Statement to Oireachtas Committee for Enterprise, Trade and Employment for 20th October 2021 meeting

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I will begin with some context before delving into the specific issues the ITF has been encountering with the Workplace Relations Commission.

My address to this committee will come four years on from that of my predecessor Ken Fleming. The picture he painted then to this committee of the experiences of non-EEA migrant fishers working on Irish flagged vessels was one of both gross exploitation coupled with institutional obstacles the fishers and the ITF face in improving the situation.

Subsequently the volume and gravity of abuses coming to the ITF's attention in the sector compelled us to take High Court proceedings in 2018 against the continuation of the Atypical Work Permit scheme. These proceedings ended in a mediation process between the ITF and the State that concluded with an agreement in April 2019 to a number of reforms to the Atypical Scheme that on paper ought to have tipped the balance of power somewhat less towards the vessel owner to whom the fishers are tied with the annually renewable VISA Stamp 1 that accompanies the scheme.

Two and half years have passed since that settlement agreement, much of that time coinciding with Covid, which while impacting on the work of the WRC (who performed 'desktop' inspections of vessels during the lockdowns), did not greatly alter the work of fishing from the migrant fisher's perspective.

By the time I address the Oireachtas Committee in person the Maynooth University Department of Law will have published the day previous, next Tuesday 19th October, a piece of research entitled *The Treatment of Non-EEA Workers in the Irish Fishing Industry*. This study, similar in format to a study conducted by the Migrant Rights Centre of Ireland in 2017, is based on in depth interviews with migrant fishers, both documented and undocumented, who have worked in the course of the last two and a half years since the settlement agreement between the ITF and the State and longer in most cases.

Not to pre-empt the findings of the Maynooth research I regret to say that the conditions in general, described to me by scores of migrant fishers I have directly spoken to since I assumed my role in February this year have not fundamentally improved. A range of further changes are required to make work for migrants in the sector bearable. Some of those changes are the scope of other government departments, particularly Justice and Transport so the issues I will focus on are areas for reform pertinent to the Department of Enterprise, Trade and Employment and the Workplace Relations Commission.

Employment Permits Act 2003 amended 2014

Starting with undocumented fishers who do not have the same recourse as documented fishers to obtain enforceable rulings from a WRC hearing. This arises from a position taken that the employment relationship between, in our instance, a vessel owner and undocumented fisher is unlawful and therefore complaints related to fundamental rights such as the minimum wage cannot be pursued by the ITF on behalf of the undocumented worker.

There is a provision, Section 2B (5) of the Employment Permits Act 2003 (amended 2014) http://www.irishstatutebook.ie/eli/2014/act/26/section/4/enacted/en/html#sec4 whereby the Minister can request that the WRC pro-actively investigates the non-payment of wages and can take a civil case against an employer for wage recovery for the injured parties. However in practice this provision has either never been successfully employed according to a PQ answer 37344/21 obtained in June this year, or has been successfully employed on only one occasion, according to correspondence among Department officials I obtained under freedom of information in August this year.

The ITF made a request to the Minister in 2018 to use this provision in a particular high profile case about which I have previously written to committee members. I am constrained from going into the specifics of that case here but suffice to say the ITF does not have confidence that this provision in the Employment Permits Act vindicates the rights of undocumented workers to have unpaid wages retrieved. The testimony and evidence in the specific case was, in our estimation, of comparable strength to cases we successfully took ourselves to the WRC for documented fishers. It seems to us the WRC set themselves a higher bar before deciding to prosecute, a bar so high that it has yielded little or nothing for any undocumented workers in seven years since the Act was amended.

I would like to be able to say that remedying the situation would involve a simple transposing of the Employer Sanctions Directive of which only Ireland and Denmark are not signatories but even then as this analysis explains, as with the WRC in Ireland labour inspectorates where that directive is in force are compromised in their ability to compassionately deal with undocumented migrant exploitation when they are effectively required to report the undocumented workers to the immigration authorities jeopardising their job and income Employers' sanctions: will the EU finally take steps to protect migrant workers? • PICUM

Cognisable Period for claims under the Workplace Relations Act 2015

For documented migrant fishers there are also obstacles to obtaining justice from the WRC. A worker, Irish or documented migrant, typically has a six month deadline from the time a wrong was done to them by their employer to submit their complaint to the WRC. This is referred to as the 'cognisable period' in the Workplace Relations Act 2015. This can be extended to twelve months if extenuating circumstances are presented to the WRC

For the vast majority of workers, assuming they know their rights, six months is adequate to seek redress, whether it is an unfair dismissal or an underpayment of wages.

However for migrant fishers in the Atypical Scheme which has been in force now for over five years the ITF has encountered a number of cases of fishers who have endured regimes of overwork for periods spanning years who either were not aware of time bound recourses open to them or even when made aware in real time by the ITF of the legal position felt unable to let the ITF submit a complaint on their behalf because the atypical contract has to be renewed by the vessel owner, to whom they are tied, on an annual basis.

Their legitimate fear is that making a complaint while in the employ of the vessel owner will precipitate an ending of the employment relationship and a revocation of their permit by the Department of Justice. All the vessel owner has to do is contact the Department of Justice and say the employment relationship is terminated and the Department of Justice then writes to the fisher who has a short timeframe to try find an alternative employer to engage him under the terms of the atypical scheme or else he becomes undocumented. Many if not most of the hundreds of undocumented fishers currently working on our vessels were formerly in the atypical scheme.

In practice it is typically at the point at which the fisher's relationship with the vessel owner is severed, often when they are injured, that they then seek assistance from the ITF to recover wages for the hours they actually worked, not the fictional 39 hour average working week contained in the standard atypical contract.

I have one WRC case pending where I calculated an underpayment of €114,000 over a four year period (based on minimum wage rates) between unpaid wages, holiday pay, pay in lieu of public holidays and an absence of Sunday premia. If the WRC accepts the testimony and evidence of the duration of underpayment it will be mainly of propaganda value to us in highlighting in practice how the Act fails fishers in the atypical scheme as the maximum award available will be either a quarter or one eighth of the actual underpayment because of the cognisable period.

Our courts system allow the pursuance of contract debts for up to six years. Why should the pursuance of unpaid wages through the WRC be confined to one tenth of that time frame?

Working Time at Sea Directive – nowhere to go for a remedy!

The core recurring abuse experienced by migrant fishers is overwork ranging typically from 15 to 20 hours per day, days and weeks in succession. The laws governing working time at sea differ somewhat from most other work which is governed by the Organisation of Working Time Act.

The Working Time at Sea Directive (EU Directive 2017/159) has been transposed via SI 627 of 2019 in a botched fashion by the Minister for Transport in that the reference periods for making a complaint for overwork are not clearly set out permitting the vessel owners to argue that weeks where the fisher is not at sea whether it is because of illness, injury, holidays or inclement weather brings the weekly or monthly average working hours down to within legal limits.

The other omission is the absence of a clear path for seeking redress. While this is an error primarily on the part of the Minister for Transport it is the Labour Court which comes under the Department of Enterprise, Trade and Employment that two weeks ago ruled that it does not have jurisdiction to hear complaints under this directive. This will have knock on effects on a number of other pending and ongoing WRC and Labour Court cases involving fishers.

The ITF is backing immanent judicial review proceedings that we hope will force the government to correctly transpose the directive with clear reference periods and jurisdiction for the WRC and Labour Court to hear complaints as they can on under other working time legislation. We have separately brought the mis-transposition to the attention of the EU Commission.

Conclusion

The WRC can rightly point to several hundred detections of various non-compliances they have made in the course of their inspections of vessels since the atypical scheme came into being in 2016.

However, the downside of the statistics they produce in this regard is that we cannot say that there is an improving culture of compliance among vessel owners in their treatment of migrant workers year on year. Insofar as penalties are applied whether arising from WRC inspections or from WRC hearings of complaints, they are not dissuasive enough to prevent repeat offending by some vessel owners.

The above reforms the ITF is calling for would improve the legal terrain somewhat from the point of view of achieving redress on unpaid wages and overwork for documented and undocumented migrant fishers. However, for as long as the atypical scheme as currently constituted, ties the migrant fisher to the individual boat owner as opposed to being at minimum a sector wide VISA

enabling the fisher to leave the worst employers, seek timely redress, and obtain documented work elsewhere without risking having their VISA revoked we are perpetuating daily recurring instances of severe exploitation.