



HEATING & PLUMBING
ASSOCIATION of IRELAND

APHCI,
Gas Junction House,
Finglas Village,
Dublin 11 D11 NW22

The Secretary,
The Labour Court,
Lansdown House,
Lansdown Road,
Dublin 4 D04 A3A8



15th. December 2020

Re Notice of Intention to Conduct an Examination into Terms and Conditions in the Mechanical Engineering Building Services Contracting Sector pursuant to section 14 of the Industrial Relations (Amendment) Act 2015

Dear Sir/Madam,

We note that whereas the draft Sectoral Employment Order (Mechanical Engineering Building Services Contracting Sector) 2020 became defunct when an election was called resulting in the dissolution of the Dáil, an application was made to the Labour Court on 25 September 2020 for a new SEO.

We object to the commencement of a process leading to the introduction of SEO which would apply to our members in circumstances where the Labour Court applied to the High Court (Simons J) for a stay of a Declaration of unconstitutionality of Chapter 3 of the Industrial Relations (Amendment) Act 2015 pending its appeal to the Supreme Court. Mr Justice Simons made it clear that the Labour Court sought to have the constitutional issue determined, but now you are proceeding without the imprimatur of the Supreme Court. We are informed that that appeal is now set down for hearing on 15 February 2021. We would ask the Labour Court not to proceed with any hearing in relation to this current application in advance of that date. We ask that the Labour Court not rely on the Act to introduce further legally binding terms and conditions for our members prior to the determination of your appeal.

There is an SEO in place for this sector, SI No. 59 of 2018 - Sectoral Employment Order (Mechanical Engineering Building Services Contracting Sector) 2018 (covering qualified plumbers and registered apprentice plumbers (craftsperson) and qualified pipefitters and registered apprentice pipefitters (craftsperson) working in the sector).

Introducing a new one would set terms and conditions in stone for at least a year. The Minister could not review it for a period of three years. For so many obvious reasons, it is unsatisfactory to have this process commence at this time. As we understand it, the current legal situation is that the Labour Court (along with the Minister) lost a constitutional challenge to the Chapter 3 of the 2015 Act and the Labour Court's determination of the application for an SEO for that sector were found to be wanting. Mr Justice Simons made the following findings:

- 1) the 2015 Act did not contain sufficient principles and policies to guide the very broad discretion conferred upon the Minister (and, indirectly, upon the Labour Court);
- 2) the parent legislation abdicated the making of significant policy choices to the Minister (and, indirectly, to the Labour Court); and
- 3) Chapter 3 involved a “*standard-less delegation*” of law making to the Minister, and one which would be almost impossible to challenge by way of judicial review. The parent legislation was, therefore, invalid by reference to Article 15.2.1° of the Constitution.
- 4) the Minister had acted *ultra vires* in purporting to make an SI introducing an SEO for the electrical contracting sector;
- 5) the Labour Court procedures leading up to the recommended sectoral employment order did not comply with Chapter 3;
- 6) the Labour Court’s statutory report submitted to the Minister in respect of the electrical contracting sector was deficient in two significant respects (failing to record the *conclusions* of the Labour Court on crucial matters and not providing a rationale for those conclusions);
- 7) the Labour Court failed to set out a fair and accurate summary of the submissions made by those interested parties who opposed the making of a sectoral employment order and not engaging with the issues raised in those submissions);
- 8) the Labour Court report did not adequately address the definition of the “economic sector” concerned, and did not specify the class, type or group of workers to which the recommendation shall apply (as required by subsection 16(3)(a)) insofar as the position of workers employed by state and semi-state organisations is not expressly dealt with;
- 9) the terms of the SEO were also invalid insofar as they purported to fix the rate of pension contributions payable by reference to the actions of a third party (Construction Workers Pension Scheme);

It is therefore astonishing that the Labour Court would act as though nothing had changed. You have advertised that “*The Labour Court received a joint Notice of Intension to Conduct an Examination into Terms and Conditions in the Mechanical Engineering Building Services Contracting Sector from Connect Trade Union and Unite the Union on 25 September 2020*” [*sic*] whereas what you have received is in fact a joint application (from two employee unions) to request an examination of pay and conditions in a particular sector and, arising out of that, you have formed an intention to conduct the examination which is likely to lead to an SEO. Your notice is therefore clearly defective. It is also certainly not something which would alert a plumber to the fact that an SEO was likely to be made (when has an SEO been

refused) which could result in criminal prosecution. The quashing of the legislation received a lot of media attention and it is therefore confusing to see a statutory body race ahead of a Supreme Court appeal.

Notwithstanding that the Labour Court knows that the legislation has been struck down by the High Court and its procedures quashed, there is no indication that you intend to deal with the matter in a manner that is consistent with the judgment of the High Court. We therefore have to ask for an undertaking that the failings identified by Mr Justice Simons are put right.

We are very concerned to learn that you have not accepted any of the High Court's criticisms and have appealed against all of them, which must mean that you intend to continue to rely on these flawed procedures. We are concerned that that means that the Labour Court intends to continue to treat applications as was done in relation to the electrical contracting sector and indeed as you did when the draft SEO was prepared last year. You may recall that we also asked questions during the last SEO application and were given short shrift by the Labour Court. We received none of the material we sought in our solicitor's letter of 7 November 2019.

Your notice also states that *"(having had regard to the provisions of Section 15 (2) and (3) of the Industrial Relations (Amendment) Act 2015, the Labour Court hereby gives notice of its intention to conduct an examination of the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme in respect of the Mechanical Engineering Building Services Contracting Sector. This could result in a recommendation to the Minister which may provide for legally enforceable minimum terms and conditions of employment in the sector)."*

In the middle of a pandemic lockdown, you have called for submissions before 16 December 2020. As you can also imagine, the pre-Christmas period is a hugely busy time for our members. It is disappointing that we would have to point this out. In order to be able to engage in this process, we require the following information:

What did the Labour Court do in relation to section 15(1) of the Industrial Relations (Amendment) Act? Who determined the issues in section 15, including those referred to in your notice? Please provide us with copies of all material considered and any reports that have been prepared.

You maintained before the High Court in the NECI case that the sector cannot be broken down into smaller sectors? Is that still your position?

You maintained in the High Court in the NECI case that only employee numbers are considered in relation to who is substantially representative of employers? Is that still your position?



How is the removal of labour costs not anti-competitive when it is seen by employer bodies as a means of removing competition?

What specific principles and policies are guiding the Labour Court when assessing such applications? The High Court was told of further policy concerns which are not contained in the 2015 Act. Please clarify whether the Labour Court takes the matters set out on behalf of the Minister in an affidavit sworn on 22 January 2020 in the NECI proceedings into consideration?

Will we be provided with a draft report before a recommendation is sent to the Minister?

Will the Minister be provided with the submissions of the parties?

Will we be notified if a recommendation is made?

Will the Labour Court await the Supreme Court determination of the issues and not schedule the hearing for before 15 February 2021 (and not before judgment issues in the NECI case)?

Without prejudice to the above, we make the following submissions in relation to the SEO application:

We represent the majority of the smaller contractors in this sector (and yet we have to read about the SEO application rather than receive notification directly). We feel that the SEO system has a lot of shortcomings, not least that "one size does not fit all". We submit that there is a two-tier economy. While there appears to be a vibrant and booming economy, or was prior to the outbreak of the Covid pandemic, much of that is in the Greater Dublin Area only and perhaps in a few other major urban areas. The economy in large sections of the country is very depressed and indeed the lockdown to restrict the spread of the Corona virus will inevitably have put many businesses and individuals out of business.

We submit, as we did on the last occasion, that the industry can be divided roughly into three parts: heavy industrial, commercial, and domestic.

By and large, wages and conditions are negotiated and agreed at a high level between major players in the industry without any input from or discussion with the smaller contractors who in fact employ far greater craftsmen than the smaller group of larger contractors. While it is right and proper that all workers are well paid, the ability to pay must also be taken into account – and not simply at the enforcement stage. It is controlled by what the market will bear. Rurally based contractors in particular are not able to achieve the rates required to satisfy the conditions of the current SEO, never mind a further increase.

A worker living and working in, for example, a western county has a cheaper living costs than in Dublin but this is also reflected in rates available to the employer. Even in major



urban areas, a domestic or light commercial contractor cannot hope to charge rates anything near those enjoyed by those working on major projects. The effect of this is that the small and medium contractors will be forced out of business to be replaced to a degree by a large number of one-man operators. However, in the main, the work will be lost to the so-called black/grey economy.

The application for an SEO is not backed up by objective evidence. For example, the DKM report for the CIF, entitled "The Demand for Skills in Construction to 2020 Final Report" has been overtaken by the pandemic. Covid-19 is not mentioned in the report, which is undated, and one has to presume it was completed before March 2020 and is therefore of no relevance to a post-Covid economic landscape. Incidentally, it had little bearing on plumbing in any event (mentioning plumbing only 3 times in tables and plumber 6 times). It is a report for CIF and the brief given to DKM is not disclosed. According to Connect Trade Union's application, the report was relied on for the last SEO for the sector.

We object to the introduction of a legally questionable SEO which would require that a worker to whom the SEO relates be entered into a pension scheme the terms of which shall be no less favourable than those set out in the Construction Workers Pension Scheme. Pension and Death in Service Scheme contribution rates shall be set by the CWPS. Similarly, we object that it would mean that a worker to whom this SEO relates shall be entered into a sick pay scheme the terms of which shall be no less favourable than those set out in the CWPS. This requires a mirroring of the terms of the CWPS by any other pension provider. To date, no provider other than the CWPS has been identified.

We appreciate that the SEO system is relatively new, but at this stage it cannot possibly proceed without the analysis that the Supreme Court will bring. It seems to us to be undeniable that the rates are being set by larger employers and if we cannot be carved out of the sector, then we are doomed.

We look forward to hearing from you in relation to our questions above and hope that the Labour Court will set its timetable so as not to trigger the deadlines under the Act. We also reserve the right to make further submissions in response to the submissions of other interested parties. Currently all that is on the website are the brief applications, the out of date DKM report and a CSO link.

Yours faithfully

Crozier Deane

Administrator, APHCI & HPAI