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Abstract

Ireland's selective system of collective agreed minimum wages has come under significant pressure in recent years. A new fast-food employer body took a constitutional challenge against the system of Joint Labour Committees (JLCs) and this was strengthened by the discourse on the negative effects of minimum wages as Ireland's economic crisis worsened. Taking a historical institutional approach, the article examines the critical juncture for the JLC system and the factors which led to the subsequent government decision to retain but reform the system. The article argues that the improved enforcement of minimum wages was a key factor in the employers' push for abolition of the system but that the legacy of a collapsed social partnership system prevented the system's abolition.

Keywords

Economic change, pay, peak employer's organisations, trade unions

Introduction

While countries have struggled to respond to the global recession, and many have introduced austerity measures, there has been a mixture of responses with regard to minimum wages. Some countries like the UK, Australia, New Zealand, Latvia, Luxembourg and Portugal have increased their National Minimum Wage (NMW) while others such as the Czech Republic and Estonia have had minimum wage freezes

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(European Foundation for the Improvement of Living and Working Conditions, 2011). In Ireland the NMW was reduced in February 2011 by over 11%, but this was reversed in June 2011 by a new government. In addition to the NMW, Ireland also has a system of legally binding minimum wages covering 11 sectors. The focus of this article is on these sectoral minimum wages set by Joint Labour Committees (JLCs), which have been in existence since the early 1900s. The majority of JLCs set basic minimum pay rates in excess of the NMW and they also set overtime rates, Sunday premiums and minimum conditions of employment like sick pay schemes (O'Sullivan and Wallace, 2011).

Until recently there was relatively little public policy attention paid to the JLC system, but this has changed in recent years as there has been increasing pressure to abolish it. JLCs are statutory bodies composed of employer and employee representatives and an independent chair which set legally binding minimum pay and conditions for vulnerable workers through Employment Regulation Orders (EROs);¹ analogous to the system of Wages Councils that existed in the UK until 1993. Lowndes (1996: 193) has argued that, 'stability is a defining feature of institutions' and this has been the case for much of the life of JLCs. However, a recent major driver for change was a legal case taken against the JLC for the catering industry in 2008 by a fast-food employer and a new employers' organisation, the Quick Service Food Alliance (QSFA). The QSFA was formed in April 2008 and represents over 180 members with a mixture of multinationals such as McDonald's, Subway, Supermac's, the Bagel Factory and other independent outlets (Higgins, 2009; [ww.qsfa.ie](http://www.qsfa.ie)). In their legal challenge the employers argued that JLCs were unconstitutional because they were setting legally binding regulations which, according to the Irish Constitution, only Parliament has the authority to do.

In June 2011, the High Court found in favour of the fast-food employers and deemed that the Catering JLC was unconstitutional. The subsequent High Court decision left the JLC system in a state of limbo, leaving important worker protections under threat. This decision served to strengthen the position of other employers who sought the abolition of JLCs because they were 'costing jobs' (Sweeney and O'Brien, 2011; Wall, 2011). Their argument gained a lot of traction in the context of Ireland's financial and economic crisis. When Ireland received a financial bail-out from the International Monetary Fund, the European Union and the European Central Bank in late 2010, the Irish government committed to reviewing the JLC system in order to increase flexibility in the labour market (IMF, 2010). The government's choices were to introduce legislation to retain or abolish JLCs or avoid taking action and let the High Court decision stand, leaving JLCs in a legal limbo and effectively become obsolete. In the end, the government chose the middle ground: it has introduced draft legislation to reinstate JLCs but their powers will be curtailed and their decision-making processes will become more complex. Taking a historical institutional approach and drawing on the theory of path dependency, the article examines the way in which the JLCs work in practice and the employers' legal case in pushing for the abolition of JLCs. We also examine the role of the government in responding to the drivers for change and consider the resultant transformation of JLCs. We begin with a review of research methods.

Research methods

The findings are based on semi-structured interviews carried out between March 2009 and May 2010 (Table 1) and an analysis of documentary materials. Interviews were conducted with the QSFA including McDonald's and Supermac's (Ireland's largest fast-food group) and employer associations which sit on the Catering JLC: Ireland's largest employer body, the Irish Business and Employers Confederation and the Vintners Federation of Ireland (abbreviations are presented in Table 1). We interviewed the Services Industrial Professional and Technical Union, which represents workers on the JLCs and conducted a telephone interview with a senior representative of the National Employment Rights Authority, a state body which is responsible for enforcing JLC regulations. At the time of interviewing, the main opposition political party was Fine Gael and it was vocal on the effects of JLC regulations on business so we interviewed the Fine Gael Spokesperson on Enterprise, Trade and Employment. Since elections in February 2011, Fine Gael has been the lead party in a coalition government. We interviewed representatives from the Migrant Rights Centre of Ireland, which has been critical of the QSFA challenge, observed a worker protest organised by the MRCI outside a Supermac's outlet in April 2010 and interviewed workers who took part in it. The interviews were between half an hour and two hours in duration and were recorded and transcribed or notes were taken. Our interview data were also supplemented by emails with some of the respondents. The interviews were supplemented with data from a number of key documents. These were (1) High Court case documents involving the QSFA and the JLCs, (2) two government-commissioned reviews on the JLC system (Duffy and Walsh, 2011; O'Sullivan and Wallace, 2005), (3) National Employment Rights Authority reports on compliance with JLC regulations, (4) Labour Court documents on a case taken by a fast-food employer disputing their obligation to pay JLC wage rates, (5) two pieces of proposed legislation on JLC reform: the Industrial Relations (Amendment) Bill 2009 and the Industrial Relations (Amendment) Bill 2011 and (6) news articles from the weekly magazine, the Industrial Relations News. We used an historical institutional approach to ascertain how and why JLCs changed and thematic analysis was used across the data set. We started with broad headings in mind ('QSFA constitutional challenge', 'government role') related to the overall research objectives: what triggered the QSFA's legal challenge and why did the government choose the course of action it did in relation to JLCs? In line with thematic analysis, we familiarised ourselves with the data, generated initial codes and searched for themes based on their frequency and 'keyness' (Braun and Clarke, 2008).

Institutional stability and change

Most definitions of institutions emphasise their persistence or 'status quo bias', that is, that they are difficult to change even when economic and social conditions change (Mahoney and Thelen, 2010; Pierson, 2000; Thelen and Steinmo, 1992: 18). The theory of path dependency emphasises the importance of history in explaining current institutional features and phenomena and, depending on the version of path dependency, can

Table 1. Interviews and abbreviations.

Organisation/interviewees	Number of interviews
Quick Service Food Alliance (QSFA)	
Senior representative	1
McDonald's	1
Supermac's	1
Employer associations on JLCs	
Irish Business & Employers Confederation (IBEC)	1
Vintners Federation of Ireland (VFI)	1
Trade union on JLCs	
Services Industrial Professional and Technical Union (SIPTU)	1
Migrant Rights Centre of Ireland (MRCI)	
Representatives	3
Workers	9
National Employment Rights Authority (NERA)	1
Political party	
Fine Gael Spokesperson on Enterprise, Trade & Employment	1

focus on either a 'persistent diffusion' path or 'branching pathways' (Ebbinghaus, 2005). The persistent diffusion path 'stresses the spontaneous evolution of an institution and its subsequent long-term entrenchment' and self-reinforcing or feedback processes contribute to the institution becoming 'locked-in' (Ebbinghaus, 2005: 5, 10). In this scenario, it becomes costly for actors to change the direction of the institution (Levi, 1997; Pierson, 2000). Ebbinghaus (2005: 11) criticises the notion of 'lock-in' because it excludes the possibility of the gradual adaptation of an institution and it has been argued in some institutional change literature that even gradual change can result in major changes in institutions with the passage of time (Erickson and Kuruvilla, 1998; Thelen, 2009). The 'branching pathways' version of path dependency emphasises the particular historical origins of institutions through 'the conscious choices by collective actors at critical junctures' (Ebbinghaus, 2005: 16). Critical junctures are important in the institutional change literature which focuses on dramatic rather than continuous and incremental change (Krasner, 1984: 234). In this dramatic change or punctuated equilibrium model of institutional change, there are long periods of stability and these are interrupted with crises associated with an exogenous shock that 'opens the door for significant institutional innovation' (Thelen, 2009: 474). During times of stability, there may be incremental adjustments but without a change to the deep structures of the institution (Gersick, 1991). In times of revolutionary change, the deep structure of the institution is dismantled, 'leaving the system temporarily disorganized' and the system is reconfigured according to a new set of rules (Gersick, 1991: 19). The changes produced by the crisis can vary and the changes can harm or benefit the system (Gersick, 1991). Busenberg (2003) notes that periods of significant change are often caused when attention to an issue has expanded from subsystem politics (consisting of those individuals active in a policy domain) to the macro-political system (government leaders and the public). Historical

institutionalism and the punctuated equilibrium model in particular offer an effective lens through which to study JLC change. A key issue in the historical institutional approach is the influence of power distributional struggles on institutional change and this is prevalent to the discussion on the choices made by collective actors in triggering and determining the change in the JLC system (Thelen, 2010). For example, Mahoney and Thelen (2010: 9–10) note that if institutions disadvantage subordinate groups, they can organise and challenge institutional arrangements.

Some previous research examined the history of JLCs and the reasons for their stability during the twentieth century. The predecessors of JLCs and Wages Councils in Britain were the trades boards and their establishment has been well documented (Blackburn, 2009; Clegg, 1970; Deakin and Green, 2009). They were created by the British government in 1909 and were intended to protect vulnerable workers in sweated trades characterised by terrible working conditions and child labour. When Ireland became a Free State in 1922, the legislation on trade boards was retained and, in 1946, the Irish government chose to rename them as JLCs and increased their powers. One way institutions retain their status quo is when their designers create significant barriers to change (Pierson, 2000). In the case of JLCs, their foundation in legislation under the Industrial Relations Act 1946 meant that their abolition would be difficult. Until recent years, the JLC system remained stable. There were periods of gradual change which did not affect the deeply-rooted structure of the JLC system. Individual JLCs were created and abolished usually in response to the changing labour market. While trades boards covered mostly small trades in clothing, JLCs evolved with the labour market and now mostly cover employment in the services sector such as hotels, catering, security, retail and contract cleaning – employments which satisfy the criteria for JLC creation: low pay and inadequate collective bargaining. Thirteen individual JLCs in 11 sectors, some covering specific geographical regions, protect 168,000 employees, accounting for approximately 9% of all employees in Ireland (Turner and O'Sullivan, 2011). Thus, part of the reason for JLCs' survival is that they adapted to the changing labour market (O'Sullivan and Wallace, 2011).

In addition to their adaptation, O'Sullivan and Wallace (2011) argue that other factors contributed to the stability of JLCs during the twentieth century. In contrast to the experience of the British Wages Councils, there was an absence of an Irish political party which pursued strong neoliberal labour market policies and employer organisations had relatively benign attitudes towards JLCs. Even when some employer organisations criticised JLCs, this was generally directed at their operation and changes were sought through the system of tripartite social partnership. National social partnership agreements determined pay increases for unionised employments and made commitments on economic and social policy. They were agreed by employer organisations, trade unions and the government since 1987 but could not survive the economic crisis and collapsed in 2009. In the social partnership agreement agreed in 2004, IBEC successfully sought a review of the JLC system and on foot of the review, the social partners committed to modernise the system in the subsequent social partnership agreement agreed in 2006. This provided the basis for JLC members, including IBEC and SIPTU, to negotiate and correct anomalies in the system such as multiple Catering JLCs setting different minimum pay rates for different geographical areas. Thus Ireland's major employer organisations were

members on JLCs and any changes they sought were negotiated through the social partnership system, contributing to their stability. However, this stability was put in doubt following the formation of the QSFA. As the rest of the article illustrates, the QSFA is one of a new breed of 'outsider' employer associations which perceives its interests to be disadvantaged by existing institutional arrangements; and has acted accordingly by legally challenging the JLC system.

Driver for change: The fast-food challenge

The legal challenge by fast-food employers against the Catering JLC was not the first time such a case had been taken. A constitutional case against the Hotels JLC was initiated in 2007 by a hotel employer and the employers' association, the Irish Hotels Federation, which was represented on the Hotels JLC. However, a High Court decision was never issued because the case was withdrawn as a result of a settlement reached between the Irish Hotels Federation and SIPTU in which it was agreed that the employers' case would be dropped in return for the JLC minimum pay and conditions being renegotiated. Following the agreement, the Irish Hotels Federation returned to participate on the Hotels JLC as an employer member. In interviews, a SIPTU official stated that the employer association was concerned about the negative publicity and court costs associated with the case and was 'very relieved' that the issue was settled out of court. A representative of the QSFA stated that some employers were not satisfied that the hotels case was settled out of court and that the constitutionality issue was not decided. When a fast-food employer and the QSFA launched their constitutional challenge in 2008, they used the same legal argument as the hotels employers used: that the power of the JLC and the Labour Court to issue an ERO was unconstitutional. The employers referred to the 1937 Irish Constitution which states that law-making power rests with the Oireachtas (Irish Parliament) and that therefore only Parliament should have the power to set legally binding pay and conditions. In addition, the employers argued that the Constitution guarantees the right to the protection of private property and that the setting of EROs breached employers' right to fair procedures guaranteed in the European Convention of Human Rights (High Court, 2008). Our analysis suggests that three factors prompted the fast-food constitutional challenge: first, employers were reacting to the improved enforcement of JLC regulations; second, employers claim that the existence of an NMW meant that the JLCs were no longer necessary; and third, there appeared to be increasing dissatisfaction with the operational and structural features of JLCs amongst employers. We now discuss these factors below in more detail.

Enforcement of JLC regulations

Enforcement of, and compliance with, minimum wages has long been a concern of proponents of a minimum wage including the Webbs (Metcalf, 2009). Stewart (1993: 318) contends that all regulatory regimes rest on the assumption that the greater part of the target population will obey the law voluntarily. If this were not the case, compliance problems would be so massive as to 'render the law unworkable'. As Stewart (1993: 320) accurately reflects, those who need the law (imposed on them) the most, are more likely

to want to evade it, while those who are more law-abiding anyway will be more likely to comply: 'the bad will tend to drive out the good, unless formidable efforts are made at enforcement'. Weil (2009) argues, in the case of the USA, that the long-term reduction in government resources towards enforcement of wages and other regulations contributed to the growth of vulnerable workers. In Ireland, until 2000, enforcement of JLC regulations and other employment laws were carried out by just 10 government labour inspectors. This low number was criticised by the European Committee of Social Rights/Committee of Independent Experts (Council of Europe, 1999: 395–397) and between 2000 and 2005, the number of labour inspectors was gradually increased to 32. During interviews, a representative of McDonald's Ireland commented on enforcement:

... the poor labour inspectorate there was only 30 of them. There's no way they can get around the whole country so the regulation was inconsistent and patchy at best so there were no implications and people just operated on industry norms ...

However, there was a considerable change in the Irish system after two high profile disputes in 2005 involving the GAMA construction company and Irish Ferries, which raised a debate about a 'race to the bottom'. These disputes involved breaches of employment regulations and led to strong pressure from trade unions in social partnership negotiations for improvements in employment rights compliance resulting in the creation of a new body, the National Employment Rights Authority (NERA). It was created to enforce the NMW and JLC regulations and the social partners also agreed that the number of labour inspectors would be increased to 90. While the number had only increased to 69 by 2010, the increase in the number of inspectors and the creation of NERA led to greater inspection activity. This exposed employers who had not paid employees correctly and arguably became a major trigger for the QSFA's constitutional challenge. A Supremac's representative commented:

It went from being half regulated in that the Department of Labour sent an inspector once every five years to suddenly 90 inspectors from NERA who were like dogs with bones constantly calling to catch you out; threatening people that were struggling to keep their head above water. ... People were in tears ... it wasn't because of staff or customers, it was because of NERA.

A VFI official argued that fast-food employers took the constitutional challenge because 'in the last 12 months NERA have done a rampage around the country to justify their existence'. The IBEC official noted a perception amongst catering employers that they were being singled out for inspections and a senior NERA representative confirmed that the catering sector had been targeted in 2008, 2009 and 2010 as the sector had been,

... identified as an industry 'at risk' of breaches of minimum regulations and underpayments because of its low pay and high numbers of migrant workers.

In 2008, NERA found breaches of JLC regulations and other employment legislation in 73% of inspections in catering (NERA, 2009). The NERA representative noted that there was no noticeable difference in compliance rates between larger and smaller

employers and that the main reasons given by employers for non-compliance with EROs were a lack of awareness of them, a lack of understanding of their contents and an inability to pay the minimum rates. An IBEC official commented that,

... with the behaviour of NERA, employers who thought they were compliant through lack of awareness and not through malice or criminal intent are liable for retrospective.

However, there seems little doubt that compliance in the catering sector remains a major problem, with the number of catering organisations found non-compliant increasing to 79% in 2009 (NERA, 2010).

The high level of breaches in catering is not unique to Ireland. In the USA, Weil (2010) notes that the large number of low-wage jobs in the catering industry makes it prone to minimum wage and hours violations. Research found 40% non-compliance with minimum wage and overtime regulations among fast-food outlets owned by the top 20 national chains (Ji and Weil, 2009). This is supported by other research, which has found many similar examples of inaccurate wages, non-compliance for unsociable hours premiums, pay groupings and the problem of unpaid work in US-owned fast-food giants worldwide and also in several of their European competitors (Royle, 2004, 2010). A senior McDonald's Ireland representative suggested that the increased activity of NERA meant that, 'the level of financial exposure per businesses . . . is absolutely enormous'. Employers were liable to up to three years' retrospective payments of minimum wages for any detected underpayment and it was estimated that the retrospective exposure for a business would be in the region of €50,000–€100,000 (ST£45,000–£90,000) (interview, QSFA). Employers who had underpaid employees and had difficulty in paying back the money could come to an instalment arrangement with its workers and NERA whereby wages were repaid over a period of time. Employers who did not cooperate with NERA and/or were found to have repeated offences were liable to criminal prosecution leading to possible fines or imprisonment. The possibility of criminal prosecution in the case of the JLC regulations marks a departure from much other employment legislation. Under most individual employment laws covering, for example, unfair dismissals, employment equality, maternity leave or terms of employment, individuals can seek enforcement of their entitlements through referral to specialist state agencies and not through criminal prosecution. A SIPTU official stated that improved enforcement was key to the fast-food employers' constitutional challenge:

... NERA came in, started to do inspections. . . . What they're saying and they've said it publicly – they haven't been paying it and now they being forced to do something that wasn't being enforced. Because they're being forced.

Unsurprisingly, the SIPTU official had little sympathy for QSFA's arguments regarding the burden of paying back unpaid wages:

I make it simple. If a worker was employed in a restaurant and was taking money out of the till, stealing the money, putting in their pocket, the employer caught them they would be dismissed, prosecuted and all that would go with that and probably jailed if they were stealing, but an

employer has been doing it for years . . . taking money out of workers' pockets, but what they want to do, they want to change the law to make it legal what they have been doing illegally.

As employers came under more pressure to comply with JLC rates they argued that the effects of complying with JLC regulations were a loss of competitiveness and reduced working hours and jobs. In addition, employer representatives argued that the JLC rates were harder to pay as there had been increases in other operational costs such as rent, water and insurance costs, beef prices and licences. The QSFA and VFI argued that JLC regulations placed fast-food employers in the Republic of Ireland at a competitive disadvantage to those in Northern Ireland, where there is no equivalent of the JLCs; a QSFA spokesperson stated:

The actual minimum wage for the catering sector here is €9.31. . . . If you incorporate all the other benefits like paid break and time and a third that they don't have [in Northern Ireland]. They don't have Sunday premium, they don't have late night premium. Overtime doesn't have to be applied until 64 hours or something like that . . . the Irish national minimum wage for the catering sector is probably around €12 compared to €6 in the North and the €6 is only applicable to people over 21.

However, most Irish employers are unlikely to be affected by the lower wage rates in Northern Ireland unless they are located close to the border and this argument does not take into account the difference in the cost of living, which is substantially higher in the Republic. Employers were particularly critical of the Sunday premium set by the Catering JLC because they argued that Sunday pay should be no different to any other day in a seven-day week business. A McDonald's representative argued that the consequence of the Sunday premium was that: 'businesses started closing on Sundays all around the country'. Similarly, a QSFA spokesperson stated:

Particularly in this climate what we were faced with the application of the JLC at this time and particularly with Sunday pay is two things: increased costs on Sundays that would make it unviable to work on Sundays and the retrospective pay that would literally cripple businesses.

Even though employers suggested that general operational costs were rising, they attributed the loss of jobs to JLC rates. A Supermac's representative stated that the JLC rates could lead to closures, which would remove jobs altogether. Labour costs represent around 30% of total costs for fast-food employers and they are one of the few areas fast-food employers can make significant savings and, unlike utility costs, employers feel that JLC minimum regulations can be challenged (see Leidner, 2002; Royle, 2010). As the McDonald's representative admitted, 'labour costs are the only variable that can be managed'.

The arguments made by employers on the effects of JLC regulations reflect the classical economic contention that minimum wages increase unemployment (Brown et al., 1982; Kaufman, 2009; Neumark and Wascher, 1992). Similarly, the neoliberal British Conservative governments from 1979 used the 'reduction in employment' argument to justify a restriction of the scope of the Wages Councils from 1986 and then their almost

complete abolition in 1993, removing minimum wage protection for approximately 10% of the active labour force (Deakin and Wilkinson, 2005). However, there is evidence that minimum wages do not have a significant negative impact on employment and can have positive effects (Böckerman and Uusitalo, 2009; Card and Krueger, 1995; Deakin and Green, 2009; Deakin and Wilkinson, 2005; Rubery, 1997; Wilkinson, 1983). In relation to the impact of overtime rates and Sunday premiums set by JLCs, the evidence on the earnings of JLC workers does not support the employers' argument. Only a small percentage of workers covered by JLCs work overtime and the number of overtime hours worked by them is very low, amounting to an average of just 30 minutes per week (Turner and O'Sullivan, 2011). Research internationally shows that large fast-food operators take great care to ensure that their predominantly part-time workforce are utilised in a manner that will almost guarantee that overtime rates can nearly always be avoided (Royle, 2010).

The constitutional challenge was taken in the early stages of a major downturn in the economy; however, employer respondents suggested that this was not a significant factor contributing to the challenge. Despite the claim that businesses were closing because of the JLC pay rates, it is worth noting that the multinational fast-food giants were doing well in the recession as consumers 'traded down' their eating habits to save money (Royle, 2010; Wood, 2012). Supermac's pre-tax profits quadrupled in 2009 leading its managing director to comment that, 'the current recession had resulted in consumers opting for value for money as opposed to paying high restaurant prices' (*Connacht Tribune*, 2009; Deegan, 2009). In fact there appeared to be a general consensus amongst employers that the QSFA challenge would probably have happened even without an economic downturn. The McDonald's representative stated that: 'the recession accelerated it but the constitutional challenge or some challenge would have taken place'. Nevertheless, the recession appears to have led to a greater level of non-compliance, more difficulty in collecting arrears and more employers reporting non-compliance by competitor employers as unfair competition has become more transparent (interview, NERA).

NMW and legislation

One of the arguments made by employers against JLC regulation is that the existence of a NMW since 2000 makes JLCs unnecessary. In addition, employers argue that JLCs are irrelevant because of the vast array of employment legislation governing the employment relationship. The McDonald's representative stated that, 'there has always been this sense of JLCs covering more vulnerable sectors, but from our point of view the [national] minimum wage is quite high'.

The VFI representative was more aggressive on the relevance of the JLC system in the context of current employment law, stating that the system is,

... a throwback to the 1970s when we didn't have the type of legislation in place that we have today in relation to employment law and it's probably anti-competitive. In a nutshell: a waste of time. It amounts to overregulation.

The QSFA representative also stated:

There was no [national] minimum wage when JLCs were first created. Now we have roughly 25 pieces of legislation governing employee rights that weren't there 30 or 40 years ago and we feel that's enough of a base to work from . . . there's enough with the minimum wage there. The minimum wage has such an impact on the economy generally that it should be controlled by the government and with proper advice from economists and not just a group of people sitting around a table and making up their own mind on it.

Structure and operation of JLCs

Employers expressed frustration over a number of operational and structural features of JLCs. One feature is that for some sectors, there were two JLCs covering different geographical regions and these JLCs operated independently of each other, setting different minimum rates of pay. Employers argued against the resultant competitive inequalities whereby 'you would have two stores a mile apart under different terms and conditions' (interview, McDonald's). Another frustration lay with the definition of a catering organisation under JLC regulations. According to the Catering EROs, a catering establishment is a premises primarily used for supplying food or drink for consumption on the premises. Fast-food employers have argued that fast-food outlets which do not own seating (such as in a communal food court) should not be covered by JLCs. The QSFA representative stated that:

A takeaway-only premises is not included on the JLC if it's for consumption off the premises so therefore I'm at a disadvantage because I've got seating. . . . Their staff do not do any duties beyond that of a normal takeaway so it's a very strong argument and I hope they're successful. Again it shows how many problems you have with JLCs as it stands. It serves to confuse everything.

SIPTU disagreed with this, arguing that once an establishment serves food, then it is covered by the JLC. This issue was resolved in 2009 by the Labour Court when it determined that fast-food employees working in food courts were covered by JLCs (Busy Bee Bagels Ltd and NERA, Labour Court Decision No. Dec092).

Part of the QSFA constitutional challenge is that employers' rights to fair procedures and due process under the European Convention of Human Rights were breached. The basis for this claim is that there was no provision for an employer to claim an inability to pay the JLC rates and there was no right of appeal once an ERO was made. Employers contrasted this with an inability to pay provision which was available in social partnership agreements and which is available in regard to the NMW. Interestingly though, no employer has ever made an application claiming an inability to pay the NMW. While there is no right of appeal for either employers or workers once an ERO is set, proposed EROs are published and the public is given the opportunity to voice objections and these must be considered by the JLC.

Employers also alleged that chairpersons of JLCs were biased towards proposals made by the worker representatives on JLCs. JLC chairpersons have a casting vote when employer and worker members are unable to agree, giving them considerable

influence over the outcome. A Supermac's representative commented that employers who attended JLC meetings stated that the casting vote, '99.9% of the time would go with the union side of the things . . . it was an absolute futile worthless exercise'. The McDonald's representative stated that the employer members had attempted to change the Sunday premium pay within JLCs for years but that 'the chair has never once voted in favour on the side of the employer'. Similarly, IBEC and VFI officials stated that chairpersons did not vote for employer motions. This is not a new complaint by employers. In a survey of JLC members in 2005, over 40% of employer respondents thought that the casting vote was unfair because chairpersons were biased towards workers proposals (O'Sullivan and Wallace, 2005). The IBEC representative argued that the power of casting vote should be removed from chairpersons,

. . . if there is supposed to be agreement in a voluntary system, then chairs should be facilitators or mediators to facilitate agreement. If they agree, agree. If they don't agree, they don't agree.

The IBEC representative argued that such a system would encourage better dialogue. However, when this issue was considered by a review of the JLC system in 2005, the review authors recommended that the chairperson's casting vote be retained; otherwise, they concluded, there would be a possibility that JLCs could not resolve issues (O'Sullivan and Wallace, 2005).

Fast-food employers and the future of JLCs

With regard to the issue of whether or not JLCs should be abolished, the QSFA representative stated that, 'we would like to see the JLC system gone, we would like to work off the [national] minimum wage structure . . . to get some breathing space at this particular time. We can get NERA off our back at a time we really don't need it.' The Supermac's representative did not explicitly state that JLCs should be abolished but questioned why people in an unskilled job, with no experience, who receive no external training and who are trained on the job should get a higher premium through JLCs than those who work in non-JLC covered industries. It was SIPTU's belief that the aim of the constitutional challenge was to dismantle the JLC system:

The issue is a political one which is to dismantle the ERO system completely, the JLCs, to make them unconstitutional and bring everybody down to the NMW with no protection for rosters and no protection for hours of work and all the other stuff that's contained in the ERO.

While the QSFA said there was no 'plan B' if the legal challenge was unsuccessful, they also stated that they had lobbied the then Minister for Enterprise, Trade and Employment over the issue of retrospective payments for unpaid wages. Fast-food chains also have a history of lobbying governments to dilute minimum regulations in other countries. In the 1970s in the USA for example, in the aftermath of the Watergate scandal, it was discovered that McDonald's had contributed \$250,000 to the Nixon re-election campaign at a time when there was a bill going through Congress that would exempt part-time students from getting the minimum wage; it was later dubbed the McDonald's Bill (Royle, 2000, 2010). Barry and Wilkinson (2011: 154) note the trend

internationally for employer associations to become more active in lobbying, opinion formation and developing political influence.

Government role in change and stability of JLCs

For successive governments since the 1980s, their role in balancing the interests of employers and trade unions and in responding to significant industrial relations problems was done through social partnership. In addition to employer associations using social partnership to achieve operational changes to JLCs, trade unions also used social partnership to protect them. Following the launch of the first constitutional challenge against a JLC by a hotel employer in 2007, the trade unions sought a commitment through social partnership that the JLC system would be strengthened to protect it from legal challenges. The government and employer associations, including IBEC, in social partnership agreed to this. The then Fianna Fáil/Progressive Democrat coalition government's stated position was one of support for JLCs. The then Minister for Enterprise, Trade and Employment, *Micheál Martin*, stated: (Wall, 2008):

... we will certainly be at one with the trade union side in terms of making sure that this particular edifice is shored up in whatever way it takes. We believe in common basic standards and will do whatever we have to.

The government introduced an Industrial Relations (Amendment) Bill 2009 which proposed to retain the JLCs. To effectively derail the employers' constitutional argument, the Bill proposed that any ERO from the JLCs and the Labour Court would be approved by the Parliament. While satisfying union concerns, the government also sought to address some employer concerns about the operation of JLCs. The Bill proposed that JLCs would consider certain issues when proposing EROs such as the prevailing economic circumstances and the legitimate interests of workers and employers as well as including an employer inability to pay clause in certain circumstances. A government minister said that the Bill would balance the demands of unions and employers and gave an assurance 'that the proposed provision would not be a *carte blanche* for derogation from the minimum wages and conditions prescribed in an ERO' (Department of Enterprise, Trade and Innovation,² 2011). In spite of the Bill, the QSFA continued with its legal case because the Bill did not address the issue of employers being prosecuted for retrospective payments for underpaying workers (interview, Supermac's).

Given the government's supportive stance on JLCs, the QSFA and VFI representatives hoped that a change of government in the subsequent general election in 2011 would change their circumstances. The then main opposition party Fine Gael traditionally had strong support from employers and this was reflected in comments made by the party's spokesperson for Enterprise, Trade and Employment, Dr Leo Varadkar. He said he opposed the Industrial Relations (Amendment) Bill because:

... all that Bill does really is to make [JLC system] constitutional. We think that's wrong. We think there's an opportunity here and now to actually bring in a new system. ... I'd let the courts strike it down and then that would be the opportunity to bring in a new system. I think [the Minister] is actually giving up her opportunity to negotiate a new system by bringing in this legislation.

However, the Industrial Relations (Amendment) Bill 2009 was never introduced as the government's attention turned to managing the escalating economic crisis. Indeed, the crisis emerged as a second potential driver for change as employers increasingly criticised the NMW and JLC minimum pay rates. In late 2010, the IMF/EU/ECB provided a financial assistance package to Ireland and as part of the deal, the government committed to reducing the NMW by €1 per hour and to undertake an independent review of the JLC system. Three months later following a general election, a new Fine Gael/Labour Party coalition government was in place and it restored the NMW to its previous level of €8.65 per hour. The independent review of JLCs was completed in April 2011 and it rejected many of the arguments made by employers for the abolition of the JLCs, such as that employment would increase significantly (Duffy and Walsh, 2011). The review recommended that JLCs should be retained but reformed.

The new Industrial Relations (Amendment) Bill 2011 proposed that JLCs would be retained but the reforms were more far reaching than those in the 2009 Bill. The Bill stipulates that JLCs would no longer set Sunday premiums or any other conditions of employment where legislation already existed; that record-keeping requirements for employers would be reduced; that employers would be able to claim inability to pay JLC rates; and that JLC members would have to consider a list of factors in making minimum wage decisions including unemployment levels, competitiveness and wage levels in comparable sectors in other countries. There was immediate criticism of the proposal to eliminate Sunday premiums by trade unions while employer associations like IBEC said that JLCs should be abolished (Wall, 2011). The Minister for Jobs, Enterprise and Innovation's view on the effects of JLC regulations was clear when he stated 'the urgent need to protect and create jobs in these sectors has driven my determination over the past four months to see through comprehensive and radical reform in this area' (Department of Jobs, Enterprise and Innovation, 2011). The proposals were supported by the European Commission's Directorate-General for Economic and Monetary Affairs who, in line with the neoliberal orientated European Employment Strategy (Royle, 2012), said that the government's commitment to radical reform of JLCs 'is welcome, as eliminating any impediments to job creation/reallocation, while safeguarding basic workers' rights, is essential to ensure that the emerging recovery benefits all' (Higgins, 2011). Despite the absence of social partnership in 2009, the Minister sought consultation on his proposals from the social partners IBEC and the Irish Congress of Trade Unions. There were some minor changes made to the proposals following consultation but most of the original elements remain in the draft legislation.

Discussion

In the fast-food industry where there is effectively no union workplace representation, employers have largely been unilaterally determining wage rates, often ignoring the rates set by the JLC system. Studies in other countries have shown that this is not unusual for this kind of industry; fast-food employers are continually looking to reduce labour costs, as labour is one of the few areas where savings can be made. This has led to a variety of labour rights violations from health and safety to unpaid overtime; 'off-the-clock' work; 'shaving' and other pay discrepancies; works council and union-busting violations; and an often

systematic inability to enforce collective agreements where these exist (Leidner, 2002; Reiter, 2002; Royle, 2000, 2010). It is perhaps ironic that the Irish trade unions' success in acquiring better enforcement of the JLC system appears to be one of the key factors in prompting the legal challenge. Instead of enforcement acting as a self-reinforcing process which contributed to the stability of the JLC system, it arguably had the opposite effect. Improved enforcement increased the detection of violations and left an increasing number of employers liable for back payments.

Actors' use of other institutions to enact change has been highlighted in the institutional change literature (Mahoney and Thelen, 2010). In the case of JLCs, different employer associations tried to enact change through other institutions, though the type of change sought and institution used differed significantly. Despite growing complaints about JLCs by employer associations represented on them, they did not take legal action. In IBEC's case, this was because, 'it's not our practice to fund legal challenges. We prefer to engage and fashion an agreement.' The VFI and IBEC officials stated that if the public policy deemed that the JLC system should remain, then employers would require fundamental changes to the system in order to retain their support. In other words, they believed it was 'better to be in than out' of the system (interview, IBEC). IBEC and the VFI are 'insider organisations' in that they are represented on JLCs and have not sought to dismantle them from within. IBEC in particular has a history of negotiating with trade unions and, as noted, when they have had concerns about specific issues relating to JLCs, they have sought changes through a traditional industrial relations institution – social partnership. Sheehan (2008) suggests that while IBEC may be opposed to over-regulation, it has been concerned that member firms should stay within established institutional structures. Even when the Irish Hotels Federation was part of the first constitutional challenge against JLCs, they withdrew the case following negotiations with SIPTU. Arguably this first case provided the ground work to the fast-food employers' subsequent legal challenge.

The QSFA was critical of existing employer organisations, arguing that they were:

... out of touch ... in respect to the JLC, we feel IBEC haven't done us a whole lot of favours in the past in relation to look what we got, look what we have on our doorstep. We're not particularly happy with their performance up to now.

We noted earlier that institutions can be challenged by groups who are disadvantaged by them (Mahoney and Thelen, 2010). Certainly, fast-food employers *perceived* themselves as disadvantaged by the ERO-setting process and ERO regulations and it is in this context that they created their own employers' association. The QSFA is an 'outsider organisation', with no representation on JLCs, no history of negotiating with unions and no participation in social partnership. Thus, the QSFA chose the legal system as the mechanism for enacting change. The creation of the QSFA harps back to one of the rationales for employer association formation in the early twentieth century: 'to respond to encroachments by, the state, as governments began to comprehensively regulate employment' (Barry and Wilkinson, 2011: 152). The nature of the QSFA response to state regulation occurred in the context of growing instances of employer opposition to traditional industrial relations institutions. For example, indigenous employers such as

Aer Lingus and Ryanair had started to adopt a more hardened stance towards state dispute resolution institutions and this confidence reflects the continuing shift in the balance of power to employers (Roche, 2007; Sheehan, 2008). Research on employer associations suggests there are often tensions between satisfying the interests of larger and smaller employers (see Grote et al., 2007). However, the QSFA includes large multinationals and indigenous small outlets that are unified by their operation in a low-wage sector under a 'productive system' that competes on low cost rather than quality (McLaughlin, 2009: 329).

The creation of the QSFA may also reflect a similar pattern of behaviour in Germany in the 1990s, where after nearly 20 years of refusing to take part in company- or sector-level collective bargaining, McDonald's and other US-owned fast-food companies established a German fast-food employers' association and for the first time negotiated a sector-level collective agreement in 1989. Royle (2000, 2002, 2004) argues that this action was taken to improve the image of fast-food employers, who had been receiving a lot of negative publicity over labour conditions and their refusal to recognise unions. Collective agreements brought improved media coverage and also allowed wages and conditions to be more closely calibrated to the requirements of fast-food employers rather than that of the hotel and catering sectors more generally. However, this did not stop fast-food employers and the new German fast-food association from continuing to prevent unions from gaining a presence within the outlets.

It has been suggested that a focus on the punctuated equilibrium model can mask more gradual changes in institutions, resulting in 'drift' akin to that which has occurred in the collective bargaining system in Germany (Mahoney and Thelen, 2010; Thelen, 2009). While there were some gradual changes regarding the JLC system, such as IBEC's successful request under social partnership that they be modernised, the potential for gradual change endogenously within the institution was restricted by the legislation governing JLCs. In addition to the legislation setting out rules on how JLCs operate, a series of criteria had to be fulfilled before an individual JLC could be abolished, making it difficult for an employer association to successfully achieve abolition of the system.

In punctuated equilibrium theory, the timing of events can be significant as well as the event that triggers change. The fast-food employers launched their legal case in late 2008 but it was not heard and decided upon until 2011, during which time the economy went into freefall, the social partnership process collapsed and a new government was elected. These elements played different roles in contributing to, and restraining, the changes which the JLC system is undergoing. The demise of social partnership and growing economic crisis meant that the 2009 Bill which proposed to protect JLCs was not pushed through as it might have been and this would have undermined the legal basis for the fast-food employers' case. The disintegrating economy fuelled the employer discourse on the negative impact of JLC rates, particularly overtime rates for Sunday working. The Restaurants Association of Ireland argued that 37% of restaurants closed on Sundays because of JLC premiums and said 4000 jobs would be created if JLCs were abolished (www.rai.ie). This discourse has influenced the recent proposed legislation, which will remove the power of JLCs to set a Sunday premium rate and JLCs will have to consider competitiveness and unemployment issues in deciding basic minimum pay rates in the future.

Thelen (2010) comments that higher unemployment and budget constraints have limited policy makers' room for manoeuvre. It might be expected that policy makers would have abolished JLCs but Lowndes (1996: 193) contends that institutions have legitimacy beyond the preferences of individual actors. There was some degree of 'political lock-in' in pursuing a public policy in which JLCs would exist and this is likely to have been influenced by the coalition nature of the new government. O'Sullivan and Wallace (2011: 23), commenting on Ireland's political history, note that 'coalitions involving Labour and Fine Gael effectively exclude the pursuit of an anti-regulation agenda based on neo-liberalism'. Despite the fall of social partnership, its legacy was arguably influential in deciding the future of JLCs. Social partnership agreements consisted of negotiated trade-offs between unions and employers and this is true in the case of the future of JLCs. The government chose to consult with those actors who held power during the social partnership era rather than the outsider employer associations. While the stability of the system has likely been secured, this has been in return for significant operational change.

In regard to the extent of change of the JLC system, it would appear that functional transformation has not occurred. The criteria for the creation of JLCs, and therefore their *raison d'être*, will still be the same: to protect low-paid workers where collective bargaining is inadequate. However, there has been some reorientation of the reconfigured JLC system. Gersick (1991: 31) notes that revolutionary periods can vary in how much they benefit or harm a system. The legal challenge and the proposed changes may have harmful consequences for workers, in five respects. First, since the High Court ruling found the Catering JLC unconstitutional, the previous minimum pay and conditions it set are null and void and so it is very unlikely that employers who were found to have breached JLC pay rates will be prosecuted, leaving many workers without back pay. Second, there is a new provision that employers in financial difficulty can seek an exemption from the minimum pay rates and this can be done with or without the agreement of employees. This differs to NMW legislation in which the majority of workers must agree to an exemption. Third, the ruling on JLC unconstitutionality and the creation of new legislation mean that new EROs will have to be made and it is likely to be difficult for workers' representatives to be able to retain the minimum pay and conditions of previous EROs given the economic environment (see Higgins, 2011). Fourth, a key barrier to the JLCs' capacity to protect workers lies in the criteria which representatives will have to consider in making decisions on future EROs. The proposed criteria which JLC members will have to consider are likely to make the decision-making process very cumbersome and there is no guidance as to which of the criteria should be given greater weight in decision-making. It has also yet to be determined what would happen if an employer legally challenged a new ERO on the basis that a JLC had not given due consideration to one of the criteria. Fifth is the proposal that there will be additional steps in resolving a deadlock between employer and worker representatives on JLCs, which will likely increase the length of time it will take to make an ERO.

Conclusion

This article adds to knowledge by illustrating how institutions like JLCs may be challenged by new employer association interest groups – such as the QSFA – who perceive

themselves as ‘outsider organisations’ disadvantaged by the institutional status quo. The government chose a politically expedient response to the employers’ challenge. The influence of the Labour Party as a coalition partner and the legacy of social partnership in which successive governments have attempted to address industrial relations problems by giving something to both sides – enough for them to live with – have arguably resulted in their retention. However, the trade-offs for their retention are significant. Unrepresented workers will have little option but to accept sub-minimum pay rates if requested and the list of criteria which JLC members will have to consider may make the system unworkable and redundant as a mechanism for protecting employees. Such changes may have a similar impact to the changes which diluted the powers of the British Wages Councils in the 1980s.

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Notes

1. JLCs propose minimum pay and conditions, which are approved by a state industrial relations dispute resolution body, the Labour Court, and the resultant ERO is given legal effect by the Minister for Jobs, Enterprise and Innovation.
2. The department was renamed the Department of Jobs, Trade and Innovation in 2011.

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