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

National Electrical Contractors Ireland.
6 Main Street
Wicklow Town
County Wicklow
Phone: 086 6008836
Info@neci.ie

The Secretary
The Labour Court
Lansdowne House,
Lansdowne Road,
Ballsbridge,
Dublin 4.

By email only to info@labourcourt.ie

23 July 2024

OUTLINE WRITTEN SUBMISSION ON BEHALF OF THE NECI RE THE PROPOSED EXAMINATION INTO TERMS AND CONDITIONS IN THE ELECTRICAL CONTRACTING INDUSTRY

PRELIMINARY OBJECTION

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 and, in particular, 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) has been made by the Technical Engineering and Electrical Union (TEEU) which is now trading as Connect Trade Union. This is the fifth such application. The application is made jointly with the Association of Electrical Contractors Ireland (AECI) and the Electrical Contractor Association (ECA)

The first application made during the course of 2016 was subsequently withdrawn following a submission to the Labour Court by the NECI. The second application made in 2017, was again withdrawn by the TEEU after the NECI issued Judicial Review proceedings against the Labour Court. The third application resulted in a Sectoral Employment Order being made which, however, was subsequently struck down on several bases by the High Court through Judicial Review proceedings issued by the NECI. That decision was upheld by the Supreme Court in its decision of 18th June 2021. The fourth applicant was made and resulted in a Sectoral Employment Order being made, however, this Sectoral Employment Order was subject to Judicial Review proceedings taking again by the NECI and this SEO was struck down by the High Court on consent by the Minister on 28 March 2023.

Despite the NECI having been the Applicant in all of the above-mentioned Judicial Review proceedings and having made submissions in respect of every application made for an SEO relating to the Electrical Contracting Industry, its name was omitted from the application forms of all three of the above mentioned parties to the section 14 application, despite the Labour Courts Application form requesting the Applications to identify within the form any "organisation of employers that is representative of employers in the sector to which the request relates". We note again, as with every application made to date for every section 14 Application made under the 2015 Act to the Labour Court, relating to the Electrical Contracting industry that neither the parties to the Section 14 Application nor the Labour Court itself notified the NECI of the application.

The judgments of both the High Court and the Supreme Court provide welcome elucidation of the mandatory obligations of the Labour Court when carrying out its statutory functions under the Act. At the forefront of these requirements is an obligation on the part of the Labour Court to provide adequately clear reason(s) for its decisions made, whereby a mere perfunctory statement of purported compliance with the statutory items is impermissibly insufficient.

Given the seriousness of the impact an SEO would have upon our members, it is vital from our perspective that any process leading to the potential introduction of an SEO is statutorily and constitutionally compliant.

The Labour Court must act within the statutory constraints imposed by Chapter 3 of the Act.

Substantial representation

An issue to be determined by the Labour Court is whether an applicant (all applicants) 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.

Whilst no clear universal framework for such assessment was ultimately confirmed by the Labour Court, certain issues did emerge from the proceedings. It is helpful to summarise some of the main issues here.

First, the Labour Court has confirmed that it is a 'numbers game'. Substantial representativity is based on the numbers of workers (or employers of workers, as appropriate) only.

Secondly, 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 NECI challenges the proposition that the bodies who have made these applications for the examination are substantially representative of the workers on the one hand and/or employers of workers in the economic sector to which the application relates.

The NECI does so on several grounds.

First, the calculation of Connect's stated members purportedly within the sector to which the application relates is unclear. The data relied upon by Connect appears to be multi-layered, circular and, to an extent, obfuscated. The NECI have sought clarification of whether any of the 10,806 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 hold real concerns that the figures relied upon by Connect are inaccurate. With respect, the TEEU (now Connect) have delivered demonstrably false and misleading information to the Labour Court in previous applications. The TEEU now Connect Trade Union has filed four 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."

This information is obviously false. 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's 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.

This is demonstrably false and misleading lexicon which, concerningly, had the result of artificially augmenting Connect's suggestion that it is substantially representative of the persons in the sector to which its application relates.

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.

The NECI is currently endeavouring to obtain updated figures from Safe Electric's new administrator and expect to have these figures prior to the examination hearing (if the Labour Court decides same should take place). Until we have these figures, we will rely on the figures provided within our previous submission to the Labour Court in 2021, and which were obtained from the administer of Safe Electric which was the Register of Electrical Contractors of Ireland at that time (had the NECI been notified

of the Section 14 Application we would have obtained this information earlier, not notifying the NECI of the Section 14 application has prejudiced us and our ability to prepare our Submissions and we will be raising this as an issue at any subsequent examination hearing which may take place):

In this regard, the NECI relies on the 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 are subject to an Annual Safety Supervisory Body – Inspection report consisting of details of the number of electricians and apprentices which they employ. To assist the Labour Court, the NECI in June 2021 requested that RECI confirm the number of electrical contractors working within the state and the number of electricians and apprentices employed by them.

On 29 June 2021 Mr Martin on behalf of RECI confirmed that 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 thus excludes workers employed by state, local authorities, semi-state companies, electricians employed in manufacturing sector and self-employed electricians with no employees.

This data is, it is submitted, more reliable than the mere estimates and aspirational computations compiled on Connect's behalf, which interweave and rely heavily upon figures relating to the construction industry – which is a separate industry and sector.

In circumstances in which registration with Safe Electric is a legal requirement to exercise restricted electrical contracting functions, the Safe Electric database is the obvious, preeminent empirical categorisation and listing of electrical contractors and their workers in Ireland. It provides a minimum listing of workers who can lawfully carry out restricted electrical contracting functions. It cannot sensibly or reasonably be overlooked as the primary source of information confirming the number of electricians and apprentices employed by electrical contractors in the country.

Accordingly, to even assume the stated figure of 10,806 electrical workers represented by Connect as being correct (which the NECI does not accept and requires clarification), at best, Connect represents 10,806 workers in a pool of approximately 24,000 workers in the sector to which the application relates.

This equates to a representation of only 45.025% 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. This means that Connect seek to affect the constitutional rights of, and bind, 56.9% of an economic sector which they do not represent with mandatory terms and conditions of employment.

This, in the NECI's submission, does not and cannot reasonably or sensibly constitute 'substantial representation' within the meaning, and for the purposes, of the Act.

The Ernst & Young, Business and Advisory Services report, which all three section 14 applicants rely upon in support of their figures relating to the number of workers and employers to which the proposed SEO is to apply, does not use the same definition of the sector or workers identified within

the Section 14 Applications. Therefore, the report cannot be relied upon, as its underlining assumptions are predicated on definitions which do not align with the section 14 applications made. That is the evidence tendered by the applicants and it is contradictory.

The figures relied upon in the EY Report in deducting the number of electricians which the proposed new SEO is alleged not to apply does not explain how it has come to specific figures. Instead, it makes bold statements such as “based on consultations with the Electrical Contracting industry”. However, this statement is in fact meaningless – the figures presented by EY in its report, in these circumstances cannot be relied upon. Who is the Electrical Contracting Industry to which EY refers to when saying it consulted with to prepare its report? The NECI has not been consulted with by EY.

The question is, has the Labour Court made any enquiry into this Report, or will it, and as it has done in the past, simply accept the report, without seeking formal evidence from the person or persons that prepared the report in respect of its content. The onus is on the Labour Court to test the evidence.

It is submitted that this provides a complete answer to the issue of substantial representation and means that the application must fail.

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.

A. Has the Labour Court been so satisfied and how was it satisfied?

B. When was that exercise conducted?

C. By whom was it done?

D. What was the conclusion and what is it based on?

E. 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.

F. Who had an input into the investigations required by 15(1)a-d of the Act?

G. Are there any documents or records? If not, why not? If there are such documents or records, the NECI requires sight of them before this examination commences.

H. Was there a ballot of the Connect Trade Union? These are preliminary steps to be taken by the Labour Court which are mandated by the legislation before the Labour Court conducts the examination it has given notice of. The NECI requires to be satisfied that the steps were complied with by the Labour Court. With respect, mere assertions that the Labour Court has done so does not suffice given the gravity of the consequences for our members. These are important protections included in the legislation. 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.

If there is to be such an examination (and it seems premature given that it is not at all clear how the requirements of section 15 of the Industrial Relations (Amendment) Act 2015 have been met, submissions which we also made in September 2016 and June 2017, the NECI requests that an oral hearing be convened prior to any decision being taken. It strongly recommends 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:

i. 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.

ii. Were a national agreement, SEO controlling labour costs applied across an industry as diverse as the electrical contracting sector 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 <u>there is no benefit to the consumer</u>. 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."*

iii. 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.

It is our experience that the larger contractors in the country use subcontracted labour, many of who are from outside the State. It is impossible to impose any national wage agreements on parties who operate their payroll outside the State.

iv. 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.

v. 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.

vi. 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.

vii. 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.

viii. 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.

ix. 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, air conditioning units, food processing automation, water treatment services, Solar PV, EVC and many more.

x. 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.

xi. We agree it is reasonably necessary to promote and preserve high standards of training and qualification to ensure fair and sustainable rates of remuneration.

xii. 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.

xiii. 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.

xiv. 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 and not restricted to an occupational pension scheme and may be a PRSA product.

xv. 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 similar to the Statutory Sick Pay scheme.

xvi. We reserve the right to determine pay and conditions directly with our own employees.

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 Safe Energy Ireland T/A Walkmeadow Limited, on behalf of SGS to operate as a Safety Supervisory Body. Safe Electric, the statutory regulatory scheme for electrical contractors is operated by the Safe Energy Ireland T/A Walkmeadow Limited, of SGS on behalf of the Commission for Regulation of Utilities (CRU). All Electrical Contractors are required to register with Safe Electric. RECI, the previous license holder 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. We have requested from both Safe Energy Ireland T/A Walkmeadow Limited and the CRU for the up to date current data.

This is live, empirical data derived from mandatory registration obligations. Its reliability far outweighs that which is contained within what is, it is respectfully submitted, a loose calculation and estimation of worker numbers prepared by a third-party firm, which inferentially has not had regard to the number of electrical contractors (and electricians and apprentices they employ) registered with Safe Electric.

Indeed, the EY DKM report which supported Connect's previous application specifically admitted 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.

It is unclear to the NECI that Connect would seek to establish their purported substantial representativity of workers in the sector through such demonstrably unreliable information – whilst actively avoiding engagement with a method of empirical calculation such as the Safe Electric register.

The NECI are dismayed at the fact that Connect have chosen to circumvent the Safe Electric and its administrators register as means of attempting to establish their purported substantial representativity in the sector in favour of less reliable information, with the effect of wrongfully and artificially augmenting their position.

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.

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 as follows
   Electrician (5 Years Service) €25.23
   Electrician (3 Years Service) €23.65
   Electrician (0-1 Years Service) €22.16
2. Apprentices:
   a. 1st year at rate of €11.70 (Equal to minimum wage for Under 19)
      1st Year rate of €12.70 (Equal to the minimum wage for 20 years old plus).
   b. 2nd year at rate of €15.90
   c. 3rd year at rate of €17.00
   d. 4th year at rate of €19.50

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.

Finally, it is unclear how the Labour Court has purported to accept the Section 14 Applications in circumstances where none of the three Statutory Declarations supporting the applications comply with the requirements of the Statutory Declarations Act 1938 and where, as required by the Labour Court (Sectoral Employment Order) Rule 2016, certain mandatory information has been omitted from one of the applications made.

Yours faithfully,

John F. Smith (CEO of the NECI)