

***Battered and Fried? Regulation of Working Conditions  
and Wage-Setting after the 'John Grace' Decision***

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## Introduction

Recent years have not been kind to structures and processes promoting collective solutions to problems of Irish labour market regulation. The long-term decline in trade union density has weakened the traditional role of unions as regards workplace representation and in some sectors of the economy (for example, amongst the important Multinational Corporation sector or in “high value” services like information technology) unions barely register a presence at all.<sup>1</sup> From around 2004, a number of long-established indigenous companies began to engage in hitherto inconceivable conduct by effectively snubbing the State’s dispute resolution agencies; Sheehan recounts a number of instances where major Irish companies rejected pressure to resolve disputes from agencies such as the Labour Relations Commission (LRC) and the National Implementation Body (NIB), and ignored non-binding recommendations of the Labour Court.<sup>2</sup> In 2007, the Supreme Court in *Ryanair v The Labour Court*<sup>3</sup> effectively neutered legislation enacted allowing members to be represented by their trade union in workplaces where the employer did not recognise the union for the purposes of collective bargaining. In a pointed rebuke, the Court criticised the Labour Court’s “mindset”, which, in interpreting the meaning of “collective bargaining” favoured the way particular expressions are used and particular activities are carried out by trade unions.<sup>4</sup> The enactment of legislation seeking to promote better collective information and consultation practices in Irish workplaces, the Employees (Provision of Information and Consultation) Act 2006, has, as commentators predicted, proven to have had little, if any, impact.<sup>5</sup> The economic, political and social crisis that has dominated the Irish landscape since 2008 has also claimed the once-lauded model of Irish social partnership, which collapsed in 2010, amid much recrimination and rancour.<sup>6</sup>

This article focuses on another recent development in relation to collective regulation of the labour market, the challenge to the operation of the

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<sup>1</sup> Patrick Gunnigle *et al*, “Subtle but Deadly? Union Avoidance Through ‘Double Breasting’ Among Multinational Companies” (2009) 16 *Advances in Industrial and Labor Relations* 51. It should be noted that recent data indicate a slight *increase* in trade union density from 31% in 2007 to 34% in 2009, but this is alongside a *decrease* in absolute numbers of members from 565,000 to 535,000; report by Social Science & Parliamentary Affairs Team (Oireachtas Library & Research Service), *Trade Unions, Collective Bargaining and the Economic Crisis: Where Now?* (Official Publications, 2011).

<sup>2</sup> Brian Sheehan, “Employers and the Traditional Industrial Relations System: How the Bonds Have been Loosened” in Hastings ed, *The State of the Unions* (Liffey Press, 2008).

<sup>3</sup> [2007] IESC 6; [2007] 4 IR 199.

<sup>4</sup> See Maura Connolly, “Industrial Relations (Miscellaneous Provisions) Act 2004— Implications for industrial relations law and practice of the Supreme Court decision in *Ryanair v Labour Court and IMPACT*” (2007) 3 *IELJ* 37; Michael Doherty, “Union Sundown? The Future of Collective Representation Rights in Irish Law” (2007) 4 *IELJ* 96.

<sup>5</sup> Michael Doherty, “It’s Good to Talk... Isn’t It? Legislating for Information and Consultation in the Irish Workplace” (2008) 30 *DULJ* 120; John Geary and William Roche, “The Future of Information and Consultation in Ireland” in Storey ed, *Adding Value Through Information and Consultation* (Palgrave, 2005).

<sup>6</sup> William Roche, “The Breakdown of Social Partnership” (2011) 59(1) *Administration* 23; Michael Doherty, “It Must Have Been Love... But It’s Over Now. The Crisis and Collapse of Social Partnership in Ireland” (2011) 17(3) *Transfer: European Review of Labour and Research* 371.

Joint Labour Committee (JLC) system. The article has two principal objectives. First, it outlines and analyses the background to recent disputes relating to the operation of the JLC system, culminating in the constitutional challenge to its legitimacy in the High Court case of *John Grace Fried Chicken Ltd & Ors v Catering Joint Labour Committee & Ors*.<sup>7</sup> The article examines the High Court decision in the case and the legislative reform proposals made as a consequence. Secondly, the article sets the JLC story in the wider context of shifts in labour market regulation at European Union (EU) level, arguing that the challenges to the JLC system are consistent with general trends militating against collective approaches to regulation, and which prioritise legally binding minimum standards over bargained terms and conditions of employment. The article proceeds as follows. The next section explains the operation of the JLC system and locates it within the Irish industrial relations model. The article goes on to describe why the validity of the JLC system began to be questioned and the reasons giving rise to challenges to it before the Superior Courts. The article then looks at the decision of the High Court in the *John Grace* case and analyses the reforms to the system proposed in the Industrial Relations Amendment (No. 3) Bill 2011. Before concluding, the article then looks at how the challenge to the JLC system is reflective of broader trends in labour market regulation under Irish, and EU, law.

## **Bargain Town: Joint Labour Committees and Employment Rights**

The Irish system of employment relations, derived as it is from that of the UK, has traditionally been classified as “voluntarist”, where the preference is for joint trade union and employer regulation of employment relations and the relative absence of legal intervention.<sup>8</sup> Voluntarism is premised on freedom of contract and freedom of association, whereby the employment relationship is essentially regulated by free collective bargaining between worker and employer representative groups.<sup>9</sup> In such a model, 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 management and organised labour”.<sup>10</sup> The implications of this are that Irish (and British) employers and unions traditionally viewed employment *legislation* with disfavour, so that collective bargaining was the key element in the functioning of the employment relations system. However, collective bargaining in the Irish system has always been voluntary in that there is no obligation on employers to recognise a trade union for collective bargaining purposes and collective agreements are generally not legally

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<sup>7</sup> [2011] IEHC 277.

<sup>8</sup> The Irish “Anglo-Saxon” model can be contrasted, for example, with the “Roman-Germanic” model of France and Germany, where the state, through its labour laws, has an active and central role in labour market organisation; see Paul Teague, “Deliberative Governance and EU Social Policy” (2001) 7(1) *European Journal of Industrial Relations* 7.

<sup>9</sup> Michael Doherty, “Institutional Challenge: Tribunals, Industrial Relations and the Law” (2009) 2 *Employment Law Review* 70.

<sup>10</sup> Otto Kahn-Freund, *Labour and the Law* (Stevens, 1977), at 4.

binding.<sup>11</sup> Agreements are enforced through industrial relations (IR) negotiations and, if necessary through displays of IR “muscle” (strikes or lock-outs, for example). Collective bargaining in Ireland, thus, is seen as normative; collective agreements are usually not legally enforceable, as they do not generally intend to create legal relations,<sup>12</sup> and as a rule, only the parties to an agreement are bound by its terms.<sup>13</sup> Collectively agreed terms may be incorporated, impliedly or expressly, into individual contracts of employment,<sup>14</sup> but only where such terms are apt or suitable for incorporation.<sup>15</sup>

There are some important exceptions to this general rule. Collective agreements can be given legal effect if such agreements are *registered* with the Labour Court. Under section 25 of the Industrial Relations Act 1946, an “employment agreement” is defined as:

...an agreement relating to the remuneration or the conditions of employment of workers of any class, type or group made between a trade union of workers and an employer or trade union of employers or made, at a meeting of a registered joint industrial council, between members of the council representative of workers and members of the council representative of employers.<sup>16</sup>

Under section 27 of the 1946 Act, any party to such an employment agreement can apply to the Labour Court to register the agreement. There are currently 74 Registered Employment Agreements (REAs) on the Register

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<sup>11</sup> Anthony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books Limited, 1985), at chapter 1.

<sup>12</sup> *Goulding Chemicals Ltd. v Bolger* [1977] IR 211. But see also *O’Rourke v Talbot Ireland Ltd* [1984] ILRM 587, where a collective agreement was enforced at the level of the individual contract of employment.

<sup>13</sup> It should be noted that the Irish (and UK) system differs substantially from that in many other EU countries. In states like France and the Netherlands, for example, collective agreements are commonly extended to all workers in a particular sector, while in some Nordic States (like Sweden and Denmark) comprehensive labour market regulation is based on voluntary agreements between strong collective employer and employee organisations; see Teague, note 8.

<sup>14</sup> *Goulding Chemicals Ltd v Bolger* [1977] IR 211; *Reilly v Drogheda Borough Council* [2009] ELR 1. See also the Terms of Employment (Information) Act 1994, section 3(3).

<sup>15</sup> Anthony Kerr, “Industrial Relations” in Regan ed, *Employment Law* (Tottel, 2009), at 670. See *Holland v Athlone IT* [2011] IEHC 414, where Hogan J held that the Public Service Agreement 2010-2014 (the “Croke Park Agreement”), made between public sector unions and management, could not be taken to have created enforceable legal rights which are justiciable in law at the hands of an individual public sector employee. Hogan J held that the language used in the agreement applied in the political and industrial relations sphere, but not the legal sphere and that the parties had never intended to create legal rights.

<sup>16</sup> Joint Industrial Councils (JICs) are voluntary negotiating bodies for an industry or part of an industry and are designed to facilitate collective bargaining at industry level in certain sectors. They generally exist where a high level of unionisation exists. Arguably, the most important JICs currently operating are those related to the construction and electrical contracting industries. See, generally, [http://www.lrc.ie/document/Joint\\_Industrial\\_Councils\\_and\\_Joint\\_Labour\\_Committees/6/233.htm](http://www.lrc.ie/document/Joint_Industrial_Councils_and_Joint_Labour_Committees/6/233.htm) (visited 23 Jan 2012).

required to be maintained by the Labour Court.<sup>17</sup> Registered agreements apply to all employers and employees working in a particular sector or industry irrespective of whether such employers or employees were, in fact, parties to the agreement or wished to be subject to its terms.<sup>18</sup> Although individual contracts of employment of workers subject to REAs can provide for terms and conditions in excess of those stipulated, such contracts cannot contain terms less favourable to workers. Thus, REAs are particularly suited to, and indeed conceived in terms of, labour intensive industries where labour costs form a large portion of overall costs.<sup>19</sup> The rationale behind REAs is to ensure uniform minimum standards apply across the relevant industry in order to prevent a “race to the bottom” amongst employers, who may seek to compete by cutting labour costs.

The other principal exception to the general rule that parties in an employment relationship are not bound by contractual terms to which they have not expressly agreed, relates to terms and conditions of employment laid down in Employment Regulation Orders (EROs).<sup>20</sup> Joint Labour Committees (JLCs) are statutory bodies established under Part IV of the Industrial Relations Acts 1946-2004 to provide for the fixing of minimum rates of pay and the regulation of employment.<sup>21</sup> They typically exist in employments where there is little or no collective bargaining and are designed to protect vulnerable workers. The Labour Court has the power, under section 35 of the Industrial Relations Act 1946, to establish such bodies, on the application of the Minister, a trade union, or any organisation or group of persons claiming to be representative of a group of workers or employers.<sup>22</sup> The Court must be satisfied, before making an establishment order that, in respect of an application by an organisation or a group of persons claiming to be representative of workers or employers, that the claim is well-founded. Furthermore, there must be *either* substantial agreement between such workers and their employers to the establishment of a joint labour committee *or* the Court must be satisfied that the existing machinery for effective regulation of remuneration and other conditions of employment of such workers is inadequate or is likely to cease or to cease to be adequate *or* the Court must be satisfied, having regard to the existing rates of remuneration or conditions of employment of such workers or any of them, it is expedient that a joint labour committee should be established.<sup>23</sup>

A JLC comprises of an independent chairperson appointed by the Minister and representative members (of such number as the Labour Court thinks fit) of employers and employees following consultation with the social

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<sup>17</sup> This requirement derives from the Industrial Relations Act, section 26. The Register can be accessed via [www.labourcourt.ie](http://www.labourcourt.ie).

<sup>18</sup> Industrial Relations Act 1946, section 30(1). REAs can also cover sole traders within a relevant industry; *O'Boyle v TEEU* (REA 0757/2007).

<sup>19</sup> Kerr, note 15, at 672.

<sup>20</sup> For a comprehensive overview of the JLC system, see Michelle O' Sullivan and Joe Wallace, “Minimum Labour Standards in a Social Partnership System: the Persistence of the Irish Variant of Wages Councils” (2011) 42(1) *Industrial Relations Journal* 18.

<sup>21</sup> Francis Meenan, “Regulation of Pay and Conditions of Employment” (2009) 6(4) *IELJ* 92.

<sup>22</sup> Industrial Relations Act 1946, section 36.

<sup>23</sup> Industrial Relations Act 1946, section 37. Formulated proposals must be available for inspection and representations in respect of these can be made to the JLC; Industrial Relations Act 1990, section 48(1).

partners. 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.<sup>24</sup> If such proposals are confirmed by the Labour Court, through the making of an ERO, they become binding terms, which employers are not permitted to undercut in the contract of employment.<sup>25</sup> Where a worker's contract provides for less than the terms of an ERO, the ERO terms are effectively read into the contract and replace the provisions relating to pay and/or conditions contained therein.<sup>26</sup> Failure by an employer to comply with the terms of an ERO is an offence and, on conviction, the employer can be ordered to alter the terms and conditions of the employee in question, as well as compensate him or her for the period of employment in which terms and conditions fell below the ERO minimum.<sup>27</sup> The worker can also issue civil proceedings on his or her own behalf, or under section 49 of the Industrial Relations Act 1990, an inspector can institute such proceedings, on behalf of a worker.<sup>28</sup>

This, at least, was the position up until the summer of 2011 and the decision of the High Court in *John Grace Fried Chicken Ltd & Ors v Catering Joint Labour Committee & Ors*,<sup>29</sup> which declared the provisions of the 1946 Act, allowing the Labour Court to confirm the EROs as binding on all employers in the catering sector, to be unconstitutional. The decision is discussed in detail below, but first it is important to address the issues leading up to the taking of the case. In particular, it is important to set the issue of EROs in the context of broader developments in Irish labour market regulation.

## **Hotels, Shops and Bailouts: The Pressure for Reform**

The validity of EROs had been tested before the Irish Superior Courts in the late 1970s, in the case of *Burke v Minister for Labour*.<sup>30</sup> The issue before the Supreme Court was whether the manner of the making of the ERO in question was tainted with invalidity. Henchy J, in describing the power delegated to JLCs to make proposals to the Labour Court for fixing statutory minimum wages, stated:

It will be seen, therefore, that the power to make a minimum-remuneration order is a delegated power of a most fundamental, permissive and far-reaching kind. By the above provisions of the Act of 1946 Parliament, without reserving to itself a power of supervision or a power of revocation or cancellation (which would apply if the order had to be laid on the table of either House before it could have statutory

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<sup>24</sup> Industrial Relations Act 1946, s 42. The procedures to be followed once a JLC has formulated proposals is set out in the Industrial Relations Act 1990, section 48.

<sup>25</sup> Kerr, *The Trade Union and Industrial Relations Acts* (3<sup>rd</sup> ed, Round Hall, 2007), at 25.

<sup>26</sup> Cox *et al*, *Employment Law in Ireland* (Clarus Press, 2009), at 57.

<sup>27</sup> Industrial Relations Act 1946, section 45.

<sup>28</sup> The onus is on the employer to show that the statutory minimum compensation has been paid and that it has complied with the statutory conditions of employment; Industrial Relations Act 1946, sections 45(5) and (6).

<sup>29</sup> [2011] IEHC 277.

<sup>30</sup> [1979] IR 354.

effect) has vested in a joint labour committee and the Labour Court the conjoint power to fix minimum rates of remuneration so that non-payment thereof will render employers liable to conviction and fine and (in the case of conviction) to being made compellable by court order to pay the amount fixed by the order of the Labour Court. Not alone is this power given irrevocably and without parliamentary, or even ministerial, control, but once such an order is made (no matter how erroneous, ill-judged or unfair it may be) a joint labour committee is debarred from submitting proposals for revoking or amending it until it has been in force for at least six months. While the parent statute may be amended or repealed at any time, the order, whose authors are not even the direct delegates of Parliament, must stand irrevocably in force for well over six months.<sup>31</sup>

As a result, Henchy J held that JLCs must exercise their functions, not only with constitutional propriety and due regard to natural justice, but also within the framework of the terms and objects of the Act and with basic fairness, reasonableness and good faith. The Supreme Court clearly indicted unease with the scope of the powers delegated to JLCs and the Labour Court. Henchy J, first, pointed to the fact that apart from the “skeletal provisions” in the second schedule to the Act of 1946 as to its constitution, officers and proceedings, the Act was silent as to how a committee was to carry out its functions in making an order, and, secondly, referred to the Hotels JLC in question as “an unelected body, functioning behind closed doors”.<sup>32</sup> The Supreme Court held that the order in this case had been made *ultra vires* the Labour Court and was void, as the JLC, in making the proposals, had failed to satisfy the requirement of basic fairness.

For many years after the judgment in *Burke*, little attention was focused on the operation of JLCs or the legitimacy of the JLC system. However, this state of affairs has altered dramatically in recent years, and particularly since the economic climate began to worsen in 2007. All of a sudden, the hitherto relatively obscure workings of the JLCs began to become the focus of widespread public interest and debate. Employers and their representative groups, in particular, began to rigorously question the rationale for continuing with the JLC system.<sup>33</sup> This questioning was founded on a number of related arguments, which may be summarised as follows.

First, it was argued that the JLC system had become fragmented and unwieldy and, in certain cases, illogical. The JLC for the Brush and Broom sector, for example, had not made a proposal to the Labour Court for an ERO since 1994. In some sectors, EROs varied depending on seemingly arbitrary, often historical, geographical demarcations. So for example, JLCs for the Contract Cleaning sector were divided into those covering Dublin and the rest of the country, for the Catering sector into those covering Dublin and Dun

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<sup>31</sup> *Ibid*, at 358-359. The six-month period is stipulated in section 42(3) of the Industrial Relations Act 1946.

<sup>32</sup> *Ibid*, at 361 and 362, respectively.

<sup>33</sup> See, for example, Mary Carolan, “Hoteliers Resist Rises for Low Paid” *The Irish Times*, 7 February 2008; Susan Mitchell, “Food Retail Body Wants Change to Minimum Pay Rates Regime” *Sunday Business Post* 31 May 2009. See also O’ Sullivan and Wallace, note 20, at 28-32.

Laoghaire and the rest of the country, whilst in the Hairdressing sector, one JLC covered Cork City and one covered Dublin, Dun Laoghaire and Bray.

Secondly, it was argued that the entire *raison d'être* for JLCs had become redundant. Unlike in the 1940s, when the system had been established, extensive protective legislation, covering all workers, is now in place (notably the National Minimum Wage Act 2000 and the Organisation of Working Time Act 1997). Unsurprisingly, as the economic climate worsened, arguments based on cost were increasingly proffered. A particular source of employer criticism focused on overtime and unsocial hours rates. So, in the retail sector, for example, the relevant ERO provided for time-and-a-half to be paid where overtime was worked up until midnight and for time-and-a-third to be paid to all those working on Sundays. Given that Sunday opening is now overwhelmingly the norm in the sector, employers argued that Sunday should be treated as any other working day. Further criticism was focused on the fact that a normal working week under the retail ERO was stipulated to be 39 hours (as against the maximum of 48 permitted under the Organisation of Working Time Act 1997). The cost to employers of the JLC system was said to be so significant that Retail Excellence Ireland, the largest retail industry trade body in Ireland, maintained that scrapping the system (in addition to reforming laws on rent reviews) would save nearly 43,000 jobs and create an additional 31,840 in the sector.<sup>34</sup>

From 2008, in particular, the JLC (and, indeed, the related REA) system began to come under sustained attack on a number of fronts. In 2008, a group of hoteliers challenged a decision of the Labour Court to approve JLC proposals for a minimum wage for 25,000 staff in the hotel sector. The applicants sought a declaration that the provisions of sections 42 and 43 of the Industrial Relations Act 1946 and section 48 of the Industrial Relations Act 1990 were invalid as they allowed an impermissible delegation of legislative functions (the setting of minimum wages) to a body other than the Oireachtas and on the grounds that they unduly interfered with constitutionally protected property rights.<sup>35</sup> The case was ultimately decided on procedural grounds and the constitutional challenge did not proceed.

A twist in the saga came about as a result of Ireland's financial and banking crisis and the subsequent need for financial support from the International Monetary Fund (IMF) and the EU. The Memorandum of Understanding outlining the terms of a financial support package for Ireland included a specific commitment to review the REA and JLC systems with follow-up actions to be agreed with the European Commission.<sup>36</sup> The review, carried out jointly by Labour Court chairman Kevin Duffy and labour economist Dr Frank Walsh was published in May 2010 and recommended reform, rather than abolition, of the systems.<sup>37</sup> In response to some of the criticisms levelled at the JLC system outlined above, it is interesting to note

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<sup>34</sup> <http://www.retailexcellence.ie/index.php/news/?page=11> (visited 24 Jan 2012).

<sup>35</sup> See Meenan, note 21, for a discussion of the claim.

<sup>36</sup> At 10. The document is available at <http://www.merrionstreet.ie/wp-content/uploads/2010/12/EUIMFmemo.pdf> (visited 24 Jan 2012).

<sup>37</sup> Kevin Duffy and Frank Walsh, *Report of Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms* (available at [http://www.djei.ie/publications/employment/2011/Report\\_ERO\\_REA.pdf](http://www.djei.ie/publications/employment/2011/Report_ERO_REA.pdf); visited 24 January 2012).



the report's conclusions. The report found that the system was in need of significant overhaul, that the number of JLCs should be reduced and geographical distinctions abolished, and that terms and conditions of employment regarding overtime payments, including the conditions under which they become payable, and Sunday premium should be standardised across the various JLCs.<sup>38</sup> The report, though, rejected the argument that lowering the basic JLC rates to the level of the minimum wage rate was likely to have a substantial effect on employment.<sup>39</sup> It also concluded that it was not accurate to suggest that the body of primary employment rights legislation in force adequately covered matters dealt with by EROs.<sup>40</sup> As noted above, this is the case, for example, in relation to working time and pay rates other than basic pay. The report also focused on the need, in terms of basic fairness, for systems of setting pay and conditions of employment that went beyond the statutory minimum.

## **Fried and Battered: the 'John Grace' Decision**

Within weeks of the publication of the Duffy-Walsh report, the High Court handed down its decision in *John Grace*.<sup>41</sup> The plaintiffs in the case were a small business in Cork city involved in the preparation and sale of fried chicken and other snack foods (operated by a husband and wife) and an organisation calling itself the "Quick Food Alliance" (set up for the purposes of representing the interests of the businesses and persons involved in the quick food service industry). In essence, the plaintiffs claimed that the provisions of the Industrial Relations Acts 1946 and 1990 allowing JLCs and the Labour Court to set terms and conditions of employment in the catering sector were unconstitutional and that the 2008 ERO made by the Labour Court was invalid as a consequence.<sup>42</sup> Feeney J, in an unequivocal judgment, ruled that the provisions of the 1946 Act, allowing the Labour Court to confirm the EROs as binding on all employers in the catering sector, were unconstitutional as they allowed an impermissible delegation of legislative powers (the setting of the rate of remuneration and conditions of employment for the sector) to a body other than the Oireachtas without dealing with how, or on what basis, such powers should be exercised. Feeney J referred to the "far reaching nature of the delegation within the 1946 Act" identified by Henchy J. in *Burke*<sup>43</sup> and found that the "absoluteness of the delegation which he identified remains unaltered".<sup>44</sup> The Court ruled that the 1946 Act allowed *all* choices and decisions as to the rates of remuneration and conditions of employment to be made by a delegated body (the Labour Court, on a proposal from the JLC) without providing any identification of the principles or policies upon which that body should act (e.g. what factors should be taken into account in deciding an

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<sup>38</sup> *Ibid*, at 78-79.

<sup>39</sup> *Ibid*, at 63-66.

<sup>40</sup> *Ibid*, at 34-36.

<sup>41</sup> [2011] IEHC 277.

<sup>42</sup> See Kara Turner, "Cases and Comment" (2011) 8(4) *IELJ* 116.

<sup>43</sup> [1979] IR 354.

<sup>44</sup> [2011] IEHC 277 at [32].

appropriate rate of pay) and without providing for any parliamentary power of supervision in terms of revocation or cancellation.<sup>45</sup>

In addition, the Court ruled that a system allowing EROs to set wages and conditions for employees in one geographical area, when significantly different wage rates and conditions applied in an immediate adjoining area, without any identifiable basis for such discrimination, and where failure to comply could result in criminal prosecution, was arbitrary and unfair and amounted to an unlawful interference of the plaintiff's property rights.<sup>46</sup> The Court, therefore, concluded that the provisions of sections 42, 43 and 45 of the 1946 Act and section 48 of the 1990 Act were invalid having regard to the provisions of Article 15.2.1 of the Constitution and granted the plaintiffs a declaration that the 2008 ERO was invalid.

The decision, predictably, was welcomed by employer representative groups, with many calling for the abolition of the JLC system in its entirety.<sup>47</sup> Trade unions, meanwhile, expressed concerns that following the ruling, workers in the catering sector, and indeed in other sectors covered by EROs, would have their terms and conditions of employment downgraded.<sup>48</sup> However, the Minister for Jobs, Enterprise and Innovation moved swiftly to pledge new legislation to re-establish, with significant reforms, the JLC system; the result is the Industrial Relations (Amendment) (No 3) Bill 2011.

## **A Healthy Alternative? The Industrial Relations (Amendment) (No 3) Bill 2011**

The Bill seeks to address the criticisms of the JLC system summarised above, as well as the problems identified by Feeney J in the High Court.<sup>49</sup> First, section 11 inserts a new section 41A into the 1946 Act, which provides that the Labour Court is to undertake a review of all existing JLCs and may recommend that a JLC be either abolished, amended or amalgamated with another.<sup>50</sup> Such reviews are then to be carried out every five years. In carrying out its reviews, the Labour Court is to have regard to factors including the classes of workers and businesses affected and the extent to which they have been affected by changes in a given sector, the impact of an ERO on employment levels, whether the ERO has been prejudicial to the exercise of collective bargaining in the sector and, addressing the question of

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<sup>45</sup> [2011] IEHC 277 at [33]-[35].

<sup>46</sup> [2011] IEHC 277 at [39].

<sup>47</sup> See, for example, "IBEC Welcomes High Court Ruling on JLCs"

(<http://www.ibec.ie/IBEC/Press/PressPublicationsdoelib3.nsf/vPages/Newsroom-ibec-welcomes-high-court-ruling-on-jlcs-07-07-2011?OpenDocument>; visited 24 January 2012);

"Reforms to JLC System Do Not Go Far Enough" (<http://blog.isme.ie/competitiveness-2/reforms-to-jlc-system-do-not-go-far-enough/>; visited 24 January 2012).

<sup>48</sup> "UNITE Demands Emergency Legislation for Low Paid Workers after JLC Court Ruling" ([http://www.unitetheunion.org/regions/ireland/news\\_from\\_ireland/unite\\_calls\\_for\\_emergency\\_legi.aspx](http://www.unitetheunion.org/regions/ireland/news_from_ireland/unite_calls_for_emergency_legi.aspx); visited 24 January 2012).

<sup>49</sup> The Bill also proposes substantial reforms to the REA system; space precluded these being addressed in this article.

<sup>50</sup> The Minister has also announced plans, which do not require legislative amendment, to reduce the 13 JLCs currently in place to about half that number through a process of abolition or amalgamation (<http://www.djei.ie/press/2011/20110728a.htm>; visited 24 January 2012).

geographical demarcations, the need for continued regional representation, where it exists.

Section 12 of the Bill inserts a new section 42A into the 1946 Act, which allows for JLCs to set a basic adult rate and two additional higher rates relating to length of service in the sector or business. This represents a significant reduction in the number of different rates previously in place. New Section 42A(5) explicitly links subminimum rates under EROs with those under the National Minimum Wage Act 2000, in respect of employees aged under 18 years, first time job entrants, and employees undergoing training. New section 42A(7) provides that compensation for Sunday working will now be regulated by section 14 of the Organisation of Working Time Act 1997 and not set by EROs.

A number of measures in the Bill seek to address criticisms proffered by employer groups (though not, as noted above, universally accepted) that EROs impose excessive costs on business. So, JLCs will no longer set Sunday premium rates, or make orders covering pay or time-off from work in lieu of public holidays, payments in lieu of notice; or payments referable to a worker's redundancy (new section 42A(7)). The Minister has pledged to request the Labour Relations Commission to devise a new Code of Practice on Sunday Working to provide guidance to employers, employees and their representatives in sectors covered by EROs on arrangements that may be put in place to comply section 14 of the Organisation of Working Time Act 1997. The Code is to be given the status of a statutory instrument by the Minister.<sup>51</sup> An "inability to pay" mechanism, such as exists under the minimum wage legislation, will also be introduced. Section 14 of the Bill inserts a new section 48A into the 1946 Act, which sets out a detailed process by which individual employers can seek temporary derogation from the sector-level minimum pay and conditions set by EROs on grounds of financial difficulty. The maximum period of an exemption will be 24 months and it must be sought for a minimum of three months. Under new sections 48(7) and (8) an exemption can be sought where the employer has obtained the agreement of its workers or their representatives or, in the absence of agreement, where the employer has informed the workers of its precarious financial position and the Labour Court is satisfied that the employer cannot maintain the terms of the ERO, and compliance with its terms would result in considerable lay-offs or redundancies and adverse effects on the survival of the employer's business. The Court is also to have regard to whether granting an exemption would have an adverse effect on employment levels and distort competition in the sector to the detriment of employers not party to the particular application, and to the implications of granting an exemption for the long term sustainability of the employer's business (new section 48A(9)).

Finally, the Bill seeks to address the constitutional problems with the JLC system outlined in the *John Grace* decision, in particular, that Section 42 of the 1946 Act failed to prescribe sufficient "principles and policies" to govern the exercise of the powers conferred on JLCs. Section 12 of the Bill inserts a new section 42A into the 1946 Act, which lays down matters to which a JLC

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<sup>51</sup> *Ibid.* The Minister has also pledged that benefits in the nature of pay – including overtime – should be standardised across sectors either by means of a nationally agreed Social Partnership protocol or, failing that, a statutory Code of Practice.

must have regard when formulating proposals for an ERO to be put to the Labour Court. Under new section 42A(6) these include: the general level of wages in comparable sectors, including, in cases where enterprises in a given sector are in competition with enterprises outside the State, the general level of wages in comparable sectors in other relevant jurisdictions; the current national minimum hourly rate of pay applicable under the National Minimum Wage Act 2000 and the appropriateness of fixing a higher statutory minimum hourly rate of pay; and the terms of any relevant national agreement in force. The JLC must also consider the legitimate interests of employers and workers likely to be affected by the proposals, including:

- the legitimate financial and commercial interests of the employers in the sector in question;
- the desirability of agreeing and maintaining efficient and sustainable work practices appropriate to the sector in question;
- the desirability of agreeing and maintaining fair and sustainable minimum rates of remuneration appropriate to the sector in question;
- the desirability of maintaining harmonious industrial relations;
- the desirability of maintaining competitiveness; and
- the levels of employment and unemployment in the sector in question.<sup>52</sup>

Section 12 of the Bill inserts a new section 42B into the 1946 Act, which explicitly provides for the regulation of decision making procedures both by JLCs themselves, in particular the role of the Chairperson in facilitating agreement, and the Labour Court, including where a JLC cannot agree proposals to put to the Court. In such a case, the Court, in making a recommendation (to which the JLC Chairman must have regard in casting his vote in the event that the parties to the JLC cannot come to agreement) must consider factors such as any representations made to it, prevailing economic circumstances in the sector, and the remuneration and conditions of employment of workers in similar employment sectors. New section 42C introduces Parliamentary oversight into the ERO process. Following adoption of a proposal for an ERO by the Labour Court, the proposals will be forwarded to the Minister who shall either make an order giving effect to the proposals (laying the order before the Houses of the Oireachtas in the standard way) or shall refuse to make an order and shall advise the Labour Court in writing of the grounds for the refusal.

Finally, an alternative enforcement mechanism is provided for (inserted by section 13 of the Bill into the 1946 Act) under new section 45A, where, instead of going to the courts, employees or their trade unions with a complaint against an employer can bring the complaint to a Rights Commissioner within six months of the contravention. Section 13 of the Bill also inserts a new section 45E enabling the Minister to present a complaint to the Rights Commissioner in circumstances where a breach of the ERO has occurred and it is unreasonable to expect the employee to present a

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<sup>52</sup> The new section 42A(3) also provides mechanism for revoking or amending an ERO that has been in force for less than six months.

complaint. Such a complaint is to be treated in the same way as if it were a complaint from the employee.

The 2011 Bill, then, represents an attempt by the legislature to reconstitute the JLC system in a manner which seeks to adapt the system to contemporary labour market conditions and which insulates it from constitutional challenge. In the next section, observations on how successful this attempt is likely to be are outlined. The JLC case is also placed within the wider context of shifts in labour market regulation, at domestic and European Union level.

## **Now That the Chips are Down...Will the JLC System be Revived?**

The fact that the legislature has chosen to reconstitute the JLC system, rather than heed calls for its abolition, represents something of a departure from prevailing tendencies. It is submitted that at both national and EU level, a discernable regulatory trend can be identified in the area of employment and labour law, which is moving away, first, from prioritising the role of the social partners in negotiating and “policing” regulation of terms and conditions of employment and, secondly, moving towards the establishment of statutory minimum standards and away from bargained terms and conditions of employment. The introduction to this article outlined a number of developments by way of illustrating this point. However, whether the 2011 Bill, if and when enacted, will, in practice, buck this trend remains to be seen.

First, in a number of crucial ways, the Bill may well sanction an imposition of statutory minimum standards. In relation to payment for Sunday working, this is explicit, as the provisions of the Organisation of Working Time Act 1997 are to replace the bargained standards that existed prior to the *John Grace* decision. Implicitly, however, what emerges in terms of remuneration under the reconstituted JLC system may well approximate the provisions of the minimum wage legislation. The “principles and policies” to be considered by JLCs when formulating an ERO under new section 42A(6) are extremely restrictive, requiring, *inter alia*, a consideration of the appropriateness of fixing a minimum hourly rate of pay that is higher than the existing statutory minimum wage, and of wage levels in comparable sectors in other countries (an issue debated almost daily by economists in the media and academic publications on which it is deucedly difficult to gain consensus).<sup>53</sup> The Bill also provides for an ERO to establish a minimum rate of pay and no more than two higher rates, which are related to length of service in the sector or business, in order to address the argument that JLCs had previously set too many different rates of pay, which engendered complicity and confusion. While there is some merit in this argument, it does however, tend to ignore the reality that the fixing of pay levels by reference to skills and qualifications, as well as experience, is a common and long-standing feature of pay determination systems across Europe.

In addition, the “inability to pay” provisions, under which individual exemptions can be granted to employers (for up to two years) allowing them

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<sup>53</sup> See, for example, Duffy and Walsh, note 37, at sections 4 and 7.

to pay a rate not lower than the statutory minimum wage, may well undermine the entire ERO system, by creating an uneven playing field and allowing employers with exemptions to undercut their competitors. The Bill attempts to address this by providing that exemptions should only be granted where the employer has obtained the agreement of workers or where the Labour Court, having regard to the factors in new section 48A(9), outlined above, sanctions the exemption. However, in terms of employee agreement, there is clearly scope, particularly in difficult economic times, for employers to exert pressure on vulnerable employees, especially where these do not have the assistance of a trade union or where employers do not provide full information about the economic position of the business. The factors to which the Labour Court must have regard in sanctioning an exemption in the absence of employee agreement, again, may prove difficult to operate in practice (whether compliance with the terms of an ERO would have adverse effects on the survival of the employer's business, for example, or the implications of granting an exemption for the long term sustainability of the employer's business). It is clear, too, that where one exemption is granted, the Court's duty to consider possible distortions in competition in the sector in question, make the granting of *future* applications more likely.

Secondly, the Bill confers a wide discretion on the Minister to accept or reject a proposed ERO. The issue of the lack of Parliamentary supervision identified in both the *Burke* and *John Grace* decisions clearly needed to be addressed in the Bill, but the legislation does appear to go further than is necessary in relation to the powers granted to the Minister. It may have been preferable if the traditional deference shown to the Labour Court by the Superior Courts had been reflected in the legislation by giving the Minister an oversight role, rather than an outright veto.<sup>54</sup>

Finally, the Bill does make progress in relation to enforcement. Section 18 of the Bill amends the terms of Employment (Information) Act 1994, by requiring that the terms of an ERO must now be included in the written statement of the terms of employment given to a worker under that section. The section also allows for prompt rectification of errors in these terms, by means of allowing a labour inspector to give directions to the employer concerned (rather than pursuing the issue through the employment tribunal system, as at present). Crucially, the Bill allows for civil claims, through the employment tribunals, to be pursued, rather than relying on criminal prosecution or civil actions through the regular courts (although these options remain).

In terms of enforcement, however, the Bill does not – and, perhaps understandably, does not seek to – address a more fundamental concern. With the decline in trade union workplace coverage and collective dispute resolution, and the “explosion” in the volume of employment legislation over

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<sup>54</sup> “A very high degree of deference indeed needs to be applied to decisions which involve the exercise by a statutory body, such as the Labour Court, of an expertise which this (High) Court does not have” *Ashford Castle v SIPTU* [2007] 4 IR 70, *per* Clarke J, at 85. See also *Calor Teoranta v Mc Carthy* [2009] IEHC 139, where Clarke J noted that, while the High Court can scrutinise the extent to which the Labour Court considered all necessary matters and excluded from its consideration any matters that were not appropriate, it should not interfere with a legitimate and sustainable judgment of the facts based on a proper consideration of all relevant materials

the last 20 years or so,<sup>55</sup> there has been a huge increase in the numbers of individual claims pursued in front of employment tribunals. This has been accompanied by a “legalisation” of employment relations in terms of the adoption of court-like rules and procedures and the related cost and delay engendered by the involvement of lawyers in what was envisaged originally as a relatively informal, party-driven and party-controlled dispute resolution system.<sup>56</sup> The nettle of reform of the employment dispute resolution system has finally been grasped and the Minister has begun the process of revamping the system, via a wide-ranging project on *Employment Rights and Industrial Relations Streamlining*.<sup>57</sup> The outcomes of this are eagerly awaited.

For the purposes of this article, however, the objection remains that workers seeking to enforce rights under EROs, who by definition will be working in low-pay, low-skill employment, must pursue individual claims before increasingly legalistic and intimidating employment tribunals. This is a significant shift from the position where problems with compliance were historically dealt with by unions and employers via traditional industrial relations structures and procedures (negotiations, agreements, collective action, mediation via the Labour Court, etc). Indeed, one of the primary functions of trade unions has traditionally been to diffuse *individual* rights across memberships so that the outcome of a dispute does not end with one individual. Instead unions can be “an instrument in translating statute and case law into changed employment practice”.<sup>58</sup> Otherwise, in the absence of a class-action type procedure, even where cases are brought and won, the impact of the law is often confined to the individual. In the absence of fundamental reforms of Irish trade union recognition laws and collective bargaining (in both union and non-union contexts), and an attempt to restore or revive the collectivist ethos of the system for employment dispute resolution, this problem will remain.<sup>59</sup> Indeed, it is not at all clear that employers that refuse to recognise trade unions for bargaining purposes will simply accept the imposition of terms and conditions of employment (under EROs) negotiated by JLCs, of which trade unions are members. This may particularly be the case where union organisation in a sector is relatively weak. It remains to be seen whether controversies regarding the “representativeness” of the parties to an REA may yet seep their way into the JLC debate.<sup>60</sup>

Without such reform, a greater role, is demanded of, and played by, labour inspectorates as they take over many of the “policing” functions, formerly performed by the social partners. Curiously, the Bill is relatively silent in this regard in relation to the role of the National Employment Rights Authority (NERA). NERA had been active in recent times in pursuing

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<sup>55</sup> Brenda Daly and Michael Doherty, *Principles of Irish Employment Law* (Clarus Press, 2010), at [1-07].

<sup>56</sup> Doherty, note 9 at 83.

<sup>57</sup> See <http://www.djei.ie/employment/rights/erirproject.htm> (visited 24 January 2012).

<sup>58</sup> Linda Dickens, “Individual Statutory Employment Rights Since 1997: Constrained Expansion” (2002) 24(6) *Employee Relations* 619, at 633.

<sup>59</sup> Doherty, note 9, at 89-90.

<sup>60</sup> Duffy and Walsh, note 37, at 85-86. See also sections 5 and 7(6) of the 2011 Bill.

employers, through the criminal courts, for violations of ERO provisions.<sup>61</sup> The Authority retains this role under the 2011 Bill, notwithstanding the establishment of an alternative enforcement mechanism operating through the employment tribunals. Indeed, in the absence of enhanced institutional backing for increased social partner monitoring of labour market rules, the resourcing of the enforcement authority remains critical. A commitment under the *Towards 2016* social partnership agreement, under which the pledge to establish NERA was made, was that the number of labour inspectors would be trebled from 30 to 90. However, it has been reported that, because of the moratorium on recruitment and promotion in the public service announced in 2009, the number of labour inspectors has actually decreased since 2007 and that the commitment to employ 90 inspectors has not been met.<sup>62</sup> Thus, whether resources will be available for NERA to continue to enforce EROs remains an open question.

## Continental Drift: Posted Workers, the Court of Justice and Bargained Employment Standards

It is submitted here that developments in Ireland are perfectly consistent with general trends under EU law, which also militate against collective approaches to labour market regulation. In a line of judgments relating to the Posting of Workers Directive,<sup>63</sup> the Court of Justice of the European Union (CJEU) has insisted on adopting an interpretation of the directive's provisions that also concentrates on enforcing *legally* binding minima and reducing the scope for *collectively bargained* standards and social partner monitoring thereof. In a series of cases (commonly referred to as the "Laval Quartet") *Laval, Viking, Ruffert and Luxembourg*,<sup>64</sup> the Court has severely restricted the rights of trade unions (and Member States) to act in order to protect collective agreements in cases where the rights of free movement of services or establishment are involved. So, in *Laval*, the CJEU ruled that the blockage of a building site by Swedish unions in order to force a Latvian service provider to enter into negotiations on pay and sign a collective agreement was illegal under EU rules on the freedom to provide services under Article 56 TFEU (ex-Article 49 EC). The Court pointed out that the Posting of Workers Directive does not allow the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection (laid down in Article 3(1) of the Directive).<sup>65</sup> The Court

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<sup>61</sup> See, for example, NERA Quarterly Update (September 2010) available at: <http://www.employmentrights.ie/en/media/NERA%20Quarterly%20Update%20September%202010.pdf> (visited 23 January 2012).

<sup>62</sup> Daly and Doherty, note 55, at [2-62].

<sup>63</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L18/1.

<sup>64</sup> Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP* [2008] IRLR 14; Case C-346/06 *Ruffert v Land Niedersachsen* [2008] IRLR 467; and Case C-319/06 *Commission v Luxembourg* [2006] ECR I-8673.

<sup>65</sup> Article 3(1) refers to rules on (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) minimum rates of pay, including overtime rates but



stated that it would be a restriction on the free movement of services if service providers established in another Member State were forced into negotiations of unspecified duration with trade unions in the host Member State in order to ascertain minimum wage rates and to sign a collective agreement, the terms of which went beyond the minimum protection guaranteed by the Directive. This is because it would be liable to make it less attractive, or more difficult, for such undertakings to carry out work in the host Member State. Thus, while workers posted to another Member State were entitled to avail of the legally binding minimum wage in the host State, trade unions (and indeed employers) could not legally enforce any agreements guaranteeing a higher, negotiated “going” rate.

The Directive, in Article 3(10), allows Member States to apply to cross-border service providers terms and conditions of employment on matters other than those specified in Article 3(1) in the case of “public policy provisions” (as long as these are applied equally to domestic workers). In *Commission v Luxembourg*<sup>66</sup> the issue revolved around what constituted “public policy” under the Directive. Luxembourg had implemented the Directive in such a manner that considered virtually *all* “laws, regulations and administrative provisions and those resulting from collective agreements which have been declared universally applicable or an arbitration decision with a scope similar to that of universally applicable collective agreements” to constitute mandatory provisions falling under national public policy.<sup>67</sup> This included, for example, the requirement of an automatic adjustment to rates of pay to reflect changes in the cost of living. According to the ECJ, the public policy exception was a derogation from the fundamental freedom to provide services and, so, must be interpreted strictly and relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. As a result, Member States could not rely on the public policy exception in order to apply to undertakings posting staff on its territory the requirement relating to the automatic adjustment of wages, other than minimum wages, to reflect changes in the cost of living.

These cases have provoked much comment, as they seem to restrict the power of Member States and, particularly, trade unions to enforce against cross-border service providers *negotiated* terms and conditions of employment that exceed statutory minima<sup>68</sup> and where these refer to terms and conditions of employment in areas other than those specified under Article 3(1) (notice periods or grievance and disciplinary rules, for example).<sup>69</sup>

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excluding supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and (g) equality of treatment between men and women and other provisions on non-discrimination.

<sup>66</sup> [2006] ECR I-8673.

<sup>67</sup> *Ibid*, at paragraph 4.

<sup>68</sup> This is despite Article 3(7) of the Directive which states that provisions “shall not prevent application of terms and conditions of employment which are more favourable to workers”.

<sup>69</sup> See, for example, Claire Kilpatrick, “Laval’s Regulatory Conundrum: Collective Standard-Setting and the Court’s New Approach to Posted Workers” (2009) 34(6) *ELRev* 844; Simon Deakin, “The Labour Law Perspective: the Economic Implications of the Decisions” (2007-08)

Barnard has noted that this reflects the “single market approach” of the CJEU, which sees the application of national labour law by a host state as a barrier to the provision of services under Article 56 TFEU and therefore presumptively unlawful. This contrasts with the “labour law” perspective traditionally adopted by Ireland, the UK, and a number of other Member States, which seeks to apply national labour rules to all those working in the national territory in the name of equality, fairness and, crucially, good industrial relations<sup>70</sup> and which relies, to an appreciable extent, on monitoring by the social partners.

The decisions in the “Laval Quartet” were handed down prior to the coming into force of the Treaty of Lisbon, which grants binding legal status to the EU’s Charter of Fundamental Rights.<sup>71</sup> Article 28 of the Charter states:

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interests, to take collective action to defend their interests, including strike action.

It had been suggested that the legally binding status of Article 28, post-Lisbon, might encourage the CJEU to adopt a different approach to the protections to be afforded collective bargaining under EU law.<sup>72</sup> Recent judgments from the CJEU indicate this will not be the case. In *Commission v Germany*<sup>73</sup> at issue was whether a practice by which local authorities awarded contracts for pension services, without a call for tenders, on the basis of the selection criteria agreed under *collective agreements* violated EU public procurement directives.<sup>74</sup> The CJEU held Germany had infringed the EU public procurement rules and ruled that, in accordance with the public procurement Directives, a call for tender must be advertised at EU level. The CJEU held that:

...while it is true that the right to bargain collectively enjoys constitutional protection under the German Basic Law, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Law.

Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms

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10 CYELS 463; A.C.L. Davies, “One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ” (2008) 37(2) *ILJ* 126.

<sup>70</sup> Catherine Barnard, “The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law” (2009) 38(1) *Ind Law J* 122, at 123.

<sup>71</sup> Article 6 of Treaty on European Union (TEU).

<sup>72</sup> See Sonia Morano-Foadi and Stelios Andreadakis, “Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights” (2011) 17(5) *ELJ* 595.

<sup>73</sup> Case C-271/08, judgment of 15 July 2010.

<sup>74</sup> Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L209/1 and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L134/114.

protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement and be in accordance with the principle of proportionality.<sup>75</sup>

The Court concluded that the proportionality test had not been satisfied, and so the fundamental rights to bargain collectively, and to autonomy in collective bargaining, did not justify the effective non-application of the directives.

## Conclusion

This article began by instancing a series of developments, which have served to weaken the scope for collective regulation of the Irish labour market. The challenges to the JLC system, culminating in the *John Grace* decision in 2011, provide another chapter to this tale. The publication of the Industrial Relations Amendment Bill (No 3) 2011, which seeks to reconstitute the system, may provide a rare counterbalance to prevailing trends. As noted above, however, doubts exist as to whether the Bill will, in fact, successfully reinstate terms and conditions of employment, bargained by the social partners, that exceed the “floors” laid down in protective employment legislation. It seems as likely that a drift towards minimum standards will continue, and that the rights of workers in low-paid JLC sectors will need to be enforced by a stretched and under-resourced labour inspectorate.

It has been argued that the Irish situation, moreover, is in harmony with the approach taken by the CJEU to collectively bargained standards, where these interfere with fundamental market freedoms under the Treaties. The judgments in the “Laval Quartet” and subsequent cases have sparked much debate about the balance between economic and social rights under EU law. The Monti report of 2010 proposed two legislative initiatives to try and address the issues and concerns raised by trade unions and others about the status of collective bargaining rights under EU law.<sup>76</sup> First, a “concrete” measure, to clarify and improve the implementation of the Posting of Workers Directive and, secondly, a “normative” measure, to better coordinate the interaction between social rights and economic freedoms within the EU system.<sup>77</sup> The Commission is due to bring forward its legislative proposals in early 2012.

It is submitted here that a reversal of the shift to regulation of the labour market by way of statutory minima, which must be enforced by individual workers taking claims to employment tribunals, is required and that regulation based on bargained standards between employer and employee representative groups must be supported. The issues discussed in this article are, of course, hugely significant for workers, employers and other labour market actors. However, they also touch on fundamental questions about the

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<sup>75</sup> Case C-271/08, at paragraphs 44-45.

<sup>76</sup> Mario Monti, *A New Strategy for the Single Market- At the Service of Europe's Economy and Society* (Report to the European Commission, 9 May 2010); available at: [http://ec.europa.eu/internal\\_market/strategy/docs/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf) (visited 25 January 2012).

<sup>77</sup> *Ibid.*, at 70-72.

future direction of economy and society at both domestic and EU level. This view is based on a number of factors.

First, bargained standard setting is of particular pertinence to low-paid sectors where vulnerable workers tend to be concentrated. Such sectors are typically characterised by low levels of trade union organisation, and relatively high numbers of migrant workers, young people, and part-time and casual workers, with little or no individual bargaining power. These are precisely the sectors (retail, cleaning, hotels) covered by JLCs (and, indeed, with the addition of construction, the sectors in which posted workers tend to be congregated). As Duffy and Walsh note, for “unskilled workers in a large European labour market with free mobility of labour it is unlikely that the market mechanism will provide...adequate protection”.<sup>78</sup> Removal of the protections of a JLC system (which, recall, has traditionally provided minimum standards higher than legislative floors in terms of pay and working time and has provided for bargained benefits, such as sick pay, for which there exists no statutory provision) would be likely to have seriously detrimental social consequences for many already low-paid workers, and would disproportionately affect certain categories of workers, such as migrant workers and women. Workers in these sectors are unlikely to have the potential to bargain individually with employers and are, consequently, more amenable to succumbing to pressure to accept inferior working terms and conditions.

The situation might be otherwise were the option to have a trade union negotiate on their behalf open to such workers. However, given the extremely restrictive nature of Ireland’s trade union recognition laws, this opportunity is unlikely to arise.<sup>79</sup> It is noteworthy that the 2011 Bill does not take up the recommendation in the Duffy-Walsh report that individual employers, or groups of employers, could apply pay and conditions below those stipulated in an ERO, provided that they were agreed under a collective agreement arrived at through a process of collective bargaining, as defined by either Article 28 of the Charter of Fundamental Rights or under ILO conventions.<sup>80</sup> It has been suggested that this recommendation was not taken up due to fears of the consequences of introducing a statutory definition of “collective bargaining” into Irish law, which would replace the much-criticised Supreme Court definition in the *Ryanair* case,<sup>81</sup> and which could have ramifications beyond the JLC issue.<sup>82</sup>

Secondly, at EU level, it has been noted that the jurisprudence on collectively bargained standards “has the potential to alienate from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration”.<sup>83</sup> It is contended that it is not simply workers’ movements that are disconcerted by a potential “race to the bottom” in terms of working terms and

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<sup>78</sup> Duffy and Walsh, note 37, at 48.

<sup>79</sup> See Doherty, note 4.

<sup>80</sup> For example, under ILO Convention C98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1951).

<sup>81</sup> [2007] IESC 6; [2007] 4 IR 199.

<sup>82</sup> Colman Higgins, “Government Drops Collective Bargaining JLC Proposal” (2011) 30 *IRN* 12.

<sup>83</sup> Monti, note 76, at 68.

conditions and social protection, but that the current economic climate has engendered a much more widespread public suspicion of greater market integration measures at EU level, which for many, is “code for dismantling social rights protected at national level”.<sup>84</sup> In Ireland, the role played by EU institutions in the context of the economic crisis and, in particular, the terms of the economic support package has clearly damaged public support for the EU project.<sup>85</sup> It has been noted above that the terms of the support package have been central to the JLC reform agenda, by requiring a review of Irish wage-setting mechanisms. In an extraordinary intervention, however, in January 2012, it was announced that the “Troika” of the European Commission, IMF and European Central Bank, have sought an amendment of the 2011 Bill, to allow employers who get temporary “inability to pay” exemptions of less than two years to seek extensions of those exemptions, for up to two years. The requested change, in itself, is relatively minor, although it does represent support for a minimalist position in terms of what pay rates future JLCs will deliver, but the “micro-managing” of the details of the legislation is significant.<sup>86</sup> Such moves are unlikely to buttress waning support for EU institutions. Failure to protect the pay and conditions of vulnerable workers, similarly, is unlikely to contribute to social cohesion and popular support for national or international institutions in an era of crisis.

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<sup>84</sup> *Ibid*, at 69.

<sup>85</sup> See, for example, “Dislocated and Disillusioned” *The Irish Times*, 8 October 2011; “Our Position in EU is Awkward and Adversarial” *The Irish Examiner*, 30 December 2011.

<sup>86</sup> Colman Higgins, “Troika Delves into Detail of new ERO/REA Bill, as Changes Proposed” (2012) 4 *IRN* 22.