

October 2020

INDUSTRIAL RELATIONS IN CONSTRUCTION



THE CONSTRUCTION INDUSTRY FEDERATION

This Booklet is intended to give general guidance to members of the Federation and is not a legal interpretation. Members should consult with the Industrial Relations & Employment Services Department of the Construction Industry Federation where appropriate.

BACKGROUND TO INDUSTRIAL RELATIONS

The system of industrial relations in Ireland is based on voluntary or free collective bargaining between workers or their representatives and employers. The principles of voluntary or free collective bargaining are based on legislation. The principal Acts of legislation pertaining to industrial relations are the Trade Union Act of 1941, the Industrial Relations Acts of 1946, 1969, 1990, 2012 and 2015 and the Workplace Relations Act 2015.

The role of the State in industrial relations is primarily one of facilitating the relationship between trade unions and employers by providing the legislative framework within which trade unions can operate and machinery to assist the parties in dispute settlement.

The diverse and transient nature of the construction industry make it prone to industrial unrest. The industry is labour intensive and labour costs count for a high proportion of the overall costs. Therefore, it is important that there are sufficient mechanisms in place to deal with collective bargaining in the industry.

Registered Employment Agreements under the Industrial Relations Act 1946

Under Part III of the Industrial Relations Act 1946, the parties to an agreement on pay and/or conditions of employment of any class or group of workers could apply to the Labour Court to have that agreement registered. Once registered, the Registered Employment Agreement (REA) became binding in Irish law. The terms of the agreement included enforceable minimum rates of pay and conditions of employment directly applicable to every worker and his employer of the type, class or group to which the agreement expressly applied. Therefore, the REA applied to workers of the type, class or group and their employers even when they were not parties to the agreement.

Registered Employment Agreements were struck down in Irish law when Part III of the Industrial Relations Act 1946 was deemed to be unconstitutional by the Supreme Court in *McGowan v The Labour Court*. The three REAs applicable to the Construction Industry, the Electrical Contracting Industry REA, the Construction Industry REA and the Construction Industry Pensions Assurance and Sick Pay REA, were no longer legally binding in Irish law from 9 May 2013 when the Supreme Court delivered their Judgment.

Industrial Relations (Amendment) Act 2015

The Industrial Relations (Amendment) Act 2015 was enacted to rectify the constitutional issues of the 1946 Act. The new legislation provides for a new regime for REAs which are not universally applicable and are only binding on the parties who sign up to them. The 2015 Act also provides for Sectoral Employment Orders (SEOs) which are universally applicable to all workers in a particular class, type or group of workers in an economic sector. SEOs provide for minimum rates of remuneration, pension and sick pay and a dispute resolution procedure applicable to a class, type or group of workers in a sector.

SECTORAL EMPLOYMENT ORDERS

Sectoral Employment Orders

There were three Sectoral Employment Orders (SEOs) in the construction industry, SEO (Construction Sector) 2019, SEO (Electrical Contracting Sector) 2019, and SEO (Mechanical Contracting Sector) 2018. However, the SEO (Electrical Contracting Sector) 2019 is no longer valid.

SEOs provide for minimum rates of remuneration, pension, sick pay and death-in-service contributions in their relevant sector, as well as a dispute resolution procedure.

The Industrial Relations (Amendment) Act 2015 outlines the SEO application process. An application is made to the Labour Court by an employer representative body or employee representative body or both as a joint application. The applicant must be able to demonstrate that they are substantially representative of the sector. The Labour Court conducts an examination into the terms of the sector and in doing so invites submissions from interested parties. The Labour Court will usually hold a hearing and the interested parties who made submissions will be invited to attend the hearing. If the Labour Court decide that an SEO is appropriate in the sector, it will then make a Recommendation to the Minister. If the Minister is satisfied that the Industrial Relations (Amendment) Act 2015 has been complied with, the Minister will turn the Recommendation into an Order and lay it before both Houses of the Oireachtas. If it is approved by the Houses, it will go back to the Minister to be signed into law.



High Court Challenge

The National Electrical Contractors of Ireland (NECI) challenged the validity of the SEO (Electrical Contracting) Sector 2019 and the constitutionality of the Industrial Relations (Amendment) Act 2015. On 23 June 2020, the High Court issued its Judgment and found in favour of NECI on both counts. The defendants, the Labour Court, the Minister for Business, Enterprise and Innovation and the Attorney General have appealed the decision. However, they have only appealed the decision in relation the constitutionality of the Industrial Relations (Amendment) Act 2015 and not the validity of the SEO (Electrical Contracting Sector) 2019. Therefore, the SEO (Electrical Contracting Sector) 2019 is now invalid.

Stay on the Industrial Relations (Amendment) Act 2015 Pending Appeal

The defendants have sought to skip the Court of Appeal and appeal the decision regarding the constitutionality of the Industrial Relations (Amendment) Act 2015 directly to the Supreme Court. In

appealing the decision, the defendants sought a stay on the Industrial Relations (Amendment) Act 2015 pending the outcome of the appeal. The defendants were successful in their application to the High Court for a stay on the parent legislation. The Judgment from the High Court in granting the stay quashes the SEO (Electrical Contracting Industry) 2019. The impact of this Judgment is that the SEO (Construction Industry) 2019 and the SEO (Mechanical Contracting Industry) 2018 will remain enforceable until the appeal is heard by either the Court of Appeal or the Supreme Court.

TRADE UNIONS

Trade Unions

A trade union is an organisation that provides information, advice and representation on behalf of workers. A trade union must have a negotiating licence to negotiate on behalf of workers regarding their wages and other conditions of employment. Workers have a constitutional right to join a trade union. Dismissal for trade union membership is automatically unfair under the Unfair Dismissals Acts 1977-2015.

Irish Congress of Trade Unions (ICTU)

The Irish Congress of Trade Unions is the umbrella organisation for trade unions. There are 55 unions affiliated with ICTU in Ireland and Northern Ireland. ICTU represents a range of interests on behalf of its members. ICTU operates in accordance with its Constitution and Standing Orders which contain regulations for dealing with the maintenance of good relationships between its affiliated unions and has a disputes procedure which can be invoked to deal with disputes.

Construction Industry Committee (CIC)

The CIC is a sectoral committee of trade unions under ICTU that represents workers in the construction industry. The committee comprises of members from the following:

- ICTU
- SIPTU
- BATU
- Unite the Union
- Connect Trade Union
- OPATSI

Shop Steward

A shop steward is a worker who has been elected as the union representative by the workers to represent them in dealings with management. A shop steward is usually the first port of call if a worker has concerns in the workplace. The matter may be referred to the trade union if the matter is not

resolved with the shop steward's efforts. Shop stewards will also act as the link in the chain of communication between the trade union and workers.

The shop steward does not have the power to authorise a work stoppage. The Trade Union will have specific rules around the procedures for industrial action which will include a secret ballot of all workers.

TRADE DISPUTES & INDUSTRIAL ACTION

Trade Disputes

Even where an employer is legally correct in taking action or where employees are seeking a change that is not legally enforceable, employees may engage in a trade dispute in an effort to bring about changes or to prevent an employer from imposing changes. Section 8 of the Industrial Relations Act 1990 defines "trade dispute" as "any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment, of any person."

Collective Agreements

When terms and conditions of employment are negotiated between employers and trade unions on a collective basis and an agreement is reached, this will be a collective agreement. Collective agreements are not legally binding. However, they are entered into in good faith by both sides and if they are broken, they are likely to lead to a trade dispute.

Industrial Action

Industrial action occurs where workers have a grievance over terms and conditions of employment, such as pay, hours of work, holidays, etc. Workers may decide to engage in industrial action for other reasons such as supporting a co-worker where the workers are of the view that their co-worker has been treated unfairly. Examples of industrial action may include strike action, a picket, a 'work-to-rule' or an overtime ban where workers only work the hours they are bound by in their contracts.

Work-to-rule

Work-to-rule is a form of industrial action where workers do the bare minimum during their working hours with the effect of reducing output and efficiency. Workers on a 'work-to-rule' will do the minimum required by the terms of their contract. This type of action is less disruptive than a strike and obeying the rules is less susceptible to disciplinary action. An 'overtime ban' is an example of a 'work-to-rule' in practice.

Strike Action

A strike is a cessation of work by any number of workers due to the refusal to carry out their work duties. It is usually unresolved worker grievances that lead to strike action. Strikes and industrial action are extremely disruptive and can have the effect of causing long term damage to a company through operational drawback, negative publicity, and poor worker morale.



Picketing

Picketing is a form of protest where picketers congregate outside of their workplace to draw attention to their cause and/or discourage others from entering the premises. The picketers will usually have placards or handouts. The objective of picketing is to communicate information regarding the trade dispute, harm the company through loss of business and/or through negative publicity.

Primary Picketing

The Industrial Relations Act 1990 permits peaceful picketing at the place where their employer works or carries on business, if they attend merely for the purpose of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working. There is no protection in the Act for persons who picket an employer's dwelling which is not his place of business.

Restrictions on the employer's right to seek injunctive relief is subject to the picketing being conducted in a peaceful manner.

Secondary Picketing

Secondary picketing is picketing at the premises of an employer who is not directly concerned with the industrial dispute in question. Secondary picketing shall only be lawful if the picketers have a 'reasonable belief' when they start to picket and for the duration of the picketing, that the employer

who is the subject of the secondary picketing directly 'assisted' the employer who is party to the dispute for the purpose of frustrating the industrial action. What constitutes a 'reasonable belief' and what constitutes 'assistance' is not defined in the legislation.

Immunities

There is no 'right to strike' in Irish law. However, there is a freedom to strike in certain circumstances where immunities from legal restrictions on strikes and industrial action apply, provided certain conditions are met. The immunities restrict the right of employers to seek injunctions restraining industrial action where, the unions can demonstrate compliance with their statutory obligations in respect of such matters as balloting and strike notice and that the unions actions were carried out in 'contemplation or furtherance of a trade dispute'.

Section 10 of the Industrial Relations Act 1990 provides immunity from actions for tort or conspiracy for acts done by two or more persons in contemplation or furtherance of a trade dispute if such acts done by one person would not be actionable. Section 12 stipulates that there is no right of action against a person who, in contemplation or furtherance of a trade dispute, induces another person to break a contract of employment, or interferes with the trade, business or employment of some other person. Section 13 provides that trade unions, members, officials, and trustees of authorised trade unions are similarly immune from action for acts committed by or on behalf of the trade union in contemplation of furtherance of a trade dispute. Immunities from actions arising out of strike activity contained in sections 10, 11 and 12 of the Act, shall not apply to a trade union or group of workers who act in disregard to or contrary to the outcome of a secret ballot.

The onus of proving compliance with the relevant statutory requirements lies on the trade union as the trade union are the party resisting the application for the injunction. The trade union will have to prove that they conducted a secret ballot and all its members who were called upon to engage in industrial action were balloted.

Employers can seek injunctions restraining industrial action in situations where pickets placed on premises were not peaceful or where the union has failed to serve adequate notice on the employer of the pending industrial action.

The Industrial Relations Act 1990 provides that in relation to disputes concerning an individual employee, immunities shall only apply if agreed procedures for the resolution of individual grievances have been resorted to and exhausted.

Secret Ballots

Section 14 of the Industrial Relations Act 1990 sets down the procedures for secret ballots. All members of a trade union who will be called upon to take industrial action must be entitled to vote in the ballot. The union must take reasonable steps to ensure that all members can vote, and members must be given a fair opportunity to vote. Voters must be asked if they are prepared to take part in the

relevant industrial action. If the secret ballot is to result in industrial action, the majority of voters must answer yes to the specific question asked. As soon as practicable after the secret ballot the union shall take reasonable steps to inform their members, who were entitled to vote in the ballot, of the following:

1. The number of ballot papers issued;
2. The number of votes cast;
3. The number of votes in favour of the proposal;
4. The number of votes against the proposal; and
5. The number of spoilt votes.

Injunctions

In the event of industrial action being taken without a ballot in favour of it, normal injunction procedures will be available to employers to bring the action to an end. If a ballot is held, the Act restricts the right of employers to obtain an injunction in two respects.

Firstly, where the ballot is in favour of strike action and the union has given one week's notice to the employer of the action, then the employer shall not be entitled to obtain an injunction restraining the industrial action unless notice of the application has been given to the trade union and its members.

Secondly, where the above conditions have been complied with, and the outcome of the ballot favours industrial action, a court shall not grant an injunction restricting the strike or other industrial action where the trade union establishes a fair case that it was acting in contemplation or furtherance of a trade dispute.

There are two exceptions to these provisions. They shall not apply to proceedings arising out of or relating to unlawfully entering, trespassing on, or causing damage to property, or to any activities resulting in, or likely to result in, death or personal injury.

Obtaining an injunction can be very costly for an employer. The more preferable outcome for all parties involved is the resolution of a dispute through a disputes resolution procedure or the State's machinery for dispute resolution.



THE WORKPLACE RELATIONS COMMISSION

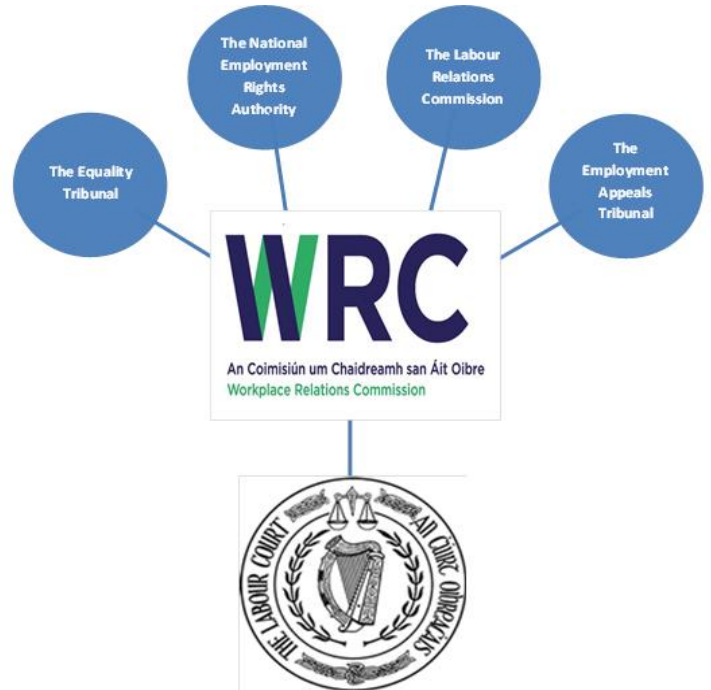
The Workplace Relations Commission

The Workplace Relations Commission (WRC) was established on 1 October 2015 under the Workplace Relations Act 2015.

The WRC took over the functions of the National Employment Rights Authority (NERA), the Labour Relations Commission (LRC) and the Director of the Equality Tribunal. It also took over some of the functions of the Employment Appeals Tribunal. However, the appeal functions of the EAT were transferred to the Labour Court.

The aim of the workplace relations reform was to deliver a *“world-class workplace relations service which is simple to use, independent, effective, impartial, cost effective and provides for a workable means of redress and enforcement within a reasonable time frame.”*

The WRC hears cases under employment protective legislation and industrial relations employment disputes. The WRC hears all employment rights cases at first instance through the Adjudication services. The Labour Court is the single appeal body for all employment rights appeal cases. Industrial relations disputes are also heard at the WRC. If resolution cannot be achieved at the WRC, the dispute can be referred to the Labour Court for a Recommendation.



Mediation



Mediation may be offered by the WRC as a form of early resolution before a case proceeds to Adjudication. Not all cases will be offered Mediation. It will depend on whether the WRC find that mediation is appropriate, and the WRC have the resources available to offer this service. Mediation is voluntary and it can be face to face or over the phone. Where a resolution is reached an agreement will usually be drafted and signed by the parties. If a settlement is reached, the case does not proceed to Adjudication. Where no agreement is reached at Mediation, the case will normally proceed to Adjudication.

Adjudication

Complaints made by workers under employment protective legislation are made to the WRC. If the parties have not availed of Mediation, or if they have and agreement has not been reached, an independent Adjudication Officer will be appointed to hear the case. The Adjudicator will hear from both parties and consider any legal arguments before making a determination. The determination will be legally binding and published on the WRC website with the names anonymized. Both parties have the right to appeal to the Labour Court where either party is not satisfied with the determination. The Department has identified the most referred cases to Adjudication in the construction industry are those under the Unfair Dismissals Acts 1977-2005, Employment Equality 1998-2015 Acts, the Redundancy Payments Acts 1967-2014, the Organisation of Working Time Act 1997, Payment of Wages Act 1991 and the Safety, Health and Welfare at Work Act 2005. However, more recently we have noticed an influx in cases under the Protected Disclosures Act 2014.

Conciliation

The WRC conciliation service is the first stage of the State's machinery to resolve industrial relations disputes. An independent conciliation officer is appointed to assist with reconciling the dispute. Conciliation is voluntary so both parties have to be agreeable to attend. However, conciliation is usually a necessary preliminary to investigations by the Labour Court. Where agreement cannot be reached, the dispute is usually referred to the Labour Court for a Recommendation.

Construction Industry Disputes Tribunal (CIDT)

The Construction Industry Disputes Tribunal was developed by the parties to the previously agreed REA in line with a disputes resolution procedure specific to the industry. The CIDT was chaired by an officer of the WRC conciliation services. The employee side would nominate an appropriate employee representative and the employer side would nominate an appropriate employer representative. The Chair, together with the employee and employer nominated representatives would assist in the resolution of the dispute. Where no agreement was reached the matter would usually be referred to conciliation.

National Joint Industrial Council (NJIC)

NJICs are voluntary negotiating bodies for specific industries or parts of industries that are substantially representative of employers and trade unions. The purpose of the NJICs are to promote harmonious relations between the workers and the employers. The NJIC will be facilitated by a conciliation officer of the WRC who will be known as the Chairman and they will usually be accompanied by an Observer and a Secretary on behalf of the WRC. There are two NJICs in construction, the Construction National Joint Industry Council (CNJIC) and the Electrical National Joint Industrial Council (ENJIC).

Inspections

Inspectors of the WRC have the power to conduct investigations, examinations, or investigations. Inspectors monitor and enforce compliance with employment protective legislation. An inspector will request records from the employer to demonstrate compliance with the relevant legislation. Where non-compliance is found to exist and an employer refuses to rectify non-compliance highlighted by the inspector, the inspector may issue a compliance notice. If an employer refuses to rectify the matters, the WRC may initiate prosecution proceedings against the employer. Fixed charge notices may be issued in certain instances of non-compliance. If the charge is unpaid the matter proceeds to the District Court.

THE LABOUR COURT

The Labour Court

The Labour Court is quasi-judicial forum. It hears cases on appeal from Adjudication and it hears industrial relations disputes. It can also deal with an appeal from an employer arising from a compliance notice they have been issued.

Appeal of Adjudication

The Labour Court hears cases where either party has appealed the outcome of an Adjudication hearing, of which they have 42 days to do so from the issuing of the decision from the WRC. The Labour Court will treat the case as a de novo appeal. This means that it will treat the case as a new hearing and the adjudication officer's decision will have no influence on the decision of the Labour Court.

The Labour Court is made up of the Chairman, an employer representative, an employee representative, and the secretary. The parties are required to make written submissions in advance of the hearing. The party bearing the burden of proof will normally present their case first. Both sides will have the opportunity to comment on each other's submissions. Once the Court is satisfied they have heard the details of the case, they will end the hearing. Parties may be asked for a closing statement. The decision of the Labour Court in cases that are appeals of Adjudication are legally binding on the parties. Decisions are published and available on the Labour Court website. Such decisions made by the Labour Court can only be appealed to the High Court on a point of law.



THE LABOUR COURT
An Chúirt Oibreachais

Industrial Relations Dispute

The Labour Court also conducts investigations into trade disputes. Where the dispute cannot be resolved at Conciliation, it will usually be referred to the Labour Court. The Labour Court will receive the notes of the conciliation officer before a hearing. The parties to the dispute will submit written submissions to the Labour Court in advance of the hearing. The Labour Court will hear from all sides of the dispute. The outcome of the Labour Court hearing will be a Recommendation setting forth its opinion on the merits of the dispute and the terms on which it should be settled. The Recommendation is usually made public and published on the Labour Court website. A Recommendation made by the Labour Court is not legally binding on the parties. It is up to the parties to accept or reject the outcome of the Labour Court's Recommendation.

Industrial Relations & Employment Services Department Contacts:

The CIF Industrial Relations & Employment Services Department are happy to assist you with your enquiries regarding any industrial relations issues or queries you may have. Our qualified and experienced staff can be contacted as follows:

Jean Winters, Director - 01-4066011 / jwinters@cif.ie

Cheryl Treanor, Executive - 01-4066022 / ctreanor@cif.ie

Anthony Brady, Executive - 01-4066089 / abrady@cif.ie

Cathy Curry, Administrator - 01-4066008 / cgurry@cif.ie