

Emergency Exit? Collective Bargaining, the ILO and Irish Law

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Abstract

This article analyses a recent complaint pronounced upon by the International Labour Organisation (ILO) relating to collective bargaining rights under Irish law. The article analyses the manner in which the ILO dealt with the complaint and the response of the Irish State. However, the article argues that there are lessons to be drawn from this case of wider significance. In particular, the article considers the role of collective bargaining in the 'Anglo' model of industrial relations; the influence of the judiciary in interpreting and protecting collective labour rights; the influence of global multinational corporations on labour law and practice; and the effect of the EU institutions on labour rights in the context of the current crisis.

**THIS IS AN EARLIER DRAFT OF AN ARTICLE LATER
PUBLISHED (WITH REVISIONS) AS:**

***Emergency Exit? Collective Bargaining, the ILO and Irish
Law***

**European Labour Law Journal, Volume 4 (2013), No. 3, 171-
195**

Keywords

Collective bargaining rights, 'Anglo-saxon' model, international law, Ireland

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1. Introduction

In 2010, the Expert Committee on Freedom of Association of the International Labour Organisation (ILO) received a complaint referred to it by the Irish Congress of Trade Unions (ICTU). The complaint related to the lack of legal protection afforded to the practice of collective bargaining in Ireland. This article analyses the complaint, the Committee's recommendations and the response to date of the Irish Government. However, the article argues that there are lessons to be drawn of importance beyond the confines of Irish law. The article proceeds as follows. First, an overview of the law relating to collective bargaining in Ireland is presented. The Committee of Experts system of the ILO is then briefly described. The article goes on to consider in detail the complaint made against Ireland to the ILO, the recommendations of the Committee of Experts and the response of the Irish government. The article then draws out some key implications from this situation, focusing on the role of collective bargaining in the 'Anglo' model of industrial relations; the influence of the judiciary in interpreting and protecting collective labour rights; the influence of global multinational corporations on labour law and practice; and the effect of the EU institutions on labour rights in the context of the current crisis.

2. Collective Bargaining and Voluntarism

Different 'models' of employment relations exist throughout the world. Indeed, even in Europe, while there are certain features common to all European countries (the recognition of the rights of workers to organise, at least in the sense of a freedom to join trade unions, a degree of State intervention in the labour/capital relationship and the existence of a relatively developed welfare State, to name a few) it cannot be said that there is a 'European model' of employment relations.¹ The Irish system of employment relations, derived as it is from that of the UK, has traditionally been classified as *adversarial* and *voluntarist*. 'Adversarialism' refers to a situation where there is a strong 'them and us' relationship between the capital and labour and each side sees its interests as clearly divergent.² 'Voluntarism' refers to a system where the preference is for joint trade union and employer regulation of employment relations and the relative absence of legal intervention. Voluntarism is premised on freedom of contract (Kahn-Freund, acknowledging the power imbalance in the employment relationship, referred to the employment contract as the great 'indispensable figment of the legal mind')³ and freedom of association, whereby the employment relationship is essentially regulated by free collective bargaining between worker and employer representative groups.⁴ In such a model, there is no rejection of public intervention or labour law but the role of the State is seen to be primarily to provide a supportive framework for collective bargaining and the 'principal purpose of labour law is to regulate, support and restrain the power of

¹ Crouch, C., *Industrial Relations and European State Traditions* (Oxford, Clarendon Press, 1993).

² Hyman, R., 'Industrial Relations in Europe: Theory and Practice' *European Journal of Industrial Relations* (1995), 1(1), p. 17.

³ Kahn-Freund, O., *Labour and the Law* (London, Stevens, 1977), p. 18.

⁴ Doherty, M., 'Institutional Challenge: Tribunals, Industrial Relations and the Law' *Employment Law Review* (2009), 2, p. 70.

management and organised labour'.⁵ The implications of this were that Irish (and British) employers and unions traditionally viewed with disfavour employment legislation, so that voluntary collective bargaining was a key element in the functioning of the employment relations system.

Under Article 40.6.1°(iii) of the Irish Constitution, the State guarantees liberty for the exercise (subject to public order and morality) of the right of citizens to form associations and unions. However, the Article also provides that laws may be enacted for the regulation and control in the public interest of the exercise of this right. The Constitutional guarantee of freedom of association underpins the rights of citizens to form trade unions and provides the framework for regulating the right to be a member of a union (although the latter right comes with some significant qualifications). However, litigation involving the role of trade unions under Article 40.6.1°(iii) has:

'...[a]most invariably concerned the protection of individuals in their relations with trade unions, rather than the protection of organised labour in its relationship with the State, or with employers pursuing anti-union policies. This may reflect the fact that unions have a traditional distrust of the law, preferring instead to rely on their industrial muscle in order to achieve their objectives'.⁶

⁵ Kahn-Freund, *cit.*, p 4.

⁶ Hogan, G., and Whyte, G., *JM Kelly: The Irish Constitution* (4th ed, Dublin, Butterworths, 2003), p. 1793.

While the Irish Constitution protects the right of freedom of association, unlike in many other Western democracies, trade unions in Ireland have no right to be recognised for bargaining purposes by an employer. Thus, while employees are free to join a trade union, they cannot insist their employer negotiate with that union regarding their pay and conditions.⁷ Employees and trade unions have traditionally gained the right to negotiate collectively with employers through the use, or threat, of collective action. This, of course, depends to a large extent on trade unions mobilising a critical mass of employees to join and to participate in trade union action.⁸ The principle that an employer is not constitutionally bound to negotiate with a union has been affirmed on many occasions. In *Ryanair v Labour Court*⁹ Geoghegan J., in the Supreme Court, noted that it was ‘not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions’: indeed the Judge went further in suggesting that ‘neither could a law be passed compelling it to do so’.¹⁰

Neither is there a right at common law for workers to have their trade unions represent their interests in negotiations with employers. According to O’ Hanlon J. in *Association of General Practitioners Ltd v Minister for Health*:¹¹

‘I do not consider that there is any obligation imposed by ordinary law or by the Constitution on an employer to consult with or negotiate with any

⁷ Hogan and Whyte, *ibid.*, p 1803.

⁸ Howlin, N. and Fitzpatrick, B., ‘The Feasibility of Mandatory Trade Union Recognition in Ireland’ *Dublin University Law Journal* (2007), 29(1), p. 178.

⁹ [2007] 4 IR 199.

¹⁰ *ibid.* at 215. This interpretation would seem to suggest that a *legislative* right to trade union recognition, such as exists, for example, in the UK, would be constitutionally prohibited. This will be discussed further below.

¹¹ [1982] IR 382 at 391.

organisation representing his employees or some of them, when the conditions of employment are to be settled or reviewed. The employer is left with freedom of choice as to whether he will negotiate with any organisation or consult with them on such matters, and is also free to give a right of audience to one representative body and refuse it to another, if he chooses to do so’.

This leaves only the legislative route. Unions can process ‘recognition’ claims under section 20 of the *Industrial Relations Act 1969*. This section allows workers (or their unions) concerned in a trade dispute to request the Labour Court to investigate the dispute as a whole, or allows the parties to a dispute to request the Court to investigate specified issues within the dispute.¹² This would include disputes relating to union recognition. Recommendations issued by the Labour Court are binding on the party referring the dispute to the Court (i.e. the union) but not on the employer. As a result, recommendations under the 1969 Act that the employer should recognise the union in respect of those workers it had in membership were often ignored by employers.¹³

As in the UK, collective agreements reached between unions and employers are typically not legally enforceable, as they generally do not intend to create legal relations.¹⁴ There are two exceptions to this general rule. Under Part III of the *Industrial Relations Act 1946*, collective agreements made between unions and

¹² Note that, despite its moniker, the Irish Labour Court is not part of the regular court system, but is a statutory industrial tribunal, comprised of representatives of unions and employers, and chaired by a Government nominee. The Labour Court, depending on the nature of the dispute before it, may grant legally binding ‘determinations’ or ‘recommendations’, which are *not* legally binding.

¹³ Higgins, C., ‘The Right to Bargain Law: Is it Working?’, *Industrial Relations News* (2001), 45 (online). However, such a recommendation still allowed a union taking industrial action in support of recognition to show that it had done its best to abide by procedures.

¹⁴ *O’Rourke v Talbot* [1984] ILRM 587.

employers that are *registered* with the Labour Court are legally binding. While many of these are company agreements, they can be applied to *all* employers and employees working in a particular sector or industry, so long as the parties to such agreements are 'substantially representative' of workers and employers in that sector.¹⁵ The most important of these Registered Employment Agreements (REAs) are in the construction and electrical contracting sectors. These set minimum levels of pay (which exceed the national minimum wage) and other terms and conditions for workers in these industries. The second exception relates to Joint Labour Committees (JLCs), which are statutory bodies originally established under Part IV of the *Industrial Relations Act 1946* to provide for the fixing of minimum rates of pay, and the regulation of employment, in industries and sectors where there is little or no collective bargaining and where pay and skill levels tend to be low. They are akin to the wages councils that existed in the UK until 1993.¹⁶ A JLC comprises of an independent chairperson appointed by the Government and representative members of employers and employees. The most important function of a JLC is to submit proposals to the Labour Court on fixing minimum wages and regulating conditions of employment for workers covered.¹⁷ If such proposals are confirmed by the Labour Court, through the making of an Employment Regulation Order (ERO), they become statutory minimum remuneration and statutory conditions of employment, which employers are not permitted to undercut in the contract of employment. The most significant JLCs exist in industries such as catering, hotels and retail. Recent developments in relation to the operation of both the REA and JLC systems, crucial for the argument outlined in this article, will be outlined below.

¹⁵ *Industrial Relations Act 1946*, section 27.

¹⁶ O' Sullivan, M. and Wallace, J. 'Minimum Labour Standards in a Social Partnership System: the Persistence of the Irish Variant of Wages Councils' *Industrial Relations Journal* (2011), 42, p. 18.

¹⁷ *Industrial Relations Act 1946*, section 42.

In recent years, the traditional pillars of adversarialism and voluntarism have come under stress. There has been much comment, both in Ireland and the UK, on the decline of the voluntarist model.¹⁸ Principally, this is because trade union density has dropped considerably in Ireland over the course of the last twenty years and now stands at approximately 31 percent (in the private sector, the figure is approximately 25 percent).¹⁹ Many organisations (particularly in the service industries) do not engage in collective bargaining and do not recognise trade unions. The decline in trade union density and presence in the workplace has been accompanied by a corresponding decline in industrial action (usually taken as a measure of adversarialism), prompting some to identify a new 'individualism' amongst workers, which encompasses an ideological rejection of collective organisation and action.²⁰ At the same time, there are increasingly attempts by employers to individualise the employment relationship through the implementation of various human resource management (HRM) techniques, which often seek to bypass trade unions and foster employee commitment to the enterprise.²¹ Growing antipathy, in some cases bordering on oppression, towards unions by some major employers has also been documented.²² In certain cases, employer attention has shifted to the establishment of non-union structures for employee representation at work and, indeed, a number of obligations exist on employers in non-union settings to inform, and consult with,

¹⁸ See, for example, Redmond, M., 'The Future of Labour Law' *Irish Employment Law Journal* (2004), 1 (1), p. 3; Colling, T., 'What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights' *Industrial Law Journal* (2006), 35(2), p.140; Brown, W. et al, 'The Employment Contract: From Collective Procedures to Individual Rights' *British Journal of Industrial Relations* (2000), 38(4), p. 611.

¹⁹ <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Ireland/Trade-Unions> (accessed 20 June 2013). Density figures in Ireland are disputed; this author considers that the figure quoted overstates density in the private sector, which is more likely to be below 20 percent.

²⁰ Beck, U., *The Brave New World of Work* (Cambridge, Cambridge, 2000); cf. Kelly, J., *Rethinking Industrial Relations: Mobilisation, Collectivism and Long Waves* (London, Routledge, 1998).

²¹ D'Art, D. and Turner, T., *Irish Employment Relations in the New Economy* (Dublin, Blackhall, 2002).

²² D'Art, D. and Turner, T., 'Union Recognition and Partnership at Work: A New Legitimacy for Irish Trade Unions?' *Industrial Relations Journal* (2005), 36(2), p. 121; O'Sullivan, M. and Gunnigle, P., 'Bearing All the Hallmarks of Oppression; Union Avoidance in Europe's Largest Low-cost Airline' *Labor Studies Journal* (2009), 34(2), p. 252.

their workers.²³ These changes have been accompanied by an explosion in the volume of employment legislation over the last 20 years or so; from 1990 to 2010, 28 major labour law Acts were passed; a huge volume for an area of law unused to statutory regulation.²⁴ The enactment of important employment legislation in recent years has been driven significantly by developments at EU level. Moreover, the changing nature of the (increasingly globalised) labour market has demanded and generated legislative responses. In particular the growth in private sector service employment and the demands by employers for ‘flexibility’ in employment relations have seen an exponential growth in the numbers employed in ‘atypical’ work (most commonly part-time, fixed-term, temporary and agency work).²⁵ Given all of this, some commentators have argued that it is now inaccurate to describe the Irish employment relations system as voluntarist, due to the decline in trade union density and voluntary collective bargaining and the parallel expansion in individual employment rights, which has arguably resulted in a transition from a bargaining-based employment relations system to a rights-based system.²⁶ It is important to note, however, that legislative developments have almost exclusively been concerned with *individual* (rather than collective) employment rights.

The waning of trade union presence and influence at the workplace level became, throughout the 1990s, an issue of increasing concern for the Irish trade union movement. Ironically, this was in the context of the union movement finding for itself a new and crucial role in socio-economic governance at *national* level. From 1987-2010, Ireland adopted a much-studied model of ‘social partnership’, whereby a

²³ Doherty, *cit.*, (n 4) p 73.

²⁴ Doherty, M. ‘Developments in Legal Scholarship: Labour Law’ in Schweppe, J. and Mohr, T. (eds), *30 Years of Irish Legal Scholarship* (Dublin, Round Hall Press, 2011), p. 274.

²⁵ Doogan, K., ‘Insecurity and Long-term Unemployment’ *Work, Employment and Society* (2001), 15(3), p. 419.

²⁶ Teague, P., ‘New Developments in Employment Dispute Resolution’ *LRC Review* (2005), 4, p. 5.

series of tripartite social pacts was concluded between the social partners; the State; the unions (represented by the only trade union confederation, the Irish Congress of Trade Unions- ICTU); employers (represented primarily by the main employers' association, the Irish Business and Employers Confederation- IBEC- but also by sector specific groups, like the Construction Industry Federation); and what was termed the 'community and voluntary pillar' (a wide spectrum of civil society interest groups). The social pacts each ran for three years. While not legally binding, the pacts involved all parties making a wide range of commitments on virtually all issues of socio-economic governance, including setting pay rates for the public sector and the unionised private sector. Importantly, legislative measures affecting employment relations were agreed through social partnership (including, for example, a commitment to introduce a national minimum wage), which were then progressed through the normal legislative process. Social partnership, then, played a crucial role in setting labour standards since 1987. However, the process has effectively collapsed since early 2010, following the economic and unemployment crisis that has recently gripped the country, leaving Irish industrial relations in a state of some uncertainty and flux.²⁷ During the partnership era, however, and in the context of declining trade union density in the 1980s and 1990s, as well as the Thatcherite attack on trade unionism evident in the UK, the issue of statutory recognition rights for trade unions became a key point of discussion during social partnership talks. The legislative outcome of this discussion is discussed below.

Finally, it should be noted here that Ireland, as a Member State of the European Union, is of course, bound to respect the provisions of Title X of the Treaty on the Functioning of the European Union (TFEU), which gives a privileged role in

²⁷ See Doherty, M., 'It Must Have Been Love...But It's Over Now. The Crisis and Collapse of Irish Social Partnership' *Transfer: European Review of Labour Research* (2011), 17, p. 371.

law-making to the social partners at both Union, and Member State, level, and Article 28 of the Charter of Fundamental Rights, which protects the rights of collective bargaining and collective action. Furthermore, Ireland has incorporated the European Convention on Human Rights into domestic law.²⁸ Article 11 of the Convention guarantees the right of freedom of association. Finally, Ireland is also a signatory to ILO Conventions No 87 (Freedom of Association and Protection of the Right to Organise) and No 98 (Concerning the Application of the Principles of the Right of Organise and to Bargain Collectively).

3. The ILO

Before going on to look at the complaint with which this article is concerned in more detail, it may be useful to briefly outline the ILO system. The ILO is a tripartite United Nations agency that brings together representatives of governments, employers and workers to 'set labour standards, develop policies and devise programmes'.²⁹ The ILO Constitution lays down, in its preamble, basic labour principles and standards, which the Organisation seeks to promote and protect, including the principle of freedom of association. Other standards are laid down or elaborated upon in ILO Conventions and Recommendations. States that ratify Conventions are obliged to 'take such action as may be necessary to make effective' their provisions.³⁰ The ILO's Governing Body is supported by Committees of Experts, which hear complaints that a State is not securing the application of a Convention right and

²⁸ Albeit at a sub-constitutional level; see U. Kil Kelly (ed), *ECHR and Irish Law* (2nd ed, Bristol: Jordans, 2008).

²⁹ <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> (accessed 20 June 2013).

³⁰ ILO Constitution, Article 19(5).

which can issue recommendations directed at rectifying such matters. There is a regular and ongoing system of supervision (by the Committee of Experts on the Application of Conventions and Recommendations), but also a special procedure, based on the submission of a representation or a complaint. In 1951 the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints about violations of freedom of association. Complaints may be brought against a Member State by employers' and workers' organisations. The CFA has nine members; an independent chairperson and three representatives each of governments, employers, and workers. If the CFA decides to hear a case, it first establishes the facts in conjunction with the government in question. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations.³¹ As with most international law procedures, the ILO system has no real method of sanction; ultimately it relies on goodwill and persuasion.

4. Fasten Your Seatbelts: The ICTU Complaint

The ICTU complaint³² centred on alleged anti-union behaviour and refusal to engage in good faith collective bargaining by the airline Ryanair, and the failure of Irish law to address these issues. The background to the dispute lies in the attempt to address

³¹ <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang-en/index.htm> (accessed 20 June 2013).

³² Case 2780; see the *363rd Report of the Committee on Freedom of Association* (March 2012), p. 207-231 (available at: http://www.ilo.org/gb/GBSessions/GB313/ins/WCMS_176577/lang-en/index.htm, accessed 20 June 2013); hereinafter referred to as the "CFA Report".

the aforementioned issue of a lack of statutory obligation on employers to negotiate with trade unions. Under the fourth social partnership agreement, *Partnership 2000*, a high-level group comprising trade union and employer representatives was set up to examine the issue. The result was the drawing up of the Code of Practice on Voluntary Dispute Resolution³³ and the passing of the *Industrial Relations (Amendment) Act 2001* (which was further amended in 2004; the Acts are cited as the *Industrial Relations (Amendment) Acts 2001-2004*).³⁴ The Code of Practice and the 2001-2004 Acts explicitly exclude the imposition of any 'arrangements for collective bargaining' on the grounds of protecting Ireland's voluntarist tradition.³⁵ The general philosophy behind both is that disputes relating to union recognition should be dealt with within the context of voluntary collective bargaining (with parties offered recourse to the advisory and conciliation services of the Labour Relations Commission - LRC).³⁶ Thus, the legislation does not provide for union recognition but for a range of procedures to allow unions to seek to have specific disputes with regard to pay, terms and conditions of employment and dispute resolution procedures addressed.³⁷

The provisions of the Acts are used as a fallback measure whereby, in a situation where the parties cannot come to agreement under the 'voluntary leg' of the process, a union or excepted body³⁸ may request a further investigation by the

³³ SI No 145 of 2000.

³⁴ See Purdy, K., 'The Industrial Relations (Amendment) Act 2001 and the Industrial Relations (Miscellaneous Provisions) Act 2004 - Have they helped?' *Irish Employment Law Journal* (2004), 1(5), p. 142.

³⁵ *Industrial Relations (Amendment) Act 2001*, s 5(2).

³⁶ Kerr, A., *The Trade Union and Industrial Relations Acts* (3rd ed, Dublin, Round Hall, 2007), p. 279-280.

³⁷ Ryan, B., 'Leaving it to the Experts - In the Matter of the Industrial Relations (Amendment) Act 2001' *Irish Employment Law Journal* (2006), 3(1), p. 118.

³⁸ 'Excepted body' is defined by section 6(3)(h) of the *Trade Union Act 1941* (as inserted by section 2 of the *Trade Union Act 1942*) and refers to 'a body all the members of which are employed by the same employer and which carries on negotiations for the fixing of wages or other conditions of employment of its own members (but no other employees)'. This definition is directed towards a

Labour Court, which can issue a recommendation and, where appropriate, give its view as to the action that should be taken having regard the matters in dispute. Should the issue remain unresolved, the Court has the power to issue a legally binding determination on pay and terms of employment. If the employer does not comply with a Labour Court determination, the trade union may apply to the regular civil courts to enforce the order. Under the Acts, therefore, an employer may be compelled to grant union representatives the right to represent unionised employees on specified workplace issues relating to pay and terms and conditions of employment, but cannot be forced to make arrangements for collective bargaining.³⁹ To this end, the proposals amount to a set of dispute resolution procedures, rather than a means of promoting recognition *per se*.⁴⁰ Nevertheless, some employers expressed the concern that the Acts effectively promoted a form of ‘back door’ union recognition by allowing unions to get their ‘foot in the door’ and, undoubtedly, the unions hoped that this would be the case.⁴¹ This outcome now seems less likely in the light of the Supreme Court decision in *Ryanair v Labour Court*.⁴²

The *Ryanair* case centred on a dispute between a number of pilots, members of the Irish Airline Pilots Association (IALPA, a branch of the Irish Municipal Public and Civil Trade Union, IMPACT), who sought to have the union negotiate with Ryanair about various issues on their behalf. Ryanair refused to negotiate and, as a

situation where a group of employees wish to negotiate collectively with their employer, but have no access to trade union representation (perhaps because of the very small size of the workplace). The idea of an ‘excepted body’ is to allow such workers to have the protections afforded to licensed unions.

³⁹ Doherty, M., ‘Union Sundown? The Future of Collective Representation Rights in Irish Law’ *Irish Employment Law Journal* (2007), 4(4), p. 96.

⁴⁰ Contrast, for example, the statutory procedure for gaining recognition rights that now exists in the UK under the *Employment Relations Act 1999*; see Dukes, R. ‘The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?’ (2008) *Industrial Law Journal*, 37(2), p. 236.

⁴¹ Doherty, M., ‘Representation, Bargaining and the Law: Where Next For the Unions?’ *Northern Ireland Legal Quarterly* (2009), 60(4), p. 383.

⁴² [2007] 4 IR 199.

result, the union invoked the procedures under the Acts. When both the Labour Court and the High Court found against it, Ryanair appealed to the Supreme Court. The case turned on the interpretation given to section 2 of the 2001-2004 Acts. This states that the Labour Court can only investigate 'a trade dispute' where it is satisfied that it is 'not the practice of the employer to engage in collective bargaining negotiations' and that the 'internal dispute resolution procedures normally used by the parties concerned have failed to resolve the dispute'.

Ryanair contended that it did engage in 'collective bargaining' as employees, including pilots, elected employee representatives to Employee Representative Committees (ERCs), which negotiated directly with the company on an ongoing basis in relation to all terms and conditions of employment. The Labour Court's view was that if a group of employees unilaterally withdraws from the internal negotiating procedures (as had occurred in the instant case) it could not thereafter be said that the employer had a 'practice' of engaging in collective bargaining with them.⁴³ The Supreme Court, however, interpreted the provision as requiring a decision on whether or not there was in place any permanent machinery, which would have obliged the management of Ryanair to sit around the table with representatives of the Dublin pilots and discuss matters of pay and conditions. Such machinery would need to have been established, in place and not *ad hoc*: however, the 'practice' did not cease to exist simply because the employees unilaterally abandoned it.⁴⁴ The Supreme Court also held that an 'ordinary dictionary' meaning (not any distinctive meaning as understood in trade union negotiations) of collective bargaining was to be read into the legislation. The Court objected to the view 'arguably hinted at' by the

⁴³ *Ryanair v Impact/IALPA* (LCR 18075/2005). All Labour Court decisions can be accessed at www.labourcourt.ie.

⁴⁴ *Ryanair v Labour Court* [2007] 4 IR 199 at 217 *per* Geoghegan J. See also *Iarnród Éireann v Holbrooke* [2001] 1 IR 237.

Labour Court that collective bargaining in a non-unionised company must take the same form and adopt the same procedures as would apply in collective bargaining with a trade union. The Court reiterated that if machinery existed in Ryanair whereby the pilots had their own independent representatives who sat around the table with representatives of Ryanair with a view to reaching agreement if possible, this would seem to be collective bargaining within an ordinary dictionary meaning.

The Supreme Court was also quite critical of the procedures adopted by the Labour Court when hearing the case, in particular, the fact that neither a single pilot nor any other employee of Ryanair was called by the union to give evidence. The Supreme Court held that the Labour Court did not adopt fair procedures, first, by permitting complete non-disclosure of the identity of the persons on whose behalf the union was purporting to be acting and, secondly, by disbelieving the oral evidence of two senior management figures in Ryanair in the absence of hearing evidence from at least one relevant pilot who was an employee of Ryanair. The Labour Court had decided the issue against Ryanair to a large extent on foot of omissions in Ryanair documentation and on foot of a view put forward by the union that company did not engage in collective bargaining. This, according to the Supreme Court, did not amount to sufficient evidence to justify the finding. Moreover, the Supreme Court was critical of what it referred to as the Labour Court's 'mindset', which favoured the way particular expressions are used and particular activities are carried out by trade unions.⁴⁵ As a result of these procedural failings, the Supreme Court found, first, that the Labour Court had not adequately investigated if, in fact, there was a trade dispute; secondly, had not adequately investigated if internal dispute resolution

⁴⁵ *ibid.* at 215 *per* Geoghegan J.

procedures had actually failed to resolve the dispute and, thirdly, had not ascertained if the Ryanair ERCs did, in fact, amount to collective bargaining machinery.

5. ILO Convention No 98

The ICTU complaint was essentially grounded on alleged breaches of four articles of the Right to Organise and Collective Bargaining Convention of 1949. Article 1 offers protection against acts of anti-union discrimination (e.g. insisting on non-unionisation as a condition of employment or dismissal for union activities). Article 2 protects against any acts of interference in the establishment, functioning or administration of employers' or workers' organisations (in particular, the establishment of workers' organisations under the domination of employers). Article 3 states that 'machinery appropriate to national conditions' shall be established to ensure respect for the right to organise. Finally, Article 4 states that measures appropriate to national conditions shall be taken to encourage and promote voluntary negotiation 'with a view to the regulation of terms and conditions of employment by means of collective agreements'. There are various strands to the complaint; for the purposes of this article, we can identify three, core (inter-related) elements.

5.1 The ICTU Complaint 1: Conditional Benefits

The first element in dispute related to an alleged contractual term concerning mandatory re-training for pilots. The allegation was that Ryanair had stated it would pay for this training, but that pilots were required to sign an agreement stating that they would be liable to repay the full cost of the training (€15, 000) if the company

was forced, within the following five years, to deal with the IALPA union. The ICTU argued that such a term amounted to an act of anti-union discrimination and that Ireland was in breach of Convention No 98 by virtue of the fact that Irish law does not render such terms unlawful. The Government responded that this particular term, in fact, was not at issue in the Supreme Court case and quite possibly *would* be unlawful, given that Irish law offers stringent protection against anti-union discrimination, noting, in particular, the Code of Practice on Victimisation.⁴⁶ The CFA concluded that the allegation, if true, would amount to ‘interference’ under Article 2 of Convention No 98;⁴⁷ it recommended, therefore, that the Government should, with the social partners, review the relevant protective legislation to ensure such acts are prohibited.

5.2 The ICTU Complaint 2: Irish Law and Employee Representation

At the core of the complaint, however, was the impact of the *Ryanair* decision on the representation of employees under Irish law. ICTU contended that the effect of the decision was that Irish law allows the establishment of fora with negotiation and/or consultation rights, which act as inducements to workers not to support collective bargaining with unions. It claimed that Ryanair’s ERC was ‘a sham’, that it had a consultative role at best (not a genuine negotiating role) and that it was clearly not independent from the company (given the control Ryanair had over the establishment and operation of the ERC).⁴⁸ Worse still, according to ICTU, was that the existence of such a body as the ERC, following the Supreme Court judgment, effectively gave the company immunity from proceedings under the 2001-2004 Acts.

⁴⁶ *Industrial Relations Act 1990 (Code of Practice on Victimisation) (Declaration) Order 2004* (SI No 139/2004).

⁴⁷ CFA Report, p. 231.

⁴⁸ *Ibid.*, p. 208.

ICTU pointed, with alarm, to the Supreme Court holding that the Labour Court procedure was, overall, fundamentally unfair to the company because no pilot or other employee of the company appeared in Court to support the allegations of the union. In this context, ICTU expressed 'deep concern' at the Supreme Court's requirement that employees of a multinational company come forward and publicly give evidence against their employer in a dispute between a trade union and their employer.⁴⁹

This aspect of the claim was vigorously defended by the Government and IBEC. The Government argued, first, that a body such as an ERC did not amount to a 'workers' organisation' and so was not subject to Article 2 of the Convention (which, it argued, also respects employers' rights *not* to negotiate with unions). IBEC argued that staff associations are permitted by the Convention and, indeed, may be required by EU law (citing, by way of example, obligations under the Information and Consultation Directive).⁵⁰ Furthermore, Irish law did protect the right to organise and guaranteed protection against both interference (by way of affording unions wide discretion in the conduct of ballots for industrial action, for example) and against offering 'anti-union' inducements to employees (via the Code of Practice on Victimisation). Secondly, both the Government and IBEC pointed out that the Supreme Court had not actually determined whether the Ryanair ERCs were, in fact sufficiently independent. This was a matter for the Labour Court to determine, in light of the legal guidance given by the Supreme Court; as the case had never gone back to the Labour Court for final determination, there was nothing to suggest that a properly raised claim under the 2001-2004 Acts would not have been successful.

⁴⁹ *Ibid.*, p. 218. See, also, Doherty, *cit.*, (n. 42), p. 392.

⁵⁰ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community (OJ L80/02).

On these points, the CFA was somewhat sceptical. It noted that Article 4 of the Convention clearly emphasises the role of workers' organisations as one of the parties in collective bargaining. The CFA went on to suggest that, since the creation of bodies like ERCs can constitute a 'preliminary step' towards the setting up of independent and freely established workers' organisations, all official positions in such councils should be occupied by persons freely elected.⁵¹ The CFA noted that an employer's bypassing of representative organisations in favour of direct negotiation with employees *can* be detrimental to the promotion of voluntary collective bargaining and that the existence of elected representatives should not operate to undermine union representatives (where both are present). As a result, the CFA recommended that the Irish Government should set up an independent inquiry into the alleged acts of interference in Ryanair.

5.2 The ICTU Complaint 3: Voluntary Collective Bargaining

The third, and closely related, limb of the complaint centred on the right to bargain collectively under Irish law. ICTU argued that the effect of the Supreme Court decision left Irish law in violation of the core principle of voluntary collective bargaining, as it allowed employers to impose a particular structure of negotiations on workers, with persons neither selected nor elected by the workforce. Essentially, according to ICTU, the *Ryanair* decision 'consecrated a new constitutional right for companies to operate free of unions'.⁵² The Irish Government responded that this was a questionable interpretation of the Supreme Court judgment, and that the 'positive and aspirational' duty to promote collective bargaining could not be

⁵¹ CFA Report, p. 237.

⁵² *Ibid.*, p. 220.

considered breached by reference to the 'idiosyncratic facts' of one particular case.⁵³ The Government noted that Ireland has, in general, taken many steps to promote collective bargaining; for example, via the process of social partnership in which trade unions played a significant role, 'unparalleled in most other countries'.⁵⁴ IBEC argued that there exists no requirement under international law to mandate union recognition and pointed out that Irish law, consistent with its voluntarist tradition, respects a 'diversity of arrangements' for negotiation, collective bargaining and consultation.⁵⁵

Again, the CFA seemed somewhat unconvinced, pointing out that it 'firmly believes that the right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of their members'.⁵⁶ The CFA recommended that the Government, with the social partners, should review the existing legal framework and consider any appropriate measures, including legislative measures, so as to ensure respect for the freedom of association and collective bargaining principles. It also recommended that the parties review the mechanisms available with a view to promoting machinery for voluntary negotiation between employers' and workers' organisations for the determination of terms and conditions of employment.

6. An Irish Solution?

⁵³ *Ibid.*, p. 219.

⁵⁴ *Ibid.*, p. 219.

⁵⁵ *Ibid.*, p. 230.

⁵⁶ *Ibid.*, p. 231.

The outcome of the *Ryanair* case has resulted in a scenario whereby Irish law offers perhaps the weakest protection for trade union bargaining rights in the Western industrialised world. The current state of play is interestingly summed up the facts of a case referred to the Labour Court, involving the US multinational corporation (MNC), Dell.⁵⁷ In 2009, the company sought to introduce a number of changes to the terms and conditions of employment of 52 workers. Thirty-four of the workers raised objections to the new working arrangements. Subsequently, Dell engaged in a two-month consultation process, which involved team meetings, individual meetings and the establishment of a '24/7 information website.' During this process, several changes and concessions in regard to the proposals were made by management. Notwithstanding this, a number of employees sought representation by a trade union (the Communication Workers Union) under the terms of the 2001-2004 Acts. The Labour Court refused to investigate the substantive claim, holding that the 34 workers, in fact, constituted a 'collective body', satisfying the Supreme Court test. By the time of the hearing, some 13 of the original 52 had accepted voluntary redundancy and left the company. However, the Court found that, as a majority of the remaining workers appeared to have accepted the changes proposed by management, collective bargaining had taken place and a valid agreement had come into existence. Those who wanted union representation in the matter were denied this; a number instituted individual cases against the company for breach of contract.

The facts and outcome of this case require little comment. Suffice to say, it is unlikely that what occurred would strike many familiar with labour law and practice as amounting to 'genuine collective bargaining'. Likewise, it must be concerning that, of

⁵⁷ *Dell Direct* (LCR20079/2011).

the workers in dispute originally, a number either left the company or were forced to institute individual proceedings against the employer.

The Irish coalition Government (on taking office in 2011) promised to 'reform the current law on employees' right to engage in collective bargaining (*the Industrial Relations (Amendment) Act 2001*), so as to ensure compliance by the State with recent judgments of the European Court of Human Rights' and reiterated this commitment to the CFA.⁵⁸ The Government has a number of options. One would be to amend the Constitution, in order to allow a broader interpretation of Article 40.6.1.iii than currently exists under Supreme Court jurisprudence. A second option would be to introduce a statutory procedure whereby unions could seek to gain mandatory collective bargaining rights, as exists, for example, in the UK (following the introduction of the *Employment Relations Act 1999*). This would require a new, statutory definition of collective bargaining, perhaps along the lines of the definition laid down by the Labour Court itself (but struck down by the Supreme Court).⁵⁹

'Collective bargaining comprehends more than mere negotiation or consultation on individual employment related issues including the processes of individual grievances in relation to pay or conditions of employment. In the industrial relations context in which the term is commonly used it connotes a process by which employers or their representatives negotiate with representatives of a group or body of workers for the purpose of concluding a collective agreement fixing the pay and other conditions of employment applicable to the group of workers on whose behalf the negotiations are

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http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Programme_for_Government_2011.pdf (accessed 20 June 2013).

⁵⁹ *Ashford Castle v SIPTU* [2004] ELR 214 at 217.

conducted.

Normally the process is characterised by the involvement of a trade union representing workers but it may also be conducted by a staff association, which is an excepted body within the meaning of the Trade Union Act, 1941, as amended. However an essential characteristic of collective bargaining, properly so called, is that it is conducted between parties of equal standing who are independent in the sense that one is not controlled by the other’.

A further option is to strengthen support for non-union collective representation structures. For example, the legislation transposing the Information and Consultation Directive, the *Employee (Provision of Information and Consultation) Act 2006*, provides a template of sorts in its ‘standard fall-back provisions’, which, for the purposes of establishing an information and consultation forum, contain rules of procedure, rules on the election of employee representatives, rules on the structure of any information and consultation body to be set up and rules governing complaints and disputes.⁶⁰ Under the Directive, of course, information and consultation on certain matters must be with a ‘view to reaching agreement’ and, in *Junk*, the Court of Justice gave quite an expansive interpretation to what is to be understood as ‘consultation’.⁶¹ The most likely option, in the view of this author, however, is that some attempt will be made to ‘fix’ the 2001-2004 Acts, emphasising the voluntarist

⁶⁰ Doherty, M., ‘It’s Good to Talk...Isn’t It? Legislating for Information and Consultation in the Irish Workplace’ *Dublin University Law Journal* (2008), 30, p. 120.

⁶¹ Case C-188/03 *Junk v Kühnel* [2005] ECR I- 885. The CJEU found that consultation ‘imposes an obligation to negotiate’, thereby driving home the point that consultation ‘with a view to reaching an agreement’ envisages compromise and change; employers who have a rigid agenda that they want to impose on the workforce without engaging in meaningful consultation will be in breach of their obligations.

nature of the legislation. Whether a formula can be found to return to a 'pre-*Ryanair* position' is another issue. In any case, the argument here is that the actual outcome of this process will add little to its significance; it is submitted, as presented below, that we can already pinpoint the crucial lessons that can be learned from this 'Irish' problem.

7. An Irish Problem?

7.1. *Living in an Anglo World*

Legal protection for collective bargaining rights is currently in bad shape in the Anglo world. The statutory procedure in the USA (under the 'Wagner Act') and the more recent statutory procedure introduced in the UK have not been seen as particularly successful in securing robust protections for unions and their members, especially in the face of employer resistance.⁶² Bogg has noted the dominant influence of the 'Wagner Act' model and 'its theory of majoritarian consent' which has spread like a 'virus' across the English-speaking common law world.⁶³ The features of such a model have not been hospitable to unions in these countries. Unions must organise a majority of workers in support of collective bargaining before any rights can be granted, making it difficult and costly to get a foothold, and leaving workers open to pressure or intimidation, if the employer is hostile; rights must be 'triggered' (usually via workplace ballots, which can lead to delays and conflict) rather than being automatically granted; and the rights gained are procedural (the right to talk

⁶² Sachs, B., 'Enabling Employee Choice: A Structural Approach to the Rules of Union Organising' *Harvard Law Review* (2010), 120, p. 655; Gall, G., 'Union Recognition in Britain: The End of Legally Induced Voluntarism?' *Industrial Law Journal* (2012), 41, p. 407.

⁶³ Bogg, A., 'The Death of Statutory Recognition in the United Kingdom' *Journal of Industrial Relations* (2012), 54, p. 409, at p. 423.

with the employer) rather than granting any entitlement to substantive outcomes. Relatively weak union movements (such as exist in the UK, US and, arguably, Ireland) are unlikely to prosper in such a model without strong regulatory intervention by the State. However, as long as the State sees its role as confined to 'the aggregation of worker's preferences' rather than 'promoting...collective bargaining as a public good', public policy support seems unlikely.⁶⁴

In this context the argument made by IBEC in relation to the Information and Consultation Directive is interesting. It had been felt by some commentators that strengthened information and consultation rights in the UK and Ireland, in particular, would be highly significant in promoting employee voice at work given that neither had a 'general, permanent and statutory' system of information and consultation or employee representation.⁶⁵ Such hopes were soon dashed, as a weak transposition in both countries has resulted in the Directive making little or no impact.⁶⁶ It is ironic in the extreme, however, that the existence of obligations under the Directive (which very few Irish employers fulfil) is cited as an argument by an employers' confederation in support of the view that 'staff associations' can legitimately provide a representation role in place of trade unions.

It is also somewhat ironic that the Irish Government referenced the social partnership process as an example of public policy support for collective bargaining. The social pacts agreed between 1987 and 2010 were never legally binding; the implications of this became blindingly obvious when, in late 2009, as part of its response to the worsening economic crisis, the Government (and IBEC) simply

⁶⁴ Bogg, A., *The Democratic Aspects of Trade Union Recognition* (Oxford, Hart, 2009), p. 80.

⁶⁵ Article 10 Directive 2002/14.

⁶⁶ Doherty, M., 'Hard Law, Soft Edge? Information, Consultation and Partnership' *Employee Relations* (2008), 30(6), p. 603.

resiled from the agreement in place and collapsed the process.⁶⁷ Following two emergency budgets in 2009 and 2010 (both of which introduced public sector pay cuts), the Government then concluded a new four-year *Public Service Agreement* (the 'Croke Park Agreement'), under which it was agreed to protect public sector pay levels, in exchange for a reduction in employee numbers and a substantial commitment to organisational reform. In 2013, the Government announced it wanted to renegotiate the terms of this agreement. The resulting *Haddington Road* agreement promises another round of pay cuts for public servants; members of unions that refuse to sign up to the agreement will have their pay cut by legislation.⁶⁸ So much for voluntary bargaining!

7.2. Judge, Jury and Executioner?

Given this context, it may also be unsurprising that union movements in Anglo systems have a somewhat jaundiced view of the judiciary. Indeed, it has been persuasively argued that the Irish judiciary, in a number of major areas of constitutional interpretation, frequently tends to defer to individual values, and particularly individual property rights (including the right to run a business), over those of the community or collective groups.⁶⁹ In this context, again, it is somewhat disingenuous of the Irish Government and IBEC to argue that, as the *Ryanair* case never returned to the Labour Court for a final determination, Irish law on employee representative bodies may not be as restrictive of trade union rights as ICTU claimed in its complaint. This view misses (or ignores) the stridency of the language used by

⁶⁷ Doherty, *cit.*, (n. 27), p. 380.

⁶⁸ <http://per.gov.ie/haddington-road-agreement/> (accessed 20 June 2013).

⁶⁹ Gwynn Morgan, D., *A Judgment Too Far? Judicial Activism and the Constitution* (Cork, Cork University Press, 2001); in relation to trade union rights see p. 38 *et seq.* See also the comments of Hogan and Whyte, *cit.*, n. 4.

the Supreme Court. It also wilfully ignores the clear disfavour with which the Supreme Court viewed the procedures adopted by the Labour Court (which is, recall, an industrial relations tribunal and not part of the regular court system). The Court felt that factual issues in dispute should be resolved on oral evidence from parties who participated in the process or who could give first hand evidence on how the employer's procedures operated. Therefore, direct evidence on any issue is generally to be preferred to a legal submission, or an opinion or references to documents unsupported by direct evidence.⁷⁰ This, clearly, requires the identification of individual union members. The reference here to an 'opinion' is also worrying for the unions, as, in order to protect employees' anonymity, it is not untypical in cases such as these for a union official to outline the employee case. It is interesting to note in *Ryanair* that Hanna J., in the High Court,⁷¹ pointed out that whether or not oral evidence is offered in a case is a call made on a daily basis by advocates before the *ordinary civil* courts, where parties are free to offer *viva voce* evidence or not as the case may be. He went on to observe that, while there might be circumstances in which the Labour Court might take a more 'activist role' in determining what oral evidence it might wish to hear (for example, where there is a marked imbalance of 'fire power' in the representation of the parties before it) this was not such a case.

This idea of pressure on unions to disclose to courts and tribunals sensitive information regarding membership has interesting parallels with the view posited by some that the result of the Court of Justice's decisions in cases like *Viking* could well be that unions, in order to defend the proportionality of industrial action in claims relating to EU free movement rights, could be forced to disclose to national courts

⁷⁰ It should be noted that IBEC maintained that, by criticising the Supreme Court in this respect, ICTU seemed to be objecting to the application to employers of Article 6 (right to a fair trial) of the European Convention on Human Rights (ECHR).

⁷¹ [2005] IEHC 330.

and tribunals potentially oppressive volumes of materials on internal union strategy, tactics and policy.⁷² Of course, judicial hostility (or underestimation, at least) of the value and role of collective labour rights is not confined to the common law world. It scarcely needs adding that, in the '*Laval Quartet*' series of judgments:

'[t]he Court rewrote the role of social actors, using only the fundamental freedoms pen... It forced the flexible, heterodox and autonomous social regulation entrusted to trade unions into the rigid and narrow space resulting from the application of the broad scope and long tentacles of fundamental freedoms....[i]n the mind of the Court, the social conflict is replaced by the Court's unilateral definition of the rules of the game'.⁷³

It remains an open question as to whether the influx of Judges from the 'new' Member States, with perhaps a more 'Anglo' sense of the resolution of disputes involving economic and social rights have permanently altered the 'rules of the game'.

7.3. The Corporate Takeover

A further aspect of the case which is of interest beyond the confines of Irish labour law relates to the power of MNCs to influence public policy. Crouch has recently

⁷² Ewing, K. and Hendy, J., 'The ECJ Decisions and Trade Union Freedom: Lessons from the UK' in Ewing, K. and Hendy, J., (eds), *The New Spectre Haunting Europe-The ECJ, Trade Union Rights and the British Government* (Liverpool, IER, 2009). Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* [2007] ECR I-10779.

⁷³ Actis Perinetto, P., '*Viking and Laval: An Italian Perspective*' *European Labour Law Journal* (2012), 3(4), p. 276-277.

described what he refers to as the ‘corporate takeover of the market’; the idea that neo-liberalism (at least in Anglo-American capitalist societies) has resulted in the preferential treatment of large organisations (rather than rigorous enforcement of competition laws) and the market dominance of global corporations (rather than small and medium-sized enterprises), which the modern State is too weak to effectively regulate.⁷⁴ As a small, export-led, open economy, Ireland has a strong dependence on foreign direct investment (FDI). Partly due to historical and cultural factors, FDI from US-based MNCs has been traditionally crucial. During the 1970s and early 1980s, the Irish state-backed industrial development agencies actively encouraged incoming companies to conclude agreements with particular unions. By the mid-1980s, however, state agencies began ‘marketing’ Ireland as a non-union environment, at least in part as a response to the increasing reluctance of US MNCs to recognise unions.⁷⁵ Therefore, the possibility that a statutory duty to engage in collective bargaining could be imposed in Ireland has been more or less ruled out as a ‘potential threat to inward investment’.⁷⁶ This is despite, incidentally, the fact that analysis of the operation of the 2001-2004 Acts showed clearly that almost three-quarters of cases involved indigenous Irish firms, and that the vast majority involved relatively low-paid and low-skilled groups of workers (not the ‘high-tech’ employees of powerful corporations based in Ireland, like google and Intel).⁷⁷ The role of powerful non-state actors like the American Chamber of Commerce Ireland (the representative body for US companies based in Ireland at both Government and

⁷⁴ Crouch, C., *The Strange Non-death of Neo-liberalism* (Cambridge, Polity Press, 2011).

⁷⁵ J. Lavelle et al., ‘Unions on the Edge? Industrial Relations in Multinational Companies’ in Hastings, T. (ed), *The State of the Unions* (Dublin, Liffey Press, 2008).

⁷⁶ See ‘Effectiveness of “Right to Bargain” Law Questioned’, <http://www.eurofound.europa.eu/eiro/2002/09/feature/ie0209203f.htm> (accessed 20 June 2013).

⁷⁷ Doherty, *cit.*, (n. 42), p 401.

industry level) has become ever more pronounced.⁷⁸ The role of powerful domestic MNCs should not be forgotten either; no public inquiry into Ryanair (as recommended by the CFA) has been held.

7.4. A Market in Union?

Here, the role of the EU institutions must again be considered. It had been tentatively suggested that the 2001-2004 Acts might have proven increasingly significant following the judgments in the 'Laval Quartet'. At the centre of these well-known decisions is the Court's view that, where collective agreements are not declared universally applicable, extended *erga omnes* to non-union workplaces, or their provisions protected, in some way, by Member State legislation, they cannot be imposed on service providers from EU jurisdictions operating in a Member State other than that of origin.⁷⁹ All that can be required of such service providers is that they observe *statutory* minima terms and conditions of employment. The Labour Court, however, in exercising its jurisdiction under the legislation had, effectively, begun to 'benchmark' employers against others in the sector in question, and recommend that, where employers fall below the general, *prevailing* industry pay and conditions standards (as located by the Court), they would have to raise standards to that level.⁸⁰ As these prevailing standards were frequently identified as those set down by national pay agreements (negotiated with ICTU) or those applicable in unionised employments in the relevant sector, this provided a clear method for the

⁷⁸ Doherty, *cit.*, (n. 27), p. 618.

⁷⁹ See Deakin, S., 'The Labour Law Perspective: the Economic Implications of the Decisions' *Cambridge Yearbook of European Legal Studies* (2007-08), 10, 463; Barnard, C., 'Viking and Laval: A Single Market Perspective' in Ewing and Hendy (eds), *cit.*, p. 27; Davies, A.C.L., 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' *Industrial Law Journal* (2008), 37(2), p. 126.

⁸⁰ Doherty, *cit.*, (n. 42), p. 397-398.

setting of an industry wide 'fair rate for the job' (by a tri-partite, State industrial relations tribunal). This approach, however, has been emasculated by the decision in *Ryanair*.

Perhaps more worrying, however, has been the recent intervention by the European Commission and the European Central Bank, which, along with the International Monetary Fund (IMF), make up the 'Troika' to which Ireland applied for financial support, which was granted in 2010. The Memorandum of Understanding, outlining the terms of the financial support package for Ireland, contained little in the way of suggested labour law reforms, but did include a specific commitment by the Government to 'review' the Registered Employment Agreement and Joint Labour Committee systems (outlined in section 2) with follow-up actions to be agreed with the European Commission.⁸¹ This review was to be carried out in order to ensure there were no distortions of wage conditions across sectors associated with the presence of *sectoral* minimum wages in addition to the *national* minimum wage. Irish labour law regulation (as noted in section 2) is comparatively light. Where legislation exists, it focuses almost exclusively on providing a floor of *minimum* rights for *individual* workers. Statutory provisions supporting collective bargaining are almost non-existent and bargained standards that exceed statutory minima (in terms of pay, working time, etc) are either achieved by trade unions through the deployment (or threat) of industrial action, in the public sector by virtue of the (legally non-binding) Croke Park Agreement, or in sectors covered by JLCs or REAs; the last mentioned being the one area where the Troika demanded Government action.⁸² Thus, we see the drift from bargained standards to statutory minima continue (aided and abetted

⁸¹ The document is available at <http://www.merrionstreet.ie/wp-content/uploads/2010/12/EUIMFmemo.pdf> (accessed 20 June 2013).

⁸² Achtsioglou, E. and Doherty, M., 'There Must Be Some Way Out of Here... The Crisis, Labour Rights and Member States in the Eye of the Storm' *European Law Journal* (2013), 19, (online).

by the European Commission). In any case, the Troika need not have been concerned. The Irish superior courts have, in two recent decisions, struck down both the REA and JLC systems as being unconstitutional in that they, first, grant too much law-making power to a non-Parliamentary body (the Labour Court) and, secondly, represent an unwarranted interference with the property rights of employers.⁸³ A life jacket for trade unions in an Anglo world was never likely to come from the local judiciary; it seems unlikely, in light of recent developments, that it will come from Brussels, Frankfurt or Luxembourg either.

8. Conclusion

Over the past 30 years, trade unions in Ireland have engaged in various 'revitalisation strategies', including a focus on servicing members, organising and, most notably, entering into social partnership arrangements.⁸⁴ The 2001-2004 Acts represented an attempt to bolster the partnership process at national level by encouraging voluntary employer-union interaction at the workplace, with the fall-back of imposing certain legal obligations, in the event voluntary engagement was unsuccessful. The legislation, it has been argued, proved relatively beneficial to unions in arguing cases before the Labour Court, but was effectively neutered by the Irish Supreme Court. It has been noted above that the general trend away from collectively bargained standards in Ireland fits well with the EU picture (in terms of the decisions of the Court and the policy priorities of the EU arms of the Troika). It

⁸³ *John Grace Fried Chicken Ltd & Ors v Catering Joint Labour Committee & Ors* [2011] IEHC 277; *McGowan & Ors v The Labour Court & Ors* [2013] IESC 21. Legislation has been passed to try and rectify this situation (the *Industrial Relations (Amendment) Act 2012*), but its status is currently somewhat uncertain).

⁸⁴ Frege, C. and Kelly, J., *Varieties of Unionism: Comparative Strategies for Union Renewal* (Oxford, Oxford University Press, 2004).

was this that led the ICTU to take its complaint to the ILO. Whilst it has been noted that the language of the CFA recommendations indicated some concern at the extent to which ILO Convention rights are being vindicated in Ireland, the CFA did not explicitly uphold the complaint; rather, it recommended that a number of matters be reviewed. This outcome is not, given the structure of the CFA, necessarily unexpected, but it illustrates the 'soft' nature of ILO jurisprudence. As Brodtkorb rather cuttingly, if somewhat unfairly, argues (in the context of the exclusion of small businesses from the UK's statutory recognition procedure):

'[t]his failure is not unique, or even particularly unusual, among UK employment laws...in contrast to the ILO, the UK government is charged with managing and trying to grow a large and complex economy. It may be forgiven for preferring practicality principle'.⁸⁵

So, is there any area of international law that might prove valuable to the unions in this context? The Irish Government has pledged to reform collective bargaining law to comply with recent decisions of the European Court of Human Rights.⁸⁶ In cases such as *Demir and Baykara v Turkey*⁸⁷ and *Enerji Yapi-Yol Sen v*

⁸⁵ Brodtkorb, T., 'Statutory Union Recognition in the UK: A Work in Progress' (2012) *Industrial Relations Journal*, 43, 70, p. 82.

⁸⁶ As noted above (n. 28), Ireland has incorporated the European Convention on Human Rights into domestic law at a sub-constitutional level. Furthermore, following the entry into force of the Treaty of Lisbon in 2009, Article 6(3) of the new Treaty on European Union (TEU) states that 'fundamental rights, as guaranteed by the (ECHR) and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'. Art 6(2) TEU states that the Union 'shall accede to the (ECHR)'; see L. Pech, and X. Groussot, 'Fundamental Rights Protection in the EU Post Lisbon Treaty' (2010) (available at: <http://ssrn.com/abstract=1628552>; accessed 20 Jun 2013).

⁸⁷ Application No 34503/97, 12 November 2008.

Turkey,⁸⁸ the Strasbourg Court has held that the right to collective bargaining is protected by Article 11 of the ECHR and that the right to strike constitutes an important aspect in the protection of trade union members. In *Demir*, the Court ruled that the right to collectively bargain with an employer in principle had become one of the 'essential elements' of the right to form and join trade unions, guaranteed under Article 11 of the ECHR. The Court held that Article 11 of the ECHR encompasses a right *not* to have prohibitions imposed on the freedom of trade unions to engage in collective bargaining. The Court seemed to suggest that the absence of legislation necessary to give effect to provisions of international law (in particular ILO Conventions), protecting collective bargaining rights might be in breach of the ECHR. According to Ewing and Hendy, this could mean serious difficulties for states like Ireland where 'the Supreme Court appears to be inching its way towards a position where the implied constitutionally protected right not to associate means...that employers have a right not to recognise [a union]'.⁸⁹ Ewing and Hendy further contend that the Court of Justice decisions in the 'Laval Quartet' (and, it is submitted here, the *Ryanair* decision) cannot be reconciled with the European Court of Human Rights' requirements of a legal regime that '(i) recognises the right to collective bargaining (and the duty to take steps to promote it), (ii) respects the right to take collective action, and does so (iii) in accordance with *international labour conventions and regional labour standards*' (emphasis added).⁹⁰

Whether a re-fashioning of recent jurisprudence along the lines of that of the Strasbourg Court is possible, given the global inhibiting factors outlined in section 9,

⁸⁸ Application No 68959/01, 21 April 2009.

⁸⁹ Ewing, K. and Hendy, J., 'The Dramatic Implications of *Demir and Baykara*' *Industrial Law Journal* (2010), 39(1), p. 30-31.

⁹⁰ Ewing and Hendy, *ibid.*, p 40. The authors conclude, with undisguised relish, that the European Court of Human Rights is 'pulling in different directions from its Luxembourg counterpart, with the mouth-watering possibility of a high noon conflict between the two' (p. 4).

is an open question. The outcome in Ireland perhaps reflects the danger of legislative rights being 'bolted on' to a voluntarist system where 'norms' of adversarialism and power imbalance are accepted. It also suggests the potential dangers for union movements (particularly, but not exclusively) in voluntarist systems of excessive reliance on legal solutions. However, to quote Machiavelli:

'There is no need of legislation so long as things work well without it, but, when such good customs break down, legislation forthwith becomes necessary'.