Submission on Behalf of Electrical Contractors who are Members of ECSSA (Ireland) CLG

In response to the Notice of Intention to Conduct an Examination into Terms and Conditions of Electricians and their Apprentices employed in the Electrical Contracting Industry, published by the Labour Court, the following submission is made on behalf of Electrical Contractors who are Members of the Electrical Contractors Safety and Standards Association (Ireland) CLG.

In May 2013 the Supreme Court declared that Part 3 of the Industrial Relations Act 1946 was incompatible with Article 15.2.1 of the Constitution and therefore void *ab initio.* *McGowan v The Labour Court* [2013] IESC 21

Relying on the provisions of Part 3 of the 1946 Act the Labour Court registered a Registered Employment Agreement for the Electrical Contracting Industry in 1990.

This Agreement was made at the request of the Electrical Contractors Association (ECA) which represented approximately 70 large electrical contractors, The Association of Electrical Contractors of Ireland (AECI) which represented less than 400 contractors and Unions representing electricians employed in the Industry.

While it is not suggested that the Unions were not representative of the employees, they did not have the right or approval of those electricians who were not affiliated to either union to enter into agreements binding on those unaffiliated electricians.

Neither did the ECA nor the AECI have the right to negotiate terms and conditions of employment for anybody other than their own members, and indeed in the case of the AECI, which did not hold a negotiating licence, one has to question whether it could lawfully negotiate on the terms and conditions of any employee other than those directly employed by AECI.

ECA, which is affiliated to the Construction Industry Federation (CIF) is said to have "borrowed" the CIF Negotiating Licence.

In 2008 the TEEU (into which the original contracting unions had amalgamated) sought approval from the Labour Court for a variation by way of an increase in the hourly rate payable to Electricians and Apprentices under the terms of the REA.

This Application was opposed by a very substantial number of electrical contractors, some of whom were members of the National Electrical Contractors of Ireland (NECI) and a further large group which were loosely and somewhat contemptuously referred to as " mavericks" or "unaffiliated electricians".

In 2009, in the course of one of the longest hearings ever in the Labour Court, all the matters referred to below were brought to the attention of the Court, which was asked not only to refuse to sanction the variation sought, but also to cancel the Agreement , as provided for in Section 29.2 of the 1946 Act.

The conduct of the Labour Court during the course of that hearing has to give rise to serious questions as to its impartiality.

Firstly the Court had to be reconstituted on the morning of the second day of the hearing when one of the union officials, who was to present the case for the Variation, was seen to engage in protracted conversation with a Member of the Court over breakfast.

Secondly, union officials did not even display the common courtesy of rising when addressing the Court and this lack of respect was condoned by the Court, while at the same time witnesses on behalf of the Opponents of the Variation were constantly required to stand when addressing the Court.

This one sided approach could not have assured those present that their case would be dealt with in an even handed manner and gave the distinct impression that what the unions asked for they invariably got.

Over the course of eleven days at hearing it was conceded by the Court that it could not produce one iota of evidence to show that the parties who purported to represent Employers in 1990 were in fact substantially representative of the 2500 contractors which were accepted as having been operating in 1990.

Neither could the Court point to any record of efforts by the Labour Court to establish the veracity of the claim that ECA and AECI were substantially representative of Employers, as required by Section 27.3.c of the 1946 Act.

Evidence was given that for the most part the REA was not applied in the industry to any great extent until the early 2000s.

In or about 2002 the parties to the REA established a private limited company, Epace, for the express purpose of enforcing the REA on all electrical contractors in the industry.

Epace was funded by a levy imposed on electrical contractors who were registered with the CIF Pension Scheme, which was the sole Pension Scheme acceptable under the terms of the Registered Employment Agreement.

Despite the fact that it had no legal remit to do so, Epace went about enforcement of the REA by harassing electrical contractors and forcing them to hand over their accounts and payrolls for analysis by Epace officials.

Not only was this intrusive conduct a breach of the Contractors constitutional right to privacy but it also placed Contractors who made payroll details available to Epace in a position of having breached Data Protection legislation by disclosing details of the earnings of their Employees to a company which had no legal right to such information.

Contractors were not made aware of the levies to fund Epace were not obligatory and in this way hundreds of thousands of Euro were skimmed off into the Epace accounts.

Direct evidence was given that Epace regularly submitted to AECI lists of contractors who were to be targeted for inspection and not only did AECI delete the names of those of its members who were not to be targeted but, in a disgraceful abuse of his position, one AECI official, who was a trading electrical contractor, specifically added the names of his direct commercial competitors in his own area of operations.

There is no direct evidence of a similar arrangement between ECA and Epace but neither is there any evidence of any member of ECA having been referred to the Labour Court for non- compliance with the REA.

At the same time prominent members of AECI would privately admit that they were not complying with the REA in respect of Travel time and country money, citing as justification the fact that the area of the country in which they operated and the type of contracts they were engaged in could not sustain such add on costs.

In this they were reflecting the true situation in the competitive world of small and medium sized contractors.

On deciding that a contractor was not compliant with the REA, Epace would then pass details to the TEEU who would go to the Labour Court and, without difficulty, obtain an Order from the Court specifying that the Contractor in question owed outlandish sums of money in back pay, travelling money and pension contributions.

The conduct of the Court at one such sitting in Tralee Court House is something of which I can speak personally in that a Killarney based electrician, who had never in his life employed even a single apprentice, was targeted by Epace and, on quite rightly refusing to make accounts available to their Inspectors, was deemed by Epace to be non- compliant and was therefore summoned before the Labour Court on somewhat vague grounds.

I have known this electrician since long before the REA was ever registered and was well aware that he had never had any employees.

In actual fact I had employed this person on a number of occasions over the years and went to the Labour Court Hearing to give evidence in his defence.

A female official from Epace was present with the TEEU Official who attended to present the case (whatever that might be) objected to my presence at the hearing.

Notwithstanding the fact that Section 32(1)a of the 1946 Act obliges the Court to hear all persons desiring to be heard, the Chairperson of the Court, In an open and despicable display of partiality, ruled that I could not remain to give evidence which would have demolished Union case.

That an accused person should be denied the opportunity to rebut ill-founded and vexatious allegation directed against him is utterly unacceptable in a civilised society and such subservience to the demands of Epace or the TEEU does nothing to foster respect for the Labour Court.

Failure to pay the amounts specified in these Labour Court Order then resulted in Criminal Prosecution in the District Court, with summary conviction carrying a fine of up to one thousand pounds and, in the case of a continuing offence, a further two hundred pounds for each day until the Order is complied with.

Thousands of Euro were paid by Epace to the AECI, ECA and the TEEU under the guise of secretarial and inspection services, while at the same time staff in AECI were advised not to inform AECI members that AECI was actually a founder and shareholder in Epace.

At the outset of the Labour Court Hearing in 2009, AECI, conscious of the backlash from members who had belatedly become aware that their association was actually a founder and shareholder in Epace, sought to take a Neutral stance on the application for Variation and Cancellation and had to withstand sustained bullying by the Court which sought to have them change their stance.

Despite ample evidence of such unacceptable conduct on the part of the parties to the REA and despite the fact that respected economists Moore McDowell and Dr Alan Ahern gave evidence that the country was faced with unprecedented economic difficulties and could not sustain any increase in labour costs, the Court refused to exercise its powers by cancelling an Agreement which was obviously no longer acceptable to sustain.

It should be remembered that this was at a time when the country was facing bankruptcy as a nation!

Faced with this irrational stance by the Labour Court, opponents of the REA were left with no option but to commence legal proceedings which culminated with the decision of the Supreme Court in May 2013.

It is therefore clear that the initial registration of the REA by the Labour Court consisted, in effect, of rubber stamping the request of the parties who had concluded the agreement and that for twenty three years the Labour Court had condoned and defended an REA which was based on unconstitutional and therefore invalid legislation.

Realising that the game was up, the directors on Epace, in a blatantly cynical exercise, changed the Articles of Association of the Company in order to permit them to pay redundancy, gratuities and other payments to employees, ex- employees, directors, former directors and anybody else deemed to be worthy of a share in the hundreds of thousands of euro which had been accumulated by way of levies which most contractors understood to be part of the pension contributions and therefore exempt from Income Tax.

Money collected to fund a private company, whose purpose it is to enforce an illegal agreement, is not exempt from income tax nor should money collected on foot of invalid Labour Court Orders be allowed to remain in the coffers of a private limited company

During the course of its existence Epace, aided and abetted by the TEEU and the Labour Court caused severe hardship, worry and financial loss to very many electrical contractors and their families.

Contractors saw their companies ruined by the publication of Labour Court Orders, alleging that they lawfully owed hundreds of thousands of euro in back pay, pension contributions and expenses.

The inevitable effect of such ill- founded and damaging publicity was that clients, suppliers and bankers of those companies all lost confidence in the ability of the targeted businesses to continue trading, with the inevitable closures and job losses.

Sadly we are aware that the horror of being faced by an unsurmountable debt in the form of such an Order was the final straw for two embattled individuals who took their own lives.

While the no legal actions have been initiated against the State and the Labour Court to date there is still some time before such actions become statute barred and since the purported authorising measure was void *ab initio*, logically there was no lawful authority under which to infringe the bodily integrity, personal liberty, property or privacy of the individuals targeted

It is already established case law that where private property rights are impinged on, without proper lawful authority, the person or body whose rights have been unlawfully damaged is entitled to compensation.

Leaving aside the question of Damages, including punitive damages for stress, harassment and economic damage to business, the people who paid over money are undoubtedly entitled to the return of same with appropriate interest.

It was established by the Supreme Court as far back as 1982 (*Murphy v Attorney General*) and confirmed by the same Court in 1985 (*Muckley v Ireland*) that persons from whom money has been collected on foot of invalid legislation should have that money returned.

Immediately that the Supreme Court struck down Part 3 of the 1946 Act, in May 2013, the Labour Court, on foot of whose invalid Orders these monies were collected, should have established the whereabouts of that money and ensured that it was returned to its rightful owners.

Retaining property which has been illegally obtained amounts to fraud and if the Labour Court cannot ensure that this fraud is rectified without delay it becomes a matter for investigation by another arm of the State.

The Labour Court should realise that, since it has failed or neglected to clear up the mess and injustice created by what it approved in 1990 and defended for twenty three years, it would be wholly inappropriate that it should proceed towards the creation of an opportunity to have the whole scam visited once again on electrical contractors by the registration of a new REA or Sectoral Agreement

Righting the injustice still remains the responsibility of the Labour Court and the first task in its Examination has to be to ensure that money illegally collected is located and returned to its rightful owners

Where the State and its agent, the Labour Court knew, or ought to have known, that the legislation which underpinned this REA was constitutionally frail, it was obliged by Art 40.3.1 of the Constitutions to respect and, as far as practicable, by its laws, to defend and vindicate the personal rights of citizens

Quite a long time ago, Leo Varadker TD, then in Opposition, placed such doubts on the Record of the Dail when he said (in relation to the 1946 Act) ***"It will come as no surprise to anybody if we find that what we have been doing for the past fifty years is unconstitutional and therefore illegal".***

Despite such grave doubts regarding the legality of what was going on and in the face of uncontested evidence of the abuses being perpetrated by the parties to the REA, the Labour Court failed to act in a logical manner when afforded the opportunity to cancel the registration of the REA.

The TEEU is committed to improving the terms and conditions of all its members in the electrical industry.

They must be commended for this and in fact they would be failing in their duty if they were to do otherwise.

Nobody can object to a worker seeking to get as good a deal for his labour as he can.

No employer objects to paying his employees as much as the sector in which he is involved can afford.

However, no prudent person can be obliged to run his business into insolvency by paying wages which cannot be recovered from his clients.

What most employers object to is the add on costs in the form of obligatory registration in a monopoly pension scheme which, in common with most other pension schemes of this nature, cannot now sustain the level of return promised to those who have paid into the scheme for many years.

Employers were deemed non-compliant with the REA because they would not deduct money from the wages of employees who had specifically stated that they did not want to be part of this poorly performing scheme, where annual reports on the value and performance of each individual's pension fund were not provided as required by pension legislation.

Obviously the big players in the Electrical Contracting industry would like to have a Registered Employment Agreement in place in that it provides a veneer of legality to what is in effect a price fixing exercise on the cost of labour.

It also serves as a negotiating tool for these big players when agreeing prices with their major National and Multi-national clients, in that they can point to the costs imposed by the REA as being the law of the land and therefore justify an hourly rate far in excess of that which they could obtain in a truly competitive market.

Not infrequently, once the contract has been secured at these inflated figures, the lip service to compliance becomes less important and they then get all or part of the work carried out by sub-contractors to whom the pay a rate which they know full well will not allow those sub-contractors to comply with the terms of the REA in respect of the sub-contractors own employees.

This practice has been going on for years in major projects under the very noses of the unions who would seek to police the REA, yet when major players in the industry have brought in sub-contractors from this jurisdiction and from Northern Ireland and paid rates well under what compliance with the REA would dictate, no evidence has emerged of any of these big players being targeted.

It does not require any great amount of logic to figure out that the Union needs the support of these contractors and their association to keep the REA in place and it is only when one of these big contractors goes belly up, leaving a plethora of unpaid sub- contractors that the true extent of the mal-practice becomes apparent.

It also calls into question the number of electricians claimed by the big players as their own direct employees, or are they including the sub-contractors and their employees in those figures.

Furthermore, the numbers of these electricians working for these major contracting firms also includes many employed on contracts outside of this country. Where the terms of the REA are not enforceable

Ironically, when one of the major players is put into liquidation, the unpaid sub-contractors would be held liable for all the provisions of the REA in respect of their own employees but the very firms who were the cheer leaders in putting the REA in place have no liability in respect of their unpaid sub- contractors.

Finally it needs to be put on record that when Epace was being would up it had somewhere in the region of €800,000 of accumulated funds.

Given that this money was all accumulated on foot of an invalid REA it was incumbent on the directors to see that it was returned to those from whom is was taken and if any of these people could not be traced, the residue should have gone to the **Irish Electrical Benevolent Association,** which had undertaken to ring fence it for relief of distress among electrical contractors, their families or dependants.

The derisory amount actually handed over to the IEBA begs the question of where the rest of this money has gone to and who have benefited from the carve up of the ill- gotten reserves

It is incomprehensible that the Labour Court should even contemplate the registration of an Employment Agreement at the behest of all, or any, of the parties who so grossly abused powers which the actually did not have under the former illegal REA and which have failed to make available for the benefit of electrical contractors a very considerable amount of money gathered from electrical contractors in such a devious and underhand manner.

Registering an REA and entrusting its operation to these same parties will become an obstacle to employment in that any small contractor who is currently contemplating a staff increase will not be prepared to do so if, by becoming an employer, he will be pulled in under the remit of an agreement to which he is not party and the financial consequences of which he could not sustain.

If the major players want to conclude an agreement for their own elite group then so be it, but it is utterly illogical that such an agreement should extend to all contractors irrespective of what type of work they are engaged in or what level of charges their clients are prepared to pay.

The law does not require the impossible, nor should it demand the unreasonable or the unviable.

The small number of major players in the industry have nothing to fear from small or medium sized contractors in that the pre-qualification requirements for most major contracts are such that small or medium contractors would not qualify to tender in the first place nor would they have the technical, financial or administrative resources to take on such projects even if allowed to tender.

Therefore the Labour Court, in examining terms and conditions in the industry, should be conscious of its inescapable responsibility to right the wrongs created by the first REA , prevent the repetitions of the abuses perpetrated under that REA and to take account of the fact that the scenario in which small and medium sized family firms operate is a world apart from that of big contracting firms,most of which operate on a multinational scale and on vastly higher contract rates than those available in the sectors of work in which smaller contractors are confined.

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