

**McGowan**  
**&**  
**Collective Bargaining in Ireland**

**A Lecture by**  
**John Hendy QC<sup>1</sup>**  
**At Trinity College, Dublin**  
**in conjunction with the**  
**Irish Congress of Trade Unions**  
**and**  
**Merchants' Quay Chambers**  
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On 9 May 2013 the Supreme Court delivered judgment in the case of *McGowan & others v The Labour Court, Ireland & another*,<sup>2</sup> a case on collective bargaining in Ireland. It struck down an important collective bargaining mechanism which had been in force for over 70 years. Its effect has been devastating for the Irish workers concerned, it is bad for the Irish economy and it has placed Ireland in breach of international law. Furthermore the judgment contains a number of major flaws. These are serious allegations and I hope to make them good.

In passing we should note that *McGowan* is the third in a trilogy of cases which have all but destroyed the Irish system of industrial relations which now needs to

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<sup>2</sup> [2013] IESC 21.

be rebuilt.<sup>3</sup> It is a curiosity that the courts, no doubt unconsciously, have achieved in Ireland precisely the strategy which we will later find has been applied by the Troika elsewhere in Europe. I will only deal with the earlier two cases in passing.

Part III of the Industrial Relations Act 1946 promoted voluntary collective bargaining in Ireland by providing a mechanism for registering, and thereby giving legal effect to, collective agreements at both sector and enterprise level, as appropriate. *McGowan* declared Part III constitutionally invalid<sup>4</sup>, with two consequences. First, all collective agreements previously registered as Registered Employment Agreements (REAs) under Part III of the 1946 Act no longer have any application beyond the subscribing parties and, even as between those parties, are not enforceable in law<sup>5</sup>; in consequence employers previously abiding by those collective agreements are now refusing to do so.<sup>6</sup> Secondly, any future system for legally-enforceable, sector-wide collective bargaining would have to impose significant limitations on the autonomy of the industrial partners and free collective bargaining by requiring that any agreement complied with state-determined policies and by reserving a power to refuse to register any agreement if not judged to be in conformity with those policies.<sup>7</sup>

### ***The McGowan Judgment***

The Supreme Court decided<sup>8</sup> that Part III of the 1946 Act (prior to its amendment by the 2012 Act) was unconstitutional because the power conferred on the

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<sup>3</sup> The others being *Ryanair v the Labour court* [2007] IESC 6 and *John Grace Fried Chicken Ltd & others v The Catering Joint Labour Committee & others* [2011] IEHC 277.

<sup>4</sup> *McGowan & ors*, para 32.

<sup>5</sup> *Statement from Minister Bruton re Registered Employment Agreements*, 27 June 2013.

<sup>6</sup> Of course, a collective agreement specifying particular terms and conditions of employment can be enforced by an individual worker if it is incorporated into his or her contract of employment but aspects of the collective agreement which provide for collective bargaining or dispute resolution as to subsequent changes are not “apt” for inclusion in a contract of employment and hence not enforceable by the worker (and not, in the usual case, by the union): *National Coal Board v National Union of Mineworkers* [1986] ICR 736; [1986] IRLR 439; *Malone v British Airways PLC* [2010] EWCA Civ 1225; [2011] ICR 125; [2011] IRLR 32.

<sup>7</sup> *McGowan & ors*, para 25; *John Grace Fried Chicken Ltd & others v The Catering Joint Labour Committee & others* [2011] IEHC 277, paras 24, 28 & 33.

<sup>8</sup> Given the tangled procedural history of the *McGowan* proceedings, there is a serious question as to whether it was appropriate to decide such fundamental issues on the application of parties of dubious standing in circumstances here the issues had not been properly canvassed below. The Court described the proceedings thus (paragraph 13): “... a District Court prosecution had been commenced against Camlin Limited for breach of the existing REA. On the 27th of May 2008 those proceedings were adjourned and a consultative case stated prepared for the High Court. The District Court proceedings and case stated did not raise, as they could not, any issue of the constitutional validity of Part III. Meanwhile, an application had been made to the Labour Court on the 22nd of May 2008 by, it was said, 500 contractors seeking a cancellation of the REA. Some procedural skirmishing took place and the Labour Court refused the applicant contractors’ request for an adjournment to await the outcome of the case stated proceedings. A large number of applicants then sought judicial review of the Labour Court decision and an injunction restraining further hearing. These proceedings (which were then known as the “Sullivan Proceedings” after the then first named plaintiff) were commenced, and leave to seek judicial review was granted on the 13th of June 2008 together with an interim injunction restraining a further hearing. However, on the 20th of October 2008 the injunction was lifted by O’Keeffe J. because, we are informed, of the unwillingness of the applicants to offer an undertaking as to damages, and also because of concerns about the constitution of the applicants. The proceedings nonetheless remained in being. Since there was now no injunction restraining the proceedings, the Labour Court proceeded with an eleven day hearing and on the 26th of February

representative parties in an industry or sector to make a collective agreement registered by the Labour Court was a ‘law making’ power.<sup>9</sup> By giving this remarkable description to the process of collective bargaining, it was possible for the Court to conclude that the Act was in conflict with Article 15.2.1 of the Irish Constitution of 1937 which provides that:

The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

The Court held that law making could not be delegated by the Oireachtas unless the latter had imposed:

sufficient limitation on the regulation making power granted by the statute to render that regulation no more than the filling in of gaps in a scheme established by the parent statute.<sup>10</sup>

Such limitation was not apparently to be found in the process of registration of an REA by the Labour Court.<sup>11</sup> The Oireachtas had thus, nearly 70 years before (and unnoticed since), crossed the boundary between “permissible subordinate

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2009 issued a determination which refused the initial application to vary the agreement by increasing the remuneration, but also refused the application made on behalf of the discontented contractors for a cancellation of the existing REA. Yet again the representatives of the contractors sought judicial review to challenge the decision refusing cancellation and a further set of proceedings (“the Bunclody Proceedings”) were commenced which ultimately were heard with these proceedings in the High Court. The respondents to these proceedings sought to clarify the identity of the multitude of applicants named, and that they were indeed electrical contractors and were not members of any body which was a party to the 1990 REA. Accordingly they raised this issue by way of particulars. This proved to be anything but a straight forward task. In the end the applicants’ response was not to provide particulars but to seek to reduce dramatically the number of named applicants. Even then, of the seven applicants remaining one was not an employer at the time of the institution of the proceedings and three had previously been members of organisations that were party to the REA. One further party, Camlin (which as already observed was the party to the case stated), had been struck off... In addition, passage of time and the economic downturn have had their own effect on the proceedings. The party to the case stated, Camlin Ltd., was struck off the register of companies for failing to make returns thus ending those proceedings. Similarly the Bunclody proceedings which were heard with these proceedings in the High Court were struck out in July 2012 in the Supreme Court following the appointment of a liquidator to the last remaining appellant in that case. The result is that what remains in this appeal is a far reduced number of applicants to the original Sullivan proceedings (now the McGowan proceedings) and which retain their original structure as a challenge to the Labour Court commencing a hearing even though in the event the hearing did proceed, and which became the subject of a separate challenge, which, itself although heard in conjunction with the Sullivan/McGowan proceedings, is not now before this court.”

<sup>9</sup> The ‘law-making’ which the Supreme Court had in mind was, arguably, the fact that compliance with an REA (and ERO) was a requirement of criminal law and enforceable by criminal prosecution, see paras 8 and 25, though para 30 suggests otherwise. If that aspect of the 1946 Act were to be removed so that REAs were enforceable only by civil action for breach of any contract of employment to which they applied, it is to be wondered whether Part III would necessarily remain unconstitutional.

<sup>10</sup> *McGowan*, para 25. Uncontroversially, this was “an assertion of a core democratic principle. Since all power comes from the People, the only body with power to make legislation binding the People, is the Oireachtas containing as it does the chosen representatives of the People” (*McGowan*, para 19).

<sup>11</sup> This was essentially the same reasons that the High Court had found the provisions of Part IV to be invalid in *John Grace Fried Chicken Ltd & others v The Catering Joint Labour Committee & others* [2011] IEHC 277 see below.

regulation, and the abdication, whether by delegation of otherwise, of the law-making authority conferred on [it] by the People, through the Constitution.”<sup>12</sup>

It is not for an English lawyer to argue the subtleties of Irish constitutional law.<sup>13</sup> But there are four points arising from the judgment I do wish to discuss with you. They are:

- (1) Historical precedents;
- (2) The obligations of International law;
- (3) The asserted uniqueness of the Irish legislation;
- (4) The benefits of collective bargaining.

In my conclusion I will touch on collective bargaining in Europe.

### **1. Historical precedents**

The Supreme Court prayed history in aid. The historical basis for the constitutional restriction on the delegation of such law-making power was the “uncompromising reassertion of the freedom from legislative control by the Imperial Parliament at Westminster of the new State.”<sup>14</sup>

But the Supreme Court’s appreciation of Irish history was curiously ill-informed. Whilst it recognised that Part IV of the Act could be traced back to the Trade Boards Act of 1909,<sup>15</sup> it asserted (at paragraph 7) that “it appears that Part III is unique to the Irish code of industrial relations and cannot be traced back to any pre-existing body of legislation.” We will come later to the claim that the legislative scheme was “unique to Ireland”.

The assertion that Part III had no pre-cursor was simply wrong. The predecessor of Part III of the 1946 Act was s.50 of the Conditions of Employment Act 1936.<sup>16</sup> And

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<sup>12</sup> *McGowan*, para 31. The need for some delegation of power in a modern sophisticated State has been recognised in Irish jurisprudence. The leading modern authority on this issue was the case of *Cityview Press v AnCo* [1980] IR 381 (referred to in the judgment in *McGowan*). In this case it was held that as long as the power delegated was to “give effect to principles and policies which are contained in the statute itself,” it was not an unauthorised delegation of parliamentary power (at 399). In *McGowan*, the Supreme Court held that Part III of the 1946 Act went beyond this principle. It found that the provisions for registration in Section 27(3) of the 1946 Act were not adequate to provide sufficient limitation on the regulation making power of the parties to an agreement (para 28), and refused to construe the provisions broadly to give it greater restrictive capacity (para 28). It adopted a strikingly narrow construction of both Article 15.2.1 and of Part III of the 1946 Act.

<sup>13</sup> Though it is to be observed that *McGowan*, relying on Article 15.2.2 to assert the core democratic principle that all legislation is made by the People for the People, paradoxically strikes down a piece of legislation enacted by the representatives of the people and supported by those representatives and their successors for nearly seven decades.

<sup>14</sup> *Laurentiu v. The Minister for Justice* [1999] 4 I.R. 26 at 83.

<sup>15</sup> Judgment, para.6.

<sup>16</sup> It is worth noting that 13 years later, the UK introduced not dissimilar enforcement mechanisms for industry-wide (even if restricted to a district) collective agreements in the shape of s.8 Terms and Conditions of

the long tentacles of history went further back than that. The Court was therefore in ignorance of the fact that the mechanism specified by Part III had been in existence at the time of the adoption of the Irish Constitution in 1937, a point to which I shall return in its historical context.

### ***A brief history of ... collective bargaining***

The history of collective bargaining in Ireland began whilst what is now the Republic of Ireland was part of the United Kingdom of Great Britain and Ireland. I don't need to tell this audience that the Irish Free State was formed in 1922 and that the Irish Constitution was adopted on 29 December 1937. On 18 April 1949 the Irish Republic was founded.

Collective bargaining is a nineteenth century term but it is a concept with a long history.<sup>17</sup> For most of that history collective bargaining has been conducted on a multi-employer basis across an industry though usually confined to a particular locality. Enterprise bargaining no doubt took place in parallel. But the idea that collective bargaining should be confined to a single enterprise is a very modern and, to previous generations of trade unionists and employers, a strange idea.

In some industries wages and certain conditions (e.g. holidays or hours) had been long settled on a local industry-wide basis without, of course, anything in the nature of collective bargaining. Since the Statute of Artificers in 1562, agricultural wages were set (usually for the county) by local magistrates, effectively on behalf of the local farmers. Agriculture was then the principal occupation for workers. In towns, wages and other conditions in many trades were set by guilds of masters - with or without the intervention of organised workers in the trade.

It is noticeable that the disputes identified by labour historians usually concerned a particular trade or industry, mostly on a localised basis. The demands made (whether of claim or of resistance) were not, generally, confined to an enterprise but were claims against the 'masters' in the trade in the locality.<sup>18</sup> The case of the *Journeyman-Tailors of Cambridge* in 1721 concerned a concerted demand for higher wages apparently aimed at all the employers of tailors in Cambridge.<sup>19</sup> The establishment of trade unions was almost invariably on this basis, see for example, the fledgling General Society of Labourers established by the Tolpuddle Martyrs in 1834 to maintain wage rates for agricultural workers employed by all farmers, at

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Employment Act 1959 - though registration of the agreement as a pre-condition was not required. The legislation was subsequently repealed.

<sup>17</sup> The phrase 'collective bargaining' was coined by Mrs Sidney Webb (Beatrice Potter) in *The Co-operative Movement in Great Britain*, 1891, and reiterated by both S and B Webb in *Industrial Democracy*, Longman, 1902 (at 173).

<sup>18</sup> See for example the description of disputes (and their resolutions) in the 18<sup>th</sup> century in CR Dobson, *Masters and Journeymen; A Prehistory of Industrial Relations in 1717-1800*, Croom Helm, 1980.

<sup>19</sup> *R v Journeyman-Tailors of Cambridge* (1721) 8 Modern 10; 88 E.R. 9.

least in Dorset.<sup>20</sup> The Combination Acts of 1799 and 1800 were intended to target, and were subsequently used, against combinations of workers in particular trades seeking minimum rates from all employers in the trade in the locality.<sup>21</sup> The 1800 (amendment) Act made provision (s.18) for arbitration of collective disputes between masters and workmen in manufacturing.

By the 1860s, it had become common for organisations of employers to set rates across an industry or at least in given localities in which a particular industry was found. The degree of organisation, of course, varied greatly between industries and localities. But it is clear that it was commonplace for employers in a trade in a locality to take the initiative in setting wage rates in concert so as to prevent undercutting on labour costs. Thus a case in 1855 involved spinning mill employers who bound themselves by a financial bond to employ workers only on certain conditions. The issue there was whether the bond was void as being in restraint of trade (it was).<sup>22</sup> In fact the restraint of trade cases brought against trade unions in the 19<sup>th</sup> century are illustrative of the across-employer nature of the industrial relations of the time. The leading case is *Hornby v Close*<sup>23</sup> in 1867 in which it was held that the objects of the Society of the United Order of Boilermakers and Iron Shipbuilders were not those of a friendly society but those of a trade union and hence in restraint of trade since they “included every combination by which men bind themselves not work except under certain conditions” for any employer in the trade.<sup>24</sup>

Thus it was that trade union activity in seeking to regulate the terms and conditions on which workers work became in 1871<sup>25</sup> and remains today (in Ireland and in the UK)<sup>26</sup> one of the defining legal features of a trade union.

Even where labour was plentiful the actions of trade unions could force employers to a common rate. The London dock strike of 1889 faced a unified trade union

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<sup>20</sup> They were convicted of taking an illegal oath: *R v Lovelass* (1834) 6 Carrington and Payne 596; 172 E.R. 1380.

<sup>21</sup> CR Dobson, *op cit*, 141 ff. Irish workers had successfully organised to resist earlier Irish versions of the Combination Act: CR Dobson, *op cit*, 140-141.

<sup>22</sup> *Hilton v Eckersley* (1855) 6 E&B 47.

<sup>23</sup> (1867) 19 Cox CC 393.

<sup>24</sup> Per Cockburn CJ at 158. Since those activities were examples of the way trade unions acted in restraint of trade, the Society was illegal and consequently no action lay to recover its funds misappropriated by a member of the Society.

<sup>25</sup> The Royal Commission on Trades Unions under Sir William Erle in 1871 led to the Trade Union Act 1871 which (s.23) defined a ‘trade union’ as: “such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade...”

<sup>26</sup> And restraint of trade is still a live weapon against trade unions: *Boddington v Lawson* [1994] ICR478 Ch D.

movement against some hundreds of dock employers and resulted in a common agreement (“the dockers’ tanner”) across the industry in that locality.<sup>27</sup>

This audience will not forget that the Dublin lockout of 1913, the ending of which you have just commemorated, was conducted by 400 employers in the Dublin Chamber of Commerce united by a desire, not to fix wages but, in the first place, to prevent the ITGWU taking hold across all the industries and workplaces represented and, in the second, to prevent the demands for better wages and conditions which would follow if the workers did sign up to the ITGWU.

In 1921 after a miners’ strike a national agreement establishing a national board and district boards to settle wage rates was reached by the Miners Federation of Great Britain (a federation of all the many area miners’ unions) and the Mining Association (the national organisation of mine-owners).<sup>28</sup>

### ***State intervention***

After sporadic voluntary efforts at local industry wide collective bargaining and dispute resolution machinery between representatives of the employers and the unions in the trade,<sup>29</sup> the State began to intervene to promote collective agreements in the shape of the Arbitration Act of 1872.<sup>30</sup> In 1888 the 21<sup>st</sup> Trade Union Congress held in Bradford passed a resolution seeking “the formation of joint boards composed equally of employers and workmen.” A Royal Commission on Labour set up in 1891 led to the Conciliation Act of 1896.<sup>31</sup> In 1891 too, the House of Commons passed the first *Fair Wages Resolution* which held that government contracts should stipulate “the payment of such wages as are generally accepted as current in each trade for competent workmen.” It was then evident, however, that in many industries there were no “generally accepted” rates.

In 1908 the House of Commons established a *Committee on Homework*<sup>32</sup> which proposed the establishment of “trade boards” (later known as “Wages Councils”

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<sup>27</sup> The matchwomen’s strike at Bryant and May in the previous year was unique not only because it involved only women but because it involved only one employer. See L Raw, *Striking a Light: The Truth About the Match Girls Strike and the Women Behind it*, Hambledon Continuum, 2009.

<sup>28</sup> It was breach of this agreement by wage cutting which in effect led to the miners’ strike which in turn led to the General Strike of 1926.

<sup>29</sup> Most notably by AJ Mundella in the hosiery trade of Nottingham beginning in 1860.

<sup>30</sup> Introduced by Mundella, by then an MP. This Act replaced the moribund Arbitration Act of 1824 (which had followed the arbitration provision of the Combination Amendment Act of 1800) and the Councils of Conciliation Act of 1867.

<sup>31</sup> The Act of 1896 established independent machinery for the settlement of industrial disputes. Such disputes by definition occurred in industries where trade unions were well organised and in which collective bargaining, to some degree, usually took place, usually on an industry (or at least a locality within an industry) basis. In 1908 the independent arbitrators, under that Act, were joined by Courts of Arbitration consisting of an independent chair, an employers’ representative and a workers’ representative. In 1911 an Industrial Council was established by the Board of Trade with a distinguished civil servant as chair and 13 representatives from the employers and the same from the trade union side. It had a short life but was a model for later developments.

<sup>32</sup> Cmd 246 of 1909.

which subsequently became the “joint labour committees” which promulgate Employment Regulation Orders under Part IV of the Industrial Relations Act of 1946).<sup>33</sup> The Trade Boards Bill was introduced in 1909 by the then President of the Board of Trade, Winston Churchill MP with minimal opposition.<sup>34</sup>

The importance of industry-wide enforcement to prevent undercutting provided an essential feature of the Trade Boards Act 1909 and its successors, including Part IV of the Industrial Relations Act 1946. The 1909 Act established four trade boards in tailoring, cardboard box manufacture, lace finishing and chain-making.<sup>35</sup> More significantly it empowered the Board of Trade to establish a trade board consisting of equal numbers of representatives of employers and workers together with additional independent representatives in any industry in which wage rates were “exceptionally low, as compared with that in other employments” (s.1(2)) and gave the board power to fix minimum wages by Order for the entire industry (s.4).

The state’s role under the Trade Boards Act 1909 was thus to establish a mechanism for collective bargaining about pay only in a small number trades which were not susceptible to conventional trade union organisation. Outside those trades, the extent of any collective bargaining was the product of trade custom, trade union pressure and local initiative, though the *Fair Wages Resolution* was a significant incentive.

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<sup>33</sup> The precedent of such trade boards had been established in the Australian State of Victoria in 1896. Sir Charles Dilke, every year from 1898, proposed a private member’s Bill in the House of Commons to establish their equivalent in the UK.

<sup>34</sup> Churchill declared: “It is a serious national evil that any class of His Majesty’s subjects should receive less than a living wage in return for their utmost exertions. It was formerly supposed that the working of the laws of supply and demand would naturally regulate or eliminate that evil. The first clear division which we make on the question to-day is between healthy and unhealthy conditions of bargaining. That is the first broad division which we make in the general statement that the laws of supply and demand will ultimately produce a fair price. Where in the great staple trades in the country you have a powerful organisation on both sides, where you have responsible leaders able to bind their constituents to their decision, where that organisation is conjoint with an automatic scale of wages or arrangements for avoiding a deadlock by means of arbitration, there you have a healthy bargaining which increases the competitive power of the industry, enforces a progressive standard of life and the productive scale, and continually weaves capital and labour more closely together. But where you have what we call sweated trades, you have no organisation, no parity of bargaining, the good employer is undercut by the bad, and the bad employer is undercut by the worst; the worker, whose whole livelihood depends upon the industry, is undersold by the worker who only takes the trade up as a second string, his feebleness and ignorance generally renders the worker an easy prey to the tyranny; of the masters and middle-men, only a step higher up the ladder than the worker, and held in the same relentless grip of forces – where those conditions prevail you have not a condition of progress, but a condition of progressive degeneration. Just as in the former the upward progress will be constant if nobody or no law gives a downward tendency, so it is that the degeneration will continue, and there is no reason why it should not continue in a sort of squalid welter for a period which compared with our brief lives is indefinite.” (Hansard HC vol 155, col 388, 28 April 1909).

<sup>35</sup> The identification of the first industries in which trade boards should be established was drawn from the Fifth Report (Cmd 146 of 1890) of the House of Lords *Select Committee on the Sweating System*, established in 1888 because of public concern over poverty wages in the “sweated” industries, largely because of their nature (home-working, out-working etc).

An overview of the situation outside the trade boards is described in three phases by I G Sharp in *Industrial Conciliation and Arbitration in Great Britain*.<sup>36</sup>

The first step was one of local negotiation, current during the last three decades of the nineteenth century. The characteristic institutions of that period were the local joint committees and the town or district conciliation and arbitration boards. These were concerned mainly with questions between individual ‘masters’ and their employees. At the end of the century the formation of district federations of local unions and employers’ associations initiated the second period dominated by county or area boards conducting more general negotiations as well as acting as courts of appeal from the local bodies. The establishment of area or county standards of wages and working conditions was the chief consideration of this second period. Finally, the development of national associations, which began before 1914 and which World War I fostered, produced the third stage in which the central organisations have drawn authority away from the localities and have placed negotiation, including formalised conciliation and arbitration, on a national footing. This has, in effect, reduced the joint bodies of the preceding period to the position of agents for the supervision of the local application of industry decisions. This position was reached very early in a few industries (e.g., railways and boot and shoe manufacture); in others (e.g. coal-mining) it had still to be fully realised at the start of World War II.

The stimulus of the First World War and the need for reconstruction led, in 1917, to the formation of the *Committee on Relations between Employers and Employed*, known as the “*Whitley Committee*” after its eminent chairman, JH Whitley. Set up by the Ministry of Reconstruction, its task was to “make and consider suggestions for securing a permanent improvement in the relations between employers and workmen”.<sup>37</sup> No doubt the painful memory of the human and material costs of the Dublin lock-out of 1913 and widespread strikes in Britain was a stimulus as well as a realisation that the simmering discontent with the Great War (leading to mutinies in Calais and Southampton) might lead to an outcome similar to that in Russia in October 1917, if concessions were not made.

The *Whitley Committee* produced five reports on aspects of industrial relations, with the first recommending that “the government should propose, without delay, to the various associations of employers and employed, the formation of Joint Standing Industrial Councils in each industry”.<sup>38</sup> These were subsequently known as Joint Industrial Committees (“JICs”). What became known as the REAs under the Industrial Relations Act of 1946 derive from this recommendation.

The *Whitley Committee* came close to, but fell just short of, recommending that collective agreements made by JICs should be made legally enforceable, noting that “it may be desirable at some later stage for the State to give the sanction of

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<sup>36</sup> Allen & Unwin, London, 1950, at p6.

<sup>37</sup> *Whitley Committee*, Final Report (1 July 1918), Cmd 9153 (1918), para 1.

<sup>38</sup> *Whitley Committee*, Interim Report on Joint Standing Industrial Councils (8 March 1917), Cmd 8606 (1917), para 6.

law to agreements made by the Councils, but the initiative in this direction should come from the Councils themselves”.<sup>39</sup>

For trades where “organisation is at present very weak or non-existent, the *Whitley Committee* recommended that, where trade boards did not already exist, they be established and that the remit of such boards be extended beyond merely setting minimum levels of pay to providing “a regular machinery for negotiation and decision on certain groups of questions dealt with in other circumstances by collective bargaining”.<sup>40</sup> This recommendation was implemented in the form of the Trade Boards Act 1918. Such wider issues, once agreed, were also enforced by means of a legally binding Order.

Therefore, from 1918 there were in effect two parallel systems of collective bargaining. In sectors where trade unions had already been able to organise effectively, whilst the creation of JICs was encouraged as a matter of policy, the State did not impose the fora in which collective bargaining should take place. Compulsory machinery for collective bargaining, through the mechanism of trade boards, was reserved for trades in which existing organisation was very weak or non-existent. In both cases, of course, the extent of collective bargaining and its substantive content was purely a matter for the industrial parties, save that in trade boards the independent members would intervene by way of conciliation, mediation or arbitration to resolve deadlock in the negotiations. This mirrored the conciliation, mediation and arbitration mechanisms (through third parties) adopted by many JICs.

The Trade Boards Acts were transposed into Irish legislation by the Adaptation of Enactments act 1922.<sup>41</sup> The period of the Cumann na nGaedhael government saw little activity in relation to the regulation of employment conditions, the exception being the Shop Hours (Drapery Trades Dublin) Act of 1925, and the Apprenticeship act of 1931. The latter Act established joint apprenticeship committees empowered to set apprenticeship wages in their district, the agreements of which were enforceable by Order of the Minister and displaced the provisions of the Trade Boards Acts, 1909 and 1918 in relation to matters dealt with by the committees.

From the 1920s, under the entirely voluntary collective bargaining system that continued to apply to sectors with effective union organisation, representative trade unions and employers in a number of sectors began to negotiate collectively for the entire trade or industry. This was most common in labour intensive sectors

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<sup>39</sup> *Whitley Committee*, final report, Cmd 9153, p2.

<sup>40</sup> *Whitley Committee*, Final Report, para 3; Second Report on Joint Standing Industrial Councils, Cmd 9002 (1918), para 11.

<sup>41</sup> B Shiels, ‘Minimum Wages,’ (1934) *Journal of the Statistical and Social Inquiry Society of Ireland*, Vol XV, 61-82 describes the operation of trade boards in Great Britain Northern Ireland and Irish Free State, [.

where labour costs are a high proportion of overall costs and where a large number of firms compete against each other for available work through competitive tender. These characteristics were, and remain, most prevalent in sectors such as construction, electrical contracting, contract cleaning and security services.<sup>42</sup>

Such sector-wide bargaining could be more or less formal. An example of a more formal model was the establishment in Ireland, in 1931, of a national JIC for the electrical contracting sector. This brought together representatives from both sides of the industry, including the Contracts Section of the ESB, the Association of Electrical Contractors, the Society of Irish Electrical Trades (Contracts Section), the Electrical Trades Union and the Irish Engineering Industrial and Electrical Trade Union. (The latter two subsequently became the constituents of one of the trade union parties to the *McGowan* case.) This Council met regularly to discuss and set wage rates, conditions of employment and training for the entire industry. The agreements reached were then applied across the entire sector through what was referred to as the “union rate”.<sup>43</sup>

The election of a Fianna Fáil government in 1932 brought a new phase of legislation, first manifested in the Conditions of Employment Act 1936, which provided by s.50, (in relation to wages payable for particular forms of “industrial work”) for the registration of collective agreements on wages made between employers and unions. Most significantly, for our purposes it provided for the universal application of such registered agreements and for their enforcement in the particular industry once the terms of the agreement had been registered and published in the Official Journal, *Iris Oifigiúil*.<sup>44</sup> This put into effect the proposal of the *Whitley Committee* referred to above.

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<sup>42</sup> *Report and Recommendations of Enquiry under section 38(2) of the Industrial Relations Act 1990 into a dispute between the TEEU and employers in the electrical contracting industry*, Peter Cassells and Finbar Flood, December 2009, section 3.

<sup>43</sup> *Ibid.*

<sup>44</sup> S.50(4) provided, amongst other things, that:

(4) Whenever an agreement is registered in the register, the following provisions shall, on and after the date on which such agreement is so registered and for so long thereafter as it continues to be binding on the parties thereto, have effect in relation to such agreement, that is to say:—

(a) such agreement shall be binding on every employer concerned in the form of industrial work in the area to which such agreement relates and on every worker or, where such agreement relates only to a class of workers, every worker in such class employed in the said form of industrial work in the said area;

(b) it shall not be lawful for any such employer to employ or pay any such worker or for any such worker to accept any employment or payment with or from any such employer at a rate of salary, wages, or other reward which is less than the rate provided by such agreement and applicable to such worker;

(c) if any such employer employs or pays any such worker in contravention of the next preceding paragraph of this sub-section, such employer shall be guilty of an offence under this section and if any such worker accepts any employment or payment in contravention of the said next preceding paragraph, such worker shall also be guilty of an offence under this section;

(d) subject to the provisions of the next following paragraph of this sub-section, every such worker shall notwithstanding any contract to the contrary, be entitled to demand from and be paid by and to recover from his employer, salary, wages, or other reward at the rate provided by such agreement and applicable to such worker;

### ***Ireland's common history***

This was not a unique Irish solution. Whilst its “imperial” roots have been noted above, sector wide collective bargaining had a global blossoming in the 1930s.<sup>45</sup> It was seen, in Europe, North America, and Australia, as a central component of the strategy of economic recovery from the Great Crash of 1929 and the Depression which followed in the 1930s.

In the UK the government’s decision to implement the Whitley report had had a remarkable immediate impact, with some 5 million workers being brought into some kind of joint wage regulation (either JICs or trade boards) between 1917 and 1921. But in the period of austerity from 1921 until the aftermath of the Great Depression, the system was allowed to decay and of the original 73 JICs, only 47 remained in existence by 1926.<sup>46</sup> But from 1934, however, the Ministry of Labour assumed a pro-active rôle so that its Annual Report for 1934 said that:

It has been the policy of the Department to take every opportunity of stimulating the establishment of joint voluntary machinery or of strengthening that already in existence. It cannot be doubted that the operation of lower conditions than those observed by no less successful and efficient employers creates a problem which is bound to become more prominent unless there is an increase in voluntary co-operation and in recognition of agreed standards.<sup>47</sup>

In other words, in mobilising to counter the great crash of 1929 and its consequences, it was necessary to stimulate collective bargaining machinery to put an end to the destructive race to the bottom that would impair economic recovery. In 1937 when the Ministry reported that:

In some industries the scope of existing machinery was extended, while in others, where no constitutional machinery existed, discussions took place under the auspices of the Department for the purpose of formulating proposals for the joint regulation of wages and working conditions’.<sup>48</sup>

During the World War II, the collective bargaining system was heavily relied upon to enhance Britain’s war effort with a legal mechanism which had the effect of enforcing collective agreements in an industry or locality against non-parties, so

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(e) nothing contained in this sub-section shall operate to prevent any such employer from employing or paying any such worker salary, wages or other reward at a rate greater or more beneficial to such worker than the rate provided by such agreement and applicable to such worker, or operate to prevent any such worker who is so employed at such greater or more, beneficial rate of salary, wages, or other reward from recovering from his employer salary, wages, or other reward at such greater or more beneficial rate.

<sup>45</sup> Though as far back as 1919 Article 165 of the German *Weimar Constitution* had made provision for workers and employees to regulate wages and working conditions (as well as to develop economic development “productive forces”) at enterprise, district and national levels.

<sup>46</sup> A figure which slipped to 20 by 1939, even though the latter were said to be ‘by far the largest and most important’: A Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (1985), p 297.

<sup>47</sup> Ministry of Labour, *Annual Report 1934*, Cmd 4861 (1935), p 74.

<sup>48</sup> Ministry of Labour, *Annual Report 1937*, Cmd 5717 (1938), p 63.

preventing undercutting.<sup>49</sup> This too was a legislative experience on which part III of the 1946 Act drew.

In 1936 France's Popular Front government established the right to bargain collectively<sup>50</sup> in the *Matignon Accords* which settled the general strike of that year. In the United States the *National Labor Relations Act* of 1935 was introduced to stimulate collective bargaining.<sup>51</sup> In Sweden the *Saltsjöben Agreement* was signed in 1938 cementing the consensus approach to collective bargaining and industrial dispute resolution which is the bedrock of the Nordic model and has preserved Sweden from the worst of the economic crisis of the last few years.

### ***The 1936 Act and the Constitution***

It is significant that the Conditions of Employment Act 1936 was passed before but within months of plebiscite adopting the Irish Constitution of 1937.<sup>52</sup> The drafting of both documents was overseen by the then Attorney General, Conor Maguire, later Chief Justice of Ireland from 1946-1961. It was never suggested either before the adoption of the Constitution or in the 10 years subsequently (i.e. until s.50 of the Act was replaced by Part III of the 1946 Act - see below) that there was any incompatibility between the 1936 Act and the Constitution.

### ***The 1946 Act***

It will be seen that by the 1930s a distinction was drawn between collective agreements in an industry which were enforceable throughout an industry once registered and published in *Iris Oifigiúil* and terms and conditions imposed by the Minister which had to be laid before the Oireachtas.

In the Irish and UK systems of industrial relations, collective agreements are not normally binding in law and there is a presumption that the parties to a collective agreement do not intend to enter into legal relations. Such agreements do not

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<sup>49</sup> The UK had industry-wide collective agreement enforcement mechanisms continuously between 1940 and 1980. The Conditions of Employment and National Arbitration Order 1305 of 1940 (effected by compulsory binding arbitration of disputes rather than enforcement of the duty 'upon all employers ... to observe recognised terms and conditions of employment (or terms and conditions not less favourable)'); Industrial Disputes Order 1376 of 1951 (compulsory arbitration continued but ban on strikes and lockouts lifted); s.8 Terms and Conditions of Employment Act 1959; Industrial Relations Act 1971; Schedule 11, Employment Protection Act 1975. Repeal occurred in 1980. Of course, and Wages Councils awards were enforceable as a matter of law from 1909 to 2013 when the last Wages Council was abolished.

<sup>50</sup> As well as the right to strike and the right to a 40-hour work week and paid holidays.

<sup>51</sup> Though the precedent had been laid in the railway industry in the *The Railway Labour Act* 1926 requiring railway companies to collectively bargain. See also the National Industrial Recovery Act of 1933 which made provision for a form of sector wide regulation of the US economy through 'codes' in which it was anticipated labor unions would play a part in negotiating. Although there were 546 such codes (which dealt with prices as well as wages). The NIRA was declared unconstitutional in 1934. The provisions of the Wagner Act re-enact right to organise provisions first contained in the NRA, but it is much inferior, thanks to the Supreme Court, see A J Badger, *FDR: The First Hundred Days*, 2008.

<sup>52</sup> The plebiscite was on 1 July 1937 and the Constitution formally came into force on 29 December 1937.

normally have normative effect and are binding on the parties in honour only and on others not at all.<sup>53</sup>

Consequently, outside the trade boards industries and the limited industries to which the Conditions of Employment Act 1936 applied, the effective implementation of sector-wide collective bargaining depended on the voluntary submission of all employers in the sector to the agreements concluded. Whilst it was in the interest of the majority of employers to capture and bind all the employers in the industry to prevent undercutting there was no legal means of doing so in most industries.

That was a significant weakness in the system, in particular because in sectors which are characterised by a large number of employers of various size and a highly mobile workforce, making collective bargaining at the level of each enterprise effectively impossible<sup>54</sup>. Therefore, in the absence of any mechanism to give legal effect to the agreements reached, sector-wide bargaining arrangements were ultimately unable to ensure full implementation of the collective agreements reached. In the event of undercutting amongst employers, trade unions were, in the absence of circumstances enabling industrial action, without effective means of implementing collective agreements and hence collective bargaining in those sectors could become futile. Undercutting undermined those who had agreed to be bound since the latter bore the competitive burden of higher labour costs.

That is precisely the weakness which was subsequently addressed by Part III of the 1946 Act, following the precedent of the Conditions of Employment Act 1936.

The 1946 Act was, in a sense, a consequence of the Second World War. During the war Ireland, though neutral, was severely affected in many ways. Under Emergency Powers legislation wages and prices were frozen in the Standstill Order of May 1941. On the conclusion of hostilities, a method was needed to manage, in an orderly way, the pent up wage demand in the economy since, notwithstanding the Standstill Order, the real value of wages had declined in comparison with prices. The 1946 Act was the result.

It was passed with little dissent and, on second reading (i.e. the principal debate) in the Dáil (the lower House) on 25 June 1946, there was no disagreement to the proposal that the terms of the collective agreements made by the JICs should be made binding by Order of the Labour Court across the relevant industry. The mechanism adopted was a slight modification of that introduced 10 years earlier in

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<sup>53</sup> Duffy and Walsh, *Report of Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms*, April 2011, para 3.16.

<sup>54</sup> *Ibid*, para 9.2.

the Conditions of Employment Act 1936. S.50 of that Act ceased to have effect, being superceded by the new Act.<sup>55</sup>

There was no suggestion in the debate that Part III of the 1946 Act conflicted with the Constitution of 1937 or that s.50 of the 1936 Act had been in conflict with the Constitution. This is significant because it is seen that this mechanism was adopted by the Oireachtas both before and after the adoption of the Constitution of Ireland.

It is also significant that the principle contained in Part III has been accepted and applied and the principle has not been amended<sup>56</sup> by the Oireachtas notwithstanding that nearly 70 years have passed since the 1946 Act - and nearly 80 years since the 1936 Act.

### ***REAs and EROs***

The 1946 Act formalised two mechanisms under which a general sectoral agreement made in respect of terms and conditions in a specified industry or sector of an industry could become legally enforceable<sup>57</sup>. Those two mechanisms both reflected and strengthened the two parallel systems that had been developing since the early twentieth century, as we have seen. The two mechanisms were:

*Employment Regulation Orders* (“EROs”) made by Joint Labour Committees under Part IV; and  
*Registered Employment Agreements* (“REAs”) made by Joint Industrial Councils under Part III.

Part IV empowered the Labour Court (itself created by Part II of the 1946 Act) to establish Joint Labour Committees (“JLCs”) in relation to particular classes, types or groups of workers and their employers<sup>58</sup>. These were the latest incarnation of the Trade Boards (which had become Wages Councils in the UK, the last one of which was abolished in 2013<sup>59</sup>). S.53 of the 1946 Act deemed all existing trade boards to be JLCs.<sup>60</sup> The Act stipulated certain conditions for the establishment of a new JLC and the application process to be followed<sup>61</sup> and prescribed that a JLC should consist of equal numbers of worker and employer representatives, an

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<sup>55</sup> S.8 and Schedule 1 of the 1946 Act repealed s.50 of the 1936 Act.

<sup>56</sup> Subsequent amendments (outlined below) have been as to procedural aspects, not to the principle.

<sup>57</sup> *McGowan & ors*, para 4.

<sup>58</sup> 1946 Act, s.35.

<sup>59</sup> And is the subject of an Application to the ECtHR by Unite, Appn

<sup>60</sup> In 1990 further provisions affecting REAs and EROs were enacted in the Industrial Relations Act 1990. In particular, section 46 of the 1990 Act provided that the Labour Court may exclude from the scope of an ERO an employment which was covered by an REA.

<sup>61</sup> 1946 Act, ss.36-39.

independent chairman and up to two further independent members<sup>62</sup>. Once established, the key functions of the JLC were to submit to the Labour Court proposals for fixing minimum rates of remuneration and/or for regulating the conditions of employment for all or any of the workers in within the remit of the JLC<sup>63</sup>, which if approved by the Labour Court<sup>64</sup> would then take the form of an ERO binding on all employers and workers covered<sup>65</sup>.

Part III of the 1946 Act, by contrast, was a mechanism built on the Conditions of Employment Act 10 years earlier and which implemented the suggestion by the *Whitley Committee* 30 years earlier that “it may be desirable at some later stage for the State to give the sanction of law to agreements made by the Councils, but the initiative in this direction should come from the Councils themselves”.<sup>66</sup>

Thus, section 27 of the 1946 Act allowed the parties to a collective agreement (referred to as an “employment agreement”) to take the initiative and apply to register their agreement with the Labour Court. If the Court was satisfied that the agreement met six criteria stipulated in section 27(3)<sup>67</sup> then, subject to certain procedural requirements<sup>68</sup>, it was required to register the agreement.<sup>69</sup> Amongst the 6 criteria most importantly were a requirement that the parties to the agreement were “substantially representative” of the workers and employers to be

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<sup>62</sup> 1946 Act, Second Schedule.

<sup>63</sup> 1946 Act, s.42.

<sup>64</sup> Pursuant to a process defined in s.43.

<sup>65</sup> 1946 Act, ss.44-45.

<sup>66</sup> *Whitley Committee*, final report, Cmd 9153, p2.

<sup>67</sup> The 6 criteria were:

- (a) that, in the case of an agreement to which there were only two parties, both parties consented to its registration and, where there were more than two parties, there was substantial agreement amongst the parties on both sides of the industry;
- (b) that the agreement applied to all workers of a particular class, type or group in respect of which the Labour Court was satisfied that it was “a normal and desirable practice” or otherwise expedient to have a separate agreement;
- (c) that the parties to the agreement were substantially representative of the workers and employers to which it was expressed to extend;
- (d) that the agreement was not intended to restrict unduly employment generally or the employment of workers of a particular class, type or group or to ensure or protect the retention in use of inefficient or unduly costly machinery or methods of working;
- (e) that the agreement provided that if a trade dispute occurs between workers and employers to whom it related, no strike or lock-out could take place until the dispute had been submitted for settlement in the manner specified in the agreement; and
- (f) that the agreement was in a form suitable for registration.

<sup>68</sup> 1946 Act, s.27(4)-(5).

<sup>69</sup> The conditions were judicially elaborated in *National Union of Security Employers v Labour Court* (1994) JISLL 97 by Flood J who held that the Labour Court must approach the question of satisfaction in the light of: (a) the fact that the overall purpose of the agreement is to create harmony within the industry as a whole, (b) the agreement is intended to bind all persons in the industry, (c) that sanctions will flow from the breach of the agreement by firms in the industry, (d) that the parties to the agreement are substantially representative of employers in the industry, and workers in the industry.

covered and that there was an agreed and binding method of dispute resolution before taking any strike action.<sup>70</sup>

The effect of registration of an employment agreement as an REA was twofold. Firstly, it made the agreement legally enforceable<sup>71</sup>; and secondly, it gave the agreement “normative effect” such that its terms became legal minimum terms of employment for workers covered by the agreement.<sup>72</sup>

Part III of the 1946 therefore provided an essential ingredient for effective collective bargaining that had been lacking in the purely voluntary model (outside trade boards and s.50 Conditions of Employment Act agreements): legal enforceability. That ingredient was important for both single-employer agreements and sector-wide agreements, both of which could be registered under the provisions of Part III. In relation to the latter, it was particularly important for the reasons already noted, relating to the nature of the sectors in which these agreements were generally adopted and the impracticability of collective bargaining at the level of individual employers<sup>73</sup>.

As at April 2011, there were 73 agreements registered with the Labour Court, covering just under 8% of private sector workers. The majority of these were single-employer agreements registered because the parties wanted them to be binding in law. However, though fewer in number, there were significant industry or sectoral agreements negotiated between employer bodies representative of an industry and the trade unions representing workers in the sector. There were 6 of these sectoral REAs: two in the construction sector and one each covering electrical, printing, overhead power line contracts and Dublin drapery, footwear and allied trades<sup>74</sup>. The principal agreements out of those six were those relating to the construction industry and electrical contracting.<sup>75</sup> At the time of the *McGowan* judgment there were 2 more agreements which had been concluded and were in the process of registration: in respect of the contract cleaning industry and the security industry. In the case of the construction and electrical contracting industries Part III of the 1946 Act was of particular importance because both:

are characterised by a large number of employers of various size, and a highly mobile workforce. They are also sectors which have had a relatively high level of trade union density. Both sectors are labour intensive and labour costs account for a high proportion of overall costs. Given the diversity of the industry it would be

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<sup>70</sup> This was thus a measure designed to improve industrial relations stability in the sectors covered, see *Duffy & Walsh, op cit.*, April 2011, para 9.4.

<sup>71</sup> The relevant mechanisms for enforcement were set out in section 32 of the 1946 Act and section 10 of the Industrial Relations Act 1969.

<sup>72</sup> See *Duffy & Walsh, op cit.*, April 2011, para 3.17. The principle is referred to in European labour law as the *erga omnes* principle.

<sup>73</sup> *Ibid.*, paras 9.2 & 9.20.

<sup>74</sup> *Statement from Minister Bruton re Registered Employment Agreements*, 27 June 2013.

<sup>75</sup> *Duffy & Walsh, op cit.*, April 2011, paras 3.18 & 4.4.

difficult if not impossible for normal collective bargaining to take place at the level of each enterprise.<sup>76</sup>

This is equally true of the cleaning and security industries.

The benefits of a sector-wide REA in such a context is not all on the side of the workers, and goes significantly beyond the advantage of the stability of a dispute resolution mechanism that avoids strike action, as we will discuss later.

### **Challenge, review and reform**

The onset of recession after 2007 provided the impetus for a series of challenges and reviews of the collective bargaining system under the 1946 Act.<sup>77</sup>

In relation to the REA governing the electrical contracting industry a campaign as begun by employers to cancel the REA for that sector.<sup>78</sup> This resulted in a general review of industrial relations in the electrical contracting industry carried out under section 38(2) of the Industrial Relations Act 1990 by Mr Peter Cassells and Mr Finbar Flood in 2009.<sup>79</sup> Their central conclusions (in section 4) were:

These negotiating and collective bargaining arrangements within the sector [i.e. the existing 1990 REA] appear to have worked well over many years and provided both employers and workers with a fair and, until recently, orderly system of fixing wages and conditions of employment in the industry.

Indeed the Labour Court has expressed the view that “the Electrical Contracting Industry has been a model of stable and cooperative industrial relations --- This has been achieved, to a significant extent, by the maintenance of effective negotiating structures in the form of the National Joint Industrial Council.”

.....

From our review of the operation of the system, and our discussions with the parties we have concluded that the arrangements for negotiating and collective bargaining are appropriate for this sector.

The current serious problems do not arise from the system itself but from the way in which the system has been operated. In particular, they arise from the grave economic and financial difficulties, the significant decline in levels of activity, the consequential fragmentation of the sector, the failure to update the agreement to reflect these realities and the method of enforcing the agreement.

Messrs Cassells and Flood therefore firmly endorsed the essential mechanism of sector-wide collective bargaining for the electrical construction industry - and also noted that both a majority of employers and the relevant union, the TEEU,

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<sup>76</sup> *Duffy & Walsh, op cit.*, April 2011, para 9.

<sup>77</sup> The rationale for which is described in M Doherty, “Battered or Fried? Regulation of working conditions and wage-setting after the *John Grace* decision, 2012 DULJ 98.

<sup>78</sup> *Duffy & Walsh*, para 12.4; *Cassells & Flood, op. cit.*, section 5.

<sup>79</sup> Peter Cassells and Finbar Flood, *Report and Recommendations of Enquiry under section 38(2) of the Industrial Relations Act 1990 into a dispute between the TEEU and employers in the electrical contracting industry*, December 2009

supported that mechanism<sup>80</sup> - but made a number of recommendations for the reform of the particular existing arrangements.

A year later, in the context of the National Recovery Plan announced by the Irish Government on 24 November 2010 (and as a requirement of the Memorandum of Understanding agreed with the Troika), a detailed review of both EROs under Part IV of the 1946 Act and REAs under Part III of that Act was commissioned. That review was carried out by Mr Kevin Duffy, Chairman of the Labour Court, and Mr Frank Walsh, Lecturer in the School of Economics, University College Dublin.<sup>81</sup> Their report was published in April 2011. Their central conclusion was:

In relation to the REA system we found that there is still broad support for the retention of a mechanism by which collective agreements can be made universally applicable across sectors. The current system is, however, in need of significant reform.<sup>82</sup>

They recommended the identification of clearer criteria to establish whether the parties to a collective agreement were to be regarded as “substantially representative” of the sector, together with various reforms to the procedures by which REAs may be cancelled or amended.<sup>83</sup>

Thus the two detailed reviews carried out on behalf of the State in recent years have both found strong support for the continuation of that system, both in the electrical contracting industry in particular and more generally, and both have strongly endorsed its continuation (subject to procedural reform).

Notwithstanding that, employers in the catering industry made a legal challenge to the ERO<sup>84</sup> in their industry. In *John Grace Fried Chicken v The Catering Joint Labour Committee* [2011] IEHC 277 Feeny J held that Part IV of the 1946 Act was invalid on the grounds subsequently upheld by the Supreme court in *McGowan* because the Act did not sufficiently define the principles and policies which should “guide, inform and direct” the JLC and Labour Court when making EROs and because the Oireachtas had not retained any power of supervision, revocation or cancellation in relation to EROs.<sup>85</sup>

In response both to the general review carried out by Messrs Duffy and Walsh, and to the High Court judgment in *John Grace Fried Chicken*, the Oireachtas passed

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<sup>80</sup> Cassells & Flood, *op. cit.*, section 5.

<sup>81</sup> Kevin Duffy and Frank Walsh, *Report of Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms*, April 2011.

<sup>82</sup> *Ibid.*, p3.

<sup>83</sup> *Ibid.*, Recommendations 11-15, pp6-7.

<sup>84</sup> Of 12 May 2008.

<sup>85</sup> *Ibid.*, paras 24, 28, 31 & 33-35. For an excellent discussion of the case see M Doherty, *op. cit.*, 2012 DULJ 98.

the Industrial Relations (Amendment) Act 2012.<sup>86</sup> The Act made changes to both the ERO regime under Part IV of the 1946 Act and to the REA regime under Part III, as a result of which the making of both forms of sector-wide agreement were subject to “much more elaborate principles and policies and indeed provisions for review and reconsideration by the Minister and the Oireachtas”<sup>87</sup>. In relation to REAs in particular, the new regime was to apply only to new, not to existing REAs.<sup>88</sup>

The *McGowan* judgment of course applied only to EROs made prior to the 2012 Act to which the reforms introduced by that Act did not apply.<sup>89</sup>

Lurking behind these developments was the *Ryanair* case. Though Article 40.6.1.iii of the Irish Constitution protects the right of freedom of association, trade unions in Ireland have no right to be recognised for bargaining purposes by an employer. Thus, while workers are free to join a trade union, they cannot insist their employer negotiate with that union regarding their pay and conditions. The 200 Supreme Court judgment in *Ryanair v The Labour Court*<sup>90</sup> considered the operation of the 2001 and 2004 Industrial Relations (Amendment) Acts, Acts which had been used, under the social partnership arrangements, as an indirect means of extending the effect of collective agreements to non-parties.<sup>91</sup> While explicitly recognising the purpose of that legislation was to avoid the danger that, in a non-unionised company, workers may be exploited and may have to submit to unfair terms and conditions of employment, Geoghegan J. at several points of his judgment reiterated the employer’s right to operate a non-unionised company, stating: “it is not in dispute that as a matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling it to do so.”<sup>92</sup>

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<sup>86</sup> See *McGowan & ors*, para 11.

<sup>87</sup> *Ibid.*

<sup>88</sup> See subsection 27(5A)(e) of the 1946 Act as inserted by section 5 of the 2012 Act. In relation to new REAs, a new subsection 27(3)(aa) added an additional requirement for registration that it must be “appropriate” for the agreement to be registered and subsection 27(3B) set out a new suite of 11 policy factors to which the Court was required to have regard when deciding whether it was “appropriate” to register an agreement. In addition, a new subsection 27(5A)(c) conferred a right on the Minister to block the registration of an agreement even where the Court had concluded that registration was appropriate. Moreover, a new subsection 27(5A)(d) provided an opportunity for either House of the Oireachtas to block the registration of an agreement, for any reason or none, even where approved as “appropriate” by both the Labour Court and the Minister.

<sup>89</sup> *McGowan*, para.11.

<sup>90</sup> [2007] IESC 6.

<sup>91</sup> Both the mechanism, caselaw and the *Ryanair* judgment are well described and referenced in M Doherty, “When you ain’t got nothin’ you ain’t got nothin’ to lose... Union recognition laws, voluntarism and the Anglo model” (2013) 42 ILJ 369.

<sup>92</sup> Prior to *Ryanair* the legislation permitted unionised members in firms where union recognition was denied to take a dispute to the Labour Court (if certain conditions were fulfilled). The Labour court could then make a binding order on the dispute. After *Ryanair*, which held that an in house staff association could be recognised for collective bargaining and so preclude an independent union taking a claim to the Labour Court, the blossoming of such in house bodies and a fear of victimisation on the part of individual trade union members taking a case has meant that the 2001-2004 mechanism is no longer fit for purpose and it is understood the government is about to propose new law on the subject.

## 2. *International law*

In its *McGowan* judgment, it is striking to note that the Supreme Court made no reference to the freedom of association provision of the Irish Constitution Article 40.6.1.iii which provides:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality: ... iii The right of the citizens to form associations and unions.

Yet, notwithstanding the *Ryanair* decision freedom of association and the right to form a trade union surely were relevant to a discussion of collective bargaining and might have provided (for reasons developed below) a perspective from which the law-making provision of the Constitution so heavily relied on might have been considered.

### (i) *The ECHR*

More striking still is that the Supreme Court made no reference to its obligation to construe the law so as to comply, so far as possible, with the European Convention on Human Rights (ECHR).

The European Convention on Human Rights Act 2003, which came into effect in December 2003 provides in s.2 that:

- (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
- (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.'

S.4 provides that:

Judicial notice shall be taken of the Convention provisions and of—

- (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,

...

and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

It is conceivable that the Supreme Court was not aware of the relevant ECHR provisions and judgments of the ECtHR. If it was aware, it ignored them.

It seems to me clear that with due regard to the strong interpretive obligation to construe legislation and any rule of law compatibly with the ECHR and in the absence of any contrary obligation *not* to construe the Constitution compatibly with the ECHR, it was open to the Court to conclude that the obvious parallel<sup>93</sup> between Article 40.6.1.iii and Article 11 should induce a court to conclude that the jurisprudence of the former should be consistent with the latter. This might have led to a different conclusion to that which the Supreme Court reached, one in conformity both with Ireland's international commitments, as well as upholding the democratic objectives of the Irish constitution.

Article 11 of the ECHR states as follows:

*Freedom of assembly and association*

- (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The words “for the protection of his interests” distinguish the ECHR Article from the parallel provision of the Irish Constitution but that is probably a distinction of form rather than substance. Under the ECHR those words are held to mean that members of a trade union have a right that the trade union should be able to strive to and be heard on behalf of its members in order to protect their interests.<sup>94</sup> The rights under Article 11 (“the conduct and development of which the Contracting States must both permit and make possible”<sup>95</sup>) are both those of the workers and of their trade unions.<sup>96</sup> The ECtHR has identified a number of *essential elements* of trade union freedom without which it would be ineffective and devoid of substance<sup>97</sup>. That list is not finite and is subject to evolution.<sup>98</sup> In ascertaining the content of those rights, and the permissible restrictions on them, the ECtHR takes into account other international instruments, even those not ratified by the State

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<sup>93</sup> See e.g. *Dublin colleges ASA v City of Dublin* (1982) 1 JSILL 73.

<sup>94</sup> *National Union of Belgian Police*, para 39; *Swedish Engine Drivers' Union v Sweden*, No. 5614/72, 6 February 1976 (1979-80)1 EHRR 617, para 40.

<sup>95</sup> *National Union of Belgian Police v Belgium* No. 4464/70, 27 October 1975 (1979-80) 1 EHRR 578 at paragraph 49.

<sup>96</sup> *Wilson, National Union of Journalists v United Kingdom* Nos. 30668/96, 30671/96, 30678/96 (2002) 35 EHRR 20 at paras 41-48.

<sup>97</sup> *Demir and Baykara v Turkey*, No. 34503/97, 12 November 2008 (GC); (2009) 48 E.H.R.R. 54; [2009] I.R.L.R. 766 at, para 145.

<sup>98</sup> *Demir*, para 146.

in question.<sup>99</sup> In fact Ireland has ratified all the relevant international treaties relating to collective bargaining.

Amongst the *essential elements* of the Article 11 right to trade union membership is the right to collective bargaining.<sup>100</sup> This was established by the landmark case of *Demir and Baykara v Turkey* in which the Grand Chamber held:

...the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of contracting states in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one's] interests” set forth in Article 11 of the Convention, it being understood that states remain free to organise their system so as, if appropriate, to grant special status to representative trade unions...<sup>101</sup>

The nature of the right to collective bargaining protected by Article 11 is elaborated in the international treaties to which the Grand Chamber in *Demir* had regard. These are discussed briefly below.

In addition to protecting individuals and unions against arbitrary interferences by public authorities with the rights protected, the State owes a positive obligation to secure the rights set out in Article 11.<sup>102</sup> The obligation on the State to secure and promote *effective* collective bargaining means that the State must ensure that mechanisms are in place which enable meaningful collective bargaining to take place at the appropriate level. It appears implicit that there must be mechanisms which give such collective bargaining legal force.<sup>103</sup> If employers (or indeed workers or trade unions) are free to repudiate the results of collective bargaining at will, the right is rendered merely theoretical or illusory.

Because the Convention is a system for the protection of human rights, it must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. While Contracting States are in principle free to decide what measures to take to comply with Article 11 (within a limited

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<sup>99</sup> see, especially, *Demir*, paras 60-86, in which the Grand Chamber rejected the argument of the Turkish government that it was impermissible to examine international instruments other than the Convention. On the contrary, this Court paid full regard to them.

<sup>100</sup> Other essential elements so far recognised by the Court are: the right to form and join a trade union (*Tüm Haber Sen v Turkey* (2008) 46 E.H.R.R. 19); the prohibition of closed-shop agreements (*Sørensen and Rasmussen v Denmark* (2008) 46 E.H.R.R. 29); the right of a trade union to seek to persuade an employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists v United Kingdom* Nos. 30668/96, 30671/96, 30678/96 (2002) 35 EHRR 20 at para 44); perhaps the right, subject to limitations, to appropriate facilities for workers' representatives to enable them to carry out their trade union functions effectively (*Sanchez Navajas v Spain* App No. 57442/00, 21 June 2001) and the right of a trade union to determine its own membership (*ASLEF v UK* Appn No. 11002/05; (2007) 45 E.H.R.R. 34; [2007] I.R.L.R. 361; 22 B.H.R.C. 140)

<sup>101</sup> *Demir*, para 154.

<sup>102</sup> See *Wilson* at para. 41, *Demir* at para. 110

<sup>103</sup> See for example ILO Recommendation R91 of 1951, clause 3.

margin of appreciation<sup>104</sup>), the restrictions must not be such as to make the right to trade union freedom devoid of substance.<sup>105</sup>

### ***McGowan assessed against Article 11(1)***

The central effect of the judgment of the Supreme Court in *McGowan* has been to dismantle, in a matter of months, an effective mechanism for sector-wide collective bargaining in sectors such as the construction and electrical contracting industries, which, according to the independent reports, had broad support on both sides of industry and had operated well for more than 60 years subject to modest reforms aimed primarily at strengthening the process for ensuring that the parties to registered sector-wide agreements were and remained genuinely representative).<sup>106</sup>

Indeed, Part III of the 1946 Act (subject to the proposed reforms) provided what might be described as a model mechanism for giving effect to voluntary representative collective bargaining in those sectors. It respected the autonomy of the representative industrial parties whilst making their bargaining effective by giving sector-wide legal effect to their agreements, without which any employer (including even the direct parties to the agreements themselves) would be free to repudiate the agreements at will.

The effect of the judgment in *McGowan* has been that all existing REAs are now of no legal effect. Not only can they be repudiated at will even by the direct parties to them, they have no wider effect at all beyond those parties. Those REAs are now being repudiated and terms and conditions formerly protected are being cut.<sup>107</sup> The Government's position appears to be that Part III of the 1946 Act has fallen away entirely, even as amended by the 2012 Act, so that no new REAs are possible.<sup>108</sup>

There is now no mechanism to which the trade unions representing workers in previously REA regulated sectors can have resort in order to engage in effective collective bargaining. In those industries, and others like them, collective bargaining at the level of the individual enterprise is not practicable because they are characterised by a large number of employers of various size and a highly mobile workforce.<sup>109</sup> Therefore, the appropriate form for *effective* collective bargaining in such industries is representative collective bargaining at the industry or sector level.

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<sup>104</sup> *Demir*, para 119.

<sup>105</sup> *Demir*, paras 66, 144.

<sup>106</sup> Duffy & Walsh, op cit. p. 3 (3<sup>rd</sup> bullet point) & paras 6.1, 5.6-5.9, 9.1, 9.4 & 9.9; and see also Cassells & Flood, op. cit., section 4.

<sup>107</sup> See the evidence filed in the ICTU Application to the ECtHR.

<sup>108</sup> Written Answers No. 149, 3 July 2013; letter from John Maher, Private Secretary to the Minister, dated 17 July 2013, in response to letter from David Begg, General Secretary of the ICTU, dated 30 May 2013.

<sup>109</sup> Duffy & Walsh, op cit., paras 9.2 & 9.20.

In the absence of any means of giving sector-wide legal effect to any agreement, the Posted Workers Directive (discussed below) leaves any employers who might otherwise voluntarily submit to the terms of a collective agreement highly vulnerable to competition from enterprises based in other EU Member States which can use lower-paid posted workers, thereby still further undermining the changes of any effective collective bargaining at a sector-wide level.

There is no JLC for those sectors under Part IV of the 1946 Act (and even if there were, the structure of JLCs does not allow representation by trade unions as such and, following the amendments introduced by the 2012 Act, it would have to comply with State-dictated policies and would be subject to State oversight).

Finally, the effect of *McGowan* is that any mechanism to give effect to sector-wide collective bargaining for the future would, in order to be valid, have to stipulate State-determined policies with which the industrial parties would be required to comply and would have to reserve substantial powers of veto and oversight to the Labour Court, the Minister or the Oireachtas (as was purportedly done by the amendments introduced by the 2012 Act). This would necessarily substantially infringe the principle of autonomy and independence of the parties which are essential features of the freedom to engage in collective bargaining.

Therefore, it appears that the current position in the Republic of Ireland, both in law and in practice, is in breach of Article 11(1) because of the abolition of the effective mechanism for collective bargaining in sectors such as the construction, electrical contracting, contract cleaning and security industries and the absence of any effective replacement for it.

### **Article 11(2)**

Whilst it might be argued that breach of Article 11(1) can be justified by reference to Article 11(2) this requires “compelling and convincing reasons.”<sup>110</sup> This must particularly be so where the right is an *essential element* of Article 11. Above all there are no compelling or convincing reasons why the current absence of an effective mechanism for collective bargaining could be said to be “necessary in a democratic society,” or why it was necessary in a democratic society to dismantle the system under Part III of the 1946 Act.<sup>111</sup> The lack of necessity is fortified by the two independent reviews.<sup>112</sup> Furthermore it would be difficult to explain why it is

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<sup>110</sup> *Demir* at paras 97, 119.

<sup>111</sup> Especially where the 1946 Act, like the 1936 Act before it, was passed by the democratically elected legislature, and has been sustained by that legislature for nearly 70 years. There was no dissent in the Dáil when the measure was debated. This democratic consensus was not abolished by a democratic reversal of legislative act but by the intervention of a Court which, far from acting to uphold fundamental rights was, on examination, striking them down.

<sup>112</sup> Duffy and Walsh found that the system had worked well for many years; had maintained industrial stability in the sectors covered; and had broad support on both sides of industry: p. 3 (3<sup>rd</sup> bullet point) & paras 6.1, 5.6-5.9,

necessary in a democratic society to require any system for representative collective bargaining at a sector-level to pay be subject to State policies, powers of veto and oversight.<sup>113</sup>

### ***Other international treaties***

The ECtHR has repeatedly had regard to the provisions of international treaties other than the ECHR, in construing the latter. This is notably the case in construing the right to trade union membership “for the protection of his interests” in Article 11.<sup>114</sup>

This international material includes: the European Social Charter of 1961,<sup>115</sup> the Charter of Fundamental Rights of the European Union,<sup>116</sup> and the Conventions of the International Labour Organisation (ILO).<sup>117</sup> The following legal instruments are therefore relevant.

### **(ii) *The European Social Charter***

Article 6 of the European Social Charter (“ESC”) (like the ECHR an instrument of the Council of Europe) and the meaning given to it by the European Committee of Social Rights (“ECSR”) was expressly relied on by the Court in *Demir*, even though Turkey had not ratified it.<sup>118</sup> Ireland has ratified Article 6 and all sub-clauses of it. That Article, entitled the right to bargain collectively, states as follows:

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9.1, 9.4 & 9.9 (and see also Cassells & Flood, *op. cit.*, section 4). The found, too, that it was “not accurate to suggest, as many of those advocating abolition of the system contend, that the body of primary employment rights legislation currently in force adequately covers matters dealt with by EROs and REAs” (Duffy & Walsh, para 6.6). In any event, as the ILO jurisprudence makes clear, collective bargaining “must be able to establish conditions of work more favourable than those envisaged in law: indeed, if this were not so, there would be no reason for engaging in collective bargaining” (2012 ILO *General Survey* – referred to fully below - para 199). The very point of the right to engage in collective bargaining under Article 11 is to seek to secure *better* terms and conditions of work than the minimum provided by law. Duffy & Walsh also found no evidence that REAs resulted in inflated or uncompetitive wages or overtime rates. On the contrary, it found “some evidence that, controlling for worker and firm characteristics, labour costs were higher and wage dispersion lower in firms implementing individual or firm level bargaining relative to firms adopting the national wage agreement or industry level agreements” (para 7.2). As to wage rigidity, they found that, whilst the available evidence “is no more than suggestive, it does not indicate any substantial difference in the degree of inflexibility across the different groups [of JLC/REA workers compared to others]” (para 10.3).

<sup>113</sup> In fact, the only element of Article 11(2) which appears fulfilled is that the breach of Article 11(1) is prescribed by law in the form of the *McGowan* judgment. None of the other conditions of Article 11(2) are met. Whilst it might be claimed that the alleged infringement is in order to protect the rights and freedoms of others, the right of an employer not to be bound by the terms of a representatively agreed collective bargain in the employer’s industry is not one protected or recognised by the ECHR. In those circumstances where one right (to collective bargaining) is protected by the Convention and the other not, only “indisputable imperatives” can justify interference with enjoyment of the Convention right: *Chassagnou v France* (2000) 29 EHRR 615, paragraph 113. There are no such indisputable imperatives here.

<sup>114</sup> The ECtHR considers this international material in accordance with principles identified in paras 65-78, 85, 86 of *Demir*.

<sup>115</sup> *Demir* at paras 45-51, 149.

<sup>116</sup> *Demir* at para 150.

<sup>117</sup> *Demir* at paras 37-51, 99-105 and 147-148.

<sup>118</sup> See judgment para. 149.

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

- (1) to promote joint consultation between workers and employers;
- (2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;

...

The obligations under Article 6 cannot be subject to any restrictions except as are prescribed by law and necessary in a democratic society for the aims set out in Article 31 of the Social Charter, which mirrors Article 11(2) of the ECHR.

The ECSR has recently emphasised the importance of the right to collective bargaining to the fulfilment of many other rights protected by the Charter:<sup>119</sup>

From a general point of view, the Committee considers that the exercise of the right to bargain collectively and the right to collective action, guaranteed by Article 6§§2 and 4 of the Charter, represents an essential basis for the fulfilment of other fundamental rights guaranteed by the Charter, including for example those relating to just conditions of work (Article 2), safe and healthy working conditions (Article 3), fair remuneration (Article 4), information and consultation (Article 21), participation in the determination and improvement of the working conditions and working environment (Article 22), protection in cases of termination of employment (Article 24), protection of the workers' claims in the event of the insolvency of their employer (Article 25), dignity at work (Article 26) workers' representatives protection in the undertaking and facilities to be accorded to them (Article 28), information and consultation in collective redundancy procedures (Article 29).

The ECSR considers that the obligation to consult (Article 6(1)) "must take place on several levels: national, regional/sectoral."<sup>120</sup> It follows that so must collective bargaining. The importance of ensuring that collective bargaining is made effective at the appropriate level is one which, as will be seen, is common to the jurisprudence of all of the relevant international instruments. Furthermore, The ECSR have made clear that:

... the Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreement if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other.<sup>121</sup>

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<sup>119</sup> *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden* Complaint No 85/2012, decision of 3 July 2013. para 109.

<sup>120</sup> *Digest of the Case Law of the European Committee of Social Rights*, 2008 at 54 in the commentary on Article 6(1); and see ESCR's *Conclusions I, Statement of Interpretation on Article 6§1* at pp.34-5.

<sup>121</sup> *Conclusions I, Statement of Interpretation on Article 6§2* at p.35.

It is only where:

adequate machinery for voluntary negotiation is set up spontaneously [that] the government in question is not, in the Committee's opinion, bound to intervene in the manner prescribed in this paragraph.<sup>122</sup>

After *McGowan* in sectors such as the construction, electrical contracting, contract cleaning and security industries there is no adequate machinery for voluntary negotiation and the State has failed in its obligation to intervene actively to promote collective agreement.

**(iii) ILO Conventions**

The ILO (founded in 1919 and the arm of the UN concerned with international labour standards) has three historic declarations of fundamental labour rights. All give prominence to collective bargaining.

The *Declaration of Philadelphia* 1944 (which is annexed to the Constitution of the ILO) provides for “the effective recognition of the right of collective bargaining.”<sup>123</sup>

The *ILO Declaration on the Fundamental Principles and Rights at Work* 1998 was adopted by the International Labour Conference (the supreme governing body of the ILO, of which Ireland is a member). The Conference stated that it:

1 Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, ...;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2 Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) ...

The *Declaration on Social Justice for a Fair Globalization* adopted by the International Labour Organisation on 10 June 2008 contains in the fourth of “the four equally important strategic objectives”<sup>124</sup> of the ILO the goal of:

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<sup>122</sup> Ibid.

<sup>123</sup> Para III(e).

<sup>124</sup> At A(iv).

respecting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting:

- that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives;...

Of the many Conventions adopted by the ILO, two have particular significance to collective bargaining. ILO Convention C98 on the Right to Organise and Collective bargaining has been ratified by 163 States, including the Republic of Ireland on 4 June 1955. It is in any event so fundamental that it is binding on States as a consequence of membership of the ILO without the need for specific ratification.

Article 4 provides as follows:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

ILO Convention C154 on Collective Bargaining has been ratified by 44 States but not by the Republic of Ireland. It elaborates the concept of collective bargaining in other ILO Conventions and generally in international law.

In addition, ILO Recommendation R91 of 1951 makes provision in clauses 3-5 as to what should be the effects of collective agreements and the extension of their application beyond the immediate parties:<sup>125</sup>

### *III Effects of Collective Agreements*

3. (1) Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.

(2) Stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.

(3) Stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.

(4) If effective observance of the provisions of collective agreements is secured by the parties thereto, the provisions of the preceding subparagraphs should not be regarded as calling for legislative measures.

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<sup>125</sup> Recommendations are not, of course, binding but are nevertheless indicative of the standards of democratic societies.

4. The stipulations of a collective agreement should apply to all workers of the classes concerned employed in the undertakings covered by the agreement unless the agreement specifically provides to the contrary.

#### *IV Extension of Collective Agreements*

5.(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

(2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions;

(a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;

(b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;

(c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

It is not clear whether the provisions of Part III of the 1946 Act provided the model for Recommendation 91 less than 5 years after the adoption of R91 but there can be no question but that Part III conformed to it.

The meaning and effect of ILO Conventions and Recommendations are elaborated by the Committee of Experts on the Application of Conventions and Recommendations (“CEACR”). The latest General Survey of the jurisprudence of the CEACR, *Report III(1B): Giving globalization a human face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* was published in July 2012 (the 2012 General Survey) and includes the following statements (emphasis in the original):

165. One of the ILO’s principal missions is to promote collective bargaining the world over. This mission was set out in 1944 in the Declaration of Philadelphia, which forms part of the ILO Constitution and recognizes the solemn obligation of the International Labour Organization “to further among the nations of the world programmes which will achieve [...] the effective recognition of the right of collective bargaining”. This principle was enshrined in Convention (No. 98), adopted five years later, which has since achieved almost universal endorsement in terms of ratification, bearing witness to the force of its principles in the majority of countries. In June 1998, the ILO took a further step with the adoption of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Declaration indicates that “all Members, even if they have not ratified the [fundamental] Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles

concerning the fundamental rights”. These principles include the effective recognition of the right to collective bargaining.

.....

198. Under the terms of the ILO Declaration on Fundamental Principles and Rights at Work, 1998, ***collective bargaining is a fundamental right accepted by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith.*** In this respect, *Article 4* of Convention No. 98 sets out two essential elements: action by the public authorities to promote collective bargaining; and the voluntary nature of negotiation, which implies the autonomy of the parties...

.....

*Free and voluntary negotiation and autonomy of the parties*

200. Under the terms of Article 4 of the Convention, collective bargaining must be free and voluntary and respect the principle of the autonomy of the parties. However, the public authorities are under the obligation to ensure its promotion. Interventions by the authorities which have the effect of cancelling or modifying the content of collective agreements freely concluded by the social partners would therefore be contrary to the principle of free and voluntary negotiation. The detailed regulation of negotiations by law would also infringe the autonomy of the parties. However, in the view of the Committee, machinery to support bargaining, such as information, conciliation, mediation or voluntary arbitration, is admissible. Such measures exist in many countries.

201. Prior approval by the authorities. One of the main restrictions on the principle of free and voluntary collective bargaining consists of the obligation to submit collective agreements for prior approval by the authorities (and particularly the administrative or budgetary authorities). In the view of the Committee, such provisions are only compatible with the Convention when they are confined to stipulating that approval may be refused if the agreement has a procedural flaw or does not conform to the minimum standards laid down by general labour legislation. On the other hand, if legislation allows the authorities full discretion to deny approval or stipulates that approval must be based on criteria such as compatibility with the general or economic policy of the government, or official directives on wages and conditions of employment, it in fact makes the entry into force of the agreement subject to prior approval, which is in violation of the principle of the autonomy of the parties. In such cases, the Committee pays great attention to evaluating the consequences of provisions which authorize in general terms the evaluation, or even cancellation by the authorities of collective agreements for reasons related to the protection of the public interest or similar concepts (“public order”, “morals”, the “economic interests of the nation”, etc.), which are liable in principle to give rise to problems of compatibility with the Convention. ...

.....

*Level of collective bargaining*

222. ... On various occasions, the Committee has recalled the need to ensure that collective bargaining is possible at all levels, both at the national level, and at the enterprise level. It must also be possible for federations and confederations...

.....

*Extension of collective agreements*

245. The Collective Agreements Recommendation, 1951 (No. 91), indicates that, where appropriate, having regard to established collective bargaining practice, “measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.” National laws or regulations may make the extension of the collective agreement subject to the following, among other, conditions: (i) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative; (ii) that, as a general rule, the request for extension of the agreement shall be made by one or more organizations of workers or employers who are parties to the agreement; and (iii) that the employers and workers to whom the agreement would be made applicable should be given an opportunity to submit their observations. The Committee considers that the extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of Convention No. 98. It observes that such measures are envisaged in several countries.

In the light of the above it appears that Ireland is, as a consequence of *McGowan*, in breach of its obligations under Article 4 of Convention C98.<sup>126</sup> It will be of no surprise to learn that the ILO Committee on Freedom of Association has already expressed criticism of the Supreme Court judgment in the *Ryanair v The Labour Court* case.<sup>127</sup> Whilst irresponsible States may ignore the ILO with apparent impunity, given that the ILO jurisprudence is considered so significant by the ECtHR in its approach to Article 11 of the ECHR, such a State is at risk of more formidable sanctions from the Council of Europe.

#### **(iv) European Union law**

The law of the European Union both recognises the right to engage in effective collective bargaining as a fundamental social right and positively encourages the extension of collective agreements concluded by representative parties to cover industries, sectors or regions, whilst respecting the autonomy of those parties.

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<sup>126</sup> It can be said that the very features of the REA scheme which *McGowan* held were in breach of the Constitution were those which the ILO required to be protected: (i) a mechanism for sectoral collective bargains to be effective in sectors such as the construction, electrical contracting, contract cleaning and security industries where collective bargaining at the level of individual enterprises is impractical; (ii) in accordance with clause 5(2)(a) of Recommendation R91 that, in order to secure registration, the parties to the agreement in question must be substantially representative of the sector as a whole (and indeed the procedural requirements in sub-clauses 5(2)(b) and (c) of that Recommendation, made in 1951, might almost have been lifted from the 1946 Act); and (iii) having thereby established a mechanism to promote and recognise effective representative collective bargaining a sectoral level, it preserved the crucial autonomy of the representative industrial parties by not imposing any straightjacket of policies, principles or constraints on the substance of collective bargains reached with which the parties were required to comply and by limiting the grounds on which registration could be refused to, in effect, verifying the representative capacity of the parties and ensuring that there was no procedural flaw (see paragraph 201 of the 2012 *General Survey*).

<sup>127</sup> 2012, 363<sup>rd</sup> Report of the ILO Committee on Freedom of Association.

The fundamental right to collective bargaining is found in Article 28 of the Charter of Fundamental Rights of the European Union (to which Grand Chamber referred in *Demir*<sup>128</sup>) which provides:<sup>129</sup>

*Right of collective bargaining and action*

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.<sup>130</sup>

Article 52 of the Charter is also relevant, providing that insofar as the Charter contains rights which *correspond* to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention” (but that is not prevent to prevent EU law providing more extensive protection). Indeed, by Article 6(3) of the Consolidated Version of the Treaty on European Union, the rights guaranteed by the ECHR “shall constitute general principles of the Union’s law.” The Charter now “has the same legal value as the [EU] Treaties” by virtue of Article 6(1) of that Treaty.<sup>131</sup>

The Court of Justice of the European Union (“CJEU”) has recognised the special place of collective bargaining in EU law which requires it to be exempt from the requirements of anti-competition provisions which would otherwise render it unlawful (by operating as a price fixing cartel in the labour market): the *Albany* cases.<sup>132</sup>

Article 152 of the TFEU recognises and promotes the role of the social partners at EU level and is to facilitate dialogue between the social partners. Article 155 promotes EU level agreements (which necessarily bind those covered by but not a

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<sup>128</sup> At paras 105, 150.

<sup>129</sup> According to the *Explanations Relating to the Charter of Fundamental Rights* (2007/C 303/02), Article 28 Article 28 is based on Article 6 of the Council of Europe’s European Social Charter and points 12-14 of the EU Community Charter of the Fundamental Social Rights of Workers, 1989 (referred to in Article 151 of the Treaty on the Functioning of the EU). Point 12 of the latter Charter protects the right to collective bargaining.

<sup>130</sup> Article 12(1) is also material, providing that: “Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.” Plainly this Article corresponds to Article 11 of the European Convention from which it is drawn. That this is so is set out in the *Explanations Relating to the Charter of Fundamental Rights*. The right to collective bargaining in Article 28 appeared to be ignored in *Alemo-Herron v Parkwood Leisure Ltd*, Case C-426/11 [2013] ICR 1116; [2013] IRLR 744 where one so-called fundamental right, that to conduct a business (article 16), was used to defeat the fundamental right to collective bargaining (Article 28).

<sup>131</sup> The supremacy to be attached to provisions of the Charter was recently reinforced by the CJEU Grand Chamber in *European Commission v Otis NV* (C-199/11) [2013] 4 C.M.L.R. 4 at paras 37-47.

<sup>132</sup> *Albany International v. Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96), [1999] E.C.R. I-5751; [2000] 4 C.M.L.R. 446; see also Joined Cases *Brentjens' Handelsonderneming v. Stichting Bedrijfspensioenfonds Voor de Handel in Bouwmaterialen*: (C 115-117/97), [1999] E.C.R. I-6025; [2000] 4 C.M.L.R. 566 ; and *Maatschappij Drijvende Bokken v. Stichting Pensioenfonds Voor de Vervoer- En Havenbedrijven* (Case C-219/97), [1999] E.C.R. I-6121; [2000] 4 C.M.L.R. 599.

party to them). These can be effected by contractually binding agreement or by a Council Decision.<sup>133</sup>

EU law regularly permits the use of collective agreements to bring member States into compliance with EU Directives. For example, both Council Directive 2000/43/EC (the *Race Equality Directive*) and Council Directive 2000/78/EC (the *Employment Equality Directive*) provide that member states “may entrust the social partners, at their joint request, with the implementation of this Directive as regards provisions concerning collective agreements.”<sup>134</sup> The *Working Time Directive*, states that derogations to the provisions on daily rest, rest breaks and weekly rest may be adopted by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent protection.<sup>135</sup> Thus the duration and conditions for granting rest breaks if the working day lasts longer than 6 hours “shall be laid down in collective agreements or agreements between the two sides of industry or, *failing that*, by national legislation” (emphasis added).<sup>136</sup> Implementation of Directives by means of national level collective agreements is confirmed by Article 155(2) of the EU Treaty (TEU).

There are other examples of the centrality of collective bargaining to the implementation of EU labour law standards in Member States. The *Works Council Directive* specifically delegates the duty to define the operation of the Works Council to negotiations between management and representatives of the employees. This ‘special negotiating body’ also has the duty to negotiate an agreement on the arrangements for implementing a procedure for the information and consultation of employees.<sup>137</sup>

EU law recognises collective agreements which bind non-parties and it regards them as legitimate. This is no surprise since such agreements are commonplace throughout most of Europe. They are known by European lawyers as *erga omnes* agreements.

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<sup>133</sup> EU Directives 97/81/EC on *Part-time Workers* 97/81/EC of 15 December 1997 and EU Directive 96/34/EC on *Parental Leave* 96/34/EC of 3 June 1996, are examples of the latter. EU wide collective agreements effective by binding contract have not yet been achieved.

<sup>134</sup> Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000/43, Article 16; Council Directive 2000/78, Article 18. Other examples are found in the Council Directive on proof of the employment contract 91/533/EEC and the Council Directive on young workers 94/33/EC.

<sup>135</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Article 17; and see Article 19.

<sup>136</sup> Article 4.

<sup>137</sup> Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), Article 5.

Thus, in the context of workers from one EU State working in another, the CJEU in *Rush Portuguesa* held that:<sup>138</sup>

[EU] law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does [EU] law prohibit Member States from enforcing those rules by appropriate means.

Though the court was not dealing directly with the legitimacy of *erga omnes* agreements (and subsequent judgments have regulated the conditions in which legislation and agreements may apply to workers from one EU State working in another), the point remains that the Court clearly considered that if the conditions did not infringe (three of the four) founding principles of the EU Treaties, freedom of movement, freedom to provide services and freedom of establishment, there is nothing illicit in an *erga omnes* agreement.

The *Posted Workers Directive*<sup>139</sup>, in requiring Member States to guarantee to workers posted from other Member States the same minimum terms and conditions of employment that apply to workers ordinarily based in their territory, not only gives special recognition to collective agreements that apply to sectors or regions, but also provides an additional mechanism for Member States to extend representative collective agreements not already recognised under domestic law in that way. Thus Article 3(1) of the Directive requires Member States to:

.... guarantee workers posted to their territory the terms and conditions of employment covering [various stipulated matters] which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex...

Article 3(8) defines the collective agreements that may be relied on as:

Collective agreements or arbitration awards which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

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<sup>138</sup> Case C-113/89, [1990] ECR I-141, para 18.

<sup>139</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.

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and
- are required to fulfil such obligations with the same effects.

Therefore, the combined effect of paragraphs (3) and (8) of Article 3 is that, where the domestic law of a Member State already gives legal effect to a sector-wide or regional collective agreement, then the terms of that agreement will also extend to posted workers. But even where the domestic law of a Member State does not already give such effect to collective agreements, when implementing the Directive, the Member State may choose to rely on representative sectoral collective agreements, provided in practice national undertakings are required to fulfil the same obligations as posting undertakings.<sup>140</sup>

Collective agreements which are not universal in their application (to the sector) cannot be enforced against the employer of posted workers: *Rüffert v Land Niedersachsen*.<sup>141</sup> The centrality of the *erga omnes* collective agreement in EU law is thus evident. It was because Sweden had not taken advantage of the requirement in Article 3(8) that the collective agreement applied (in the construction sector) 'throughout national territory' that it was legally impermissible for the construction union to blockade the building site in furtherance of its demand for enterprise-level collective bargaining on behalf of posted workers in *Laval v Byggnads*.<sup>142</sup> This was because (so the CJEU held) such industrial action would constitute a disproportionate interference with the rights of the employer posting the workers to enjoy the principle of free movement of services<sup>143</sup>.

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<sup>140</sup> And note that the proportion of relevant workers covered by the agreement before it is declared to be universal is irrelevant: *STX Norway Offshore AS v Norway*, Case E-2/11, EFTA Court, 23 January 2012, para 105.

<sup>141</sup> Case C-346/06, [2008] ECR I-1989, paras 26 and 31; and see *Commission v Luxembourg*, Case C-319/06 [2008] ECR I-4323; and *Commission v Germany*, Case C-271/08 [2011] All ER (EC) 912.

<sup>142</sup> Case C-341/05 [2007] ECR I-11767; [2008] 2 CMLR 9.

<sup>143</sup> *Ibid.*, paras 90-111.

The *Laval* decision has been heavily criticised in academic circles and the requirement that a collective agreement must be universal before industrial action so long as proportionate) may legitimately be taken to enforce it (in a cross-border situation) is plainly inconsistent with the jurisprudence of the European Committee on Social Rights.<sup>144</sup>

For present purposes, the significance of the judgment of the CJEU in *Laval* is that, unless a sectoral collective agreement has universal application in the particular industry, a union may lose the right to take industrial action against employers (and workers) from another Member State where those workers receive inferior terms and conditions to those provided in the collective agreement. Consequently, undertakings which have signed up to such a less-than-universal collective agreement will find themselves at a serious competitive disadvantage in the face of competition from undertakings based in other Member States able to use posted workers on inferior wages, terms and conditions.

That, in turn, will inevitably act as a deterrent against purely voluntary sectoral collective bargaining, particularly in industries that do face significant competition from undertakings based in other Member States, of which the construction, electrical contracting, contract cleaning and security industries are paradigm examples.

It was precisely this problem which led Messrs Duffy and Walsh to conclude, in their detailed review of the operation of REAs that<sup>145</sup>

the absence of industry wide agreement having universal application in sectors such as construction and electrical contracting would undermine collective bargaining at either a national or local level as employers who concluded collective agreements providing terms in excess of statutory minimum terms would be seriously disadvantaged in the face of external competition in particular.

This was an important factor in their recommendation in favour of retaining REAs.

In the context of EU law it may be said, at the very least, that *McGowan*, in invalidating the registration of sectoral collective agreements cuts against the grain of the preferred approach in EU law. The fact that the Supreme Court did not even refer to EU law is remarkable.

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<sup>144</sup> See *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden* Complaint No 85/2012, decision of 3 July 2013.

<sup>145</sup> *Report of Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms*, April 2011, para 9.8.

### 3. *The Uniqueness of the Irish model*

The Supreme Court held<sup>146</sup> that “it appears that Part III is unique to the Irish Code of industrial relations.” The holding was unwarranted. One might have thought that both evidence and argument might have been required to found the proposition that Part III of the 1946 was unique in Europe or to employ that proposition to any degree as a justification in part for its abolition.

As we have seen, the ECtHR in construing Article 11, takes into account the practice of other European States<sup>147</sup> and the common recognition across the vast majority of European States of the right to collective bargaining was one of the factors which led it to reverse previous case-law to hold, in *Demir*, that the right to collective bargaining was an essential element of that Article.<sup>148</sup>

We have already observed above that aspects of EU legislation and case-law, presuppose the legitimacy of binding sector-wide collective agreements and that such agreements whether at national or EU level are regarded as consistent with the EU Treaties and Directives.

We have also noted above, that the precise mechanism of Part III of the 1946 Act looks as if it served as the template for Recommendation 91 of the ILO some 5 years later, a Recommendation which many countries across the globe have, presumably, followed - though there appears to be no published information on that globally.

However, what is known is that the mechanism of making collective agreements binding on an industry-wide basis is common in Europe where it is far from “unique.” This is not because of the EU, rather the EU assumption of the legitimacy of such arrangements is a reflection of the commonness of them in the otherwise diverse industrial relations systems of Europe. So, in 2009, the overwhelming majority (21 out of 27) EU Member States had in place mechanisms to make collective bargaining agreements legally binding for all employees and employers in a certain sector or in the entire industry.<sup>149</sup>

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<sup>146</sup> Judgment, para.7.

<sup>147</sup> *Demir* at paragraphs 52, 151.

<sup>148</sup> *Demir*, para 154.

<sup>149</sup> See P Kerckhofs, *Extension of collective bargaining agreements in the EU: Background paper*, Peter Kerckhofs, Eurofound, 2011. The mechanisms are described in, amongst other places, F Traxler and M Behrens, *Collective Bargaining and Extension Procedures*, various years, available at [www.eiro.eurofound.eu.int](http://www.eiro.eurofound.eu.int); S Sciarra, *The Evolving Structure of Collective Bargaining in Europe 1990-2004*, 2004, European commission and University of Florence; P Du Caju *et al*, *Institutional Features of Wage Bargaining in 23 European countries, the US and Japan*, 2008, Working Paper No.154, National Bank of Belgium. As noted above, the UK had industry-wide collective agreement enforcement mechanisms continuously between 1940 and 1980, and Wages Councils awards were enforceable as a matter of law from 1909 to 2013 when the last Wages Council was abolished.

Furthermore, in respect of those States which imposed minimum requirements in order for a collective agreement to have that effect, the requirements in question related essentially only to thresholds of representativeness. It does not appear that any imposed detailed policy criteria of the kind that were enacted in the 2012 Act or that are contemplated as necessary requirements for validity by the Supreme Court in *McGowan*.

#### ***4. Burdensome restraints and intrusive paternalism - the benefits of collective bargaining***

The Supreme Court considered<sup>150</sup> that Part III “appear[s] somewhat anomalous today,” “giving rise to the prospect of burdensome restraints on competition for prospective employers and intrusive paternalism for prospective employees.”

##### *Restraints on competition*

Though the language is not so florid, this line of judicial thought echoes that of eighteenth and nineteenth century judges holding that union attempts to regulate terms and conditions of employment through collective agreements was a restraint of trade and, in reality, detrimental to the employers’ freedom to hire on any terms they could get and equally damaging workers’ freedom to undercut each other to obtain work.<sup>151</sup>

The Court did not appear to have had drawn to its attention the very different conclusions of the 2009 Cassells and Flood *Report and Recommendations* nor the 2011 Duffy and Walsh *Report of the Independent Review*. Certainly the Court offered no rationale for disagreeing with the conclusions of those Reports. It is not clear that there was any evidence to support the Court’s reasoning here and the possibility that the Court was expressing personal prejudice is difficult to exclude.

The idea that standard minimum terms and conditions of employment across an industry offends the principle of competition is, of course, unsustainable. As we have seen the EU, notwithstanding its insistence on free competition as one of the four pillars of the EU Treaty, recognises that collective agreements must be excluded from the rigours of competition law.

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<sup>150</sup> Judgment para.8.

<sup>151</sup> In reality this is a classical statement of neo-liberal dogma: see F Hayek, *The Constitution of Liberty* (1959), ch 18. Hayek’s disciples focus on collective bargaining as the distorting feature of the labour market which must be eradicated. On neo-liberalism generally see D Harvey, *A Brief History of Neoliberalism* (2007), and K Birch and V Mykhnenko, *The Rise and Fall of Neo-Liberalism* (2010); C Crouch, *the Strange Non-Death of Neo-Liberalism*, 2011, Polity Press. On its impact on labour law see Lord Wedderburn, ‘Freedom of Association and Philosophies of Labour Law’ (1989) 18 ILJ 1, T Novitz, *International and European Protection of the Right to Strike* (2003), pp 80-83, and P Smith, ‘Order in British Industrial Relations: From Donovan to Neoliberalism’, (2012) 31-32 HSIR 115.

It is to be noted that by preventing the undercutting of wages, competition is forced to focus on efficiency, productivity, investment, research and development. This is good for industry and for the State. The conclusion is supported by much academic research which rejects the notion that economic efficiency is damaged by the institution of collective bargaining;<sup>152</sup> or that high labour standards maintained by collective bargaining (or otherwise) is economically detrimental.<sup>153</sup> The achievement of higher labour standards through collective bargaining also tends to improve productivity by greater commitment to the job on the part of the worker.<sup>154</sup>

As Duffy and Walsh pointed out in relation to REAs:

All employers in these sectors compete with each other for available contracts which are normally awarded by competitive tendering. In tendering for work employers need to know, with a high degree of certainty, what their labour costs will be over the currency of the contract. Moreover, since all employers nominally have the same employment costs competition is focused on cost efficiency, including efficiency in the utilisation of labour, rather than on the actual wages and conditions of employment to which individual contractors are committed. Thus, if the wages and conditions of employment of workers were fixed by collective agreement with some contractors but not all, those covered by agreements would be placed at a competitive disadvantage relative to those who are not.<sup>155</sup>

### ***Intrusive paternalism***

The result of *McGowan* is and will be that many employers are employing workers on worse pay and conditions than those agreed in the REAs and abandoning the pension schemes provided by the REAs. The effect is obviously to undercut those employers which do abide by the collectively agreed REAs. In consequence, competition on labour costs is stimulated causing further employers to refuse to abide by the collectively agreed terms and conditions.

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<sup>152</sup> E.g. F Traxler and B Brandl, *The Economic Effects of Collective Bargaining Coverage: A Cross-National Analysis*, 2009, ILO; F Traxler and B Brandl, "The economic impact of collective bargaining coverage", in S Hayter (ed), *The Rôle of Collective Bargaining in the Global Economy*, Edward Elgar Publishing and ILO, 2011; F Traxler and B Brandl, 'Collective Bargaining, Inter-Sectoral Heterogeneity and Competitiveness: A Cross-National Comparison of Macroeconomic Performance,' (2012) 50 BJIR 73.

<sup>153</sup> S Deakin, J Michie and F Wilkinson, *Inflation, Employment, Wage-Bargaining and the Law* (Institute of Employment Rights, 1992); S Deakin and F Wilkinson, 'Rights vs Efficiency? The Economic case for Transnational Labour Standards' (1994) ILJ 289; S Deakin and F Wilkinson, , *Labour Standards – Essential to Economic and Social Progress* (Institute of Employment Rights, 1996); S Sachdev and F Wilkinson, *Low Pay, The Working of the Labour Market and the Role of the Minimum Wage* (Institute of Employment Rights, 1998); S Deakin and F Wilkinson, 'Labour Law and Economic Theory: A Reappraisal', in Collins, Davies, and Rideout, above; D Cunniah and others, *Towards a sustainable recovery: the Case for age-led Policies*, 2011 3 Int'l Journal of Labour Research, ILO; Ö Onaran and G Galanis, *Is aggregate Demand Wage-led or Profit-led?*, 2012, ILO.

<sup>154</sup> See F Fakhfakh, V Pérotin and A Robinson, "Workplace change and productivity: does employee voice make a difference?" in S Hayter (ed.), *The Rôle of collective Bargaining in the Global Economy*, Edward Elgar Publishing and ILO, 2011.

<sup>155</sup> Duffy & Walsh, para 9.3.

It is to be doubted whether the workers whose wages have been cut and whose pensions have been stopped by abandonment of the relevant REA (or at least a refusal to negotiate any improvement to it) regard the lost protection of Part III as “intrusive paternalism.”

It is a fact that collective bargaining raises wages. This is a good thing.<sup>156</sup> It would help to resolve a fundamental problem in the Irish and other economies at present, namely diminished purchasing power of wages. Higher wages allow people to spend more. This stimulates demand in the economy and hence economic activity.<sup>157</sup> This is good for all. Indeed, small employers are the greatest beneficiaries. The State too benefits by greater tax receipts. Increasing demand also increases employment and decreases unemployment. It turns part-time jobs into full-time jobs. This in turn reduces State expenditure on subsidising low wages and income for the unemployed.

### **Inequality**

In particular high labour standards diminish inequality of income.<sup>158</sup> Economic inequality is now known to be causative of huge damage to individuals and to society (both rich and poor, curiously enough).<sup>159</sup> Wilkinson and Pickett have shown<sup>160</sup> that in every scientifically measurable respect, even the rich suffer in a

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<sup>156</sup> E.g. S Hayter and B Weinberg, ‘Mind the Gap: Collective Bargaining and Wage Inequality: Negotiating Social Justice,’ 2011, ILO; L Mishel, *The Decline of collective bargaining and the erosion of middle class incomes in Michigan*, Briefing Paper No.347, 24 September 2012, Economic Policy Institute. A strengthening of collective bargaining together with other labour market institutions is advocated by D Coats, *From the Poor Law to Welfare to Work, what have we learned from a century of anti-poverty policies?* 2012, The Smith Institute; and by S Lansley and H Reed, *How to Boost the Wage Share*, 2012, Touchstone Pamphlet No.13. To state the converse: “In heavily monopolised economies, demand will not automatically keep pace with production. This will particularly be so if the bargaining power of labour decreases, and this is precisely what happened in the decade after 2000.” J Foster, paper for Institute of Employment Rights Conference on Developments in European Labour Law, 21 March 2012, reproduced in (2012) 64 *Communist Review*, 2 at 5; or “...higher pay is also needed in sectors of the UK economy that can afford it. As we have seen, this is a particular problem in the UK, where given the scale of the decline in private sector collective bargaining coverage, there is now relatively little upward pressure on many firms in the large service sectors that account for the bulk of low pay.” C Cowdery *et al.*, *Gaining from Growth, the Final Report of the Commission on Living Standards*, Resolution Foundation, 2012, at 95. T Aidt and Z Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment*, 2002, World Bank, wrote that “high rates of unionization lead to greater income equality, lower unemployment and inflation higher productivity and speedier adjustments to economic shocks.” Note the review of literature in T Aidt and Z Tzannatos, ‘Trade unions, collective bargaining and macroeconomic performance: a review,’ (2008) 39 *Industrial Relations Journal* 258. Industrial unionism promotes productivity growth: G Vernon and M Rogers, ‘Where do Unions add Value? Predominant Organizing Principle, Union Strength and Manufacturing Productivity Growth in the OECD,’ (2013) 51 *BJIR* 1.

<sup>157</sup> IMF, *World Economic Outlook: Spillovers and cycles in the Global Economy*, 2007; ILO, *Global wage Report 2008/9 – Minimum wages and collective bargaining: towards policy coherence*, 2008.

<sup>158</sup> S Machin, “The Decline of Labour Market Institutions and the Rise in Wage Inequality in Britain,” 1997 41 *European Economic Review* 647; D Card, T Lemieux and W Craig Riddell, “Unions and Wage Inequality,” 2004 25 *Journal of Labor Research* 519; B Western and J Rosenfeld, “Unions, Norms and the Rise in US Wage Inequality,” 2011, 76 *American sociological Review* 513; S Hayter and B Weinberg, “Mind the gap: collective bargaining and wage inequality” in S Hayter (ed.), *The Rôle of collective Bargaining in the Global Economy*, Edward Elgar Publishing and ILO, 2011.

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<sup>160</sup> R Wilkinson, *Unhealthy Societies: The Afflictions of Inequality*, 1996, R Wilkinson, *The Impact of Inequality: How to Make Sick Societies Healthier*, 2005, R Wilkinson and K Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger*, 2010; and S Lansley, *Rising Inequality and Financial Crises: Why Greater Equality is Essential for Recovery*, CLASS, 2012; Oxfam, *The Cost of Inequality: How wealth and Income Extremes Hurt us all*, Oxfam Media Briefing, 2013; Oxfam, *Working for the Few; Political Capture and Economic Inequality*, 2014, Oxfam.

more unequal society - and the poor, of course, suffer yet more. Growth in inequality and poverty are irrefutably associated with growth in crime, drug abuse, and anti-social behaviour, mental illness, and hopelessness.

Disparity in wealth is mirrored by disparity in health<sup>161</sup> and life expectancy<sup>162</sup> and a loss of social mobility.<sup>163</sup> These blemishes echo down the generations. All this creates huge burdens on the State as well as misery for its citizens, including the wealthy. Inequality is very bad for society and, in particular, for the economy.<sup>164</sup> Consequently, redressing inequality of income is vital for humanity as well as saving expenditure by the State on dealing with the consequences of inequality (such as more police and prisons, more resources for health care and so on). Reducing inequality in income reduces other forms of inequality and discrimination. Widespread collective bargaining is the obvious means of raising wages and reducing inequality (regardless of minimum wages, the 'living wage' and, of course, progressive taxation regimes). It was the technique nearly universally adopted in the 1930s - and it worked over the next 50 years.

Academic research has confirmed in relation to REAs in Ireland the presence of beneficial competitive gains and reduction of inequality within employing firms.<sup>165</sup>

It is no coincidence that strong and efficient economies such as in Germany, Sweden, Norway and Denmark have extensive sectoral collective bargaining coverage underpinned by strong trade union rights. As research for the ILO has found:

...income distribution is not primarily determined by technological progress, but rather depends on social institutions and on the structure of the financial system. Strengthening the welfare state, in particular changing union legislation to foster collective bargaining and financial regulation could help increase the wage share with little if any costs in terms of economic efficiency.<sup>166</sup>

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<sup>161</sup> A Reeves *et al*, "Austere or not? UK Coalition government budgets and health inequalities", (2013) 106 *JRSM* 432-6.

<sup>162</sup> H Aldridge, P Kenway, T McInnes and A Parekh, above, at 76; Office for National Statistics, *Life Expectancy at Birth and at Age 65 by Local Areas in the United Kingdom, 2004-6 to 2008-10*, 2011 shows that life expectancy was no less than 13½ years greater for men born in Kensington and Chelsea compared to those born in Glasgow. The gap between the highest and lowest life expectancy has grown by 1 year for men and 1.7 years for women in the four year gap studied. Infant deaths are 35% more common amongst those from manual work backgrounds than those from non-manual work backgrounds: ONS Child Mortality Statistics reported at [www.poverty.org.uk/21/index.shtml](http://www.poverty.org.uk/21/index.shtml) July 2012.

<sup>163</sup> [www.economist.com/node/21564417](http://www.economist.com/node/21564417).

<sup>164</sup> J E Stiglitz, *The Price of Inequality*, Penguin 2013; S Lansley, *The Cost of Inequality: Why Economic Equality is Essential for Recovery*, CLASS 2011. S Lansley, *Rising Inequality and Financial Crisis: Why Greater Equality is Essential for Recovery*, CLASS, 2012 at 4-5 points out the link between growth in inequality and economic crisis:

'...historical evidence provides strong evidence of a link from equality to instability. The two most damaging recessions of the last century - the Great Depression of the 1930s and the Great Crash of 2008 - were both preceded by sharp rises in inequality.'

<sup>165</sup> S McGuinness, E Kelly and P O'Connell, *The Impact of Wage Bargaining Regime on Firm-Level Competitiveness and Wage Inequality: the Case of Ireland*. ESRI, Working Paper No 266, 2008; R Dickens, S Machin and A Manning, 'The Effects of Minimum Wages on Employment: Theory and Evidence from Britain', (1999) 17 *Journal of Labour Economics*, 1.

<sup>166</sup> E Stockhammer, *Why Have Wage Shares Fallen?* ILO, 2012, at p 43.

## ***Social justice***

Collective bargaining is also essential for the achievement of social justice at the workplace. In the absence of collective bargaining, the outcome of the conflicting interests of the employer and the workers would otherwise merely reflect the inherent imbalance in power between the worker and the employer can be redressed. Inequality of power between the worker and the employer is a notion that is neither new nor controversial. It is not merely a fundamental and undeniable characteristic of capitalism,<sup>167</sup> but is equally apparent in nationalised industries and State controlled and run economies.<sup>168</sup> The second preamble to the National Labor Relations Act 1935 in the USA encapsulates the issue.<sup>169</sup> Though much amended since, its preamble is still extant:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

When addressing these questions 40 years ago, the leading labour lawyer Sir Otto Kahn-Freund wrote that:<sup>170</sup>

the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to the inequality of bargaining power which is inherent and must be inherent in the employment relationship.

Whether that is the object of labour law or not,<sup>171</sup> it is only collective bargaining which is effective in redressing to any extent that imbalance of power.

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<sup>167</sup> Save in very unusual situations of labour or specific skills shortage. Hence the founding statutes of labour law in the United Kingdom were an attempt to prevent wage increases consequent on the labour shortages which followed the Black Death: see S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution* (2005).

<sup>168</sup> The circumstances of the miners' strike in 1984-5, and a glance at trade unionism in the former Soviet Union illustrate the first and second propositions. This is not to diminish public ownership as a means of improving conditions, which is one reason why miners supported nationalisation in the first place.

<sup>169</sup> Other provisions have been amended but this is still extant.

<sup>170</sup> O Kahn-Freund, *Labour and the Law* (3<sup>rd</sup> ed by P Davies and M Freedland, 1983), p 18, cited and discussed in S Deakin and F Wilkinson, 'Labour Law and Economic Theory: A Reappraisal', in H Collins, P Davies, R Rideout (eds), *Legal Regulation of the Employment Relation* (2000). Kahn-Freund's analysis was endorsed in *Slaight Communications v Ron Davidson* [1989] 1 SCR 1038.

<sup>171</sup> A controversial proposition: Professor Lord Wedderburn certainly agreed that the inequality of bargaining power inherent in the employment relationship required to be redressed, he certainly did not consider that labour law *inherently* fulfilled that object, see *The Worker and the Law*, 3<sup>rd</sup> edn., 1986, pp 27ff. He regarded labour law as a battle ground in which the advance and retreat of the conflicting interests of capital and labour were dictated by the shifting balance of their relative strengths. The front line was marked by the judicial decisions and legislation which together comprehend labour law. This is evident in all his writings but is particularly lavishly illustrated in 'Laski's Law behind the Law, 1906 to European Labour Law', in R Rawlings (ed) *Law, Society and Economy* (1997).

## **Democracy at work**

Even where collective bargaining is insufficient to negate the inherent inequality of bargaining power, it still provides the means by which workers can be heard by those who make the decisions. Collective bargaining is usually the only satisfactory way of achieving any degree of democracy at work - without it workers have no voice in the conditions of their working lives.<sup>172</sup> Given the importance of work as a means of earning a living, and the very prominence that work has in the lives of most peoples, having a say in the conditions and future of the work place is of vital importance.<sup>173</sup> The mere experience of inclusion in decision making processes appears to result in decreased stress and increased well-being, an increase in job satisfaction, and a reduction in absenteeism; from the employers' perspective the benefit would seem to be greater commitment, initiative, productivity and improved decision-making.<sup>174</sup>

Yet even the most paternalistic management is only concerned with the interests of workers to the extent that concessions to those interests advances or impedes the profit earning capacity of the enterprise. Collective bargaining forces employers to hear and consider, and sometimes make concessions to, the interests of their workers. Without collective bargaining, ultimately the worker is at the mercy of management *diktat*.

The demand for 'industrial democracy' is one with a long pedigree.<sup>175</sup> So rights of political citizenship should not operate in an economic vacuum with the citizen as worker leaving his or her democratic rights of participation in decision-making at the workplace door, to pick them up again at the end of the shift. Where power is exercised democracy is an ideal that should pervade all aspects of life, including the workplace. After all the workplace is a site where rules governing rights and obligations are made, administered and enforced and decisions taken which deeply affect the economic and social wellbeing of those who work there. The demand for

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<sup>172</sup> 'Employee forums', 'Colleague huddles' and other euphemisms used by HR practitioners are usually considered by those that experience them as little more than means of communicating instructions from the top down or harvesting workers' ideas for greater efficiencies.

<sup>173</sup> As the ECtHR point out in applying Art.8 of the European Convention (protecting the right to private life): "The notion of "private life" does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world." *Volkov v Ukraine* (2013) 57 E.H.R.R. 1, para 165.

<sup>174</sup> See F Fakhfakh, V Pérotin and A Robinson, "Workplace change and productivity: does employee voice make a difference?" in S Hayter (ed.), *The Rôle of collective Bargaining in the Global Economy*, Edward Elgar Publishing and ILO, 2011.

<sup>175</sup> Industrial democracy was a term first used by Proudhon in the 1850s to assert that management must be chosen from the workers by the workers themselves. Sidney and Beatrice Webb used the term to connote collective bargaining in *Industrial Democracy* 1897. The Final Report of the Whitley Committee in 1918 (see later), Cmd 9153, para 2, considered that the collective bargaining structures it recommended would give 'to labour a definite and enlarged share in the discussion and settlement of industrial matters with which employers and employed are jointly concerned.' Harold Laski wrote in the 1930s that it is not enough "to limit the hours of labour and to make the reward of effort adequate to the basic needs of life ... The citizen as an industrial unit must somehow be given the power to share in the making of decisions which affect him (sic) as a producer if he is to be in a position to maximise his freedom" (HJ Laski, *A Grammar of Politics*, 4<sup>th</sup> edn., 1938, pp112-113.

greater industrial democracy appeared relatively uncontroversial in the 1970s,<sup>176</sup> but neo-liberalism has tossed it aside.

### ***Non-parties***

It may be that one of the unpalatable features of Part III (and other *erga omnes*) schemes is that the agreements, though made by representative parties, are binding on those who have not sat at the bargaining table. But this is an inevitable feature of collective bargaining. From the workers' side, even at enterprise bargaining level, it would be an exceptional case where every worker bound by the agreement took part in the negotiating of it. Often union officers are delegated (and not necessarily by the workers concerned) to do their best. Even where the final offer is put to and accepted by a majority vote, those who disapprove of the agreement are nonetheless bound by it. It is hard to see a rational basis for excluding employers from analogous collectivity which is inherent in the very process of collective bargaining.

It is impossible to resist making the point that an applicant for a job will invariably be told the terms and conditions to which he or she must submit in order to gain employment. A claim that in so imposing terms and conditions the employer is improperly exercising a law-making power is one which would be met with derision.

## **5. Conclusion**

The Irish Government has made clear its view that the effect of the judgment in *McGowan* is that further legislation is required in order to “introduce a revised framework to deal with” the Supreme Court’s judgment.<sup>177</sup> It is understood that it is the Government’s view that Part III of the 1946 Act has been struck down in its entirety, such that the amendments purportedly introduced by the 2012 Act have nothing to attach to and, consequently, unless and until there is further legislation on the matter, there is now no effective REA mechanism at all. That does not appear to accord with the judgment which makes clear that “this case concerns however the provisions of Part III in their unamended form” (judgment, para. 11).

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<sup>176</sup> See *Report of the Committee of Inquiry on Industrial Democracy, 1977*, Cmd 6706, (‘The Bullock Report’), majority report, 160, para 1: “In fact, the debate about industrial democracy is much less about the desirability of moving in the direction of greater participation (which many would accept as inevitable), than about the pace of change and the need to extend such participation to the board [of directors].”

<sup>177</sup> Written Answers No. 149, 3 July 2013; letter from John Maher, Private Secretary to the Minister, dated 17 July 2013, in response to letter from David Begg, General Secretary of the ICTU, dated 30 May 2013.

To the extent that REAs or EROs do or may in the future subsist under Part III, in order to cover employers and workers not directly party to that agreement, they would have to be at the very least subject to closely defined principles and policies which would “guide, inform and direct” both the representative parties and the Labour Court; and in all probability, also subject to powers of supervision and/or veto by the Minister and/or the Oireachtas. This would appear to be in breach of the requirement of autonomy for the collective bargaining parties required by international law.

There is also the question whether the *McGowan* ruling will undermine potential future legislative efforts to address the concerns raised by the International Labour Organisation (ILO) Committee on Freedom of Association in 2012 about the failure to secure respect for the right to collective bargaining in Ireland. The Government of Ireland in its response to the ILO, committed itself in a non-specific way to address that deficit. The Government’s response to the ILO also referred to the *Programme for Government* it had published in 2011 which committed it to reform the current law on employees’ right to engage in collective bargaining so as to ensure, it says, compliance by the State with judgments of the European Court of Human Rights. However, it is not at all clear what legislation will be brought forward and whether additional limitations on the right to collective bargaining will be included as a consequence of the *McGowan* ruling.

I understand that the Irish government is considering options at the present time. I would never presume to offer a view save to say that it is surely the industrial relations structures of the successful economies which conform to the requirements of the international obligations ratified by Ireland which require careful examination rather than those which do not.

At all costs Ireland must avoid the tragic and massive contraction of the coverage of collective bargaining in the UK.

Until very recently, the United Kingdom was isolated in the EU as the only country with collective bargaining coverage below 50%. Though it is now the second lowest in the EU, there are several other countries with levels of below 50%, including Ireland (at 44%).

The UK level of collective bargaining coverage (including wages councils) has dramatically declined as can be seen from the following table:

1950	71-73% <sup>178</sup>
1960	70-74% <sup>179</sup>
1970	76-80% <sup>180</sup>
1975	84-86% <sup>181</sup>
1979	82% <sup>182</sup>
1984	70% <sup>183</sup>
1990	54% <sup>184</sup>
1998	40% <sup>185</sup>
2000	36% <sup>186</sup>
2004	29% <sup>187</sup>
2011	23% <sup>188</sup>

The last figure is likely to fall still further. In 2013 the UK government abolished the last extant Wages Council, the Agricultural Wages Board, so abolishing sectoral collective bargaining for some 200,000 workers. That loss will not be substituted by enterprise level bargaining because of the nature of that industry.

One of the most significant features of these figures is the fact that the continuous slump in collective bargaining coverage in the UK has relentlessly continued - regardless of the introduction of a statutory recognition scheme which came into effect in June 2000.<sup>189</sup> The statutory recognition scheme is, in any event, riddled with defects as others have shown (just like the US scheme on which it was based - though the defects are different).<sup>190</sup> Most recently this was demonstrated by a

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<sup>178</sup> S Milner, 'The Coverage of Collective Pay-setting Institutions in Britain, 1895- 1990' (1995) 33 BJIR 69at 82. Some of these figures, particularly the early ones, may significantly under-estimate collective bargaining density. The Ministry of Labour and National Service reported much higher levels (86%) in 1946 and there appears no reason for sudden decline, especially given the stability (indeed, slight increase) of the 20 years from 1950.

<sup>179</sup> See previous footnote.

<sup>180</sup> See previous footnote.

<sup>181</sup> See previous footnote.

<sup>182</sup> Extrapolated from previous and subsequent footnotes.

<sup>183</sup> N Millward, A Bryson and J Forth, *All Change at Work? British Employment Relations, as Portrayed by the Workplace Industrial Relations surveys Series*, Routledge, 2000, table 6.5 at p197.

<sup>184</sup> See previous footnote.

<sup>185</sup> See previous footnote.

<sup>186</sup> K Brook 'Trade Union Membership: an Analysis of Data from the Autumn 2001 Labour Force Survey', (2002) 110 Labour Market Trends no.7 at 343. See also P Davies and M Freedland, *The Evolving Structure of Collective Bargaining in Europe 1990-2004; National Report on the UK*, 2004, European commission and University of Florence.

<sup>187</sup> H Grainger *Trade Union Membership 2005* (DTI, 2006), p 12 and table 28, p 39. B Kersley, C Alpin, J Forth, A Bryson, H Bewley, G Dix and S Oxenbridge, *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey*, Routledge, 2006; B van Wanrooy *et al*, *The 2011 Workplace Employment Relations Study, First Findings*, 2013, table 1 at 22.

<sup>188</sup> B van Wanrooy *et al*, *op cit.*, table 1 at 22.

<sup>189</sup> See J Hendy and G Gall, "British Trade Union Rights Today and the Trade Union Freedom Bill" in KD Ewing (ed.), *The Right to Strike: From the Trade disputes Act 1906 to a Trade Union Freedom Bill 2006*, Institute of Employment rights, Liverpool, 2006 at 256-7 for a fuller analysis of the figures.

<sup>190</sup> B Simpson, "Trade union recognition and the law: a new approach - Parts 1 and II of Sched A1 to the Trade Union and Labour Relations (Consolidation) Act 1992" (2000) 29 ILJ 196; G. Gall, "Union recognition in Britain:

judgment handed down last week showing the scheme to be incompatible with Article 11 of the ECHR.<sup>191</sup>

Perhaps the most fundamental problem is that the procedure does nothing to promote sector level bargaining. As Professor Ewing and I have argued elsewhere, it is sector level bargaining that is required.<sup>192</sup>

### ***Collective bargaining elsewhere in Europe***

Collective bargaining coverage in Europe is falling under pressure from the neo-liberal policies of the Troika (the European Commission, the European Central Bank and the International Monetary Fund),<sup>193</sup> especially the European Commission<sup>194</sup> and in the shadow of the EU-US Transatlantic Trade and Investment Partnership.<sup>195</sup> Schulten<sup>196</sup> has revealed that a report<sup>197</sup> prepared by the European Commission's Directorate General for Economic and Financial Affairs (DG ECFIN) lists the following measures under the heading of 'employment friendly reforms':

- General decentralisation of wage setting and collective bargaining.
- Introduction of or wider scope for opportunities to derogate from industry-level agreements at workplace level.
- Limitation or abolition of the 'favourability principle', under which the most favourable agreed term provision in a hierarchy of agreements will apply to employees. Typically, this means that workplace agreements may not provide for poorer terms and conditions than those negotiated at industry level. Limitations and reduction in the scope for the extension of collective agreements to non-signatory employers.

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the end of legally induced voluntarism?" (2012) ILJ 40; A Bogg, "the Death of Statutory Recognition in the United Kingdom" (2012) 54 JIR 409; S Moore, S McKay and S Veale, *Statutory Regulation and Employment Relations; the impact of Statutory Trade union Recognition*, 2013, Palgrave Macmillan; M Doherty, "When you ain't got nothin' you ain't got nothin' to lose... Union recognition laws, voluntarism and the Anglo model" (2013) 42 ILJ 369.

<sup>191</sup> R (*Boots Management Services Ltd*) v CAC and PDAU [2014] EWHC 65 Admin.

<sup>192</sup> KD Ewing and J Henty, *Reconstruction after the Crisis, a Manifesto for Collective Bargaining*, Institute of Employment Rights, Liverpool, 2013. Perhaps the single most powerful tool to achieve it is to restrict the grant of public contracts (and sub-contracts) to companies which honour collective agreements and which are represented in associations of employers which collectively bargain with trade unions on a sectoral basis.

<sup>193</sup> See S Clauwaert and I Schömann, *The Crisis and National Labour Law Reforms: a Mapping Exercise*, ETUI Working Paper, 2012, at 13; .

<sup>194</sup> See S Deakin, *Social Policy, Wage Determination and EMU: Towards an Egalitarian Solution to the Crisis*, 2013, Paper Line 4Europe (paper prepared for the ETUI Workshop on the Impact of the Economic Crisis on Collective Labour Law in Europe).

<sup>195</sup> In fact the attack on trade union rights is global. See, e.g., the Employers' Group attack on the right to strike at the ILO: *General Survey on the Fundamental Conventions Concerning Rights at Work in the Light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008 Report III (part 1B) of the Report of the CEACR to the International Labour Conference, 2012, at pp 46-50. See too the UN Secretary General's derecognition of its staff unions for collective bargaining in April 2013: TUC Briefing, 1 September 2013.

<sup>196</sup> T Schulten, 'The Troika and Multi-Employer Bargaining, How European pressure is destroying national collective bargaining systems,' 139 Global Labour Column, June 2013, [http://www.global-labour-university.org/fileadmin/GLU\\_Column/papers/no\\_139\\_Schulten.pdf](http://www.global-labour-university.org/fileadmin/GLU_Column/papers/no_139_Schulten.pdf) .

<sup>197</sup> European Commission (2012). Labour Market Developments in Europe 2012. European Economy No. 5/2012. ([http://ec.europa.eu/economy\\_finance/publications/european\\_economy/2012/pdf/ee-2012-5\\_en.pdf](http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-5_en.pdf)) .

In addition, the recommendations also refer directly to:

- ‘decreasing bargaining coverage’ and
- ‘an overall reduction in the wage-setting power of trade unions’.

The principal means of achieving reduction of collective bargaining coverage in Europe has been the decline in national and sector level bargaining and limitations on the extension of collective agreements to non-signatories.<sup>198</sup> Yet industry-wide agreements and the extension of more limited agreements has been a central feature of European industrial relations and one reason for the success hitherto of the European economy and the standard of living enjoyed by its peoples. Indeed, there is evidence that collective agreements have alleviated some of the impact of the financial crisis.<sup>199</sup>

Schulten and Müller have identified four main constituents of the strategy advanced by the Troika.<sup>200</sup> The first is the termination or abolition of national-level collective agreements. The second aspect is the extension of the scope for workplace derogation from industry-level collective agreements so allowing workplace agreements to have unrestricted priority over terms and conditions agreed at a higher level. The third aspect has been the introduction of more stringent preconditions for extending collective agreements by legislative means to non-signatory employers. Finally, the fourth element is the dismantlement of the trade union monopoly over collective agreements and encouraging non-union employee groups to conclude workplace collective agreements.

The consequences of the strategy of radical decentralisation advocated by the Troika are already evident. Systems of collective bargaining that were once robust have been systematically eroded and destroyed. The collective agreement itself - as an instrument for collectively regulating wages and other employment conditions - is manifestly now at risk.<sup>201</sup>

Thus in Greece, the Troika has demanded decentralisation and fragmentation of collective bargaining activity, away from national and sectoral levels to enterprise level. Part of the effect of decentralising collective bargaining in this way is, of course, that many employers take the opportunity to opt out. In consequence, collective agreement coverage has haemorrhaged. The Troika have also sought

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<sup>198</sup> As Sharan Burrow, General Secretary, ITUC put it: ‘The key objective ... is to slash labour costs by replacing multi-employer collective bargaining systems at industry or national level with enterprise level bargaining or to eliminate collective bargaining altogether. A retreat to enterprise-level bargaining is inequitable in all circumstances.’ *Frontlines Report summary*, April 2013, at 4.

<sup>199</sup> V Glassner and M Keune, *Collective Bargaining Responses to the Economic Crisis in Europe*, ETUI Policy Brief, 1/2010.

<sup>200</sup> T Schulten and T Müller, ‘A New European Interventionism? The Impact of the New European Economic Governance on Wages and Collective Bargaining’ in, Natali, D. and Vanhercke, B. (eds) *Social Developments in the EU 2012, 2013*, European Trade Union Institute and the European Social Observatory, Brussels.

<sup>201</sup> T Schulten, ‘The Troika and Multi-Employer Bargaining,’ above.

opportunities for bargaining to be conducted by non-union based employee representatives.

The ILO sent a High Level Mission to Greece as a result of which these changes were documented and strongly criticised by the Committee of Experts as violating the obligations of the Greek government under ILO Convention 98. The Committee in particular criticised the procedures for the decentralisation of collective bargaining, and in particular the procedures permitting derogation from sectoral agreements by non-union associations of workers at enterprise level. It expressed “deep concern” that the changes “aimed at permitting deviations from higher level agreements through ‘negotiations’ with non-unionized structures” were “likely to have a significant - and potentially devastating - impact on the industrial relations system in the country.” Indeed, the Committee expressed the fear “that the entire foundation of collective bargaining in the country may be vulnerable to collapse under this new framework.”<sup>202</sup>

Similar initiatives have been undertaken in Romania, Spain and Portugal. In Romania the national collective agreement was abolished and sector level agreements much restricted in coverage.<sup>203</sup> The effect on collective bargaining coverage has been catastrophic, a reduction from 98% in May 2011 to 36% at the end of 2012.<sup>204</sup>

Notwithstanding the ravages of the Troika, and the insidious influence of the dogma of neo-liberalism, which flourishes despite the overwhelming economic evidence demonstrating its perniciousness, it remains the case that sector-level bargaining remains a common and thriving feature of the northern and western European States. Obviously the precise industrial relations structure differs from one country to another. On average across the EU, 62% of workers continue to be covered by collective bargaining. There are 10 countries with collective bargaining coverage of around 80% or more.<sup>205</sup>

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<sup>202</sup> ILO Committee of Experts, *Observations (Greece) 2011* (2012):

[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2698934](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698934).

<sup>203</sup> See S Clauwaert and I Schömann, *Country by Country Analysis*, Annexed to *The Crisis and National Labour Law Reforms: a Mapping Exercise*, above, 35-38.

<sup>204</sup> Press statement 2 July 2012: CNS Cartel ALFA si BNS: Modificarea Legii dialogului social o prioritate <http://www.cartel-alfa.ro/default.asp?nod=67&info=48020#> cited by the ETUI at <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Romania/Collective-Bargaining>.

<sup>205</sup> Much of the account that follows is taken from L Fulton, *Worker representation in Europe*, Labour Research Department and ETUI, 2013, summarised in KD Ewing and J Henty, *Reconstruction after the Crisis, a Manifesto for Collective Bargaining*, Institute of Employment Rights, Liverpool, 2013, for which we were indebted. Any errors in the commentary are ours however. Fulton points out that some of the figures may be unreliable. Earlier figures and descriptions may be obtained from: OECD *Employment Outlook*, various years; European Industrial Relations Observatory, *Collective Bargaining and Extension Procedures*, various years, available at [www.eiro.eurofound.eu.int](http://www.eiro.eurofound.eu.int); S Sciarra, *The Evolving Structure of Collective Bargaining in Europe 1990-2004*, 2004, European commission and University of Florence; P Du Caju *et al*, *Institutional Features of Wage Bargaining in 23 European countries, the US and Japan*, 2008, Working Paper No.154, National Bank of Belgium; Director General's Report I(B), *Freedom of Association in Practice: Lessons Learned*, 2008, ILO; S Hayter and V Stoevska, *Social Dialogue Indicators: Trade Union Density and Collective Bargaining Coverage, International statistical Inquiry 2008-09*, 2009, ILO.

The figures are: France (98%), Belgium (96%), Austria (95% coverage), Portugal (92%) and Slovenia (90%), the Netherlands (81%), Italy(80%), Norway (70%), Spain (70%), Greece (65%), Malta (61%), Croatia (61%), Germany (59%), Luxembourg (50%), *Ireland* (44%), Czech Republic (38%), Romania (36%), Slovakia (35%), Latvia (34%), Estonia (33%), Hungary (33%), and Bulgaria (30%), Poland (25%), UK (23%), and Lithuania (15%).

Ireland will find its own solution to the triple blows of the trilogy of cases but the restoration of sector-level, *erga omnes* collective agreements must surely be a key feature, as must conformity to Ireland's international obligations.

**ENDS**