

THE HIGH COURT

2008 686 JR

BETWEEN

**BENEDICT MCGOWAN, KIERAN MARSHALL, PADRAIG BRADY, BRIAN KELLY, DONAL PHELAN, DAVE MCCARTHY, JIMMY LEE,
CAMLIN ELECTRIC LIMITED, SOUTHWESTERN POWER SERVICES LIMITED AND CAVANTY ELECTRICAL LIMITED**
APPLICANTS

AND

THE LABOUR COURT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE TECHNICAL ENGINEERING AND ELECTRICAL UNION AND THE ASSOCIATION OF ELECTRICAL CONTRACTORS (IRELAND)
AND

THE ELECTRICAL CONTRACTORS ASSOCIATION AND THE NATIONAL ELECTRICAL CONTRACTORS OF IRELAND

NOTICE PARTIES

2008 1864 SS

BETWEEN

MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT

PROSECUTOR

AND

CAMLIN ELECTRIC LIMITED

ACCUSED

2009 507 JR

BETWEEN

BUNCLODY ELECTRICAL CONTRACTING LIMITED, CAMLIN ELECTRIC LIMITED AND SOUTHWESTERN POWER SERVICES LIMITED
APPLICANTS

AND

THE LABOUR COURT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

**THE TECHNICAL ENGINEERING AND ELECTRICAL UNION AND THE ASSOCIATION OF ELECTRIC CONTRACTORS (IRELAND) AND
THE ELECTRICAL CONTRACTORS ASSOCIATION**

NOTICE PARTIES

Judgment of Mr. Justice Hedigan delivered on the 30th day of June 2010.

1. The proceedings herein are linked by order of this Court dated the 18th May, 2009. The applicants are electrical contractors who in various ways, set out in these proceedings, seek to challenge a Registered Employment Agreement ("REA") on grounds of invalidity *ab initio* and for unconstitutionality. The notice parties are parties to the REA. The applicants further challenge the decision of the Labour Court made on the 26th February, 2009 refusing to cancel the REA. I propose to consider these three grounds in this judgment.

2. The background

2.1 Pursuant to s. 27 of the Industrial Relations Act 1946, a body which is representative of the interests of employers, in this case the electrical contractors, may register an agreement stipulating certain employment conditions, guidelines and wages in agreement with a body representing the interests of employees. Such a registered employment agreement may be amended from time to time to

fall in line with inflation or prevailing economic conditions. The REA in question relates to the electrical contracting industry and was registered by the Labour Court on 24th September, 1990 and has been varied on fourteen occasions since, most recently on the 11th May, 2007. The applicants, who are all electrical contractors who engage the services of electricians and are, as such, subject to the provisions of the REA, are what remain of several hundred proposed applicants who oppose the REA.

2.2 An REA, once registered, is binding on all bodies in the electrical industry and breach of its provisions is a criminal offence. Some of the applicants have sought to derogate from the REA in question and, as a result, several are awaiting criminal prosecutions for failure to adhere to the terms, (*Minister for Enterprise, Trade, and Employment v Camlin Electric Limited*, 2008/1864 SS) Several applicants took a case to the Labour Court seeking to cancel the agreement claiming, among other things, that the rates of pay under the REA were highly punitive in the current economic climate and that observance of the terms therein would lead to further job losses and uncompetitive conditions. The Labour Court refused to cancel the REA. This application was brought by *inter alia* the applicants before the Labour Court on the 12th January, 2009. It continued over eleven days and was the longest ever sitting by the Labour Court. It was completed on the 4th February, 2009 and the decision was delivered on the 26th February, 2009. The Labour Court refused to cancel the REA and also declined the wage increase application heard at the same time.

2.3 The applicants object to the REA on the basis that it was made by parties who were not representative of the electrical industry taken as a whole. Specifically, they claim that they were not parties to the REA, that it requires pay levels and conditions of work far above those that small contractors like themselves can afford to pay, and that it makes it impossible for them to tender for work because their costs are too high, especially in the current economic difficulties. The applicants claim that they were unaware of the existence of the REA until comparatively recently since it is only recently that it has been enforced against them.

3. The Statutory Framework

3.1 Reference is made herein to the provisions of Part III of the Industrial Relations Act 1946 ("the 1946 Act") headed "Agreements in relation to wages and conditions of employment" and under which REA's may be registered, cancelled and enforced. The relevant sections of Part III of the 1946 Act are as follows:-

"Section 25

In this Part –

the expression "employment agreement" means an agreement relating to the remuneration or the conditions of employment of workers of any class, type or group made between a trade union of workers and an employer or trade union of employers or made, at a meeting of a registered joint industrial council, between members of the council representative of workers and members of the council representative of employers;

the expression "the register" means the Register of Employment Agreements;

the word "registered", in relation to an employment agreement, means for the time being registered in the register;

the expression "registered employment agreement" means an employment agreement for the time being registered in the register.

Section 26

The Court shall maintain a register to be known as the Register of Employment Agreements."

3.2 Sections 27, 28 and 29 of the 1946 Act provide for the registration, variation and cancellation of REA's. Breaches of an REA are governed by s. 32 of the 1946 Act. Sections 27(3), (4) and (5) set out in detail the steps to be taken and the matters to be considered by the Labour Court when processing an application for registration under s. 27(1) and provide:-

"(3) Where an application is duly made to the Court to register in the register an employment agreement, the Court shall, subject to the provisions of this section, register the agreement in the register if it is satisfied—

(a) that, in the case of an agreement to which there are two parties only, both parties consent to its registration and, in the case of an agreement to which there are more than two parties, there is substantial agreement amongst the parties representing the interests of workers and employers, respectively, that it should be registered,

(b) that the agreement is expressed to apply to all workers of a particular class, type or group and their employers where the Court is satisfied that it is a normal and desirable practice or that it is expedient to have a separate agreement for that class, type or group,

(c) that the parties to the agreement are substantially representative of such workers and employers,

(d) that the agreement is not intended to restrict unduly employment generally or the employment of workers of a particular class, type or group or to ensure or protect the retention in use of inefficient or unduly costly machinery or methods of working,

(e) that the agreement provides that if a trade dispute occurs between workers to whom the agreement relates and their employers a strike or lock-out shall not take place until the dispute has been submitted for settlement by negotiation in the manner specified in the agreement, and

(f) that the agreement is in a form suitable for registration.

(4) Where an application is made to the Court to register an employment agreement, the Court shall direct such parties thereto as the Court shall specify to publish specified particulars of the agreement in such manner as, in the opinion of the Court, is best calculated to bring the application to the notice of all persons concerned.

(5) (a) The Court shall not register an employment agreement until the lapse of fourteen days after publication of particulars of the agreement in accordance with subsection (4) of this section.

(b) If within that period the Court receives notice of an objection to the agreement being registered, the Court shall, unless it considers the objection frivolous, consider the objection and shall hear all parties appearing to the Court to be interested and desiring to be heard, and if, after such consideration, the Court is satisfied that the agreement does not comply with the requirements specified in subsection (3) of this section, the Court shall refuse to register the agreement."

3.3 Sections 28 and 29 cover variation of REAs and cancellation of REAs' **registration**, respectively, and provide as follows:-

"Section 28

(1) If a registered employment agreement provides for the variation of the agreement in accordance with this section, any party to the agreement may apply to the Court to vary it in its application to any worker or workers to whom it applies.

(2) Where an application is made under this section to vary an agreement, the following provisions shall have effect:—

(a) the Court shall consider the application and shall hear all persons appearing to the Court to be interested and desiring to be heard;

(b) after such consideration, the Court may, as it thinks fit, refuse the application or make an order varying the agreement in such manner as it thinks proper;

(c) if the Court makes an order varying the agreement, the agreement shall, as from such date not being earlier than the date of the order as the Court specifies in the order, have effect as so varied.

Section 29

(1) The registration of an employment agreement may be cancelled by the Court on the joint application of all parties thereto if the Court is satisfied that the consent of all such parties to its cancellation has been given voluntarily.

(2) The Court may cancel the registration of an employment agreement if satisfied that there has been such substantial change in the circumstances of the trade or business to which it relates since the registration of the agreement that it is undesirable to maintain registration.

(3) Where a registered employment agreement does not provide for its duration or termination, the Court may, after the lapse of twelve months from the date of registration, cancel the registration on the application, made after six months' notice to the Court, of all parties thereto representative of workers or of employers.

(4)(a) Where a registered employment agreement is expressed to be for a specified period, it shall, if in force at the end of that period, and notwithstanding any provision that it shall cease to have effect at the expiration of such period, continue in force until its registration is cancelled in accordance with this Part.

(b) The registration of an employment agreement continued in force under paragraph (a) of this subsection may be cancelled by the Court on the application of any party thereto, made after three months' notice to the Court, and consented to by all parties thereto representative of workers or of employers.

(5) Where a registered employment agreement is terminated by any party thereto in accordance with its terms, the Court shall, on receiving notice of the termination, cancel the registration."

4. Preliminary Objection-- Delay

4.1 The respondents have at all times in these proceedings argued that the applicants should not be allowed to challenge the REA some eighteen to nineteen years after its registration. They argue no exceptional circumstances arise to justify an extension of time. They claim that the applicants have not in fact provided any explanation or justification which might excuse or justify their failure to act promptly; and that they bear a heavy burden to satisfy the Court which they have failed to meet. The applicants claim they did not know about the agreement or did not know it applied to them. They note it was only in recent years it was in fact applied to them.

4.2 The law governing the questioning of time limits and delay in judicial review is now well known. Order 84, rule 21(1) of the Rules of the Superior Courts provide:-

"An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the Court considers that there is good reason for extending the period within which the application shall be made."

In *Solan v. DPP* [1989] I.L.R.M. 491, Barr J. held (at p. 493):-

"The applicant is obliged to satisfy the court that in all the circumstances it is in the interests of justice that time for the making of an application should be extended and that the court should exercise its discretion accordingly."

4.3 The *locus classicus*, however, is clearly *De Róiste v. Minister for Defence* [2001] 1 I.R. 190. The applicant sought to challenge the decision to summarily dismiss him from the Defence Forces twenty nine years after the event. The Supreme Court held that "delay in itself" could be a ground for refusing relief. Denham J. listed at page 208 of the reported ruling, five (non-exhaustive) factors, to which the Court could have regard:-

"In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the

conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive. It is clear from precedent that the discretion of the court has ever been to protect justice. When criminal convictions are in issue the matter of justice may be very clear."

On the delay issue Fennelly J. added at page 221:-

"In my view, extremely long delay, without cogent explanation and justification may in itself constitute a ground for refusing relief. The respondent does not have to establish that he has been prejudiced though prejudice will usually be relevant. So also will the effect on third parties as in *The State (Cussen) v. Brennan* [1981] I.R. 181. It is, of course, conceivable that in exceptional circumstances even very long delay might be explained and even justified. The respondent might, for example, be responsible for concealment or for exercising control over relevant information or even the applicant's own freedom of action."

4.4 Nevertheless, the categories of potential "good reasons" justifying an extension of time are difficult to catalogue for the reasons outlined by Costello J. in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301:-

"The phrase 'good reasons' is one of wide import which it would be futile to attempt to define precisely. However in considering whether or not there are good reasons for extending the time, I think it is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show (and I think the onus under Order 84, rule 21 is on the plaintiff) is that there are reasons which both explain the delay and afford a justifiable excuse for the delay."

4.5 These decisions establish that an applicant in judicial review proceedings must move promptly and within three months, or six months where the relief sought is *certiorari*. If they do not do so then in order to proceed, they must satisfy the Court that there is a justifiable excuse which explains the delay and justifies extending the time. Prejudice to the respondents or third parties must be weighed in the balance. So too should it be kept in mind that on public policy grounds, proceedings, notably judicial review proceedings, should take place promptly.

4.6 Turning to the circumstances of this case, in light of the lengthy delay of eighteen and nineteen years in the face of the requirement to act promptly and in any event within three or six months as the case may be to challenge the REA, a very heavy onus lies on the applicants herein. They must show exceptional circumstances. These should be clearly set out in their pleadings. There does not appear to be any concrete explanation offered to excuse the inordinate delay. The claims of lack of knowledge of the REA are very hard to credit. The applicants are contractors working in the electrical industry. They must have known of the existence of something as important as this REA which was negotiated by the key players in their industry. The application to register the agreement was publicly advertised. All fourteen subsequent applications to vary which occurred since 1992 on an almost annual basis were also publicly advertised.

4.7 Moreover, on their own evidence the applicants have known for some time of the existence of this REA. In his affidavit sworn on 8th July, 2008, Michael Marshall, manager of the Electrical Contractors Safety Association, avers at paragraph 11:-

"[T]owards the end of 2003, my predecessor ... started to get phone calls from contractors concerned about claims that they were somehow governed by a Registered Employment Agreement."

And further at paragraph 13:-

"When I took over as technical manager of the ECSSA in March 2004, I was inundated with queries and complaints from members in relation to their growing worries about the Agreement."

4.7 Mr. Marshall also swears at paragraph 12 that legal advice of senior counsel was sought towards the end of 2003 in relation to the REA. The advice received was that the REA was "the law of the land". This advice was circulated to any member who asked for it. The December 2005 newsletter of Mr. Marshall's association discussed the issue of the REA. In his affidavit of 8th July, 2008, Benedict McGowan swore that the burden of compliance with the REA was becoming difficult in 2004 and impossible by 2006. Matt Murphy in his affidavit of 8th July, 2008 refers to a meeting with EPACE (the body charged with enforcing the REA) in February 2006 in which the agreement was brought to his attention. Nick Murphy in his affidavit of 11th May, 2009 states that EPACE "began pursuing" him in respect of his failure to comply with the REA in 2005.

4.8 In the light of this evidence it is impossible to accept the applicants' arguments that they were not aware until recently of the existence of the REA. They clearly have been well aware of it for some considerable time and certainly since the end of 2003. Indeed I find it difficult to accept that they were not well aware of the existence of the REA since it was first negotiated and registered. No explanation has been offered which could justify the failure to act promptly or within three or six months much less the extraordinary delay involved here. The challenge to the validity of the REA must, therefore, be rejected as being well out of the time permitted to seek judicial review.

5. The challenge to the Labour Court decision

5.1 The scope of judicial review: The High Court has a limited role in reviewing the decision of bodies which have been given a specialist role by the Oireachtas. The nature of this limited role was set out by Hamilton C.J. in the case of *Henry Denny & Son (Ireland) Ltd. v. Minister for Social Welfare* [1998] 1 I.R. 34 where (at p. 37) he emphasised the restraint the Court should exercise when reviewing the decisions of specialist decision-makers:-

"[T]he courts should be slow to interfere with the decisions of expert administrative tribunals. Where the conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

Identifiable errors of law or unsustainable findings of fact are the key requirements before the High Court may intervene. Absent these

the Court should not intervene.

5.2 A further consideration of the limited role of the Court with specific reference to the Labour Court as an expert or specialist tribunal is to be found in the decision in *Ashford Castle v. SIPTU* [2007] 4 I.R. 70 where, writing at pages 83 – 84, Clarke J. stated:-

"The tasks which administrative bodies are given under statute vary significantly. The issues which have to be decided can be of very different types. At one end of the spectrum are issues which involve the same sort of mixed questions of law and fact with which the courts are frequently faced.

A person may, for example, be entitled to a social welfare benefit provided that a certain set of facts, as specified by statute, are found to exist. The issue at a hearing within the social welfare system may well, therefore, turn on whether, as a matter of fact, the necessary qualifying requirements have been established or disqualifying requirements have been shown to exist. In such cases the findings of fact will be very similar to the facts which will be found by a court should a comparable issue arise in judicial proceedings.

At the other end of the spectrum, expert bodies may be required to bring to bear upon a situation a great deal of their own expertise in relation to matters which involve the exercise of an expert judgment. Bodies charged with, for example, roles in the planning process are required to exercise a judgment as to what might be the proper planning and development of an area. Obviously in coming to such a view the relevant bodies are required to have regard to the matters which the law specifies (such as, for example, a development plan). However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area."

5.3 Identifying the Labour Court as a body with such specialist expertise, Clarke J. continued at page 85:-

"...it seems to me that the Labour Court, when exercising its role under the Act of 2001, is very much towards the end of the spectrum where it is required to bring to bear its own expert view on the overall approach to the issues. It, correctly in my view, identified that its decision must be one which is fair and reasonable to both sides. Precisely what is fair and reasonable in the context of terms and conditions of employment is a matter upon which the Labour Court has great expertise and, in my view, the Labour Court is more than entitled to bring its expertise to bear on the sort of issues which arise in this case.

For those reasons it does seem to me that a very high degree of deference indeed needs to be applied to decisions which involve the exercise by a statutory body, such as the Labour Court, of an expertise which this court does not have. Similarly in assessing whether a decision could legitimately have been come to by the Labour Court, it is necessary to consider all of the materials which were properly before the Labour Court and to identify whether those materials could reasonably have led to the conclusion reached, taking into account the legitimate exercise by the Labour Court of its own expertise in the matter."

Dealing further with this issue, Clarke J. in *Calor Teoranta v. McCarthy* [2009] IEHC 139 wrote at para. 3.6:-

"...this Court can scrutinise the extent to which the Labour Court considered all necessary matters and excluded from its consideration any matters that were not appropriate. However, a legitimate and sustainable judgment of the facts based on a proper consideration of all relevant materials should not be interfered with by this Court. Likewise, particular deference should be paid to the judgment of the Labour Court on matters which are within its own special expertise."

5.4 In the recent case of *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, the Supreme Court reiterated that the tests in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanála*, continue to govern the law of judicial review in Ireland. Denham J. dealing with the need for deference by the courts to the decisions of specialist decision-makers wrote as follows at paras. 23-25:-

"It appears to me that the principles to be applied in a judicial review application, to determine if a decision is reasonable or irrational, are fundamentally as described by Henchy J. in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642. They are broad principles.

A narrower aspect of the test, as stated by Finlay C.J. in *O'Keeffe v An Bord Pleanála*, applies in circumstances where the review is of a decision of a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge. The general test is not as narrow.

The relevant factors in the general test are as follows:-

- (i) In judicial review the decision-making process is reviewed.
- (ii) It is not an appeal on the merits.
- (iii) The onus of proof rests upon the applicant at all times.
- (iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense.
- (v) The nature of the decision and decision maker being reviewed is relevant to the application of the test.
- (vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.
- (vii) The Court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Victims' Compensation*

Tribunal referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

It is the narrow test that is applicable in this case. That test was expressed by Finlay C. J. in *O'Keeffe* as follows, at page 72 of the decision:

"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

5.5 Relying upon these authorities it seems to me that the Court can only intervene in a decision by the Labour Court where satisfied that the decision it made was fundamentally at variance with reason and common sense or where there is an identifiable error of law. The Court should be slow to intervene where the Labour Court is exercising its special expertise in the area of labour relations. The Court must further be conscious that the Oireachtas in s. 29 of the 1946 Act set a test which required the Labour Court to determine, based on its experience and expertise, the desirability of applying a particular form of industrial relations agreement to a particular industry. Implicit in this is the requirement of a particular deference to the Labour Court's decision herein. In order to justify intervention on the basis of irrationality, the Court must be satisfied that there was no relevant material before the Labour Court which would support its decision or that the decision was based upon an error of law.

6. The irrationality Claim

For the reasons set out in chapter 9 of this judgment I find this claim to be manifestly unsustainable in this case.

7. The alleged errors of law

The *Laval* decision

7.1 In arriving at its decision to refuse cancellation of the agreement, the Labour Court considered the effect on the electrical contracting industry of the decision in *C-341/05 Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, [2008] IRLR 160. The Labour Court concluded that the cancellation of the REA would allow contractors including contractors from low wage economies to provide services in Ireland without having to pay the minimum terms and conditions required under the REA. In *Laval* the European Court of Justice was dealing with a labour dispute on a building site in Sweden where Latvian workers were working on terms and conditions below those demanded by the Swedish Union. In its judgment the E.C.J. considered Directive 96/71/EC which provided as follows, at Article 3(1):-

"Member States shall ensure that whatever the law applicable to the employment relationship, the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to [below]

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

(c) the minimum rates of pay, including overtime rates; this point does not apply to supplemental occupational retirement pension schemes;

(d) the conditions of hiring out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

(g) equality of treatment between men and women and other provisions on non-discrimination."

7.2 For the purposes of this Directive the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

Article 3(8) states that:

"Collective agreements or arbitration awards which have been declared universally applicable" means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned."

7.3 In summary, this Directive provides that employers from one jurisdiction may be lawfully required to accord their employees the same minimum terms and conditions enjoyed by workers in another jurisdiction to which they are posted provided those terms and conditions are universally applicable. Explaining its decision at paragraphs 74 – 76 the E.C.J. found:-

"[Article 3] seeks, first, to ensure a climate of fair competition between national undertakings and undertakings which provide services transnationally, insofar as it requires the latter to afford their workers, as regards a limited list of matters, the terms and conditions of employment laid down in the host Member State by law, regulation or administrative provision or by collective agreements or arbitration awards within the meaning of Article 3(8) of Directives 96/71, which constitute mandatory rules for minimum protection.

That provision thus prevents a situation arising in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters, undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.

Secondly, that provision seeks to ensure that posted workers will have the rules of the Member States for minimum protection as regards the terms and conditions of employment relating to those matters applied to them while they work on a temporary basis in the territory of that Member State.

Sweden, unlike Ireland did not have a system under which collective agreements could be declared universally applicable.

7.4 At paragraph 67 the E.C.J. noted further:-

"It is not disputed that the collective agreements have not been declared universally applicable, and that [Sweden] has not made use of the possibility provided for in the second paragraph of Article 3(8) of that Directive."

In light of the existence in Ireland of universally applicable collective agreements, such as the REA, posted workers in Ireland in the electrical industry must enjoy the same terms and conditions as those to which domestic workers are entitled under the REA which is universally applicable. Thus, under the REA herein foreign contractors from low wage economies cannot undercut Irish contractors.

7.5 It seems to me that this interpretation of the *Laval* judgment by the Labour Court was correct. Its interpretation of s. 20(3) of the Protection of Employees (Part-Time Work) Act 2001 was also correct as being in harmony with Ireland's obligations under the Directive. In sum, the findings of the Labour Court to the effect that the cancellation of the REA would remove the protection for domestic contractors against being undercut by posted workers from low wage countries was one which was correct in law.

The Inclusion of Subcontractors

7.6 The applicants are also seeking a declaration that the Labour Court's interpretation of the REA to include sub-contractors was an unlawful variation of the agreement. The relevant section provides that:-

"This agreement will apply to all electricians who are engaged in the general electrical contracting industry and to their employers and to all electrical contractors engaged in the Industry. An electrical contractor is defined as the proprietor of a business whose main activity is the performance of electrical work on a contract or sub-contract basis for any third party."

It is plain from the wording that it was always meant to apply to sub-contractors and did so.

Meaning of substantial change in s. 29(2) of the 1946 Act

7.7 The applicants argue that in its consideration of whether it should cancel the agreement, the Labour Court misdirected itself as to what could amount to substantial change pursuant to s. 29(2) of the 1946 Act. That section provides as follows:-

"The Court may cancel the registration of an employment agreement if satisfied that there has been such substantial change in the circumstances of the trade or business to which it relates since the registration of the agreement that it is undesirable to maintain registration."

At page 38 of its determination in the application to cancel the REA, the Labour Court held that under s. 29(2), in order to cancel such an agreement, it had to be satisfied that:-

- (i) There had been changes in the circumstances of the relevant industry since registration of the agreement,
- (ii) Any such changes were substantial, and
- (iii) Any such substantial changes made it undesirable to maintain registration of the agreement.

7.8 The applicants argue that the Labour Court, at paragraph 9.8 of its determination, adopted an incorrect test, when it stated as follows;

"It seems to the Court that the expression used in s. 29(2) of the Act is not a term of art but an ordinary expression which should be given its ordinary and colloquial meaning. This suggests that in order to be substantial, change must be real and tangible and not imaginary (see *Oxford Dictionary of English*, 2nd Ed., 2003). In the context in which the expression is used in the Act, it should be understood in contra distinction to ordinary or ongoing change, which is a normal feature of all industry and employment."

It is the last sentence of paragraph 9.8 that is the basis of the applicants' complaint. According to them this means that the Labour Court consider that change which has occurred cumulatively over the years is not the kind of change that can give rise to cancellation.

7.9 It seems to me that the applicants are here engaged in "parsing" the Labour Court's decision. They are combing through it for phraseology that seems, taken in isolation, to give rise to grounds for judicial review. However, as has frequently been stated by these courts, decisions must be read in the round. Every word or phrase must be firstly understood in its immediate context and also as a part of a whole decision. It is hard to find any substance in the applicants' complaint under this heading since the Labour Court did in fact find there had been substantial change in the industry. Discussing this at paragraph 13.1, the Labour Court explained;

"The question for the court is whether that change, either in its individual manifestations or cumulative effect, constitutes substantial change."

This, it seems to me shows that the Labour Court's view was that cumulative change over the years could amount to "substantial" change. This Court does not accept the applicant's argument that the Labour Court applied the incorrect test in respect of substantial change under s. 29(2) of the 1946 Act.

The test of undesirability under s. 29(2) of the 1946 Act

7.10 The applicants referred to the Labour Court's holding that the test would only be satisfied if the applicants could show that "the

overall or dominant effect of the agreement has become deleterious to the interests of all parties in the sector.”

I do not think that the Labour Court did in fact limit itself thus. As noted above, phrases appearing at various stages of the decision of an administrative body must be read in the round in order to determine matters such as whether they have unduly limited their jurisdiction by, for instance, adopting too narrow an interpretation of their powers. By reference to the Labour Court’s holding at paragraph 29.1 that the agreement could also be cancelled where “[s]ome other compelling reason exists as to why the registration of the agreement should be cancelled.”, it seems to me that the Labour Court was not limiting its jurisdiction to cancel only to circumstances where the agreement had become deleterious to all the parties in the sector. While the former phrase may be infelicitously worded, the true view of the Labour Court as expressed in its latter phrase seems clearly to show it could cancel in certain other circumstances. Section 29(2) gives a very broad remit to the Labour Court to cancel such an agreement and its decision herein in that regard, read in the round, indicates they took that into account and did not unduly limit themselves. Their use of the concept of compelling reason seems to me to be a usefully wide formulation of the tests to meet this wide remit.

7.11 The applicants further complain that the Labour Court incorrectly and unfairly placed upon them the burden of proof to establish the undesirability of maintaining the agreement. In this regard, the Court must accord a considerable measure of procedural flexibility to the Labour Court in its approach to an application for cancellation. In *Calor Teoranta* at paragraph 7.4 Clarke J. observed that the Labour Court while it must observe constitutional standards of procedural fairness;

“must be afforded a significant degree of procedural autonomy as to the manner in which it conducts its proceedings.”

I gratefully adopt this approach. The terms of s. 29(2) are framed in such a way as to provide that the Labour Court must be satisfied that there has been such substantial change in the relevant industry as to make it undesirable to maintain registration of the agreement. This terminology favours maintenance unless certain criteria are met. It still leaves cancellation as an option open, i.e. the Labour Court “may” cancel. This formulation by the Oireachtas suggests the need for those who believe the requirements of subs. (2) have been met to come into court and show how this is so. Section 29(1) deals with the situation where all parties are agreed to cancel. Section 29(2) deals with the situation where not all parties are agreed to cancel. It seems to follow that such party should bring their case before the Labour Court. It is as much an opportunity as an onus.

7.12 The complaint is made that so little is known of the circumstances in 1990 when the agreement first was registered, that no valid comparison can be made to ascertain the existence of change and that the absence of a baseline of reference made this exercise impossible. This complaint, in my view, is without substance. In the first place the Labour Court found there had been substantial change. Secondly and quite correctly, the Labour Court was able to ascertain from its own specialised expertise that substantial change had occurred without reference to any particular baseline. Common sense itself, which ought to infuse all decision making, also indicated a substantial increase, for example, in numbers working in the industry in the nineteen years since 1990.

8. Objective Bias

8.1 The claim of the applicants in relation to objective bias of two members of the Labour Court cannot be allowed. This claim was based on an issue that arose on the seventh day of the hearing. Allegations were made by a witness that the Construction Workers’ Pension Scheme was being fraudulently administered. The chairman of the Court stated that he and another member of the Court had served as trustees of that Scheme over ten years before. Following discussion of this possible problem, the applicants were offered the choice of proceeding or having a new tribunal to start afresh. The applicants, in the light of the costs already expended, declined a new tribunal and opted to proceed. They withdrew their objection.

8.2 This claim cannot be allowed because leave has not been granted in respect of such a claim. This Court, therefore, does not have jurisdiction to hear such a complaint. In any event, no such claim could, in my view, succeed in the teeth of the applicants having agreed to forgo a new tribunal and waived its objections.

9. Irrationality/The Labour Court’s assessment of the evidence

9.1 The applicants complain that:

- (i) the Labour Court failed to adequately consider the evidence of the applicants,
- (ii) the Labour Court failed to follow the expert evidence called by the applicants in the absence of any evidence to the contrary, and
- (iii) that the Labour Court’s conclusions were unsupported by evidence.

The Labour Court over a period of ten days heard 24 witnesses. This was the longest hearing in its history. These included the two leading economists, Dr. Moore McDowell and Dr. Alan Aherne. There was evidence from experts and non-experts, from those supporting the application to cancel and from those against. The applicants have not identified to the Court any specific error in the Labour Court’s consideration of this evidence but have rather relied on a submission that the vast bulk of the evidence was in favour of cancellation including the expert evidence and that the decision flew in the face of the preponderance of this evidence. Counsel for the applicants, went so far as to characterise the decision as “perverse”.

9.2 It seems to me that the applicants misconceive the role of the Labour Court. It is not a court of law hearing the evidence before it as a disinterested party and deciding on the preponderance of the evidence brought before it by opposing sides. It is *sui generis*. It is a mix of arbitrator, facilitator and inquisitor. It is a tribunal with special expertise in a wide area including labour law, labour relations, social and political policy. Its role in an application to cancel an REA is to decide whether it is satisfied there has been such change in the circumstances of the relevant trade or business that it is undesirable to maintain it. In coming to its conclusion on that question it seems to me that it is entitled to hear and to accept the evidence proffered to it in whole or in part as it sees fit. In that sense there seems in principle to be nothing *ipso facto* objectionable to the Labour Court in an application of the sort that was before it herein, hearing evidence which seems all one way but then coming to a conclusion the opposite way. This is because, as a specialist tribunal, it must be taken to have itself an institutional bank of knowledge and expertise upon which it can rely. In this type of application moreover the onus lies upon those seeking to cancel the REA. If their evidence fails to convince the Labour Court then it may refuse to cancel.

9.3 In this case, however, there was, in fact, evidence before the Court by an economic witness which supported the maintenance of the REA. The applicants’ objection to his evidence on the basis that he was not independent is itself somewhat partisan. It seems to me to be a matter well within the jurisdiction of the Labour Court to determine the weight to be given to any particular witness. Moreover, it seems that contrary to the argument of the applicants, the Labour Court did not in fact reject the evidence of Dr. McDowell and Dr. Aherne. In fact, it refers to that evidence in its decision. It seems to me that the Labour Court decided the matter

did not fail to be decided solely on economic grounds. Such a decision seems well within the broad parameters set by s. 29(2) as to determining change so as to decide on the desirability of maintaining the REA. These parameters include factors other than the need to maintain flexibility in wages. *Inter alia* there may be social policy, national economic policy and industrial relations policy. The applicants' main argument however strong it might appear to them is only one of many different matters to be weighed in the balance. In my opinion, the Labour Court in its decision did not fail to adequately consider the applicants' evidence. Its decision not to follow the expert evidence called by the applicants in all respects was a decision within its jurisdiction and its overall decision was itself one within its jurisdiction based upon its assessment of the evidence in the light of its own expertise as a specialist tribunal.

9.4 In this regard, the Labour Court referred to a number of consequences of cancellation as follows:

- (1) Cancellation would as a matter of strong probability lead to a retrenchment of pay and conditions in the sector (paragraph 30.1).
- (2) Cancellation would in all likelihood lead to a significantly greater incidence of industrial disputes (paragraph 30.4).
- (3) Cancellation would greatly impair the system of orderly determination of pay and industrial disputes which currently exists in the sector (paragraph 30.5).
- (4) Cancellation would create internal competition which would lead to lower wages for employees and greater competition for contractors (paragraphs 32.1 and 32.2).
- (5) Cancellation would, following Laval, mean external contractors could provide services in Ireland while paying terms and conditions typical of their home country. This would seriously undermine the competitive position of contractors (paragraphs 32.10 and 32.11).
- (6) Cancellation would not have a particular impact on the alleged practice of using sub-contracting as a way of avoiding taking on individuals as employees (paragraph 33.3).
- (7) Cancellation would remove the burden from smaller contractors of seeking to comply with those terms and conditions of the REA which they find onerous (paragraphs 34.2 and 34.3).

It seems to me that the above clearly demonstrate the very broad range of consideration that informed the Labour Court in coming to its decision. It demonstrates classically the special expert role of the Labour Court in applications such as this. As noted above the matters set out in this chapter of the judgment demonstrate to the satisfaction of this court that the claim of irrationality is manifestly unsustainable in this case. The above shows clearly that the Labour Court had a wealth of relevant material before it upon which to base its decision

10. Representativity of parties to the REA

10.1 This is the core of the applicants' complaint against the agreement and the decision of the Labour Court. They maintain the REA is an agreement between parties that are not representative of the electrical industry. They have described this issue in their written submissions as "the key issue central to both the application to cancel and the proposed variation". Yet the requirement for representativity under the 1946 Act relates to the registration process. The Act does not require such an investigation at variation or cancellation applications. The requirements of s. 29(2) as noted above are in fact very broadly drawn but include no reference to representativity. By comparison other provisions such as s. 62 in relation to a joint industrial council provide that where *inter alia* a council is not substantially representative, its registration may be cancelled.

10.2 The omission by the Oireachtas to include such a ground for cancellation in s. 29(2) can hardly have been anything other than deliberate. The Court cannot in the light of this omission read into the Act something quite deliberately omitted therefrom. Moreover, it must be noted that throughout the evidence before this Court there has been some degree of confusion as to the identity of the applicants. Many of them were alleged not to be employers, thus calling into question their locus standi and their representativity. The drastic reduction in the number of plaintiffs still leaves open this question and it is a very undesirable aspect of this case to date.

11 Conclusions

Delay: The Preliminary Objection

11.1 In respect of the issue of delay in the issuing of judicial review proceedings challenging the legality of the REA, such delay can only be allowed if there are justifiable reasons for same, as set out above. There has been no concrete explanation for the delay in reviewing the legality of the REA, which was registered in 1990. It is not possible to accept the applicants' arguments that they were not aware until recently of the existence of the REA. They clearly have been well aware of it for some considerable time and certainly since the end of 2003, as found above. No explanation has been offered which could justify the failure to act promptly or within the time frame, as required by the Rules of the Superior Courts in relation to judicial review. The challenge to the validity of the REA must, therefore, be rejected as being well out of the time permitted to seek judicial review.

The challenge to the Labour Court Decision

11.2 The High Court should be slow to interfere with the decisions of expert administrative tribunals, such as the Labour Court. The Labour Court is entitled and required to bring to bear its own expert view to cases that come before it. In this respect, a high degree of deference should be applied to its decisions. As recently emphasised in the decision of *Meadows v Minister for Justice, Equality and Law Reform*, the test to be applied in reviewing a decision of a professional decision maker is narrower than the general test. The test, which should be applied in this case, is whether the decision maker acted irrationally, in that it had no relevant material before it which would support its decision. Alternatively, a court must find the decision was based upon an error of law or unsustainable finding of fact. There is nothing in the decision of the Labour Court to support a claim of irrationality. It had before it its own expertise together with the evidence of economic experts including those called by the applicants

The alleged errors of law

11.3 The alleged errors are in three parts:

- (a) that the Labour Court was incorrect in its interpretation of the Laval judgment and Ireland's obligations under the Posted Workers Directive ;
- (b) that the REA did not apply to sub-contractors; and

(c) that the Labour Court was incorrect in its interpretation of s. 29(2) of the 1946 Act.

11.4 (a) The effect of the Laval decision and the Directive is that posted workers in Ireland must enjoy the same terms and conditions as those to which domestic workers are entitled under universally applicable collective agreements. The REA is such an agreement, and as such the finding of the Labour Court was correct that the cancellation of the REA would allow contractors from low wage economies to provide service in Ireland without having to adhere to the terms of the REA.

11.5 (b) The relevant section of the REA defines electrical contractors as including sub-contractors; as such it is plain in its wording that it was meant to apply to sub-contractors.

11.6 (c) In relation to the interpretation of 'substantial change' under s.29(2) of the 1946 Act, the Labour Court's view was that cumulative change over the years could amount to substantial change. In my view this was a correct interpretation of 'substantial change'. In relation to the interpretation of the test of undesirability under s. 29(2), the applicant referred to the Labour Court's holding that the test would only be satisfied if the applicant could show that "the overall or dominant effect of the agreement [had] become deleterious to the interest of all the parties in the sector". By reference to the Labour Court's holding at para. 29.1 that the agreement could also be cancelled where "some other compelling reason exists as to why the registration of the agreement should be cancelled", it seems to me that the Labour Court was not limiting its jurisdiction to cancel only to circumstances where all the parties to the agreement were agreed that it could be cancelled.

Irrationality/ The Labour Court's assessment of the evidence

11.7 In relation to the assessment of the evidence by the Labour Court, there is nothing objectionable in an application such as this one to the Labour Court's hearing evidence which is all one way and coming to a conclusion the opposite way. The onus lies upon those seeking to cancel the REA. If their evidence fails to convince the Labour Court then it may refuse to cancel. Moreover, as a specialist tribunal it must be taken to itself possess an institutional bank of knowledge upon which it can rely. Insofar as it did so, its decision not to follow the expert economic evidence called by the applicants was a decision within its jurisdiction. Its overall decision was itself one within its jurisdiction based upon its assessment of the evidence in the light of its own expertise as a specialist tribunal. There was a wealth of relevant material before the labour Court both in the evidence produced and its own institutional bank of knowledge and expertise to meet the requirements of the *O'Keeffe* test of rationality.

Objective Bias

11.8 Leave has not been granted in respect of the claim of objective bias and as such the Court does not have jurisdiction to hear such a complaint. In any event, such a claim cannot succeed in light of the withdrawal of the applicant's objection at the Labour Court hearing.

Representativity

11.9 The applicants maintained that the REA is an agreement between parties that are not representative of the electrical industry. As held above, the requirement for representativity under the 1946 Act relates to the registration process and the Act does not provide for cancellation on the grounds of representativity. Moreover, as noted above, there has been some degree of confusion as to the identity and number of the applicants, thus calling into question their own representativity.

The constitutional challenge

11.10 This aspect of the case has been brought in judicial review proceedings and I can see no reason why it should not be subject to the same requirements as to time limits as any other application. That being so, it is brought well outside the period of three months from the date when grounds for the application first arose and for that reason alone ought not be allowed to proceed. It would also, I think be undesirable that the constitutional challenge should proceed alone in judicial review proceedings. There are many issues concerning the balancing of interests and, as noted above, the identification of the plaintiffs that need much greater elaboration than they have had in these proceedings. I will not therefore proceed to consider the constitutional issues raised herein. They should be brought if the applicants wish to do so by way of plenary proceedings.

11.11 The application is dismissed.