THE LABOUR COURT

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT 1946

AND IN THE MATTER OF THE SECURITY INDUSTRY JOINT LABOUR COMMITTEE

AND IN THE MATTER OF A PROPOSED EMPLOYMENT REGULATION ORDER 2021

OUTLINE WRITTEN SUBMISSIONS ON BEHALF OF TOP SECURITY LIMITED, MORBURY LIMITED, GUARDEX LIMITED AND LAS SECURITY LIMITED

Introduction

1. Arising from a decision of a divisional court on 15 December 2020, it has been decided by the Labour Court to conduct an oral hearing for the purposes of Section 42B (12) (b) of the Industrial Relations Act 1946, as amended, to "hear all parties appearing to the Court to be interested and desiring to be heard" in respect of a proposal from the Security Industry Joint Labour Committee for the promulgation of a new Employment Regulation Order for the industry.

2. These submissions are made by the aforementioned companies and concern the following matters :-

   (a) The jurisdiction of the Labour Court in the circumstances.
   (b) The constitutionality of the underlying legislation.
   (c) That the requirements of Section 42A (6) of the Industrial Relations Act 1946 have not been met in the circumstances.

Issue related to jurisdiction

3. It is claimed that the existence of the Security Industry Joint Labour Committee is unlawful in circumstances where the provisions of Section 41A of the 1946 Act requiring a statutory acceptance of the continued existence of Joint Labour Committees have not been adhered to in respect of the Security Industry Joint Labour Committee.

4. The first review of the Security Industry Joint Labour Committee took place in 2013, and the relevant Minister made an Order pursuant to same in January 2014 (SI No. 30/2014). That was the first review carried out following the enactment of the Industrial Relations (Amendment) Act 2012.

5. The second Review was submitted to the relevant Minister by the Labour Court on or about 20 April 2018 (or, at least, the report is so dated as of that date).

6. Section 41A (6) of the 1946 Act, as amended, states as follows :-

> *"(6) As soon as practicable after receipt of a copy of a recommendation under subsection (5), the Minister shall, where he or she is satisfied that subsection (3) has been complied with, and where he or she considers it appropriate to do so, make an order in the terms of the recommendation."*

7. No order was made by the Minister in the terms of the recommendation given by the Labour Court pursuant to the 2018 review. No such order was, therefore, laid before the Oireachtas as is required by Section 41A (9). The last time the Minister exercised his powers pursuant to Section 41A (6) arising from a recommendation under Section 41A (5) was by way of S.I. No. 30/2014 i.e. the Security Industry JLC Establishment (Amendment) Order 2014. The website www.irishstatutebook.ie does not record any further orders having been made by the Minister per Section 41A (6) in respect of the security industry JLC since 2014. A search of the "documents laid" section of the Oireachtas website does not show any documents laid before the Houses in respect of a Ministerial Order as per Section 41A (6) in respect of the security industry JLC either.

8. As there was no Order made pursuant to Section 41A (6) either "as soon as practicable after receipt of a copy of a recommendation" following on the Minister's receipt of the Labour Court's recommendation in 2018, or at all, to maintain the Security Industry Joint Labour Committee in its then current form, the Joint Labour Committee as it stood on the date of the making of the report to the Minister ceased to exist as a matter of law in 2018. Section 41A requires review and renewal of the JLC architecture at least every 5 years and, in the case of the Security Industry JLC, same has not occurred.

9. In the foregoing circumstances, the Labour Court lacks jurisdiction to consider the ERO as proposed because the statutory mandate of the Joint Labour Committee, which has recommended this ERO in 2020, lapsed in 2018.

Issue Concerning Constitutionality

10. The members of the Court are no doubt aware of the decision of Simons J. in the matter of *Naisiunta Leictreach v. The Labour Court* [2020] IEHC 303 delivered on 23 June 2020. The High Court made the following declaration at para. 202 of the judgment :-

> *"It is proposed to make a declaration that the provision made for sectoral employment orders under Chapter 3 of the Industrial Relations (Amendment) Act 2015 is invalid having regard to the provisions of Article 15.2.1° of the Constitution. The effect of this declaration is that the entire of Chapter 3 is to be struck down."*

11. The *Naisiunta Leictreach* judgment is currently subject to an appeal before the Supreme Court and the appeal is scheduled (according to the Courts.ie website) to be heard over 3 days beginning on 15 February 2021.

12. *Naisiunta Leictreach* concerned Sectoral Employment Orders issued pursuant to Chapter 3 of the Industrial Relations Amendment Act 2015. The ERO the subject matter of the within hearing is proposed pursuant to Part IV of the 1946 Act. The decision in *Naisiunta Leictreach* did not directly affect the JLC/ERO legislative machinery.

13. The SEO legislation was considered unconstitutional in *Naisiunta Leictreach* because it infringed upon Article 15.2.1° of the Constitution which provides for the vesting of the "sole and exclusive power of making laws for the State" in the Oireachtas.

14. At para. 116 of the judgment, the Court stated :-

> *"It was accepted by both parties that the making of a sectoral employment order represents an instance of law-making subject to the "principles and policies" test."*

15. And at para. 120 :-

> *"The core issue in respect of which the parties seek a ruling from this court is as follows. It is whether the parent legislation, i.e. the Industrial Relations (Amendment) Act 2015, contains sufficient principles and policies to guide the Minister, as delegate, in the making of the delegated legislation, i.e. the sectoral employment order."*

16. Having set out the criteria the Labour Court should employ when judging an SEO i.e. to promote harmonious relations etc., Simons J. stated at para. 124 :-

> *"Whereas these outcomes may well be laudable or desirable, the statutory language used is too imprecise to provide any meaningful guidance to the Labour Court. A decision to impose minimum terms and conditions of employment upon an entire economic sector necessitates making difficult policy choices. This is because the consequences of making a sectoral employment order are so far-reaching, and the interests of the principal stakeholders, namely, the employers, workers and consumers; are not necessarily aligned. The fixing of high rates of renumeration might well be welcomed by workers, but may limit competition, and thus adversely affect consumers."*

17. A perusal of the criteria in e.g. Section 42A (6) of the 1946 Act does reveal exactly the same situation as per Chapter 3 of the 2015 Act.

18. The parties making these submissions are engaged in High Court proceedings challenging the 1946 Act / ERO legislative machinery and seeking the equivalent declarations as were sought in *Naisiunta Leictreach.*

19. Although Acts of the Oireachtas are presumed constitutional, this precept does not operate in circumstances of patent unconstitutionality. Part IV of the 1946 Act, as amended, contains strikingly similar provisions as Chapter 3 of the 2015 Act which has been found to be unconstitutional already. Arising from its similarity to provisions which have been declared unconstitutional, Part IV of the 1946 Act cannot attract the presumption of constitutionality in all the circumstances. An application of the foregoing principle was as discussed in *Attorney General v. Lee* [2000] 4 IR 298 where a coroner was unwilling to apply the provisions of statute because same was materially identical to two other statutory provisions which had already been found to be unconstitutional. The Supreme Court held that it was permissible in the circumstances for the coroner not to apply the provisions of the statute given the cloud of unconstitutionality hovering above the said provisions.

20. It is respectfully submitted that the Labour Court ought to, at least, await the decision of the Supreme Court in the *Naisiunta Leictreach* case before deciding to recommend to the Minister the promulgation of a new ERO for the security industry. It would be unfair to the industry (including employees) for a new ERO to be promulgated and then for the machinery underpinning it to be then found unconstitutional.

The requirements of Section 42A (6) of the Industrial Relations Act 1946

Introduction

21. Whilst the employer organisations presenting the proposals for an ERO represent a sector of the security industry i.e. larger employers who have a national and international profile, they do not represent the many smaller and mid-sized employers in the industry. The interests of the larger employer and big security companies are, in general, served by the introduction of an ERO as it allows the fixing of prices in the market to the advantage of large employers, but this is to the detriment of both consumers (contrary to the letter and spirt of the Competition

Acts) and smaller and mid-sized operators in the market whose ability to survive is dependent on an ability to compete. Higher costs, and conditions, as are proposed here, will naturally affect the within companies' ability to compete.

22. The services provided by different operators in the security industry are not readily comparable and employees engaged by different employers and in different areas of work have a wide range of backgrounds and expertise which means that variations in terms and conditions of employment are to be expected.

23. It is our contention that it is not appropriate to deal with all employees engaged in this diverse industry on the same basis and that the process of collective bargaining which underpins the operation of the JLC system has little place in the security industry in the modem day.

24. The experience of the employers making these representations is that the industry requires the flexibility to engage in individual negotiation of terms and conditions with employees.

25. The fact that there has been no industrial unrest or disharmony demonstrates no need for an ERO in the circumstances. It is important, in the interests of industrial harmony, that employers have a capacity to reward well performing employees through additional pay or enhanced terms and conditions. The imposition of strictures in relation to terms and conditions of employment restricts the employers' ability to offer enhanced terms where warranted or to recognize experience or additional training in the pay rates available, which can lead to disharmony among employees.

26. It is denied, as set forth at page 1 of the Chairman's report, that the persons who negotiated the proposed ERO represent 70% of the industry. It is notable that numbers of companies and numbers of employees represented are not set forth thereat, despite the overall numbers being mentioned as being licensed. The companies are not aware of the current form or position of the NUSE, for example, or whom it represents. The Security Institute of Ireland appears (from its website) to be a training body representing both individuals and corporates, including

corporates not involved in providing static guarding services. In ascertaining the level of industry involvement (on both the employer and union side) in the JLC, increased transparency is required, and the Court ought not accept at face value only, the assertion so made.

27. According to Section 42B (12) (d) of the 1946 Act, as amended :-

> *"The Court shall not adopt the proposals of a joint labour committee unless the Court is satisfied that, when considering the proposals, the committee has had regard to the matters set out in subsection (6) of section 42A"*

Considerations which should Inform the Formulation of Proposals

28. Section 42A (6) as inserted by section 12 of the Industrial Relations (Amendment) Act, 2012, requires the joint labour committee to have regard to the following matters :-

(a) the legitimate interests of employers and workers likely to be affected by the proposals, including –

(i) *the legitimate financial and commercial interests of the employers in the sector in question.*

The implementation of this proposed ERO is not in the interests of employers in the sector due to the effect it will have on increasing prices to customers at a time when the Covid-19 pandemic and Brexit are very real and large unknowns across all business sectors. Companies across the country are being supported by the government to remain open and maintain employment. To implement compulsory increases now across the sector, as proposed, would be detrimental to the businesses and it would be the opposite of the purpose of this sub-section's requirement. Employers will be required to implement wage increases with little possibility of getting agreement from clients to cover these costs, which will result in losses to the employers in the sector.

The proposed ERO forces employers to be fixed and inflexible in their costing options for a period of 3 years and with two increases slated to occur in the 2021 period, which is unprecedented and which, in itself, does not take into account the currency and inflexibility of many guarding contracts.

Unless employers have flexibility, employment will be lost and will obviously impact negatively on employees. Increasingly, companies are looking to technology e.g. remote monitoring, which is a direct result of the increasing cost of engaging security personnel. Clients are also turning to the solution of engaging staff not categorised as security staff such as janitors and caretakers and shop staff and which are not subject to EROs who replace the role of security officers who are more expensive, due to the prescribed terms and conditions of employment, to the detriment of the industry which is unable to control its own costs to remain viable in an already distressed marketplace.

(ii) *the desirability of agreeing and maintaining efficient and sustainable work practices appropriate to the sector in question.*

The implementation of compulsory wage increases will have no positive bearing on efficient or sustainable work practices across the industry. Each contract of guarding is different and each company is different. A licensing requirement is in place that satisfies the required standards to be met under the Private Security Services Acts, superintended by the Private Security Authority. The presence or absence of an ERO will have no effect on the relevant legislation pertaining to work practices.

The companies reject the assertion that the increases in remuneration proposed will lead to an efficiency wage situation. The theories of *Rebitzer* and *Taylor* and *Georgiadis* as so posited and relied upon in the Chairman's report are, when the relevant scholastic papers are read, heavily circumscribed by the writers/theorists themselves. It defies logic to state, in this industry, that the increases so proposed will lead to an increase in

employed numbers or to lower supervisory costs. No evidence for the "efficiency wage" theory has been offered by the JLC as part of this process. The supervisory costs associated with manned guarding services in Ireland will not change due to an increase in pay, as these are set down by PSA standards and represent, also, required supports available to employees in the form of management, training, operational supports available etc.

The companies also reject the supposition set forth at page 6 of the Chairman's report that *"any cost-increase associated with a rise in the ERO basic rate is normally recoverable from clients".* This is an assumption given without evidence or logic. A client facing significant increases will have the option to refuse to pay the increase thereby forcing the service provider to either withdraw from the contract or absorb the additional costs which will damage margins, and encourage the diminution of office and managerial standards and support.

To illustrate the effects of cost increases and the availability of alternative security solutions in the marketplace, electronic alarm installation companies grew from 733 in 2015, to 807 in 2016, to 930 in 2017, to 973 in 2018 and to 1,017 in 2019, representing a rise of over 25%. Guarding companies, in the same period, fell from 214 companies (2014), 202 companies (2015), 199 companies (2016), 192 companies (2017), 190 companies (2018) and 184 companies (2019).

(iii) *the desirability of agreeing and maintaining fair and sustainable minimum rates of remuneration appropriate to the sector in question*.

A majority of small to medium sized companies in the industry do not wish to have a set, fixed or industry wide ERO. The sector is diverse and a one-size fits all approach is not appropriate for the sector as a whole.

The proposed ERO does not distinguish between the different types or

groups of worker. Given the wide variation in service type and employee profile it is not appropriate that a standard rate be applied across the board within the industry. The rate of pay and conditions of service should be dependent on the level of skill or responsibility of a particular employee such that employees with a higher level of responsibility and/or experience and/or at higher risk would be remunerated accordingly. The proposed ERO is too broadly drawn. It serves to undermine industrial harmony that staff are treated the same irrespective of their level of skill, experience and/or commitment because employers lack the flexibility within the pricing parameters on a competitive tender to differentiate between the contributions of different members of staff. By way of example, not every security guard has the same level of training or skill. A security guard who works in the reception area for a high-profile client such as a large chemical company may require computer skills and specialist training. He/She is clearly more capable and qualified, in general, than, for example, a security guard who does night duty at a warehouse. An ERO makes it unduly difficult for employers to distinguish between the two, because independent negotiation freedom is restricted.

It is not reasonable, for example, to compare a cash in transit security officer with a night-watchman in a factory. The wage rates should be different and reflect the different requirements of the job. Enforcing uncompetitive wage rates across the industry will have a number of undesirable outcomes including, *inter alia:*

- Licensed security officers will lose jobs as the customer cannot afford to pay;
- Customers will tum to cheaper, less labour-intensive options (camera monitoring, patrols);
- Security guards will be replaced by 'caretakers', 'janitors' etc.;
- Service providers will re-categorise services provided and operate outside of the licensing legislation, thus undermining the

good work done to date in raising the profile and standards of the sector.

The companies disagree with the assertion at page 7 of the Chairman's Report that "The absence of legally enforceable, fair and sustainable rates of remuneration, as outlined in the proposed ERO, would lead to more volatile service provision and a less sustainable industry in the short to medium term.". No evidence has been offered to support this statement. Prior to 2015, during a period the JLC machinery was ruled to have been unconstitutional, the industry did not become, and nor has it ever been, volatile.

The Companies take significant issue with the statement set forth at page 4 of Appendix 8 to the Report (Headed "Notes on Clarification") that "An ERO does not represent a levelling of wages; it represents a wage floor. Wage can vary either through collective bargaining, efficiency wages or the impact of diminishing supply of labour (usually as a result of poor wages and working conditions). It is this wage floor that 'maintains competitiveness." This is, in fact, a completely unsustainable and illogical position. The pay rate set forth in an ERO becomes the de-facto rate of pay as it is the one that all bidders to a contract are measured against. The customer knows the ERO rate, and then measures all bids against that in a price comparison. Competitiveness is neither driven nor achieved by an increase in base costs.

(iv) *the desirability of maintaining harmonious industrial relations in the sector in question.*

There has not been any industrial unrest or disharmony in the industry in recent memory, certainly going back 20 years. The imposition of a new ERO will have no bearing on achieving harmonious industrial relations, as it is down to each company to manage their business in a sustainable and profitable manner which requires good relations with its employees. Employees should be able to benefit from pay and conditions according to

their experience, skills, diligence and qualifications.

The introduction of the proposed ERO is likely to cause industrial unrest and disharmony because it will result in forced job losses and business failure. It also creates unrest as between employers because the drive to introduce an ERO is supported by a minority of employers (typically those larger employers and international operators). It creates disharmony among employees because it makes it impossible to differentiate between different categories of employees.

The companies do not agree with the suggestion, at page 9 of the Chairman's Report, that if the ERO is not approved it is likely that this would lead to widespread pay claims and industrial disharmony. In fact, the absence of an ERO and the JLC machinery would bring the industry in line with most other industries in Ireland where the employer and employee are free to negotiate terms on a criteria of suitability basis, such as manpower availability, experience, standards, qualifications, and so forth.

(v) *the desirability of maintaining competitiveness in the sector in question*.

The ERO, as proposed, is in stark contravention of this requirement. As guarding sector employers would all have the same, increased, wage costs, it is inherently anti-competitive in a sector where employment costs are c. 80% of a company's costs. The most-used selection criteria for the award of guarding contracts is one of cost, which is directly related to wage costs, which are standard, and which stifles competition and encourages a race to the bottom regarding employee support and managerial standards.

There is a real concern that if the proposed ERO is introduced customers will not entertain any further increases and will seek cheaper options e.g. technology- based solutions.

We are satisfied that the adoption of the proposed ERO would lead to

further unemployment and job losses throughout the industry as smaller and medium sized employers across the country will be unable to compete. The proposed ERO would unduly restrict employment generally in that the application of higher wage rates would result in increased costs for employers both in terms of employee remuneration and taxation such that employers would be struggle to maintain existing employment and would be unable to afford to take on new employees. Creation of new employment in the industry would be stifled.

(vi) *the levels of employment and unemployment in the sector in question.*

The levels of employment in the sector overall are not relevant to the consideration of a new ERO. The industry is made up of a mix of full-time security staff and other part-time staff (including part-time students). There is a steady throughput of temporary licensed staff who will always only be transient, while they study and avail of part-time work at the same time, for example. The levels of employment in the guarding sector is dictated by client requirements (including affordability), and the implementation of this ERO will diminish that requirement by adding additional costs to an already very uncertain economy.

Private Security Authority annual reports show a licensing level in static guarding, in 2014, at 16,553. This fell to 15,558 by 2016. Conversely, electronic alarm installation companies grew from 733 in 2015 to 807 in 2016, 930 in 2017, 973 in 2018 and 1,017 in 2019. A rise of over 25%. Guarding companies in the same period fell from 2014, 214 companies, 2015, 202 companies, 2016, 199 companies, 2017, 192 companies, 2018, 190 companies and 2019, 184 companies. While the number of licensed static guards has fluctuated between 15,000 and 17,800 licenses over an 8 year period, it is the companies' contention that a lot of full time roles have been replaced with part-time roles which account for the increased levels of activity in the alarm and electronic installation sector. Costs and competitiveness-shifts due to rising costs

do and have had a negative impact on the industry in recent years.

(b) *the general level of wages in comparable sectors.*

The guarding sector is vastly diverse, with security staff deployed in reception type duties to A & E departments where e.g. stab vests are required and necessary. To implement an ERO covering all of the range is not only unjust on the employers, but on the employees themselves as it becomes the standard (as all bidders will only use that rate of pay as a benchmark to be competitive). The market and the individual skill, and experience of the employee should dictate the pay rate.

(c) where enterprises in the sector in question are in competition with enterprises in another Member State, the general level of wages in the enterprises in that other Member State taking into account the cost of living in the Member State concerned;

The companies have no comment upon this criterion.

(d) the national minimum hourly rate of pay declared by order for the time being in force under section 11 ofthe National Minimum Wage Act 2000, and the appropriateness or otherwise of fixing a statutory minimum hourly rate of pay above that rate;

The training and induction process for guarding staff is not unlike customer care, HACCP, safe pass and safety training that other sectors such as retail staff undergo, yet those sectors are not subject to EROs. The national minimum wage is adequate to protect employees in the security sector. Between July 2007 and January 2016, there was no increase in the national minimum wage (due to the economic crash of 2008) yet in that period, security employers were subjected to several increases under the ERO system. The economy is in difficult circumstances again due to Covid-19 and the potential impact of Brexit. Now is not the time to radically increase the rates of pay in the sector.

(e) the terms of any relevant national agreement relating to pay and conditions for the time being in existence.

The companies have no comment upon this criterion.

29. It is contended that the joint labour committee has not had sufficient regard to, or provided sufficient evidence for, the proposed ERO's compliance with Section 42A (6) of the Industrial Relations Act 1946, as amended.

Conclusion

30. For the foregoing reasons, the companies respectfully request the Labour Court not to make an ERO as proposed by the JLC.

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