become stringently regulated.

Therefore, it appears the total abolition of recruitment agencies only leads to significant difficulties for employers, migrant workers and the state. It presents real challenges to the legislative system to develop a safe and secure means of recruitment that offers the benefits private recruitment agencies currently provide to employers and employees alike.

\textit{1.2. The Case for Deregulation}

After the difficulties associated with prohibition, many states questioned whether it was really appropriate to regulate the recruitment market at all. One line of argument that developed was that if the market were left to self-regulate, the

\textsuperscript{25} ILO Recommendation No. 1 on Fee-Charging Employment Agencies.

\textsuperscript{26} Letter from FÁS dated 31\textsuperscript{st} May 2005.
forces of competition would soon ensure that recruitment agencies would regulate
themselves, thus ensuring adequate protections for migrant workers. The general
consensus of recruitment agencies, employers and states at this point suggested
that excess regulation was inappropriate and ineffective in a global economy, as it
stifles development and free movement. Any special protections, which could be
further introduced to protect migrant workers, were thus met with little ceremony.

With this in mind, many states turned their backs on the concept of regulation and
the adverse effects associated with regulation. Increased regulations had the
adverse effect of isolating many of the workers whom such regulation sought to
protect. Spooner comments that due to the technicalities imposed by the recent
regulations in the UK, many workers have been forced out of agency work for
failure to comply with the conditions imposed on them. The alienation of those
workers, such as irregular migrant workers, which the regulations were designed
to protect, is just one of the many ill effects imposed by the increased regulation
of recruitment agencies and how they operate. Recruitment agencies are perceived

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27 See the comments of Somavia, “The ILO Decent Work Agenda as the aspiration of people: The
insertion of values and ethics in the global economy” In Peccoud, *Philosophical and Spiritual
Perspectives on Decent Work* (Geneva: International Labour Office, 2004) at p. 8-9 who notes that
some sectors in the international community hail low labour costs, low social expenditure and the
introduction of relocation and subcontracting as being more effective than a permanent labour
force. However, Somavia warns that such systems are fragile “because it has been imposed by
force, not because it has required legitimacy”.

particular, the author is referring to irregular workers who must now produce an employment
permit before they can register for employment with a recruitment agency. These regulations,
which will be discussed, further below, refer to the Conduct of Employment Agencies and

29 These conditions include proving identity, experience, training, qualifications and any
authorisation the hirer considers necessary, or that are required by law or by any professional body
to work in the position the hirer seeks to fill and that the work-seeker is willing to work in the
position the hirer seeks to fill. (Regulation 18) As Spooner notes, these requirements do not appear
to be too onerous but “there is a real risk that many of these work-seekers will be forced out of the
employment market on a technicality”. Spooner supra n. 28 at p. 7155.

30 Spooner supra n. 28 at p. 7155. This author would, with respect, disagree with the contention
that irregular workers were ever supposed to be protected by the new regulations.
generally as “useful, commendable, and in great demand”. The advent of recruitment agencies has meant that employees, who would otherwise spend much time unemployed, can now participate fully in the labour market, contribute to the revenue system, and experience an improved standard of living.

It was for these reasons that the UK decided to deregulate the recruitment agency industry in 1994. For many years, recruitment agencies in the UK were regulated through a licensing process strikingly similar to the system presently in operation in Ireland. However, in 1994 the UK attempted to deregulate the recruitment agency sector and moved in favour of more flexible systems of job placement. The aim was to allow the industry to successfully regulate itself, introducing its own ethical standards and protections for workers. However, it emerged that the recruitment agencies began adopting practices aimed at the achievement of profit, which did not necessarily coincide with the best interests of their clients, often migrant workers. In 2003, therefore, the UK Parliament reintroduced Regulations aimed specifically at the protection of workers who seek employment through recruitment agencies.

Similarly in 1993, Sweden passed a law deregulating the recruitment agency industry. A report presented four years after the passing of the Swedish Act

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31 Adams v. Tanner (1917) 244 U.S. 590 (per Mr. Justice Reynolds) at p. 593.
33 Deregulation and Contracting Out Act 1994 (UK).
34 This was achieved by the Deregulation and Contracting Out Act 1994, (UK) section 35 and Schedule 10.
revealed a rapid increase in the number of leasing companies after the passing of the law. While this was good for competitive purposes, little was known of the effect this system had on the workers operating within the system. Neither is the regime a perfect example of deregulation. Unlike the UK, the Swedish law did not introduce absolute deregulation. It still imposed regulations on recruitment agencies *albeit* that these regulations were reduced. Recruitment agencies were prevented from stopping clients from accepting employment in the user-enterprise and ensured that a person who left employment to work for a leasing firm must not be leased to their previous user-enterprise until at least six months had passed. These regulations undermined the assertion that this was a real and successful deregulatory measure.

However, even this limited and more timid form of deregulation was not entirely successful. A 1997 Swedish Commission Report suggested that a registration system should be introduced to maintain a register of agencies in Sweden. In order to be registered, the Swedish Commission suggested that recruitment agencies should have to meet certain conditions similar to those that currently operate in Ireland and in other countries where regulations over recruitment agencies exist. The Commission were of the opinion that a system of regulation was necessary and that deregulation was not effectively operating in Sweden. This is similar to the situation in the Netherlands where in 1998 a licensing requirement was reintroduced after many years of deregulation in an attempt to “*combat the large scale fraud which plagues the temporary employment branch*”.

37 Commission of the Social Democratic Government headed by Bjorn Rosengren. See Bergstrom *supra* n. 37.
It is interesting to note that in 2005 only four out of the twenty four EU Member States at the time did not have any licensing requirements for temporary agency workers.\textsuperscript{39} The rationale for the existence of such regulation is most likely the fact that as recruitment agencies are essentially trading in human labour, the practice of recruitment agencies should never be left entirely to market forces.\textsuperscript{40} The dependency of migrant workers on recruitment agencies to provide them with the “opportunity to earn a livelihood” has meant that migrant workers are “not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer”.\textsuperscript{41} Therefore, while deregulation may be beneficial to employers, it will not result in the dual benefits of migrant worker protection and economic benefit for recruitment agencies and employers. There is always the danger that the industry will sway too far in either direction, either providing greater economic benefits at the expense of migrant worker protection or too great a protection at the expense of business.

1.3. The Case for Balanced Regulation

An examination of the effects of deregulation or prohibition in various states identifies the need to develop a more organised system of recruitment with

\textsuperscript{39} These are Denmark, Sweden (although this is due to change), UK (now introduced as a result of the Conduct of Employment Agencies and Employment Businesses Regulations, 2003 S.I. 3319/2003 (UK)) and Finland. For a more detailed examination of the regulation of recruitment agencies and in particular leasing agencies in the Netherlands see Sol “Targeting on Transitions: Employment Services in the Netherlands” (2001) 23 \textit{Comparative Labor Law and Policy Journal} 81.

\textsuperscript{40} Peccoud (ed.) \textit{Philosophical and Spiritual Perspectives on Decent Work} (Geneva: International Labour Office, 2004) at p. ix.

\textsuperscript{41} Ribnik v. Mc Bride, 277 U.S. 350, (per Mr. Justice Stone (dissenting)) at p. 360-361. This case involved a challenge to the constitutionality of a statute, which regulated the fees that recruitment agencies could charge. It was held in this case that under the due process clause of the fourteenth amendment a state cannot fix the fees that such a recruitment agency may charge for its services.
sufficient checks and balances. This system should be facilitative rather than prohibitive towards recruitment agencies, employers and migrant workers in order to maintain a balance between worker protection and the financial needs of employers.

In 1997, the ILO, in recognition of the important role private recruitment agencies play in the functioning of the labour market and the importance of maintaining sufficient flexibility in this area substantially altered its earlier position on prohibition of recruitment agencies in favour of a more of a more balanced approach to regulation. In a new Convention, entitled the Private Employment Agencies Convention (1997), the ILO, adopted a more lenient stance than in their earlier conventions. The Convention sanctions the continued operation of recruitment agencies subject always to the enforcement of stringent regulation by the state.

This approach to the regulation of recruitment agencies can be seen in other employment sectors such as the seafaring industry, where the gradual acceptance of recruitment agencies subject to regulation has replaced the earlier and more prohibitive formulations. Earlier conventions prohibiting the use of recruitment agencies in the recruitment of seamen and encouraging the development of public employment offices, have now been superseded by a gradual acceptance of

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43 ILO Convention No. 181, Preamble.
45 ILO Convention No. 181, Article 2(3).
46 ILO Convention No. 9 Placing of Seamen Convention, 1920, Article 2.
47 ILO Convention No. 9 supra n. 46 Article 4.
of such private recruitment agencies, on condition that they are subject to a system of licensing and certification.48

A recent Report by the ILO strongly encouraged national legislators and law enforcement agencies to develop regulations governing private recruitment agencies.49 Regulation should ensure that private recruitment agencies “offer their services in the interests of their clients as well as in support of the overall development goals of countries”50.

2. The Effect of Globalisation on the Regulation of Recruitment Agencies

2.1. The Regulation of Recruitment Agencies in Ireland

Ireland attempted to curb the exploitative practices of recruitment agencies operating within the jurisdiction of the State with the introduction of the Employment Agency Act (Ireland) in 1971.51 The Act requires that persons carrying on the business of recruitment agencies operating within the State must obtain a licence.52 Such licenses are only granted where the agency can show that they have satisfied certain prescribed conditions that are laid down by the Minister for Enterprise, Trade and Employment. At present, these conditions specify that

50 ILO supra n. 49 at p. 2.
51 During the passing of the Employment Agency Bill (Ireland) through the Dáil Éireann, the Minister for Labour, Mr. J. Brennan noted that the “provisions of this Bill then are such as to ensure I would hope that ultimately we will have none but genuine agents doing a good job so that people who seek advice or use these agencies for the purpose of seeking employment will know that they are being dealt with properly and that they are dealing with legitimate organisations”. Dáil Éireann, Volume 256, 17 November, 1971, Employment Agency Bill, 1971, [Seanad] Second Stage at column 2174.
the premises upon which the agency is operating must conform to a certain standard of accommodation, the applicant for a licence must comply with a standard of suitability and fitness and the applicant must not have been convicted of an offence under the Act in the preceding five years. Revocation of the licence by the Minister for Enterprise, Trade and Employment is permitted where the holder has given false information in an application for a licence or where the holder has been convicted of an offence under the Act.

The adoption of a licensing system for the regulation of recruitment agencies by Ireland and the UK was preceded by International Labour Conventions on this subject. In fact, the enactment of the 1971 Employment Agency Act (Ireland) coincided with Ireland’s signing of the ILO Convention No. 96 on Fee-Charging Employment Agencies.

A recent report of the ILO would appear to advocate the approach currently adopted by Ireland to the regulation of recruitment agencies. The report highlights the importance of proper enforcement, objectivity, transparency and providing assistance to recruitment agencies to deliver their services appropriately and

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53 Section 3 (3) (a). Under section 3(4) the Minister for Enterprise, Trade and Employment may prescribe by Regulation an appropriate standard of accommodation. These are laid out in the Employment Agency Regulations, 1972 (Ireland).
54 Section 3(3) (b). These prescribed standards are also laid out in the Employment Agency Regulations, 1972 (Ireland). Regulation 8 provides that the applicant shall be the owner or the tenant of the premises in which he carries on business, shall not be an undischarged bankrupt, shall not in the preceding five years have been convicted of an offence under the Act and have never been the holder of a licence under the Act which was revoked or was refused a licence on grounds other than suitability of the premises. Under the Employment Agency Regulations 1978, Regulation 3 (Ireland) the applicant must also be, in the opinion of the Minister for Enterprise, Trade and Employment, “a person of good character and repute”.
55 Section 3(3) (c).
56 Section 4 Employment Agency Act 1971 (Ireland).
57 Ireland ratified this Convention in 1972. It chose to ratify Part III of the Convention, which allowed the State to continue the operation of private recruitment agencies as long as they were stringently regulated.
adequately. Thus it would appear that the present structure in Ireland adequately regulates Irish recruitment agencies in accordance with the principles and practices as envisaged at an international level. If recruitment agencies are subject to licence and certification, then this is supposed to prevent the exploitation of migrant workers. However, this has not been the experience of many migrant workers in Ireland. The question must then be asked as to why migrant workers are subjected to exploitation by recruitment agencies in Ireland when sufficient regulation appears to exist.

2.2. The Problem with the Current Regulatory System

One of the biggest criticisms that can be made of the Irish recruitment landscape is the fact that the regulations do not meet the needs of Ireland’s diverse migrant population. In Ireland, the regulation of recruitment agencies takes the form of a licensing procedure, the criteria for the grant of which are outmoded and inappropriate. Before a licence will be granted, the recruitment agency must prove that they are operating from premises within the State, which conforms to certain prescribed regulations. When one considers that migrant workers are frequent users of recruitment agencies in Ireland and that most recruitment for employment of migrant workers occurs outside the State, it is clear that the present system is unreasonable, inappropriate and not designed to meet the needs of the migrant population. Migrant workers often utilise more intangible mediums, such as the internet, to source work through cyber recruitment agencies, the owners and

58 ILO supra n. 49 at p. 5.
operators of which may remain completely anonymous or act through recruitment agencies in their sending state. Therefore, the major omission from the Irish regulatory regime is the fact that it only applies to recruitment agencies that are registered in Ireland and have premises in the State.

This allows corporations to move freely to other states to establish themselves, subject to fewer regulations and to provide services to migrant workers coming to Ireland. States presume, somewhat incorrectly,\(^{60}\) that as foreign agencies are operating outside their jurisdiction, such agencies cannot be regulated.\(^{61}\) The full and complete regulation of recruitment agencies is therefore hampered in Ireland because of the failure of the State to regulate recruitment agencies operating overseas who are sending workers to Ireland. Without this form of regulation, there is a large quantity of migrant workers, both EU and third country nationals, who are being recruited to Ireland through unregulated recruitment agencies that can exploit migrant workers without consequence.

3. Regulating for the Global Nature of Recruitment

A reformed recruitment model must ensure that it has control over all recruitment agencies sending migrant workers to Ireland. This section provides a detailed overview of how this might be achieved without imposing financial or other burdens on employers or recruitment agencies. In recent years, there have been many attempts by the Oireachtas to improve the situation of recruitment agency

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\(^{60}\) See section 3 infra.

\(^{61}\) See the statement of Mr. J. Brennan, Minister for Labour during the discussion in the Seanad on the Second Stage of the Employment Agency Bill, 1971 Dáil Éireann, Volume 256, 17 November, 1971 at column 2161-“There are obvious difficulties about dealing with this problem in legislation, because many of the actual abuses can take place outside the jurisdiction.”
workers in Ireland. Each of these has been markedly different in their approach and it is interesting that none of them has ever reached the statute book. The solutions presented here have been gleaned from states where such solutions have been effective in reducing recruitment malpractices without significantly impacting on the labour market.

3.1. Jurisdiction over Recruitment Agencies

It is possible to stretch the concept of regulation far beyond the boundaries of the territory of a state. There are multiple ways in which this can be achieved and this section examines each of these in turn.

3.1.1. The Information Model

In 2004, the Irish Government announced its intention to revise the current arrangements governing recruitment agencies under the Employment Agency Act 1971 (Ireland) so as to include regulation of those agencies operating outside the State. The solution arrived at by the reform proposals involved the placement of considerable responsibilities on the user-enterprise to inform the Department of Enterprise, Trade and Employment or the equivalent authority when a foreign recruitment agency was used and to provide them with documentary evidence of the method of recruitment used, the name of the recruitment agency, its location, contact details and its licence or registration number.62

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The Government appeared to be committed to the possibility of regulating overseas agencies. The only similar provision, which exists in Ireland, relates to the application for an employment permit, where the employer or employee must indicate the name, address and licence number (where appropriate) of any recruitment agency used. A declaration must also be signed to the effect that the recruitment agency will not keep any personal document belonging to the holder of an employment permit.

However, it must be remembered that such regulations are of little assistance to workers from within the EU who do not require employment permits to work in Ireland. Therefore, such workers currently have no protection during recruitment by overseas agencies. There was also no enforcement mechanism proposed to ensure that this system would work effectively and would not be subject to abuses as the employment permit scheme had been.

3.1.2. The Domestic Agency Responsibility Model

In the UK, the approach adopted by the legislature is not regulatory but places the responsibility on domestic recruitment agencies to ensure that any foreign agencies that domestic agencies deal with are bona fides and acting in the best

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63 See New Employment Permit Application Form at p. 4 available from www.entemp.ie [last checked 15th September 2008].

64 See Employment permit Application Form available from the Department of Enterprise, Trade and Employment available at www.entemp.ie [last checked 15th September 2008].

65 This was introduced into the most recent version of the Employment permit Application Form in order to deal with the growing number of migrant workers who had their passports or personal documents taken from them by their employers.
interests of their client. Domestic recruitment agencies must be satisfied that any foreign agency that they deal with is suitable to act as a recruitment agency, which is usually proved by evidence that the recruitment agency is registered by the corresponding authority.  

What is commendable about the approach in the UK is the responsibility it places on the domestic agencies to utilize legitimate recruitment agencies abroad in sourcing workers. It recognises the fact that the domestic agencies often have the greatest finances and know-how to seek information about the legality and conditions imposed by the recruitment agencies they are dealing with abroad and recognises further the growing responsibilities of user-enterprises and recruitment agencies to their workers and to society.

The only difficulty with this system is that if the employer does not use a domestic agency, they can recruit through a foreign agency that is unregulated and not *bona fides*. Indeed there is no means of ensuring that a domestic agency will ensure the *bona fides* of overseas recruitment agencies or that they will utilise overseas agencies at all in the recruitment of overseas workers. So while the Regulations do provide some limited protection, they are not satisfactory in their operation and leave potential gaps through which exploitation can take place.

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66 Employment Agency Act, 1973 as amended by the Conduct of Employment Agencies and Employment Businesses Regulations, 2003 S.I. 3319/2003-Regulation 23(1)(a) (UK). This latter comment regarding registration is not in fact mentioned in the legislation itself. The regulation merely provides that the agency should be suitable to act. The latter formulation has come about through practice. However, there is no restriction on domestic agencies utilising those foreign agencies that are not licensed or registered as long as they are satisfied as to their *bona fides*. 

3.1.3. The Extended Jurisdiction Model

The current situation that operates in Germany by virtue of the Employee Leasing Law 1972 (Germany) is that overseas agencies that assist migrant workers in finding work in Germany should produce evidence of a licence to practice as a recruitment agency from the state in which they are ordinarily resident and also a licence from Germany.\(^{67}\) In order to protect against the undercutting of wages, and due to the practical and procedural difficulties involved in regulating service providers outside the jurisdiction of the state, the German Employee Leasing Law (Germany) provides that leasing agencies with a registered place of business outside the EU\(^{68}\) may not operate leasing companies that provide services within Germany.\(^{69}\)

If this approach were adopted in Ireland it would allow the Irish State to extend its jurisdiction over recruitment agencies operating both within and outside the State. Whether this approach could be effectively adopted in Ireland will be discussed further below.

\(^{67}\) See the German Employee Leasing Law 1972 (Germany). This Law provides that foreign recruitment agencies that wish to lease employees to user-enterprises in Germany must produce evidence of a licence to practice as a recruitment agency from the native state and also from Germany (Employee Leasing Law 1972, §3, ¶ 2-5 (Germany)).

\(^{68}\) European Economic Community.

\(^{69}\) German Employee Leasing Law 1972 (Germany) at §3, ¶2.
3.2. The Extended Jurisdiction Model in Ireland - The Protection of Employees (Agency Workers) Bill 2008 (Ireland)

In a more comprehensive review of the current legislation in 2005 and more recently in 2008, it was suggested that all recruitment agencies, including those operating over the internet or in foreign jurisdictions would be required to register in Ireland if they wished to become involved in the recruitment of migrant workers to Ireland.\(^{70}\) This is similar to the position currently operating in Germany.

The Protection of Employees (Agency Workers) Bill 2008 (Ireland) introduced and published on the 18\(^{th}\) of March 2008 is intended to be both a regulatory measure for recruitment agencies and a protective measure for recruitment agency workers. It places the worker in a strong position by providing him/her with the tools to combat exploitation and discrimination. The reference to agencies established in other Member States is a departure from the approaches adopted in previous proposed legislation.

3.2.1. The Application of the Bill to All Types of Recruitment Agencies

One of the drawbacks of the German system is the fact that it is limited to migrant workers hired through leasing agencies. Only a minority of migrant workers enter into leasing arrangements with recruitment agencies so as to become leased workers. Those workers who are not leased workers but who merely utilise a recruitment agency to match them to a particular employer or to provide them

with information on particular employments in certain areas are not covered by such legislation. This effectively excludes a huge majority of migrant workers who utilise third party intermediaries in the recruitment stage of migration and leaves them open to potential exploitation.

An agency worker is defined in the Protection of Employees (Agency Workers) Bill 2008 (Ireland) as a person who works under an “agency work contract” whereby the agency worker agrees with a recruitment agency to work for a third party whether that person is a party to that contract.\textsuperscript{71} The Bill covers a wide range of activities including “obtaining and supplying” for reward persons who will work for another person. It applies to matching, leasing and information providing recruitment agencies and this is a novel and commendable approach. This would appear to be quite a wide definition and would include all forms of recruitment agency including those that merely provide information services and matching services.

However, the Bill goes on to provide that it does not apply to workers who work under contracts of indefinite duration with a recruitment agency by virtue of which he or she received regular remuneration during periods where he or she is working for an end user or when they are not.\textsuperscript{72} This is an unusual omission from the Bill as it effectively excludes from its operation certain forms of leased workers who receive regular remuneration. However, the Bill still applies to other types of leased worker who do not receive regular remuneration. It is unclear why such an approach should be adopted other than the fact that such workers are in a

\textsuperscript{71} Section 2, Protection of Employees (Agency Workers) Bill 2008 (Ireland).
\textsuperscript{72} Section 2(1)(b) of the 2007 Bill.
more stable situation than other forms of leased worker and therefore less in need of protection. Also as they receive regular remuneration, the recruitment agency will most likely be considered to be their employer and thus will be responsible for their employment rights.

The definition employed in the Bill is generally an acceptable one but should be amended to ensure the protection of workers that receive regular remuneration from recruitment agencies.

3.2.2. The Application of the Bill to Agencies Outside Ireland

The German legislation excludes all recruitment leasing agencies that do not operate a registered place of business in the EU. This effectively excludes migrant workers from many states who will not be able to find a convenient agency that has such a registered place of business in the EU. This once again opens up the possibility of many migrant workers utilising unregulated recruitment channels.

The Protection of Employees (Agency Workers) Bill 2008 (Ireland) follows this approach applies to any natural or legal person carrying on the business of obtaining or supplying for reward of persons who will, within the State, accept employment from or render services to others. It applies to agencies established in Ireland or another Member State and the agency does not have to be a holder of a licence under the Employment Agency Act 1971 (Ireland).²³

²³ Section 2, Protection of Employees (Agency Workers) Bill 2008 (Ireland).
Despite this shortcoming, it is a notable result of the 2008 Bill that the recruitment agency does not have to be registered in Ireland. It recognises the fact that often businesses fall outside the scope of the licensing requirements but still provide recruitment agency services. Secondly, and commendably, the Bill applies to recruitment agencies established in Ireland and in the Member States of the EU. This is similar to the position adopted in the Germany and while not totally inclusive is an important step in the protection of migrant workers in Ireland. However, the author would advocate for more inclusive provisions in the final Bill.

4. Potential Obstacles to Regulating for Globalisation

4.1. The Potential Conflict with EU Law

The approach adopted in the most recent Bill in Ireland and advocated as a potential model for the improved protection of migrant workers is novel and avoids many of the criticisms levelled at other forms of regulation. Increased regulation is often perceived as expensive and unnecessary and this approach appears to allay many of those fears. It provides workers with adequate protections without increasing substantially the administrative burden on recruitment agencies, as it does little to affect the position of national agencies.

It also avoids the possibility of falling foul of the potential conflict between the commitment of the State to the protection of migrant workers and the States’ responsibilities within the EU. Any attempt to regulate recruitment agencies operating outside the domestic sphere of the State may be seen as a potential
restriction on the free movement of services within the EU. According to Article 50EC the definition of “services” includes all services that are “normally provided for remuneration.” What is important in this regard is that it is not essential that the remuneration be provided by the recipient of the service as long as the service is remunerated “one way or another.” This is important because often recruitment agencies are paid not by the migrant worker but by the user-enterprises and any other definition could mean that such recruitment agencies would not be covered by Article 50EC.

It has been held that the provision of recruitment services constitutes a service under Article 50EC. Further, it also covers any situation in which the service provider and the recipient are in different Member States and also situations where both parties are in one Member State but the provision of the service requires one of them to cross an internal Community border.

Article 49EC calls for the prohibition across the Community of restrictions on the free movement of such services. Any provisions which are directly or indirectly discriminatory, or which prohibit, impede or render less advantageous the activities of a service provider in another Member State will be in breach of this fundamental principle and will thus be prohibited. While the regulation of

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74 Chapter III Treaty of the EU – Articles 49-55.
78 Wyatt and Dashwood supra n. 75 at p. 532. This would occur where a migrant worker is recruited by a recruitment agency in another EU Member State for employment in Ireland.
agencies both within and outside of Ireland could not be described as either
directly\textsuperscript{80} or indirectly\textsuperscript{81} discriminatory, it could constitute an impediment to the
free movement of services by requiring recruitment agencies registered outside
Ireland to meet criteria both within their home state and within Ireland in order to
prove that they have been registered in another state by a corresponding authority.

4.1.1. Is there an Impediment to the Free Movement of Services?

This situation was addressed specifically in the case of \textit{van Wesemael}.\textsuperscript{82} The court
here had to consider national rules of one Member State which imposed licensing
requirements on recruitment agencies established in other states before it would
allow them to pursue business in the former state. The ECJ held that a "state may
not, ... impose on the persons providing the service who are established in
another Member State any obligation either to satisfy such requirements or to act
through the holder of a licence, except where such requirement is objectively
justified by the need to ensure observance of the professional rules of conduct and
to ensure the said protection".\textsuperscript{83}

Whether an obligation was objectively justified depended on whether the
recruitment agency had already been operating under the public administration of
another Member State or had been granted a licence by the proper authorities in
their own state? Of further relevance, was whether the recruitment agency had

\textsuperscript{80} The restrictions would, in their current formulation, apply equally to national and non-national
service providers.

\textsuperscript{81} These apply equally to national and non-national service providers and would not require any
extra efforts to be made by non-national service providers. See Wyatt and Dashwood, \textit{European

\textsuperscript{82} Case C-110/78 and 111/78 \textit{Van Wesemael} [1979] ECR 35.

\textsuperscript{83} In \textit{van Wesemael supra} n. 82 at paragraph 29. (\textit{Own emphasis added.})
been subjected to comparable conditions and was being adequately supervised in another Member State. In such cases it would not be appropriate to impose further conditions on the recruitment agency and would in fact amount to a restriction on the free movement of services. Despite arguments by the Belgian Government that the requirements of ILO Convention No. 96 on Fee-Charging Employment Agencies placed a requirement on states to adequately supervise the activities of recruitment agencies operating in their territory, the Court refused to consider this an adequate justification for restricting the free movement of services.

The court reconsidered its earlier position in the case of Re Alfred John Webb in light of the “special nature of the employment relationships inherent in that kind of activity” and the fact that the “pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned”. The court decided that “in view of the differences there may be in conditions on the labour market between one member state and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to require possession of a licence issued on the same conditions as in the case of its own nationals”.

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84 In van Wesemael supra n. 82 at paragraph 30.
85 In van Wesemael supra n. 82 at paragraph 35-36.
87 In Re Alfred John Webb supra n. 86 at paragraph 18.
88 In Re Alfred John Webb supra n. 86 at paragraph 19.
Therefore, in granting such licences two distinct requirements must be met. The first is that in granting the licence no distinction on grounds of nationality is made and the second is that the state granting the licence must take into account the evidence and guarantees already furnished to them by the provider of the service relating to the pursuit of such activities in the country of employment.\textsuperscript{89} There will be no direct conflict with EU law if two conditions are met. Firstly, that the state pursues a policy of non-discrimination in relation to the distribution of recruitment agency licences and secondly, that the state ensures that it accepts evidence provided from other Member State applicants as evidence of the fitness to practice.

However, all of this can be avoided by the introduction of protections which will apply to all workers in Ireland and to all agencies throughout the EU as the new Irish Bill, modelled on the German approach will bring about. The adoption of the 2008 Bill into Irish law is awaited with much anticipation. There would not appear to be any obstacle from a European perspective and a comparison with other potential solutions to the issue of globalisation reveals that this is the most effective method of ensuring the protection of migrant workers by reducing the obstacle of poor regulation.

**Conclusion**

This chapter considers the issue of globalisation and the effect that this has on the type of regulation that should be introduced in the recruitment sector in Ireland and in particular in the recruitment agency sector. The chapter focuses specifically

\textsuperscript{89} In *Re Alfred John Webb* supra n. 86 at paragraph 20.
on recruitment agencies because of their popularity as a recruitment method and because of the various obstacles they present. The chapter examines three examples of regulation: prohibition, deregulation and a balanced system of state regulation. It concludes that a balanced approach is the most acceptable form of regulation as it corresponds to the expectations of both the migrant worker and the employer.

Secondly, the chapter considers the current system of regulation in Ireland. While the system conforms to international expectations, the chapter identifies one specific problem related to the increased globalisation of the recruitment industry. The Irish legislation does not regulate recruitment agencies not registered in Ireland who are sending workers to Ireland.

Three potential solutions are put forward. The first of these is the information approach advocated by the Irish Government in 2004 and involves placing a responsibility on agencies and employers to provide the Department of Enterprise, Trade and Employment with information on the recruitment agency used to recruit migrant workers to Ireland. A lack of monitoring and enforcement undermines this approach.

The second approach examined is the domestic agency responsibility approach. However, this system places unfair responsibility on the recruitment agency sector and would be difficult to monitor and enforce, thus reducing its effectiveness.
The final solution proffered is the extended jurisdiction approach. This is currently employed in Germany and is proposed to be adopted here in Ireland in the most recent Protection of Employees (Agency Workers) Bill 2008 (Ireland). The chapter examines the benefits and potential obstacles to this solution, in particular, the principles relating to the free movement of services within the EU. It concludes that this is the most effective method of protecting migrant workers, employers and recruitment agencies from the effects of globalisation. There are no obstacles to the introduction of this system in EU law and the author would advocate the adoption of this approach into Irish law.
Chapter 3: Regulating Recruitment Agencies: Practical Issues

Introduction

Chapters 1 and 2 examined the regulation of recruitment processes in Ireland and in particular, the regulation of recruitment agencies and concluded that such processes require regulation and that this regulation should extend to all types of recruitment agencies operating outside the State. However one question still remains: what specific aspects of the recruitment process should be regulated?

An Irish report\(^1\) published in 2002 on the experiences of migrant workers in Ireland revealed that a lack of information regarding employment and its terms and conditions was widespread during the recruitment process.\(^2\) Migrant workers who are recruited through recruitment agencies should, as a matter of good practice, be given substantial information about their employment in the host state. It will be demonstrated in this Chapter that migrant workers in Ireland are often very unclear as to the identity of their employer or their terms and conditions of employment under which they are expected to work. This occurs despite various legislative initiatives in the area of employee information. This has the effect of creating a vulnerable worker who can easily be exploited.

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\(^1\) Conroy and Brennan, *Migrant Workers and Their Experiences* (Joint Publication of the Equality Authority, Congress, CIF, IBEC and Know Racism, 2002).

\(^2\) Gloria, a Filipino health-care worker was interviewed as part of this report. Her story is indicative of many other the health care workers who came to Ireland to remedy labour shortages. “At stage one, Gloria got no information about Ireland. At stage two of the process the Irish recruitment agency gave information about the hospital facilities, the expectations of the hospital and nursing responsibilities. She saw pictures of the hospital. At stage three, she was told to bring warm clothes because it would be cold.” Conroy and Brennan, *supra* n. 1 at p. 15.
This Chapter aims to balance the responsibility for certain obstacles between the various parties to the recruitment process. This Chapter will firstly consider the situation of migrant workers who are unclear as to the identity of their legal employer and who should be responsible for the employment rights of migrant workers in such cases. The courts in Ireland and in other common law jurisdictions have found that workers hired through certain recruitment agencies known as leasing agencies may have the recruitment agency as their legal employer. Others have determined that the user-enterprise is the legal employer. The difficulties presented by this indecision become very apparent when the procedural and legal difficulties of the worker are examined. Where the employee is a migrant worker, these difficulties often become insurmountable hurdles, therefore exposing such workers to exploitation. The Chapter will compare the system in Germany, where legislation has been in place for over thirty years, with the position in common law jurisdictions. It will be demonstrated that while the system in that jurisdiction is not perfect, there is much the common law jurisdictions could learn from their approach. There is great potential in the legislation for the resolution of the current problems facing migrant leased workers in Ireland.

Secondly, an important issue that falls for consideration is the issue of fee-charging. The charging of excessive fees to migrant workers is one of the most frequent malpractices in the recruitment agency industry. Experience in Ireland has shown that such malpractices are occurring in this jurisdiction yet little has been done to curtail the practice. It will be demonstrated that an outright
prohibition on fee-charging is the most effective method of ensuring that migrant workers are not burdened financially during the recruitment process.

Thirdly, the Chapter explores the administrative burdens facing migrant workers during the recruitment process. This is primarily based on the lack of protections and remedies for misleading advertising currently available under Irish law. The Chapter will consider the recent European Communities (Misleading and Comparative Marketing Communications) Regulations 2007\(^3\) as a potential recourse for migrant workers affected by misleading advertising. The recent developments in consumer law will also be examined as a potential model for designing regulations in the area of recruitment agencies.

Fourthly, it has been found that often recruitment agency staff are not equipped to deal with migrant workers, the inevitable language barriers, the issues and the problems which migrant workers encounter. The Chapter will examine best practice in order to determine the types of qualifications recruitment agency staff should acquire so as to ensure migrant workers are not burdened by administrative failures.

Fifthly, the Chapter will examine the situation in Ireland in relation to migrant workers who do not know the terms and conditions of employment under which they are working. The present employment legislation will be examined to discover the reasons why migrant workers are often prevented from accessing such information prior to the commencement of their employment. The Chapter

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\(^{3}\) S.I. No. 744 of 2007.
will provide insight into the type of information that is essential to migrant workers who are arriving in Ireland and how this information should be transmitted. Due to the differences between EU and third country nationals and the manner in which they are allowed to work in Ireland, each will require different information and their migratory status will determine how this information can be transmitted to them.

Finally, the Chapter will look at the responsibility of sending states in the recruitment process. While this thesis examines the situation of migrant workers from the perspective of the receiving state, it is appropriate to consider in a cursory manner the need for cooperation with sending states so as to reduce the growing practice of exploitation during the recruitment process.

1. Regulating the Identity of the Employer

One of the most important pieces of information any employee needs to know is the identity of the person they can associate as being responsible for their employment. It is equally important that the employer also knows if they will be held responsible for a particular worker. Migrant workers often do not know the identity of their employer because of the fact that they are employed through a form of recruitment agency known as a leasing agency. Such recruitment agencies lease migrant workers out on a temporary basis to various user-enterprises to carry out specific tasks. This used to be very common in the

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4 See Chapter 1, section 1.4.2.
secretarial industry but in recent years has become more popular in the health sector and in areas of domestic work, particularly among migrant workers.5

Despite the apparent simplicity of such arrangements, the position of the leased migrant worker has caused much controversy in the common law jurisdictions particularly in Ireland and in the UK. The leasing agency employs workers “with a view to making them available to a third party, who may be a natural or a legal person...which assigns their tasks and supervises the execution of these tasks”.6 This means that in effect the agency becomes the “surrogate employer” of the migrant worker.7 The controversy arises due to the development of a triangular relationship between the worker, the agency and the user-enterprise.8 The traditional common law approach to the employment relationship, based on the law of contract and the doctrine of privity of contract between two parties and the concept of voluntarism,9 did not envisage the interference of a third party in the contract of employment.10 As such, both the legislature and the courts have avoided providing a definitive answer to the following question: whether the responsibility of legal employer should fall upon the agency or the user-enterprise in such circumstances. From the perspective of a migrant worker or any worker

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6 ILO Convention No. 181, Article 1(1) (b).


8 Deakin notes that the coordination and risk functions of the employer are split in agency cases between the intermediary agency and the user-enterprise. The coordination function vests in the user-enterprise, while the agency or the worker generally assumes the risk. Deakin, “The Changing Concept of the “Employer” in Labour Law” (2001) 30 Industrial Law Journal 72.


working in a leasing agency, this means that the identity of their employer is effectively unknown.

In many cases, the user-employers are not technically the legal employer of the migrant worker. This situation means that the user-employer has reduced costs and this in turn impacts in a positive manner on the competitiveness of the business. The wage costs of the enterprise are lowered, specialised skills can easily be obtained, recruitment costs are reduced and temporary staff can be hired to fill in short term labour shortages without undertaking the hassle of hiring and maintaining a permanent, core employee.

It could be expected that given the importance and simplistic nature of the problem, employment legislation would be able to provide a suitable solution.

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12 Hylton, “Symposium: The Case Against Regulating the Market for Contingent Employment” (1995) 52 Washington and Lee Law Review 849 at p. 858. However, it is to be noted that upon the introduction of the proposed Directive on Temporary Agency Workers, this will no longer be the case as the Directive proposes to introduce a provision which will insist upon agency workers receiving the same wages as workers employed directly by the employer. See Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Workers/*COM/2002/0149 final_COD 2002/0072*/ OJ 203E, 27/08/2002, pp. 0001-0005.
14 Silverstein and Goselin “Intentionally Impermanent Employment and the Paradox of Productivity” (1996) 26 Stetson Law Review 1 at p. 37. They note that recruitment agencies are beneficial as they “screen, refer, monitor, and pay the employee” reducing the need for the employer to hold in-house interviews and negotiations (at p. 37).
1.1. The Current Legislative Approach

The legislation in Ireland fails to come to any definitive conclusion on the matter. Some legislation provides that in the case of leased workers, the individual responsible for paying the worker or the individual who actually pays the worker is the employer for the purposes of the legislation.\textsuperscript{16} This would appear to be a coherent solution to the problem of the identification of employer of the worker in all cases, yet not all of the employment protection legislation relies on such a simple formulation.

The Unfair Dismissals (Amendment) Act 1993 (Ireland) provides that the user-enterprise is considered to be the employer of the worker for the purposes of an unfair dismissals claim, despite the fact that the user-enterprise may have no control over the payment or other entitlements of the worker.\textsuperscript{17} Other legislation remains completely silent as to the status of the leased migrant worker.\textsuperscript{18} In such cases, the final arbiter in deciding the status of the worker will be the court. A

\textsuperscript{16} In Ireland, the person who pays the worker is known as the employer under the Redundancy Payments Act 1967 (Ireland), section 2(1); the Terms of Employment (Information) Act 1994 (Ireland) section 1(1); the Adoptive Leave Act 1995 (Ireland), section 2(2)(c); the Protection of Young Persons (Employees) Act 1996 (Ireland), section 1(1); the Organisation of Working Time Act 1997 (Ireland), section 2 (1); the Parental Leave Act 1998 (Ireland), section 2 (1); the Employment Equality Act 1998 (Ireland), section 2 (3)(c); the Protection of Employees (Part-Time Workers) Act 2001 (Ireland), section 3(1)(b); the Carers Leave Act 2001 (Ireland), section 2(1) and the Employment Permits Act 2003 (Ireland), section 1(1). Similar formulations can be found in the UK under the Working Time Regulations 1998 (UK), S.I. 1998/1833 Regulation 36(1) and (2) and under the National Minimum Wage Act 1998 (UK), sections 34 (1) and (2).

\textsuperscript{17} Unfair Dismissals (Amendment) Act 1993 (Ireland), section 13 (a).

\textsuperscript{18} See for example the Minimum Notice and Terms of Employment Act 1973 (Ireland); the Protection of Employment Act 1977 (Ireland); the Payment of Wages Act 1979 (Ireland); the Protection of Employees (Employers Insolvency) Act 1984 (Ireland); the Safety, Health and Welfare at Work Act 1989 (Ireland); the Payment of Wages Act 1991 (Ireland); the National Minimum Wage Act 2000 (Ireland) and the Protection of Employees (Fixed-Term Workers) Act 2003 (Ireland).
court will have to assess firstly, whether a contract of employment actually exists\(^ {19}\) and secondly, between which two parties it operates.

1.2. The Current Common Law Approach

Unfortunately an analysis of the case law reveals a similar lack of predictability. As Forde notes, particularly in the Irish context, the identity of the employer, as viewed by the courts, will depend to a very large extent upon the agreement between the parties.\(^ {20}\) The courts in Ireland\(^ {21}\) most frequently insist upon a contract of employment coming into existence between those two parties, which have the greatest mutuality of obligation. In the case of leased workers then, the existence of a contract of employment between the intermediary agency and the worker is the most common decision of the courts.\(^ {22}\) In the UK, unusually, there

\(^{19}\) The rules governing the determination of a contract of employment by the courts are particularly uncertain but recently the courts have tended towards a “reality” test, which looks at all the circumstances of the situation, the existence of control and the existence of the right to terminate the employment of the worker, to determine whether a contract of employment actually exists. There are recent cases on this. See Philip Kirwan v Technical Engineering and Electrical Union, (2005) High Court (unreported) 14\(^ {th}\) January 2005 and Michael Hogan v. United Beverage Sales Limited [2006] ELR 274 which discuss the various tests which can be applied.

\(^{20}\) Forde, Employment Law (Dublin: Roundhall Ltd, 2\(^ {nd}\) ed., 2001) at p. 32.

\(^{21}\) Von Prondzynski, Von Prondzynski and McCarthy on Employment Law (Dublin: Sweet & Maxwell, 2\(^ {nd}\) ed., 1989) at p. 3. von Prondzynski links the basis of the Irish approach to the theories of Sir Henry Maine who described this movement as one away from “feudalism and towards self-determination by individual citizens” (at p.4).

\(^{22}\) In Ireland, in the case of Zuphen v. Kelly Technical Services (Irl.) Ltd. (2000) IEHC 117 at paragraph 86 Murphy J. noted the existence of a relationship between the agency and the worker which was capable of being defined as “one of master and servant, to use the old-fashioned term”. Similarly, in the case of Minister for Labour v. PMPA Insurance Co. (under administration) (1986) High Court unreported 16/4/86, Barron J. held the contract clearly indicated that the employer was the agency and proved this by demonstrating that no contract of employment could possibly have come into existence between the user-employer and the worker. In the UK, it is generally accepted that a contract of employment comes into existence between the intermediary agency and the worker. See for example McMeecham v. Secretary of State for Employment (1997) IRLR 353 per Waite LJ; Stephenson v. Delphi Diesel System (2003, EAT) ICR 471; Bunce v. Postworth Ltd. (t/a Skyblue) [2005] IRLR 557. The latter case held that, on the facts of the case, no contract of employment came into existence at all. However it did express agreement with the dicta of Waite LJ in McMeecham. See Edwards, “Legal Update: Employment Law: Agency Workers” (2005) 102 Law Society Gazette 27 at p. 30. See also “News” (2005) 155 New Law Journal 7176. See Deakin and Morris, Labour Law (London: Butterworths, 2\(^ {nd}\) ed., 1998) at p. 179 (New edition 2001) where they note that as a matter of construction, “an agency worker will
have been judicial dicta to the effect that the user-enterprise will, on certain occasions, be considered to be the employer, while in both jurisdictions the courts have often chosen to describe the relationships, which come into existence as being governed by a contract *sui generis*. In the latter two cases “striking features” distinguish the cases from the decision that recruitment agencies are the employer of the migrant worker. In many cases, for example, a large degree of control by the user-enterprise was discernible. In others, little consideration was given to the possibility of an implied contract of employment between the agency and the worker, to conform to the expectations of the parties. The most recent

almost certainly have a contract with the agency, but is much less likely to have one with the user”. The most recent decisions of the Employment Appeals Tribunal in the UK would appear to reinforce this view. See Consistent Group Ltd. v. Kalvack & Ors. EAT 18.05.07; Heatherwood and Wexham park Hospitals NHS Trust v. Mr. D S Kulabowilia, Mr. R Andrews, Mr P Hill and Short Term Engineering Ltd. (2007) Appeal NO. UK EAT/0633/06/LA where His Honerable Judge Peter Clark held that the contract was between the agency and the worker and in Mr DJ Astbury v. Gist Ltd (2007) Appeal No. UKEAT/0619/06 DA where the same decision was made. This might occur where for example, the relationship between the agency and the worker were never intended to reflect reality “but rather to obfuscate the true nature of the relationship”. See James v. Greenwich Council [2006] UKEAT 0006_06_1812 at paragraph. 37; Craigie v. London Borough of Haringey [2007] UKEAT 0556_06_1201; Brook Street Bureau (UK) Ltd. v. Patricia Dacac (2004) EWCA Civ 217. Here the Court expressed the view that an implied contract of employment could come into existence between the user-employer and the worker but this was not discussed on appeal (per Munby J at paragraph 53). In Ireland this was held by the Circuit Court in the case of Jacinta Cervi v. Atlas Staff Bureau (unreported) Circuit Court. See Department of Enterprise, Trade and Employment, *Review of the Employment Agency Act, 1971*; White Paper, June 2005 at 4-5. See Deakin and Morris, *Labour Law* (London: Butterworths, 2nd ed., 1998) at p. 39 (new edition 2001) There is also implicit acceptance of this approach in *Minister for Labour v. PMPA Insurance Co. (under administration)* (1986) High Court unreported 16/4/86, where Barron J quoted with approval the judgment of Cooke LJ in *Construction Industry Training Board v. Labour Force Ltd.* (1970) 3 All ER 220. In the UK, this concept of a contract *sui generis* has been found in many cases. See for example *Ironmonger v. Movefield Ltd.* (t/a Deering Appointments) (1988) IRLR 461 per Wood J and *Construction Industry Training Board v. Labour Force Ltd.* (1970) 3 All ER 220 per Cooke J. *Motorola Ltd. v. Davidson and Another* (2001, EAT Edinburgh) IRLR 4 at paragraph 2 (per Lindsay J).

In the case of *Motorola* (supra n. 25 above), the user-enterprise was held to be the employer on the grounds that it provided the employee with induction courses, instructions as to how to do the job, the tools for the job, the permission for holidays and absences and dealt with the issues of overtime and any grievances. Lindsay J noted that the user-enterprise was for all intents and purposes the employer and exercised “*the same or even a greater degree of control over [the worker] than it would have done over a full-time orthodox employee*”. (At paragraph 10). Similarly in the case of *Construction Industry Training Board v. Labour Force Ltd.* (1970) 3 All ER 220, it was held that the respondent was not a recruitment agency at all. The Court did consider the possibility of a contract of employment between the respondent and the worker but a sufficient degree of control did not exist.

25 See *Ironmonger v. Movefield Ltd. (t/a Deering Appointments)* (1988) IRLR 461 per Wood J.
decision in the UK confirms the position of the agency worker as a particularly precarious one where the existence of the contract of employment will depend very much on the facts of the case at hand.\textsuperscript{28}

1.3. The Effect of the Current Approach on Migrant Workers

The effects such decisions have on migrant workers are many and varied but the combined result is that migrant workers are in a particularly disadvantaged position in comparison to their employer.\textsuperscript{29} Cohany reports that in the United States, temporary agency workers are heavily concentrated in manual labour industries, are disproportionately young, female, members of minority groups and somewhat less educated than other workers. In general, they are relatively dissatisfied with their work, with two-third preferring to work in more traditional employment.\textsuperscript{30}

1.3.1. The Difficulty in Enforcing Employment Rights

The result of the lack of uniformity in the legislation and in the decisions of the courts means that there are “now a large and growing number of people in full-time or nearly full-time work who, because they work under agency agreements, ..

\textsuperscript{28} James v. Greenwich Borough Council [2008] EWCA Civ 35.
\textsuperscript{29} Rothstein reports that the growing use of leasing recruitment agencies will result in lower pay and less stable jobs. Rothstein, “Entry into and Consequences of Nonstandard Work Arrangements” (1996) Monthly Labor Review 76 at p. 76. The articles explores the impact on workers aged between 29 and 37 of being in non-standard employment. It examines the distribution, aspects of work behaviour and life events and compares wages and hours worked on a previous job with those on the current job “to see whether the non-standard employment arrangements imply a relative “step up” versus a “step down” with respect to wages and hours”. The article concludes that overall there is a relative “step down” with respect to wage growth. This is supported by the research of Hipple and Stewart who found that “temporary agency workers earn less that their counterparts in traditional arrangements”. Hipple and Stewart, “Earning and Benefits of workers in alternative work arrangements” (1996) Monthly Labor Review 46 at p. 54.
do not enjoy the full range of employment rights conferred under the legislation”.

In such cases, both national and non-national workers, whether from within the EU or otherwise, find themselves in a legal vacuum when it comes to enforcing their legitimate employment entitlements against their employer.

This can be most conveniently demonstrated by examining the case of one migrant worker, Ms. Salvacion Y Ortenero Orge, a beautician hired to work on board an Irish registered passenger vessel. Ms. Orge was recruited by a Philippine based agency, one of the largest recruitment agencies for seafarers in the Philippines. Her contract of employment was characterised by illegal recruitment practices, underpayment of wages, few hours of rest and lack of representation.

Yet her user-enterprise, claimed that it was completely unaware of the terms and conditions of Ms. Orge’s employment as the contract operated between Ms. Orge and the employer identified in her employment contract, the recruitment agency. Despite this the user-enterprise decided to settle with Ms. Orge and to pay her significant compensation but only after Ms. Orge decided to pursue expensive and potentially unsuccessful court action to establish her legitimate employment entitlements through the Irish Labour Court.

The case of Ms. Orge demonstrates effectively the ease with which employers and recruitment agencies can avoid their legal duties to their employees, leaving their

31 Bunce v. Postworth Ltd. (t/a Skyblue) [2005] IRLR 557 at paragraph 32 (per Keene LJ).
32 Jupp, “Agency work: legal black hole”, (2005) 155 New Law Journal 1447 at p.1447. The author notes that there are over 700,000 agency workers in the UK who “can never be sure, even with the best legal advice, whether an employment tribunal will find that they have a contract of employment with the agency or the “end-user””.
33 The contract contained conditions that effectively sanctioned an hourly rate of pay of €1.08 and a twelve-hour day with three days rest a month.
workers unclear as to the identity of their real employer and who is responsible for their rights and entitlements.

Often the migrant worker is prevented from accessing employment rights merely because they are employed by a leasing agency. The difficulty here is that a leased agency worker, employed under such conditions, may not have a continuous employer for more than a few weeks and while this may suffice in some cases, for some of the most important protections, including protection against unfair dismissal,\textsuperscript{35} they will not be able to meet the requisite levels of continuous employment to claim under the legislation. It is significant that the reasoning behind such legislation is aimed at the protection of the employer against frivolous and unnecessary claims by workers who have only been in their employment for a short period of time. Yet the consequence of this is that already vulnerable migrant workers are placed in positions of particular disadvantage in comparison with the employer, whoever this may be.\textsuperscript{36}

1.3.2. The Procedural Difficulties in Enforcing Employment Rights

One of the other major pitfalls of the current uncertainty arises from the procedural difficulties involved in pursuing employment rights. This has caused

\textsuperscript{35} The Unfair Dismissals Acts (1977-1993) requires a continuous period of service of up to one year before its provisions can be relied upon. In certain cases the migrant worker will have access to the employment tribunal under the Employment Equality Acts 1998-2004 where the migrant worker can show that they have been discriminated against on one of the nine grounds mentioned in the Act.

\textsuperscript{36} The system is the same in the United States where it is made clear that a worker must be an employee before any rights can accrue. Linder, “Employed or Self-Employed? The Role and Content of the Legal Distinction: Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy rooted in Simulated Statutory Purposelessness” (1999) 21 Comparative Labor Law and Policy Journal 187. A similar situation exists in civil law jurisdictions. For a detailed examination of the situation in Germany see Daubler, “Employed or Self-Employed? The Role and Content of the Legal Distinction: Working People in Germany” (1999) 21 Comparative Labor Law and Policy Journal 77.
many leased agency workers to fail in their quest to assert their rights.\textsuperscript{37} Where the migrant worker decides to bring a case against their leasing agency or their user-enterprise to assert their employment rights and they fail, they cannot then assert their rights against the other party unless that party was also joined in the proceedings. A case must be taken both against the agency and the user-enterprise to ensure that the contract can at least be asserted against one of the parties, an option many workers will fear due to the potential costs, time and breakdown in relationships between the worker, the user-enterprise and the agency involved. In the case of \textit{Dacas v. Brook Street Bureau (UK) Limited}\textsuperscript{38} the user-enterprise was not joined as a party to the final proceedings in the Court of Appeal for England and Wales and for this reason, when the court ruled that Mrs. Dacas was the employee, not of the agency, but of the user-enterprise, her case could be taken no further. These procedural rules are advantageous to the user-enterprise and the leasing agency as they are designed in such a way as to make the enforcement of rights by the migrant worker a difficult and uncertain act capable of destroying their relationship with their employer. The migrant worker is therefore deterred from pursuing their employment rights by this uncertainty.

1.3.3. The Potential for Discrimination

Other procedural difficulties arise in cases involving issues of discrimination where due to the legal status of leased workers, it has become increasingly difficult to pursue equality with co-workers. This is due to the formulations developed by the current Irish anti-discrimination system, governed by the

\textsuperscript{37} Jupp, \textit{supra} n. 32 at p. 1447.

Employment Equality Act 1998 (Ireland)\textsuperscript{39}, where significant emphasis is placed on the existence of a suitable comparator against whom disparate treatment can be compared. The legislation makes it very clear that in the case of leased workers comparators can only be drawn from other leased workers\textsuperscript{40} in the employment of the user-enterprise. The result is that leased workers are not entitled to compare themselves to other permanent employees in the user-enterprise. Employers can use this provision to keep the terms and conditions of employment of migrant workers hired through leasing agencies lower than those of national workers. Migrant workers are therefore often hired on short-term contracts to save the employer from the burdensome financial consequences of maintaining core employees entitled to basic employment rights. Similar provisions have been incorporated into legislation governing the rights of part-time workers.\textsuperscript{41}

1.3.4. The Diminution of Collective Bargaining Rights

The lack of protection at a national and international level of collective bargaining rights is one of the most significant burdens facing migrant workers during the recruitment process.\textsuperscript{42} The recent ILO Convention on Private Employment Agencies\textsuperscript{43} provides that member states should take measures to ensure that all recruitment agencies respect a workers’ right to freedom of association and the

\textsuperscript{39} As amended by the Equality Act 2004 (Ireland).
\textsuperscript{40} Section 8(2) Employment Equality Act 1998 (Ireland).
\textsuperscript{41} Section 7(4) Protection of Employees (Part-Time Work) Act 2001 (Ireland) provides that the comparator for agency workers will be another agency worker in the user-enterprise.
\textsuperscript{42} As noted in “Developments in Law – Employment Discrimination” (1996) 109 Harvard Law Review 1647 temporary workers were so “transitory that the costs of organizing would be prohibitive, and their individual claims to statutorily – secured guarantees are ephemeral as any labor conditions that might violate them”.
\textsuperscript{43} ILO Convention No. 181.
right to bargain collectively.\textsuperscript{44} However, the Convention does not provide any guidance on how this is to be achieved in practice.\textsuperscript{45}

In Ireland, the protection of workers in employment is well provided for by employment legislation. However, it has failed in any real way to extend to the protection of leased migrant workers. This is because migrant workers are not usually covered by the collective bargaining agreements in many user-enterprises and are generally fearful of joining a union while out on contract for fear of reprisals from their recruitment agency that may or may not be their employer.\textsuperscript{46}

As Vigneau has noted, the \textit{“performance of the assignment within the user company, the short duration of the assignment, and the constant change of employer make it particularly difficult for agency workers to exercise collective rights”}.\textsuperscript{47} This can have significant effects on migrant workers who often have little or no access to trade union protection in many employments.

The construction of the present system of trade union representation, which depends exclusively upon which union is operating within a particular organisation, severely undermines the protection of migrant workers in employment generally. In fact, it only seeks to reduce the financial and administrative burdens on the employer and to isolate the migrant worker from the

\textsuperscript{44} ILO Convention No. 181, Article 4.
\textsuperscript{45} Raday “The Insider –Outsider Politics of Labour –Only Contracting” (1999) 20 \textit{Comparative Labour Law and Policy Journal} 413 at p. 426. Raday comments that the Convention fails in any real way to deal with the manner in which agencies undermine the whole concept of collective bargaining.
other employees in the workforce. This isolation opens up greater potential for exploitation of migrant workers by their employers. As a result, it cannot be said that migrant workers are provided with the tools to find out information about their employer and their terms and conditions of employment. As a result “the experience of all too many migrant workers, who fall into the hands of disreputable agencies, is one of virtual forced labour and appalling living conditions. These abuses undermine the proper functioning and reputation of the sector as a whole”48.

1.4. Reinstating Transparency

The identity of the employer of the migrant worker, against whom employment rights can be enforced, is the most intractable method by which it can be ensured that migrant workers give true consent to employment. The difficulty with the allocation of such responsibility in Ireland is the trenchant opposition that arises each time it is suggested that an employment relationship should be developed between the user-enterprise and the migrant worker. This is because it questions “the most basic assumptions upon which the whole of the industry has hitherto conducted its business”49. Avoidance of legal duties and the associated costs, are the biggest reasons user-enterprises decide to hire workers through recruitment agencies instead of through a more direct route.50 The fears expressed by many commentators with regard to the dangers of excess regulation apply equally in this

49 Brook Street Bureau (UK) Ltd. v. Patricia Dacas [2004] EWCA Civ 217 at paragraph 81 (per Munby J).
context. In particular, the fear of a reduction in the demand for agency workers and the distinct possibility that if user-enterprises are forced to extend benefits to their agency workers, they will in effect end up discontinuing the benefits already attendant upon its core employees,\textsuperscript{51} are real.

Therefore the proposition that the recruitment agency be held responsible for the employment rights of migrant workers because of their intimate relationship with the contract of employment, is more acceptable. The question then arises as to why such recruitment agencies should not be responsible for ensuring the enforcement of employment protections for migrant workers. Most of the decisions of the courts surrounding agency relationships in the UK and in Ireland would appear to support the concept of the recruitment agency as the employer. Indeed the ILO, in its recent Convention on Private Employment Agencies reinforces the view that this is the most appropriate solution to the situation of leased migrant workers in such jurisdictions.\textsuperscript{52}

In the recent Employment Permits Act 2006 (Ireland), the Irish Government reiterated its position in relation to this issue, an opinion that appears to be at odds with the position endorsed in the EU Temporary Agency Workers Draft Directive.\textsuperscript{53} The legislation provides that that the agency will never be the employer of a worker employed through a leasing agency.\textsuperscript{54} What is unusual about the Act is the fact that the recruitment agency may apply for an employment

\textsuperscript{52} ILO Convention No. 181 (1997), Article 12.
\textsuperscript{54} Section 1(3) 2006 Act.
permit on behalf of a migrant worker but may never be responsible for the employment rights of that worker. Despite the fact that the present Irish Government has promised to develop legislation that will ensure every employee will have an identifiable employer within the State, how and when this will be implemented has not been elaborated beyond this mere assertion.

1.4.1.Achieving Certainty: A Practical Solution

In devising a practical system that provides migrant workers with significant levels of protection and one which does not detract from the present position of leased workers in the market place, it is interesting to examine the Employee Leasing Law of 1972 (Germany). This law, despite preceding the EU Draft Directive by almost 40 years, implements very similar provisions to those enumerated in the Draft Directive and has developed a system of strict regulation of the three party contract which exists between the recruitment leasing agency, the workers and the user-enterprise. The German Law sets out in a clear and efficient manner the duties and responsibilities of all the parties to the contract.

1.4.1.A. The Employee – Leasing Contract

The central precept of the law is the development of two distinct contracts. The first of these is the employee-leasing contract which comes into existence between

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the user-enterprise and the leasing agency,\textsuperscript{59} which effectively provides that the leasing agency will provide the user-employer with a worker without the user-employer becoming the legal employer of the worker.\textsuperscript{60} This means that in all cases it is clear that the leasing agency is at all times the employer of the migrant worker. The migrant worker is thus aware of whom his/her employer is and against whom he/she can enforce their rights.

1.4.1.B. The Employment Contract

The second contract which comes into existence is a contract between the worker and the recruitment agency, which is very clearly a contract of employment.\textsuperscript{61} The conditions laid out in these contracts are also detailed in the legislation. The employment contract specifically states that the contract must be unlimited in duration\textsuperscript{62} and details the terms and conditions of employment as would be seen in any legal contract of employment.\textsuperscript{63} The leasing agency is responsible for the payment of wages.

Secondly, the contract is clear as to the terms and conditions of employment under which the migrant workers operates. At the outset, the migrant worker is provided with a contract of employment which details the conditions under which they work. This means that they are aware and are freely able to consent to the conditions under which they work. The specific references to equality for migrant

\textsuperscript{59}Employee Leasing Law 1972 §1, ¶1, AUG (Germany). In France, a similar legislative scheme is in force. The three party contract is regulated by what is known as the contract of assignment. See French Labour Code Article L. 124-3 (France).

\textsuperscript{60} Employee Leasing Law 1972, 1, P.1 (Germany).

\textsuperscript{61} This is similar to the situation under the French Labor Code Art. L. 124-4 (France). See also Schuren \textit{supra} n. 57 at p. 68.

\textsuperscript{62}Employee Leasing Law 1972, 9 P. 2 (Germany).

\textsuperscript{63} See Schuren \textit{supra} n. 57 at p. 70.
workers with other workers in the user-enterprise in terms of remuneration prevents the situation which may arise whereby user-enterprises hire out workers at a cheaper rate in order to avoid the cost of recruiting core employees. However, leased workers still remain attractive due to the low recruitment costs and the availability of high skills for short-term projects. While the German law does not allot a maximum amount of time for which a recruitment agency worker may remain employed by a user-enterprise without becoming an employee of the user-enterprise, it is envisages that this would be a useful addition to any legislation in this area.

1.4.1.C. The Comparator

A solution to the problem of the potential for discrimination where a user-enterprise is comparing a leased worker with other leased workers in the user-enterprise would be to provide that the agency worker is entitled to equal rights to another core employee in the user enterprise. This is what is provided for in the new Draft Temporary Agency Workers Directive and the German Employee Leasing Law (Germany). Since 2004 in Germany, the leasing agency is obliged to pay the leased person the same wages as the leased person would get as an

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64 This was one aspect which was not covered by the ILO Convention No. 181 or by the German Leasing Law (Germany). As Raday comments the Convention also failed to “limit the numerical or percentage extent of recourse to leased workers in order to protect core in-house employment”, a task, the ILO had previously considered worthy of Conventions in its own right. Raday “The Insider – Outsider Politics of Labour – Only Contracting” (1999) 20 Comparative Labour Law and Policy Journal 413 at p. 426.

65 Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers/*COM/2002/0149final-COD2002/0072*/. Despite trenchant criticism the Draft Temporary Agency Workers Directive proposes to apply the principle of equality to agency workers and to utilise the regular employees of the user-enterprise as the comparators.

66 See also the French Labor Code (France) Art. L. 124-4-2.
employee of the user-enterprise as long as there is no collective bargaining agreement in force.

1.4.1.C.(i) The Draft Directive

The proposed Directive has promised an increased level of protection for leased workers in Europe. Conceived in 1990 following a proposal from the Commission, the proposed Directive has had a turbulent history, the main point of contention originating with this issue of equal pay for leased workers. There were many states in favour of a provision, which would give equal conditions of employment to a leased worker as temporary workers directly employed by the user enterprise. This would include offering such workers equal rights as permanent core employees and training and education rights. This formulation was adopted in the most recent proposals.

Ireland and the UK have been at the fore in rejecting this concept of the comparator in the user-enterprise and have been singled out by the European Trade Union Confederation for special criticism. Both states have been accused of

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67 Article 1(1).
69 See the preamble at paragraph 15 which states that “The basic working and employment conditions, applicable to temporary workers should be at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job”. See also Article 5 which sets out this principle. Zappala infra n. 73 at p. 315.
70 In particular, the European Trade Union Confederation. See the description given by Jones, “Temporary Agency Labour: Back to Square One?” (2002) 31 Industrial Law Journal 183 at p. 185.
71 Zappala notes that this concept of “worker” includes both employees i.e. those working under a contract of employment and those persons who are not considered employees but who do work under a contract for services, such as leased agency workers. Zappala infra n. 73 at p. 311.
72 Article 6(1) and (2) of the Proposed Temporary Agency Workers Directive.
74 Zappala supra n. 73 at p.315.
creating a stalemate in the introduction of the proposed Directive. 75 Employer bodies in the UK and Ireland have concerns over the potential increases to costs and bureaucracy that the proposed Directive might entail. The Confederation of British Industry contends that the proposed Directive as it stands could cost the UK over 160,000 temporary jobs. 76 There is also a distinct fear that the proposals will adversely affect small businesses that are vulnerable to small changes in regulation. 77

However, a recent study 78 has shown that while 57% of employers state that they would reduce the numbers of temporary agency staff that they employ if the new proposals are adopted, only 1% stated that they would replace temporary staff with permanent ones altogether. 79 So it remains clear that the demand for temporary agency staff will remain strong. It must also be noted that in relation to small businesses the use of temporary employment is much more limited than larger businesses so therefore the impact would not be as significant as envisaged by the Report. 80 In any event, Vockrodt notes that the proposed Directive actually dulls the effect of the equal pay terms on small businesses as it requires equal pay only when there are formal pay scales or a collective bargaining agreements in force. 81

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75 ETUC’s 10th Congress, Prague, May 2003 IN ETUC supra n. 68.
78 Carried out by the Confederation of British Industry.
81 Vockrodt supra n. 80 at p. 600.
The reality, therefore, is that the present proposals could in fact make agency work more attractive to employers by increasing its status among user-enterprises, clarifying the law and ensuring certainty in employment. As the Trade Union Congress has noted these provisions also have the potential to prevent unscrupulous employers who are attempting to avoid providing basic rights to workers, including migrant workers.82

(ii) The Recent UK Approach

Interestingly, the UK has sought the introduction of legislation governing this area of law in the form of the Temporary and Agency Workers (Equal Treatment) Bill 2008 (UK). This Bill seeks to introduce the concept of a comparable worker in the user-enterprise as the proposed Directive also seeks83. The introduction of this legislation could do much to ensure the rights of migrant workers employed through leasing agencies in the UK. However, the introduction of the Bill has been met with the same criticism as its European counterpart and as yet no decision has been made on the future of this piece of legislation.

1.4.2. Conclusion

The German approach and the Draft Directive provide a good framework from which proposal for reform of the law in Ireland in relation to leased workers can be adduced. However, the identity of the employer is just one factor that influences the migratory experience of the migrant worker. Information in relation

82 TUC supra n.  48 at p. 8.
83 Section 1.
to the terms and conditions of employment is also essential to ensure that the
migrant worker is not exploited during the recruitment process. The next Section
of the Chapter will deal with this particular issue.

2. Financial Considerations in utilising Recruitment Agencies

Financial difficulties are among the greatest obstacles facing migrant workers
during the recruitment process.\textsuperscript{84} The amount of money that a recruitment agency
will charge a migrant worker has become a very important condition of migration
and recruitment for migrant workers. The charging of fees by recruitment
agencies is not an unusual phenomenon despite international and national
prohibitions on fee-charging.\textsuperscript{85} Media stories of fee-charging by recruitment
agencies are plentiful\textsuperscript{86} and reports of migrant workers in Ireland paying fees of
up to €6,000 are not uncommon.\textsuperscript{87}

When this author made some preliminary investigations into recruitment agencies
operating over the internet, the charging of fees was a common occurrence. In one
particular instance, the recruitment agency stated that the costs were always
covered by the employees \textit{“who pay for: transportation, collecting and

\textsuperscript{84} As Mr. Durken noted in Dáil Éireann on Wednesday, 12 October 2005 Volume 607 No. 3
\textit{“many of the poor people who come here seeking employment must pay some intermediary an
excessive sum of money...This is reprehensible”}.

\textsuperscript{85} ILO Convention No. 181, Article 7 Annex II paragraph 3.1(a); ILO Convention No. 96, Article
Employment Agencies in Australia: A Historical Approach” (2001) 23 Comparative Labour Law
and Policy Journal 7 at p. 8.}

\textsuperscript{86} See Diminescu “Assessment and Evaluation of Bilateral Labour Agreements Signed by
Romania” In OECD \textit{Migration for Employment: Bilateral Agreements at a Crossroads} (Paris:
OECD, 2004) at p. 69. The author discusses the substantial fees paid by migrant workers to
recruitment agencies in Romania for jobs which might not even exist.

\textsuperscript{87} Ms. Denise Charlton, CEO Immigrant Council of Ireland, Joint Committee on Enterprise and
Small Business, Vol No. 47 Wednesday, 16 June 2004. See also the speech of Mr. Derek Stewart,
Steering Committee of the Immigrant Council speaking in the Joint Committee on Enterprise and
completing indispensable documents”. Further, migrant workers were expected to pay the fees in advance of the employment permit application being delivered to the Department of Enterprise, Trade and Employment as a “guarantee that everyone will come”. Where the employment permit is refused or the worker decides not to travel, the recruitment agency expected the worker to return to the recruitment agency “to get the transport fee back” despite the fact that “the candidate will not get total refund, because part of his money will be remitted to the employer to cover real costs related with applying for work permit”. This is also borne out in research conducted in Ireland in recent years. One report has demonstrated that migrant workers in Ireland pay fees to foreign and domestic agencies for their services, despite the fact that the Irish Employment Agency Act 1971 and its UK equivalent both prohibit in a general way the charging of fees by recruitment agencies.

The phenomenon of fee-charging is not uncommon amongst EU and third country nationals. In relation to the latter group of workers, the recent amendments to the

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<table>
<thead>
<tr>
<th>Country of Payment of Fee</th>
<th>Amount Paid or Equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philippines</td>
<td>43,000 pesos (c. € 850)</td>
</tr>
<tr>
<td>Philippines</td>
<td>53,000 pesos (c. € 1,000)</td>
</tr>
<tr>
<td>Lithuania</td>
<td>One months Lithuanian salary</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Six months Lithuanian salary</td>
</tr>
<tr>
<td>Ukraine</td>
<td>Twelve months Ukrainian salary</td>
</tr>
<tr>
<td>Poland</td>
<td>No charging of fees reported</td>
</tr>
</tbody>
</table>

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88 See as an example www.mywork.agent-tour.pl/england.php [last checked 15th September 2008].
89 See recruitment agency above supra n. 88.
90 See recruitment agency above supra n. 88.
91 Conroy and Brennan, Migrant Workers and Their Experiences (Joint Publication of the Equality Authority, Congress, CIF, IBEC and Know Racism, 2002) demonstrate at p. 20 using a summary table, the fees reported to have been paid outside the Irish jurisdiction to recruitment agencies by current resident migrant workers in Ireland (2002).
92 Section 7(1) and (2) Employment Agency Act 1971 (Ireland). Unless such fees are sanctioned by the Minister for Enterprise, Trade and Employment.
employment permit regime appear to increase the cost of recruitment to the migrant worker. Under the most recent legislation, where the migrant worker applies for his/her own employment permit, he/she are required to pay a fee for his/her employment permit, which he/she have no guarantee of recovering from their employer.\textsuperscript{94} Therefore, despite international and national prohibitions on fee-charging during the recruitment process, migrant workers continue to be burdened unnecessarily by this phenomenon in Ireland.

2.1. Eliminating Excessive Fee-Charging

There is a strong international prohibition against fee-charging by recruitment agencies.\textsuperscript{95} This is due to the danger that where a migrant worker is forced to pay exorbitant fees for their recruitment, he/she will end up working only to repay those fees and become vulnerable to exploitation. Despite the dangers involved in fee-charging by recruitment agencies, the general prohibition on fee-charging by recruitment agencies is not an absolute rule and often states allow for a certain level of fees to be charged.

2.1.1. The Irish Approach

The Irish legislation allows for a certain level of fee-charging where this does not exceed “a scale approved by the Minister”.\textsuperscript{96} Such a scale has never been

\textsuperscript{94} This fee can be quite substantial. At present a employment permit for a period of 6 month costs £500, one for 6-12 months £1,000 and a permit for any time more than that £1,500. See Department of Enterprise, Trade and Employment at www.entemp.ie [last checked 15th September 2008]. See also Employment Permits Act 2006 (Ireland) section 8.


\textsuperscript{96} Employment Agency Act 1971 (Ireland), section 7(1). The Minister referred to is the Minister for Enterprise, Trade and Employment.
implemented because it was considered prohibitive to set certain fee levels given that it was reasonable to expect that “commercial competition should prevent the charging of excessive fees”\textsuperscript{97}. This failure by the Oireachtas to set a fee level can be interpreted in two ways. Firstly, recruitment agencies are not entitled to charge any fees whatsoever, as no fee has been set by the Minister for Enterprise, Trade and Employment. In the alternative, it could be interpreted as allowing recruitment agencies to charge what they please because there is no minimum fee set by the Oireachtas. This latter interpretation would be contrary to Ireland’s commitments under international law. However, given the former Minister’s references to market forces and his reluctance to interfere with such forces, this is most likely the current situation in Ireland. This inconsistency alone is enough to demonstrate the need for reform of the legislation in Ireland.

2.1.2. The UK Approach

While, in the UK, the recent regulations\textsuperscript{98} governing recruitment agencies reassert the prohibition on fee-charging,\textsuperscript{99} they do go on to allow fee-charging in certain defined circumstances. Firstly, fee-charging will be allowed where the service is provided to certain occupations including artists, performers and professional sports persons.\textsuperscript{100} In such cases, however, the fee charged must only be one based on commission for work found for the work-seeker.\textsuperscript{101} A fee may not be charged where the agency is also receiving a fee from the hirer\textsuperscript{102} or where the agency or

\textsuperscript{97} Minister for Labour (Mr. J. Brennan) Dáil Éireann-Volume 256-17 November, 1971 Employment Agency Bill, 1971 [Seanad]: Second Stage at column2160.
\textsuperscript{99}Ibid, Regulation 26(1).
\textsuperscript{100}Ibid, as set out in Schedule 3.
\textsuperscript{101}Ibid, Regulation 26(2).
\textsuperscript{102}Ibid, Regulation 26(3).
business include information about the work-seeker in a publication for the purposes of finding work-seekers employment in, or providing hirers with information about a work-seeker looking for work in, one of the occupations listed in Schedule 3103 and that is the only service provided by the agency. Where the fee resembles the cost of publication and circulation of the publication and the work-seeker has access to a copy of this publication104 a fee may also be charged and the agency, the hirer and the work-seeker must be informed of this link.105

This departure from the general rule is relatively benign and includes protections against the various forms of abuse. The list of occupations covered by the exceptions is comparatively small and represents occupations not usually undertaken by vulnerable migrant workers. Indeed the remuneration for such occupations would be of such an amount that the possibility of exploitation is reduced. The same can be said of the final exception, which allows a fee to be charged for work-finding services where the work-seeker is a company106 and where the employment is in one not listed in Schedule 3.107 This latter provision is of little relevance to migrant workers, who as individuals are in a far more vulnerable position than companies.

The benefit of the legislation in the UK is the detail in which it develops the prohibition against fee-charging and the importance of the concept of

103 Schedule 3 sets out certain occupations in respect of which employment agencies may charge fees to work-seekers. Examples include performers, artists and professional sports persons.
104 Ibid, Regulation 26(5).
105 Ibid, Regulation 26(4).
107 Ibid, Regulation 26(7) (b).
disclosure. The development of such a discursive attitude to the prohibition on fee-charging, the recognition that it is advisable in certain cases and the importance of openness in the invoicing of fees by recruitment agencies has meant that the issue of fee-charging can finally be aired for public debate and the practices of recruitment agencies available for public scrutiny.

2.1.3. Adoption of the UK Approach in Ireland

The development of a system similar to that operating in the UK in Ireland would do much to remedy the current uncertainty in Irish law in relation to fee-charging by recruitment agencies and question the relaxed approach currently adopted by the Irish legislature in relation to this issue. The approach in the UK, despite complexity in certain areas, is a coherent piece of legislation that places openness and transparency in the area of fee-charging ahead of administrative simplicity. Such an approach in Ireland would be very welcome. This would merely require a clear statement that no fees will be charged unless clearly specified by the Minister for Enterprise, Trade and Employment by regulation.

3. Misleading Information and the Effect on Migrant Workers

While giving a migrant worker a job description may seem a simple and obvious task for a recruitment agency, many migrant workers report that they are given false and misleading information about their job and the terms and conditions of employment. Recruitment agencies often provide migrant workers with

108 The regulations refer to disclosure of the calculations, the method of payment and details in relation to return of the payment. Ibid, Regulation 13.
inadequate, false or misleading information in relation to their job, the receiving state and their rights.

There are two aspects to this problem. Firstly, the current situation whereby migrant workers are laid vulnerable to exploitation by virtue of inaccurate or misleading information distributed to them by recruitment agencies must be considered. In this respect, it will be necessary to consider the current regulations governing such acts internationally and nationally. Secondly, if migrant workers do find that they are disadvantaged in some way by misleading information, the issues of remedies will become important. This section of the Chapter examines the current law and potential solutions in relation to these two issues.

3.1. Preventing the Transmission of Misleading Information

One of the most serious obstacles facing migrant workers who utilise recruitment agencies is the danger of misinformation. This can lead to migrant workers taking up jobs for which they are unqualified, unskilled and unprepared, in employments which are unsuitable and in conditions of which they have little if no information. So how can this be prevented?

3.1.1. The International Approach

In order to ensure full transparency during the recruitment process, it is necessary first to consider ways in which to remove many of the inaccuracies and misleading information often presented to migrant workers by recruitment
agencies. The ILO in the Migration for Employment Convention (Revised) 1949\(^\text{109}\) provides that special measures should be taken to repress misleading propaganda relating to immigration and emigration.\(^\text{110}\)

3.1.2. The Irish Approach

This has never specifically been adopted into national legislation but there are existing provisions in Irish law that, if utilised, could be effective in this regard. The Employment Equality Act 1998 (Ireland)\(^\text{111}\) prohibits the display of any employment advertisement, which discriminates or demonstrates an intention to discriminate on one of nine grounds\(^\text{112}\) provided for under the legislation.\(^\text{113}\) However, outside of these initiatives there are little protections for workers. This is in contrast to consumers who are increasingly protected against misleading advertising. Why these protections have not been extended to workers is questionable and unfortunate as there is a great potential in the most recent legislation for the protection of migrant workers against the dangers of misleading advertising.

The only standards presently in place are those laid out by the Advertising Standards Authority. Recruitment agencies are expected to adhere to the 2007 Code of Advertising Standards from the Advertising Standards Authority of Ireland, which provides that advertisers of employment opportunities should ensure that employment advertisements correspond to genuine vacancies and in

\(^{109}\) ILO Convention No. 97.

\(^{110}\) Art. 3(1).

\(^{111}\) As amended by the Equality Act, 2004.

\(^{112}\) These are gender, marital status, family status, sexual orientation, religious belief, age, disability, race or membership of the travelling community. See section 6(2).

\(^{113}\) Section 10(1) (a) and (b).
all cases, “should not require interested respondents to send money for further details”\textsuperscript{114}. In particular the standards insist that the terms and conditions of employment should not be misrepresented.

3.1.2. A. Using the Consumer Legislation as a Model for Recruitment Agencies

The Consumer Protection Act 2007 (Ireland) which commenced on the 21\textsuperscript{st} of April 2007 and became effective from the 1\textsuperscript{st} May 2007 prohibits a trader from engaging in any commercial practice\textsuperscript{115} which is misleading.\textsuperscript{116} A practice can be misleading in four specific circumstances, subject always to the caveat that the practice is one that would be likely to cause the consumer to make a transactional decision that the average consumer would not otherwise make. While this does not apply to migrant workers and recruitment agencies at present, as they could not be described as consumers and traders, it does give a good example of the type of legislation that could be introduced.

There are four circumstances where a practice under the legislation may be misleading. Firstly, where false information is provided to the consumer in relation to the execution or performance of the service, this will be an indication that the practice is misleading.\textsuperscript{117} Secondly, a commercial practice will be considered to be misleading where the consumer is deceived or mislead in some

\textsuperscript{114} Section 11.2 Advertising Standards Authority of Ireland.
\textsuperscript{115} This is defined in section 2 as “any conduct (whether an act or omission), course of conduct or representation by the trader in relation to a consumer transaction, including any such conduct or representation made or engaged in before, during or after the consumer transaction”. This definition is very broad and could apply to almost any of the functions of a recruitment agency. What is perhaps most interesting is that the Act applies to any conduct, which occurs even before or after the transaction has taken place. This means that agencies would have to ensure that their services are provided in a manner that is responsible and that all information given to migrant workers in Ireland is accurate and up-to-date.
\textsuperscript{116} Consumer Protection Act, section 2.
\textsuperscript{117} Section 43 (2)(xiv).
way in relation to the performance or execution of the service.\textsuperscript{118} Thirdly, if the trader omitted or concealed information that the average consumer would need to make an informed transactional decision, this would be considered to be a misleading commercial transaction and is therefore prohibited.\textsuperscript{119} Fourthly, if the information is transmitted in an unclear, unintelligible, ambiguous or untimely way this will also be considered to be misleading.\textsuperscript{120}

All of these tests are subject to the \textit{caveat} that the consumer must prove that the misleading practice caused them to make a decision that they would not otherwise have made. This causative link between the misleading information and transactional decision of the consumer could present problems if applied in the context of recruitment agencies. The burden of proof in the current consumer legislation would appear to be on the consumer to prove that had they received different information, they would not have made the decision that they made. If applied in the context of recruitment agencies and migrant workers, it would be very difficult for a migrant worker to prove that they would not have migrated but for the information provided to them by the recruitment agency. This is a crucial hurdle for migrant workers to overcome and one which could prove prohibitive in any legislation.

The difficulties which emerge from this legislative provision is that not only do they present consumers with significant obstacles to clear in establishing a case but they also provide for a right of compensation only after injury, loss or damage has been caused, and provide no protection for migrant workers against loss. This

\footnotesize{
\textsuperscript{118} Section 43(2).
\textsuperscript{119} Section 46(1).
\textsuperscript{120} Section 46(2).}

*ex post facto* approach means that migrant workers can still be misled into migrating for employment and may still be subjected to abuses such as contract substitution. In such cases their only remedy would be one for damages. Migrant workers will need to have the necessary financial resources and the will to take an action to court to challenge a misleading advertisement when it could mean that they may lose their position in the recruitment agency or with an employer for doing so. Prevention may be more effective than the cure.

### 3.1.2.B. Recent Developments in Consumer Law and the Potential Application to Recruitment Agencies

In a similar vein, the most recent European Communities (Misleading and Comparative Marketing Communications) Regulations 2007\(^{121}\) prohibit misleading marketing communications. The Regulations supplement the Consumer Protection Act 2007.

As with the other consumer legislation, it does not apply to contracts for employment.\(^{122}\) However, the relationship between a recruitment agency and a migrant worker is not a contract of employment, unless the migrant worker is a leased worker and the agency a leasing agency. A trader is defined in the Regulations as a “person who is acting for purposes relating to the person’s trade, business or profession...or a person acting on behalf of” such a person.\(^{123}\) Both recruitment agencies and migrant workers would fall into the definition of a trader.

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\(^{121}\) S.I. No. 774 of 2007 European Communities (Misleading and Comparative Marketing Communications) Regulations 2007.

\(^{122}\) Regulation 2.

\(^{123}\) Regulation 2(1).
for the purposes of the Regulations. This is an excellent addition to the protection of migrant workers during recruitment for employment.

The Regulations prohibit misleading marketing communications. The communication must mislead the trader in relation to, among others, the existence or nature of the service, the main characteristics of the service, the price of the service, the nature, attributes and rights of the service provider and the legal rights of the trader to whom the service is provided or matters respecting when, how, or in what circumstances those rights may be exercised. The definition of misleading communications in the Regulations is very broad and it is likely to cover misleading information that recruitment agencies provide to migrant workers.

However, the difficulties present under the Consumer Protection Act 2007 (Ireland) relating to the need to show that the consumer would have acted differently if they had not received the misleading information are equally relevant here. The migrant worker must show that the communication, by reason of its deceptive nature, is likely to affect the migrant worker’s economic behaviour. However, the test is not as difficult to meet as the Consumer Protection

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124 Regulation 3.
125 Regulation 3(2).
126 Regulation 3(4)(a).
127 Regulation 3(4)(b).
128 Regulation 3(4)(c).
129 Regulation 3(4)(d).
130 Regulation 3(4)(j).
Act 2007 (Ireland). The test merely requires the migrant worker to show that the misleading information would be “likely” to affect their economic behaviour, a much easier test to meet. Furthermore, the migrant worker need only show that the misleading information affected their “economic behaviour”. This is a much easier test than that available under the Consumer Protection Act 2007 (Ireland).

The main benefit of the Regulations is that once a migrant worker can prove that information or any service provided to them by a recruitment agency is misleading in some way, either the migrant worker or any other person may apply to the Circuit Court or the High Court, on notice to the recruitment agency, for an order prohibiting that trader from engaging in or continuing to engage in a misleading marketing communication.\(^{131}\) The benefit of this provision is that recruitment agencies that are marketing misleading communications to migrant workers can be prevented from carrying out this behaviour by way of a simple application to the courts. Another benefit is that the application to the courts does not need to be made by a person affected by the communication but by any person who considers the communication to be misleading. This is of great benefit to migrant workers.

The Regulations also provide that the representation is presumed to be untrue until the trader against whom the application is made can prove that the representation is in fact true.\(^{132}\) The Court may, after a consideration of all the interests involved, including the public interest, make an order without any proof of any actual loss or damage on the part of the trader against whom the order is sought or any

\(^{131}\) Regulation 5(1).
\(^{132}\) Regulation 5(2).
intention or negligence on the part of the trader against whom the order is sought.\textsuperscript{133} The Court may order that the trader desist from engaging in misleading marketing communications or prohibited marketing communications, publish a corrective statement, at the trader’s own expense and in any manner that the Court considers appropriate and comply with other terms and conditions that the Court considers appropriate.\textsuperscript{134} These are all welcome protections for migrant workers and will act as a deterrent to recruitment agencies to prevent misleading communications with migrant workers.

The only fault of the Regulations is that they do not provide for damages for loss occasioned as a result of a misleading communication. This would have been a useful and appropriate addition to the protection of migrant workers and it is hoped that this will be provided for in future legislation.

3.1.2. The Development of Regulations Specifically Related to Recruitment Agencies

The approach in the UK brought about by the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (UK)\textsuperscript{135} develops a system that is more appropriate to the situation of migrant workers. In a simple formulation it provides that all job advertisements made by agencies should be easily legible or audible, as the case may be; should clearly indicate the name of the recruitment agency advertising the position; and should give explicit details of the job and the

\textsuperscript{133} Regulation 5(4).
\textsuperscript{134} Regulation 5(5).
qualifications, training and experience required for the job. In conjunction with these statutory requirements, the Recruitment and Employment Confederation Ltd., the professional recruitment agency regulatory authority, has developed a code of practice for its members that insist upon all advertisements being accurate and capable of substantiation by reference. As a further precaution against the possibility of misleading workers, any job advertisements that have been filled are required to be removed from display immediately. Such provisions would be a useful feature of statutory codes of practice in the Irish context governing the operation of all recruitment processes and not just recruitment agencies. It could be equally applicable to advertisements made directly by employers in newspapers or on the internet, whether that employer is the State or merely a business.

While many states insist that the development of such detailed legislation could have the effect of hampering the development of recruitment agencies, in the UK it has met with a very positive response. In fact, they have mostly been greeted with enthusiasm and despite the “inconvenience of a little more paperwork [should] result in greater standards of professionalism and better protection (and fewer disputes) for both clients and candidates – a good trade”.

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136 Ibid, Regulation 27.
138 REC supra n. 137 Article 15.
139 Socca; Director at Sacco Mann Legal Recruitment Consultancy “Career Brief: Agencies can serve and protect” (2004) 101 Law Society Gazette 41 at p. 41.
3.2. Remedies for Misleading Information

The difficulty with all these systems, from the consumer related legislation in Ireland to the more specific approach in the UK, is that they do not provide for a remedial system that is cost effective and simple to use in order to discourage recruitment agencies from giving out false and misleading information in the first instance. This would provide migrant workers with significant compensation for any damage that they suffer as a result of recruitment agency malpractices. This could be most effectively achieved by providing for a right to compensation on a statutory basis so that migrant workers are clear on the remedy that they can obtain. The need for such provisions has recently been recognised in consumer legislation, which provides an excellent model for the introduction of a compensation system into the recruitment agency arena.\footnote{Section 74 of the most recent Consumer Protection Act 2007 (Ireland) provides that any consumer who is aggrieved by a prohibited act or practice shall have a right of action for relief by way of damages, including exemplary damages against any trader who commits or engages in a prohibited act or practice. The Act commenced on the 1st May 2007.}

One of the most novel provisions of the Consumer Protection Act 2007 (Ireland) is the provision that provides that any consumer\footnote{Section 1 of the Act defines consumer as “any natural person (whether in the State or not) who is acting for purposes unrelated to the person’s trade, business or profession”.}, who is aggrieved by a prohibited act or practice, shall have a right of action for relief by way of damages, including exemplary damages, against any trader\footnote{This includes anyone who is acting for the purposes of their trade, business or profession or someone acting on their behalf. Section 1 of the 2007 Act.} who commits or engages in the prohibited act or practice.\footnote{Section 74(2).} This would be an excellent provision to include in legislation for the protection of migrant workers who could use it to obtain damages for the exploitation they may have suffered at the hands of...
recruitment agencies. If this could be extended to more updated recruitment agency legislation, it could have many positive implications for the protection of all migrant workers in Ireland.

Therefore the model of the Consumer Protection Act 2007 (Ireland) would have a significant impact on migrant workers. Firstly, it would provide for protections for migrant workers against misleading advertising. Secondly, it would provide a framework for relief for migrant workers. There is a statutory right to compensation by way of a civil action for damages. These provisions provide a model from which legislation in relation to recruitment agencies could be developed. A list of malpractices for which there is a statutory right to compensation would be very welcome in the recruitment agency sector.

4. Educating Recruitment Agencies

Migrant workers are in a vulnerable position when they seek to migrate not least because of the language barriers that they may encounter. Migrant workers may have little information on the type of work they are expected to undertake, the rights and duties that they will have and may not even have a basic knowledge of local customs, services or laws.

Recruitment agency staff have come under specific scrutiny in recent developments at a national and international level in an effort to reduce the obstacles facing migrant workers during the recruitment process. Recruitment agency staff should display the requisite skill when providing services to migrant workers. Presently, there is a distinct lack of regulations governing staff training
and qualifications, despite calls by the ILO to introduce minimum standards of qualifications.\textsuperscript{144} The ILO promotes the development of skilled recruitment agency staff.\textsuperscript{145} Singapore for example has very specific conditions on the skills required to work in a recruitment agency. There is a designated Certificate for Employment Agencies test conducted by the Singapore Polytechnic and the Ministry of Manpower. This certificate covers the legislative framework surrounding recruitment agencies and managing and counselling capabilities. The importance of independently monitored and trained recruitment agency staff should not be underestimated.\textsuperscript{146}

The Irish Government in their Discussion Paper on the Employment Agency Act 1971 (Ireland) discussed the possibility of introducing a requirement of a qualification in human resources for recruitment agency staff.\textsuperscript{147} However, such a provision was not carried through to the final White Paper and has thus been removed from further consideration. The UK in the most recent overhaul of its recruitment agency regulations has also failed to make any provision for the training and qualification of recruitment agency staff. Recently in the Ten Year Framework Social Partnership Agreement 2006-2015, entitled “Towards 2016”,\textsuperscript{148} it was mooted as a potential requirement for the regulation of recruitment agencies but it has yet to make its way into a legislative enactment.


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Without such provisions, however, migrant workers face significant challenges in dealing with recruitment agencies.

4.1. Current Legal Obligations on Recruitment Agency Staff

Under Irish law at present, recruitment agency staff are required to be skilled to deal with migrant workers. The regulations governing the sale of services in Ireland under the Sale of Goods and Supply of Services Act 1980 (Ireland)\(^{149}\) would appear to place an onus on recruitment agencies to provide a service in a manner which displays due care, skill and diligence. Forde notes that the legislation applies to most contracts for the supply of services, be they consumer contracts or otherwise\(^{150}\) and would appear to apply to the services provided by recruitment agencies.

The law implies certain terms into the contract for services where the supplier of the service is acting in the course of business. These include firstly, that the supplier has the necessary skill to render the service\(^{151}\) and secondly, that the service will be provided with due care, skill and diligence.\(^{152}\) The responsibilities

\(^{150}\) Forde, *Commercial Law* (Dublin: Butterworths, 2nd ed., 1997) at p. 530. Cf. section 2(1) Sale of Goods and Supply of Services Act 1980 which defines “service” as anything which “does not include meteorological or aviation services provided by the Minister for Transport or anything done under a contract of service”. White notes that a contract for the supply of services is not defined in the legislation “but may be taken to include … (i) a simple supply of service contract…and (ii) a contract for work and materials…and (iii) a contract for the supply of services which involves the supply of a finished item or goods”. White, *Commercial Law* (Dublin: Thomson Round Hall, 2002) at paragraph 20.2.
\(^{151}\) Section 39(a) Sale of Goods and Supply of Services Act, 1980.
\(^{152}\) Section 39(b) Sale of Goods and Supply of Services Act, 1980. There are also two other implied terms provided for which are not applicable in this context. These include that where materials are used they will be sound and reasonably fit for the purpose and that where goods are supplied, they will be of merchantable quality. See section 39 (c) and (d).
set out in the legislation cannot be excluded or varied either impliedly\textsuperscript{153} or expressly\textsuperscript{154}. Where, however, a term is brought to the attention of the migrant worker\textsuperscript{155} and it is fair and reasonable\textsuperscript{156} then it can be excluded. These terms are described as innominate terms, \textit{“the effect of the breach of which depends on the seriousness of the breach”}.\textsuperscript{157} Repudiation of the entire contract will only be possible where the breach of the implied terms would deny the party to the contract the benefit of that contract.

In Ireland, the law in this area has rarely been discussed in great detail and what constitutes a breach of duty has not been clearly defined. In the UK, where a similar formulation is utilised,\textsuperscript{158} it has been held that the standard to which the service provider is held accountable is one of common law negligence.\textsuperscript{159} In Ireland the supplier is expected to act as a \textit{“reasonably careful member of the profession”}\textsuperscript{160} would be expected to act.\textsuperscript{161}

\begin{itemize}
\item \textsuperscript{153} Forde refers to the possibility of excluding such terms by usage in trade and arising from the course of dealings of the parties. Forde \textit{supra} n. 150 at p. 530.
\item \textsuperscript{154} Section 40(1) Sale of Goods and Supply of Services Act, 1980.
\item \textsuperscript{155} Section 40(1) Sale of Goods and Supply of Services Act, 1980.
\item \textsuperscript{156} This is defined in a Schedule to the Act as being fair and reasonable if \textit{“having regard to the circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made”} it should be included. \textit{“2. Regard is to be had in particular to any of the following which appear to be relevant: (a) The strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met; (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term; (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; (e) whether any goods involved were manufactured, processed or adapted to the special order of the customer.”} \textsuperscript{157} White, \textit{supra} n. 150 at paragraph 20.3.
\item \textsuperscript{158} Supply of Goods and Services Act, 1982, section 13.
\item \textsuperscript{159} Bradgate, \textit{Commercial Law} (London: Butterworths, 3\textsuperscript{rd} ed., 2000) at p. 466.
\item \textsuperscript{160} \textit{Roche v. Peilow} [1986] ILRM 189 at 197 (per Walsh J).
\end{itemize}
According to general principles of professional negligence, however, a professional may not rely on a generally approved practice\(^\text{162}\) where that practice “has such inherent defects which ought to be obvious to any person giving the matter due consideration”\(^\text{163}\). The present practice whereby recruitment agencies appear to ignore the defects inherent in allowing migrant workers to come to Ireland without sufficient checks and regulation of terms and conditions of employment is inconsistent with the responsibility of recruitment agency staff in Ireland to operate with due care, skill and diligence.\(^\text{164}\)

Such legislation has the potential to cover contracts made in Ireland by recruitment agencies with all migrant workers either in Ireland or abroad. However, the legislation is not applicable to contracts provided by foreign agencies abroad with migrant workers, where malpractices are at an even greater level. This is one area where new legislation in relation to overseas recruitment agencies could be expanded.

Therefore recruitment agency staff in Ireland are currently under a legal obligation to have the requisite skill to deal with the issues facing migrant workers in Ireland and migrant workers are entitled to seek compensation should they not receive the benefit of such skill to their detriment. However, the lack of certainty surrounding

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\(^161\) White considers that this approach would also be adopted in Ireland, following the old common law position which existed up until 1980. Forde supra n. 150 at paragraph 20.3.2.

\(^162\) This can be described as not “universal but must be approved of and adhered to by a substantial number of reputable practitioners holding the relevant specialist or general qualifications”. Dunne v. National Maternity Hospital [1989] IR 91 at p. 108-110 (per Finlay CJ).


\(^164\) The public employment service in Ireland, FÁS, admits that it operates on an entirely self-service basis and has “no mechanism for establishing the bona fides of companies or jobseekers using the website”. Indeed most recruitment agencies operate in a similar manner.
the concept of due care and the fact that such provisions are not mentioned in legislation dealing with recruitment agencies in Ireland means that recruitment agencies and migrant workers may not be aware of their obligations and rights under Irish law.

5. The Type of Information that is Necessary to Migrant Workers

Once the issue of inaccuracies and misleading information has been dealt with, the next question that must be considered is the type of information that migrant workers require and how that information should be transmitted to them.

5.1. What Kind of Information is Necessary?

The Department of Health Voluntary Code of Practice\(^{165}\) and the UK’s REC\(^{166}\) Members’ Code of Good Recruitment Practice\(^{167}\) insist that the employee should be given, prior to recruitment, information about the employment.\(^{168}\) Information as to whether the worker is operating under an employment contract or otherwise is one of the first issues that should be clarified to the worker. Such provisions have been introduced into the UK as part of the recent regulations governing


\(^{166}\) Recruitment and Employment Confederation.

\(^{167}\) REC supra n. 137 at paragraph 31.

\(^{168}\) This includes information on the job description, the length of any necessary probation periods, the recruitment process, the role of the recruitment agency and the employer, the costs, the salary scale and accommodation, the living and working conditions in Ireland, the social welfare, tax and pension entitlements, their rights under the equality and employment legislation, the recognition of their qualifications and their health policies.
recruitment agencies. They provide that the work-seeker must be informed prior to taking up employment\(^ {169}\) of all the terms and conditions of employment.\(^ {170}\)

This should avoid the situation, which arose in Ireland with the Turkish GAMA workers.\(^ {171}\) The simple step of providing the migrant worker with a contract of employment in their own language would have prevented the exploitation, which occurred in the case of these workers.

5.2. How Should the Information be Transmitted?

The ILO has commented “in light of fraudulent practices taking place in the country of employment, such as contract substitution,\(^ {172}\) migrant-receiving countries should take a more active role in supervising the issuance and execution of contracts of employment.”\(^ {173}\) In relation to third country national migrant workers, the transmission of information is not as difficult in comparison to migrant workers from within the EU who do not travel through such formal recruitment networks.

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\(^{169}\) Regulation 21 (1).

\(^{170}\) Regulation 18(d) provides that the worker must be informed of the identity of the hirer and the nature of the hirer’s business (Regulation 18(a)), the date of commencement and the duration of the work (Regulation 18(b)), the position the hirer seeks to fill, including the type of work to be done, the location, the hours, the risks to health or safety known to the hirer and the precautions taken to prevent such risks (Regulation 18(c)). The worker also has a right to know the experience, training and qualifications expected from the hirer (Regulation 18(d)), any expenses payable by or to the work-seeker (Regulation 18(d)) and in the case of an agency, the minimum rate of remuneration and benefits and notice entitlements (Regulation 18(e)).

\(^{171}\) O’Connor “Migrant Workers suffer most because of a poorly resourced labour inspectorate” SIPTU News Online 28\(^{th}\) October 2004.

\(^{172}\) This is a process whereby a migrant worker is given one contract prior to departure which is then substituted by another, usually less attractive, contract upon arrival in employment.

\(^{173}\) ILO General Survey on Migrant Workers infra n. 174 at paragraph 143.
5.2.1. Transmitting Information to Third Country National Migrant Workers

In relation to third country national migrant workers, the issue of transmitting information to such workers is relatively simple. The development of standard form contracts of employment in the recruitment of migrant workers has been one of the key suggestions proffered as a solution to the difficulties often faced by migrant workers and as a means of ensuring full consent to the terms and conditions of employment is obtained. In fact, many states already operate a system, which prohibits a migrant worker from working in a state unless they are in possession of a contract of employment, which has been approved by the competent authority in that state.\textsuperscript{174} This is reminiscent of certain procedures which are already in existence in Ireland under the employment permit regime.\textsuperscript{175}

The only suitable protection which can be afforded to migrant workers is the development of a system in which the granting of permission to work in any state would be conditional upon the inspection of a standard form contract which cannot be altered without prior agreement with the migrant worker\textsuperscript{176} and which is issued to the migrant worker prior to their departure. This already occurs in a number of states in varying degrees. In some states standard form model contracts are provided to all migrant workers entering the state so as to provide these

\textsuperscript{174} See for example Section II.37.2 of the Labour Code of the Central African Republic which requires all contracts for workers recruited abroad to be authorized by the Ministry of Labour. Cf: New Zealand which insists that contracts of employment be checked by the Immigration Service. See 1999, ILO (General Survey) Migrant Workers (Report III Part 1B) Session of the Conference: 87: Chapter 3 “The migration process” at paragraph 143.

\textsuperscript{175} The old Irish employment permit application form requests details of wage rates and the working hours of the employment. Similarly in the UK details are also requested from the employer as regards the wage rates but not as regards the hours of work.

\textsuperscript{176} This was suggested by the Irish Government in the recent proposed changes to the Employment Agency Act 1971 (Ireland). Department of Enterprise, Trade and Employment \textit{infra} n. 189 at p. 17.
workers with a minimum standard of rights to prevent exploitation. In other states model contacts are available in those industries, which are considered particularly susceptible to abuse, such as domestic work and agriculture. It has been proposed that standard form contracts will be adopted in the construction sector in Ireland to ensure compliance with employment law. The selection of specific occupations, should be avoided, however, as it automatically excludes large sectors of workers from the protection of the legislation. It would be more appropriate to adopt model contracts setting out the basic entitlements of all migrant workers.

Standard form contracts of employment should be given to the migrant worker, most appropriately, prior to departure from their state of origin and contained, where possible in one single document, issued by embassies or by consulates, or by the Department of Foreign Affairs in Ireland. The contract should contain all the details as to the remuneration, the rights and entitlements of the migrant worker, the duties of the migrant worker and the employer, and where possible, the conditions of work and the nature of the work. It should also detail the

177 These include Antigua and Barbuda, Bulgaria, Croatia and the United Republic of Tanzania (Zanzibar). ILO supra n. 174 at paragraph 151.
178 Smith “Organising the Unorganisable: Private Paid Household Workers and Approaches to Employee Representation” (2000) 79 North Carolina Law Review 45 who notes the vulnerability of such workers abuse and subject to the “whims of employers”.
179 Hong Kong, Sri Lanka and United Republic of Tanzania (Zanzibar). ILO supra n. 174 at paragraph 152.
180 Social Partnership Agreement supra n. 55 at paragraph 20.1.
181 Article 5(1) (a), Annex I and Art. 6(1) (a), Annex II of ILO Convention No. 97.
182 This is similar to the provisions, which already exist in the UK under the 2003 Regulations, see regulation 14. It is also one of the recommendations made by the ILO in Recommendation 188, Article 5.
183 ILO “Private Employment Agencies Send Millions to Work Overseas to Work” Friday 18th April 1997 (ILO/97/9) at p. 9.
184 5(1) (b) of Annex I and Article 6(1) (b) of Annex II to Convention No. 97.
185 There is no specific mention of the nature of the work in the ILO Convention No. 97, however, due to the possibility of a migrant worker being forced to do a job for which they are not qualified coupled with the attendant health and safety risks, it is this authors opinion that information as to
nature of the relationship between the parties so as to avoid confusion and potential exploitation later.\textsuperscript{186} Copies should be distributed to the worker themselves, to the user-employer and, where practicable, to the embassy of the migrant-receiving state for inspection.\textsuperscript{187} The contracts should be detailed in the language of the migrant worker and the employer.\textsuperscript{188} Ireland is proposing to introduce such a provision in a proposed statutory code of practice for Employment Agencies and Businesses.\textsuperscript{189}

It is arguable that standard form contracts will remove the capability of migrant workers to negotiate better terms and conditions of employment than those enjoyed by national workers as employers may utilise the standard form contract to keep the terms and conditions of employment at a minimum.\textsuperscript{190} However, it is envisaged that if standard form contracts are adopted, they would set out the rights and duties of both employer and migrant worker and would leave all issues such

\begin{figure}
\begin{itemize}
\item the nature of the job and the work expected of the migrant should be detailed in the contract for employment. The ILO agrees with this statement. \textit{“In this respect, the Committee emphasizes that, in order to ensure that migrants are protected to the greatest possible extent from abuse and exploitation in relation to conditions and terms of employment, contracts of employment should be as complete as possible. In particular, the Committee considers it desirable that contracts should regulate such essential matters as hours of work, weekly rest periods and annual leave, without which the indication of the wage, as required by the annexes to Convention No. 97, may become meaningless.” ILO supra n. 174 at paragraph 150.}
\item I.e. is it a contract of or for, services. It would also contain the proviso that in the case of an agency worker, the agency is responsible for the terms and conditions of employment of the migrant worker.
\item ILO Convention No. 97 Migration for Employment Convention (Revised) 1949, Annex I Article 5(1) (a) states that where a system of supervision of contracts is in place in a state, it should be ensured that a “copy of the contract of employment should be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration”.
\item ILO supra n. 174 at paragraph 149. \textit{Cf: ILO Recommendation 188, Article 8(b) and the European Convention on the Legal Status of Migrant Workers 1979, Article 5.}
\item The author would like to thank Mr. John Cotter BL for bringing this particular point to its attention.
\end{itemize}
\end{figure}
as remuneration\textsuperscript{191} and other terms and conditions of employment to be negotiated by the migrant worker with the employer. Equality legislation should ensure that comparable workers receive equal terms and conditions of employment.

5.2.2. Transmitting Information to EU Migrant Workers

For those migrant workers from within the EU, the question of how such information is to be transmitted to them is more complicated. As they do not travel through the formal networks, it is more difficult to ensure that they have received accurate information about their terms and conditions of employment. The Terms of Employment (Information) Act 1994 (Ireland)\textsuperscript{192} provides that all migrant workers, including those workers from within the EU, have an entitlement to receive a copy of the terms and conditions of their employment within two months of commencement of their employment.\textsuperscript{193}

The obvious problem with the legislation is the fact that the migrant worker cannot obtain the right to such information until they have been employed for over two months. This is of little assistance to a migrant worker currently involved in the recruitment process who may not be fully informed as to the terms and conditions of their employment as in many cases they will already have migrated before they have knowledge of their employment conditions. The whole regime lacks the strength of protection offered by the simple insistence of standard form contracts, which lay out certain minimum terms and conditions of

\textsuperscript{191} This would have to be in compliance with minimum wage legislation and any relevant joint labour agreements operating in the particular employment sector.


\textsuperscript{193} Section 3 Terms of Employment (Information) Act 1994 (Ireland).
employment. The system merely offers migrant workers a right to information, which can never be as effective as set standard terms and conditions of employment. One way of amending this for EU workers is to adopt a provision that on commencement of employment, this information is made available to the migrant worker.

6. Sending State Responsibilities

While the main focus of this Section on recruitment processes has been the actions which receiving states may develop in order to protect migrant workers, the analysis would not be complete without reference to the responsibilities of sending states and the contribution which these states may make to the protection of migrant workers globally. This particular issue is beyond the scope of this work but reference will be made to the importance of the development of orientations, as it is a condition of migration, which could be insisted upon by receiving states.

It is this authors’ opinion that orientations in the language of the migrant worker should be provided to all migrant workers prior to their departure, as has been suggested at an international level. In Ireland, there are no legislative provisions in place to support such an approach. Many voluntary codes of practice in the recruitment industry, however, have incorporated such details in their terms. Such codes recommend for example that the migrant worker receive information on the culture, location, cost of living and working, social welfare, tax and pension entitlements, their rights under the equality and employment legislation and their health policies in the receiving state. The European Convention on the

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194 ILO Convention No. 97 Migration for Employment Convention (Revised) 1949, Article 5(1) (c) Annex I and Article 6(1) (c) Annex II. Cf: ILO Recommendation No. 86, 1949, Article 5(2).
195 ILO supra n. 174 at paragraph 6.1.
Legal Status of Migrant Workers also provides that the migrant worker should also be informed as to their rights to family reunification, housing, food and the religious conditions in the receiving state.\(^{196}\)

In the absence of a bilateral agreement between the sending and receiving state which sets out the exact obligations of each party to the protection of migrant workers, receiving states cannot assume that sending states will ensure the protection of citizens going abroad to work. Receiving states, which are obtaining the benefits of migrant labour, should as a matter of priority ensure that sending states do provide certain levels of orientation to their citizens and where this is not possible provide similar services upon the arrival of the worker in their state.

**Conclusion**

The importance of information provision, not just to the migrant worker, but also to employers and government bodies cannot be over-emphasised. The absence of such measures from the present recruitment regimes operating in receiving states has led to an increased number of migrant workers being forced into migration and terms and conditions of employment to which they have not consented.

The key issue among the author’s proposals is the allocation of responsibility for employment rights. To date many migrant workers are operating in a market in which they are unsure as to the identity of their real employer. This is desirable for neither the migrant workers nor the employers. The introduction of a provision, which settles the issues of employment responsibility, will do much to

\(^{196}\) Art. 6.
aid in the prevention of exploitation and assist businesses in determining the manner in which they choose to recruit migrant workers. Migrant workers often face procedural difficulties in enforcing their rights due to the uncertainty over whom they can enforce their rights against and due to the fact that in many cases they are not in employment for long enough for them to satisfy the requirements of certain employment rights. Similarly, the migrant worker is presently compared, for remuneration and other purposes, with other leased agency workers and not with workers in the user-enterprise. This means that migrant workers are being used as a form of cheap and flexible labour in place of more permanent core employees. Finally, migrant workers employed through such agencies do not have effective collective bargaining rights, which leaves them vulnerable to exploitation.

Secondly, the Chapter considered the financial burdens that are often inflicted upon migrant workers because of the excessive fee-charging by recruitment agencies. It was demonstrated that this is occurring throughout the world, including Ireland and it has the effect of making migrant workers very vulnerable to exploitation. The situation in Ireland and in the UK in relation to fee-charging was examined. It has been suggested that a clear and unambiguous prohibition on fee-charging needs to be introduced in order to prevent further exploitation of migrant workers in Ireland. The position in the UK is advocated as the most appropriate model because it is transparent and capable of ensuring a clear prohibition of fees during the recruitment process.
Thirdly, the Chapter addressed the issue of misleading advertising of employment conditions by recruitment agencies and the potential remedies available to migrant workers. It concluded that the most recent Consumer Protection Act 2007 (Ireland) and the model present in the Act for the development of a statutory right to damages should be adopted in the context of recruitment agencies. The new statutory right to compensation under the Consumer Protection Act 2007 (Ireland) has opened up a potential model to be introduced in recruitment agency legislation for migrant workers to claim compensation for recruitment agency malpractices. In this way, a migrant worker friendly recruitment process that ensures that a balance of power is maintained between the parties to the recruitment process can be successfully developed.

Fourthly, the Chapter examined the problems raised by recruitment agency staff who are not equipped with the requisite skill to deal with migrant workers and the obstacles which such workers face. It was found that under the current consumer legislation in Ireland, Irish recruitment agencies are under an obligation to have skilled staff providing their services and that such services should be provided with due care, skill and diligence. The present situation in practice in Ireland does not conform to these standards. Many recruitment agencies operate without skilled staff and many believe that they are under no obligation to train their staff in how to deal with migrant workers. Many of the present obstacles facing migrant workers during the recruitment process would be eliminated if the staff had the requisite skill to deal with migrant workers. The current proposals of the Irish Government in relation to this issue need to be revised and legislation in relation to the skills required by recruitment agency staff introduced.
Finally, the responsibilities of the sending state cannot be ignored. While this author contends that the receiving states, as the beneficiary of migrant labour, should take the greatest proportion of responsibility for migrant workers, sending states should ensure that their citizens are protected against exploitation by employers in other states. However, where sending states fail to do this, receiving states need to ensure that the failures of the sending state are ameliorated by providing orientation services to migrant workers upon their arrival in the state.
SECTION II: AVOIDING LEGAL DUTIES

1 This Section was presented at the Annual Conference of the British International Studies Association, Monday 18th December 2006 to Wednesday 20th December 2006, University College Cork, Ireland entitled “Avoiding Regulation: Corporations and Migrant Workers”, at De Monfort University, Leicester, UK “Three Years On: The 2004 EU Enlargement and European Migration to the UK and Ireland” entitled “The Irish Ferries Story” and at Fourth Annual Gloucester Summer Legal Conference “Law and Justice in the Age of Globalisation” Marking the 200th Anniversary of Britain’s Abolition of the Slave Trade (1807) entitled “Crews of Convenience: But Convenient for Whom?”. It has been published in part on the website of the British International Studies Association at www.bisa.ac.uk/2006/pps/dewhurst.pdf [last checked 15th September 2008].
Chapter 4: Avoiding Legal Duties

Introduction

International competition for the quickest, cheapest and most unregulated methods for the production of goods and the provision of services has placed increased pressure on business enterprises worldwide to seek out methods of avoiding the legal obligations associated with operating a business. The low corporate taxation system in Ireland has had the effect of attracting much business and enterprise as it has allowed significant cost savings. It is not surprising then that where other cost saving incentives are offered in other jurisdictions, corporations will be willing to move and secure them. Labour, as one of the most expensive factors of production, is often offered at a much cheaper rate in the newer emerging markets.

However, it does not suit every corporation to move their entire operations to where labour is cheap as they may rely on the infrastructure, location or skilled workforces that they have built up. For many corporations, there is the option of maintaining their business in the same location but moving the place of registration to another jurisdiction where the labour is cheaper. The current preoccupation with corporate mobility and the corporate quest for profit is particularly obvious in the shipping industry, where the globalisation of shipping and the special rules governing the law of the sea allows corporations to avoid their legal obligations to their employees by effectively “law shopping”; picking and choosing the state and thus the regulations that will govern the contracts of

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employment. This is reflected throughout the shipping sector internationally³ and is equally relevant to other industries.⁴

This Section seeks neither to condemn nor condone the actions of such corporations. In contrast, the author is fully aware of the need to “strike a balance between living in a utopia and living in the real world”⁵. However, it is important to get this balance right. Presently, there is a danger that corporations are obtaining many of the benefits of decreased labour costs at the expense of workers. This imbalance will continue to exist as long as corporations are encouraged, by intense and often unfair competition, to reduce labour conditions to the lowest common denominator.⁶ The shipping industry example will be utilised throughout this Section of the thesis to demonstrate how successfully corporations can avoid their legal obligations and the effect that this can have on workers.

³ Recently, in Australia, an established maritime nation, a similar situation to the one that occurred in Ireland emerged. A ship owned by Canadian Steam Ship Lines sought to re-flag in the Bahamas and hire a Ukrainian crew on lower wages and working conditions. The court was aware of the competing interests at stake in such cases, the interests of the port state and the need not to obstruct commerce by interfering in the internal regulations of a company. Nonetheless, the court held that in this case the balance should be swayed in favour of the employees and decided that non-Australian ships, with non-Australian crews, are nevertheless subject to the jurisdiction of the Australian Industrial Relations Commission if they operate on domestic shipping routes. The decision to reinstate the sacked Maritime Union of Australia members was unanimous. See Re the Maritime Union of Australia & Ors; Ex parte CSL Pacific Shipping Inc [2003] HCA 43 (per Gleeson CJ, McHugh, Gummow, Kirby, Callinan and Heydon JJ.).
⁴ The aviation industry has also suffered from such actions by employers. Crews with lower training standards and more flexible working conditions have replaced cabin crews on European airlines. For more information see Boyd “HRM in the Airline Industry: Strategies and Outcomes” (2001) 30 Personnel Review 442 at p. 442.
⁶ This echoes the sentiments of the European Parliament who in 2001 noted “with alarm the increasing use being made of flags of convenience..., with severe impact...for social and working conditions for the crews on board”. European Parliament Resolution on the role of flags of convenience in the fisheries sector (2000/2302 (INI)), preamble.
This Chapter will, firstly, introduce the concept of the flag of convenience and, secondly, examine the convenience associated with it. This second analysis will involve asking two separate questions. Firstly, how easy is it in practical terms to adopt a flag of convenience and secondly, what are the practical benefits of re-flagging. There is a general perception internationally that flags of convenience allow labour exploitation to develop. The Chapter will look at the effect the phenomenon has had in Ireland and will conclude that while flags of convenience are cost-saving devices for corporations, the balance between profit creation and worker protection needs to be realigned. Until this is achieved, migrant workers will continue to face obstacles to achieving equality with nationals.

1. What is a Flag of Convenience?

The flag, which a ship flies, generally provides two very significant pieces of information about a ship. Firstly, it defines the nationality of the ship, and therefore the law, which applies on board that vessel. It determines its labour laws and its health and safety requirements. Secondly, it determines, what Sinan refers to as, the “point of responsibility, of how and where a right can be enforced vis-à-vis that ship”.

Usually states offer their nationality to ships only when they are satisfied that the ship owner or operator has a genuine link with their state, where for example the

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7 Anderson explains that the flag state has exclusive jurisdiction over that vessel on the high seas and is responsible for ensuring compliance with national and international laws and regulations concerning the crewing of the vessel. Anderson, “The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives” (1996) 21 Tulane Maritime Law Journal 139 at p. 140.


owner is a citizen of the state. However, many states provide open registries where corporations can register and are entitled to fly the flag of that state even though “they are in fact beneficially owned and controlled by nationals of other countries, manned by foreign crews and seldom, if ever, enter the jurisdiction or ports of their country of registry”. These open registries provide ship owners with what are known as “flags of convenience”. The ship owners choose these flags often because the state of registry allows easy access to its registry, taxes may be low, manning by non-nationals is freely permitted and the state imposes little if any national or international regulations. There are benefits both to the State and to the corporations arising out of the flag of convenience phenomenon. The number of ships registered in a state can have a significant effect on national income and balance of payments. Corporations also benefit from decreased costs and increased competitiveness.

12 The generally accepted definition in international law of a flag of convenience was laid down in 1970 by the Rochdale Inquiry into Shipping. It states: “(i) the country of registry allows ownership and/or control of its merchant vessels by non-citizens; (ii) access to the registry is easy. A ship may usually be registered at a consul’s office abroad. Equally important, transfer from the registry at the owner’s option is not restricted; (iii) taxes on the income from the ships are not levied locally or are low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given; (iv) the country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered (but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments); (v) manning of ships by non-nationals is freely permitted; and (vi) the country of registry has neither the power nor the administrative machinery effectively to impose any government or international regulations; nor has the country the wish or the power to control the companies themselves”.
The concept of a “genuine link” has never been adequately defined in international law and as such has been subject to various interpretations which has rendered it ineffectual. Some suggest that the concept merely requires that the state of registry exercise effective jurisdiction over the vessel, which would allow flag of convenience vessels and their registries to assert their compliance with this criterion. This would appear to echo the traditional assumption in international law that a state is entitled to a complete discretion in deciding which vessels it will grant its nationality to and exercise jurisdiction over. This interpretation has been reinforced by the International Court of Justice which has always been of the opinion that nationality, in the form of a flag in this case, would be an adequate legal reflection of a factual link between an individual and a State.

Many academics, including Farthing, condemn the international legal regime as actually “legitimating the open registry system”. Their claim that flexibility is inherent in the definition and thus has potential to “accommodate the current practices of the flag of convenience states”, is substantiated by the preamble to the most recent UN Convention on the Conditions for Registration of Ships (1986). The Preamble appears to allude to the right of each state to determine the conditions under which it grants its nationality to ships. The reality, therefore, is

17 Farthing, International Shipping (London: Lloyd’s of London Press, 2nd ed., 1993) at p.125. See 120-125 where he describes in much detail the negotiations culminating in the final draft of the Convention on the Conditions for Registration of Ships (1986). He notes that the original aim to abolish open registries, which the United Nations initially set out to achieve, was in stark contrast to the final result.
that the present situation allows states a large measure of discretion as to how they interpret the genuine link requirement.19

2. How Convenient are Flags of Convenience?

The question of how convenient a practice may be depends on two factors. Firstly, how easy it is to achieve in practice and secondly, the benefits attendant upon the adoption of the practice. In this section, the process of re-flagging and the benefits that can be generated from a flag of convenience will be addressed.

2.1. How to Re-Flag an Irish Shipping Vessel

The legal steps necessary to carry out a re-flagging are uncomplicated. A ship can de-register from the Irish shipping registry with relevant ease, unlike the complicated system of company de-registration. Under the Mercantile Marine Act 1955 (Ireland), an Irish ship registered on the Irish shipping registry can make an application to the Minister for Transport20 to request a removal from the registry and transfer to another registry. The Minister for Transport has absolute discretion in deciding whether or not to allow such an application21. There are no known cases of a refusal by the Minister for Transport in such cases.22 Recently Irish Ferries managed to secure a re-flagging of two vessels to both the flags of the Bahamas and Cyprus.

19 Wachenfeld supra n. 18 at pp. 179-180.
20 The marine portfolio was transferred from the Department of Communications, Energy and Natural Resources to the Department of Transport in 2006.
21 Section 21, Mercantile Marine Act 1955 (Ireland).
22 A search for case law or newspaper articles in relation to this returned no results.
The Irish approach to re-flagging would appear to be supported by a recent EU Regulation that was introduced to assist in the transfer of cargo and passenger ships between registers within the Community by requiring member states to eliminate any technical barriers, which may exist. The Regulation applies to all cargo and passenger ships engaged on domestic or international voyages, excluding those not complying with the conditions laid down in Article 3. The Regulation requires the elimination of any technical barriers to the transfer of any ship operations to a flag state within the EU. The Regulation applies only to the Member States to whom the ship owners have applied for registration. It insists that such a state cannot withhold registration for technical reasons arising from the Conventions from a ship registered in another Member State. The state of the losing register is required to cooperate fully with the other Member State when a decision to transfer registries has been made. The losing registry must provide information relevant to the ship, in particular information as to the conditions and equipment on board the ship. Whether or not a Member State could refuse to de-

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24 Article 1.
25 This is defined in Article 2(h) as a ship, which is not a passenger ship.
26 This is defined in Article 2(d) as a ship carrying more than twelve passengers.
27 A domestic voyage is defined as a voyage in sea areas from a port of a Member State to the same or another port within that Member State. Article 2(f).
28 An international voyage is defined as a voyage by sea from a port of a Member State to a port outside that Member State or conversely. Article 2(g).
29 Ships are excluded from the Regulations where they do not carry valid full-term certificates from the Member State of the losing register (Article 3 (2)(a)); ships that have been refused access to Member State Ports in accordance with Directive 5/21/EC during the three years proceeding applications for registration and to ships that have been detained following inspection in the port of a State signatory of the Paris Memorandum of Understanding of 1982 on Port State control (Art 3(2)(b)); ships of war or troopships (Art 3 (2)(c)); ships not propelled by mechanical means, wooden ships, pleasure yachts etc. (Art 3(2)(d)); cargo ships of less than 500 gross tonnage (Art 3(2)(e)).
30 Article 4(1).
31 Article 4(3).
32 Article 4(3). The information should contain the history file of the ship, and, if applicable, a list of improvements required by the losing register for registering the ship or renewing her certificates or overdue surveys. The information should also contain all the certificates and particulars of the
register a vessel from its registry is questionable given the spirit of cooperation evident in the Regulations although it would not seem to completely preclude a state from refusing to de-register the vessel where a reason other than a technical one is proffered.

The process of re-flagging with a flag of convenience registry even within the EU is also relatively straightforward. There are corporations who specialise in providing shipping companies with flags of convenience. Applications for a particular flag can even be made online\textsuperscript{33} by simply choosing the flag from a list available and registering the details of the vessel. Information is offered on all the countries whose flags are available giving details on everything from the climate to labour laws. Online consultations on the best options in flags of convenience are also available for a small fee.

The re-registering of a ship with a flag of convenience is a very straightforward process and initiatives at a EU level to reduce technical barriers to the movement of corporations in the EU has only sought to make this process easier. This does not mean, however, that states are obliged to allow a ship to de-register. The possible refusal and its effect will be discussed further in Chapter 7, which will look at potential solutions to the flag of convenience phenomenon.

\textsuperscript{33} See for example \url{www.flagofconvenience.com} [last visited 06/10/2008].
2.2. The Benefits of Flags of Convenience

All shipping registries are keen to attract ships to their registries and flag of convenience registries are not any different. This marketing is an interesting way to examine the types of advantages offered to ship owners and operators.

Cyprus has the sixth largest shipping registry in the world, which is due almost exclusively to its strategic geographical location between the Mediterranean Sea and the Suez Canal. The Cypriot Department of Merchant Shipping has engaged in a marketing campaign to attract ship owners to the Cypriot registry, offering such incentives as a democratic government, a modern banking system, a freedom of movement currency, low set up costs, excellent telecommunications and highly qualified staff. These conditions, while obviously important and attractive could be attributed to almost any country in the EU and by itself, does not single Cyprus out as being a particularly cost efficient registry.

Cyprus does offer very good tax incentives. The Cypriot Department of Merchant Shipping offers many double taxation treaties and competitive taxation policies. Included in this are such incentives as zero tax on profits, no capital gains tax on sale or transfer of vessels, no estate duty, no income tax on emoluments of officers or crew and no stamp duty. Cyprus also operates bilateral

34 Cyprus is the 7th in the world in tonnage terms as at January 1, 2004. The number of ships over 100gt is 1,198 and Cyprus has a gross tonnage in millions amounting to 22.1 % of the world fleet. Lloyds Register of Shipping (2005) ITF Seafarers’ Bulletin No. 19 at p. 28.
35 Available at www.cyprus.gov.org [last checked 15th September 2008].
36 I would like to thank Professor Irene Lynch-Fannon, National University of Ireland, Cork, for bringing this interesting point to my attention.
37 This is a feature of many open registries. See “The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies against Shore side Picketing” (1960) 69 Yale Law Journal 498 at p. 500 which discusses the issue of corporate tax savings in Liberia and in the United States.
agreements with 27 countries, offers competitive tonnage taxes, a favourable tax system for ship management and 10% corporation tax. In comparison with Ireland, Cyprus is a cost effective location for those wishing to avoid heavy taxation. Ireland also has a number of double taxation treaties with other states\(^3^8\) and has competitive tonnage tax.\(^3^9\) It also offers an attractive Pay Related Social Insurance Refund Scheme, which refunds employers their PRSI contribution for each of its seagoing employees, which has been extended by the EU until 2010. However, in Ireland, the tax on profits for self-employed persons ranges from between 20-42% depending on the actual profits, there is capital gains tax on all sales and transfers and there is a standard rate of inheritance tax of up to 20%. Irish registered vessels must pay income tax on emoluments of officers and crews and varying rates of stamp duty up to 9%, as well as 12.5% corporation tax.

Cyprus, as a member of the EU, is also in a unique position to provide ship owners with sources of finance which they may not otherwise be able to obtain, such as finance under the EU Marco-Polo Agreements I and II\(^4^0\) which were set up to encourage alternative and environmentally safer modes of transport within the EU and to integrate them better into road transport. It is available to all vessels operating between at least two member states of the EU or between a member state and a third country. The scheme has an annual budget of €75 million for the

\(^{38}\) Ireland has comprehensive double taxation agreements with 44 countries worldwide. See www.revenue.ie/services/tax_info/taxes12.htm [last checked 15\(^{th}\) September 2008] for a list of these agreements. In addition to this, where no double taxation agreement is in effect, there are provisions within the Irish Tax Acts, which allow unilateral credit relief against Irish tax for tax paid in the other country in respect of certain types of income (e.g. dividends and interest).

\(^{39}\) Dáil Éireann Debate Vol 607 No. 2 Irish Ferries Motion (Tuesday 11 October 2005)-Mr. Gallagher.

financing of three major projects. It provides start up finance\textsuperscript{41}, finance for catalyst actions\textsuperscript{42} and, finally, finance for common learning actions.\textsuperscript{43}

However, it appears that Cyprus is benefiting from full membership of the EU without ensuring compliance with international and regional standards. Despite assurances by the Department of Merchant Shipping in Cyprus and the extensive list of ratifications of international instruments concerning safety and labour conditions on board vessels registered in their territory,\textsuperscript{44} it is evident that Cyprus

\textsuperscript{41} 30\% of start up costs.
\textsuperscript{42} 35\% of costs.
\textsuperscript{43} 50\% of costs.
does not meet the required standard set at an international level.\textsuperscript{45} The ratification
by Cyprus of the ILO Convention No. 147 on labour standards and inspection did
not result in a decline in the number of ships registering in Cyprus as would
normally be anticipated.\textsuperscript{46} It is noteworthy that Cyprus was absent from the White
lists\textsuperscript{47} of the Paris or Tokyo Memorandums of Understanding\textsuperscript{48} and was on the
United States Coast Guard target list for safety violations.\textsuperscript{49} In 1998, Cyprus was
one of the 39 registries in the world that exceeded the average global detention
rate.\textsuperscript{50} In 2004, the Irish Port State Control found deficiencies in eleven of the
fifteen vessels registered in Cyprus, which entered Irish ports. The Paris
Memorandum Of Understanding, which records deficiency levels in the European
waters, reported a total of 35 detentions in the year 2005 and the first two months
of 2006, with a total of 613 safety and labour deficiencies. Deficiencies in safety
were the most common reasons cited for the detention of the Cypriot flagged
vessels. Some of the deficiencies cited related more specifically to deficiencies in
labour conditions on board, such as excessive working hours of crew,\textsuperscript{51} working

\textsuperscript{45} Christodoulou-Varotsi and Pentsov “Labour Standards on Cypriot Ships: Myth and Reality”
\textsuperscript{46} Christodoulou-Varotsi and Pentsov, supra n. 45 at pp. 651-652.
\textsuperscript{47} There are three major lists, the white list which includes states that have a good safety record,
the grey list which contain those states which were once on the black list or the white lists and who
have been performing better or worse than previously as the case may be and the black list which
includes those states who are performing poorly in terms of safety and labour conditions.
\textsuperscript{48} The three major regional Port State Control authorities that maintain comprehensive statistics
are the countries of the Paris MOU, the Tokyo MOU and the United States. See \textit{Shipping Industry
Guidelines on Flag State Performance} (London: Maritime International Secretariat Services
Limited, 2003) at p. 10.
\textsuperscript{49} Shipping Industry Flag State Performance table (based on data available as of end June 2005)
available at \texttt{www.marisec.org/flag-performance} [last checked 15\textsuperscript{th} September 2008].
\textsuperscript{50} Cyprus that year had some 3, 107 inspections and 236 detentions. International Transport
\textsuperscript{51} In November 2005, a ship was detained in Le Harve for 8 days after deficiencies were spotted in
the working hours of the crewmembers.
conditions described as dirty (in one instance, containing parasites), insufficient manning levels and resource and personnel deficiencies.

It is apparent that the traditional reasons advanced for the flag of convenience phenomenon, such as low taxes on profits, few regulations on employment and safety and little administration, remain compelling reasons today for many ship owners and operators to adopt regulation avoidance techniques. However, other factors also influence ship owners and operators such as the availability of a strategic geographical location, the possibility of unique sources of finance, low taxation and few inspections or enforcement of national or international labour laws. The Cypriot flag remains one of the world’s most popular flags of convenience and its membership of the EU has only served to strengthen its position in the global market.

3. The Effect of Flags of Convenience on Migrant Workers

Flags of convenience offer ship owners and corporations a type of paper refuge from the “burdensome income taxes, wage scales and regulations” often imposed by their national shipping registries. The world’s most popular open

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52 For example in November 2005 a ship owned by Perosa Shipping was detained for eight days in Le Harve for dirty conditions including the finding of parasites on board the vessel.
53 Ships were detained in Le Harve in November 2005, after manning levels were found to be insufficient. Similarly in March 2005, a ship was detained in Coruna for 9 days for the same reason.
54 The Paris Memorandum Of Understanding reports detention of vessels in Brindisi and Lisbon for insufficient resources and personnel for four days and one day respectively.
56 Ship owners often manage to externalise the costs associated with these ships and rarely suffer the economic losses, which arise from a lack of adherence to international standards. SSY Consultancy and Research Ltd., The Cost to Users of Substandard Shipping (Paris: OECD Directorate for Science, Technology and Industry, 2001). See also De Sombre infra n. 59 at p. 10.
registries include Panama, Liberia, Bahamas, Greece and Singapore. Flag of convenience vessels are “generally characterised as those that ... allow ships to be worked by non-nationals, and have neither the will nor capability to impose domestic or international regulations on registered ships”. This next section will test the veracity of this statement with reference to seafarers working on Irish owned vessels.

3.1. The International Experience

The vulnerability of seafarers, arising from their unique working conditions and from the natural, technical and social risks to which there are regularly subjected, has exposed them for centuries to various forms of exploitation. Seafarers have been described as “politically, legally and economically weak”.

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58 International Transport Federation, “Shipping Review: Top 50 Flag Fleets”, Lloyd’s Register of Shipping, ITF Seafarers’ Bulletin 2005 at p. 28. In deciding whether or not to declare a register a flag of convenience register, the ITF take into account the ability and willingness of the state to enforce minimum human rights standards.


60 As Hill notes the difference between seafarers and land-based employees, is that seafarers live and work in the same environment, which leaves them in a vulnerable situation when it comes to complaining about their conditions of employment as it could mean that their living conditions could also be adversely affected by any disputes they may have with their employer. An analogy could be drawn here between domestic workers who often face the same dilemmas. However, one difference between seafarers and domestic workers is that when a seafarers’ contract of employment is terminated, he or she may be left in a state of which he or she is not a national and has no right to reside, and may be effectively abandoned. See Hill, Maritime Law (London: Lloyd’s of London Press Ltd., 4th ed., 1995) at p. 506.

61 Natural risks include the risk of the vessel floundering at sea, the risk of injury and the exposure to extreme weather conditions. See Hill n. 60 at p. 506.

62 Technical risks include the risk of accidents at sea caused by equipment and exposure to toxic or carcinogenic materials. See Hill n. 60 at p. 506.

63 Seafarers, due to their unique working conditions, are easy targets. They are routinely abused, refused food, accommodation and medical treatment and subjected to illegal practices by recruitment agencies. See Hill n. 60 at p. 506.


The jurisdictional difficulties associated with the employment of seafarers and a desire on the part of states to increase international trade and the associated economic benefits has meant that the international and domestic protection of seafarers falls well below the standards applicable to more conventional employment relationships.

While labour exploitation and safety violations are not a “universal characteristic of open registry shipping”, it is obvious that where employment standards do not exist or where they are inadequately enforced, the conditions on board will, as a result of fierce competition, be reduced to the lowest international level. This inevitably leads to conditions of employment characterised by excessive working hours, reduced rates of pay and employment conditions which are of questionable safety. The International Transport Workers Federation refers to these ships as “floating coffins”, in light of the fact that many flag of convenience vessels “are over aged and under maintained” subjecting the seafarers to “arduous, often brutal conditions that sometimes approach outright slavery”. The seafarers are often non-unionised and this means that the majority of exploitation goes undiscovered. Many seafarers on such vessels also suffer from blacklisting and

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66 Seafarers are often employed on vessels registered in a State of which they are not nationals.
72 If the seafarer is unsuccessful at arbitration, they are blacklisted, which means they are prevented from working as a seafarer for anything up to two years.
watch listing\textsuperscript{73} when they complain about their conditions of employment. The ILO have also specifically noted the safety risks involved in hiring untrained or poorly trained staff from abroad, placing them on sub-standard vessels and expecting them to handle deficiencies when they occur.\textsuperscript{74}

This would appear to be backed up by the most recent figures of the Paris Memorandum of Understanding on Port State Control. In the 2006 Annual Report, there were 1,684 deficiencies in accommodation for crews; 1,673 deficiencies arising out of food and catering; 2,449 deficiencies in the working space of seafarers and 936 deficiencies in mooring arrangements. Considering that 13,417 vessels were inspected in 2006, these figures are very high. In total, over 66,142 deficiencies were found on board these vessels.\textsuperscript{75}

3.2. The Irish Experience

Beneficially owned Irish vessels of various nationalities are not immune from cases of exploitation. In 2004, a Filipino beautician on board an Irish Ferries’ vessel was found to be earning only €1.08 an hour and working over twelve hours a day. These conditions would be considered exploitative under most employment protection regimes but she had little recourse to such protections because she was employed at sea.\textsuperscript{76} It was not until the intervention of a local union that her pay was substantially improved and back pay recovered.

\textsuperscript{73} This refers to a practice where a seafarer who makes a complaint in relation to their employer, which ends up in arbitration, the seafarer, will not be employed while the arbitration is ongoing.
\textsuperscript{74} Captain Stephen E. Bligh \textit{supra} n. 5.
\textsuperscript{75} Paris Memorandum of Understanding Port State Control Annual Report 2006 at pp. 37-47.
\textsuperscript{76} All seafarers on Irish registered vessels, whether national or non-national, are expressly excluded from protection under the Organisation of Working Time Act, 1997 (Ireland), the
Perhaps the most publicised case in recent years in Ireland has been the reflagging undertaken by Irish Ferries. In September 2005, Irish Ferries announced that it was to offer five hundred and forty three seafaring employees, on its Irish Sea services between Dublin and Holyhead and Rosslare and Pembroke, a choice between a voluntary redundancy package or an amended contract of employment which offered terms and conditions of employment far inferior to the terms set out in the collective agreement operating on board the vessels at the time. Those workers who chose the voluntary redundancy package were to be replaced with agency workers from Eastern Europe after the vessels were re-flagged in Cyprus. Irish Ferries argued that economic pressures from outside the company necessitated these measures. However, there was much evidence to suggest that these "economic pressures" were not as grave as the firm claimed. In fact, media reports suggested the firm had made a healthy profit the

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Protection of Young Persons (Employment) Act 1977 (Ireland), the Holidays (Employees) Act 1973 (Ireland) and the Minimum Notice and Terms of Employment Act 1973 (Ireland). However, non-national seafarers are also excluded by implication from the Unfair Dismissals Act 1977 (Ireland), which insists upon evidence of residence or domicile in Ireland before an employee is entitled to claim under the Act. Non-national seafarers are regularly engaged on transit visas which do not entitle them to enter or reside in the State and which thus effectively excludes them from the scope of the Act. Other legislation insists upon the conclusion of a contract of employment “in the State” (own emphasis added) before it will extend its protection, impliedly excluding all seafarers who conclude contracts of employment with recruitment agencies in their home states.

Irish Ferries is a subsidiary company of the Irish Continental Group. It was established to operate combined passenger and Ro/Ro ferry services and to provide holiday and travel services on the seas around Ireland. The Irish Continental Group is a public limited company registered in Ireland. See Companies Registration Office Co. No. 41043.

Taaffe “The Real Deal” (2005) Business and Finance Magazine, Dublin, September 22. It was reported in this article that this offer was made on condition that the employees would make no threat of, or take any actual, industrial action of any sort.

The package offered a sum of money equivalent to 8 weeks pay per year of service, including 2 weeks statutory pay.

These conditions included an 84 hour week and a rate of pay of up to €3.50 an hour. See Dáil Éireann Leader’s Questions, 4th October 2005-Joe Higgins, Socialist party.

Irish Ferries reasoned that a combination of factors, including a 9% fall in the Irish Sea car market, a 50% hike in the price of fuel, increased competition from low fare airlines and low fare shipping and the fact that 95% of competitors already out sourced their crews, meant that unless they implemented radical restructuring within the firm they would be unprofitable by 2007.
previous year,\textsuperscript{82} it still held its market share,\textsuperscript{83} and that the claims by the firm that they were responding to the trend in outsourcing which had been adopted by their competitors, were exaggerated.\textsuperscript{84} Various reports by financial institutions appeared to play down the apparent financial crisis in Irish Ferries.\textsuperscript{85}

The trade unions interjected on behalf of the seafarers. They requested the Labour Court to make a recommendation that those employees who wished to remain with the firm would be “red-circled”, a term which would mean that their terms and conditions of employment could be maintained at the current levels.\textsuperscript{86} They also requested that the collective agreement, which was still in operation, be maintained until it could be voluntarily renegotiated.\textsuperscript{87} The Labour Court acceded to both requests. The Court emphasised the importance of collective agreements and noted that during “the currency of any collective agreement circumstances may change which makes its terms more or less attractive, to one or other of the parties, than was originally anticipated. Nevertheless this could not relieve either party from the obligation to honour the agreement for its duration or until it is voluntarily renegotiated. Were it otherwise the conduct of orderly industrial relations would be made significantly more difficult.”\textsuperscript{88}

\textsuperscript{82} It was widely reported that Irish Ferries made a profit of €20 million in 2004.
\textsuperscript{83} This is approximately 38% of the Irish Sea Passenger Ferry route.
\textsuperscript{84} It was true that the other ferry operators on this route for example, P&O and Swansea Cork Ferries had both re-flagged, in the Bahamas and St. Vincent and the Grenadines respectively. However, Irish Ferries’ main competitor, \textit{Stena Line}, had not engaged in outsourcing. See Dooley “Claims Ebb and Flow in the Ferry Dispute” (2005) \textit{Irish Times}, Dublin, November 30.
\textsuperscript{85} See for example the Farrell, Grant, Sparks Report and the Report carried out by Davy Stockbrokers.
\textsuperscript{86} Irish Ferries v. Seaman’s Union of Ireland CD/05/1016 Recommendation No. 18390 11th Nov. 2005.
\textsuperscript{87} Irish Ferries v. Services Industrial Professional Technical Union CD/05/1015 Recommendation No. 11th Nov 2005.
\textsuperscript{88} Irish Ferries v. Services Industrial Professional Technical Union supra n. 87.
Despite these efforts, Irish Ferries continued with its decision to re-flag its vessel in Cyprus and to replace its staff with agency staff from Eastern Europe. The Irish Government maintained that there was little they could do to prevent the exercise by this corporate entity of its right of establishment in another EU Member State. The attitude that this type of action was commonplace within the industry internationally and could not be prohibited appeared to pervade the decisions of the Labour court, the Government and the trade unions.

The trade unions eventually managed to secure a two-year collective bargaining deal with Irish Ferries. This, however, is a short-term solution to a long-term problem. The Irish Government on the advice of the Attorney General agreed to grant a redundancy rebate to the value of sixty percent of the cost of the redundancy to Irish Ferries. In the case of the Irish Sea routes this will amount to approximately €12.05 million. This serves to present the flag of convenience phenomenon to ship owners and operators as an additional solution to their competition worries and presents a real obstacle to migrant workers who are seeking equality with nationals in Ireland.

**Conclusion**

The avoidance of legal duties, whether by flag of convenience, moving legal jurisdiction or subcontracting, causes inevitable obstacles for migrant workers. The flag of convenience serves as a good example of such avoidance schemes and was chosen because of the seriousness of the issue and the vulnerability of the

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89 *Irish Ferries v. Seaman’s Union of Ireland* CD/05/133 Recommendation No. 18116 (CC031698-05).

migrant workers affected by it. The flag of convenience is the ultimate in avoidance techniques.

A flag of convenience is a legal device used to avoid legal obligations. These obligations can be taxes, registration requirements or labour regulations. The availability of cheap labour in emerging markets, coupled with intense competition in global trade has encouraged corporations to seek alternative methods of cutting costs. It has always been difficult to balance the “need to ensure comparable protection for workers’ rights in ... states and to harmonise the costs which such protective rules entail for ... undertakings”91. However, there comes a time when the balance between the two needs to be realigned especially where evidence of labour exploitation becomes evident.

This Chapter demonstrated that the flag of convenience is used by employers in the shipping industry as a means of avoiding legal obligations to migrant workers and is just one example of how easily corporations can avoid their legal obligations in general. The reality of law shopping is that employers can pick and chose the labour laws that will apply on board their vessels. Labour conditions are being reduced on an international stage to the lowest common denominator. The major difficulty facing states is that the ability of ship owners to de-register and re-flag with a flag of convenience registry is relatively easy and there are systems in place to make the move smoother. Furthermore, the savings in cost attendant upon the flag of convenience means that it will always be an attractive proposition to ship owners and operators.

The question remains then as to what the problem with the flag of convenience phenomenon is. Internationally, there is evidence that flag of convenience vessels are exploiting workers at an alarming level. This is also true in Ireland and the situation that arose in Irish Ferries is a testament to this. The remaining Chapters in this Section will examine why such avoidance techniques are allowed to operate in Ireland and how workers can be protected against the dangers that flags of convenience and other avoidance techniques present.
Chapter 5: The Response of the State and Future Role of Trade Unions

Introduction

It is interesting to examine the reactions of various interest groups to the avoidance of legal duties by employers as it demonstrates the differing interests, problems and associated difficulties with achieving a compromise solution to ensure the protection of both workers and employers. Such an examination also assists in drawing up solutions to dealing with similar situations in the future. The reaction of the Irish State to the dispute that arose at Irish Ferries and to the flag of convenience phenomenon in general was controversial. From the Government’s perspective, it took all the necessary steps to prevent the action of Irish Ferries. Due to the importance attached to the freedom of establishment within the EU, the State considered that it had little choice but to pay the redundancy rebate to the company and the Attorney General was of the opinion that the State was legally obliged to do so. From the perspective of the worker, however, it was argued that the State was not obliged to allow its labour laws to be applied in this manner. Many members of the opposition expressed grave concerns that the legal system could be used in such a manner.1

The Chapter firstly examines the concept of freedom of establishment and whether that right extends to purely internal conflicts within one Member State.

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1 Dooley “Rabbitte angry at IBEC defence of Irish Ferries” (2005) Irish Times Dublin October 11 where the then-Labour leader, Mr. Rabbitte expressed the opinion that it would be shocking if a “precedent were established whereby a company could “disemploy” more than 500 workers, call it “redundancy”, make out an invoice to the State’s redundancy fund, replace the workers with cheap labour and just carry on its business”. Senator Joe O’Toole also remarked that “sacking an employee and replacing him or her a week later does not constitute redundancy” 29/09/05 Seanad Eireann Debates.
The Chapter also demonstrates that the re-flagging of a vessel does constitute an act of establishment that can only be restricted in very limited circumstances.

Secondly, the Chapter analyses the extent to which the discretion of the State in the case of Irish Ferries was fettered by the principle of freedom of establishment. In fact, the State was so concerned by the manner in which a corporation could avoid their legal duties, it introduced new legislative protections in the immediate aftermath of the Irish Ferries dispute. While the benefit of the new legislation to the situation that arose in Irish Ferries is limited, the State should be commended for the efforts made to protect the interests of workers in similar situations. The difficulty with this admission is that it reveals that there is little the State can do to protect migrant workers employed on board flag of convenience vessels. This Chapter explores alternative interpretations of the Redundancy Payments Acts which may provide some relief in future cases.

Thirdly, the Chapter explores the role of trade unions in protecting migrant workers in situations involving flags of convenience or other avoidance techniques. While the reaction of the trade unions in the Irish Ferries case could be criticised, a recent decision of the ECJ in a similar case seriously restricts the role of trade unions in protecting workers employed on flag of convenience vessels across the EU. The future position of trade unions in similar circumstances is analysed to determine the future role of trade unions in the protection of workers in the future.
1. Freedom of Establishment

The right of establishment has been defined as “the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period”. It is a necessary extension of the freedom of movement of workers and allows any person, who is not a worker “to enter a Member State and establish himself or herself there for the purpose of carrying on economic activities in that State”. The principle underlying this fundamental freedom is that there should be no discrimination on the grounds of nationality, “whether such discrimination stems from legislation, regulation or administrative practices”. Therefore, it would appear that ship owners who wish to carry on their trade in another Member State of the EU should not be prevented from doing so by virtue of the freedom of establishment. As Gloster J. recently noted in the Commercial Court, prior to the decision of the Court of Appeal in the same case, “re-flagging of a vessel in a Member State clearly involves the exercise of an establishment right”.

However, it is not an absolute right and it is subject to a number of important qualifications. Any measure which is likely to hamper or render less attractive the exercise by a national of a Member State of the freedom of establishment or any

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3 Lasok infra n. 4 at p. 517. The authors stress the fact that this freedom allows persons not only the freedom to work in their profession but also to choose the place in which they wish to work. See Case 143/87 Stanton v. INASTI [1988] ECR 3877; Cases 154 and 155/87 Rijksinstituut voor de Sociale Verkering du Zelfstandigen v. Wolf [1988] ECR 3897.
6 Viking Line ABP v. FSU (Finnish Seaman’s Union) and ITF [2005] All ER 155 at paragraph 106 (per Gloster J.)
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measure which places a financial burden on a person so as to make the exercise of a free movement right more difficult, constitutes a restriction on free movement.\(^8\)

1.1 Does Freedom of Establishment apply to Internal Situations?

Does the right of establishment apply to purely internal situations?\(^9\) It is questionable whether a shipping company who is being prevented from establishing themselves in another Member State could rely on the provisions in Article 43 even though they have not yet made any move to another Member State. Craig and De Burca argue that as Article 43 refers to the position of nationals in a Member State other than that of their nationality, this implies that “Article 43 cannot be invoked by nationals against their own Member State”\(^10\).

The ECJ, however, has made it quite clear that Article 43 can be invoked against the state of which you are a national\(^11\) and that the prohibition in the Treaty applies equally to measures imposed by or in the Member State from which the person concerned comes.\(^12\) The treaty is also clear that the provisions prohibit “the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation”.\(^13\)

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\(^8\) See also International Transport Workers’ Federation and another v. Viking Line ABP and another supra n. 6 Commercial Court Decision at paragraph 105.


\(^11\) Arnull supra n. 9 at p. 337.

\(^12\) Losak supra n. 4 at p. 521. See also Case C-2000/98 XAB & Y AB v. Rikssatteverket [1999] ECR I-8261; Case C-251/98 Baars v.Inspectuur der Belastingen Particulieren/Orde\(\text{en}\)mengen Gorinchem [2000] ECR I-2787.

1.2 Who is entitled to Benefit from the Freedom of Establishment?

Article 48 EC provides that companies are entitled to the same rights of establishment as natural or legal persons. The definition of a company is particularly broad and covers all “companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit making”\(^{14}\).

While at first glance, this would not appear to cover the re-flagging of a vessel, it has been held by the ECJ that “where a vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be disassociated from the exercise of the freedom of establishment”\(^{15}\). Therefore, where a vessel is pursuing an economic activity, with a fixed place of establishment in a Member State, the registration of the flag in another state would constitute an act of establishment, which cannot be restricted without justification.

2. The Reaction of the Irish State to the Situation at Irish Ferries

When Irish Ferries announced its intention to re-register with an open registry and replace its existing workers with agency workers from Eastern Europe, it utilised the existing law relating to redundancy in Ireland to justify its decision and offer...

\(^{14}\) Article 48 EC.

\(^{15}\) Case-221/89 Factortame [1991] ECR I-3905 paragraphs 19-23. See also the decision of the Gloster J. in the Commercial Court where she stated that the re-flagging of a vessel in a Member State clearly involves the exercise of an establishment right. Viking Line supra n. 6 at paragraph 106.
each outgoing employee substantial redundancy packages. Under Irish redundancy law, corporations are entitled to a substantial rebate of the redundancy monies paid out to employees from the Government, where a genuine redundancy has occurred. In a previous dispute with Irish Ferries, the Irish Government paid out substantial sums of money on redundancy rebates where the company re-registered its vessels in the Bahamas and replaced its crew with overseas workers. Once again, in the most recent events at Irish Ferries, the Government decided to grant Irish Ferries a redundancy rebate.

2.1. The Introduction of Provisions to Prevent Future Avoidance of Legal Duties

The Government were concerned that similar situations could arise in the future and decided in the most recent Social Partnership Agreement to make proposals to address what was described as “exceptional collective redundancy situations”.

In response to this, the legislature introduced the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 (Ireland).
Under this Act, an employee shall be considered to have been dismissed in a situation where there is

- a collective redundancy, effected on a compulsory basis;
- the existing employees were or are to be replaced in the same location or elsewhere in the state by persons who are to perform essentially the same functions as the dismissed employees; and
- the terms and conditions of those other persons are, or are to be, materially inferior to those of the dismissed employees.\(^\text{21}\)

The legislation also provides for the creation of a Redundancy Panel\(^\text{22}\), the function of which is to request the Minister for Enterprise, Trade and Employment to ask the Labour Court to issue an opinion as to whether a particular situation falls within the definition of an exceptional collective redundancy. Either the employee representative or the employer may bring this question before the panel as long as either has sought local engagement through the established internal dispute resolution procedure, has behaved reasonably and has not acted in a manner which in the opinion of the Panel has frustrated the possibility of agreement and that there has been no recourse to industrial action.\(^\text{23}\) It is unclear what effect a determination that a situation falls within this definition will have, other than the fact that the employer may not be able to claim for a redundancy rebate and may be subjected to claims for unfair dismissals from its workers.

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\(^{21}\) Section 16 which inserts subsection (2A) after section 7(2) of the Redundancy Payments Act 1967.

\(^{22}\) Section 5.

\(^{23}\) Section 6.
The Minister for Enterprise, Trade and Employment may also make a referral to the Labour Court on his own initiative.\textsuperscript{24} The Labour Court can issue an opinion where there is no ongoing industrial action and it is satisfied that all the criteria have been met.\textsuperscript{25} There is no appeal from this decision.\textsuperscript{26} Where the Labour Court is of the opinion that the dismissal would meet the definition as set out, but the employer goes ahead and dismisses the workers anyway, there will be a number of implications. Firstly, the Minister for Enterprise, Trade and Employment would need to conduct his own examination of an application for redundancy rebate.\textsuperscript{27} Secondly, on foot of a refusal to pay a rebate, any exit package given to the employees would not benefit from the income tax provisions that apply to statutory redundancy payments.\textsuperscript{28} Thirdly, the employee could take a case for unfair dismissal. Finally, the employer could appeal to the Employment Appeals Tribunal, and if successful, the relevant income tax provisions would be available to the employee.\textsuperscript{29}

It is interesting that the State sought to close the \textit{lacuna} that appeared to emerge in the law in Ireland in the aftermath of the Irish Ferries case. There was a recognition that similar legal \textit{lacunae} could be found in the redundancy legislation and that employers in various industries could attempt to avoid their legal obligations in a similar manner. However, the new legislation still presents a number of difficulties.

\textsuperscript{24} Section 7.  
\textsuperscript{25} Section 8.  
\textsuperscript{26} Section 8(4).  
\textsuperscript{27} Section 8(4).  
\textsuperscript{28} Section 9(1).  
\textsuperscript{29} Section 9(2).
2.1.1. The 2007 Act - Exclusions

The new scheme expressly excludes a number of significant categories of worker from its provisions. Firstly, it excludes cases of voluntary redundancy as it only applies to cases of compulsory redundancy. This would exclude the situation that arose at Irish Ferries where the staff were offered a voluntary redundancy package or amended terms and conditions of employment. There is a significant danger that compulsory redundancy can be veiled by a voluntary redundancy scheme.

Secondly, the proposals only apply to collective redundancies and will therefore not be applicable to single incidents of employee replacement. This effectively excludes the individual worker whose employment is terminated and then replaced by a cheaper migrant worker.

Thirdly, the workers must be replaced in the same location or elsewhere within the State. This prerequisite effectively excludes the situation that arose at Irish Ferries. Under the present construction of the law, where a flag of convenience is used, the location of the employment changes and the replacement workers will not be employed in the same location or within the jurisdiction. Unless the Government considers that changing to another flag does not in fact change the location of the business for the purposes of the redundancy legislation then this

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30 Section 16.
31 Section 16.
32 Section 16.
33 This is not an uncommon provision in Irish employment law. Most employment legislation applies only to employees working within the territory of the State. See the comments of Krebber, “Conflict of Laws in Employment in Europe” (2000) 21 *Comparative Labor Law and Policy Journal* 501 at p. 506.
provision is of no relevance to seafarers currently employed on Irish ships, where that ship decides to change to another shipping registry and replace the current crew with cheaper workers.

2.1.2. The Redundancy Panel

Section 6 of the 2007 Act provides that the only function of the Redundancy Panel will be to ask the Minister for Enterprise, Trade and Employment to refer a particular situation to the Labour Court for determination. This appears to be a rather unnecessary complication of the current procedures. It is unclear why the Minister for Enterprise, Trade and Employment could not be empowered to make such references where he or she considers it appropriate or why the employee representatives or the employer could also not petition the Minister for Enterprise, Trade and Employment for such relief. Indeed, the proposals do allow the Minister for Enterprise, Trade and Employment to make a reference to the Labour Court on his own behalf. This may make the Redundancy Panel redundant when one considers the small amount of situations in which such circumstances may arise.

2.1.3. The Result of a Redundancy Determination

Where the Labour Court determines that a certain situation falls within the definition of an exceptional collective redundancy, but the employer goes ahead and carries out the dismissals anyway, the Minister for Enterprise, Trade and Employment is still entitled to consider the application for a redundancy rebate, despite the fact that the Labour Court has clearly determined that this is not a
redundancy situation.34 This seems to be a flagrant misuse of an already overburdened Labour Court. Indeed, the legislation also suggests that if the Minister for Enterprise, Trade and Employment refuses to pay the rebate, the exit package given to the employees would not benefit from the income tax provisions that apply to statutory redundancy payments. This means that effectively, the employees are punished for the actions of their employer. The employer also has a right of appeal from the decision of the Minister for Enterprise, Trade and Employment to the Employment Appeals Tribunal, despite the fact that the employees have no appeal from the decision of the Labour Court in the initial determination. The provisions appear to be too mindful of the “competitive pressures”35 of the market at the expense of employee protection. In view of the fact that there are no serious repercussions from the determination that a situation is an exceptional compulsory redundancy, this appears to be an unnecessary complication of the Redundancy Payments Acts that is beneficial only to employers and corporations.

2.2. An Alternative Solution: A Broader Interpretation of the Redundancy Payments Acts

While the approach adopted by the State is interesting, a review of the current redundancy provisions reveals that they are sufficiently complex to deal with the current avoidance schemes. A broader interpretation of the definition of redundancy in Ireland would be enough to assist workers against such schemes.

34 Section 9(1).
35 Social Partnership Agreement supra n. 19 at paragraph 18.1.
The first question, which arises, is whether or not a genuine redundancy situation occurs in cases where a vessel decides to re-register in another state and replace its existing workforce with a cheaper workforce although continuing to operate on the same sea route. An employee can only be dismissed on grounds of redundancy where they fit within the statutory definition of redundancy laid down in a series of Acts entitled the Redundancy Payments Acts 1967-2007 (Ireland).36

Whether or not the situation which existed in Irish Ferries was a genuine redundancy situation will depend to a very large extent on whether it can prove that it falls within one of the definitions laid down by the Redundancy Payments Acts 1967-2007 (Ireland).37 The criteria laid down in the Acts necessarily imply some change in the business and that the decision to make an employee or employees redundant must not be related to the personality of the employee.38

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36 Section 7 (2) Redundancy Payments Act, 1967 (Ireland) as amended by the Redundancy Payments Act 1971 (Ireland) section 4 (2). In this case, the 2007 Act will not apply as it was not in force at the time. The impact of the new legislation will be discussed later. “For the purposes of subsection (1), an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to—

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or

(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or

(d) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or

(e) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.”

37 Section 7(2) as amended by section 4 Redundancy Payments Act 1971 (Ireland) and as amended by section 5 Redundancy Payment Act 2003 (Ireland).

38 These two criteria were laid down in the seminal case of St. Ledger v. Frontline Distribution (1994) UD 56/94. These particular criteria are also alluded to by the Department of Enterprise,
An examination of the legislation reveals that the only possible way the situation which arose at Irish Ferries could have been considered to be a redundancy would be under Section 7, subsection (a), which defines a redundancy as a dismissal, which occurs where the employer ceased or intended to cease to carry on the business in the place where the employee was so employed.39

As the Employment Appeals Tribunal noted in *St. Ledger v. Frontline Distributions Ltd.*40, the concept of change runs through all the definitions in the Act. “This means a change in the workplace. The most dramatic change of all is a complete closedown. Change may also mean a reduction in needs for employees or a reduction in numbers”41. What is required then, by this definition, is a change in the place where the employee is working. This often occurs in industry where for example a multinational corporation moves to another state where the labour force and transport costs are cheaper. No one would deny that in such circumstances a redundancy situation comes into existence. Ferry companies in the business of transporting passengers from one state to another on a particular route cannot move this route to another state. They argue that their only feasible method of reducing costs is to change their flag state to a country where labour costs are cheaper.

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39 Subsection (b) of Section 7 refers to particular kinds of work and the fact that the need for that kind of work has ceased and diminished, while subsections (c), (d) and (e) refer to instances where the employer requires fewer or more qualified employees to carry out the work originally done by its employees.
40 *St. Ledger v. Frontline Distribution supra* n. 38.
41 *St. Ledger v. Frontline Distribution supra* n. 38.
2.2.1. Does Flag Swapping Amount to a Redundancy Situation?

However, does this action of “flag swapping” amount to a legitimate redundancy situation? Preliminary advice from the Office of the Attorney General in the case of Irish Ferries suggested that the actions of the company could not be said to fall within the definition of redundancy as determined by the Redundancy Payments Acts. This could have been based on the assumption that for a “change in the place of business” to occur as required by the legislation, the business would actually have to move location to a different country or region. As Bennett\textsuperscript{42} has helpfully elucidated, the equivalent definition in the English Redundancy legislation\textsuperscript{43} appears to envisage a complete closure of the business and for the jobs of the workers to literally disappear along with it. This is reflected in the redundancy laws in other European countries which only allow redundancies where the employee’s position has been eliminated or transformed in some way,\textsuperscript{44} the business is closing or reorganising or where there is a diminishing need for the employee to do a particular kind of work\textsuperscript{45} or where the redundancy is a consequence of a reduction or change in activities or labour.\textsuperscript{46} This would appear to suggest that it would not be sufficient for Irish Ferries merely to change flags but that they would also have to cease their business on the Irish Sea for a redundancy situation to arise.

\textsuperscript{43} Section 139(1)(a) Employment Rights Act 1996 (UK).
\textsuperscript{45} See Mayne, Maylon and McKenna (eds.), Employment Law in Europe (London: Butterworths, 2001) at p.449 German law on redundancy, p. 705 redundancy law in the Netherlands, p. 743 for the law in Portugal and p. 824 for information on redundancy in Spain.
\textsuperscript{46} See Mayne, Maylon and McKenna (eds.), Employment Law in Europe (London: Butterworths, 2001) at p. 570 and Italy Statute 223 at section 24.
The legal construction of this clause has yet to be considered in Ireland but it has been the subject of much discussion in the UK. The main distinction is whether the place of work is determined by the contract of employment, in which case a change of flag would be sufficient to change the place of work, or whether it is based on a more factual inquiry as to the geographical position of the place of work, in which case a change of flag will be insufficient to bring into play the redundancy legislation.

The position adopted in the UK by some academics and by the courts appears to be that the place of work of the employee must be determined by a purely factual enquiry as to the geographical location of the business. The Court of Appeal in the UK has decided that the place of work of the employee must be “established by a factual enquiry, taking into account the employees fixed or changing place or places of work and any contractual terms which go to evidence or define the place of employment and its extent”. Other decisions have alluded to the necessity to view the issue not as “a technical question as to contractual obligation but [by] a more pragmatic approach”. The question which must therefore be asked is where was the employee factually employed and has that place of work now ceased to exist?

Some Irish academics would appear to agree with this assessment. Forde notes that subsection (a) of Section 7 of the Redundancy Payments Act 1967 (Ireland)

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47 See for example, Anderman who suggests that as the legislation makes no reference to the contract of employment, this would preclude any use of that instrument in determining the place of work of the employee. Anderman infra n. 62 at p. 235.
deals with the business ceasing or relocating.\textsuperscript{50} This appears to have been supported in political circles during the Irish Ferries dispute, with some politicians expressing serious concerns\textsuperscript{51} that the legal system could be used to avoid legal obligations to employees.\textsuperscript{52} DeSombre has clarified that in his opinion registration in an open registry does not require physically relocating the industry and as such does not change the place of business for the purposes of redundancy legislation.\textsuperscript{53} The author would concur with this evaluation of the legislation. This would be an effective way to deter corporations from re-flagging at will.

2.2.2. Remedies for Migrant Workers

2.2.2.A. Unfair Dismissals Legislation

Where a genuine redundancy situation cannot be established by the employer, an employee would be entitled to sue for unfair dismissal.\textsuperscript{54} Under the Unfair Dismissals Acts 1977-1993 a dismissal of any employee is deemed to be unfair,\textsuperscript{55} unless there are substantial grounds justifying the dismissal.\textsuperscript{56} As a defence, employers often claim that the dismissal was made on grounds of redundancy.\textsuperscript{57} The employer must provide strict proof of both the fact that there was a

\textsuperscript{50} Forde, Employment Law (Dublin: Roundhall Ltd, 2\textsuperscript{nd} ed., 2001) at p. 216.
\textsuperscript{51} Dooley "Rabbitte angry at IBEC defence of Irish Ferries" (2005) Irish Times Dublin October 11 where Mr. Rabbitte expressed the opinion that it would be shocking if a “precedent were established whereby a company could “disemploy” more than 500 workers, call it “redundancy”, make out an invoice to the State’s redundancy fund, replace the workers with cheap labour and just carry on its business”.
\textsuperscript{52} Senator Joe O’Toole remarked that “sacking an employee and replacing him or her a week later does not constitute redundancy” 29/09/05 Seanad Eireann Debates.
\textsuperscript{53} DeSombre “Globalisation and Environmental Protection on the High Seas” Prepared for delivery at the 2003 Meeting of the American Political Science Association, Philadelphia, August 2003 at p. 8.
\textsuperscript{54} The Unfair Dismissals Act, 1977 provides for the bringing of claims for redress for unfair dismissal before a Rights Commissioner or the Employment Appeals Tribunal within 6 months of the date of dismissal.
\textsuperscript{55} Section 6(6) Unfair Dismissals Act 1977 (Ireland).
\textsuperscript{56} Section 6(1) Unfair Dismissals Act 1977 (Ireland).
\textsuperscript{57} Section 6(4)(c) Unfair Dismissals Act 1977 (Ireland).
redundancy situation in existence and the fact that the redundancy was the main reason for the dismissal. Where this cannot be proved the employee will be held to have been unfairly dismissed and will be entitled to the remedies laid out in the Unfair Dismissals legislation including reinstatement, re-engagement or compensation.

The Irish courts have been adamant not to allow employers to use redundancy as a reason for dismissal where it is clear that this is merely a “sham” or a “cloak” covering the real intentions of the employer. In the case of Edwards v. Aerials and Electronics (Ireland) Ltd the Employment Appeals Tribunal held that if a company wants to reorganise, it must show proof of reorganisation and cannot use it “as a vehicle for dismissal for any other reason”. Similar legislation exists in the UK.

In Ireland the remedy is only available to those employees who can demonstrate that they have twelve months service and that they are resident in the State. This precludes workers who have less than the required amount of continuous

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59 An employee who is unfairly dismissed is entitled to redress consisting of whatever the Rights Commissioner, the Employment Appeals Tribunal or the Circuit Court considers appropriate “having regard to all the circumstances” (section 7 Unfair Dismissals Act 1977 as amended by section 6 Unfair Dismissals (Amendment) Act 1993 (Ireland)). Redress includes the remedies of reinstatement, re-engagement and compensation. Compensation (section 7(1)(c)(i)) amounts to a sum not exceeding 104 weeks remuneration.
service. The legislation also precludes non-national seafarers by implication, as the legislation insists upon evidence of residence or domicile in Ireland before an employee is entitled to claim under the Act. Non-national seafarers are regularly engaged on transit visas which do not entitle them to enter or reside in the State and which thus effectively excludes them from the scope of the Act. Therefore, this remedy is only available to a small group of workers who can show that they have been unfairly dismissed.

2.2.2.B. Discrimination

The only remedy for employees who are excluded under the legislation from pursuing a claim for unfair dismissals would be to take an action under the Employment Equality Acts 1998-2004 which prohibit the selection of an employee for redundancy on any of the discriminatory grounds prohibited by the Acts, including race. The Act applies to all employees and contains no minimum service requirements. The Act prohibits both direct and indirect discrimination.

63 Under section 2 (1) of the Unfair Dismissals Act, 1977 an employee with less than twelve months continuous service is precluded from taking a case under the legislation. This does not apply where the dismissal has resulted wholly or mainly from pregnancy or where the employee can establish that the dismissal resulted wholly or mainly from trade union membership or activities (section 6(7)). The question as to whether an applicant’s service has been continuous is determined in accordance with the first Schedule of the Minimum Notice and Terms of Employment Act 1973 (Ireland).

64 section 2(3) Unfair Dismissals Act 1977 (Ireland).

65 Transit visas are issued under the Aliens (Visa) Order 2003, S.I. 708 of 2003 (Ireland). Regulation 3 provides that an alien coming from a place outside the State, other than Great Britain or Northern Ireland, who is a citizen of the State, specified in one of the Schedules to the Order, shall not enter a port in the State unless he or she is the holder of a valid Irish transit visa.

66 Section 8 (viii) Employment Equality Act, 1998. Race includes colour, nationality, ethnic or national origins.

67 Direct Discrimination is taken to have occurred where one person is treated less favourably than another is, has been or would have been treated on one of the nine grounds. (section 6 Employment Equality Act 1998 (Ireland)).

68 Indirect discrimination is more complicated and more difficult to prove. Indirect discrimination on grounds of race occurs where a provision (a) applies equally to all employees or prospective employee of a particular employer who includes C and D or, as the case may be, to a particular class of those employees which includes C and D, (b) operates to the disadvantage of C, as compared with D, (c) in practice can be complied with by a substantially smaller proportion of employees having the same relevant characteristics as C when compared with employees having
In this case, the employees of Irish Ferries could have claimed that they were dismissed on the grounds that they were Irish workers, which would provide proof of direct discrimination on grounds of race. Indirect discrimination is more difficult to prove. It would be necessary for the Irish employees to demonstrate that the new terms and conditions of employment applied to all workers, but operated to the significant disadvantage of Irish workers as compared to overseas workers as they are cheaper, can only be complied with by foreign overseas workers who are legally able to accept inferior terms and conditions of employment and that this cannot be justified in all the circumstances of the case.

In a recent case before the Equality Tribunal an employee claimed she had been selected for redundancy on the grounds that she was an Irish worker and that she cost substantially more than her non-national counterparts. However, the Tribunal held that they could find no evidence to support this contention and were convinced by the testimony of the employer, who was able to establish that she had been dismissed on the grounds of redundancy because she was a part time worker and because it was necessary to reduce staff due to what the employer described as “slack trading”. The Tribunal was of the opinion that the employee possibly had an action under different legislation, though which legislation they were referring to was unclear. It is possible that they considered that a genuine redundancy situation did not exist in this case and that she should have instead taken an action for unfair dismissal where the burden of proof would have been more substantial on the employer. This case is significant because it identifies

the relevant characteristics of D, and (d) cannot be justified as being reasonable in all the circumstances of the case. (Section 6(2) Employment Equality Act 1998 (Ireland)).

69 Ballycotton Seafood v. Cronin (2005) ED/03/05 Determination No. 47.
70 Ballycotton Seafood v. Cronin (2005) ED/03/05 DETERMINATION NO. 47.
the difficulties associated with taking a case under the Equality legislation framework and the difficulties migrant workers face in establishing a genuine redundancy situation. It also highlights the inadequacy of the current remedies available to migrant workers.

2.3. The Reaction of the State: Conclusion

The situation of workers in circumstances similar to that which arose at Irish Ferries is a precarious one. The new legislation does at least demonstrate a willingness on the part of the State to prevent the avoidance techniques currently being used by employers, even if it is worth less in the context of flags of convenience. It also demonstrates that the actions of the State are fettered by the principles of free movement. It would appear that a more inclusive interpretation of the redundancy legislation in Ireland would be a more useful strategy in deterring corporations from avoiding their legal obligations. Even though the remedies are inadequate, the deterrent effect may be sufficient to prevent the situation which arose at Irish Ferries from arising in the future and in other industries.

The issue of remedies should also be addressed. The situation whereby migrant workers cannot obtain sufficient remedies as a result of a determination, whether under the most recent regime or otherwise, is no longer acceptable and needs to be addressed through a re-examination of the entire redundancy law in Ireland.
3. The Role of Trade Unions

While the actions of the State have been fettered by the principles of free movement, the same can also be said of trade unions. The role of trade unions in situations such as that which arose at Irish Ferries is an interesting and important one and it has recently been the focus of a decision of the ECJ. The discretion of the trade unions to take industrial action during the Irish Ferries dispute was clearly fettered by the arguments based on free movement presented by the corporation. The reaction of the trade unions in Ireland in the aftermath of the Irish Ferries dispute was to achieve rights through the creation of undertakings\(^71\) with the employers. The ECJ has recently advocated this approach in its decision in Case C 438/05 *The International Transport Workers’ Federation and the Finnish Seamen’s Union v. Viking Line ABP and OU Viking Line Eesti*. The reaction of trade unions throughout the EU to similar situations is now shaped by the principle of the freedom of establishment. It is important to consider the *Viking Line* case as one of the most influential decisions made by the ECJ in recent years on the actions that trade unions may take to protect workers within the EU.

3.1. The Viking Line Case: The Facts

In November 2005, a case, *Viking Line ABP v. FSU (Finnish Seaman’s Union) and ITF*\(^72\) (hereinafter referred to as the *Viking Line* case), was brought before the UK’s Commercial Court by a Finnish shipping company, seeking an injunction.

\(^{71}\) An undertaking in this context refers to an agreement between the corporation and the trade union for a certain period of time.

\(^{72}\) [2005] EWCA Civ 1299.
against the actions of the Finnish Seaman’s Union and the International Transport Workers Federation, who were threatening to picket and boycott their vessels docked in the UK.\footnote{Viking Lime ABP v. FSU (Finnish Seaman’s Union) and ITF [2005] All ER 155.} The International Transport Workers’ Federation (“ITF”) had also tried to prevent negotiations between the ITF affiliated unions in Estonia and Viking Line. The Unions were acting in defiance of the plans of the company to re-flag its vessel in Estonia and replace its existing crew, composed mostly of Finnish seafarers, with cheaper workers from Estonia. The unions were not opposed to the re-flagging \textit{per se} but to the possibility of loss of employment for their members and a reduction in the terms and conditions of employment of the crew.\footnote{Viking Lime ABP v. FSU (Finnish Seaman’s Union) and ITF supra n. 72 at paragraph 52.} The main issue before the court was whether the actions of the unions were contrary to the community rules on free movement.

Waller L.J. in the Court of Appeal, unconvinced as to the merits of a strict application of the freedom of establishment rules in such a case, sought a reference to the ECJ citing ten pertinent questions on various aspects of this case. He sought confirmation from the Court as to the applicability of the freedom of establishment rules in this context and their compatibility with the principles of social policy outlined in Title XI of the EC Treaty. In the event that the ECJ held that the freedom of establishment rules were applicable, he also sought guidance from the court as to whether the case involved direct or indirect discrimination and whether or not these restrictions could be justified in the circumstances. He, however, refused to grant the injunction requested by Viking Ltd. to prevent the unions from exercising industrial action on the grounds that he did not consider it possible to undo the damage, which would be caused if he allowed Viking Ltd. to
continue with its plans to re-flag and replace its crew, despite the economic effect this would have on the company. He commented, “once the present crew of the Rosella were replaced by a low-cost labour crew it would be difficult if not impossible to put the clock back. In any event, compensation to the Defendant unions for jobs lost by individuals or for jobs no longer available to individuals would be difficult to calculate if recoverable at all”.

3.2. The Effect of Free Movement Principles on the Role of Trade Unions

Wherever a case regarding the right to establishment has come before the ECJ, it has used a strict formulation in determining whether a restriction exists and whether or not this restriction may be justified. This formulation was also utilised by the Commercial Court in this instance to decide whether the trade unions in question were creating a restriction of the freedom of establishment. The author will consider the following questions in determining how the role of trade unions has altered as a result of the decision in Viking Line:

- Do the Articles on Freedom of Establishment apply in such cases?
- Did the Actions of the Trade Unions amount to a Restriction?
- Was the Restriction Directly Discriminatory and could it be justified?

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75 Waller LJ. at paragraph 8 noted that if Viking were granted interim relief and ultimately held not to have been entitled to it, damages would not have provided an adequate remedy for the unions and the employees. Therefore, the balance of convenience swung in favour of the unions and the employees they represented. Viking Line ABP v. FSU (Finnish Seaman’s Union) and ITF supra n. 73.
76 This was laid out in the case of Case C –288/89 Stichting Collectieve Antennevoorziening Gouda & Others v. Commissariaat voor de Media [1991] ECR 1-6839 at paragraphs 9-16.
77 Viking Line ABP v. FSU (Finnish Seaman’s Union) and ITF supra n. 6 at paragraph 93 (per Gloster J.).
3.2.1. Do the Articles on Freedom of Establishment apply in such cases?

In the *Viking Line* case the ECJ was asked to consider whether the actions of trade unions in attempting to restrict a re-flagging of a vessel in an open registry and the consequent loss of employment and a reduction in terms and conditions of employment of seafarers, fall within the scope of the EC Treaty provisions on free movement or in the alternative whether such actions on the part of the trade unions or the State are in fact justified by reference to the objective principles of social policy as outlined in the Treaty provisions of Title XI.

Waller L.J. in the Court of Appeal, entered into a detailed examination as to whether the provisions on free movement were applicable in the case before him. The essence of his argument was that the right to take industrial action fell within Article 136 EC and Title XI, which require Member States to ensure high levels of social protection, employment and to encourage partnerships between employers and employees.\(^78\) If the right to take industrial action did fall with Article 136 EC then the free movement provisions would not apply in this context.\(^79\) An analogy was drawn by counsel for the unions with the decisions of the ECJ in cases involving competition law, where the primacy of social rights

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\(^78\) Article 136 provides: “The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.”

\(^79\) *International Transport Workers’ Federation and another v. Viking Line ABP and another* infra n. 104 at paragraph 36.
over competition law rules was recognised. Counsel also drew the Court’s attention to regulations made in the context of the free movement of goods, which uphold the central importance of the right to strike as not constituting a restriction on that freedom. Another Regulation, not mentioned in the case but which is of equal relevance, is Council Regulation 2679/98, which has been held not to affect the right the strike. Waller L.J. found it difficult to comprehend that all industrial action taken by trade unions, which constituted a restriction on free movement, would have to be justified before the ECJ.

Counsel for the shipping company demonstrated, however, the manner in which the ECJ has dealt with the rules on environmental law and the need to ensure that any restrictions are objectively justified and proportionate. In the case of Schmidberger, the ECJ had held that the right to assemble in a case involving the blocking of a motorway as part of an environmental demonstration could not oust the freedom of movement rules, but would have to be examined to see whether they were objectively justifiable and proportionate. They referred to Council Regulation 1612/68/EEC which expressly recognises the fact that collective bargaining agreements are subject to the rules on free movement. Despite these compelling arguments, however, Waller L.J. ultimately held that

82 International Transport Workers’ Federation and another v. Viking Line ABP and another infra n. 104 at paragraph 44 (per Waller L.J.).
83 International Transport Workers’ Federation and another v. Viking Line ABP and another infra n. 104 at paragraph 38 (per Waller L.J.).
84 Case C-112-00 Eugen Schmidberger v. Austria [2003] ECR I-5659.
85 See Article 7(4).
“that Viking will not get over the hurdle of showing that the trade union activities fall outside Title XI”.86

On the 23rd May 2007, Advocate General Maduro gave his opinion on the merits of this case.87 Advocate General Maduro rejected the opinion of the Court of Appeal and held that the provisions on freedom of establishment and services are “by no means irreconcilable with the protection of fundamental rights or with the attainment of the Community’s social policy objectives”88. Neither right is absolute nor did either take precedence over the other. Both could co-exist within the confines of each other successfully.

The ECJ agreed. The Court held, firstly, that collective action falls within the scope of Article 43 EC. While the right to take collective action, including the right to strike, is recognised as a fundamental right, the exercise of that right may nonetheless be subject to restrictions.89 The court did not consider that it was an inherent part of such rights that the fundamental freedoms would be prejudiced to a certain degree.90

The decision by the ECJ that the actions of the trade unions in this case fell within the principles of Article 43EC meant that the actions of the trade unions would now have to be justified by reference to concepts such as public policy. This

86 International Transport Workers’ Federation and another v. Viking Line ABP and another infra n. 104 at paragraph 62 (per Waller L.J.).
87 Case C-438/05 The International Transport Workers’ Federation and the Finnish Seamen’s Union v. Viking Line ABP and OU Viking Line Eesti.
88 Case C-438/05 The International Transport Workers Federation and The Finnish Seaman’s Union v. Viking Line ABP and OU Viking Line Eesti at paragraph 23 (per Advocate General Maduro).
89 Ibid at Paragraph 44.
90 Ibid at Paragraph 52.
meant that instead of the Court supporting the right of trade unions to take action to protect workers in such cases, the Court was asking the trade unions to justify their actions.

3.2.2. Did the Actions of the Trade Unions amount to a Restriction on the Freedom of Establishment?

At first instance, Gloster J. in the *Viking Line* case, held that the action of the defendant unions would amount to a restriction on the free movement of establishment principles,\(^91\) whether or not the defendants were opposed to the re-flagging. The action taken by them would have the result of hindering the company in their efforts to re-flag their vessel and as such was a restriction on the freedom of establishment. The Judge held that the International Transport Workers Federation’s flag of convenience campaign had as one of its primary objectives the elimination of flags of convenience and as such they could not claim that their aim was the protection of the employment of Finnish seafarers. Without the threat of industrial action, the company could exercise peacefully its rights under EU law.\(^92\)

There are a number of discrepancies with this aspect of the case, which was not dealt with by the courts. The unions were adamant that their actions did not amount to a restriction on Article 43 EC on the free movement of establishment. They accepted that the EC Regulation 789/2004, on the co-operation between States in the flagging of vessels, had the effect of making it unlawful to prevent a

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91 *Viking Line* supra n. 6 at paragraph 99 (*per* Gloster J.).
92 *Viking Line* supra n. 6 at paragraph 104 (*per* Gloster J.).
vessel from re-flagging in another Member State of the EU. However, this appears to be an unnecessarily restrictive view of the Regulation. As previously discussed, the Regulation calls for co-operation between Member States and would appear to prevent a Member State from refusing to register a vessel in its state for any reason other than a technical one. However, the Regulation makes no reference to the register of the losing state and whether or not a State could reasonably refuse to de-register a vessel for a reason other than a technical one. If the state had concerns for the safety and working conditions of its nationals, the Regulation would not appear to restrict this discretionary refusal to de-register.

Advocate General Maduro held that the practical effect of the coordinated actions of the Finnish Seamen’s Union (“FSU”) and the International Transport Workers Federation (“ITF”) was to render the exercise by Viking Line of its right to freedom of establishment subject to the consent of the FSU. In coming to this decision, Advocate General Maduro specifically mentioned the actions of the ITF in preventing negotiations between ITF-affiliated unions in Estonia with Viking Line by threatening to exclude the unions from the ITF. If this had not occurred, Advocate General Maduro may not have been so eager to declare that this constituted a restriction on the freedom as Viking Line would have had an option of negotiation with Estonian unions.

In its judgment, the ECJ reiterated the fact that the freedom of establishment constitutes one of the fundamental principles of the Community. The principle applies both to ensuring that host Member States treat foreign nationals and companies equally to nationals of the Member States and to ensuring that the
Member State of origin does not hinder the establishment in another Member State of one of its nationals or a company. Re-flagging a vessel constitutes an act of establishment as the “vessel serves as a vehicle for the pursuit of an economic activity that include fixed establishment in the State of registration”\(^\text{93}\). The Court concluded that the conditions laid down for the registration of vessels must not form an obstacle to the freedom of establishment.\(^\text{94}\)

The Court held that the actions of the unions in this case had the effect of making less attractive, or even pointless, the exercise of the right to freedom of establishment of Viking, as their actions prevented both Viking and its subsidiaries from enjoying the same treatment\(^\text{95}\) in the host Member State as other economic operators established in that State. The coordinated policies of the ITF were at least liable to restrict this right also.\(^\text{96}\) Therefore, the Court concluded that the collective action in this case constituted a restriction on the freedom of establishment.\(^\text{97}\)

3.2.3. Was the Restriction Directly Discriminatory and Could it be Justified?

The principle of non-discrimination is central to freedom of establishment. It is enshrined in Article 43 EC and in the case law of the ECJ that nationals of Member States must not be treated differently to other nationals when exercising

\(^{93}\) Supra n. 87 at Paragraph 70.
\(^{94}\) Ibid at Paragraph 71.
\(^{95}\) Ibid at Paragraph 72.
\(^{96}\) Ibid at Paragraph 73.
\(^{97}\) Ibid at Paragraph 74.
their freedoms under the Treaty.98 Any action, which is directly discriminatory, will be considered contrary to Article 43 EC.99

In the Viking case, Gloster J. considered whether the action of the unions amounted to direct discrimination on grounds of nationality or origin. The unions argued that their actions and in particular, the flag of convenience campaign was based on eliminating the abuse of flag systems by ship owners so as to avoid social and legal controls and thus had nothing to do with the nationality of the ship owners themselves. Any company in any other Member State engaging in the same behaviour would be treated in exactly the same manner.100 The aim of the unions was not to protect solely Finnish jobs and terms and conditions of employment but the jobs and conditions of all seafarers sailing in and out of Finnish ports. Gloster J., however, held that the actions of the unions amounted to discrimination because the policy adopted by the unions was applied by reference to the nationality of the ship owners, and not by reference to the protection of seafarers’ rights and interests.101 The Judge held that the arguments of the defendants masked the reality of the situation which was that a Finnish ship owner was prevented from re-flagging and was being compelled to hire a Finnish crew.102

With respect to Gloster J., the arguments of the unions appeared more convincing that those proffered by the Judge and as such the actions of the unions could not

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100 Viking Line supra n. 72 at paragraph 117 (per Gloster J.).
101 Viking Line supra n. 72 at paragraph 116 (per Gloster J.).
102 Viking Line supra n. 72 at paragraph 117 (per Gloster J.).
be described as directly discriminatory. It appears that the Judge applied a completely subjective test as to the definition of discrimination. The correct test should be an objective one: was there unequal treatment on the grounds of nationality? A cursory glance at the facts revealed that this was not the case. The actions of the ITF and the Finnish union were not aimed at a particular nationality. The policy of the unions, and in particular, the ITF Flag of Convenience Campaign is not aimed at just Finnish ship owners and would apply to any ship owner who proposed to take similar action. Also the reference to the protection of Finnish crew workers appears to be inaccurate when one considers that not all the crew of this vessel were Finnish. These arguments were raised by Counsel for the unions in their appeal against the decision of Gloster J. In the Court of Appeal, Waller L.J. held that the unions had a reasonable argument that the action was not directly discriminatory and any discrimination, which could be said to exist, if any, would be indirectly discriminatory.

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105 Viking Line supra n. 104 at Appendix I paragraphs 3-6 “[3] Where a trade union or association of trade unions takes collective action against a private undertaking so as to require that undertaking to enter into a collective bargaining agreement with a trade union in a particular Member State, which has the effect of making it pointless for that undertaking to re-flag a vessel in another Member State, does that action constitute a restriction for the purposes of Article 43 of the EC Treaty and/or Regulation 4055/86?

[4] Is a policy of an association of trade unions which provides that vessels should be flagged in the registry of the country in which the beneficial ownership and control of the vessel is situated so that the trade unions in the country of beneficial ownership of a vessel have the right to conclude collective bargaining agreements in respect of that vessel, a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86?

[5] In determining whether collective action by a trade union or association of trade unions is a directly discriminatory, indirectly discriminatory or non-discriminatory restriction under Article 43 of the EC Treaty or Regulation 4055/86, is the subjective intention of the union taking the action relevant or must the national court determine the issue solely by reference to the objective effects of that action?”
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The ECJ has not generally been unsympathetic to the legitimate concerns of Member States.\textsuperscript{106} For this reason both the Treaty and the Court have made significant inroads into the freedom of establishment and have identified certain exceptions where Member States will be permitted to impose restrictions on the freedom of establishment. A restriction, which is directly discriminatory, may only be justified on grounds of public policy, public security or public health.\textsuperscript{107} These are provided for in the Treaty and are generally given a restrictive interpretation.\textsuperscript{108}

In the case of \textit{Viking Line}, the unions argued that their actions, if directly discriminatory, could be justified on the grounds of public policy. Their actions involved the fundamental rights of freedom of expression and association and the right to take collective action and were therefore justifiable on grounds of public policy.\textsuperscript{109} Gloster J. held that the exercise of fundamental rights might fall within the scope of the public policy justification.\textsuperscript{110}

The question then arises as to whether the rights of freedom of association and collective action are characterised as fundamental under the Treaty. The rights to freedom of expression,\textsuperscript{111} assembly and association\textsuperscript{112} are recognised

\textsuperscript{106} Arnull \textit{supra} n. 62 at p. 347.
\textsuperscript{108} In the case of the freedom of establishment, this is provided for in Article 46(1). Craig and De Burca \textit{supra} n. 10 at p. 825.
\textsuperscript{109} \textit{Viking Line} \textit{supra} n. 72 at paragraph 121 (per Gloster J.).
internationally and regionally. The rights to freedom of association, expression
and assembly have also been recognised as fundamental rights by the EU and
the ECJ has been adept at utilising fundamental human rights conventions to
bolster its acknowledgement of fundamental social norms. It has also stated that
the power to invoke the public policy exception must be appraised by reference to
fundamental rights, in particular those enumerated by the European Convention
on Human Rights. The EC Treaty itself specifically states that the Convention
should be respected.

Gloster J. held, however, that these fundamental rights could not justify
discrimination on grounds of nationality. She did not think it compatible with
Article 14, the principle of non-discrimination in the European Court of Human
Rights, that workers have a fundamental right to strike in a discriminatory fashion.
This could not be a justification on grounds of public policy. It appears that

112 UDHR (1948), Article 20; CERD (1966), Article 5(d)(ix) and 5(e)(ii); ICCPR (1966), Article
21 and 22; CRC (1989), Article 15; ECHR (1959), Article 11; ESC (1961), Part 1(5); CEU (2000),
Article 12; ACHR (1969), Article 15 and 16; African Charter on Human and Peoples’ Rights
(1981), Article 8; African Charter on the Rights and Welfare of the Child (1990), Article 8;
Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms
113 Commission of the European Communities, For a Europe of Civil and Social Rights: Report by
the Comite des Sages (1996) at p. 50 as referred to in Szyszczak, EC Labour Law (Essex: Pearson
Education Ltd., 2000) at p. 46.
114 Szyszczak supra n. 113 at p. 47. She refers to the cases of Defrenne v. Sabena (No. 3) Case
149/77 [1978] ECR 1365 where the court referred to the European Social Charter 1961 and ILO
Convention No. 111 of 1958; Barber v. GRE Case C 262/88 [1990] ECR 1889 where the court
referred to the ECHR 1950, the International Covenant on Civil and Political Rights 1966 and the
International Covenant on Economic Social and Cultural Rights 1966; Blaizot v. University of
Liege Case 24/86 [1988] ECR 379 where the ECJ made particular reference to the ESC 1961;
Johnston v. Chief Constable of the RUC Case 222/84 [1988] ECR 379 where reference was made
to the European Convention on Human Rights and Fundamental Freedoms 1950 and finally Grant
v. SW Trains [1998] ECR I-621 where reference was made to the ECHR and the International
Covenant on Civil and Political Rights.
Dimotiki Etaria Pliroforissa & Another (ERT) [1991] ECR I-2925 and Case C-112-00 Eugen
Schmidberger v. Austria [2003] ECR I-5659 which underline that the ECJ will pay special
attention to the ECHR and that measures that are incompatible with the observance of rights there
recognised are not acceptable in the Community.
116 Article F(2) Treaty on European Union.
117 Viking Line supra n. 72 at paragraph 124 (per Gloster J.).
Waller L.J. in the Court of Appeal agreed with this assessment as he held that if direct discrimination were found, it would be unlikely that the unions would be able to provide any justification for it.

Despite these assertions, the ECJ has accepted that States retain certain discretion as regards public policy since “the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another”118. The ECJ in other cases has also referred to the fact that once Member States have “clearly defined their standpoint” as regards a particular activity, such as the use of flags of convenience, and “where considering it to be socially harmful, they have taken administrative measures to counteract these activities”, they may rely on the public policy exception.119

3.2.4. Was the Restriction Indirectly Discriminatory or Indistinctly Applicable and, if so, Could it be Objectively Justified?

Gloster J. at first instance, in the Viking Line case, held that in the absence of a determination that the actions of the unions were directly discriminatory, they were in the alternative indirectly discriminatory. The Judge held that if, as was claimed by the union, not all the crew were of Finnish nationality, then the majority were and as such the actions of the unions were to protect those of Finnish nationality. Furthermore, she held that even if she were incorrect in this assumption, the actions of the unions nevertheless constituted a restriction on the

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119 Viking Line supra n. 104 at paragraph 19 (per Waller L.J.).
freedom of establishment, which would require justification.\textsuperscript{120} Waller L.J. in the Court of Appeal held that the case for indirect discrimination was strong. However, in the alternative, the Judge also held that this was a restriction on the free movement of establishment.\textsuperscript{121}

Where the action is not directly discriminatory, but is indirectly discriminatory or indistinctly applicable, then the person causing the restriction must prove that the restriction is objectively justified.\textsuperscript{122} Furthermore, the interest which is sought to be protected must already be protected in another relevant Member State.\textsuperscript{123} Moreover, if there is no mutual recognition the question must be asked as to whether or not, the measures taken are appropriate to achieve the intended objective and are proportionate in the circumstances.

One of the objective justifications often argued before the courts is that it is in the public interest to impose the restriction. The ECJ has held that the protection of workers is an acceptable public interest objective.\textsuperscript{124} In the \textit{Viking Line} case, the unions justified their position by reference to the importance of the fundamental rights of freedom of association and expression and the protection of workers. They argued both in the Commercial Court and before the Court of Appeal, that the ECJ has never precluded states from imposing their labour laws on persons

\begin{itemize}
  \item \textsuperscript{120} \textit{Viking Line supra} n. 72 at paragraph 130 (\textit{per} Gloster J.).
  \item \textsuperscript{121} \textit{Viking Line supra} n. 104 at paragraph 51 (\textit{per} Waller L.J.).
  \item \textsuperscript{122} Craig and De Burca \textit{supra} n. 10 at p. 786.
  \item \textsuperscript{123} This is known as the concept of mutual recognition.
  \item \textsuperscript{124} Case C-79/01 Payroll Data Services (Italy) and Others [2002] ECR I-8923 at paragraph 31: “It is true that the protection of workers is among the overriding requirements relating to the public interest which have been recognised by the court as justifying a restriction on the fundamental freedoms guarantee by the Treaty”.
\end{itemize}
employed, however temporarily, in their territory\textsuperscript{125} in order to protect the terms and conditions of employment of workers and to prevent a downward spiralling of wages.\textsuperscript{126} Hepple has concluded that community law does not preclude Member States from extending their legislation to any person who is employed, even temporarily within their territory, no matter in what country the employer is established.\textsuperscript{127} In the context of the free movement of goods, a restriction caused by an environmental demonstration was held to be justified by the fundamental rights of freedom of association and assembly.\textsuperscript{128} The ECJ also stated that in such cases the objective sought to be achieved must be justified by reference to a social need and must be proportionate.

However, Gloster J. held that the protection of jobs was not a sufficient objective justification to justify a restriction on the freedom of establishment. As for the protection of terms and conditions of seafarers', she held that this was a subsidiary purpose of the unions and as such was not appropriate or proportionate to the aim sought to be achieved.\textsuperscript{129}

Advocate General Maduro did not make a determination on whether or not the actions of the unions were either directly or indirectly discriminatory but did consider whether there was a justification for any restriction. Advocate General

\textsuperscript{125} Viking Line supra n. 104 at paragraph 54 (per Waller LJ.) where Mr. Brealey (Counsel for the Unions) relied on the cases of Joined Case 62 and 63/81 Seco [1982] ECR 223 at paragraph 14; Case C-113/89 Rush Portuguesa [1990] ECR I-3905 at paragraph 18 and Joined Cases C-369/96 and C-376/96 Arblade [1999] ECR I-8453 at paragraphs 41-44.

\textsuperscript{126} He referred to the dicta of Advocate General Mischo in Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte [2001] ECR I-7831 at paragraphs 37 – 53.


\textsuperscript{128} Case C-112/00 Schmidberger [2003] ECR I-1577.

\textsuperscript{129} Viking Line supra n. 72 at paragraph 139 (per Gloster J.).
Maduro noted that the Treaty “does not turn a blind eye to the workers who are adversely affected by its negative traits”.\(^\text{130}\) He referred to the right to associate and the right to collective action as “essential instruments”\(^\text{131}\) to emphasise the “costs for the workers who will become displaced”\(^\text{132}\) in the case of relocation of a business. However, he questioned to what ends collective action could be used and how far it could go. He concluded that a coordinated policy of collective action among unions normally constitutes a legitimate means to protect wages and working conditions. In principle, Community law does not preclude trade unions from taking collective action “which has the effect of restricting the right of establishment of an undertaking that intends to relocate to another Member State, in order to protect the workers of that undertaking”\(^\text{133}\). However, blocking or threatening to block, through collective action, an undertaking established in one member state from lawfully providing its services in another Member State is incompatible with the Treaty.

Similarly, the action of the unions to improve in a general manner the terms of employment of seafarers throughout the Community was also allowed but subject to certain limitations. Advocate General Maduro noted that this could easily be abused in a discriminatory manner if operated on the basis of an obligation imposed on all national unions to support collective action by any of their fellow unions as it could mean that it could call on its fellow unions to make relocation of an undertaking conditional on accepting preferred terms and conditions of employment. By contrast, if the unions were free to choose whether or not to

\(^\text{130}\) *Viking Line* supra n. 87 at paragraph 59 (per Advocate General Maduro).

\(^\text{131}\) *Viking Line* supra n. 87 at paragraph 60 (per Advocate General Maduro).

\(^\text{132}\) *Viking Line* supra n. 87 at paragraph 60 (per Advocate General Maduro).

\(^\text{133}\) *Viking Line* supra n. 87 at paragraph 66 (per Advocate General Maduro).
participate in collective action, this would prevent the danger of discriminatory abuse. It would be for the national court to decide whether this had occurred in this case.

Similarly, the Court moved straight to a consideration of whether the restriction on the freedom of establishment could be justified in this particular case. Ireland, Germany and Finland supported the contention of the ITF that the restrictions were justified since they were “necessary to ensure the protection of a fundamental right recognised under Community law and their objective is to protect the rights of workers, which constitutes an overriding reason of public interest”\(^\text{134}\). The Court held that since the Community had a social as well as an economic purpose, the rights to free movement must be balanced against the objectives pursued by social policy, which include, “improved living and working conditions”\(^\text{135}\).

The Court held that it was for the national court to determine whether the actions of the unions in this case concerned the protection of workers. The Court gave guidance on how this could be examined. Firstly, it held that the actions of the unions would not involve the protection of workers if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.\(^\text{136}\) Secondly, if the undertaking given by the company was as binding as a collective agreement and if it was of a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement would be maintained, the protection of workers would again

\(^{134}\text{Paragraph 76.}\)
\(^{135}\text{Paragraph 79.}\)
\(^{136}\text{Paragraph 81.}\)
not be in issue.\textsuperscript{137} However, even if the national court determined that the jobs of such workers were under serious threat, it would still have to ascertain whether the collective action is suitable for ensuring the achievement of the objective pursued and does not go beyond what was necessary to attain that objective.\textsuperscript{138}

Once again, the Court of Justice gave guidance on what it considered objective and necessary in the circumstances. It held that collective action is \textquote{\textit{one of the main ways in which trade unions protect the interests of their members}}\textsuperscript{139}. The national court must examine whether the unions had any other means at its disposal that were less restrictive of freedom of establishment and whether these means had been exhausted before the action was initiated. In relation to the actions of the ITF, the court held that to the extent that the policy \textquote{results in ship owners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, the restrictions on freedom of establishment resulting from such action cannot be objectively justified}\textsuperscript{140}. This is due to the fact that the policy of solidarity action against flag of convenience vessels will operate regardless of whether there will be a harmful effect on the working conditions of employees.\textsuperscript{141}

3.3. \textit{The Decision of the European Court of Justice – An Analysis}

The role of trade unions in the EU in relation to the protection of national wage rates and collective bargaining agreements was very much in issue at the

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\textsuperscript{137} Paragraph 82.
\textsuperscript{138} Paragraph 85.
\textsuperscript{139} Paragraph 86.
\textsuperscript{140} Paragraph 88.
\textsuperscript{141} Paragraph 89.
\end{flushright}
commencement of this litigation and the ECJ recognised the significance of the judgment for national unions throughout the EU. The court took almost three years to make its decision in this case.

The decision of the court in *Viking Line* displays a “laissez faire” approach by the ECJ into matters concerning the manner in which states regulate flags of convenience and avoidance techniques. Instead of providing the Court of Appeal with concrete and practical guidance on the interpretation of EU law, the ECJ granted the Court of Appeal a wide birth to interpret the effect of the flag of convenience on workers. The judgment was nondescript and non-committal on this issue.

The ECJ placed a lot of emphasis on the fact that the actions of the trade unions amounted to a restriction on freedom of establishment. This demonstrates that the Court considered the protection of the freedom of establishment was more pressing than the protection of workers. While it did make general reference to the protection of workers, this was more in the context of actions that would not constitute a restriction on the free movement of establishment.

To an extent, the judgment in *Viking Line* displayed aspects of protectionism. The Court indicated that it was aware of the importance of the shipping industry to the EU and, in particular, it refused to make any determination on Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between
Member States and third countries. It must be noted that by the time the ECJ made its decision, Estonia had become a EU Member State. This may have had an impact on the court. The Court may not have wanted to place restrictions on the shipping industry of another EU state which depends to a large extent on its shipping industry and a thriving shipping registry.

Another interesting aspect of the judgment is the reliance on the concept of an “undertaking” by companies to provide effective protection to workers against a race to the bottom in terms and conditions of employment. It is undoubtedly true that undertakings can be an effective means of resolving industrial disputes and are legally binding on the signatory parties. However, such undertakings have the potential to interfere with the freedom of association and collective bargaining because they potentially remove the possibility of industrial disputes for the duration of the undertaking. Secondly, such undertakings are not long-term solutions to the problem. In the case of Irish Ferries, SIPTU managed to negotiate a deal with the company to pay the workers minimum wage in return for a promise that the unions would no longer engage in industrial action. This undertaking by Irish Ferries is due to expire in November 2008. Once this undertaking has expired there will be no effective protection for the workers on board the Irish Ferries vessels unless the undertaking is voluntarily renegotiated. However, there is no legal obligation on Irish Ferries to take part in this process. As the ship is no longer registered in Ireland, Irish employment law will no longer apply and SIPTU will have no basis for negotiation with Irish Ferries.

The judgment also refers to the fact that the actions of the unions in this case amounted to a restriction on the free movement of establishment as shipping companies are in effect treated less favourably than other economic operators in the host state. The difference, which was not examined by the court, is that other economic operators do not have access to the concept of the flag of convenience. Other businesses are subject to the rules on the transfer of undertakings and redundancy law which can be avoided by the flag of convenience phenomenon. The Court should have recognised this fundamental difference between ordinary businesses exercising their right to the free movement of establishment and the flag of convenience phenomenon which is exercised to avoid legal regulation.

Overall the judgment sounds warnings for the ITF and its flag of convenience campaign. While national unions may be able to take collective action against shipping companies where the jobs and working conditions of their members are in threat, the solidarity action of other unions is effectively prohibited. The ITF has launched a campaign against flags of convenience with the objective of eliminating open registries by enforcing the genuine link requirement, attacking sub-standard shipping using all legal, political and industrial means to insist upon minimum standards on board such vessels, protecting equally all maritime employees and consolidating unions globally to provide solidarity for their campaign.\(^\text{143}\)

This latter aspect of the function of the ITF has been seriously undermined by the decision in *Viking Line*. The ITF have been successful in insisting that vessels

\(^{143}\) ITF, *From Oslo to Delhi* available at www.itfglobal.org [last checked 15th September 2008]. Chapter 12 “ITF policy on minimum conditions on merchant ships” at paragraph 232.
flying flags of convenience must be the holders of an ITF approved collective bargaining agreement.\textsuperscript{144} These vessels are then awarded a blue certificate. There is no legal obligation on ship owners to obtain one but possessing one saves a great deal of time and is ultimately in the best interests of the ship owner. Compliance is monitored by a network of over one thousand ITF inspectors in ports throughout the world.\textsuperscript{145} Where no certificate is presented to an ITF official at a port, the ITF have the power to gather dock workers, among others, to boycott handling the ship, or otherwise to prevent it from leaving port.\textsuperscript{146} Whether this latter function will now be considered a restriction on the free movement of establishment is now debatable.

The judgment effectively restricts the role of trade unions to actions that are for the protection of jobs or conditions of employment which are jeopardised or under threat and where no undertaking is available. Even then, the actions of unions must be objective and necessary in the circumstances. If the unions have less restrictive means at their disposal, they will be compelled to adopt these less restrictive means of collective action.

\textbf{Conclusion}

This Chapter has examined the reaction of the State and the role of trade unions in the protection of workers against the avoidance of legal duties during employment. The protection of workers has to be balanced against the right of a

\textsuperscript{144} ITF \textit{supra} n. 143 at paragraph 241.
\textsuperscript{145} \url{www.itfglobal.org/flags-convenience/index.cfm} [last checked 15\textsuperscript{th} September 2008] “Flags of Convenience Campaign”.
company to freely establish in another Member State of the EU. The Chapter considers the concept of the freedom of establishment, the application of the principle to the re-flagging of a shipping vessel and the prohibition on restricting the right to freedom of establishment except in limited circumstances.

Secondly, the Chapter considered the Irish Ferries situation and the response by the State to the dispute. The State, mindful of the importance of the concept of freedom of establishment, introduced legislation to prevent further avoidance of legal duties by employers. There is, however, a more interesting alternative to the solution offered by the State. The Chapter challenges the view that a re-flagging amounts to a redundancy situation at all. While the remedies available may not be entirely adequate, the deterrent effect could be extremely useful in preventing the use of avoidance schemes altogether.

Thirdly, the role of trade unions in protecting and campaigning on behalf of workers was examined and the effect of the recent decision of the ECJ in Viking Line analysed. The actions of SIPTU in obtaining an undertaking from Irish Ferries, which were criticised roundly at the time of the Irish Ferries dispute, now appear to have been affirmed by the ECJ. The Court advocates the negotiation of legally binding undertakings between unions and ship owners instead of industrial and solidarity action with other unions. However, the problem with this approach is that it underestimates the effect on workers of the flag of convenience phenomenon and fails to acknowledge that such workers are being discriminated against because land based workers are protected against such attack whereas they are not so protected.
This Chapter has highlighted the many difficulties facing a State and trade unions in their attempts to protect workers against the detrimental effects of avoidance schemes. While the flag of convenience is an extreme example of one such avoidance scheme, the issues presented by the principles of freedom of establishment, exceptional collective redundancies and the restrictions on the role of trade unions within the EU are all relevant to other avoidance techniques. The next Chapter continues to examine the flag of convenience as an avoidance scheme and attempts to determine points of responsibility for ensuring the protection of workers. These are also relevant to other avoidance schemes.
Chapter 6: Avoidance of Legal Duties: A Shared Response

Introduction

The flag of convenience phenomenon among other avoidance schemes is “an issue that is... of high legal complexity and great socio-political sensitivity”\(^1\). The legal issues involved have been discussed in great detail in the preceding Chapters and the social issues have been highlighted most recently in the *Irish Ferries* case in Ireland and in the *Viking Line* case in the UK. It is therefore necessary to consider the possibilities open to a state that wishes to strike this delicate balance between regulation and competition. This Chapter will examine four separate points of responsibility, the state of beneficial ownership, the flag state, the port state and the market state\(^2\). The Chapter presents these possibilities and the potential barriers that may arise. However, the author advocates the development of a synthesis of these points of responsibility so as to ensure the effective protection of all migrant workers globally.

Firstly, the Chapter will consider the possibility of imposing liability on the state of beneficial ownership. As the preceding Chapter demonstrated in the cases of both Irish Ferries and Viking Line, the flag is viewed as the indicator of nationality of the ship and neither the courts nor the states are willing to look behind the flag to the beneficial owners to impose liability on them. It will be argued here that the flag is not always the most relevant factor in determining the

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\(^1\) Case C-438/05 *The International Transport Workers Federation and the Finnish Seamen’s Union v. Viking Line ABP and OU Viking Line Eesti* at paragraph 1 (per Advocate General Maduro).

\(^2\) This is the state that benefits from the fruits of the shipping vessel, its cargo and the fact that it is operated under a flag of convenience.
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law that applies on board a vessel and that the nationality of the owners may be an effective mechanism for imposing responsibility for labour disputes. This would involve removing the veil of the flag from the vessel and looking at the real owners of the ship. It will be concluded that this is not practical or desirable except in certain limited circumstances. By making an analogy with the concept of the veil of incorporation in company law, the Chapter will examine whether it is possible to lift the flag in cases similar to lifting the corporate veil in company law. It will be argued that this approach is more in line with EU developments in this area of law and should be adopted by the courts in Ireland.

Secondly, the Chapter will consider the imposition of responsibility on the flag state as is required under international law. Analogies with company law are again used in this context. Proposed legislation at a national and European level is examined. Secondly, the application of domestic law in relation to the transfer of undertakings is examined as a means of demonstrating how economic penalties imposed by the state could be used to discourage companies from de-registering from the shipping registry. The desirability and difficulties with such an approach will also be discussed.

Thirdly, the role of the port state cannot be over-emphasised. The Chapter will analyse the role of the port state in refusing access to flag of convenience vessels and will consider the political and economic consequences of this. It will also consider the role of the port state in the inspection of vessels and the need for an enhanced inspectorate in Ireland.
Market state responsibility is also a possible solution to the flag of convenience phenomenon. Given the benefits obtained by such states, it is appropriate that they should have some responsibility in securing the protection of migrant workers on board. The possibility of the introduction of a European Register is also discussed.

1. The Responsibility of the State of Beneficial Ownership

The UN has always recognised the problems caused by open registries and has been at the forefront in devising policies which would effectively guarantee a gradual abolition of flags of convenience.\(^3\) This, it has attempted to achieve through international conventions and, in particular, through the adoption of provisions, which would render open registries illegal.\(^4\) Since the very first Convention concerning the Law on the High Seas in 1958,\(^5\) there has existed in international law a requirement that there be a genuine link between the vessel and the state in which it is registered.\(^6\) Despite its repeated appearance in the United Nations Law of the Sea Convention,\(^7\) and the more recent United Nations Convention on Conditions of Registration of Ships (1986)\(^8\), the effect of the ‘genuine link’ requirement in international law has been minimal, if non-existent.

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\(^6\) Convention on the High Seas 1958, Article 5. Article 5 provided that “Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag”. However, it went on the say that there “must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”.

\(^7\) Article 91. Cf: Churchill and Lowe infra n. 9 at p. 259.

\(^8\) 1986.
A novel approach to the determination of the employment law that applies on board vessels would be to refuse to recognise the jurisdiction of the flag state in cases where the majority of the owners of the vessel are nationals of another state. While the application of Irish national employment law on board a vessel registered in another state may seem, at the present time, inconceivable, there are those who would support the notion that where the link “between a vessel and its flag state clearly was not “genuine”, it would of course be open to the courts and other public authorities of other states to do the equivalent of lifting the corporate veil and not recognise the nationality of the ship concerned.” When the International Law Commission was drafting the Convention on the High Seas in 1958, it envisaged that the inclusion of the genuine link provision in Article 5 would leave the door open to States to refuse to recognise the nationality of a ship where it had no genuine link with its state of registry.

The lack of any definitional certainty as to the scope of the concept of a “genuine link” at an international level does not prevent national legislative regimes from adopting legislation, which would effectively enforce the requirement of a genuine link in their own national registers. Enforcement at a national level can have a number of implications. The State could take action insisting that any vessels registering in its territory demonstrate a necessary genuine link between the owners and the State or could insist upon more restrictive action such as refusing to recognise ships registered in open registries at their ports.

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The Irish legal system already requires a demonstration of a genuine link between the ship owners and the State before they will allow a vessel to be registered in Ireland. The Merchant Marine Acts allow for the registration of only those vessels that are beneficially owned by the Government, the Minister of State, Irish citizens or an Irish body corporate and most recently ships from the Member States of the EU or reciprocating states and having their principle place of business in such a Member State or in a reciprocating state.

The courts have on many occasions refused to recognise the law of the flag as being a determining factor in deciding jurisdiction in many cases. Tetley has commented that the law of the flag appears to suffer from so many exceptions that it is preferable “to consider the flag as one contact of many”. Academics doubt the veracity of the assertion that the law of the flag will apply in many cases “or whether in a dispute about the proper law of contract it would ordinarily be held that the law of the flag was the decisive factor”.

Ownership of the vessel itself has often been asserted as a relevant factor in solving jurisdictional disputes. There are many examples of cases in the United States and in the UK where the courts have deemed the vessel not connected to the state of its registration but rather to the state of the persons actually controlling

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10 See the Merchant Marine Act 1955 (Ireland) as amended.
12 These include the UK and Colonies (S.I. 263/1955), New Zealand and Pakistan (S.I. 184/1958 and S.I. 189/1968) and Canada (S.I. 299/1961).
13 S. 19.
14 Tetley infra n. 52 at p. 158.
and owning the vessel. In the seminal case of Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Company the English Court of Appeal was appalled by the notion that the law of the flag would be determining factor in every instance. The Court was persuaded by the fact that pirates often “carried the flag of every nation, but they were hanged by every nation notwithstanding”. The Judges thought it was absurd “to suppose that the mere fact of carrying a Dutch flag makes her a Dutch ship”. What is important about the judgment is the statement made by Brett L.J. to the effect that “the nationality of a ship depends solely upon her ownership, and as to her liability it does not matter about her being registered”.

The courts have recognised that in cases involving ships “something more than the mere place or country of registration or incorporation must be looked at”. The courts have enquired where control over the company’s affairs is exercised. If the place where such control is located is outside the national territory, the courts have been swift to hold that a ship is not a national ship despite the fact that it is

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17 (1883) 10 QBD 521. Admittedly, the case is an extremely old one, however, it is this author’s contention that it is indicative of the variety of approaches adopted by courts in determining this issue. Indeed, as the concept of genuine link had not yet appeared in international law, the decision is important in demonstrating that even at that time this idea of a genuine link was considered necessary.

18 At p. 535 (per Brett L.J.).

19 At p. 535 (per Brett L.J.) Cf: Tetley infra n. 52 at p. 181.

20 At p. 536 (per Brett L.J.).

owned by a corporation established in the national territory. It can be implied from such decisions that the opposite scenario would also be decided in the same manner. For example, if the vessel were registered in an open registry but the place of control was in the national territory, the courts would be willing to find that the vessel was in fact a national vessel despite the fact that it was not registered there.

However, there are obvious disadvantages to allowing the approach outlined above to develop, including cost implications and impracticality. It may be more appropriate to seek out exceptions to this rule rather than relying on the odd judicial dicta. International law and national law in general view the flag as the indicator of nationality. However, what if there were exceptions to this general rule in defined circumstances? If an analogy is drawn with the corporate veil theory in company law, the flag like the veil could be lifted to reveal the owners of the company in limited circumstances. In what circumstances should it be possible to lift the flag, like the veil in company law?

### 1.1. Lifting the Flag of Convenience

As noted by Churchhill and Lowe, the recognition of the state of beneficial ownership rather than the flag would have the effect of lifting the veil of the flag and uncovering the state of beneficial ownership of the company. While the possibility of lifting the “corporate veil” in such cases has been considered in

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23. Also known as “disregarding of legal entity” in the United States, “abuso de la personalidad juridical” in Argentina, “Durchgriff” in Germany. See Dobson “Lifting the Veil” in Four
international academic circles for many years, the courts have been slower to recognise the concept. It is important to remember that the lifting of the flag is separate and distinct from lifting the corporate veil. In the latter case, this involves imposing liability on the individual persons who own the company. In the case of the flag, it merely means imposing the law of nationality of the state of ownership of the vessel. While it may not be appropriate or convenient to lift the flag in most cases, it may be so in cases where it becomes clear that the flag is being used to avoid legal obligations.

1.1.1. Lifting the Corporate Veil: An Analogy

The general rule regarding separate corporate personality does not appear to allow for many exceptions. The rule that a company registered under the Companies Acts (Ireland) is an artificial legal entity separate and distinct from the members of which it is composed and as such capable of suing and being sued in its own name has been the cornerstone of company law in Ireland since it was first pronounced in 1897 in the seminal case of Solomon v. Solomon & Co. Ltd.


25 The effect of the rule laid down in Solomon is that the shareholder cannot sue, or be sued, on foot of contracts entered into by the company (Keane, supra n. 24 at pp. 117-123), he can neither sue nor be sued in respect of torts committed by, or against the company (British Thomson-Houston Co. v. Sterling Accessories Ltd. [1924] 2 Ch 33; Keane supra n. 24 at p. 121) and he has no insurable interest in the assets or business of the company (Macaura v. Northern Assurance Co. [1925] AC 619.; Keane supra n. 24 at p. 121).

26 Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd. [1998] 2 IR 519 at p. 534 (per Murphy J.).

27 [1897] AC 22. As Lord Macnaghten stated: “ The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent for the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act” at p. 51. It has been applied in a wide range of cases in both the UK and in Ireland including Lee v. Lee’s Air Farming [1961] AC 12; Tunstall v. Steigman [1962]
Companies are by their very nature artificial or fictional persons and are often described as a “mere abstraction of law”.\(^{28}\) They are owned and run by individuals who utilise the veil of incorporation so as to enjoy the many benefits associated with it. This is similar to the flag of convenience as used by ship owners and operators.

The courts have seen fit to make a number of exceptions to the rule and in many cases have thought it pertinent to pierce the corporate veil so as to expose the liability of the real owners. There does not appear to be any principled approach adopted by the courts in deciding when this shield of corporate personality should be lifted, and in fact, the occasions on which it has been lifted “represent haphazard refusals” by the courts to apply the rule of separate corporate personality in the interests of justice or more particularly the Revenue Commissioners. Many academics are of the opinion that in fact the corporate veil is rarely lifted and that in those cases where it has purportedly been done, the result can be explained by using more conventional methods.\(^{29}\)

\(^{28}\) Courtney supra n. 24 at p. 162. Flitcroft’s Case, In re Exchange Banking Company (1882) 21 Ch D 519 at 536 (per Cotton LJ).

\(^{29}\) Mayson and French, \textit{A Practical Approach to Company Law} (London: Financial Training, 3\textsuperscript{rd} ed., 1986) at p. 84. For e.g. in Jones v. Lipman the company was bound by a contract to take in good faith or an order of specific performance could effectively have been made against him alone or the company might be said to have tortuously induced a breach of the original contract. “The use of emotive terms masked the precise juridical ground of the decision; but whatever that may have been, the separate personality of the company was not disregarded or swept aside, since an order was made against it, and doubtless, the bank still regarded it as its debtor”. at p. 29 (per Russel J.). Cf: Ussher, \textit{Company Law in Ireland} (London: Sweet & Maxwell, 1996).
Despite the range of exceptions which appear to be available in various jurisdictions, there does appear to be a general consensus that where there is an abuse of the corporate form involving the avoidance of existing legal obligations, the veil of incorporation will be lifted to prevent a misuse of the Companies Acts. It is this latter exception that will be relied on to examine whether or not they could be applied in cases of flags of convenience in order to ensure that the labour law of the country of ownership of the vessel is applied rather than the lower standards set by flag of convenience registries.

1.1.1 A. The Obligation must be an Existing One

The existence of an exception to the principle of separate corporate personality in cases where the company is attempting to avoid its existing legal obligations has often been the subject of much debate in both academic and judicial circles. A distinction has been made, however, between existing and future legal obligations. While the existence of an exception based on an avoidance of existing legal obligations has become generally accepted as a relevant exception by academics and the courts, the extent to which an exception based on the evasion of future legal duties exists is still unclear.

Both Courtney in Ireland and Gower in the UK have taken cognisance of the “apparent willingness [of the courts] to disregard the separate legal personality

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30 Where the obligation is a future one, the courts have been extremely reluctant to raise the veil of incorporation so as to find the company officers liable. This is evident from the judgment of the House of Lords in Adams v. Cape Industries [1990] Ch 433 where Lord Justice Slade refused “to accept as a matter of law that the court is entitled to lift the corporate veil as against a defendant company which is a member of a corporate group merely because the corporate structure has been used so as to ensure that the legal liability (if any) in respect of particular future activities of the group (and correspondingly the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company”. (per Slade LJ) at p. 544. See also Roundabout Ltd. v. Beirne [1959] IR 423.
of a company where to do otherwise would allow a controller to evade an existing legal obligation."³¹ Gower, in particular, is of the distinguished opinion that this is the only real exception left in company law after the case in *Adams v. Cape Industries*.³² The courts first utilised this exception in the case of *Jones v. Lipman*³³ where Russell J. noted that companies should not be used as "a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity".³⁴ Similarly, in *Gilford Motor Co. Ltd. v. Horne*,³⁵ Lord Hanworth described the company in that case as "a device, a stratagem in order to mask the effective carrying on of the business...The purpose of it was to try to enable him under what is a cloak or a sham to engage in business in respect of which he had a fear that the plaintiffs might intervene and object".³⁶ The courts in Ireland have also demonstrated an implicit acceptance of this principle. Though not traditionally viewed as such, Courtney believes that the decision in *Power Supermarkets Ltd. v. Crumlin Investments Ltd. and Dunnes Stores (Crumlin) Ltd.*³⁷ may be seen as an Irish example of the judicial willingness to ignore the separate legal personality of a company when its substantial purpose and effect is to avoid an existing legal obligation.³⁸

In *Adams v. Cape Industries*³⁹ the court accepted as a matter of principle that the courts would lift the corporate veil in two specific situations. These occur where

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³¹ Courtney supra n. 24 at p. 222. See *Cummings v. Stewart* [1911] 1 IR 236.
³³ [1962] 1 All ER 442.
³⁴ At p.445 (*per* Russel J.).
³⁵ [1933] Ch 939 (*per* Lord Hanworth).
³⁷ (22 June 1981, unreported) High Court.
³⁸ Courtney supra n. 24 at p. 225-226.
the company is being used as a device to avoid “(i) limitations imposed on his conduct by law; [and] (ii) such rights of relief against him as third parties already possess”.

In the case of a company re-registering its vessel in another state which is a flag of convenience nation, the ship owners are attempting to avoid limitations imposed on them by the law of their national state and the re-registration is designed to enable the company to continue to operate on the same sea routes while reducing the labour costs to the company.

There is evidence to suggest that the Irish courts will not accept that an avoidance of existing legal obligations will always be sufficient to lift the corporate veil or flag in this instance. In the case of *Roundabout Ltd. v. Beirne*[^40] Dixon J. held that even though there was a considerable element of subterfuge involved, designed to sidestep a trade dispute, regard must be had to “the company as what it is, a distinct legal entity”.[^41] While many academics are of the opinion that this decision is not encouraging for a potential exception from the corporate veil theory, it is possible to distinguish this case. The particular situation which arose in the case, which involved a transfer of undertakings, is now covered by the transfer of undertakings legislation and such legislation allows employees to take a case against their new employer should a trade dispute arise with their old employer. These regulations demonstrate that the situation that occurred in *Roundabout Ltd. v. Beirne* is no longer desirable considering the developments that have been made in Ireland and Europe in the area of employee protection. However, it does

[^40]: [1959] IR 423.
[^41]: *Ibid* (*per* Dixon J.).
prove that the corporate veil in Ireland is still sacred and will only be lifted in very specific circumstances.

1.1.1.B. The Obligation must be Statutory or Contractual

The majority of cases where this exception has been utilised relate to the avoidance of a contractual obligation.\(^{42}\) Courtney, however, notes that the courts have shown themselves willing to disregard the separate corporate personality of a company where it has been used to avoid statutory obligations, or where it would otherwise frustrate the purpose of the statute.\(^{43}\) The avoidance of employment law would constitute a legal obligation for the purposes of this study. In cases involving flags of convenience, enforcement of employment law is intended to be resisted by contesting the legitimacy under Irish law of the jurisdiction of Irish courts over the flag jurisdiction of another state.\(^{44}\)

1.1.1.C The Obligation must be Owed to a Third Party

What is clear from the case law is that the obligation which is to be avoided must be a legal obligation to a third party. The question is whether avoiding legal obligations owed to employees will allow the courts to lift the flag so as to impose the jurisdiction of national employment law on vessels sailing under another flag. Of particular relevance to this debate is the case of Creasey v. Beachwood Motors

\(^{42}\) See for example Jones v. Lipman [1962] 1 All ER 442; Gilford Motor Co. v. Horne [1933] Ch 935.

\(^{43}\) Courtney supra n. 24 at p. 227. See Merchandise Transport Ltd. v. British Transport Commission [1962] 2 QB 173 where the court disregarded the separate legal personality of the subsidiary by looking at the motives of the controllers. See also the Supreme Court decision in The State v. District Justice Donnelly (1977) The Irish Times 5 November.

\(^{44}\) See Adams v. Cape Industries [1990] Ch 433 at p. 478 (per Scott J.).
where the plaintiff in this case was a general manager who sued for wrongful dismissal. The company ceased trading, paid off all its debts and transferred its assets to a new company. The court allowed Creasey to claim against this new company for his wrongful dismissal. Therefore, avoiding a legal obligation to employees would allow the courts to lift the corporate veil and perhaps the flag of convenience too.

1.1.1.D. The Avoidance of the Obligation must be Intentional

“Whenever a device or sham or cloak is alleged in cases such as this, the motive of the alleged perpetrator must be legally relevant”. The courts will require evidence that the company was used “as an engine for the destruction of legal obligations or the overthrow of legitimate or enforceable claims”. Courtney notes that an important aspect of these cases is proving that the company was incorporated for that purpose and that the true facts were concealed. The courts, Ussher notes, will not readily intervene for the purpose of preventing company officers from avoiding a pre-existing legal duty but with the motive of altering the owners of the companies’ legal relations with the world in some other way. As such, the establishment of a company in another state, which flies a flag of convenience, could be said to have been established with the intention of resisting the enforcement in their national state of labour legislation and collective

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46 However, the case has been heavily criticised and rejected by the Court of Appeal in Ord v. Belhaven Pubs Ltd. [1998] 2 BCLC 447 (See Courtney supra n. 24 at p. 225), although not on this particular point.
bargaining agreements,\textsuperscript{51} thus proving the intention of the owners to avoid their legal obligations to their employees.

1.1.2. Conclusion

There is a possibility that the corporate veil analogy may have some relevance in determining the law which should apply on board a vessel. The author is aware that removing the flag as the indicator of nationality of a vessel may not be convenient or practical. However, at present there is a danger that the legal regime is allowing corporations to exploit workers. The balance therefore needs to be redressed. One way, which has just been propounded, is to use the analogy of the corporate veil. The exceptional situations in which it is allowed to be lifted in Ireland could offer possible guidance to the State in determining the situations in which it might also be appropriate to lift the flag, i.e. in cases where the employer is avoiding existing legal obligations to their employees. This would only be allowed in limited circumstances. It would have to be proved that the obligation is an existing statutory or contractual obligation that is owed to a third party and is intentional. In this way, the employment law of the state of beneficial ownership of the vessel could be enforced on board shipping vessels for the protection of migrant workers.

2. The Responsibility of the Flag State

As part of the State’s responsibilities under the United Nations Convention on the Law of the Sea, the State has a responsibility to the ships that are flying its flags.

\textsuperscript{51} See \textit{Adams v. Cape Industries} [1990] Ch 433 at p. 478 (\textit{per} Scott J.).
“The law of the ship’s flag has been used by various authorities in the past as the sole and definitive indicator of the applicable maritime law”. Indeed, Churchill and Lowe are of the distinct opinion that “[m]atters relating solely to the ‘internal economy’ of the ship tend in practice to be left to the authority of the flag state” and most states have adopted laws accepting the law of the flag as the most appropriate law in the circumstances. However, the question remains as to what techniques a flag state can develop to protect the workers operating on board their national vessels.

2.1. De-registration of Shipping Vessels

One way that this might be achieved is to refuse to allow a ship to de-register from the shipping registry where it became clear or where there was a potential risk that the vessel would adopt a flag of convenience. This is in line with the opinion of the European Parliament which has encouraged states to “discourage the transfer of fishing vessels from their registries to FOC Countries”.

However, once again States would have to be mindful of the rules on freedom of...
establishment and this could only be applicable to ships intending to register outside the EU.

2.1.1. The Company Law Analogy

One solution to the consequences of this would be to apply the principles laid out in the Companies Acts for the de-registration of Companies from the Company Register. In Ireland, this is achieved under section 311(1) of the Companies Acts 1963, which provides for the voluntary strike-off process. This is the only method by which companies are allowed to de-register voluntarily under the Companies Acts. This section requires the company to prove to the Registrar of Companies that the company is no longer carrying on business. If the Registrar then has reasonable cause to believe that this is in fact the case, they may strike the company from the Register.

The Registrar does not exercise this function lightly and has noted that a voluntary striking-off will only be granted where the director of the company “furnishes a statement to the effect that the company has ceased trading or has never traded, that it has no assets or liabilities and that it wishes its name to be struck off the register”.56 This statement must be accompanied by all outstanding annual returns, including accounts and relevant filing fees including a late filing penalty57, a letter of no objection from the Revenue Commissioners and a copy of an advertisement in the approved form published in one daily newspaper indicating the intention to have the company struck off the register. While it may

57 If applicable.
only have the effect in company law of “culling moribund companies”,\textsuperscript{58} it could have a far more significant effect in maritime law.

It is interesting to note the parallels between this provision and the law relating to redundancy. Both in effect require some element of the business ceasing to trade or no longer being able to continue in business. It is also interesting to note that in the case of Irish Ferries, it was able to move its vessel to another registry but it has not been able to de-register the company from the Irish company register, as it has not ceased business in Ireland. The application of such provisions to the shipping register would make it much more difficult for ship owners to leave the Irish register unless it could be proved that they had ceased trading. The benefits both to employees and the State, in terms of the continued employment of its seafarers, would be immeasurable. However, despite the simplicity of such amendments, in the recent Consultation Paper on the Registration of Vessels on the Irish Flag no mention was made of the process of de-registration and the possibility of bringing such processes in line with the law relating to corporations.\textsuperscript{59}

2.1.2. Mercantile Marine (Avoidance of Flags of Convenience) Bill 2005 (Ireland)

The option of a refusing to de-register a vessel was proposed in the Mercantile Marine (Avoidance of Flags of Convenience) Bill 2005 (Ireland) which has now lapsed. This was a Private Members Bill initiated by Mr. Broughan in November 2005.\textsuperscript{60} He proposed maintaining the existing provisions whereby an application

\textsuperscript{58} Courtney \textit{supra} n. 24 at p. 722.


\textsuperscript{60} Dáil Éireann, Vol 609, 10\textsuperscript{th} November 2005.
must be made to the Minister\textsuperscript{61} for de-registration but imposing additional conditions where the ship concerned is one that is registered at a port in the State and regularly proceeds to sea from a port in the State to any other port in the State or to a port in any other Member State.\textsuperscript{62} The Minister for Transport may consent to the application only where the following conditions are met:

- the person is a national of a Member State or a body corporate established under and subject to the laws of a Member State and
- the port at which it is proposed to register the ship is a port within a Member State.\textsuperscript{63}

In order to protect the rules on freedom of establishment, the provision effectively fetters the discretion of the Minister for Transport to grant a de-registration where a movement to another Member State flag was proposed. Also the Minister for Transport should have regard to the United Nations Convention on the Law of the Sea (1982), the particular need to ensure a de-registration will not result in a breach by the State of its obligations under that Convention and to ensure that no recognition is given to the documents of a ship which does not have a genuine link with its state of registry. If a ship sought registration without the consent of the Minister for Transport, it would be an offence punishable by a fine and/or imprisonment.\textsuperscript{64} This Bill never reached second stage.

\textsuperscript{61} As the Minister for Transport is now responsible for the marine portfolio, this would be the relevant Minister.
\textsuperscript{62} Section 2.
\textsuperscript{63} Section 2(2).
\textsuperscript{64} Section 4.
The Bill incorporates the call at a European level for the refusal to remove from their shipping registries vessels that are being exported to non-member countries which have been identified as flag of convenience countries.\textsuperscript{65} The European Parliament in its role in relation to the conservation of fish stocks, which are also heavily affected by flag of convenience shipping, has strongly condemned all those engaged in the flag of convenience industry and \textit{“its treatment of crew in terms of working conditions, wages and safety standards”}\textsuperscript{66}.

While the State may be concerned about the economic effect this may have on the competition of its fleet it is interesting to note that the Committee on Fisheries in their Report on the role of Flags of Convenience in the Fisheries Sector\textsuperscript{67} did not consider this to be costly for states and in fact noted that Japan banned the export of large scale long-liners in 1998 with little difficulty\textsuperscript{68}.

\textbf{2.2. Enforcing Internal Laws: Transfer of Undertakings Law}

At common law, once a business had closed down or ceased to exist in its original form, the contracts of employment of the employees were automatically terminated with the result that employees were not entitled to continued employment with the new owner, where one existed. A radical change in the law was introduced as a result of a EU initiative, which brought into force the Transfer  

\textsuperscript{65} European Parliament Resolution on the role of flags of convenience in the fisheries sector (2000/2302 (INI)), Preamble. 
\textsuperscript{66} This echoes the sentiments of the European Parliament who in 2001 noted \textit{“with alarm the increasing use being made of flags of convenience…. with severe impact for social and working conditions for the crews on board”}. European Parliament Resolution on the role of flags of convenience in the fisheries sector (2000/2302 (INI)), Preamble.
\textsuperscript{67} (2000/2302(INI)) Rapporteur Patricia McKenna.
\textsuperscript{68} (2000/2302(INI)) Rapporteur Patricia McKenna.
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of Undertakings Regulations.69 These have been substantially updated and amended over the years70 and now provide extensive protection for employees on the transfer of a business.71

The difficulty of the application of these Regulations, to cases involving flags and crews of convenience, is that the regulations specifically state that they do not apply to seagoing vessels.72 This is a serious omission from the Regulations and one to which there is no explanation. It is also omitted from the European Directive guiding the Regulations. The earlier drafts of the Directive did not omit seafarers entirely from its scope.73 It provided for the application of the entire provisions of the Directive to seafarers, except for the provisions on consultation and information. The Commission in its discussion document could find no justification for the refusal to apply the Directive to seafarers.74 For the Directive and its implementing Regulations to apply in such circumstances, amendments must be made to existing national and regional laws. However, it is interesting to examine whether the flag of convenience system would be covered by the legislation should this extension be made.

74 The Commission stated that the provisions of the Directive were in no way incompatible with the special nature of the contract of employment or employment relationships of crews on seagoing vessels and as such, their exclusion from the terms of the Directive could not be justified. Council Directive supra n. 73 at paragraph 31.
The Regulations apply to any transfer of an undertaking, business or part of a business from one employer to another as a result of a legal transfer or merger.\(^{75}\) A transfer is defined in the Regulations\(^ {76}\) as the transfer of an economic entity\(^ {77}\), which retains its identity. Flag of convenience vessels often dismiss their employees on moving flag and replace these workers with contractors who do the same work but for cheaper terms and conditions of employment. The question arises as to whether this constitutes a transfer of undertakings for the purpose of the Regulations. These regulations have never been used in the context of a flag of convenience vessel but as will be demonstrated, they could have a very important role to play in discouraging both ship owners and other employers from subcontracting in order to avoid their legal obligations to their employees.

The central issue is whether a company in contracting out the performance of services to an agency makes a legal transfer of part of its business to another employer within the Transfer of Undertaking Regulations 2003 (Ireland). The Regulations have been held to apply to cross border situations as well as purely internal ones.\(^ {78}\) Meehan has helpfully elucidated two key ingredients in determining whether a transfer of undertakings has in fact occurred. There “must be a change in the identity of the employer, and that the business be transferred as

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\(^{76}\) Regulation 3(2). See Department of Enterprise, Trade and Employment *supra* n. 75 at p. 4.

\(^{77}\) An economic entity means an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is for profit or whether it is central or ancillary to another economic or administrative entity. Regulation 3(2). See Department of Enterprise, Trade and Employment *supra* n. 75 at p. 4.

\(^{78}\) A cross border transfer of undertakings is defined as a transfer which occurs where the transferor and the transferee are governed by the laws of different member states of the EU of the European Economic Community, or where one is governed by the law of a member state and the other by the law of a third (non-EU and non-EEA) country. See Hepple, *The Legal Consequences of Cross Border Transfer of Undertakings within the European Union* (Cambridge: A Report for the European Union, 1998) at paragraph 1.1.
a going concern”. Each of these two criteria must be satisfied before the court will consider that a transfer of undertakings has taken place.

2.2.1. Is there a Change in the Identity of the Employer?

Whether or not the identity of the employer has changed will depend to a large extent on whether “the operation was actually continued or resumed by the new employer with the same or similar activities”. In the Irish case of Bannon v. Employment Appeals Tribunal and Drogheda Town Centre Blaney J. considered the scope of this first criterion. He considered that it would be satisfied where the same services are being provided both before and after the transfer whether or not there had been a change of the natural and legal owner of the business. Here, the employee had been dismissed after the provision of security services was transferred to an agency. The Court noted that the new enterprise provided the same security services, for the same person and as such was transferred as a going concern. This interpretation by the Irish Courts appears to be supported by the general protective role taken by the ECJ in defining the term “transfer of undertakings”. It has been held by that Court that a transfer of undertakings does not necessarily require the actual transfer of the entire undertaking to another company and it is sufficient that part of a business is

80 See Commission Services Working Document, Memorandum on Rights of Workers in Cases of Transfer of Undertakings at paragraph 2.4, which identifies two conditions, which must be met before a transfer can be said to have occurred. These are (1) there must be a change of identity of the employer and (2) the transferred entity must maintain its identity.
84 [1993] IR 500 at p. 509 (per Blaney J.).
contracted out. For example in the case of Schmidt, where the cleaning staff of a business were dismissed and replaced by a contracted agency, the ECJ held that this was a transfer of undertakings within the meaning of the Directive and the fact that it was merely an ancillary part of the business was irrelevant to the discussion at hand. In the case of a replacement of crew services on board a vessel with agency employees there would be a change in the identity of the employer as required by the case law and the Regulations.

2.2.2. Has the Business been Transferred as a Going Concern?

The second criterion to be examined is whether or not the business is transferred as a going concern. This is indicated by the fact that “its operation was actually continued or resumed by the new employer, with the same or similar activities.” In a situation, therefore, where an agency is contracted to do the work of the crew, this will amount to the transfer of the business as a going concern.

2.2.3. The Effect of a Transfer of Undertakings

The effect of a determination that a transfer of undertakings has occurred is that all the contractual terms and conditions, which existed at the date of transfer, are

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88 A similar situation arose in the case of Ayse Suzen v. Zehnacker Gebäudereinigung GmbH Krankenhauservice Case C-13/95 [1997] ECR I-1259. However, in that case one contractor was dismissed for another. The ECJ held that the mere loss of a service contract to a competitor cannot of itself indicate the existence of a transfer within the meaning of the Directive because the previous contractor does not cease to exist and so the business cannot be regarded as transferred.
deemed to be transferred to the new employer. Any collective agreements, which existed prior to the transfer, must be honoured until it expires or is renegotiated. One of the most important protections available in the Regulations, is the right to be protected against dismissal. The Regulations provide that the transfer in itself shall not amount to grounds for a dismissal and any dismissal based on such a transfer is prohibited. Where termination of employment occurs due to the fact that the new terms and conditions of employment are substantially inferior to those enjoyed previously, the employer concerned is regarded as being responsible for the dismissal.

2.2.4. The Defence for Employers

However, there is a defence provided for employers in the Regulations. It does not prohibit any dismissals for economic, technical or organisational reasons requiring changes in the workforce. The scope of these exceptions is not defined in the Regulations. The ECJ has examined whether the transferor is entitled to dismiss staff prior to the transfer or whether this exception applies only to the transferee. It was held that the Directive does not prohibit either the transferor or the transferee from dismissing employees for the reasons permitted. However, the derogations can only be relied on where the decision to dismiss employees is

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89 Regulation 4(1). See Department of Enterprise, Trade and Employment supra n. 75 at p. 5.
90 Regulation 4(2).
91 Regulation 5(1).
92 Regulation 5(3).
93 Regulation 5(2).
94 Jules Dethier Equipement SA v. Jules Dassy and Sovam SPRL in liquidation Case C-319/94 [1998] ECR I-1061 at paragraph 56. The court gave the example of a liquidation case where the company would need to introduce rationalization measures prior to the consideration of a transfer so as to attempt to save the business from liquidation.
made independent of the decision to transfer the undertakings. In determining whether the decision to dismiss has occurred only as a result of the transfer, the court will examine the objective circumstances in which the dismissal took place and the fact that it took effect on a date close to that of the transfer and that the employees in question were taken on again by the transferee.

Although the Unfair Dismissals Act only applies to those employees who have one year’s continuous service, the Regulations make provision for the employee with less than one year’s service to refer a case to the Rights Commissioner. This is of great benefit to workers who would not otherwise fulfil the continuous service requirements under the Unfair Dismissals Acts. Such legislation, as exists in Ireland, could have the effect of rendering less attractive the prospect of flags and crews of convenience to ship owners and of subcontracting to employers of migrant workers in Ireland given the attendant responsibilities associated with it and the potential liabilities it could be exposed to at law.

3. The Responsibility of the Port State

The role of the port state is also extremely important in preventing exploitation of migrant workers on flag of convenience ships. It “involves the powers and concomitant obligations vested in, exercised by and imposed upon a national

97 See Department of Enterprise, Trade and Employment supra n. 75 at p. 5.
maritime authority (or its delegee) by international convention or domestic statute or both". The aim is to ensure compliance with certain established standards.

3.1. Refuse Access to Ports

One possible method is to refuse access to flag of convenience vessels to ports. In the area of fishing, many states refuse access to their ports to vessels carrying illegal fish stocks. The best example is that of South Africa. Despite the fact that Cape Town is one of the most important harbours in the South Atlantic for fishing vessels, it still refuses offloading to flag of convenience vessels. Many academics are of the opinion that states could refuse access to their ports to ships flying the flag of an open registry.

However, whether such legislation should be adopted and utilised unilaterally by states is dependant upon the economic and political effects of such actions. Economically, it is important to remember, particularly in the case of Ireland, as an island nation, the detrimental effect such actions could have on shipping for the maintenance of the economy and to ensure that imports and exports do not become unrealistically expensive. The imposition of such regulations could have the effect of rendering uncompetitive the Irish shipping industry. Politically, it would be very difficult for one state to refuse to accept the legality of the register of another state. However, in the area of illegal fishing, the EU encourages Member States to adopt this approach. It is arguable then that this should naturally

99 (2000/2302(NI)) Rapporteur Patricia McKenna.
apply to all flag of convenience vessels regardless of their cargo. However, this may not be the most appropriate solution at the present stage of international law. Also, this could not apply to flag of convenience vessels that are registered with an EU Member States because of the rules on free movement.

3.2. Improvement of Inspection Mechanisms

The role of the port state is perhaps best served in establishing a system of inspection of all vessels to ensure that they are complying with minimum employment standards. The ILO introduced in 1996 a Convention on Labour Inspection101 that for the first time established a system for inspecting the working and living conditions of seafarers aboard vessels that are registered in the state. However, this system did not allow for the inspection of vessels flying flags of convenience as these vessels are registered in other states. The ILO introduced a Maritime Labour Convention in 2006102 that seeks to improve this level of inspection. However, so far this Convention has received only three ratifications.103

The EU has, however, extended the remit of the convention. It extends the inspection to all ships docking at community ports regardless of the flag it flies, in order to “identify and remedy any situation which is manifestly hazardous for the safety and health of seafarers”. The Directive allows for the provisions of C180 of

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101 C 178 Labour Inspection (Seafarers) Convention, 1996.
103 It has received ratification from the Bahamas, Liberia and the Marshall Islands. Interestingly, these are all flag of convenience nations.
the ILO, concerning seafarers’ hours of work and manning,\textsuperscript{104} to be applied to all ships docking in a community port. The Directive does contain provisions which are not contained in C180 and which are thus not enforceable against those ships not flying the flag of a Member State.

All vessels docking in the port of a member state of the EU, regardless of their nationality, will therefore be subject to an inspection of the hours of work and the hours of rest of the seafarers on board the vessel,\textsuperscript{105} the arrangements regarding night work,\textsuperscript{106} the records containing information regarding the hours of work and rest of seafarers,\textsuperscript{107} the ages of the seafarers on board\textsuperscript{108} and the sufficiency of the crew on board given the size of the crew and the work to be completed.\textsuperscript{109} Vessels flying the flags of other member states of the EU will be subjected to additional inspections governing the possession of seafarer’s certificates declaring their fitness to work,\textsuperscript{110} the safety and health protections on board\textsuperscript{111} and the implementation of annual leave provisions.\textsuperscript{112} Finally vessels registered in the State at which it is docked can be inspected to ensure that the working and living conditions of seafarers are protected. ILO Convention 178 on the labour inspection of seafarers defines “working and living conditions” as

\begin{quote}
“those relating to the standards of maintenance and cleanliness of shipboard living and working areas, minimum age, articles of agreement, food and catering, crew accommodation, recruitment, manning, qualifications, hours of work, medical examinations, prevention of occupational accidents, medical
\end{quote}

\textsuperscript{104} C 180 Seafarers’ Hours of Work and Manning of Ships Convention, 1996.
\textsuperscript{105} C 180 Article 5; Clause 5 Council Directive 1999/63/EC.
\textsuperscript{106} C 180 Article 6; Clause 6 Council Directive 1999/63/EC.
\textsuperscript{107} C 180 Article 8; Clause 8 Council Directive 1999/63/EC.
\textsuperscript{108} C 180 Article 12; Clause 11 Council Directive 1999/63/EC.
\textsuperscript{109} C 180 Article 11; Clause 10 Council Directive 1999/63/EC.
\textsuperscript{111} Clause 15 Council Directive 1999/63/EC.
\textsuperscript{112} Clause 16 Council Directive 1999/63/EC.
care, sickness and injury benefits, social welfare and related matters, repatriation, terms and conditions of employment which are subject to national laws and regulations, and freedom of association as defined in the Freedom of Association and Protection of the Right to Organise Convention, 1948, of the International Labour Organization™.\textsuperscript{113}

In Ireland, the responsibility of inspection of ships lies with the Department of Transport since 1\textsuperscript{st} January 2006. This Department operates a Maritime Safety Directorate, which is made up of the Marine Survey Office that carries out inspections as required by the Regulations implementing the EU Directive on inspection of ships\textsuperscript{114} and the Marine Environment Division.

Between 2004 and the end of 2007, 1,683 ships have been surveyed.\textsuperscript{115} 1,076 were third country national ships, 607 were ships registered in the EU and none were Irish.\textsuperscript{116} There were 5,745 deficiencies in total discovered and 93 ships were

\begin{table}[h!]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
Year & 2004 & 2005 & 2006 & 2007 & Total \\
\hline
No. Surveyed & 411 & 422 & 440 & 410 & 1,683 \\
No. of which Third Country & 280 & 261 & 283 & 252 & 1,076 \\
No. of which EU national & 131 & 161 & 157 & 158 & 607 \\
No. of which Irish national & 0 & 0 & 0 & 0 & 0 \\
No. of deficiencies & 1,393 & 1,183 & 1,534 & 1,635 & 5,745 \\
No. of which detained & 22 & 21 & 26 & 24 & 93 \\
Country with most deficiencies & Antigua and Barbuda & Antigua and Barbuda & Antigua and Barbuda & Antigua and Barbuda & \\
Largest type of deficiency & Safety & Safety & Safety & Safety & \\
\hline
\end{tabular}
\caption{Ship Inspection Statistics for Ireland (2004-2007)}
\end{table}

\textsuperscript{113} ILO Convention 178 Article 1(7)(e).
\textsuperscript{114} This Directive has been implemented in Ireland by the European Communities (Merchant Shipping) Organisation of Working Time) Regulations S.I. No. 532 of 2003 (Ireland).
\textsuperscript{115} Department of Communications, Energy and Natural Resources, Port State Control Annual Reports, Ireland 2004 – 2007.
The greatest number of deficiencies and detentions were found in ships registered in Antigua and Barbuda, with deficiencies in safety being the most common problem discovered.

These statistics reveal the major difficulties with the Irish system of inspection. Convention 178 advises states to inspect vessels registered in their territory at intervals not exceeding three years and where possible annually. Yet the statistics disclose the fact that not one Irish ship was inspected during the period of 2004 – 2007 to ensure that it was in conformity with national law. The controversy surrounding Irish Ferries and the exploitation of Ms. Orge has proved that exploitation does go undiscovered and unchecked on Irish registered vessels. Irish registered ships are not examined for deficiencies in terms and conditions of employment as required by Convention 178. Instead the Irish inspectors merely follow the guidelines laid down by the EU Directive that does not give states the power to examine the terms and conditions of employment of seafarers. It has been noted that the terms of reference of the Irish inspectorate do not extend to the “inspection of wage levels on vessels.” Yet Convention 178 would insist upon such an examination. The failure of the Irish Government to implement Convention 178 has meant that while deficiencies in health and safety are often reported, deficiencies in terms and conditions of employment are never examined.

117 Department of Communications, Energy and Natural Resources supra n. 116. Under the EC Directive and Convention 178 the inspectors are entitled to board (Article 5(2)(a)) and examine conditions on board the ship (Article 5(2)(b)), to ask that certain deficiencies be remedied (Article 5(2)(c)) and in exceptional cases where they have reason to believe that the health and safety of a member of the crew is at risk, detain the vessel until the defects are remedied (Article 5(2)(d)).
118 Department of Communications, Energy and Natural Resources supra n. 116. Article 3(1).
119 Department of Communications, Energy and Natural Resources supra n. 116.
A good indicator of the importance a state attaches to their inspection system is the amount of training inspectors are given.\textsuperscript{122} The inspectors in Ireland are sought out from different professional backgrounds, including nautical, navigation, engineering, naval architecture and radio. Yet none of these inspectors are provided with training of any kind. Some training in the legal aspects of the employment of seafarers is surely an essential element of any inspectorate. This lack of training in employment law means that breaches of such legislation will go unchecked. This trend is reflected in the statistics, which reveal a large amount of deficiencies in the area of safety and technical deficiencies. This reflects badly on Ireland’s commitment to the protection of seafarers internationally.

4. The Responsibility of the Market State

It is important that the states that are benefiting from the docking of vessels in their ports, should have some responsibility for the terms and conditions of employment of the migrant workers employed on board those vessels.

4.1. The Draft EU Directive and the Rome Convention

Developments at a EU level to the problem of flags of convenience have been tedious. Despite the existence during the 9\textsuperscript{th} to the 12\textsuperscript{th} centuries of a highly respected and vigorously enforced \textit{lex maritima}, a European-wide law of the sea, which was oral in nature and was accepted by merchants across Europe as a part

\textsuperscript{122} See ILO “Meeting of Experts on the Working and Living Conditions of Seafarers on board ships in International Registers” (Geneva: 6-8 May 2002) MEWLES/2002/1at p. 3.
of the *lex mercatoria*, development of such uniformity in Europe today has faced significant obstacles.

Efforts have been made in more recent years to introduce a European wide Directive aimed at prohibiting the use of flags of convenience. A Commission proposal was tabled in 1998 and amended in 2000 but to date little progress has been achieved in determining a final implementation date. The recent events in Ireland and in the UK have had little effect on the willingness of Member States to introduce protective measures for seafarers across the EU, which could have a substantial effect on the competitiveness of the European flagged fleet.

The Proposal required shipping companies, which operate between two EU Member States, to enforce the laws of one of these two states on board the vessel, whether or not the vessel was flagged in the EU, thus maintaining adequate labour conditions on board. Article 2(2) of the Directive stated that if a vessel used is not registered in a Member State, the terms and conditions of employment of the crew should be those applicable to the residents of one of the member states between whose ports the service is provided and with which the service has the closest connection. This was to be determined on the basis of the place from which the service is effectively managed.

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123 Tetley *supra* n. 14 at pp. 144-145.
124 Adjournment of Dáil Éireann under Standing Order 31: Irish Ferries Dispute-November 29, 2005, Mr Hogan.
126 “If the vessel used is not registered in a Member State, the terms and conditions of employment referred to in paragraph 1 shall be those applicable to the residents of one of the Member States between whose ports the service is provided and with which the service has the closest connection. The closest connection shall be determined on the basis of the place from which the service is effectively managed and of the place of residence of the seafarers concerned.”
Such provisions would have a significant effect on the labour conditions of flag of convenience crews. Firstly, it discourages ship owners who operate internally within the EU from registering outside the EU, as they will be forced to comply with the terms and conditions of employment of one of the Member States between whom they operate. Secondly, while it does not apply to vessels that do not operate within the EU, it will allow the Port State Controls in EU Member States to concentrate their efforts on vessels flagged outside the EU as all vessels operating within the EU will have to meet European labour standards at a minimum. Thirdly, it will act as a significant encouragement to other regions to develop similar strategies with the aim of eliminating completely the phenomenon of flags of convenience. Finally, its development will ensure fair competition among ship owners in the EU, reduce the unemployment of seafarers from Member States and substantially eliminate exploitation of seafarers on European routes and internationally.

The provisions of the Directive would appear to be recognised by the Rome Convention. Tetley believes that the law of the flag concept is contrary to Art 4(1) of the Rome Convention where in the absence of express or implied choice a contract is governed by the law of the country with which it is most closely connected. The Rome Convention makes no reference to the law of the flag, and commentators believe this “ omission is significant because the Convention

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128 Tetley supra n. 52 at p. 506.
represents the latest thinking on choice of contract law."¹³⁰ The reason for such aversion to the law of the flag appears to stem from the fact that often the law of the flag will have little if no connection with the people who are working on board or those that own the vessel and as such represents a fallacy of the true situation on board.

The aim of the Rome Convention is to protect the weaker party in jurisdictional disputes. In the case of employment law, Article 6¹³¹ of the Rome Convention stipulates that a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him or her by the mandatory rules of law, which would be applicable in the absence of choice. The parties have the right to choose the law applicable to the employment relationship; however, this will be lost where the mandatory rules prove more favourable. Dicey and Morris suggest that this provision will come into action where the chosen law provides less protection than the law which might otherwise apply or where the other law provides a more favourable remedy than the law which was chosen by the parties to govern the contract.¹³² The law governing these more favourable mandatory rules is determined by Article 6(2) which provides that, in the absence of choice, the contract of employment shall be governed by the law of the country in which the employee habitually carries out his work in performance of the

¹³⁰ Tetley supra n. 52 at p. 151.
¹³¹ Article 6(2) states that contract of employment shall be governed, in the absence of choice a). by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or b). where the employee does not habitually carry out his work in any one country, the contract will be governed by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.
¹³² Dicey and Morris, supra n. 52 at pp. 1037-1038.
These provisions have been found to apply to contracts of employment on board ships.\footnote{Giuliano-Lagardez Report on the Rome Convention at p. 26.}

The Rome Convention is the only applicable law of the European Union that remains in the form of an international treaty. The Vienna Action Plan, which was adopted in 1998, recognised the importance of amending the rules on conflict of law particularly in relation to contractual and non-contractual obligations.\footnote{Council and Commission Action Plan of 3rd December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, justice and security.} In 2008, a proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) was adopted and will come into force in December 2009.

The Regulation on the Law Applicable to Contractual Obligations (Rome I) expands and updates the Rome Convention of 1980\footnote{The adoption of the Rome I Regulation was first proposed in a Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. This Green Paper was adopted on 14 January 2003 (COM (2002) 654 final) and a proposal for the Rome I regulation was presented on the 15 December 2006.} and seeks to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction. In an effort to “improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments”,\footnote{Recital to the Rome I Regulation.} the Regulation adopts procedures in relation to the law applicable to employment contracts which has the potential to solve the problem of the flags of convenience phenomenon with Member States of the European Union. As in the Rome Convention, the parties have the freedom to choose the applicable law.

\footnotetext[133]{See supra n. 52 above.}
\footnotetext[134]{Giuliano-Lagardez Report on the Rome Convention at p. 26.}
\footnotetext[135]{Council and Commission Action Plan of 3rd December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, justice and security.}
\footnotetext[136]{The adoption of the Rome I Regulation was first proposed in a Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation. This Green Paper was adopted on 14 January 2003 (COM (2002) 654 final) and a proposal for the Rome I regulation was presented on the 15 December 2006.}
\footnotetext[137]{Recital to the Rome I Regulation.
governing their contract. The Regulation provides that the choice should be made expressly and clearly.

The Regulation makes it clear that weaker parties to contracts concluded should be protected by conflict of law rules that are more favourable to their interests than the general rules. With this in mind, the Regulation provides that despite the fact that the parties may have chosen the applicable law, this shall not have the effect of depriving the employee of the protection of the non-derogable provisions of law of the country that would have been applicable in the absence of a choice by the parties to the contract. Similar to the Rome Convention, the choice of applicable law is prevented from being used as a mechanism to deprive the employee of protections otherwise in force. The Regulation goes on to provide that in the absence of choice the contract will be governed by the law of the country in which or, failing that, from which the employee habitually carries out their performance of the contract. Where this rule fails to determine the applicable law, the contract will be governed by the law of the country where the place of business through which the employee was engaged is situated.

The Rome I Regulation makes no reference to seafarers and the application of the provisions to seafarers and the phenomenon of the flag of convenience. As in the case of the Rome Convention, it may well be that this silence suggests that such contracts will be covered by the Regulation. If this is the case, the Regulation has the potential to increase the protection of seafarers within the European Union.

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138 Article 3.
139 Recital to the Rome I Regulation.
140 Article 8.
141 Article 8, paragraphs 2, 3, and 4.
significantly and could have the effect of rendering the use of the flag of
congvenience to reduce the cost of labour ineffective. This may ultimately be a
matter for the European Court of Justice in interpreting the provisions of the
Regulation. It is hoped that the Court will view the Convention as applicable and
relevant in the context of flags of convenience. If this is the case, the Regulation
will be a welcome addition to the protection of migrant workers across the
European Union and could well remove the necessity for unilateral action on the
part of states in this context.

**Conclusion**

This Chapter has explored the different points of responsibility for the protection
of the rights of migrant workers. It has considered the imposition of responsibility
on the state of beneficial ownership, the flag state, the port state and the market
state.

In the case of beneficial ownership, consideration was given to comparing the flag
to the corporate veil in the company law and the occasions in which the corporate
veil could be pierced. It was found that this could be achieved in cases of fraud or
where the employer is trying to avoid existing legal obligations to their
employees. If this was imposed in relation to the law of the flag it may well act as
a disincentive to ship owners to seek a flag of convenience for the purpose of
exploiting workers. There would always be the potential in a labour dispute that
the court would look behind the flag in such circumstances and apply the law of
the state of beneficial ownership.
In addition, the flag state has responsibilities to the workers on board such vessels. The option of refusing to de-register a vessel was considered as well as the imposition of economic penalties on vessels that attempt to move to flag of convenience registries. Similarly, the port state is also responsible to vessels that dock in its port. There is some precedent for refusing to accept flag of convenience vessels in port. However, this may not be practical or desirable. The author concludes that port states have a responsibility to ensure high levels of inspection of all vessels including flag of convenience vessels and to train their inspectorate accordingly.

The state that benefits from vessels in their port, also referred to as the market state, also has responsibilities to workers. European initiatives have been put forward but to date none have been successful. However, the Rome Convention for example, would suggest that the market state has responsibilities in this regard.

The synthesis of the responsibility of each of these partners coupled with the actions of trade unions would do much to protect migrant workers throughout the world from the imposition of avoidance schemes by employers. This Section of the thesis has discussed the effect such schemes have on workers, the effect of corporate mobility and concepts of freedom of establishment on attempts to protect workers and the need for coordinated action by all states involved to ensure legal obstacles created by such schemes are reduced or ultimately removed.
SECTION III: ACCESS TO JUSTICE

1 This Section comprising of four separate Chapters has been presented in part at the Society of Legal Scholars Annual Conference 2007, Durham University 10th – 13th September 2007. The title of the presentation was “Access to Justice – Migrant Workers Need Not Apply”. Chapter 7 has been accepted for publication in the 2008 Hibernian Law Journal.
Chapter 7: Access to Justice for Migrant Workers

Introduction

Sections I and II of this thesis have examined the obstacles presented to migrant workers during recruitment and employment. This Section will examine the obstacles faced by migrant workers in seeking access to justice in the employment context. The provision by the State of a real and effective employment dispute resolution process is one of the most important methods of protecting migrant workers against exploitation by their employers. Access to such a process is, therefore, an essential pre-requisite to preventing exploitative behaviour. This Section will examine three obstacles facing migrant workers in Ireland when they seek to access the employment dispute resolution process. It will be demonstrated that each of these obstacles affects all migrant workers in many different ways, regardless of their migratory status. Migrant workers will be affected in the first instance by the preliminary requirements set by statute for access to the employment dispute resolution processes. On a more practical level, the complicated structure of the process will deter even the least vulnerable migrant workers from pursuing an employment claim and finally, the delay in the process can have serious consequences for all migrant workers in terms of accessing both the system and its remedies.

This Chapter will examine the first of these obstacles, the preliminary requirements needed to access the employment dispute resolution process. In Ireland where two distinct criteria are established, the claimant should, in theory, have access to the employment dispute resolution process. Firstly, the claimant
must establish that they are an employee of the employer and secondly, that they are not expressly or impliedly excluded by statute from taking a case. This two-part test is considered necessary in the employment context to protect the employer against frivolous claims and the associated costs. However, the reality for many workers and in particular migrant workers is that these preliminary requirements often mean that they are excluded from the employment protection regime and cannot enforce any rights through the employment tribunals.

As a result of such exclusion, many migrant workers experience discrimination and exploitation in the workplace. This Chapter will analyse firstly, the present position in Ireland in relation to exclusions from the employment protection regime. It will concentrate on irregular workers as one category of excluded workers that are the most vulnerable to exploitation as a result of their migratory status. It will examine the philosophy behind such exclusion and determine whether this can be objectively justified. Finally, it will conclude that the provision of rights to such workers can have the effect of not only reducing exploitation but also irregular migration as a concept.

1. Exclusion from the Employment Protection Regime

The death of eighteen Chinese cockle pickers in Morcambe Bay, Lancashire on the 6th February 2004\(^2\) heralded an era of restrictive legislative action\(^3\) in the area

\(^2\) “Slavery exists in our world today” Hull Daily Mail, July 12 2006 (UK); Herbert “Cockle Deaths Gangmaster ‘tried to blame two victims’” The Independent, September 20 2005 (London); “Fishing Bosses to Face Legal Action” Liverpool Daily Echo, July 9 2004 (UK); Griffith “Law’s all at sea” (Letter) Daily Post, March 1 2004 (Liverpool); “Police Bail Men over Deaths of Cocklers” Birmingham Post, February 11 2004 (Birmingham).

\(^3\) See Gangmaster’s Licensing Act 2004 (UK). This Act has been commenced by a series of commencement orders and at present the majority of the Act is in force. See Gangmasters (Licensing) Act 2004 (Commencement No 1) Order 2004 (S.I. 2004/2857) (UK); Gangmasters
of immigration aimed particularly at preventing the employment of irregular immigrants. The law in Ireland has mirrored the approach in the UK. The legislatures in both jurisdictions have become increasingly preoccupied with ensuring the criminalization of such workers and their employers and the denial of rights to such workers as a preventative tool. By taking this course of action both governments have failed to consider that the elimination of the causes of irregular immigration, in most cases the pulling force of employers intent on cost-reduction, may have a far greater preventative force than the present structure.

While this section of the Chapter focuses primarily on the situation of irregular workers in Ireland as one group of migrant workers who are regularly and systematically denied access to employment rights, the effects of such a denial

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(Licensing) Act (Commencement No 2) Order (S.I. 2005/447) (UK); Gangmasters (Licensing) Act 2004 (Commencement No 3) Order 2006 (S.I. 2006/2406) (UK); Gangmasters (Licensing) Act 2004 (Commencement No 4) Order 2006 (S.I. 2006/2906) (UK); Gangmasters (Licensing) Act 2004 (Commencement No 5) Order 2007 (S.I. 2007/695) (UK). A full discussion of the terms and implications of this Act are beyond the remit of this Chapter. A detailed analysis can be found in Ireland “Criminal Law Legislation Update” (2007) 3 Journal of Criminal Law 71. This Act requires Gangmasters to be licensed and provides for a series of enforcement proceedings. See the Employment Permits Act 2003 (Ireland); Immigration Act 1999 (Ireland) as amended in 2003 and in 2004. A non-national who is present in the State without the permission of the Minister for Justice, Equality and Law Reform (Immigration Act 2004 (Ireland), section 5(1)) is considered to be "unlawfully present in the State" (Immigration Act 2004 (Ireland), section 5(2)). The Minister for Justice, Equality and Law Reform has the authority to require the non-national to reside or remain in a particular district or place in the state and/or that they report at specified intervals to an immigration officer or a member of the Garda Siochana. (Immigration Act 2004 (Ireland), section 14(1) (a) and (b)). A non-national who fails to do this is guilty of an offence (Immigration Act 2004 (Ireland) section 14(2)). The Minister also has the ultimate authority to arrest and detain such a non-national (Immigration Act 2003 (Ireland) section 5(1)(g) as amended by the Immigration Act 2004 (Ireland) section 16(8)) until such time as they are removed from the state (Immigration Act 2004 (Ireland) section 5(2)(a) and section 5(3)(a)). The most recent version of the Immigration, Residence and Protection Bill 2008 (Ireland) provides in section 6 (1)(a) that an irregular person in Ireland will not be entitled to any services or benefits by a Minister of the Government, a local authority or the Health Service Executive or other bodies. However, provision is made for essential medical services (section 6(2)(a)(i)), medical or other services necessary for the protection of public health (section 6(2)(a)(ii)), access to education for persons under the age of 16 (section 6(2)(a)(iii)), the provision of legal aid (section 6(2)(b)), services under section 201 and section 202 of the Social Welfare Consolidation Act 2005 (Ireland) (power to make payments in cases of exceptional need and urgency) (section 6(2)(c)), other services that are of a humanitarian nature (section 6(2)(d)(i)), are provided for the purpose of dealing with or alleviating emergencies (section 6(2)(d)(ii)), or are provided by way of assistance to repatriating foreign nationals (section 6(2)(d)(iii)). While it may appear that this Bill provides for a number of rights, the reality is that these are minimum standards of human rights and do not extend their reach to other essential services such as protection from discrimination.
and the possible solutions are of relevance to other groups of migrant workers such as seafarers\textsuperscript{6} and domestic workers,\textsuperscript{7} who are also expressly excluded from legislation providing protection.

\textsuperscript{6} Seafarers are excluded expressly from the Minimum Notice and Terms and Conditions of Employment Act 1973 (Ireland), s 3(1)(f); the Protection of Employment Act 1977 (Ireland), section 7(2)(d) and the Organisation of Working Time Act 1997 (Ireland), section 3(2)(a)(i) and (ii). However, non-national seafarers are also excluded by implication from the Unfair Dismissals Act 1977 (Ireland), which insists upon evidence of residence or domicile in Ireland before an employee is entitled to claim under the Act (section 2(3)). Non-national seafarers are regularly engaged on transit visas which do not entitle them to enter or reside in the State and which thus effectively excludes them from the scope of the Act. (Transit visas are issued under the Aliens (Visa) Order 2003, S.I. 708 of 2003. Regulation 3 provides that an alien coming from a place outside the State, other than Great Britain or Northern Ireland, who is a citizen of the State, specified in one of the Schedules to the Order, shall not enter a port in the State unless he or she is the holder of a valid Irish transit visa.) Other legislation insists upon the conclusion of a contract of employment “in the State” before it will extend its protection, impliedly excluding all seafarers who conclude contracts of employment with recruitment agencies in their home states (Protection of Employees (Part-Time Work) Act 2001 (Ireland) section 20 (b)). Thus, it is the residential status of the individual, which often determines whether the individual will fall to be covered by the legislation. An employee who works in Ireland for a foreign employer is covered by the legislation. However, an employee who works outside the state for an Irish employer is excluded. Despite the obvious injustice in this decision, no justification for such a formulation appears forthcoming. All other employment legislation in Ireland applies to all seafarers, if not expressly then by implication. The Terms of Employment (Information) Act 1994 (Ireland) refers expressly to the employment of persons who are working outside the State for more than one month (section 4(1)). Where no express reference is made to seafarers or their exclusion, it is to be assumed that such legislation applies to them as long as they can prove the existence of a contract of employment (more commonly referred to as the Articles of Agreement) and satisfy the eligibility criteria laid out in the Act. So for example, all seafarers on board Irish registered vessels are entitled to the minimum wage. The seafaring industry is very much inundated with migrant workers so an exclusion from the protection of employment legislation is even more worrying. Many reasons have been given for the exclusion of seafarers from employment rights legislation. The jurisdictional difficulties associated with the employment of seafarers and a desire on the part of states to increase international trade and the associated economic benefits has meant that the international and domestic protection of seafarers falls well below the standards applicable to more traditional employment relationships.

\textsuperscript{7} See for example the Redundancy Payments Act 1967 (Ireland) section 3(a) and (b). Domestic workers were excluded from the terms of the Employment Equality Act, 1998 (Ireland) by section 37(5). However, this has been repealed by section 25 Equality Act 2004 (Ireland). It will be interesting to see whether this will make any difference to the situation of domestic workers in Ireland. They are entitled as employees to all the rights provided in Irish law, including equality with Irish nationals in comparable jobs. However, a recent Report suggests (See Migrant Rights Centre Ireland, Private Homes, A Public Concern: The Exploitation of Twenty Migrant Women Employed in the Private Home in Ireland (Dublin: Migrant Rights Centre Ireland, 2004) that they are not achieving these rights.
1.1. The Definition of an Irregular Worker

The legislature has made concerted efforts to define the concept of irregularity and persons who could be described as irregular. An irregular person is one who is in the State other than in accordance with the permission given to him or her by the Minister for Enterprise, Trade and Employment. However, the concept of an “irregular worker” is somewhat wider and includes those who could be defined as irregular persons who are engaged in employment and those persons who are present in the State with the permission of the Minister for Enterprise, Trade and Employment but who are acting outside the scope of this permission.

Therefore the concept of an “irregular worker” covers the traditional irregular persons, often described as illegal aliens, who enter the State in a clandestine

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9 Immigration Act 2004 (Ireland), section 5(2). An irregular person can be defined as a person who is in the State other than in accordance with the terms of any permission given to him or her by the Minister for Justice, Equality and Law Reform.

10 Immigration Act 2004 (Ireland) supra n. 9.

11 This includes persons who are working on employment permits, visas or authorisations, asylum seekers and refugees.


With this in mind the 1999 *International Symposium on Migration* held in Bangkok that the term “irregular” was a more appropriate term, which clearly described how easily a migrant could fall to irregularity. The Symposium was made up of the Ministers and representatives of the Governments of Australia, Bangladesh, Brunei Darussalam, Cambodia, China, Indonesia, Japan, Republic of Korea, Lao PDR, Malaysia, Myanmar, New Zealand, Papua New Guinea, the Philippines, Singapore, Sri Lanka, Thailand, and Vietnam, as well as the Hong Kong Special Administrative Region, meeting at the invitation of the Royal Thai Government in Bangkok on 23 April 1999, on the occasion of the International Symposium on Migration, held on 21-23 April 1999, under the chairmanship of H.E. Bhichai Rattakul, Deputy Prime Minister of Thailand, to address the question of international migration, with particular attention to regional cooperation on
fashion either by avoiding inspection completely 13 or by utilising false documentation to gain entry, as well as those who enter the State legally but who become irregular where their permission to remain in the State expires and is not renewed or is, for any reason, terminated. 14 The concept of an “irregular worker” could also include those persons whose permission to be present in the State is perfectly legal but who pursue employment outside of the terms and conditions of this permission. 15 This broad definition of an irregular worker has been endorsed by the European Commission in its recent survey of undeclared work in the EU. 16

For the purposes of this Chapter, then, an irregular worker can be defined as including all persons who are engaged in paid activities which are in themselves lawful but which are “not declared in conformity with national law and practices” 17 because the persons so employed are acting outside the scope of their permission, whether or not they have such permission to be present in the State. This definition is wide-ranging and inclusive of many workers in Ireland and not just those typically considered to be irregular. The result of this is that many

irregular/undocumented migration. The Symposium resulted in the Bangkok Declaration on Irregular Migration. 13 In the United States these migrants have become known as EWI’s – Entry without inspection. 14 See for example the case of Gleeson v. Chung [1997] IR 521. This was a criminal case taken under the Aliens Order 1946 Article 4 as inserted by Article 3 Aliens (Amendment) Order 1975 and was concerned primarily with determining whether the words “entered into the service of” could be read as meaning being in the service of. It was held by Geogheghan J that this was not the case. The prosecution was struck out because they had failed to meet the required time limitations. 15 This might occur, for example, where an asylum seeker decides to take up employment despite the fact that they are not entitled to do so. 16 European Commission infra n. 64 at p. 8. It defined undeclared work as including “all remunerated activities which are in principle legal but circumvent declarations to tax authorities or social security institutions”. 17 Resolution of the Council and the Representatives of the Governments of the Member States meeting with the Council of 22 April 1999 on a Code of Conduct for Improved Cooperation between Authorities of the Member States concerning the combating of Transnational Social Security Benefit and Contribution Fraud and Undeclared Work, and Concerning the Transnational hiring-out of workers Official Journal C 12506/05/1999 p. 0001-0003. Cf: Opinion of the Economic and Social Committee on the Communication From the Commission on undeclared work. Official Journal C 101, 12/04/1999 P. 0030-0037.
workers in Ireland are excluded from the employment legislation merely because they fall into this category.

2. The Effect of Irregularity on the Contract of Employment

Employment rights in Ireland are granted by Statute to all employees, usually defined as persons working under a contract of employment. Therefore, the existence of a valid contract of employment is essential to the provision of rights. Where there is an illegality found in the contract, the worker will not be defined as an employee and as such will not be entitled to the full range of employment rights usually reserved for employees. There are two specific types of illegal contracts of employment. The first is one where the contract is formed illegally where for example the worker is an irregular worker. The second type is where the contract is formed legally but is performed in an illegal manner where for example, the contracts permits a fraud on the Revenue Commissioners. This Chapter will mainly be concerned with the former type of illegality and the consequences of such a finding by a court.

The question, which must therefore be posed, is whether an irregularity in the status of the migrant worker to be either present or working in the State is sufficient to render the entire contract of employment illegal and unenforceable. The law, in this area, is particularly certain. Where the “mere making of [the

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18 See for example the Unfair Dismissals Act 1977 (Ireland), section 1; the Employment Equality Act 1998 (Ireland) as amended by the Equality Act 2004 (Ireland), section 2; the Carers Leave Act 2001 (Ireland), section 2; the Parental Leave Act 1998 (Ireland), section 2; the Maternity Protection Act 1994 (Ireland), section 2; the Terms of Employment (Information) Act 1994 (Ireland), section 1.
contract] is a legal wrong"\(^{19}\), where for example, it is contrary to the terms of a Statute,\(^{20}\) the result is that the contract will be declared to be illegal as formed,\(^{21}\) void \textit{ab initio}\(^{22}\) and as such unenforceable.\(^{23}\) Where migrant workers are found to be working in violation of immigration laws,\(^{24}\) both the employer and the worker are operating in contravention of a statute.\(^{25}\)

2.1. The Irish Approach

In Ireland, the legislature has begun to row back on the absolute bar to recovery in cases where an illegality arises in the performance of the contract. However, this only applies to an illegality that arises during the performance of a contract and has not been extended to illegality during the formation of the contract. Where the illegality is brought about during the performance of the contract, this will not preclude the worker from obtaining redress for unfair dismissal claims, regardless of the knowledge of the parties to the illegality.\(^{26}\) However, the Rights Commissioner, the Tribunal or the Circuit Court have an obligation to inform the Revenue Commissioners or the Minister for Social Welfare and Family Affairs of

any contraventions of the Income Tax Acts or Social Welfare Acts\textsuperscript{27} which occurred during the operation of the contract of employment.\textsuperscript{28} The Minister for Social Welfare and Family Affairs or the Revenue Commissioners may in their discretion decide to pursue the claim against the parties to the contract. It is at this point that the knowledge of the parties to the illegality may become relevant. Similar provisions now exist under the National Minimum Wage Act 2000 (Ireland).\textsuperscript{29}

There are other pieces of legislation in Ireland, which apply regardless of the legality of the contract; the knowledge of the parties and whether the illegality arose during performance or formation of the contract. These are all social welfare provisions and are generally restricted to the provision of social welfare benefits for occupational injury\textsuperscript{30}, accidents at work\textsuperscript{31} and industrial accidents\textsuperscript{32}. The provision of rights in these particular incidences would only appear to be of relevance to Irish nationals as they refer to social welfare benefits which would not be available to certain migrant workers under the habitual residence rule.\textsuperscript{33} So while Ireland does provide some rights for contracts that are illegal at formation, these are of little benefit to migrant workers, as they will not be entitled to them under the habitual residence rule.

\textsuperscript{27} 1981-1993.
\textsuperscript{28} Unfair Dismissals Act 1977 (Ireland), section 8(12) as substituted by Unfair Dismissal (Amendment) Act 1993 (Ireland), section 7.
\textsuperscript{29} Section 40. See Forde, \textit{Employment Law} (Dublin: Round Hall Ltd., 2\textsuperscript{nd} ed., 2001) at p. 38.
\textsuperscript{31} Social Welfare (Consolidation) Act 1993 (Ireland), section 52.
\textsuperscript{32} Social Welfare Contributions and Benefits Act 1992 (Ireland), section 97.
\textsuperscript{33} Under section 246 of the Social Welfare Consolidation Act 2005 (Ireland), provides that: "it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless he has been present in the State or any other part of the Common Travel Area for a continuous period of 2 years ending on that date."
Therefore, the reality for irregular workers in Ireland is that they cannot access the employment dispute resolution process because their contract is illegal at formation.

3. A Critique of the Illegality Doctrine

3.1. The Rule does not take into Account the Moral Culpability of the Parties

The absolute bar to the claiming of rights in cases of illegality is based on two policy justifications – protection and deterrence. The courts believe that by depriving illegally created agreements, and in particular contracts of employment, of their legal effect, they are in fact protecting the sanctity of the judicial process, as well as protecting regular employees and the State from a lowering of standards in the terms and conditions of employment. Secondly, both the courts and the legislature feel that such a policy is the only way in which to deter irregular workers from taking up employment on the black market and threatening the security, both economic and national, of the state. In effect the rule ensures that the parties to an illegal agreement will never profit from their actions.34

The rule appears to have as its primary objective the punishment of those parties who take part in illegal transactions. However, while it may be appropriate to punish those parties who knowingly enter into illegal agreements, it is questionable whether or not it is appropriate to deprive workers who are unaware

of any illegality in their contract of employment, of the right to enforce their legal entitlements.

3.1.1. Illegally Agreed versus Illegally Procured Contracts of Employment

Forshaw has identified two specific types of illegally formed contracts of employment both which result in the contract being declared void *ab initio*.\(^{35}\) The first of these is the illegally agreed contract of employment where the parties collude in the making of the contract. In such cases, both parties are equally responsible for the illegality and it is reasonable to suggest that they should be punished accordingly.

The second type of contract can be described as an illegally procured contract of employment. These contracts may come about as a result of the dishonesty of one of the parties to the contract, either the migrant worker or the employer. This may occur where the migrant worker deceives the employer by claiming to have the requisite permission to work when in fact they do not have such permission\(^{36}\) or where the employer or the intermediary recruitment agency ensures the migrant worker that the requisite legal permission has been obtained when in fact this has not occurred.\(^ {37}\)

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\(^{36}\) See the case of *Vakante v. Addey & Stanhope School and Others* EAT 10565/03/RN. In this case the migrant worker deceived the employer by pretending to have the requisite permission to work when in fact this was not the case. This is a good example of an illegally procured contract of employment.

\(^{37}\) Under the old employment permit regime, this occurred more frequently because the worker would lose their employment permit should they move employer. This has been remedied under the Employment Permits Act 2006 (Ireland).
The distinction between an illegally agreed and an illegally procured contract of employment is similarly reflected in the criminal law’s treatment of illegal contracts of employment. Third country national migrant workers may not work in the State without the permission of the Minister for Enterprise, Trade and Employment, which is issued in the form of an employment permit. It is equally an offence for an employer to hire a third country migrant worker who does not have the requisite permission to work in the State. The legislation, however, recognises that in many cases the contract may have been procured by deception. To allow for this, the legislation creates a specific defence for employers, where they can prove that they took all steps as were reasonably open to them to ensure compliance with the legislation. The law recognises that in certain cases responsibility cannot be imposed on the employer where they have been deceived into entering a contract of employment. While the legislation does not recognise such a defence for migrant workers who have been likewise deceived, the legislation does provide evidence of the importance of examining the moral culpability of the parties to any transaction, and not imposing an absolute rule in all cases, where to do so would be unjust in all the circumstances.

3.1.2. The Relevance of Knowledge

At common law, where the illegality arises during the performance of the contract, the knowledge of the parties to the illegality becomes particularly

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41 There is a much greater amount of case law in this area. See for example Lewis v. Squash Ireland Ltd. [1983] ILRM 363; Miller v. Karlinski (1945) 62 TLR 85; Napier v. National Bus
relevant. Such illegality may arise where the employer, with or without the knowledge of the worker, commits a fraud on the Revenue. In such cases the contract remains valid, however, where the worker had knowledge of the illegality, they will not be entitled to claim any of their employment rights on grounds of public policy. The courts have stated that the reason for such a rationale is based on the fact that “Parliament never intended to give the statutory rights provided for by the relevant employment legislation to those who were knowingly breaking the law.” Therefore, knowledge of the particular illegality will affect the remedy available to the worker.

The knowledge of the parties to the contract, of the illegality, is a relevant factor to be taken into account in deciding whether or not to allow the worker to rely on their statutory rights. To allow this distinction to be made in cases where the illegality arose during performance of the contract but not at the formation of the contract seems to be a pedantic distinction, which is difficult to justify. Criminal law in Ireland suggests that knowledge is relevant to the determination as to whether an employer is guilty of hiring an irregular worker. Similarly, many other

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42 The test as to whether the employee had knowledge of the illegality is a subjective one. See Corby v. Morrison [1980] IRLR 218.


statutory provisions either consider all illegalities to be irrelevant or consider knowledge relevant in determining the liability of the worker.

3.2. The Rule allows for Unjust Enrichment

An absolute bar to recovery in all cases of illegal contracts of employment, regardless of the moral culpability of the parties, operates most significantly to the disadvantage of the migrant worker. The worker provides labour, time and capital to the employer, but in the case of an illegal contractual agreement, the employer may be relieved of any obligation to the worker including any obligation to pay that worker. While most employers fulfil their obligations to irregular workers, they are under no legal duty to do so and are able to circumvent employment statutes guaranteeing workers a minimum wage and maximum hours of work. The effect of this is that the employer is unjustly enriched at the expense of the irregular migrant worker.

While the enforcement of illegal contracts of employment is contrary to public policy, so too is the concept of unjust enrichment. The courts in Ireland and in the UK have failed to recognise that an absolute bar to reliance on an illegally formed contract of employment is disproportionate to the aim sought to be achieved. The ECJ has not shied away from such an approach and has held that

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45 See the Social Welfare (Consolidation) Act 1981 (Ireland), section 40(1) which allows claims to be made for occupation injuries benefit despite the illegality of the employment contract. Similarly, the Social Welfare (Consolidation) Act 1993 (Ireland), section 52, the Social Security Contributions and Benefits Act 1992 (Ireland), section 97 and the Social Welfare (Occupational Injuries) Act 1966 (Ireland), section 5 do not prevent those working under illegal contracts of employment from claiming accident, industrial or occupational injuries benefits respectively.

46 See arguments made by the Counsel for the appellant in Hyland v. J.H.Barker (North-West) Ltd. [1985] IRLR 403 that where the employer gets the benefit of the contract the employee should not then be shut out of their statutory rights.
the absolute ban on recovery in all cases of illegally formed contracts may be precluded under EU law.\textsuperscript{47}

In the case of \textit{Courage v. Crehan}\textsuperscript{48} the ECJ were requested to examine a case under competition law\textsuperscript{49}, which involved an illegal transaction. The Court held that in no circumstances should a rule of national law impose an absolute ban on an action for recovery by a party to a transaction.\textsuperscript{50} In examining the common law rule of the UK, Advocate General Misho was concerned by the notion that a party, who bore no significant responsibility for the act in question, could be excluded from seeking damages, even though this would mean that one party would gain “an unjustified advantage from its unlawful conduct”\textsuperscript{51} at the expense of the other party. Advocate General Misho was of the opinion that a rule of national law, which would prevent a party to an illegal transaction from receiving protection, to which they would otherwise be entitled under certain conditions, was precluded at Community law.\textsuperscript{52}

This decision does not mean that all illegal contracts of employment are enforceable. This case can be distinguished on two grounds from the situation of an illegally formed contract of employment. Firstly, this case involved a provision of competition law. The ECJ has always been mindful of the need to protect parties to commercial agreements from provisions of national law which may


\textsuperscript{49} In particular Article 81.

\textsuperscript{50} \textit{Courage v. Crehan} supra n. 47 at paragraph 28.

\textsuperscript{51} Opinion of Advocate General Misho at paragraph 54 \textit{supra} n. 47.

\textsuperscript{52} Opinion of Advocate General Misho at paragraph 55 \textit{supra} n. 47.
hinder intra-community trade and commerce. Secondly, the issue of migration and in particular, irregularity is a matter that has consistently been considered an issue that should be left to the margin of appreciation of states. The decision of the court in this case could not be said to apply directly to a case involving irregular workers.

However, once again the moral culpability of the parties to the transaction appeared to be one of the factors, which weighed heavily on the opinion of Advocate General Misho and, in particular, he suggested that the rule was inappropriate where one of the parties to the transaction bore “no significant responsibility” for the illegality. It is arguable that an absolute bar to recovery in cases where one of the parties bears no moral culpability and this would lead to unjust enrichment of one party at the expense of the other, would not be in compliance with EU law.

3.3. The Rule does not take into Account the Economic Reality of Undeclared Work

According to a recent survey by the European Commission, undeclared work is a widespread phenomenon with almost one quarter of the population involved to some degree. The Report examined the demand for undeclared work and the demographics of those supplying such work and concluded that such work is tolerated among Europeans and is more acceptable than receiving welfare payments with entitlements or even than using public transport without a valid

53 Opinion of Advocate General Misho at paragraph 54 supra n. 47.
54 European Commission infra n. 64 at p. 3.
55 European Commission infra n. 64 at p. 46.
ticket. The survey results also demonstrate that there is three groups which the general public consider most likely to be involved in undeclared work: the unemployed (29%), the self-employed (26%) and irregular immigrants (18%). The tolerance of irregular workers by states has prompted some academics to comment that it amounts in effect to a “de facto employment policy”.

3.3.1. The Demand for Undeclared Work

A recent Report by the European Commission into undeclared work in the EU noted that there is a significant demand for undeclared work. 9% of individuals aged 15 years or older said they had acquired a service presumably stemming from undeclared work and 6% admitted acquiring goods under such circumstances. In Ireland, the figures were comparable with 7% and 2% respectively admitting to acquiring services or goods from undeclared work. The demand for undeclared work permeates almost every aspect of the economy. Undeclared goods and services were most frequently found in the retail sector (22%), followed by the household sector (17%), the construction sector (16%), repair activities (11%) and personal services (8%). The Report of the European Commission found that the demand for goods and services brought about as a result of undeclared work “can be found among both men and women, in all age groups, all income levels and among people with different employment status.”

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56 European Commission infra n. 64 at p. 44.
58 European Commission infra n. 64 at p. 9.
59 European Commission infra n. 64 at p. 9.
60 Services in this category include house cleaning, care for children, care for the elderly, gardening and lawn mowing. European Commission infra n. 64 at p. 11.
61 European Commission infra n. 64 at p. 11.
62 European Commission infra n. 64 at p. 12.
The Report also analysed the reasons for the demand in undeclared work. The main reason (66%) was found to be the lower cost of such work. Significantly, 21% of those surveyed stated that they preferred the undeclared good or service because it was provided quicker than regular products or services. The survey found that even if the product or service were not available in an undeclared manner 53% of those surveyed would have acquired them on the regular market anyway. Only a small percentage (12%) would have done without the service altogether. This shows great potential for the transformation of undeclared work into regular work.

3.3.2. The Supply of Undeclared Work

According to the report, only 4% of persons surveyed in Ireland admitted to taking part in undeclared work. A socio-demographic analysis of the types of individuals engaging in such work reveals that young males are the most likely to engage in such activity. When asked to give the reasons for engaging in such work, 47% answered that they engaged in such work because both parties benefited from it and in the eyes of such workers, this justified the act. Other reasons include not being able to find work in the regulated sector (16%), working undeclared is common practice in their sector (16%), taxes and/or social security are too high (13%) and interestingly, the persons who acquired it insisted on the non-declaration (12%).

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63 European Commission infra n. 64 at p. 16.
64 European Commission “Undeclared Work in the European Union” (European Commission, 2007) at p. 18.
65 European Commission supra n. 64 at p. 24.
66 European Commission supra n. 64 at p. 26.
Many of those working undeclared felt that the biggest disadvantage was the lack of insurance against accidents (21%), as well as the harder physical working conditions as compared to a regular job (9%) and the high risk of accidents (8%) or losing your job (7%).\footnote{European Commission \textit{supra} n. 64 at p. 27.}

Therefore, the reality is that undeclared workers, whether they are irregular migrants or other form of undeclared worker, are an important and tolerated part of the labour market. At present, undeclared workers who are not irregular workers and who have no knowledge of the illegality are entitled to claim for all employment rights. Undeclared workers who have knowledge of the illegality can claim for unfair dismissal and under the minimum wage legislation but may face the penalty of having to pay all tax and social welfare contributions. Irregular workers, regardless of knowledge and regardless of the fact that they are doing the same work, are not entitled to make any claim for employment rights. Given the necessary work that such workers engage in, it seems disproportionate and arbitrary to distinguish against them on grounds of nationality.

4. Solutions

The preceding analysis reveals that irregular workers are excluded from accessing justice and are thus vulnerable to exploitation due to their exclusion from the employment protection regime and the preliminary requirements of the
employment tribunals.\textsuperscript{68} The effect of such exclusion is that irregular migrant workers and other workers, such as seafarers who are also often excluded from statutory protection, have no forum in which to assert their rights and as such become vulnerable to exploitation. Significantly, the policy justifications advanced for such an approach are problematic and are questionable when one considers the detrimental effect of such action on migrant workers. Therefore, it is timely to examine the existing legal framework in an effort to uncover alternative legal solutions to this problem. This next section will outline how irregular migrant workers could potentially obtain redress under the current legal system in Ireland and suggests possible reforms that could be introduced to alleviate the situation of those workers excluded from the statutory framework from accessing rights.

4.1. Reliance on European Law

A valid contract of employment is a condition precedent to a claim for statutory employment rights. While the courts in Ireland and in the UK have been firm in their commitment to the illegality doctrine, it is questionable whether they should be allowed to deny relief to workers in cases where the rights claimed can be derived from a EU law, which does not permit derogations on grounds of public policy, such as the right to protection against sex or race discrimination.

\textsuperscript{68} As previously discussed, the employment tribunals will examine, as a preliminary issue, whether the employee has a contract of employment as required by the statutory regime. Where this does not occur the worker will not be entitled to pursue their claim.
Migrant workers regularly face discrimination on grounds of race. This is prohibited under Irish law\(^{69}\) and at a Community level.\(^{70}\) Race discrimination occurs where one person is treated less favourably than another person has been or would have been treated on the grounds that they are of a different race, colour, nationality or ethnic or national origins. Protection against race discrimination in employment in Ireland only applies to those workers who have a valid contract of employment. As discussed previously, the presence of illegality in the case of an irregular worker denies such workers the right to claim for race discrimination.

4.1.1. No Express Derogation

An examination of the EU law in the area, in particular the Race Directive\(^{71}\), permits no derogations on the grounds of public policy from the general principle of protection against discrimination. On the contrary, the Race Directives clearly states that the right to equality before the law and protection against discrimination constitutes a “universal right”\(^{72}\) without which the achievement of the objectives of the EU Treaty would be undermined.\(^{73}\) The Directive specifically requests that States take the necessary measures to ensure that any “laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished”\(^{74}\). The question therefore arises as to whether the Race Directive permits an implied derogation on grounds of public policy where the contract of employment is an illegal one.

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\(^{69}\) Employment Equality Act 1998 (Ireland), section 6(2) (b) as amended by the Equality Act 2004 (Ireland), section 4.


\(^{71}\) Council Directive supra n. 70

\(^{72}\) Council Directive supra n. 70, Preamble at paragraph 3.

\(^{73}\) Council Directive supra n. 70, Preamble at paragraph 9.

\(^{74}\) Council Directive supra n. 70, Article 14(a).
4.1.2. No Implied Derogation

It is possible that even though there is no express reference to any derogation from the Race Directive, such derogations are available to a Member State by implication from the terms of the Directive. However, a consideration of similar Directives in this area would seem to exclude such an interpretation of the Race Directive. The Race Directive was adopted at the same time as the Framework Directive on Equal Treatment and mirrors the provisions of the Framework Directive except in regard to derogations. While the Race Directive appears to admit no derogations, the Framework Directive allows for derogations on the grounds of public security, the maintenance of public order and most importantly in this context, “the prevention of criminal offences”. The absence of any such derogation from the Race Directive, and the fact that a specific directive was dedicated to the prohibition of race discrimination, suggests that derogations on the grounds of public policy would be precluded under Community law.

4.1.3. Derogation in Extreme Cases

A derogation on grounds of public policy might exist in cases where the actions of the parties to the transaction were particularly extreme and in which case, it would be inappropriate to exclude such a derogation. The courts in the UK have examined this particular question in the area of sex discrimination. While the

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76 It also permits derogations on the grounds of protection of the health of others and for the protection of the rights and freedoms of others. (Article 2(5) Framework Directive on Equal Treatment supra n. 75).
court accepted that the Equal Treatment Directive\textsuperscript{77} admitted no derogations, the Court of Appeal were of the opinion that it would be foolish to jump to the conclusion that just because a Directive appears to admit no derogations, "it is axiomatically irrelevant if a particular employment is tainted by illegality under domestic law"\textsuperscript{78}. In fact, the Court of Appeal expressed the belief that the draftsmen of the Directive were unlikely to have considered that the Directive would confer protection in cases where the employment was essentially illegal "for example employment, training or working conditions as part of a hit squad or a company known to have been established to carry out bank robberies or to launder stolen money"\textsuperscript{79}. The essence of the decision of the Court of Appeal, therefore, was that in certain cases, the doctrine of illegality could defeat a claim for sex discrimination despite the fact that the Directive permitted no derogations on grounds of public policy.

It is respectfully submitted, however, that the court considered that the doctrine of illegality would only defeat a claim for sex discrimination in extreme cases. There are two main reasons for this conclusion. Firstly, the examples given by the court refer to employment in industries, which are in themselves fundamentally illegal, such as theft and money laundering. Secondly, in the case before it, the court allowed the claimant to recover for sex discrimination even though her contract of employment was tainted with illegality during performance as it allowed a fraud on the Revenue. The court held that the Equal Treatment Directive allowed for no


\textsuperscript{78} Hall v. Woolston Hall Leisure Ltd. [2000] 4 All ER 787 at paragraph 65 (per Mance LJ).

\textsuperscript{79} Hall v. Woolston Hall Leisure Ltd. supra n. 78 at paragraph 65.
derogations on the grounds of public policy and that illegality as such could not, therefore, defeat a claim for sex discrimination.\textsuperscript{80}

What constitutes an extreme case under such circumstances remains unclear. The issue was discussed in the \textit{Hall} case,\textsuperscript{81} where the court considered that employment as a member of a hit squad, a bank robber or as a money launderer would all constitute extreme cases.\textsuperscript{82} They did not consider the case of Mrs. Hall herself to be an extreme one, despite the fact that she had known of the illegality and the actions of her employer, who had not paid PAYE or National Insurance Contributions for Mrs. Hall. The Court held that she had received no benefit from the actions of her employer and held that \textquotesingle\textquotesingle{her acquiescence in the employer\textquotesingle s conduct, which \textsl{was} the highest her involvement in the illegality can be put, no doubt reflects the reality that she could not compel the employer to change its conduct\textquotesingle\textquotesingle}.\textsuperscript{83} This case supports the proposition, therefore, that illegality cannot operate as an absolute bar to a claim for sex discrimination in all cases.

The courts have also made it clear that the principles governing the determination of sex and race discrimination are identical.\textsuperscript{84} In a case involving a Croatian national who convinced his employers that he had permission to work in the UK, when he had not, the principles of the Race Directive and their relationship with the illegality doctrine arose for determination.\textsuperscript{85} The claimant had been dismissed from his employment at a school, allegedly unfairly, and the claimant sued for

\begin{footnotesize}
\textsuperscript{80} Hall v. Woolston Hall Leisure Ltd. supra n. 78.
\textsuperscript{81} Hall v. Woolston Hall Leisure Ltd. supra n. 78.
\textsuperscript{82} Hall v. Woolston Hall Leisure Ltd. supra n. 78 at paragraph 80 (\textit{per} Mance LJ).
\textsuperscript{83} Hall v. Woolston Hall Leisure Ltd. supra n. 78 at paragraph 103 (\textit{per} Judge LJ).
\textsuperscript{84} Vakante v. Addey & Stanhope School and Others EAT 10565/03/RN at paragraph 9 (\textit{per} Burton J.).
\textsuperscript{85} Vakante v. Addey & Stanhope School and Others supra n. 84.
\end{footnotesize}
unfair dismissal on grounds of race. The Employment Tribunal in the UK, believing the contract to be tainted by illegality at formation, held that the contract was void *ab initio* and as such the claimant could not rely on statutory employment rights.

In the second hearing of the case before the Employment Tribunal, Burton J. was called upon to consider whether the concept of illegality could be defeated by reliance on the Race Directive, in the same way Mrs. Hall had relied on the Equal Treatment Directive in an earlier decision. After an examination of the decision in *Hall*\(^ {86}\), Burton J. considered whether the doctrine of illegality could be allowed to defeat a claim for race discrimination. The Tribunal gave the example of an irregular immigrant, a woman smuggled into the country, for the purposes of prostitution and questioned whether she would be able to claim that her employer “was running her sexual services on a discriminatory basis, because he was charging or causing to be charged a lesser sum for her services than for another prostitute of a different race or ethnic origin”\(^ {87}\). Burton J. held that this was an example of an extreme case in which an assertion that the illegality doctrine did not apply would be inappropriate. The Tribunal failed to make any determination regarding the issue in this case as it was decided on other grounds. However, it is likely that if they had come to a decision in this case, they would have considered the actions of the employee to have been extreme, particularly as his actions would have made him morally culpable, and as such denied him the relief sought.\(^ {88}\)

\(^{86}\) *Hall v. Woolston Hall Leisure Ltd* supra n. 78.  
\(^{87}\) *Vakante v. Addey & Stanhope School and Others* supra n. 84 at paragraph 27 (*per* Burton J.).  
\(^{88}\) *Vakante v. Addey & Stanhope School and Others* supra n. 84 at paragraph 10 (*per* Burton J.). Burton J. noted that in the *Hall* case the employer was primarily responsible for the illegality or
It is respectfully submitted that the use by the courts of the terminology of an "extreme case" appears to run contrary to the terms of the Race Directive. The present situation suggests that the courts will have to decide on a case-by-case basis whether a case is extreme enough to be barred by the illegality doctrine. It would appear that the courts are swayed by the involvement of the applicant in the illegality. In the case of Vakante, the claimant was wholly the cause of the illegal conduct.\(^8^9\) There is the distinct possibility arising from this decision that illegally formed contracts of employment, whether they are agreed or procured, will always considered to be extreme and as such unenforceable.

4.1.4. Legal Employment

There is the possibility that the Race Directive only applies to legal employment. Some commentators argue that when the Race Directive refers to "employment and working conditions, including dismissals and pay"\(^9^0\), it is referring only to legal employment and does not include employment, which has been tainted with illegality. This argument could be further advanced by the terms of the Directive which states that it is "without prejudice to treatment, which arises from the legal status of the third-country national and stateless persons".\(^9^1\) This would imply that where a migrant worker is refused access to rights as a result of their legal status, this is not actionable under the Directive.

\(^8^9\) Vakante v. Addey & Stanhope School and Others supra n. 84 at paragraph 33 (per Burton J.).
\(^9^0\) Article 3(1) (c) Council Directive 2000/43/EC of the 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
Forshaw denies that this is an acceptable interpretation of the Race Directive, in particular since this would imply that all illegal contracts of employment would be excluded regardless of the extremity of the case. The wording of the Directive itself would also appear to preclude such an interpretation. The Preamble makes specific reference to “persons” who have been the subject of discrimination. Similarly in Article 3 of the Race Directive, which details the scope of the application of the Directive, no reference is made to the concept of illegality.

The explanatory memorandum, which accompanied the Directive, did at one point make particular reference to the fact that the aim of the Race Directive was to lay down protections against racial discrimination to be “enjoyed by citizens all over the Union”. The reference to citizenship is worrying as it implies that both regular and irregular third country national migrant workers are excluded from the protection of the Directive. Thankfully such terminology is not to be found in the Directive itself. On the contrary, the Directive makes specific reference to the fact that the prohibition against discrimination applies to nationals of third countries with no reference to their regularity.

The aim of the Race Directive is to reinforce and supplement the protections that currently exist in the Member States either by widening the material scope of such

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93 Race Directive, Preamble paragraph 19.
94 Explanatory Memorandum Race Directive at Part II.
95 Race Directive, Preamble at paragraph 13.
protections or by providing or strengthening access to redress. The Directive therefore seeks to extend the basic level of protection against discrimination existing in Member States to persons and situations normally not covered by domestic legislation. It is entirely possible that the Race Directive considered that protection should be extended to all workers regardless of their migratory status. This can be gleaned from the fact that the Directive itself does not permit any derogations from the terms of the Directive, and allows little, if any, national discretion in the interpretation of its provisions.

4.1.5. Discrimination on Grounds of Nationality

A final argument raised in Vakante was to the effect that even if the Race Directive did apply, the provisions of the Directive do not cover discrimination on grounds of nationality, a point that is expressed in both the Preamble and in Article 3(2) of the Directive itself. In Vakante, the claimant attempted to circumvent this requirement by asserting that the discrimination suffered by Mr. Vakante was not on the grounds of nationality but on the grounds of ethnic origin, as he was an Eastern European. The Tribunal refused to express any view as to whether or not this would be sufficient to allow the applicant to make a claim.

97 Vakante v. Addey & Stanhope School and Others EAT 10565/03/RN at paragraph 39 (per Burton J.).
98 Preamble at paragraph 13.
99 Article 3(2) states that the “Directive does not cover differences in treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned”. Council Directive supra n. 70.
100 Vakante v. Addey & Stanhope School and Others EAT 10565/03/RN at paragraph 40 (per Burton J.).
under the Directive but the Tribunal did note that it would be one of the hurdles that would need to be secured before any decision on the matter could be made.\textsuperscript{101}

Whether or not this argument would constitute a hurdle in this jurisdiction is questionable given our firm commitment to equality in our Constitution and in the Equality Act 2004 (Ireland), which implements the Directive. The equality legislation in Ireland goes a lot further than the Directives on the issue and as such it would be unlikely that the courts would entertain a distinction such as the one which arose in \textit{Vakante}, should the same situation arise here. It is more likely that the courts would interpret the Directive in light of the Irish legislation on the matter, which allows claims for discrimination on grounds of nationality to be taken.

An analysis of the Race Directive and its relationship with the concept of illegal contracts reveals that this may be one line of argument available to an irregular migrant worker should they be denied rights as a result of the illegality of their contract of employment. It appears that the Directive admits no derogations on any grounds and, in particular, makes no reference to a derogation on grounds of public policy. As long a migrant worker could prove that their case was not an extreme one, as defined by the courts, they might be able to claim relief under the Directive. The only hurdle that they might face would be the fact that the Directive does not apply to discrimination on grounds of nationality. However, given the significant protection such discrimination receives in domestic law, this should not present much of an obstacle.

\textsuperscript{101} \textit{Vakante v. Addey & Stanhope School and Others} EAT 10565/03/RN at paragraph 41 (\textit{per} Burton J.).

Where reliance cannot be placed on the Directive, it may still be possible for an irregular migrant worker to make a claim for discrimination by utilising common law principles.102

4.2.1. The Contract of Employment

In the case of Leighton v. Michael103 the Employment Appeals Tribunal in the UK allowed a claim for sex discrimination in a case where the contract of employment was performed illegally. The Employment Appeals Tribunal justified its decision by stating that the existence of a contract of employment was only relevant as to whether the person was so employed within the meaning of the Sex Discrimination Act 1975 (UK)104 but a “claim of sex discrimination does not involve enforcing, relying or founding a claim on the contract of employment”105. This test appeared to allow any person who is employed to make a claim for discrimination, regardless of the legality of their contract as long as such a claim did not require enforcement or reliance on that contract.

The decision of the Court of Appeal in Hall v. Woolston Hall Leisure Ltd.106, also addressed this issue but quickly rowed back on this earlier decision. Peter Gibson LJ laid down a test to determine whether or not a person, who is a party to an

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102 See the views of Forshaw supra n. 35.
104 Sex Discrimination Act 1975 (UK) defines employment as “employment under a contract of service or apprenticeship or a contract personally to execute any work or labour”.
105 Forshaw supra n. 35 at p. 2 (lexis version).
illegal contract of employment, should be entitled to claim for discrimination on grounds of sex. The courts must consider “whether the applicant’s claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct”\textsuperscript{107}. In the case of \textit{Hall} itself, the court did not feel that the applicant’s conduct was so connected with her illegal contract that she should be denied relief.

In the case of \textit{Vakante},\textsuperscript{108} however, the Employment Appeals Tribunal found that “because it was the employee who was entirely responsible for the creation of the employment relationship, the incidents which then arose out of that employment relationship, of which the applicant complained, were inextricably bound up with that conduct”\textsuperscript{109}. Therefore, the court held that because the employee had procured the contract of employment, he could not later claim that he had been injured as a result of that contract. It is evident that the courts considered that in any case where the worker knowingly enters into a contract of employment, which is illegal at formation, no relief could be sought.

4.2.2. Illegality at Performance and Formation

It appears that the court in \textit{Vakante},\textsuperscript{110} held that there were two very significant points of distinction with the case of \textit{Hall}\textsuperscript{111}. These rested, firstly, on the type of

\textsuperscript{107} \textit{Hall} v. Woolston Hall Leisure Ltd supra n. 106 at p. 798.
\textsuperscript{108} \textit{Vakante} v. Addey & Stanhope School and Others EAT 10565/03/RN at paragraph 9 (per Burton J.).
\textsuperscript{109} \textit{Vakante} v. Addey & Stanhope School and Others EAT 10565/03/RN at paragraph 65 (per Burton J.).
\textsuperscript{110} \textit{Vakante} v. Addey & Stanhope School and Others supra n. 108.
\textsuperscript{111} \textit{Hall} v. Woolston Hall Leisure Ltd. supra n. 106.
illegality involved and secondly, on the knowledge of the applicant. The first ground which concerned the type of illegality involved,\textsuperscript{112} may appear to be based on a pedantic reading of the decision in \textit{Hall}\textsuperscript{113}. However, there are substantial differences between the two types of illegality. An illegality, which occurs at the formation of the contract, arises because one of the parties to the contract acted contrary to the law by entering into contractual relations. Despite this difference it must be questioned whether or not the two types are so completely different that they deserve disparate treatment by the courts. Is it relevant that the illegality occurred in one at formation and in the other during performance even though in the latter case the parties to the contract may have agreed to perform the contract illegally at formation?

4.2.3. The Relevance of Knowledge

Therefore, the most important issue is the knowledge of the parties. In \textit{Vakante},\textsuperscript{114} the court was assured that the employee was wholly or primarily responsible for the illegality. Because of this, the tribunal did not think it would be fair to allow the claimant to recover. The claimant had fraudulently led his employer to believe that he had the required permission to work in the UK. However, in most cases involving the employment of irregular workers, both the employer and the employee will have knowledge of the deception. In such a case it would be unfair to allow the employer to be unjustly enriched by following the decision in

\textsuperscript{112} That is whether the contract was illegal due to its formation or whether it was illegally performed.

\textsuperscript{113} \textit{Hall v. Woolston Hall Leisure Ltd. supra} n. 106.

\textsuperscript{114} \textit{Vakante v. Addey & Stanhope School and Others supra} n. 101.
In fact, it is arguable that by holding that the contract is an illegal one the employer is given a way of circumventing the statutory provisions for the protection of employee’s rights. The response of the courts to such arguments has been that the vast majority of employers will be aware that eventually their actions will come to the attention of the Revenue or in the case of those employing irregular workers, the criminal law.

Therefore, it appears that the general position at common law would be that an irregular migrant worker has the right to claim for compensation occasioned by discriminatory treatment in certain cases. Where the contract is performed illegally the applicant will have little difficulty in establishing a case even where they had full knowledge of the illegality. However, where the contract is illegal from formation, which would be the most likely scenario in the case of irregular workers, the worker will not be able to make a claim unless they can show that they had no knowledge of the illegality.

4.3. Restitution or Employment Rights

An examination of international practice reveals that most states deny irregular workers certain rights, including employment rights, and adopt similar provisions as regards illegal contracts to those that exist in Ireland and in the UK. In most jurisdictions, therefore, illegal employment agreements are denied any legal

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115 Hyland v. JH Barker (North-West) Ltd. [1985] IRLR 403. See the argument for the appellant by Mr. Henchy.
effect. However, differences do emerge in the treatment of such illegal agreements by the courts. While in Ireland and in the UK the effect of the illegal formation of an employment agreement is that the claimant will be barred any legal right to recovery under the contract by the employment tribunals, other jurisdictions do allow for some restitution in such cases.

Restitution may be limited to cases where the agreement has produced some effects or may be subject to the discretion of the courts to deny it in cases, where it is just to do so, or it may be subject to such conditions as the court sees fit.

The benefit of such a scheme for restitution is that where work has been performed the court will allow the worker to seek restitution for the work done, regardless of the legality of the contract. The worker would be entitled to wages for any work done and back pay. However, the difficulty with this approach is that it provides no temporal rights for the worker. The right to pay does not arise until a dispute over the work arises; the worker seeks to assert their right of access to the courts and the court orders restitution on behalf of the worker. Therefore, exploitation can, and often is, maintained and employers go unpunished because most irregular workers will not complain for fear of losing their jobs and facing deportation. A further problem arises when one considers that the only right that is

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118 See for example the law in France under the French Civil Code, Article 1131 (France) and in Israel under the Israeli Contract Law (General Part) 1973, section 30 (Israel). Cf: Enonchong “Effects of Illegality: A Comparative Study in French and English Law” (1995) 44 The International and Comparative Law Quarterly 196 at p. 207 and Freidmann “Consequences of Illegality under the Israeli Contract Law (General Part) 1973” (1984) 33 International Comparative Law Quarterly 81 at p. 81.

119 Most notably in France and Israel.

120 See the law in France, French Civil Code Article 1131 (France) where restitution is allowed subject to the claimant showing the effects of the contract.

121 Israeli Contract Law (General Part) 1973, section 31.

122 Enonchong supra n. 118 at p. 207.
protected is the right to pay for work done. All other rights are considered irrelevant and not applicable to such workers. While the situation is preferable to that existing presently in Ireland, it does present problems, which any revision of the law should attempt to circumvent.

Despite this, the provision of compensation for victims of discriminatory treatment, has been advanced by many academics in the UK who remain convinced that this is the most appropriate remedy to the situation of those working under illegal employment contracts.\textsuperscript{123} This is because damages for injuries to feelings and other non-pecuniary losses require no enforcement of the contract of employment, unlike pecuniary losses and the loss of earnings, which may require the claimant to place reliance on an illegal contract. Recent decisions in the UK would appear to support the assertion that in discrimination cases claimants are compensated for injury to feelings and not for the loss of employment as a claim for unfair dismissals might be.\textsuperscript{124} So once a claim for discrimination has been proved, the worker should receive compensation for injury to feelings occasioned by the discrimination.

Any provision of compensation to a victim of discrimination should take into account the fact that the claimant, even if in a weaker position, may have obtained certain benefits from the unlawful agreement. In order to avoid unjust enrichment and the imposition of penal damages on the employer, therefore the compensation must be assessed so as to take account of these realities.\textsuperscript{125}

\textsuperscript{123} Forshaw \textit{supra} n. 35 at p. 12 (lexis version).
\textsuperscript{124} \textit{Bakersfield Entertainment Ltd. v. Church and Stuart} [2005] UK EAT/0523/05 ZT.
\textsuperscript{125} Forshaw \textit{supra} n. 35 at p. 11 (lexis version).
Most states do not provide rights for irregular workers for one important reason – they consider that the provision of rights will lead to a proliferation in irregular migration to their country. During the course of the case of *Courage v. Crehan* the defendant utilised similar discourse to discourage the court from granting the relief sought. It was contended that the provision of compensation to persons who are party to an illegal contract would make participation in the illegal act more attractive because individuals would know that they could always be released from that unlawful contract and seek relief if the contract did not deliver the benefits anticipated.

While the decision in *Courage v. Crehan* is distinguishable to a case involving irregular employment, the opinion of Advocate General Misho in the same case is compelling. He expressed disagreement with the contention that illegal acts would be more attractive. On the contrary, he considered that the prospect of recovery for a party to an illegal contract would act as an incentive to weaker parties to denounce unlawful agreements and, perhaps more importantly, it would be an effective means of deterring the party in the position of strength from taking part in the conduct in question. It was his firm belief that the provision of rights would in fact reduce the level of illegal agreements.

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126 This is the usual argument advanced in favour of the denial of rights to irregular workers.  
127 *Courage v. Crehan supra* n. 47.  
128 His opinion was shared by that of the UK and the Commission. See *Courage v. Crehan supra* n. 47.  
129 Opinion of Advocate General Misho at paragraph 57 *supra* n. 47.
If one applies the logic of Advocate General Misho to the situation of irregular workers, the same conclusions can be drawn. By granting rights to irregular workers such workers will be empowered to enforce their rights and will find it easier to denounce exploitative working conditions. These workers will become more expensive as they will incur the same rights as regular workers and thus the incentive of utilising irregular workers will diminish particularly when harsh penalties, in both the civil and criminal law, exist for those employers who continue to employ irregular workers. This theory has received support from the Economic and Social Committee who have found that the less difference there is in financial terms between declared and undeclared work, the less attractive undeclared work will become.130

4.4.1. International Support

This would also appear to be supported on an international level by the recent United Nations Convention on the Rights of Migrant Workers and Members of their Families (1990)131 that includes a controversial provision in relation to irregular workers. States ratifying the Convention must guarantee that they will provide all basic human rights to all migrant workers regardless of their status.132 This would have been marginally more acceptable to certain states were the Convention referring merely to essential rights such as the right to life or medical care. However, the Convention insists that such all the rights in the Convention,

130 Opinion of the Economic and Social Committee on the Communication from the Commission on Undeclared Work, Official Journal 101 12/04/1999 at p. 0030-0037 at paragraph 2.2.1.2.
131 This Convention has not yet been ratified by Ireland despite numerous calls from migrant rights bodies in Ireland.
132 Article 7 UNCMW.
including employment rights, are to be applicable to both regular and irregular workers.

During the drafting process, many interesting arguments emerged which highlight the policy arguments both in favour and against the granting of rights to irregular migrant workers. What emerged from the discussion was that many states were in favour of the granting of such rights to irregular migrant workers, not out of altruism but out of a desire to reduce or eliminate irregular migration. As stated in the Preamble to the Convention, it was finally determined that “recourse to the employment of migrant workers in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognised”\(^1\).

4.4.1.(a). The Opposition

Perhaps the most compelling argument against the granting of employment rights to irregular workers is the danger of encouraging illegal trafficking in labour or “at least, to make it very difficult for states to take effective measures against such trafficking”\(^2\). States are naturally protective of their sovereign exclusionary powers. During the course of the debate it was argued that as the state never had an opportunity to refuse entry to irregular workers or impose conditions upon their admission, irregular workers had no entitlement to demand rights and the state

\(^1\) UNCMW (1990), Preamble.
was under no obligation to provide any rights for them.135 The relationship they had created with the state became a “prohibited one”136. They are no longer party to the social contract, which binds the national community with the state and thus should not be entitled to any rights.137

On an economic analysis, it was argued that the provision of rights to irregular workers would lead to the displacement of national workers, the lowering of employment standards and increasing unemployment among nationals.138 States, in general preferred the more usual alternatives such as the concept of stricter enforcement of state borders or the prosecution of employers to deter further irregular migration.139

4.4.1.(b). The Proposition

The proposition was careful to insist upon the humanitarian aspect to the provision of rights to irregular workers.140 Human rights are universal and states should not be permitted to benefit from the labour of the irregular migrants without at least providing them with their fundamental human rights.141 Irregular migrants are de facto members of the society, who make valuable contributions to not only the economy of the state but also to the cultural fabric of the host

135 Bosniak, supra n. 139 at p. 755.
140 Report of the Open Ended Working Group June 1985; UN Doc. A/C.3/40/1 at paragraph 30 (Denmark); at paragraph 17 (Finland); at paragraph 48 (Mexico).
society. It also serves the interests of the citizens of the host state. It limits the demand for irregular workers, opening up the employment market for domestic workers, increasing wages and improving working conditions at the same time.

Those states in favour of the provision drew on the principle of *non-refoulement* in customary international law as codified in the United Nations Convention Against Torture (1984), as well as other procedural restrictions placed on states as regards the expulsion of aliens, to emphasise the limited authority of states to deny human rights to individuals regardless of their status. The absolute power of states to assert authority in relation to irregular migrant workers in spheres other than immigration regulation was severely doubted.

The Convention is now in force but has yet to be ratified by many migrant-receiving states, including Ireland. However, it is a strong indication of the concerns of migrant sending states for the safety of their citizens and of the opinion at an international level, that the absolute bar to the provision of employment rights is no longer appropriate. The Convention would appear to challenge the view of the majority of migrant-receiving states that the provision of

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144 CAT (1984), Article 3 states that no state party shall “... expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

145 ICCPR (1966), Article 13; ACHR (1969), Article 22(6) and (9); ECHR (1959) (4th Protocol), Article 4.

146 Bosniak, *supra* n. 139 at p. 746.
rights will have a “sponge effect” encouraging economic migrants to take up employment on the black market. On the contrary, the Convention and the state parties to it appear to be espousing the view that the provision of rights to irregular migrant workers will reduce the attraction of such workers to employers and thus reduce the market for irregular workers in the state.

4.4.2. Country Specific Support

The situation that presently exists in France under the French Labour Code is that irregular workers are granted equal rights to regular workers, which they can enforce against their employer without fear of being discovered by the authorities. Irregular workers can make a claim to the employment tribunals through their trade unions who represent these workers against their employers. The process is entirely confidential so as to maintain the anonymity of the workers. Where exploitation is discovered the worker can be awarded the amount of compensation they would have received had they been legally employed. In breach of contract cases, for example in cases involving unfair dismissal, the worker can claim liquidated damages usually amounting to one month’s salary.

This system would avoid the difficulties of allowing an irregular worker the right to claim for restitution in an employment tribunal. It provides for temporal rights for the worker, protecting them against discrimination and exploitation. However, the difficulty in persuading states to adopt such an approach to irregular employment should not be overestimated. For this reason, the more modest recommendation of the provision of restitution by the employment tribunals

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147 Code du Travail Labour Code Article L 341-6-1 (France).
148 Article L. 341-6-2.
should be addressed and adopted as a possible solution to the situation of irregular workers.

4.5. Allow for Regularisation

The process of regularisation involves granting irregular workers the right to become regularised on the fulfilment of certain prescribed conditions. This can be carried out on a regular basis through a statutory process or on an ad hoc basis through the provision of amnesties for irregular migrant workers. The subject of regularisation has been received with mixed response throughout the states of the EU. While many Member States have embraced the opportunity to eliminate the concept of irregular immigration by regularisation, others have remained trenchantly opposed to the phenomenon. These latter states appear to consider that such proposals do not offer any significant benefits to their legal regime. Despite the widespread usage of regularisation programmes across the Europe, some states remain convinced that deportation of irregular workers is the most effective and appropriate response to the problem of irregular migration. While this might not be the simplest or the most popular method of prevention from a legal, humanitarian or even a practical perspective, deportation is in fact preventative and acts as a deterrent to further irregular migration.

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149 See for example Portugal, Spain, Netherlands, France, Belgium and Italy.
150 Most prominently Ireland and the UK.
151 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment at paragraph 3.6.
4.5.1. The Opposition

The Irish Government is trenchantly opposed to any form of regularisation. The official view appears to be that regularisation would undermine the present system of regular migration, rewarding the wrong people\textsuperscript{152} and affecting the interests of the vast majority of employers and non-nationals who have used the correct legal channels to enter the State.\textsuperscript{153} More recently, the Government expressed the opinion that amnesties create a “\textit{sponge effect}”,\textsuperscript{154} attracting more irregular workers into the country to avail of any future amnesties. In response, to the notion that an amnesty need only be a once off process, the former Minister for Justice, Equality and Law Reform stated, “\textit{amnesties or regularisation are never once off. They send out wrong signals by saying that there will be another amnesty or regularisation also soon, which in turn encourages more illegal immigration}”\textsuperscript{155}.

There is also the legitimate concern that the provision of amnesties could violate the immigration policies of other EU states that do not grant such rights to irregular workers. As Lopez has commented many states in the EU were concerned that the provision by Spanish authorities of amnesties to irregular workers would act as a magnet to encourage further irregular immigration to Spain, a country that could act as a potential entry point to other European

\textsuperscript{152} Most specifically unscrupulous employers and those who have abused the asylum process.
\textsuperscript{153} Former Minister for Justice, Equality and Law Reform, Michael McDowell, Dáil Éireann Vol 579 11/02/04, Written Answers, Illegal Immigrants.
\textsuperscript{154} Former Minister for Justice, Equality and Law Reform, Michael McDowell, Dáil Éireann, Volume 600 29 April 2005.
\textsuperscript{155} Former Minister for Justice, Equality and Law Reform, Michael McDowell, Dáil Éireann, Volume 600 29 April 2005.
countries.\textsuperscript{156} The process of regularisation in states, where it has been sought to be implemented, has never been easy. Many states experience initial difficulties in disseminating information about the regularisation process, getting employers to give their previously irregular workers a legal contract of employment, and preventing employers from dismissing such workers thus leaving the immigrant unemployed and unavailable for amnesty.

4.5.2. The Argument in Favour of Regularisation

Despite these fears and difficulties, many states in the EU have developed regularisation strategies to deal with irregular workers at various stages.\textsuperscript{157} Such states are acutely aware of the impact irregular workers have on the labour market and the importance of such programmes to the integration and social cohesion of the immigrant population. These states recognise that a large population of irregular workers allows a system of labour exploitation to develop in the short term and contributes to inefficiency in the labour market in the long term. This latter phenomenon arises due to the fact that such workers are denied the opportunity to participate fully in society both as contributors and as beneficiaries.

\textsuperscript{156} Lopez, Associate Professor of Law, Indiana University School of Law, Indianapolis “Undocumented Workers in the U.S. and Spain: The Quest for Freedom, Justice and Equality” Paper for delivery at a conference entitled “Too Pure an Air”: Law and the Quest for Freedom, Justice and Equality” (Gloucester, UK: Texas Wesleyan University and the University of Gloucester, June 2006).

\textsuperscript{157} Belgium introduced a regularisation campaign in 1974 and 2000; Netherlands regularised 15,000 people in 1975 and a further 1,800 were given residence permits in 1980; France has had three significant regularisation campaigns: in 1981, 130,000 irregular workers were regularised, in 1991, 21,000 were regularised and in 1997, 80,000 were regularised; Italy, in two separate processes in 1987/1988 and in 1995/1996, has regularised over 600,000 irregular persons. In 1998/1999 a further 250,000 were given legal status; Spain has also had various amnesties over the years. During the 1985, 1991 and 1996 regularisations some 180,000 irregular workers were regularised. In the year 2000 a further 135,000 received regularisation and in 2001 some 300,000 persons were granted an amnesty.
Such lack of opportunity only serves to fuel the negative attitudes from the domestic population and thus marginalizes irregular workers.\(^{158}\)

The EU, in its role as legislator and harmoniser, has remained particularly aloof when the question of legislating for the prevention of irregular migration has been broached. The Commission has argued for the introduction of effective strategies involving a complex mix of both sanctions and prevention to deal with the issue, although it has never encouraged openly the process of regularisation.\(^{159}\) The Commission has advocated the development of simplified business practices, the removal of disincentives and the provision of appropriate taxation and social benefit systems for employers as a welcome addition to the usual measures of improved law enforcement and the application of sanctions usually advocated by states opposed to regularisation.\(^{160}\)

While the arguments for and against the introduction of a regularisation programme continue to rage across Europe, a large and growing number of workers are being denied employment rights. The introduction of such a system in Ireland or in the UK would have the effect of reducing considerably the amount of workers presently operating illegitimately in the labour market and of deterring employers from hiring such workers initially. This account of regularisation has been included as a possible option, which could be adopted to solve the problem

\(^{158}\) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Immigration, Integration and Employment at paragraph 3.6.

\(^{159}\) Written Question No. 2152/98 by Ingo Freidrich to the Commission, Illegal Placement of Foreign Workers in the German Construction Industry, *Official Journal C* 096, 08/04/1999 at p. 0048.

\(^{160}\) Communication from the commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration and employment.
of irregular immigration. However, the reader should be aware that the issue of regularisation is a complicated and long-term one and as such this author would suggest that as regards illegal employment contracts and their enforcement, the provision of rights generally to all workers is a much quicker and more suitable solution to the issue of rights enforcement.

Conclusion

A guarantee of real and effective judicial or administrative protection can only be provided where workers have access to the employment dispute resolution process without exclusion. Currently, preliminary requirements must be met before access to the employment dispute resolution procedures can be achieved. One such requirement is that the worker has a valid contract of employment. While this may appear to be a benign requirement, the reality is that such a condition prevents irregular workers, among others, from accessing justice. The effect of this is that such workers are therefore denied their basic employment rights, leaving them vulnerable to exploitation.

This analysis recognises the policy justifications in favour of such an approach but attention must be averted to the problems associated with the current law, particularly as the law does not take into account the moral culpability of the actors, unjustly enriches the employer and does not take into account the economic realities of irregular migration. Developing a suitable solution to the current situation need not involve an intense reassessment of the current law. In fact, suitable solutions are currently available although they have never been

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161 Issues such as the various ways in which regularisation procedures may be implemented are beyond the focus of this Chapter.
argued before an Irish court. If amendments are to be introduced, however, systems such as the provision of restitution or equal rights to workers or a regularisation programme all have substantial benefits to offer any legal regime.

For a long-term solution to this problem, it is concluded that the provision of equal rights as the recent UN Convention on Migrant Workers and Members of their Families advocates and as practiced in other European jurisdictions, is the most suitable approach. It is contended that the provision of rights to all migrant workers regardless of their migratory status will in fact reduce the level of irregular migration by removing the pull factors that currently encourage irregular migration. If irregular workers are just as expensive as regular workers, employers will no longer feel the need to risk a criminal prosecution so as hire a cheaper worker.

What is clear from the proceeding analysis is that there is no one solution to the issue of irregular migration and that in order to tackle the problem successfully, a package of measures would need to be introduced. Currently in Ireland, criminal sanctions are in place for both employers and irregular workers who engage in employment. The author submits that such sanctions should be maintained along with the introduction of an equal rights provision for all migrant workers regardless of their migratory status.
Chapter 8: The Structure of the Dispute Resolution Process: A Critique

Introduction

One of the most significant motivations behind the utilisation of an employment tribunal, as opposed to the more adversarial court process, is the provision of easy access to an inexpensive forum to air complaints. Where the process is an over complicated one, accessibility and convenience are lost. Where the employee is a migrant worker, complications in the employment dispute resolution process only serve to further hinder access to an important legal remedy. Therefore, the structure of an employment dispute resolution process can have a significant effect on the ability of a migrant worker to access justice in the event of a dispute arising out of their employment.

The statutory dispute resolution process that currently exists at a domestic level involves the migrant worker in a complicated procedure involving a range of legislative enactments and a variety of judicial and administrative forum. If one considers the position of a migrant worker who is dismissed, for example, on grounds of race\(^1\), there are difficult choices to be made by that worker as to the legislation under which to claim, the correct tribunal to report to and the proofs needed to make their claim. These decisions cannot be made lightly as the answers chosen will determine the types of remedies that are made available to the worker. The complicated nature of the current employment dispute resolution

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\(^1\) The author has chosen race due to the fact that it is the largest ground upon which cases were brought to the Equality Tribunal in 2006. See Equality Authority, *The Equality Authority Annual Report 2006* (Dublin: Government Publications, 2006). This covers discrimination on grounds of nationality.
process is a serious obstacle to equality for migrant workers in Ireland and requires a reconsideration of the principles surrounding dispute resolution in the employment context.

In this respect, the Chapter outlines a number of structural changes that could be implemented to reduce the complication surrounding the current system. The author advocates the simple procedure already highly developed in Germany where a one-stop shop for employment disputes is utilised. However, it is not only the structure that requires re-consideration. There is reason to advocate for a more conciliatory approach to the employment dispute resolution process, similar to that currently operating in Germany. Recent developments in the UK would suggest that this is way forward for worker protection in Europe and would have a significant impact on the protection of migrant workers in Ireland.

1. The Dilemma

Where, for example, a migrant worker is dismissed on the grounds of race\(^2\) in Ireland, there are two possible sources from which a remedy might be obtained. The first of these is under the Employment Equality Act 1998 (Ireland)\(^3\) and the second is under the Unfair Dismissals Acts 1977-1993 (Ireland). The decision as to which piece of legislation, the case should be pursued under, is an important one. It will decide the forum, under which the case will be argued, the evidence the complainant will need to proffer the tribunal involved and the types of remedies which may be advanced to the complainant should they be successful in

\(^2\) The race ground is defined as “a different race, colour, nationality or ethnic or national origins” § 6(2) Employment Equality Act 1998 (Ireland).

\(^3\) As amended in 2004.
their claim. There are also important differences in the preliminary requirements that will need to be met before any case can be heard.


If the migrant worker decides to pursue their case under the Employment Equality legislation, they must submit a complaint, of the discrimination that they have suffered, to the Equality Authority within 6 months of the alleged incident\(^5\) by filling out a prescribed form.\(^6\) On this form the migrant worker will be required to give information regarding their own personal details,\(^7\) the grounds under which discrimination is being claimed,\(^8\) a description of the claim,\(^9\) details of their representative, where applicable,\(^10\) details of the respondent,\(^11\) and any intention which they may have to seek information from their employer.\(^12\) Where the case involves a discriminatory dismissal, the migrant worker will be referred to an equality mediation officer who will attempt to arrange a settlement between the

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\(^4\) This includes the Employment Equality Act 1998 (Ireland) and the Equality Act 2004(Ireland) which amended the earlier legislation.

\(^5\) Employment Equality Act 1998 (Ireland), section 77(5). It can be extended to 12 months where the migrant worker can show that there was reasonable cause for the delay (section 77(5) (b)).

\(^6\) Referral of Complaint of Discrimination in Relation to Employment Form EE.1.

\(^7\) Part 1, Referral of Complaint of Discrimination in Relation to Employment Form EE.1.

\(^8\) Part 3, Referral of Complaint of Discrimination in Relation to Employment Form EE.1.

\(^9\) Part 4 and Part 8, Referral of Complaint of Discrimination in Relation to Employment Form EE.1.

\(^10\) Part 5, Referral of Complaint of Discrimination in Relation to Employment Form EE.1. This is usually the Equality Authority, trade union or a solicitor.

\(^11\) Part 6, Referral of Complaint of Discrimination in Relation to Employment Form EE.1.

\(^12\) Part 7, Referral of Complaint of Discrimination in Relation to Employment Form EE.1. The Employment Equality Act 1998 (Ireland) provides in section 76 that where a person feels that they have been discriminated against in any way, they may contact their employer seeking any information which may help them in their case. See Statutory Form of Request to Employer for Information about a Possible Incident of Discrimination Form EE.2. The employer is not obliged to reply to this request for information. However section 81 of the Employment Equality Act 1998 (Ireland) provides that where the employer does not respond or if the information given in response is false or misleading, then this will be taken into account at the final determination of the case. If the employer chooses to respond then they must do so using Statutory Form of Reply from Employer to Request for Information Form EE.3. See Employment Equality Act 1998 (Section 76-Right to Information) Regulations, 1999, Statutory Instrument No. 321 of 1999 (Ireland).
two parties to the dispute.\textsuperscript{13} This mediation process is highly advantageous to the migrant worker, particularly those on employment permits, as it effectively means that they will be able to find alternative work quicker. Where they are unable to source alternative work, they will at least be able to effect settlement before they return to the sending state.

The beneficial effect of the mediation process is negated, however, by the opt-out clause, provided for in the legislation. The Equality Acts\textsuperscript{14} provide that if either party to the dispute objects to the process of mediation and would prefer instead to take the case to a full hearing, then mediation will not take place. The case will instead be referred to an Equality Officer and a full hearing on the matter will ensue.\textsuperscript{15} Similarly, if the mediation process is unsuccessful in its attempts to mediate a solution to the dispute, a referral to an Equality Officer will automatically follow.\textsuperscript{16} The decision of the Equality Officer is a legally binding one\textsuperscript{17}, although there is the right to appeal from that decision. The employer, therefore, effectively has the right to prevent mediation from occurring in a particular case. This is unfortunate for a third country national migrant worker, as they may have to leave the State due to the fact that the termination of their employment contract also signals the termination of their permission to reside in the State. As it takes on average a period of, at least, eighteen months for a case to be heard by the Equality Tribunal, it is possible that the third country national migrant worker will not be available to give evidence at a full hearing of their

\textsuperscript{13} Section 75(4)(b).
\textsuperscript{14} 1998 and 2004.
\textsuperscript{15} Section 78(3).
\textsuperscript{16} Section 79(1).
\textsuperscript{17} Section 75(4) (a).
case.\textsuperscript{18} If the migrant worker were from an EU state, the same considerations would apply. However, a worker from within the EU may at least have the opportunity to remain in the State to find alternative work if they have the financial resources to do so.

Once the full hearing has taken place, the Equality Tribunal will make a determination in the particular case. If the case is decided in favour of the complainant after this time then the Tribunal has the power to order certain remedies ranging from compensation,\textsuperscript{19} to orders that the employer take a specific course of action,\textsuperscript{20} to re-instatement or re-engagement of the employee, with or without compensation.\textsuperscript{21}

1.2. \textit{Taking a Case under the Unfair Dismissals Acts 1977 -1993}\textsuperscript{22}

Alternatively, the employee may take a case under the Unfair Dismissals Acts\textsuperscript{23}, for dismissal on grounds of race. However, the burdensome preliminary requirements necessary to take action under this legislation could prevent many migrant workers from pursuing this option. In particular, the requirement that the worker have one year’s continuous service with the employer significantly affects

\textsuperscript{18} See Section 4.
\textsuperscript{19} Section 82(1) Employment Equality Act 1998 (Ireland) as amended in 2004. The compensatory reliefs which may be awarded by the Tribunal range from compensation for arrears of pay to compensation for the effects of the acts of discrimination or victimisation. The maximum amount of compensation which may be awarded is limited to 104 weeks pay.
\textsuperscript{20} The Tribunal has the power to order that the employer pay equal remuneration or provide equal treatment.
\textsuperscript{22} This includes the Unfair Dismissals Act 1977 (Ireland) and the Unfair Dismissals (Amendment) Act 1993 (Ireland).
\textsuperscript{23} 1977-1993.
the situation of third country national migrant workers.\textsuperscript{24} This prescribed service period is extremely long and where the worker is a migrant one, often will be an insurmountable hurdle. In such a case, the migrant worker will be denied leave to complain of certain treatment before the employment tribunals.

If the migrant worker does manage to meet this onerous requirement, they will be able to proceed with a case under this legislation. Their case will initially be referred to a Rights Commissioner\textsuperscript{25} who has the power to issue a recommendation. The function of the Rights Commissioner follows closely that of the Equality Mediation Officer in the Equality Tribunal and similar opt-out clauses are also available to either party.

Where the Rights Commissioner cannot reach a solution to the dispute or where either party objects to the hearing of the case by the Rights Commissioner, the case is referred to the Employment Appeals Tribunal. Here a determination will be issued after a full hearing of all the relevant evidence. The migrant worker, where successful, could be awarded a range of remedies including the right to be granted re-instatement, re-engagement or compensation up to a maximum of 104 weeks pay.\textsuperscript{26}

\textsuperscript{24} Unfair Dismissals Act 1977 (Ireland), section 2(1).
\textsuperscript{25} Unless either party objects, or if the case has already been heard by the Employment Appeals Tribunal (section 8(3)). Otherwise the Employment Appeals Tribunal will hear the case at which point they can issue a determination.
\textsuperscript{26} Section 82 Employment Equality Act 1998 (Ireland).
2. Solutions

An analysis of a very typical case of a dismissal on grounds of race demonstrates effectively the unnecessary complications involved in seeking a remedy in cases where discrimination has occurred. Where the complainant is a migrant worker, whose language and knowledge of their rights and entitlements may be inferior to that of the domestic population, the structure will deter migrant workers from seeking justice. The solution to this problem lies in both the structure and the process. This section of the Chapter will draw on the experience of other EU countries to illustrate some potential solutions to the employment dispute resolution process in Ireland.

2.1. The Structure of Employment Dispute Resolution

A quick analysis of employment dispute resolution procedures in other countries demonstrates that these problems can be overcome by the introduction of relatively simple reforms.

2.1.1. A Single Dispute Resolution Process

In contrast to the Irish system, the employment dispute resolution mechanism in operation in Germany has been described as one of the most structurally advanced systems currently in use.27 This is because it is very simply comprised of three levels of courts. A dispute is first brought to the labour court28 where about half of

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28 This is known as the Arbeitergerichte. See information on European Labour Courts available at www.fedec.com/labcourts.html [last checked 15th September 2008].
the cases are settled during the initial hearings. An appeal is then available to the Higher Labour Courts\(^{29}\) and a final appeal is available at the Federal Supreme Labour Court.\(^{30}\) This model also exists in the UK, although to a limited extent. In the UK, the first stop for the majority of employment disputes is the Employment Tribunal.\(^{31}\) Appeals lie to the Employment Appeals Tribunal.\(^{32}\) This is in contrast to the Irish approach of various tribunals for various different employment conflicts which is unnecessarily complicated in comparison.

2.1.2. Jurisdiction over Employment Disputes

Unlike the Irish system, the labour courts in Germany can hear all types of employment disputes that are detailed in one statute, the Labour Courts Act.\(^{33}\) This Act grants jurisdiction to the courts to deal with disputes involving legal conflicts between the employer and the employee, including disputes as to collective agreements.\(^{34}\) The jurisdiction of the Employment Tribunal in the UK is impressive and covers the majority of disputes covered by the various tribunals in Ireland. In recent years, there have been attempts to simplify the employment

\(^{29}\) Also known as the Landersarbeitsgerichte. See information on European Labour Courts available at [www.fedee.com/labcourts.html](http://www.fedee.com/labcourts.html) [last checked 15\(^{th}\) September 2008].

\(^{30}\) Also referred to as the Bundesarbeitsgericht. See information on European Labour Courts available at [www.fedee.com/labcourts.html](http://www.fedee.com/labcourts.html) [last checked 15\(^{th}\) September 2008].

\(^{31}\) These were originally established under the Industrial Training Act 1964 (UK) with a limited jurisdiction. Today they are governed by the Employment Tribunals Act 1996 (UK) See Ingram “Tribunals” in Ingram, *The English Legal Process* (London: Blackstone Press, 7\(^{th}\) ed., 1998) at pp. 109-112.


\(^{34}\) See Labour Courts Act (Germany) paragraph 2, section 1, No. 3(d). See Kulke “Employment Protection of Migrant Workers: Legal facilities and their improvement” In Goldberg, Mourinho and Kulke, “Labour Market Discrimination against Foreign Workers in Germany” *International Migration Papers* No. 7 at Chapter 2, p. 70.
dispute resolution process in Ireland. For example, the jurisdiction for discriminatory dismissals taken under the Employment Equality legislation was transferred from the Labour Court to the Equality Tribunal in 2004.35

While this is an important step in removing unnecessary complications from employees, the reality is that there are still two independent tribunals in which a case for dismissal on the grounds of race can be heard. While the choice may be a simple one for a migrant worker who does not meet the necessary requirements under the Unfair Dismissals Acts36, the need for two separate tribunals is questionable. It should be possible to establish one single employment tribunal37 capable of dealing with a wide variety of cases as exists in Germany. The funding required to run the two separate tribunals in Ireland could be used to fund one large employment tribunal capable of dealing will all cases. Where a migrant worker has a complaint regarding dismissal, they may take this case to an employment tribunal for determination. This form of one-stop shop would have the benefit of reducing complexity, cost and the difficulties facing migrant workers as well as acting as a considerable deterrent to employers.38 This will require a re-working of the current statutory frameworks governing employment law in Ireland. As noted in the recent review of the employment dispute resolution process in the UK “dispute resolution processes cannot be simple where the

35 Employment Equality Act 1998 (Ireland) (as amended) section 75(4) (b).
38 See Law Reform Commission Report “Third Programme of Law Reform 2008-2014” (2007) LRC 86 where it is noted in Appendix 2 “Annotated Chronological index of Submissions Received” that this was in need of reform and would be conducted as a review by the Department of Enterprise, Trade and Employment.
underlying legislation, on which the dispute rests, is complex, burdensome or not clearly drafted”39.

2.2. Changing the Process of Employment Dispute Resolution

2.2.1. The Availability of Conciliation

One of the most impressive aspects of the procedure in Germany, aside from its envious simplicity for workers, is that the lower and appellate labour courts are statutorily obliged to attempt settlement of the dispute by conciliation.40 This process in itself acts as a means in which to speed up the entire dispute resolution process and almost one third of all cases are settled during the conciliation process.41 The chairperson sitting alone without any lay members carries out the conciliation.42 This chairperson has various powers depending on the situation that arises.

In the UK, there is also a body specifically established to conduct conciliation for employment. Acas43 is a statutory and independent organisation dedicated to improving workplace relations and offering free conciliation services to employees and employers. While there is a mediation service in Ireland, it will be

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42 As Vranken comments the first oral hearing (Guteverhandlung) takes place before a chairman sitting alone.
43 Association of Conciliation and Arbitration Services (hereinafter referred to as “Acas”).
demonstrated that there are more appropriate and effective ways of carrying out this service.

2.2.2. When should Conciliation be Available?

In Ireland, mediation is available once the complaint has been made to the employment dispute resolution bodies. If an employer or an employee decides that they do not want to take part in mediation, the case is then moved to final hearing.

In Germany, conciliation is available once a complaint has been made and the parties are obliged to appear for conciliation procedures. If the party does not appear, the Chairperson has the right to issue a default judgment against that party if it is appropriate to do so.44 There is an appeal against this default judgment, where the party can show that there was good reason why they could not appear at the conciliation procedure.45

It is important to note that this does not amount to a form of compulsory conciliation. While the parties are obliged to appear, they are not obliged to accept the determination of the Chairperson. The application of similar procedures in Ireland would have a significant impact on the delays, which currently exist. This process compels both parties to the dispute to examine their liabilities and to come to an early settlement. This would be of great benefit to migrant workers who because they have lost their right to remain in the state will often not be available

44 See website of the Bundesarbeitsgericht available at www.bundesarbeitsgericht.de/englisch/general.html [last checked 15th September 2008].

45 See website of the Bundesarbeitsgericht available at www.bundesarbeitsgericht.de/englisch/general.html [last checked 15th September 2008].
to give evidence at a final hearing. It is therefore beneficial to both parties to come
to a mutually acceptable settlement.

In Germany, the chairperson has the right to issue a judgment based on the
acknowledgement of the respondent. This gives the respondent the option of
settling with the employee soon after the dispute and before a hearing can take
place. The result very evidently signifies financial savings for both parties,
represents an early victory for the migrant worker and reduces the amount of cases
available for final determination. The chairperson may utilise the conciliation
proceedings as a method of preparing the parties for the initial oral hearings,
where it is clear that no settlement is forthcoming. In many cases, the chairperson
will give their legal opinion as to the likely outcome of the case, which has a
substantial impact on the parties to the dispute and often makes them more willing
to compromise and settle their differences.

In the UK, conciliation is available in two circumstances. Firstly it is available
where an application has been presented to an employment tribunal. It is the duty
of the conciliation officer if he is requested to do so or in the absence of such a
request, where the conciliation officer considers that he could act with a
reasonable prospect of success, to endeavour to promote a settlement of the
proceedings without their being determined be an employment tribunal.
Secondly, conciliation is available even if the complaint has not yet been made to

46 See website of the Bundesarbeitsgericht available at www.bundesarbeitsgericht.de/englisch/general.html [last checked 15th September 2008].
48 A request can be made either by the person the proceedings are brought or the person against
whom the proceedings are brought. See Section 18(2)(a) Employment Tribunals Act 1996 (UK).
49 Section 18(2) Employment Tribunals Act 1996 (UK).
the employment tribunal. The service is applicable to most types of employment claims and can seek all the remedies of re-engagement, reinstatement and compensation. Clause 5 of the Employment Bill 2008 (UK) will introduce amendments to the current conciliation procedure in the employment tribunals. Under the present Act, Acas has the power to or in some cases is obliged to offer conciliation. In cases, where a complaint has not yet been made to the Employment Tribunal, the Employment Bill 2008 (UK) will introduce a discretionary power to conciliate in such cases.

The conciliation officer shall, where appropriate, have regard to the desirability of encouraging the use of other procedures available for the settlement of grievances, such as mediation and arbitration. This overall approach to encouraging alternative dispute resolution solutions should be commended and would be a welcome improvement to the system currently operating in Ireland.

There is potentially a conflict with the proposed addition of mandatory conciliation and the constitutional law principles of the right of access to the courts and the right to litigate. The right of access to the courts is an unenumerated right under Article 40.3 of Bunreacht na hEireann arising as a general inference from Article 34.3.1 and “applies in respect of all courts”. The scope of this right includes access in defence of personal and direct rights which

50 Section 18(3) Employment Tribunals Act 1996 (UK).
51 These are detailed in section 18(1) Employment Tribunals Act 1996 (UK).
52 Section 18 Employment Tribunals Act 1996 (UK).
53 Section 18(3) as will be amended by Clause 5(2) Employment Bill 2008 (UK).
54 Section18(6) Employment Tribunals Act 1996(UK)
are being threatened by citizens or the State and the right to restrain the acts of the executive or others from breaching the constraints set by the Constitution.\textsuperscript{57}

However, the right of access is not an absolute right and can be limited.\textsuperscript{58} The Law Reform Commission note that this right has largely been utilised to prevent unreasonable impediments being put in the way of impending litigants.\textsuperscript{59} The proposed conciliation process could restrict the right of access by insisting that the claimant and the defendant engage in a conciliation process before having their case heard. However, the proposed conciliation procedure does not restrict the right completely but provides that the exercise of the right is contingent upon the parties partaking in the conciliation process before they access the court.\textsuperscript{60} A balance must therefore be struck between the individual’s right of access to the courts and the right of the State to reduce costs and expenses of legal proceedings, to reduce delays and to ensure a smooth judicial process in the common good. The Irish courts have previously held that limitation periods and the imposition of stamp duty on a litigant do not infringe the right of access to the courts.\textsuperscript{61} Therefore, it is arguable, that in the interests of the common good, the imposition of a initial conciliation procedure before the right of access to the employment dispute resolution procedures, which would not be a final determination of the matter and would involve no enforcement unless it is accepted by the parties, would not unreasonably interfere with the right of the citizen to access to the courts in this context.

\textsuperscript{58} Law Reform Commission, Multi Party Litigation (LRC 76 – 2005) at p. 30. 
\textsuperscript{60} Moore, “Isaac Wunder Orders” Judicial Studies Institute Journal 137 at pp. 139-143. 
\textsuperscript{61} Murphy v. Minister for Justice, Equality and Law Reform [2001] 2 ILRM 144.
2.2.3. The Benefits of Conciliation

The service in the UK has been very successful in economic terms. In a recent review of the economic impact of the employment relations services delivered by Acas, it was found that the work of Acas provides an economic benefit of nearly £800 million a year. The report found that better employment relationships were maintained at work and employers’ costs were reduced by £223 million. Compensation to employees was also reduced to £6 million and costs in terms of management time were reduced by £79 million. The savings are also applicable to employees who saved £3 million in legal fees and the taxpayer who saved £71 ½ million in the cost of hearing days. In February 2008, the UK Government announced that Acas would receive up to £37 in extra resources over the coming three years, to enable it to pilot conciliation in the earlier stages of disputes and to fund and expand helpline and advice services.

The role of the service will also be enhanced by the proposals in the Employment Bill 2008 (UK) to remove the current time restrictions on Acas’s duty to offer conciliation which will ensure that “Acas help is available when parties realise close to the date of hearing that they wish to reach an agreed settlement”. The Explanatory Memorandum to the Bill explains that the intention behind this

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63 Meadows, *supra* n. 62 at p. 4.
64 Meadows, *supra* n. 62 at p. 6.
65 Meadows, *supra* n. 62 at p. 6.
66 Meadows, *supra* n. 62 at p. 4.
amendment is to enable Acas to prioritise cases where demand for conciliation exceeds resources and to release Acas from the obligation to offer conciliation where there is no reasonable prospect of success.

The services in the UK and in Germany demonstrate a commitment both to reducing delays within the system by creating effective and workable alternative dispute resolution procedures and to providing suitable financial resources to ensure an efficient service. This is in stark contrast to the services currently provided in Ireland. A synthesis of the key components of the services offered in both jurisdictions would be useful to develop the role of conciliation in Ireland. The subtle difference between mediation, which is a more pro-active and facilitative role, and conciliation, which is more reactive and evaluative, is the first important difference to consider. The use of conciliation may serve to engender a better outcome for employees and employers. At present the lack of a statutory right to conciliation before a dispute goes to the tribunal is disappointing and should be encouraged. The right to conciliation should be enshrined in the legislation and should be available at the request of either party. The current opt-out clauses, which are not available in either the UK or Germany should be removed. There should be conciliation services available for certain limited periods up to the final hearing of the dispute and the conciliator should be able to offer all the remedies of reinstatement, re-engagement and compensation. The developments of such practices would do much to assist migrant workers in achieving equality with nationals in the employment dispute resolution process.

Conclusion
The current employment dispute resolution procedure is complex, difficult and inadequate. A migrant worker dismissed in the circumstances described above will face the task of choosing between two separate employment tribunals, two different legislative schemes and two sets of procedure. This complexity alone is enough to deter migrant workers from utilising the process, whether they are third country nationals or from within the EU. Also the use of preliminary service requirements may mean that many migrant workers are excluded from such services in any case. The reality is that even if a migrant worker could decipher the maze that is the employment dispute resolution process in Ireland, they may well be faced with prolonged litigation.

The solution to all this lies in simplicity, a form the German court system has managed to develop exceptionally well. Similarly, the reliance on alternative dispute resolution mechanisms in Germany and the UK must also be commended. The effect this would have on migrant workers is immeasurable. In order to deter employers from exploiting migrant workers, the system must allow a migrant worker to easily pursue their employment rights while at the same time protecting the employer against frivolous claims. A system of statutory conciliation and a simplified labour court would achieve their aims efficiently and effectively.
Chapter 9: The Impact of Delay on Migrant Workers

Introduction

One essential characteristic of an employment dispute resolution procedure is the assurance that the process will guarantee an adequate remedy to the affected party. The current structures in Ireland provide for the remedies of compensation, reinstatement and reengagement, all of which could be considered to be adequate remedies for an afflicted worker.

However, the substantial delays in the employment dispute resolution procedures in Ireland has meant that many migrant workers, from both within and outside the EU, find that the remedies which they can be offered on the determination of their dispute are substantially reduced. As third country national migrant workers depend on the existence of the employment permit for their permission to remain in the State, the termination of their employment contract, and as a consequence their employment permit, inevitably means the termination of their residence in Ireland. Similarly, EU migrant workers also find that the termination of their employment contract can often signal the end of their stay in Ireland should they be unable to find alternative work. Due to the delay in hearing their case before the tribunals and other dispute resolution bodies and the lack of social welfare payments due to the habitual residence rule\(^1\), many migrant workers find that in

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\(^1\) Under the habitual residence rule, the Department of Social and Family Affairs are not liable to pay any social welfare entitlements to a person unless they have been resident in the State in the past and can show a prospect and expectation of residence in the future. The Social Welfare (Miscellaneous Provisions) Act 2004 section 17 and Schedule 1 which inserts section 208A into the Social Welfare (Consolidation) Act 1993 provides that a person must be present in the State or
many cases they will have returned to their sending state before the determination of the hearing and as such the only available remedy open to the tribunal is that of compensation.

This Chapter explores some solutions to this particular problem in an effort to restore the concept of an adequate remedy back into the employment dispute resolution process. The Chapter will examine the possibility of introducing interim measures to enable the migrant worker to remain in the State until the final hearing of their case and to ensure that other remedies are available to them. This is relevant to the situation of all migrant workers. However, the situation of third country nationals is more pressing in this context and so the Chapter will also explore the benefits of bridging visas for such workers. It will be determined that while all these solutions are short term, a longer term solution of the development of a fast-track procedure for employment disputes with adequate protections for employers would be the most effective solution.

1. Delay in the Employment Dispute Resolution Process

One of the most significant deficiencies associated with the employment dispute resolution process in Ireland is the fact that the procedure, from the first complaint, to the final hearing is a very lengthy one that is subject to substantial delays. At present, applicants can expect to wait for up to eighteen months for the final determination of their case. The effect such delays can have on migrant workers, in particular those employed on employment permits or visas, is possibly

\[\text{in the common travel area in the past two years in order to be considered habitually resident and entitled to certain benefits.}\]
best illustrated by examining the situation which arose in November 2000, when over 1,000 Turkish workers employed by GAMA Construction Ireland Limited\(^2\), a subsidiary of GAMA International Building Contracting Incorporated, were found to have been subjected to illegal employment practices amounting to exploitation.

Despite the fear that their employment would be prematurely terminated, some workers agreed to pursue their case to the Labour Court, with the help of their unions. It was agreed that GAMA would pay its workers €8,000 for each year of service in lieu of an alleged underpayment of overtime and an ex gratia payment of one months salary on termination of their contracts. However, the general consensus was that this was an insufficient reward for the work that had been completed and efforts were made to appeal the decision through the courts. However, after the workers were advised that it would take almost eighteen months for the case to be heard before a court, it was decided that they would not pursue this particular option, given that their contracts were due to expire shortly and few of them would have the financial resources to return to Ireland for the hearing.

This particular case demonstrates very effectively the effect the current delays in the court system and in the employment tribunals can have on migrant workers. The Equality Authority has admitted, in a recent report, that the assignment of Equality Officers to cases has in some circumstances taken up to three years.\(^3\) The addition of cases of discriminatory dismissals to the remit of the Equality Tribunal

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\(^2\) Hereinafter referred to as “GAMA”.

in 2004\textsuperscript{4} has only sought to heighten this problem, an issue that has also plagued employment tribunals in other countries to a similar extent. Morris has noted that in the UK the progressive extension of the jurisdiction of the employment tribunals has meant that there are now over seventy types of complaint that can be made to an employment tribunal bringing with it a commensurate increase in workload.\textsuperscript{5}

2. The Effect of Delay

2.1. The Difficulties in Making Out a Case

For migrant workers, particularly those operating on employment permits, this is an acute obstacle to achieving equality with nationals. Many cases have already arisen where third country national migrant workers, who have made claims for discriminatory dismissals, have found themselves in a position whereby they are unable to attend their own case because they no longer had permission to reside in the country.\textsuperscript{6} While the non-attendance of the complainant is not necessarily fatal to a case for discrimination, particularly where they have managed to secure representation on their behalf, it does make it more difficult for the Tribunal to

\begin{itemize}
  \item Under the Equality Act 2004 (Ireland) section 46, the Equality Tribunal now has jurisdiction to hear cases involving discriminatory dismissals. Prior to this Labour Court only had jurisdiction to deal with such cases.
  \item Ms. Nkone Sarah Sapuru v. Mount Carmel Hospital DEC-E2004-021. The applicant was a theatre nurse who was dismissed from her position allegedly unfairly. Unfortunately she could not return from South Africa for the case so the union appeared on her behalf. Her claim, however, was unsuccessful. The Court noted that the claimants failure to appear meant that she had “failed to establish a prima facie claim of discrimination and victimisation”. Similar events occurred in Mr. Omar v. Aer Rianta DEC-E2005-041.
\end{itemize}
determine whether or not the complainant has made out a prima facie case of discrimination.

2.2. The Reduction in the Remedies Available

The most significant effect of these delays is that there is a reduction in the remedies that will be available to a migrant worker. Even if a complainant is successful in having a case found in their favour in their absence, their remedies are restricted to compensation in the form of damages. Unfortunately, due to the fact that the worker is no longer available for reinstatement or re-engagement due to their absence from the State, the discretion of the tribunal in determining a suitable remedy for the employee is fettered. Remedies such as reinstatement and re-engagement would be obsolete and any orders for the employer to provide equal treatment or payment would be ineffective. Therefore the only remedy available is compensation and while this may be appropriate in the circumstances, it could not be said to adequate. It also means that the culture of compliance, which the equality legislation was developed to achieve, is being severely undermined.7

3. Compatibility of the Current System with EU Law

There is a possibility that the current situation with its significant delays is contrary to the provisions of EU equality law.8 European equality legislation requires that remedies for discriminatory treatment must “guarantee real and effective judicial protection, have a deterrent effect on the employer and must in

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any event be adequate in relation to the damage sustained". Article 7 of the Race Directive insists that Member States establish administrative and / or judicial procedures for the enforcement of obligations for persons who have suffered discrimination. The ECJ has stated that this guarantee “acknowledges that [such persons] have rights of which they may avail themselves before the courts”.

3.1. Is Compensation a Sufficient Remedy?

It is questionable, therefore, whether compensation is a sufficient remedy for migrant workers where they have been unfairly dismissed. There is authority in the UK for the proposition that compensation is an appropriate remedy for instances of discrimination but may not be appropriate in cases of unfair or discriminatory dismissal. The process of employment dispute resolution should aim to compensate the worker for the loss of a job and this is why the remedies of reinstatement and re-engagement have been made available to them at a statutory


11 Bakersfield Entertainment Ltd. v. Church and Stuart [2005] UK EAT/0523/05 ZT.
level. It is doubtful whether compensation alone is sufficient to compensate the migrant for the loss, not only of a job, but a way of life in another country.

Morris, would argue that compensation is the only appropriate remedy in the case of dismissals as in such cases, “neither the employer nor the employee is usually interested in a continuation of the contract and the compensation or other remedies seem more appropriate than reemployment”\(^\text{12}\). However, it is arguable that this is an outmoded and unnecessary view of the employment relationship. The role of employer and employee has drastically changed in recent years and the traditional view of the employment relationship as being akin to that of a master and servant is no longer relevant in many professions.\(^\text{13}\) For this reason, it is appropriate to examine possible solutions that will guarantee migrant workers the right to an adequate remedy where they have suffered discriminatory treatment.

### 4. The Potential Solutions

It is evident that the serious delays at the employment tribunals present significant obstacles to migrant workers at the remedial stage of employment dispute resolution. This is cause by two related issues. Firstly, once their contract of employment has been terminated, their work and residence permits are also terminated and they are required to leave the State. Secondly, where they have left the State they are usually unable to return for the final determination of their case and even if they were, the only remedy that is available to them is compensation.

\(^{12}\) Morris supra n. 5 at pp. 278-279.

Therefore, one possible solution would be to prevent the termination of the contract of employment by interim relief. This next section examines the various ways in which this could be achieved.

4.1. Grant Interim Relief

The Equality Authority has suggested that interim hearings or interlocutory relief pending a full hearing of the case should be available to applicants to minimise the effects of the delays on proceedings.\(^\text{14}\) In effect this would amount to the reinstatement, re-engagement or the continuation of a contract of employment pending the full hearing of the case before the tribunal.

4.1.1. What is Interim Relief and When is it Granted?

Interim relief is essentially a remedy in the form of court order addressed to a particular person that either prohibits him or her from doing or continuing to do a certain act\(^\text{15}\) or orders him or her to carry out a certain act\(^\text{16}\). In a normal case before the civil courts, the applicant must make out a legal case in connection with the claim it has instituted and it must be shown that the balance of convenience favours the grant of the interim relief.\(^\text{17}\) The essential aim of an interlocutory injunction in an employment law context would be to preserve the


\(^{15}\) This is referred to as a prohibitory injunction.

\(^{16}\) This is referred to as a mandatory injunction.

\(^{17}\) *Campus Oil Ltd. v. Minister for Industry and Energy (No. 2)* [1983] IR 88. O’ Higgins CJ stated that “the test to be applied is whether a fair bona fide question has been raised by the person seeking the relief. If such a question has been raised, it is not for the Court to determine that question on an interlocutory application; that remains to be decided at the trial. Once a fair question has been raised... then the Court should consider the other matters which are appropriate to the exercise of its discretion to grant interlocutory relief.” at p. 107. The Supreme Court in Ireland was following the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396. These principles were applied by the Supreme Court in subsequent cases such as *Westman Holdings Ltd. v. McCormack* [1992] 1 IR 151.
status quo between the parties to the dispute until the final determination by an employment tribunal so as to prevent the applicant suffering irreparable harm as a result of the delay in hearing the proceedings.18

The current use of interim relief in Ireland is alien to the employment dispute resolution process. Such remedies are normally granted in civil cases by the courts and are discretionary.19 Most importantly, it will not be granted where damages would be a sufficient remedy.20 It appears from the case law governing wrongful dismissal that the traditional relief at common law for unfair dismissal is a claim for damages and those other remedies, which may be sought, are in aid of this remedy and have no existence independent of it.21 The difference, however, with a scheme which would be established in the employment tribunals would be that they are entitled under the legislation to order reinstatement, re-engagement or damages. As will be discussed below, in the case of migrant workers, damages would not adequately compensate third country national migrant workers were they to lose their permission to work in Ireland as this would effectively terminate their permission to remain in the country and any hope of establishing their case at a final hearing. Similarly workers from within the EU may not be able to afford to remain in Ireland pending the final determination of the Tribunal.

4.1.2. Is there a Fair and *Bona Fide* Question to be Tried?

In considering whether to grant interim relief, the tribunal could firstly, insist that the applicant establish some legal grounds on which to institute proceedings, but not necessarily, that this would be successful at the final hearing.  

This is the basis upon which interim relief is granted to employees in the UK by the employment tribunals. Where an employee claims that they have been unfairly dismissed, they then have seven days to apply to the employment tribunal for the application of interim relief pending trial. Where the employment tribunal is satisfied, that on the final hearing it will most probably be established that the dismissal is unfair, the tribunal will ask the employer whether or not they are willing to reinstate the employee, or in the alternative to re-engage that employee on the same terms and conditions as their previous contract of employment. If the employer agrees to this, then the tribunal will order that such interim relief be granted. If the employer refuses or does not attend this interim hearing, the tribunal will make an order that the employee’s contract of employment will continue in operation pending the final hearing in the case.

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23 This is granted under the Employment Rights Act 1996 (UK) sections 128-132.
24 Employment Rights Act 1996 (UK), section 128(1).
26 This is very close to a determination that there is a fair and bona fide question to be tried. See Employment Rights Act 1996 (UK), section 129(1).
27 Employment Rights Act 1996 (UK), section 129(3) (a) and (b).
28 Employment Rights Act 1996 (UK), section 129(5) and (6).
29 Employment Rights Act 1996 (UK), section 129(9).
The employee also has a power of veto over the remedy granted and where the employee refuses to accept either reinstatement or re-engagement pending trial and the tribunal considers this refusal reasonable, the tribunal may order that the contract of employment be continued until the final hearing. An order that the contract of employment be continued essentially means that the employee will continue to be paid until the final hearing and the time will be regarded as continuous employment with the employer. Any sum paid by the employer to the employee during this time may go towards the discharge of any liability which may be found at the final hearing. Provision is made for variation or revocation of the order at any time by either party.

4.1.3. Does the Balance of Convenience Favour the Grant of the Interim Relief?

In Ireland, unlike the situation in the UK, the tribunal could be required to consider whether the balance of convenience favours the grant of the injunction as is required in civil proceedings. In this regard, the tribunal would be entitled to consider the situation which would arise were the injunction to be granted and later to find out that this decision was inappropriate or, on the other hand, what situation would arise were the injunction to be refused but at the final hearing the restriction is found to be valid.

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30 Employment Rights Act 1996 (UK), section 129(7).
32 Employment Rights Act 1996 (UK), section 129(8) (a).
33 Employment Rights Act 1996 (UK), section 130(1) (a) and (b).
34 Employment Rights Act 1996 (UK), section 130(5).
36 Deakin “Stopping or Preventing Industrial Action in Australia” (2000) 24 Melbourne University Law Review 310 notes at p. 329 that the balance of convenience requires the court to weigh up the risks and benefits of granting injunctive relief.
Where the case involves a migrant worker on an employment permit who has been or is about to be dismissed, it is difficult to determine where the balance of convenience would fall. If the injunction was granted and the applicant failed in the tribunal, the employer would have suffered undue prejudice as a result of the case. They would have incurred financial loss as a result of the decision of the court to force the employer to employ a worker who was lawfully dismissed and perhaps the good will and morale of the other employees would also be affected. Due to the fact that it is unlikely that an employment tribunal would expect an employee to give an undertaking as to damages, there is no way in which the employer could be reimbursed with these costs. It could be possible to overcome this by following the example of the UK where some of the money paid out by the employer, goes towards discharging the final liability which the tribunal orders the employer to pay the employee.

Where the injunction is not granted, there is also the significant danger that the court will be deciding the outcome of the case by inaction, as any failure to grant an injunction would mean that the migrant worker would either not have permission to remain in the State or would not have the financial resources to remain and as such would be compelled to leave the State, would be unable to attend the final hearing of their case and even if the decision was made in their favour, they would no longer be able to enjoy the remedies of reinstatement or re-engagement.

37 Due to the fact that the procedure before the employment tribunals is maintained relatively cost-free so as to encourage employees to report unfair treatment, it is unlikely that any interim relief proposals would suggest that the employee should give an undertaking as to damages.
38 Employment Rights Act 1996 (UK), section 130(5).
39 The courts are particularly reluctant to do this. See Dunne v. Dun Laoighre- Rathdown County Council [2003] 2 ILRM 147 where the court noted that if no relief was granted the court would be effectively deciding the case by inaction since the action would have been completed by the time the case came to trial.
4.1.4. What Kind of Order could be Made?

The introduction of the provisions in the UK into this jurisdiction would be one possible solution to this issue. The employee could therefore be re-engaged or reinstated pending the final hearing in the case. In this way the migrant worker would not have their employment permit terminated and would continue to have permission to remain in the country. The problem with this form of remedy from a practical and legal perspective is that it is not generally appropriate to force persons to work together when the trust and confidence between the parties has been damaged. 40 The courts, in this jurisdiction, are also reluctant to grant an injunction, which involves an element of ongoing supervision, as such an injunction would require.41

The employment tribunals in this jurisdiction do not presently have the power to grant interlocutory relief pending the final hearing of the employment tribunal as they do in the UK. However, examples of how this could be achieved were the tribunals to have such power may be gleaned from the case law involving wrongful dismissal. The courts have been particularly conflicted in such cases. Often they have held that it is completely inappropriate to grant such an injunction, especially where the trust and confidence between the parties has been irreparably damaged.42 However, in other cases the courts have held that

42 See Delaney supra n. 18 from p. 510.
exceptional circumstances existed which favoured the grant of the injunction. It is possible that the tribunal would consider that where a migrant worker will lose or has lost their permission to remain in the State, this would be one of those exceptional cases in which it may be appropriate to order reinstatement or re-engagement of the employee. The courts may also have the jurisdiction to restrain the appointment of another person in place of the plaintiff or to prevent the advertising of a plaintiff’s post until the trial of action.

One order which has also been granted in many cases, which is currently available in the UK and which would be also appropriate to migrant workers generally would be to order that a plaintiff’s salary be paid while the trial of action is continuing. Such orders are not confined to those plaintiffs who have established that they would be impoverished until the trial of action although such an assertion would obviously weigh heavily on the mind of the court.

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43 Courtney v. Radio 2000 Ltd. [1997] 4 ELR 198 (per Laffoy J). The Plaintiff was employed as a broadcaster on the radio. Laffoy J. held that the job was highly specific and did not require a great deal of interaction with the employer. See also the case of Martin v. Nationwide Building Society [2001] IR 228 where the plaintiff sought reinstatement as a branch manager pending the substantive trial of action. Despite the great deal of trust and confidence required to do the job, Macken J. held that this was a case in which the grant of an injunction was appropriate. This was due to the fact that this involved a suspension, which had gone on for far too long, and the employee should be reinstated because of this delay. Similarly in Howard v. University College Cork (2000) High Court No. 3372p (per O’Donavan J) 25 July 2000 the court held that an injunction was appropriate in a case where the damage to the reputation of the plaintiff would not be adequately compensated by damages were the final trial of action to be found in her favour. O’Donavan J. noted that it would be extremely difficult if not impossible for the trial court to determine the damages which would adequately compensate the plaintiff were her dismissal found to be unlawful.


The use of interlocutory relief by the employment tribunals is one option, which would ameliorate the difficulties facing a migrant worker where they are faced with lengthy delays before their case will be heard. There are a number of significant issues, however, which would need consideration before any such scheme could be imposed. Firstly, it must be considered whether damages are an adequate remedy for migrant workers where they have been dismissed and for third country nationals who are forced to leave the State due to the termination of their permission to remain in the State. If it were considered that this is not appropriate, consideration would have to be given to the possible criteria, which should be established for the granting of interlocutory relief. Finally, it must be considered in what circumstances it is appropriate to grant injunctive relief to a migrant worker to be maintained in employment pending the hearing of their case. In this regard, the provisions currently in operation in the UK provide valuable guidance to the legislature in this country as to how such interim relief can be used to ameliorate the problems posed by delays in the employment dispute resolution process.

4.2. Introduction of Bridging Visas for Third Country National Migrant Workers

Bridging visas are temporary visas, the purpose of which are to bridge the time which elapses between the termination of a more substantive visa and the determination of a particular process. In Australia, they are utilised as temporary visas to bridge the time that passes while a more substantive visa is being processed or while arrangements are being made for a non-citizen to depart from
the State.\textsuperscript{48} It is possible that such visas could be granted to third country national migrant workers in Ireland who are awaiting the determination of a case before the Equality Tribunal or other employment body.

Such a visa would be of significant benefit to third country national migrant workers who have had their employment terminated, but who as a result of the fact that they no longer have an employer, have lost their employment permit and so are no longer entitled to remain in the State. The practice of the Department of Enterprise, Trade and Employment in Ireland, who are responsible for the issuing of employment permits, is generally to grant a second employment permit for the same employee once they have found an alternative employer. However, where the migrant worker is unable to find work, they are not entitled to remain in the State and thus are unable to remain in the country to attend the final hearing of their case. A bridging visa, therefore, would be extremely beneficial to third country national migrant workers in cases either where they have found alternative work or where they have been unable to do so.

Naturally, the grant of a bridging visa would have to be subject to stringent regulation so that it is not granted to persons who do not require its assistance. In Australia where bridging visas are regularly used, they are either granted automatically\textsuperscript{49} or where certain criteria have been met.\textsuperscript{50} In the employment law


\textsuperscript{49} See the discussion in Taylor, “Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms” (2000) 22 \textit{Sydney Law Review} 50 at p. 51. This occurs where the applicant has been cleared by immigration and is waiting for a
context one of these criteria would be that there is a case pending before an employment law tribunal and that the applicant is required at the hearing in order to establish certain facts, which are relevant to the case.

There is a reasonable concern that workers who have their employment terminated would misuse the visa in this context. However, there is anecdotal evidence to suggest that at present the Department of Enterprise, Trade and Employment have a general practice whereby they will grant another employment permit for an employee where that employee finds alternative employment. This is equivalent to granting the migrant worker a bridging visa capable of granting that worker permission to remain in the country pending the final hearing as it allows the worker to remain in the State until the final determination and for some time after.

In fact, the bridging visa would ensure that workers who are unable to find alternative employment are free to remain in the State until the final determination and that all such workers will leave the state once their action has been heard, as they would no longer have permission to remain. It is therefore unlikely that a migrant worker would take a case to the Employment Tribunals in order to obtain such a visa as it could threaten their ability to remain in the State should the trial be determined in favour of their employer. Essentially the decision to grant such a visa would be in the hands of the Minister for Justice, Equality and Law Reform, substantial visa. See also Nafziger who also discusses the issue of removal pending bridging visa. Nafziger, “Protection or Persecution? The Detention of Unaccompanied Immigrant Children in the United States” (2006) 28 Hamline Journal of Public Law and Policy 357 at p. 357.

50 Taylor, “Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms” (2000) 22 Sydney Law Review 50 at p. 51. Such conditions include that the applicant is under 18 or over 75 years, is unwell or traumatised, is a spouse of an Australian citizen, Australian permanent resident, eligible New Zealand citizen or family members of such citizens or have not received a primary protection visa order within 6 months.
but the development would put onto statutory footing the general practice of the Government in such cases.

Naturally, this solution will only affect third country national migrant workers and would be of no benefit to EU workers. With this in mind, it may be more appropriate to develop a system that is more inclusive of all migrant workers so that distinctions on grounds of nationality do not become an excuse for disparate treatment.

4.3. Development of a Fast-Track Employment Dispute Process

One solution, which could be investigated as a possible solution to the lengthy dispute resolution process and which would be of benefit to all migrant workers in Ireland, is the introduction of a fast track procedure similar to that sought to be introduced in major planning and development judicial review cases.\textsuperscript{51} Much can be learned from the development of a fast-track procedure capable of reducing the lengthy process of judicial review, which was often financially devastating to both parties in such cases.

In recent years the Commercial Court has subsumed some responsibility for certain planning and development cases\textsuperscript{52} which has meant that the detrimental effect of the lengthy review process has been circumvented due to the adoption by the Commercial Court of fast-track hearings and special case management rules. However, this was never placed on a statutory footing and it has been recently

\textsuperscript{51} See for example the Planning and Development (Strategic Infrastructure) Act 2006 (Ireland).
\textsuperscript{52} The value of the development must be over 1 million euro.
proposed that there should be a statutorily designated planning judicial review court in the High Court to deal with such cases.\textsuperscript{53} The Planning and Development (Strategic Infrastructure) Act 2006 (Ireland)\textsuperscript{54} deals specifically with major developments, which have a “strategic, economic or social importance”\textsuperscript{55} on the State or on the region. However, the principles set out in the Act could be helpful in determining how a similar scheme could be established in the case of employment disputes.

The Act sets out a number of procedural issues, which must be established before a case will be fast-tracked. Some of the most relevant provisions, which could be utilised in the context of employment law, are considered here. Firstly, the Act provides that the court must give permission for the case to be heard by fast track procedure.\textsuperscript{56} Applications for leave to appeal to the court can be made on an \textit{ex parte} basis which circumvents the previous requirements where by the applicant had to inform the other party of their intention to appeal and the grounds for such an appeal.\textsuperscript{57} The Court will be entitled to require the applicant to give an undertaking as to damages.\textsuperscript{58} Despite the fact that this latter requirement was

\begin{itemize}
  \item [53] Planning and Development (Strategic Infrastructure) Act 2006 (Ireland).
  \item [54] Sections 1 – 51 are now all in force. See Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) Order 2006 S.I. No. 525 of 2006 (Ireland); Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No. 2) Order 2006 S. I. No. 553 of 2006 (Ireland) and Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No.3) Order 2006 S. I. No. 684 of 2006 (Ireland).
  \item [55] Planning and Development (Strategic Infrastructure) Act 2006 (Ireland) section 3 (2) (a) inserting section 37A into the Planning and Development Act 2000 (Ireland).
  \item [56] Planning and Development (Strategic Infrastructure) Act 2006 (Ireland) section 13 inserting section 50A into the Planning and Development Act 2000 (Ireland).
  \item [57] Planning and Development (Strategic Infrastructure) Act 2006 (Ireland) section 13 inserting section 50A(2) into the Planning and Development Act 2000 (Ireland).
  \item [58] Planning and Development (Strategic Infrastructure) Act 2006 (Ireland) section 13 inserting section 50A (6) into the Planning and Development Act 2000 (Ireland).
\end{itemize}
criticised for the fact that it may become an insurmountable barrier to some applicants, it has been adopted in the final Act.  

4.3.1. The Adoption of the Fast Track Procedure in the UK

In the UK, the Employment Bill 2008 (UK) envisages the development of a fast-track procedure for settling monetary disputes in certain limited jurisdictions. This arose out of a recommendation by Michael Gibbons in a Report compiled for the Department of Trade and Industry.  

The Report recommended that the Government should “encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it”. This is intended to operate without oral hearings. Each party will be required to submit documentation to the tribunal where both parties agree to it. This was provided for under the original Employment Tribunals Act 1996 (UK) but it has never been used. Clause 4 of the Employment Bill 2008 provides that in such cases both parties must consent to the hearing or else must be given an opportunity to request a hearing instead of a decision based upon documentation.

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60 Gibbons, Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain (London: Department of Trade and Industry (now the Department of Business, Enterprise and Regulatory Reform), March 2007).

61 Gibbons, Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain (London: Department of Trade and Industry (now the Department of Business, Enterprise and Regulatory Reform), March 2007) at p. 50.

62 Section 7(3A) (UK).

63 Clause 4 Employment Bill 2008 (UK) which will insert section 7(3AA) into the Employment Tribunals Act 1996 (UK).
4.3.2. A Designated Division and Criterion for a Fast Track Procedure in Ireland

A similar fast-track procedure could be developed within the present structure of the Equality Tribunal or the Employment Appeals Tribunal. It would require the development of a division of the Tribunals specially dedicated to dealing with fast tracked decisions and the development of certain criteria under which it could be considered feasible to fast track a case taking into account the positions of both the applicant and the respondent and the effect any such decision would have on either party. One such criterion could be that the applicant is a migrant worker, working on an employment permit that is unlikely to be present in the State for the final determination of the case.

4.3.3. Early Investigations and Hearings

At present, in a case under the Equality Acts 1998-2004, the applicant submits a complaint form to the relevant body on an *ex parte* basis but in the interests of natural justice the respondent is sent a copy of this form, which contains detailed information of the complaint. After this, where mediation is either refused or unsuccessful, the Equality Officer conducts an investigation of the complaint by requesting detailed written submissions from both parties and by carrying out a joint hearing of the complaint. This process can take up to eighteen months to complete. In a fast-track process, this whole procedure could be made more efficient by early investigation and hearings. The employer could be adequately protected against any unfairness by the development of strict time frames, which both parties would have to adhere to in submitting their written evidence.
4.3.4. No Undertaking as to Damages

Finally, it is submitted that the inclusion of a provision requiring the applicant to make an undertaking as to damages so as to protect the respondent would be unnecessary, contrary to the spirit of the employment resolution process and would act as a deterrent to employees to assert their employment rights. This is perhaps best displayed in the fact that the employment tribunals do not award costs to the employer in disputes, as this would deter employees from seeking to assert their employment rights. There are already adequate protections in place, such as time frames and service requirements that seek to shield the employer against financial loss. The fast track procedure in fact, may actually be more favourable to the employer as the case would be dealt with expeditiously, minimising any financial loss to the employer and any negative publicity that may adhere to the case.

Conclusion

This Chapter has explored in depth the situation of migrant workers in Ireland who are engaged in the employment dispute resolution process. In line with earlier Chapters, this Chapter has engaged in an analysis of the situation of both third country national and EU migrant workers, although in this context the situation of third country national migrant workers was found to be more pressing.

The effect of the substantial delays currently found in the employment dispute resolution processes cannot be underestimated. Migrant workers regularly find
themselves unable to remain in the State until the determination of the hearing for financial or residence reasons. This means that the only remedy available to them is that of compensation. A discussion of the adequacy of this remedy in cases of dismissal was undertaken; the conclusion being that such a remedy did not adequately reimburse the migrant worker for the effect of that dismissal.

Solutions to this problem are therefore necessary. Drawing on experience from the UK many suitable options were debated. These included the introduction of interim measures, bridging visas and fast track procedures. It became clear that the development of a solution that would benefit all migrant workers would be the most practical and sensible solution.

Indeed, this Section of the thesis on Access to Justice has advocated from the beginning the development of a single migrant friendly dispute resolution process which will provide a real and effective judicial process which will act as a deterrent to employers and guarantee adequate remedies for all injured parties. Only such a system will ensure that migrant workers are not faced with significant obstacles during employment, reducing the level and extent of exploitation of migrant workers significantly.
Conclusion

This thesis began as an exploration of the reasons why migrant workers face greater levels of exploitation in employment than Irish nationals. The inquiry focussed on all different types of migrant workers in Ireland: third country nationals and EU nationals, and included particular examinations of some of the most vulnerable migrant workers including leased workers, seafarers and irregular workers. This thesis involves an examination of the various stages of the employment lifecycle from recruitment through to access to justice in employment disputes. The thesis identifies various obstacles that are faced by migrant workers in these processes. Many of these obstacles are not exclusively linked to migrant workers but because of the added vulnerabilities attached to such workers; these have a much greater impact on migrant workers than they would have on national workers. While the thesis focused mainly on what these obstacles are and where potential solutions lie, this inquiry took place in the context of how the State views migrant workers and the need to balance the protection of workers against the corporate quest for profit production and cost reduction.

1. Summary of the Main Findings

1.1. The Recruitment Process

This first Section of the thesis examined the different methods by which migrant workers migrate to and search for work in Ireland. It identified recruitment
agencies as the most popular as well as the most problematic form of recruitment process. Recruitment agencies, therefore, became the case study by which this first section of the thesis identified certain obstacles that faced migrant workers in Ireland.

The first chapter identifies four methods of recruitment for migrant workers; government sponsored migration, direct recruitment, chain migration and recruitment agencies. The chapter identified recruitment agencies as the most popular form of recruitment process and also the most exposed to exploitation. In particular, three obstacles were identified with the current system of recruitment agencies. There is a lack of regulation, equality and transparency and this contributes to high levels of exploitation and poor working conditions for migrant workers.

The question which then arose was how recruitment agencies should be regulated. In Chapter 2 the thesis examined the history of recruitment agency regulation from the early prohibitions to the now accepted form of adequate balanced regulation. It analysed critically the current recruitment agency legislation in Ireland and identified a substantial lacuna which is contributing to migrant worker exploitation during the recruitment process.

Recruitment agencies no longer operate from fixed establishments and easily monitored locations. Many recruitment agencies now operate over the internet or in various jurisdictions that makes them more difficult to regulate and monitor. Exploitation can flourish as a result. The thesis examined the possibility of
extending the jurisdiction of Irish legislation to recruitment agencies operating over the internet and in other jurisdictions. It examined legislative initiatives in other jurisdictions and the potential obstacles that might be created by EU law. The thesis set out a legislative format for extending the jurisdiction for the regulation of recruitment agencies in Ireland to agencies operating in other jurisdictions.

Chapter 3 continued with an examination of recruitment agency regulation and identified a number of serious omissions in the current scheme. It examined in particular the situation of leased agency workers, as such workers are particularly vulnerable to exploitation. The Chapter highlighted five important areas of regulation that should be addressed; the identity of the employer, the transmission of clear and honest information, the issue of fee-charging, staffing skills and remedies for exploitation. The Chapter is mindful of the impact of increased regulation on corporations and the effect that this has on the willingness of states to interfere with corporate entities and their profits. The solutions proffered are mindful of these constraints and attempt to strike a balance between the protection of migrant workers during recruitment and the need to develop regulations that are amenable to corporations and their interests.

1.2. Avoiding Legal Duties

This Section deals specifically with the issue of corporations who utilise to their benefit the well protected principles of corporate mobility but without experiencing any of the difficulties that workers face as a result. The most vulnerable migrant workers in this context are seafarers, as this concept of
corporate mobility combined with the unusual rules relating to the law of the sea, mean that they are often subjected to unacceptable levels of exploitation.

The first Chapter in this Section analysed the phenomenon of the flag of convenience, a legal device that is often used by corporations operating shipping vessels to cut costs and reduce regulatory burdens. The Chapter highlighted the benefits that are accorded to shipping companies as a result of this phenomenon through an examination of the benefits accorded to ships registered in Cyprus, an example of a European Union Member State that continues to operate an open registry. The Chapter also highlighted the negative effects that can arise as a result of the flag of convenience and gives as an example the recent events at Irish Ferries.

Chapter 5 examined the reaction of the State and trade unions in protecting migrant workers against the worst excesses of corporate mobility and profit protection. The Chapter recognised that the discretion of the State was fettered by the principles of free movement but argued that there is a solution in a broader interpretation of the Redundancy Payments Act 1967 (Ireland) that does not interfere with the principles of free movement. Chapter 5 also examined the role of trade unions in protecting workers employed at sea. The ECJ in the Viking Line case has effectively limited the role of unions to take such industrial action as is necessary to achieve their objectives and only where all other alternative forms of action have been taken. The ECJ also held that where an undertaking is offered that is legally binding on the parties, trade union action will no longer be “necessary to achieve the objectives” and this will prevent further action on the
part of the unions. However, the judgment does not take into account that such undertakings eventually expire and the situation of such workers, as happened in Irish Ferries, will no longer be secured.

So where should the responsibility for such workers lie? The thesis concluded in Chapter 6, that this should be a shared response between various actors in the process. The Chapter examined the responsibility of the state of beneficial ownership of the vessel. The state of beneficial ownership could be held responsible if regulations similar to those currently operational in the area of company law could be imposed. The Chapter examined through an analogy of corporate veil theory the possibility of lifting the flag in cases where corporations are attempting to avoid existing legal obligations. Secondly, the Chapter examined the responsibility of the state of registration. It contemplated the potential for states to refuse to de-register a shipping vessel where it is intended to register the vessel with an open registry. The potential restrictions on EU law are analysed. Once again the analogy with company law is revisited in an attempt to exact potential solutions. It is suggested that the current restrictions on de-registering a company should be applied in the context of de-registering a shipping vessel. This would prevent a shipping vessel from re-registering with an open registry and thus increasing protections for workers.

Chapter 6 also examined the port state and the market state as responsible parties in the protection of workers. Each of these states receives benefits as a result of the docking of the vessel in their port or as a result of the business which the ship can bring to their market. As a result some responsibility should be imposed on
each of these to some degree. This is not an unusual concept and has been achieved in other industries for the protection of fish stocks and to ensure that environmental damage is kept to a minimum. Port state controls, that are inclusive and adequately enforced, are advocated as well as actions by market states where exploitation or poor conditions are found on board a vessel. The sharing of the responsibility for the protection of seafarers will reduce the exploitation of such migrant workers by removing the obstacles that they face to equality with other workers.

1.3. Access to Justice

The final Section of the thesis demonstrates the obstacles faced by migrant workers when they seek equality with nationals in accessing justice in Ireland. The first Chapter in this Section, Chapter 7, looked at the access to the system of employment dispute resolution in Ireland. It determined that there are a number of obstacles in the way for migrant workers who require access to the system and that this only increases vulnerability to exploitation. Migrant workers who do not meet the requisite time periods as set out in the various employment statues are just one category of migrant worker excluded from the system. Of more significance, is the large and growing number of irregular migrant workers who by virtue of their migratory status are refused access to the employment dispute resolution process.

Chapter 7 explained that irregular migrant workers include both migrant workers that enter the State in a clandestine fashion and those that are here in the State legally but by virtue of the expiration, termination or other inconsistency in their
working arrangements are not considered to have legal contracts of employment. As these contracts are illegal from formation such migrant workers have no access to the employment dispute resolution process. The Chapter argued that the current law relating to illegal contracts of employment does not take into account the moral culpability of the parties to the contract of employment. There is a difference between contracts that are illegally agreed and those that are illegally procured and it is argued that migrant workers that do not illegally procure a contract of employment should not be prevented from accessing the system of dispute resolution. The knowledge of the parties to the contract is a relevant consideration in making this determination. Secondly, the rule allows employers to benefit from unjust enrichment. Employers benefit from the labour of migrant workers and yet can exploit migrant workers without fear of the migrant worker accessing the employment dispute resolution process. Finally, it is argued that the rule does not take into account the economic reality of undeclared work. There are so many migrant workers now operating in this undeclared sector of the economy that it would be more beneficial to allow them to access the dispute process, as it would reduce the benefits to employers of employing such workers in the first instance. The Chapter, after consideration of various different approaches to the situation of irregular workers, advocated an approach that would allow such workers to assert their rights as this reduces the pull factor of such workers to employers, thus reducing further the number of irregular workers required in the labour market.

Chapter 8 of the thesis considered the obstacles faced by regular migrant workers once they have accessed the system of employment dispute resolution. The
Chapter examined the obstacles faced by workers taking a case for race
discrimination in employment. It highlighted the complicated procedures involved
in taking a case under the Employment Equality Acts 1998-2004 and the Unfair
Dismissal Act 1977. The Chapter determined that the solution to these
complications lies in both the structure and the processes used by the employment
dispute resolution processes in Ireland. Firstly, the Chapter advocated a more
streamlined employment dispute resolution process, a one-stop shop to
determining employment disputes. However, in order to achieve this, amendments
must be made to the current employment legislative regime. In particular, the
complicated nature and the variety of legislative instruments should be clarified
and consolidated. Once this has been achieved, a simplified dispute resolution
process can be introduced. Secondly, the Chapter advocated an increased use of
alternative dispute resolution procedures. In particular, the Chapter advocated the
increased use of conciliation in the employment courts and tribunals and a
statutory right to conciliation.

The final Chapter in this Section, Chapter 9, examined the effect of delay on the
employment dispute resolution process. It demonstrated that the current process
increased the amount of migrant workers who are unable to make out a case due
to the fact that they may no longer be in the jurisdiction once the case comes
around for determination. This also affects the remedies that are available to
migrant workers as it effectively reduces their remedies to compensation as re-
instatement and re-engagement will no longer be appropriate for a migrant worker
whose permission to work and reside in the State has expired and has already left
the State. Chapter 9, therefore, identified potential solutions to the effect of delay
in the current procedures on migrant workers. It is suggested that, as in the UK, a system of interim relief should be introduced for migrant workers, who are dismissed and where the dismissal also spells the termination of their permission to work and reside in Ireland. However, the issue of delay also opens up the debate in relation to all migrant workers as to how this can be overcome. It is suggested by the author that a fast track procedure, similar to that introduced in the Planning and Development (Strategic Infrastructure) Act 2006 (Ireland) and in the new Employment Bill 2008 (UK) in the UK should in introduced. Not only would this procedure circumvent the current delay in the employment dispute resolution process, but it would also reduce the caseload of the Equality Tribunal, the Employment Appeal Tribunal and the Labour Court.

2. General Observations

There are three general observations in the Irish context that contribute to the exploitation of migrant workers in Ireland and allow obstacles to develop that prohibit migrant workers from accessing equality with nationals.

2.1. The Legacy of Emigration

Firstly, the regulations, laws and systems that are currently in place were introduced at a time when migration was not contemplated by the legislature. A good example of this are the current regulations regarding recruitment agencies that have not been updated since 1971 despite movements at a regional and an international level to introduce stricter and more comprehensive regulation of this sector of the economy. Similarly, the regulations relating to the registration of
fishing vessels have also not been updated since 1955. It is interesting to note that the Department of Transport is currently reviewing Ireland’s policy on the registration of vessels in Ireland with the objective of developing a “modern and comprehensive” central register with emphasis on the “safety, security and environmental issues” that surround this complex area of law.¹ The employment dispute resolution process, discussed in Section III of the thesis, also reflects the fact that the system was developed long before migration began in Ireland. This is another area where a review of the procedures would assist in developing a more modern and migrant friendly service.

This lack of foresight has been recognised by the Labour Court and the Equality Tribunal. In two recent cases, these bodies have imposed obligations on employers to take into account the especially vulnerable situation of migrant workers and to make special provision for them in the workplace. The Equality Authority has found that employers owe non-national employees a duty of care in the manner in which they provide their contracts of employment and instructions to staff.² The Labour Court has also held that a Nigerian national employed as a catering assistant was dismissed unfairly on grounds of race where her employer in dismissing her treated her the same as any other employee.³ “It is clear that many non-national workers encounter special difficulties in employment arising from a lack of knowledge concerning statutory and contractual employment rights together with differences of language and culture.” Similarly, the Labour Court

¹ Public Consultation on Vessel Registration from the Department of Transport. See Public Affairs Ireland Newsletter May 2008.
² Five complainants v. Hannon’s Poultry Export Ltd. Roscommon DEC – E 2006- 050 which involved Brazilian nationals who were subjected to various forms of exploitation including working in contravention of the Organisation of Working Time Act 1997 (Ireland) and Payment of Wages Act 1979 (Ireland).
³ Campbell Catering Limited v. Aderonke Rasaq ED/02/52.
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held, relying on a judgment of the ECJ⁴, that in disciplinary proceedings “employers have a positive duty to ensure that all workers fully understand what is alleged against them, the gravity of the alleged misconduct and their right to mount a full defence, including the right to representation”. Failure to do these amounts to an application of the same rules to different situations, which is discriminatory. This decision places a duty on employers to take account of the practical implications of cultural and linguistic diversity in the workplace. It will be interesting to see whether this will have an impact on the treatment of foreign nationals in Ireland. It should also be recognised by the legislature in developing more inclusive employment legislation.

2.2. Competition

The second common theme identified in the thesis is the concept of competition and the fear that increased regulation for the protection of migrant workers will decrease the competitiveness of business. This is extremely apparent in the recruitment agency sector where new regulations in the temporary agency work sector have faced rigorous opposition from employers, employer bodies and even the State. The fate of the EU Temporary Agency Workers Directive is uncertain given the stringent opposition to the introduction of the Directive in Ireland. However, a recent deal in the UK between the CBI⁵ and the TUC⁶ reflects a change in attitude to this particular work sector. These bodies have agreed that once temporary agency workers have been employed for 12 weeks they will now be entitled to be treated equally to employees in the user-enterprise. The unions

⁵ Confederation of British Industry.
⁶ Trade Union Congress.
were also successful in securing a provision that would prevent employers from terminating the employment of agency workers ahead of the three-month deadline so as to avoid the right to equal treatment. While not overwhelmingly accepted as beneficial\(^7\) this is an attempt at a compromise between the six weeks proposed by the Directive and the prospect that temporary workers will never attain the status that employee representatives hoped for.

In the area of flags of convenience and the avoidance of legal duties, the issue of competition also plays an increasing role in the development of measures to reduce the impact of this phenomenon on migrant workers. States are generally unwilling to insist upon more stringent inspection and registration requirements, in case this would stifle competition and have an economic impact on the shipping industry. Competitive elements exist to the same extent in the employment dispute resolution process. The manner in which irregular migrant workers are precluded from accessing the employment resolution process in itself, protects employers from claims by employees and ensure that employers can freely utilise and in many cases exploit such workers while enjoying the fruits of the labour of irregular workers.

### 2.3. Systemic Failure

The third major theme in the thesis is the issue of systemic failure. There is a clear failure of the system of migrant worker recruitment and employment in Ireland.

\(^7\) The Chairman of the British Chamber of Commerce, Mr. David Frost described it as “\textit{a bad deal for the country and a bad deal for business. The success of the UK economy over recent years has been down to our flexible labour market. When the economy is weakening, this is not the time to further reduce flexibility}”. Wintour, “Agency and temporary workers win rights deal” (2008) \textit{The Guardian} May 21.
The recruitment agency sector as well as all other forms of recruitment are inadequately monitored, operated and enforced. Shipping companies interested in re-flagging face little, if any, opposition and employment dispute resolution processes fail in both structure and in the remedies they provide, to ensure access to justice for migrant workers in Ireland.

The State has also consistently failed to introduce a basic Immigration and Residence Bill in Ireland that would clarify and consolidate existing practices in relation to visas, employment permits and residence permission. The most recent Immigration, Residence and Protection Bill 2008 (Ireland) received so much criticism from the various stakeholders that the most recent version of the Bill has been amended over 200 times. The Bill was criticised for the unclear procedures, reliance on the discretion of the Minister for Enterprise, Trade and Employment and the potential to damage the attractiveness of Ireland to skilled migrants interested in working in Ireland among other issues. Without this initial step of simplifying the process of granting permission to migrant workers to work in Ireland, it is difficult to organise a system of protection and regulation to assist migrant workers in their working lives in Ireland.

3. Directions for the Future

Migrant workers experience various forms of obstacles during recruitment and employment and in accessing justice for exploitation in the workplace. These obstacles make migrant workers more vulnerable to exploitative practices and discrimination in workplace. Improved regulation, better processes and a recognition of the value of migrant workers will go a long way to ensuring a
migrant friendly environment is developed that will attract, retain and benefit from the skills, work and cultural enhancement that migrant workers inevitably bring.

This thesis has three major implications for the direction of this migrant-friendly employment environment. Firstly, it recognises that migrant workers are being exploited in Ireland and that exploitation has negative effects on the labour market. The Irish Ferries case is a good example of this. Even if one can ignore here in Ireland the situation of the current migrant workers working on board that vessel at reduced rates of pay and terms and conditions of employment, it is more difficult to ignore the hundreds of Irish seafarers who are currently without work as a result of the decision of Irish Ferries to re-flag its vessel and replace it workers with migrant workers from a recruitment agency.

Secondly, the thesis identifies why this exploitation is occurring in Ireland. It identifies the legal obstacles that face migrant workers migrating to or working in Ireland. These legal obstacles add to the vulnerability of migrant workers and leaves them open to exploitation. It provides a list of the obstacles facing migrant workers at all stages of employment from recruitment to access to justice.

Finally, it identifies simple solutions to these problems that will benefit not only migrant workers but also Irish national workers, employers and the State. The solutions proffered in this analysis have been developed while taking cognisance of the competing interests involved in such regulations. It is hoped that the thesis
has struck a fair balance between migrant worker protection and economic realities.
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**Appendix A**
The Employment Rights of Migrant Workers in International Law

<table>
<thead>
<tr>
<th>Rights</th>
<th>Where these Rights are Found</th>
</tr>
</thead>
</table>

1 Exclusive of the Conventions and Recommendations of the International Labour Organisation.
| Right to just and favourable remuneration | UDHR (1948) Art 23(3)  
CERD (1966) Art 5(e)(i)  
ICESCR (1966) Art 7(a)(i) and (ii)  
CMW (1990) Art 25(1)  
ESC (1961) Art 4(1) and 5  
ACHR (1969) Art 7(a)  
Arab Charter of Human Rights (1994) Art 32 |
| Right to safe and healthy working conditions | ICESCR (1966) Art 7(b)  
CEDAW (1979) Art 11(1)(f) and 11(2)(d)  
CMW (1990) Art 25(1)(a)  
ESC (1961) Art 3 and 8(4)  
ACHR (1969) Art 7(e)  
CEU (2000) Art 31(1) |
| Right to equal opportunities for promotion | ICESCR (1966) Art 7(c)  
CEDAW (1979) Art 11(1)(c)  
ACHR (1969) Art 7(c)  
Arab Charter of Human Rights (1994) Art 32 |
| Right to leave with pay | Declaration on the Elimination of Discrimination Against Women (1967) Art 10(c)  
CEDAW (1979) Art 11(1)(c)  
ESC (1961) Art 8(1) |
| Right to maternity benefits | Declaration on the Elimination of Discrimination Against Women (1967) Art 10(2)  
CEDAW (1979) Art 11(2)(b)  
ESC (1961) Art 8(2) and (3)  
CEU (2000) Art 33 |
| Right to provision of childcare facilities | Declaration on the Elimination of Discrimination Against Women (1967) Art 10(2)  
CEDAW (1979) Art 11(2)(c)  
ACHR (1969) Art 7(2) |
<p>| Right to protection against dismissal | Declaration on the Elimination of Discrimination Against Women (1967) Art 10(2) |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td><strong>Right to training</strong></td>
<td>CEDAW (1979) Art 11(2)(a)</td>
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<td>ESC (1961) Art 4(4)</td>
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<td>ACHR (1969) Art 7(a)</td>
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<tr>
<td></td>
<td>ICESCR (1966) Art 6(2)</td>
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<tr>
<td></td>
<td>Declaration on the Elimination of Discrimination Against Women (1967) Art 10(a)</td>
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<td></td>
<td>CEDAW (1979) Art 11(1)(c)</td>
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<td>ESC (1961) Art 1(4) and 10</td>
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<td>CEU (2000) Art 29</td>
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<tr>
<td><strong>Right to rest and leisure</strong></td>
<td>ICESCR (1966) Art 7(d)</td>
</tr>
<tr>
<td></td>
<td>ESC (1961) Art 2(1), (2), (3), (4)</td>
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<td></td>
<td>CEU (2000) Art 31(2)</td>
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<td></td>
<td>CMW (1990) Art 25(1)(a)</td>
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<tr>
<td><strong>Right to protection against unemployment</strong></td>
<td>UDHR (1948) Art 23(1)</td>
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<tr>
<td></td>
<td>CERD (1966) Art 5(e)(i)</td>
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<tr>
<td><strong>Right to form and join a trade union</strong></td>
<td>UDHR (1948) Art 23(4)</td>
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<td>CERD (1966) Art 5(e)(ii)</td>
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<td>ICESCR (1966) Art 8(a)</td>
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<td>CMW (1990) Art 26(1)(a), (b) and (c) ad Art 40</td>
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<td>ESC (1961) Art 5 and 6(1)</td>
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<td>ACHR (1969) Art 8(1)(a)</td>
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<td>Arab Charter of Human Rights (1994) Art 29</td>
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<tr>
<td><strong>Right of trade unions to establish national federations, confederations and to join international federations</strong></td>
<td>ICESCR (1966) Art 8(b)</td>
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<td>ESC (1961) Art 6(2)</td>
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<td></td>
<td>ACHR (1969) Art 8(1)(a)</td>
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<tr>
<td><strong>Right of trade unions to function freely</strong></td>
<td>ICESCR (1966) Art 8(c)</td>
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<tr>
<td></td>
<td>ESC (1961) Art 6(3)</td>
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<td></td>
<td>ACHR (1969) Art 8(1)(a)</td>
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<tr>
<td><strong>Right to strike</strong></td>
<td>ICESCR (1966) Art 8(d)</td>
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<td></td>
<td>ESC (1961) Art 6(4)</td>
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<td>ACHR (1979) Art 8(1)(b)</td>
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<td>CEU (2000) Art 28</td>
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<td></td>
<td>Declaration on the Rights of the Child (1959) Principle 9</td>
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<tr>
<td></td>
<td>CRC (1989) Art 32</td>
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<tr>
<td></td>
<td>ESC (1961) Art 7</td>
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<th>Minimum age legislation</th>
<th>Declaration on the Rights of the Child (1959) Principle 9</th>
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<tbody>
<tr>
<td></td>
<td>CRC (1989) Art 32(2)(a)</td>
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<td>ACHR (1969) Art 7(f)</td>
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<tr>
<th>Hours of Work for Children</th>
<th>Declaration on the Rights of the Child (1959) Principle 9</th>
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<tr>
<td></td>
<td>CRC (1989) Art 32(2)(b)</td>
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<td>CMW (1990) Art 25(1)(b)</td>
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<tr>
<td></td>
<td>ESC (1961) art 7(3), (4), (6) and (8)</td>
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<tr>
<td></td>
<td>ACHR (1969) Art 7(f), (g) and (h)</td>
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<td>CEU (2000) Art 32</td>
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| Fair Wages for Children | ESC (1961) Art 7(5) and (7) |

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<tr>
<th>Health and Safety for Children</th>
<th>Declaration on the Rights of the Child (1959) Principle 9</th>
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<tbody>
<tr>
<td></td>
<td>CRC (1989) Art 32(1)</td>
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<td></td>
<td>ESC (1961) Art 7(9) and (10)</td>
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<td>CEU (2000) Art 32</td>
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</tbody>
</table>

| Recruitment process | CEDAW (1979) Art 11(1)(b) |