Department of Enterprise, Trade and Employment

Public Consultation on Collective Bargaining

The Workers' Party Submission

16th June 2022

Public Consultation on Collective Bargaining

The purpose of this consultation is to seek your views on proposals now being considered by the High-Level Group on Collective Bargaining. This Group was set up under the auspices of the Labour Employer Economic Forum (LEEF) to review collective bargaining and the industrial relations landscape in Ireland.

During its review, the High-Level Group has identified three principles for action. These areas concern Joint Labour Committees ('JLC'); the use of technical assessors to assist dispute resolution pursuant to Part 3 of the Industrial Relations (Amendment) Act 2015; and how 'good faith engagement' could be increased at enterprise level. Copies of the Group's progress Report are available at LEEF High Level Group on Collective Bargaining - DETE (enterprise.gov.ie).

The Group, independently chaired by Professor Michael Doherty, will consider these submissions in the context of finalising its recommendations on any policy or legislative reform in these areas.

Principle One - Joint Labour Committees

The Group recognises that the legislative intention set out in the Industrial Relations Act 1946 and updated by IR Act 2012 is for the Joint Labour Committee (JLC)to operate effectively as a mechanism to promote the sectoral regulation of pay and conditions through agreement.. The Group now acknowledges that the JLC systems is not functioning optimally ----------

Question 1

How could the operation of Joint Labour Committees be improved?

In our opinion the Joint Labour Committee JLC system, despite some administrative defects, has worked reasonably well in protecting low paid vulnerable workers, particularly where there is a low level of union representation.

Successfully operated since 1946 it is now suggested that the JLC system 'is not functioning optimally to promote the sectoral regulation of pay and conditions through agreement'. We must ask why may this be so. The supposed dysfunction of the JLCs can largely be ascribed to active opposition by some employer groups. Apparently, they oppose the concept of labour market regulation either by trade unions or the state. A brief historical review of developments in this area will support this claim It will also provide a context for our recommendations on improving the operation of JLCs.

Employer Challenge to Collective Regulation?

Professor Michael Doherty has noted that around 2004 a number of long-established indigenous companies began to engage in hitherto inconceivable conduct by effectively snubbing the State's dispute resolution agencies. He cites Sheehan who recounts incidents where major Irish companies rejected pressure to resolve disputes from agencies such as the Labour Relations Commission (LRC) and the National Implementation Body (NIB) and ignored non-binding recommendations of the Labour Court[1].

2007 – The Industrial Relations (Amendment) Act 2001/4

The Act had a two-fold objective. First to ameliorate the increasing difficulties experienced by unions seeking recognition and second to counter the growing disregard by a majority of employers of Labour Court recommendation supporting such requests. Under the Act the Labour Court was precluded from issuing a determination on collective bargaining or recognition. It was an innocuous piece of legislation. Nonetheless its operation was successfully challenged by an employer

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[1] Michael Doherty 'Battered and Fried? Regulation of Working Conditions and Wage Setting after the John Crace Decision' *Dublin University Law Journal* 35 (2012) p.97

in the Supreme Court, effecting its emasculation. In the aftermath of that judgment (*Ryan Air v Labour Court* [2007] IESC) Doherty observed 'it left Irish law offering perhaps the weakest protection for trade union bargaining rights in the Western industrialised world'[2].

2008 – REAs and JLCs Challenged

From 2008 onwards the JLC system and Registered Employment Agreements REA came under sustained attack from various employer groups[3]. The hoteliers sought a declaration that sections 42 and 43 of the Industrial Relations Act 1946 were invalid in interfering with the employer's property rights and that setting minimum wages amounted to an impermissible delegation of legislative authority.

Also 2008 was the year of financial crash and as part of the rescue packaged agreed with the IMF and European Commission the Irish government commissioned an independent review of Employment Regulation Orders and Registered Employment Agreements. The Duffy/Walsh report made a number of useful and practical suggestions for administrative reform of the system but rejected calls for its abolition. Furthermore, it rejected the argument that lowering basic JLC rates to the level of the minimum wage was likely to have a substantial effect on employment. It also rejected the claim that existing employment rights legislation adequately covered matters dealt with by EROs. Finally, it focussed on the need, in terms of basic fairness, for systems of setting pay and conditions of employment that went beyond the statutory minimum[4]. Of course, it must be recognised that where market forces are allowed unrestricted free play fairness may be at a discount.

2011 – *John Grace Fried Chicken Ltd. v Catering JLC* [2011] 3 I R 211

The employer plaintiffs in the case were engaged in the preparation and sale of fried chicken. They did not act alone but were members of an employer's collective, the 'Quick Food Alliance', representing the business interests of those involved in the fast-food industry. In Court their argument was similar to the of the hoteliers above; namely that the provisions of the 1946 Act and the 1990 Act allowing JLCs and the Labour Court to set terms and conditions in the catering sector were unconstitutional amounting to an impermissible delegation of legislative power. These complaints were upheld, the Court declaring the ERO invalid[5]. While the decision was welcomed by the principal employer's organisation IBEC it caused dismay in the union movement.

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2 Michael Doherty 'Emergency Exit? Collective Bargaining, the ILO and Irish Law' *European Labour Law Journal* 4 no 3 (2013) See also Appendix One of this document pp 90-92

3 Doherty 'Battered and Fried p.104

4 Doherty 'Battered and Fried' p.105. Kevin Duffy and Frank Walsh 'Review of Employment Regulation Orders and Registered Employment Agreements' Government Publications, Dublin (2011)

5 Doherty 'Battered and Fried' pp 106-7

2012 – Industrial Relations Amendment Act 2012 –

The legislation was a response to the judgment in *John Grace Fried Chicken Ltd*. Under the Act, JLCs, when formulating their proposals are required to take into account various factors, such as the legitimate commercial interests of employers, and the levels of employment and wages in comparable sectors. Furthermore, it provided that employers may seek a temporary exemption from ERO orders in the Labour Court. The Act also addressed concerns regarding the operation of REAs but this endeavour was overtaken by events[6].

2013 - *McGowan and Ors v Labour Court* [2013] IESC 21

This was a Supreme Court appeal by the Electrical Contractors from a High Court decision not to hear arguments that part iii of the Industrial Relations Act 1946 establishing REAs was unconstitutional. The Court found that REAs intruded into the area of law making, a power exclusive to the Oireachtas, thus rendering the agreements unconstitutional.

2015 – Industrial Relations (Amendment) Act 2015

Part 2 of the Act re-established the REA system struck down in *McGowan*. Such agreements could be registered once the labour Court was satisfied that the union(s) was 'substantially representative' of the workforce. The Act also empowered the Minister to make Sectoral Employment Orders (SEOs) regulating terms and conditions relating to pay, or any sick pay or pension scheme, of workers in a specific sector of the economy[7]. While Part 3 of the Act corrected many of the deficiencies of the 2001/4 Act, highlighted by the Ryan Air judgment, it left unresolved the question of statutory union recognition[8].

2021 - *NECI v Labour Court, Minister for Business, Enterprise and Innovation, Ireland and the AG* [2021] IESC 36.

This case arose from a High Court finding that Part 3 of the Industrial Relations (Amendment) Act 2015 was unconstitutional. Not only had the Labour Court exceeded its powers in making the SE0 but failed to give reasons for its decision. On appeal the Supreme Court upheld the constitutionality of Part 3 of the 2015 Act and SEOs generally. However, the Supreme Court agreed with the lower court regarding the paucity of reasoning. It referred the matter back to a different panel of the Labour Court to produce a new decision supported by adequate reasons for establishing the SEO. This was duly done and the SEO for electrical contractors came into effect in February 2022.

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6 Anthony Kerr 'The Trade Union and Industrial Relations Acts (fifth edition) Round Hall, Dublin (2015)

7 Kerr '*The Trade Union and Industrial Relations Acts'* p 301.

8 Kerr questions if the Act is compliant with the ECtHR *Demir* decision or meets the requirements of Art 6(2) of the European Social Charter to promote collective bargaining or the ILO Convention 98. Kerr *The Trade Union and Industrial Relations Acts*' p.302. For outline of *Demir* case see Appendix One of this document pp 96-100

2022 – In March of this year a new High Court challenge was brough by NECI seeking to quash the new SEO.

Of course, every citizen has a right to legally challenge legislative action by the state or state bodies. Yet since 2007 the volume of legal challenges by various employer groups against any collective regulation of the labour market either by the state or trade union has been remarkable. Given that context reform of the JLCs and SEOs based on consensus and accommodation becomes extremely problematic. For these employer groups, it seems, the only satisfactory reform of the JLCs would involve their abolition or at least a reduction to powerless irrelevance.

Workers' Party Recommendations on JLC Reform.

(1) Retain the JLC system but carry out a throughgoing administrative reform following the recommendations in the Duffy/Walsh report.

(2) Retain the provision in the Industrial Relations Act 2012 allowing employers to seek temporary exemptions from SEOs issued by the Labour Court. In particular cases such an expedient may be necessary to maintain employment. The requirement that an employer seeking a derogation must secure the consent of the employees concerned may act as a safeguard against sharp practice. However, it has been noted, that securing agreement, especially in difficult economic times, can be open to abuse. There may be scope for the employer to exert pressure on vulnerable employees in the absence of trade union organisation[9]. Facilitating a trade union presence by the employer or the state could overcome the defect of potentially coerced agreement. Finally, the derogation provision renders questionable the utility of carrying on business but without the ability to provide a living wage. In such circumstances the burden shifts to the employees the State or both. While we support the retention of the provision of temporary exemption from SEOs we do so reluctantly.

(3) In some of the judgements noted above the Labour Court was faulted on its failure to give reasons for its decisions regarding SEOs. It might be of assistance if the State was to clearly lay out the philosophy and objectives of JLC along with an explanation and justification of its departure from pure market principles or competition law. Aside from the technical and statistical details to be evaluated in individual sectoral cases such an outline might assist the Labour Court in reasoning and decision making. The discursive judgement of Mac Menamin J. in *NECI v Labour Court and Ors.* [2021] IESC would be helpful in this respect.

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[9] Doherty 'Battered and Fried' p.112

<u>Concluding remarks</u> – The State's decision in 2012 to retain rather than abolish the JLC system ran counter to a prevailing trend within the EU and at home. In terms of employment and labour law that trend represented a move away from collectively bargaining terms and conditions of employment. Rather it focussed on establishing statutory minimum standards[10]. Since that time growing worker discontent has eroded confidence in the efficiency and effectiveness of deregulated labour markets. Even the World Bank has modified its stance on this orthodoxy[11]. In Europe disenchantment with neo-liberalism and its outcomes has taken concrete form in the proposed Directive on minimum wages and collective bargaining coverage. This suggests a turn back towards strengthening the institutions of collective bargaining in EU countries as a precondition for a more sustainable and inclusive economic development[12]. Indeed, the present high- level group owes its establishment to these developments.

<u>Principle Two</u>

Referral of Disputes to the Labour Court under Part 3 of the Industrial Relations (Amendment) Act 2015

The Group intends to address some of the challenges by parties referring disputes to, or defending disputes at, the Labour Court under Part 3 of the 2015 Act. In particular the Group will examine the provision of expert means to assist the Labour Court in independently assessing and verifying and comparator data for the parties.

<u>Question 1</u>

***How could this statutory dispute resolution process before the Labour Court be improved for both employee and employer representatives*?**

A cogent answer to this question can only be supplied after summarising the origin and purpose of Part 3 of the 2015 Act. The impetus for Part 3 arose from a commitment by the Irish government to reform the current law of the employees

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[10] Doherty 'Battered and Fried' p.111

[11] Deirdre McCann 'Labour Law on the Plateau; Towards Regulatory Policy for Endogenous Norms' in *The Autonomy of Labour Law* (eds) A. Bogg, C. Costello, ACL. Davies and J. Prassi (Oxford Portland) 2017

[12]Thorsten Schulten and Thorsten Muller 'What's in a name; From Minimum wages to Living wages in Europe' *European Review of Labour and Research* 25, 3 (2019)
13 Kerr, The Trade Union and Industrial Relations Acts p.302

right to engage in collective bargaining so as to ensure compliance with recent judgements in the ECtHR (*Demir*, *Wilson* etc). This commitment was repeated to the ILO Committee of Experts on Freedom of Association[13].

There are a number of positive features in the Act. It amended the definition of an 'excepted body' to ensure its independence and prevent its function as an employer's creature. Protection from employer victimisation of workers who invoke the Act was strengthened. Finally, union(s) seeking Labour Court intervention must satisfy the Court they are 'substantially representative' of the enterprise employees. Along with detailing the disputed issues the official must supply an additional statement under the Statutory Declaration Act 1938. This will detail the number of members in the grade, group or category who are party to the dispute along with their period of union membership. Employers, their agents or representatives are precluded from scrutinising or interrogating the declaration. Queries as to its content or accuracy will be definitively determined by the Labour Court (See Appendix 1. P. 92-6) These measures give some protection against victimisation and discourage the legal challenges that have dogged the SEOs. Yet the evident necessity for these measures illuminates the obstacles confronting employees exercising their constitutional right to freedom of association and seeking its functional embodiment in union recognition. There is little sign here of a willingness of many private sector employers to either 'voluntary engage' or 'bargain in good faith'.

The are a number of deficiencies in the 2015 Act which are listed below.

(1) Irish government commitment to reform the law on collective bargaining was noted above. Part 3 of the Industrial Relations Act 2015 appears to fall short of that commitment. Kerr has questioned Irelands compliance with the ECtHR judgment in *Demir*. It ruled that the right to engage in collective bargaining had become an essential element or the right to freedom of association under Art 11 of the European Charter of Human Rights ECHR. Furthermore, he cites the ECtHR that Members States are obliged by Art. 8(2) of the European Social Charter to promote collective bargaining. The right to engage in collective bargaining is also enshrined in Art. 4 of ILO Convention 98 and Art. 28 of the Charter of Fundamental Right of the European Union[14].

(2) The principal focus of Part 3 of the 2015 Act is on firms which do not recognise unions and where collective bargaining is absent. It provides a mechanism by which the fairness of remuneration and conditions of employment may be assessed through the agency of the excepted body/ Labour Court. It may provide a partial remedy for difficulties experienced by workers seeking to collectively bargain with employers. Nevertheless, it is at variance with the commonly understood notion of collective bargaining which

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14 Kerr, The Trade Union and Industrial Relations Acts p.302

involves the employer and union representing employees in face-to-face negotiations. The Act does not provide for statutory recognition and there is no requirement on the employer to recognise the union. Consequently, it falls below the standard set by the ILO in which union recognition is a prerequisite for collective bargaining. The ILO holds that collective bargaining cannot begin until a union is recognised for that purpose[15].

(3) The definition of collective bargaining in the 2015 Act departs from the ILOs internationally recognised definition of collective bargaining. It substitutes a uniquely Irish definition. Under that rubric collective can only be achieved through voluntary engagement. An unintended consequence is to delegitimise collective bargaining and its indivisible concomitant of union recognition achieved through a legislative enactment or strike (See Appendix 3).

Our Proposals to improve dispute resolution process before Labour Court

(1) Remove the definition of collective bargaining in the 2015 Act and replace it with the internationally accepted ILO definition of collective bargaining. (See Appendix 3)

(2) Under the Act where a trade union makes application to the Labour Court and the Court finds the union substantially representative of the employees the court should be empowered to issue a legally binding recommendation on union recognition. The supposed constitutional and other obstacles often raised against such a measure are without foundation. (See Appendix 1).

<u>Question 2</u> –

***Do you agree that the assessment of economic and comparator data by an independent assessor, in certain circumstances, might improve the statutory process for both employer and employee representatives*?**

We do not agree for the following reasons. First as detail is scant, we are unsure as to what exactly is contemplated. Secondly the Labour Court is already tasked with the role of independent assessment.

With regard to 'independent assessment' the Labour Court has to date performed extremely well. Among the generality of industrial relations practitioners, the Court

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[15] International Labour Office ILO 'Collective Bargaining; A Workers Education Manual' 11th.ed. Geneva 1978

has achieved a high level of legitimacy and universally regarded as an honest broker; a major achievement in the fraught and contested area of industrial relations. We would welcome the provision of additional assistance to the Labour Court in collating and verifying the accuracy of data supplied by the contending parties. However, those engaged in this task should have no role in decision making on the merits of the submissions. This must remain the sole and exclusive prerogative of the Labour Court.

In our opinion, faith in a supposedly ideologically neutral, value free technocratic expert whose decisions are accepted without demur is the stuff of a dystopian nightmare. In democracies the results of expert decision making are often contested. This is particularly so in the field of industrial relations where conflicts of interests abound and even influence the negotiation of terms on which labour management cooperation will take place. Yet as presently constituted the Labour Court has a long-proven ability to deal with these complexities and hand down decisions that are generally acceptable. Consequently, we oppose any interference with the process of Labour Court decision making. Nonetheless we welcome any additional logistical and technical support that may benefit the Courts work.

Finally, while no particular profession is mentioned from which the proposed 'experts' may be drawn we suspect they are likely to be economists, practitioners of political economy. Their record of making accurate predictions or judgments is at best, patchy. Furthermore, those economists of a neo-liberal persuasion regard unions as aberrations, distorting the workings of the market mechanism and acting in 'restraint of trade'. They would seem particularly ill-suited for the role of neutral 'expert' charged with decision making on the merits of competing claims of employers and organised workers.

Principle Three

Good Faith Engagement at the Enterprise Level

The current wording of the Draft EU Directive on the Minimum Wage includes a requirement for the Member States where collective bargaining coverage is less than 80% to provide for an action plan to promote collective bargaining.

This sits alongside the growing European and International legal and policy momentum towards re-examining how employees and trade unions engage on matters of mutual interest

The Group is also cognisant of a global trend towards incorporating strong environmental social and corporate governance into business models. Taking account of these developments whilst at all time remaining conscious of the voluntarist tradition of industrial relation in Ireland the Group is exploring means a means to promote good faith engagement between employers and

workers where a substantial portion of employers are represented by a trade union and without prejudice to any outcome of such engagement.

Before turning to the substantive questions, we feel it necessary to make some observations on the above statement. These will be confined to the words underlined above.

Regarding the proposed requirement of 80% collective bargaining coverage this has already been achieved in the Irish public sector. There more than 80% of workers are represented by a trade union and consequently covered by collective bargaining. Conversely the Irish private sector exhibits very low levels of collective bargaining coverage. Implementation of the proposal to extend collective bargaining coverage must of necessity focus on that sector.

A consciousness of the 'voluntarist tradition of industrial relations in Ireland' may be an important factor in policy making. Of course, that assumes the indispensable requirement that the concept of voluntarism is clearly defined and well understood as to what measures it may encompass or exclude. This is not the case. For instance, it is frequently claimed that the Irish voluntarist tradition necessarily excludes any legislative enactment on statutory recognition. We have established, to our satisfaction at any rate, that statutory recognition far from being inimical to voluntarism would in fact strengthen and support that tradition (See Appendix 3). We submit that no rational or responsible policy maker would proceed or refrain to act on the basis of an unexamined cliché notwithstanding its continual repetition.

The Group is tasked with discovering ways to promote good faith bargaining between employers and workers at enterprise level. Apparently, this promotional effort will only be directed at enterprises 'who have a substantial proportion of employees represented by a trade union'. We are puzzled by this exclusive and narrow focus. It seems to imply that where a union is present in the enterprise but not substantially representative of employees then there is no need to promote good faith or indeed any bargaining. Where a union is sufficiently strong in numbers to challenge the employer only then will it become necessary to promote good faith bargaining. The good faith of good faith bargaining seems questionable.

Question 1

What are the main factors impeding the voluntary engagement between employers and worker representatives on matters of mutual interest?

Employer refusal to recognise or engage with independent trade unions representing workers interests is a historical and contemporary commonplace. This is particularly so in Ireland, Britain and North America (See Appendix 2 pp 14-37). The principal reason for employer opposition to unions and a refusal of recognition arises from the nature of the market system. Its motor force is an insatiable desire for profit. Employers and their managerial agents act under the market imperative of

maximising profit and return to shareholders. This overarching goal of the firm is mainly realised through the utilisation, deployment and management of labour. Workers can experience the drive for profit maximisation in various ways. It can issue in intensification of work, downward pressure on wages, extending the working day, lay-offs, short time, redundancy or the treatment of labour as a commodity. Consequently, workers organise in unions to exercise some modest check on the unrestricted play of market forces, to assert the human essence of the labour and qualify its treatment as a mere inanimate factor of production. From the employer's perspective unions represent costs, a potential diminution in profit and a curb, no matter how modest, on their freedom to respond to market dictates as they see fit. Hence the perennial opposition by employers to engagement with unions (See Appendix 2 pp 8-9).

Despite the above we do not deny the possibility that an employer will voluntarily recognise and negotiate with an independent trade union. However, such engagement tends to be rare and exceptional as the history of any union movement in the Western Industrial World will show. Nonetheless in Britain the advent of statutory recognition appeared to incentivise employer voluntary engagement with trade unions.

Mutuality and Mutual Interests - We are concerned by the Groups emphasis on mutual interest. We may be mistaken but we fear the Group may have adopted a perspective on the employment relationship promoted by the purveyors of Human Resource Management HRM; a grotesque ideological manifestation of the 1980s produced by the Harvard Business School. Its adoption proponents claimed would end the traditional adversarial relations between employer and employees. The employment relationship was essentially cooperative. It was a relationship of mutual advantage embracing all stakeholders, employers, employees and shareholders. Conflict did not arise from market operations or divergent interests between employer and employee but was the creation of trade unions (See Appendix 2 pp 30-32). It amounted to a flat denial of reality regarding the nature and operation of the employment relationship in a market economy.

The employment relationship in a market economy contains elements of both conflict and cooperation, dissent and accommodation. While management pursues control to further profit maximisation they must simultaneously attempt to engage and mobilise worker creativity and co-operative power. Likewise, workers experience the pull of contending forces. Conflict over the terms of the wage effort bargain and asymmetrical power relations prompts resistance. Yet workers material interest in the firm's survival counsels restraint if not cooperation. In the context of liberal democracy this complex interplay between antagonism and cooperation can only be managed effectively through the recognition and negotiation with the

workers independent trade union[16]. Given that context an exclusive emphasis on the pieties of mutuality will be wholly inadequate.

During the national partnership between employers and unions the concept of mutuality figured prominently in the rhetoric surrounding the process. Unions embraced the concept with enthusiasm. It proved detrimental to unions in the private sector. Under partnership they experienced a catastrophic fall in union density. In contrast, employers were, at best, lukewarm regarding mutuality. Nevertheless, they emerged as the chief beneficiaries of the partnership process. (See Appendix 2 p. 38-51)

Question 2.

Are there any practical measures that might assist in encouraging better good faith engagement between employer and worker representatives at enterprise level?

The history of personnel techniques such as profit sharing, co-partnership, human relations, the job enrichment of neo-human relations, employee involvement, organisation development and now HRM all record a search for a solid foundation, stabilising worker management relations. The success of such initiatives has been uneven. Good faith engagement may be considered as an addition to these techniques.

We will postpone consideration of what good faith engagement may mean until question 3. An employer who refuses to recognise a union(s) of his or her employee's we would regard as an example of bad faith. Alternatively, an employer who recognises a union on request from employees without the threat of sanctions presents a potentially solid foundation for the development of good faith bargaining. Yet only the behaviour of the parties over time and how their opposite number experience and evaluate that behaviour will determine the development or otherwise of good faith engagement. External assistance we believe can do little to improve the process. Progress or failure of good faith engagement will exclusively depend on the parties. For the employer who is obliged by sanctions from union or State to recognise and negotiate with the workers union(s)the development of good faith engagement msy be hampered but not impossible. Indeed, employer willingness to furnish information to the

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[16] Daryl D'Art 'Managing the Employment Relationship in a Market Economy' in Daryl D'Art and Tom Turner (eds) *Irish Employment Relations in the New Economy* Blackhall Publishing. Dublin (2002). D'Art and Turner 'New Working arrangements; changing the nature of the employment relationship?' *The International Journal of Human Resource Management* 17, 3 (2006).

union(s) on company reports, profit margins, contemplated future plans and other relevant detail would greatly improve the prospect of developing good faith bargaining.

Question 3.

***Do you agree that a statutory provision encouraging good faith engagement at enterprise level would be beneficial? Please explain*.**

Before we attach the prefix of 'good faith' to 'engagement at enterprise level' we must be clear as to what such engagement means and involves. We understand 'engagement at enterprise level' to mean collective bargaining. The ILO holds that collective bargaining cannot begin until a union is recognised for that purpose. Employers it continues will give such recognition only if they believe it is in their interests to do so or are legally required to do so (See Appendix 3 p. 151). There is substantial evidence to show that many Irish employers in the private sector regard collective bargaining as contrary to their interests (See Appendix 2. p 51-56). Consequently they are extremely reluctant to voluntary engage or negotiate. This holds good irrespective of their workers preference in the matter. This refusal to engage or recognise the union could be seen as an example of bad faith.

Remedial action correcting this state of affairs could take the following form. Once a union(s) is substantially representative the Labour Court would be empowered to issue a legally binding direction to the employer to recognise and negotiate with the workers trade union(s). The supposed constitutional and other obstacles often raised against such a measure are without foundation (See Appendix 1, part 2, p. 100-112). Once the union is recognised for collective bargaining the parties come together and thrash out a maybe less than perfect but a mutually acceptable compromise on wages, conditions, procedures etc. The outcome will depend on the relative bargaining power of the parties, the skill of the respective negotiators and the market in which the enterprise operates. In this arrangement the parties remain largely free to regulate the substantive and procedural terms of the employment relationship without state intervention satisfying the essential requirement of a voluntarist system. We do not agree that an additional statutory requirement on the parties to bargain or engage in good faith would be beneficial.

A Statutory Duty to Bargain in Good Faith? – The first legislative enactment of a duty to bargain in good faith was introduced by US Wagner Act of 1935. Under the Act this duty was confined to the employer. It was designed to prevent the employer 'talking the union to death'. In other words, the employer would continue to negotiate but never reach agreement thus demonstrating the futility of union joining and recognition. A succe3ssful employer offensive against the Wagner Act culminated in the enactment of the Taft Hartley Act 1947 (See Appendix 2. p.99-103) It imposed a duty to bargain in good faith on the union as well as the employer. Since that time the duty to bargain in good faith has produced a number of problems.

First if a legislative enactment requires 'bargaining in good faith' the exact meaning of the term becomes important. Yet the existing definitions have been less than satisfactory. Good faith it seems does not stop at bringing the parties together but the quality of the talks between them becomes of paramount importance. Usually those assessing the existence or absence of good faith bargaining relapse into generalities. Statements such as 'bargaining in good faith must involve every reasonable effort to make an agreement' but what constitutes reasonableness is left undefined. Or in other cases stating the obligation to bargain exists but without defining the nature of that obligation.[17]

Secondly from a democratic pluralist perspective, it has been argued, that the parties to collective bargaining are the ones best placed to negotiate the terms and conditions appropriate to their situation. They are much more likely to have a better sense of their respective interests. The State is not competent to engage in controversial value judgements as to which bargaining position is reasonable. Furthermore, an active duty to bargain in good faith will embroil the State in influencing the outcome of collective bargaining[18]. Finally enforcing the duty of good faith bargaining will inevitably involve the judiciary as it has done in the US up to the Supreme Court. Consequently, we oppose any statutory duty to bargain in good faith. Once the employer recognises the union for collective bargaining then the State should have no directive role in determining the outcome of the bargaining between the parties. Of course, the State continues to maintains a facilitative and auxiliary role through the Labour Court.

Concluding Observations

As we understand it the objects of the High-Level Group on Collective Bargaining was reform of the existing system of industrial relations, consider a way or ways to extend collective bargaining coverage to 80% and examine again the question of union recognition. Certainly, the questions asked invited answers on general reform of the industrial relations system. Yet the impetus for the Groups establishment came primarily from the proposed EU directive, whose central focus was the achievement of 80% collective bargaining coverage and the question of union recognition. Yet these were not the focus of the questions asked except maybe, in a very obscure and abstruse way. However, the fault here may be due to defective understanding on our part. Nevertheless, the absence of a sharper focus on the central questions – the extension of collective bargaining coverage and union recognition - was disappointing.

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17 E.E, Palmer 'The Myth of Good Faith in Collective Bargaining' *Alberta Law Review 4* (1986). Alan Simpson 'The Concept of Good Faith Bargaining under the Labour Management Relations Act 1947' *Wyoming Law Journal* 12, 92 (2019)

18 Alan Bogg '*The Democratic Aspects of Trade Union Recognition'* Hart Publishing, Oxford (2009)