



National Electrical Contractors Ireland
Ireland's largest Trade Association For Electrical Contractors

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The Secretary
The Labour Court
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**OUTLINE WRITTEN SUBMISSION TO THE LABOUR COURT IN RELATION TO THE EXAMINATION INTO
TERMS AND CONDITIONS IN THE ELECTRICAL CONTRACTING INDUSTRY**

INTRODUCTION

The following submission is made without prejudice to the fact that the NECI contends that the Labour Court has not demonstrated that it has complied with its statutory obligations under the Industrial Relations (Amendment) Act 2015, including the mandatory requirements prescribed by section 15(1) of the Industrial Relations (Amendment) Act 2015. The NECI therefore reserves all of its rights in that regard and does not consent to any derogation from those strict requirements.

It is extremely important that the legislative steps are complied with at all stages of this exercise. They are important protections which have been introduced by the Oireachtas following the striking down of Part III of the Industrial Relations Act of 1946 because it was found to be unconstitutional.

The current request under section 14 of the Industrial Relations (Amendment) Act 2015 (the 2015 Act) was made by Connect Trade Union by application dated 5 March 2021. This is the fourth such application. The first application was made during the course of 2016 was subsequently withdrawn. The second application made in 2017 and was again withdrawn by the TEEU. The third application resulted in a Sectoral Employment Order being made which was subsequently struck down by the High Court. The High Court decision (Simons J) as it related to the SEO was upheld by the Supreme Court in its decision of 18 June 2021.

Given the seriousness of the impact an SEO would have upon our members, it is vital that any process leading to the potential introduction of an SEO is supported by a reasoned report by the Labour Court.

The initial (and, perhaps, most pivotal) issue to be determined by the Labour Court is whether an applicant is 'substantially representative' of the workers and/or employers in the economic sector to which a request relates. This issue has been the subject of much argument and commentary

throughout recent legal proceedings to which the NECI was a party. The NECI had repeatedly sought clarification from the Labour Court as to what test it applied in assessing and determining the issue of substantial representativity.

In the course of the judicial review proceedings referred to above (Record number 97/20), the Labour Court appeared to argue that it is a 'numbers game'. Substantial representativity is based on the numbers of workers (or employers of workers, as appropriate) only.

Secondly, the Labour Court argued that each application process is treated as being stand-alone. Accordingly, the Labour Court does not apply a general or universal assessment process. It treats each process on its facts and on its own merit.

Thirdly, the determination of 'substantial representativity' for the purposes of conducting an examination pursuant to Section 15 of the Act is a 'threshold only' issue and can be challenged and revisited during the course of an examination hearing.

The Labour Court has not explained how it has determined that it ought to conduct an examination of this sector. Please provide a reasoned decision supporting that decision, explaining the basis of the decision and outlining what materials were relied on.

The NECI challenges the proposition that Connect is substantially representative of the workers in the economic sector to which the application relates. The NECI does so on several grounds.

SUBSTANTIAL REPRESENTATION

First, the calculation of Connect's stated members within the sector to which the application relates is unclear. The NECI requires clarification of whether any of the 10,349 workers represented by Connect fall within employment of state, local authorities or semi-state companies, or are electricians employed in the manufacturing sector or are self-employed electricians with no employees.

The NECI is concerned that the figures relied on by Connect are inaccurate. Connect Trade Union has filed three statutory declarations which constitute sworn evidence. It claimed in the statutory declaration filed in 2016 in relation the first application:

"At the height of the Industrial Boom (26th February 2009) the Labour Court conducted an investigation (the outcome of which was published in Determination No. REP091) to establish the number of Electricians employed in the section.

The Court established a figure of 12,000 Electricians within the sector."

For the avoidance of doubt, the Labour Court did not conduct any investigation to establish the number of electricians. The determination (REP091), as referred to, was a combined decision in response to the application to vary and cancel a Registered Employment Agreement (REA) and was not an examination of the number of electricians. It simply stated that it accepted the TEEU witness' figure of 12,000 electricians. The NECI and non-aligned contractors did not accept that figure.

In its 2017 application, the sworn statement of Mr Kavanagh on behalf of Connect again referred to the Labour Court having "established" that there were 12,000 electricians within the sector.

The NECI seeks clarification from the Labour Court as to what steps, if any, it has taken in attempting to verify or satisfy itself of the correctness of Connect's representations regarding the amount of workers in the sector to which its application relates.

Secondly, and without prejudice to what the NECI maintains is a general lack of reliability in information proffered by Connect regarding the issue of substantial representation, the NECI maintains the purported data relied upon by Connect in its current application is not the most reliable, empirical data available to establish the correct number of electricians and apprentices currently in the employ of electrical contractors in Ireland.

In this regard, the NECI relies on the live records of the Register of Electrical Contractors of Ireland (RECI), being the body appointed by the Commission for Regulation of Utilities (CRU) as the Electrical Safety Supervisory Body (ESSB) for the period January 2016 to December 2022 under a 7-year licence.

All electrical contractors working in the state are obliged to register with same and as part of the registration process they have to complete on a yearly basis an application form consisting of details of the number of electricians and apprentices which they employ. To assist the Labour Court, the NECI recently requested that RECI confirm the number of electrical contractors working within the state and the number of electricians and apprentices employed by them.

According to RECI there are 4,200 electrical contractors registered with the Safe Electric Scheme with approx. 24,000 declared electricians and apprentices employed by electrical contractors registered. This figure relates to workers employed by electrical contractors only and excludes workers employed by state, local authorities, semi-state companies, electricians employed in manufacturing sector and self-employed electricians with no employees.

In circumstances in which registration with RECI is a legal requirement to exercise restricted electrical contracting functions, the RECI database is a reliable source for the number of electrical contractors and their workers in Ireland. It provides a minimum listing of workers who can lawfully carry out restricted electrical contracting functions.

Accordingly, to even assume the stated figure of 10,349 electrical workers represented by Connect as being correct (which the NECI does not accept and requires clarification), at best, Connect represents 10,349 workers in a pool of approximately 24,000 workers in the sector to which the application relates.

This equates to a representation of only 43.1% of that sector. This is considerably less than half of the electricians and apprentices who would be affected, significantly, by an SEO in the sector. Please explain the basis of the assessment by the Labour Court in deciding to conduct this examination.

Given that Connect recognised within its EYDKM report some 1,700 electrical sector workers employed by the state and semi-state companies and in manufacturing sector, the Labour Court must explain whether Connect has counted such electrical workers within the 10,349 persons represented. It would seem that this would reduce the true figure of represented workers in the electrical contracting sector to 8,649. This would constitute representation of a mere 36% of workers in the economic sector to which the application relates.

Both figures result in a **minority** attempting to bind the majority of the economic sector with the terms and conditions the **minority** seeks.

SECTION 15(1) – (C) AND (D)

There has been no legally binding agreement in the sector since the legislation providing for the previous REA was deemed unconstitutional in May 2013. Despite this Connect Trade Union, refers to a current unregistered “national collective employment agreement” which is negotiated under the auspices of the unregistered National Joint Industrial Council. The current arrangement can at best be described as a "gentlemen’s agreement". This situation has caused no difficulties to the majority of employers and employees. Our members have engaged in one to one agreements with their own employees and negotiated mutual agreeable terms and conditions which suit the particular requirements of each unique business.

According to section 15(1) of the Act of 2015, the Labour Court shall not undertake an examination such as this unless it is satisfied that it is normal and desirable practice, or that it is expedient, to have separate terms and conditions relating to remuneration, sick pay schemes or pension schemes in respect of workers of the particular class, type or group in the electrical contracting sector.

1. Has the Labour Court been so satisfied and how was it satisfied?
2. When was that exercise conducted?
3. By whom was it done?
4. What was the conclusion and what is it based on?
5. What evidence and/or submissions were considered in relation to determining whether the Labour Court was satisfied in that regard? NECI members are concerned that either this has not been done or that it has not been done in a fair and transparent manner.
6. Who had an input into the investigations required by 15(1)a-d of the Act?
7. Are there any documents or records? If there are such documents or records, the NECI requires sight of them before this examination commences.
8. Please provide evidence of compliance so that the NECI can consider the Labour Court’s methodology and conclusions which it says enabled it to give notice of its intention to conduct an examination.
9. If there is to be such an examination, the NECI requests that an oral hearing be convened prior to any decision being taken. It strongly recommends that that the oral hearing be publicly announced other than in a one-off advertisement in a national newspaper.

In addition, the NECI makes the following points regarding the proposed examination:

1. The diversity in the sector includes the end user – the customer – of our members’ services. A domestic customer cannot be expected to absorb the same call out rate as the biggest employers in the country. The consumer will suffer if an SEO is imposed on all contractors regardless of their size and nature of their business.

2. Were an SEO controlling labour costs applied across an industry as diverse as the electrical contracting sector to be imposed it would be with respect a cartel, and would be anti-competitive. Such an anti-competitive agreement would fall foul of competition legislation, particularly where as in this instance there is no benefit to the consumer. Indeed the consumer, particularly the domestic consumer, is hit by the artificially raised wage levels of such agreements. The Competition Authority has said that it has encountered, in the course of its enforcement activities, situations where trade associations have coordinated, or have been used as a vehicle by which to coordinate, the activities of member firms, with the consequence that competition between these firms is restricted. The situation would be even worse if an SEO (sectoral employment order) were to be put in place because it would restrict competition between firms who are not even members of the trade associations who agreed its terms. In the Competition Authority's guidance "Notice on Activities of Trade Associations and Compliance with Competition Law" it is made clear that *"the Competition Act 2002 ("the Act") contains two principal provisions that constrain the activities of trade associations and their members: section 4 of the Act prohibits anticompetitive coordinated conduct, whether occurring as a result of explicit agreement or indirect collusion between firms or other undertakings or through a group such as a trade association, while section 5 prohibits anticompetitive unilateral conduct by an undertaking which holds a dominant market position. The Authority's notice focuses on the prohibition of anticompetitive coordination."* It goes on to state (para.2.2) that *"[w]here a coordinated activity has an appreciable effect on trade between Member States of the European Union, Article 81 of the EC Treaty ("Article 81") may also apply. This provision, upon which section 4 of the Act is based, prohibits anticompetitive coordinated conduct between undertakings, or an association of undertakings, which affects trade in the Common Market."*
3. Electricians are not all of equal ability. We believe that the competent experienced employees should command higher wages than inexperienced employees. To impose global pay rates has a twofold negative effect:
 - (a) The competent experienced employees become disillusioned because they see the less experienced employees earning the same wages.
 - (b) The less competent and less experienced employees have no incentive to improve and to learn new skills as under the type of agreement advocated by Connect Trade Union and the length of service determines the rate of pay.
4. Larger contractors use subcontracted labour to avoid the SEO. It is impossible to impose an SEO on parties who operated outside the State.
5. The sectoral employment order shall be binding on all workers and employers in the economic sector concerned and reverse the current status in the whole Electrical Contracting Sector which has had the ability to be flexible and adjust to the market trends since the Supreme Court ruling in May 2013.
6. The Electrical Contracting sector for the Class, type or group of workers relates Electricians and their apprentices employed in the Electrical Contracting Industry as referred to in the applicant's request for an examination is all-inclusive but non-specific in a wide ranging and very diverse Industry.
7. Only a registered electrical contractor (REC) can carry out restricted electrical works in a domestic setting. Most electrical works in domestic, commercial and industrial environments are covered under the scope of Controlled Electrical Works; these works are defined as electrical works that should be certified if carried out by a REC. Individuals who are not registered who carry out electrical work which falls under the scope of Controlled Electrical Works are not required to certify that work.

8. Existing lines of demarcation in the Industry: in tendering for jobs the industry has pre-qualification criteria that excludes the small and medium contractor from the tendering process. The turnover levels that can be sought are set out in the Minimum Standards Works Contractor Criteria Guidance Note, which indicates that the turnover level sought on a building project should be 75%-150% of the annualised capital value of the project. For example, a six month project valued at €1million would have an annualised capital value of €2million, and therefore the turnover level sought should be in the region of €1.5million to €3million.
9. The Construction Contracts Act 2013: the Act will exclude construction contracts with a value below €10,000, between a State Authority and its partner in a PPP arrangement, relating to a residential dwelling with a floor area not greater than 200 sqm and where one of the parties will occupy the property as their residence.
10. As we know the Industry is not a one size fits all and has many different aspects such as electrical installations and repairs, Emergency Lighting, Fire Alarm, Data Cabling, Intruder Alarm, CCTV, refrigeration and air conditioning units, food processing automation and water treatment services and many more.
11. In the intervening years we have experienced harmonious relations between our workers and employers due to the flexibility of the employers and employees through local bargaining.
12. We agree it is reasonably necessary to promote and preserve high standards of training and qualification to ensure fair and sustainable rates of remuneration.
13. We accept there is a requirement for a minimum hourly rate of basic pay that is greater than the minimum hourly rate of pay declared by order for the time being in force under the Act of 2000 but are not agreeable to an imposed SEO.
14. We accept there is a requirement for a minimum hourly rate of basic pay for apprentices based upon percentages of the minimum hourly rate of basic pay that is greater than the minimum hourly rate of pay declared by order for the time being in force under the Act of 2000.
15. The requirements of a pension scheme, including a minimum daily rate of contribution to the scheme by a worker and an employer if made compulsory, employers should be free to obtain cover for these benefits from any source of their choosing provided that the benefits cover up to a specified minimum level of benefits.
16. The requirements of a sick pay scheme if made compulsory, employers should be free to obtain cover for these benefits from any source of their choosing provided that the benefits cover up to a specified minimum level of benefits.
17. We reserve the right to determine pay and conditions directly with our own employees.

One size does not fit all. Business models vary depending on location, nature of the business and the cost of living. The question is, however, who is substantially representative of employers in the sector. We need to know whether the Labour Court has made a determination or formed a view on that question. We need to know the basis for determining that Connect is substantially representative of relevant workers in the sector and we need to know how the Labour Court intends to determine which employer bodies are substantially representative of employers in the sector – given that we say that the ECA and AECl are not substantially representative of our members.

As indicated, the only true barometer of the electrical contracting sector can be via the Commission for Regulation of Utilities (CRU) who issued the license to Register of Electrical Contractors of Ireland (RECI) to operate as a Safety Supervisory Body. Safe Electric, the statutory regulatory scheme for electrical contractors is operated by the Register of Electrical Contractors of Ireland (RECI) on behalf of the Commission for Regulation of Utilities (CRU). All Electrical Contractors are required to register with Safe Electric. RECI confirmed on 29 June 2021 that there are 4,200 Electrical Contractors on the Safe Electric register which employ approximately 24,000 electricians and apprentices.

The EY DKM report which supported Connect's previous application specifically stated that there is no published data which accurately measures employment in the sector. The CSO reporting is not obligatory to any employer and is predominately completed by businesses with a higher turnover. This would indicate that the figures of employment would be higher while the figures of representation stay the same.

Moreover, the Safe Electric / RECI register shows the minimum amount of electricians and apprentices employed by electrical contractors in the country. The number is undoubtedly higher in circumstances in which it is a regrettable reality that not every electrical contractor complies with their obligation to register with RECI when carrying out restricted works.

For all of the above reasons (and we reserve the right to add to our submission), we are not in favour of any agreement setting terms and conditions which applies to the entire electrical contracting industry.

Again, without prejudice to the foregoing, if a recommendation is to be made following this process, the NECI submit from its members experience that the Labour Court should apply the following minimum levels of remuneration:

1. Electricians at a minimum rate of €19.25 per hour
2. Apprentices:
 - a. 1st year at rate of €10.20 (equal to the minimum wage for 20 years old plus).
 - b. 2nd year at rate of €11.22
 - c. 3rd year at rate of €13.45
 - d. 4th year at rate of €17.50

The NECI also believes that no private company or private individual or proposer of an SEO should profit from the regulation of the industry with regard to the above levels of remuneration.

The figures proposed not only ensure a minimum fair standard for all within the industry but also prevent the SEO system being used by large enterprise to stifle competition and create cartels.

The NECI is also opposed to a situation where the Labour Court might proceed as they have done so in the past to support one particular pension scheme, namely the Construction Workers Pension Scheme (CWPS) above all others. It is noted that the CWPS has close affiliations with all the applicants to previous section 14 applicants for previous SEO applications within the Electrical Contracting Industry.

29th June 2021