THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 1998 NO. 246 JR

BETWEEN

BUILDING AND ALLIED TRADES UNION
AND VALENTINE SCOTT

APPLICANTS

AND
THE LABOUR COURT

RESPONDENTS

AND
CONSTRUCTION INDUSTRY FEDERATION
AND GERRY FLEMING

NOTICE PARTIES

Judgment of Mr. Justice Murphy dated the 15th day of April, 2005.

1. Issue
The first named applicant (BATU) is a registered trade union holding a negotiating licence. It represents persons who are or were employed in the building and furnishing trades, including bricklayers. The second named applicant is a bricklayer and a member of the first named applicant.

The Labour Court is a statutory tribunal established pursuant to the provisions of the Industrial Relations Acts, 1946 to 2001, and is charged, *inter alia*, with various functions concerning the registration of employment agreements.

The first named notice party (CIF) is a registered trade union holding a negotiation licence and represents employers in the construction industry.

The second named notice party is the Secretary of the Construction Industrial Committee (CIC) of the body known as the Irish Congress of Trade Unions (ICTU) and is joined in a representative capacity. The CIC comprises representatives of seven registered trade unions having members in the construction industry.

The issue concerns the validity of an amendment dated 18th May, 1998, to an existing registered employment agreement of 15th March, 1967. The parties to the agreement on the trade union side were the applicant and six of the seven trade unions represented by the second named notice party. The applicant and the seven trade unions were represented on the Construction Industrial Committee (CIC) of the ICTU. The secretary of that committee was the second named notice party. Some 21 amendments were subsequently made.

The amendment purported to have been made on 18th May, 1998, was challenged by the applicant and stayed by way of injunction until the present hearing on 8th and 9th March, 2005.

2. The Labour Court was established by s. 10 of the Industrial Relations Act, 1946 (the Act). The purpose of that Act was to make further and better provision for promoting harmonious relations between workers and their employers and for this purpose to establish machinery for regulating rates of remuneration and conditions of employment and for the prevention and settlement of trade disputes, and to provide for certain other matters connected with the matters aforesaid.

Part III of the Act made provision in relation to agreements relating to wages and conditions of employment.

The expression "employment agreement" meant:

> "An agreement relating to the remuneration or 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 court was obliged to maintain a register to be known as the Register of Employment Agreements.

Section 27 of the Act provided that any party to an employment agreement might apply to the court to register the agreement in the register. The court was obliged to register the agreement in the register if it was satisfied that, in the case of an agreement to which there were more than two parties:

> -there was a substantial agreement amongst the parties representing the interests of workers and employers, respectively, that it should be registered;
>
> - that the agreement was expressed to apply to all workers of a particular class, type or group and their employers where the court was satisfied that it was a normal and desirable practice or that it was expedient to have a separate agreement for that class, type or group;
>
> - that the parties to the agreement were substantially representative of such workers and employers;
>
> - that the agreement was not intended to restrict unduly employment generally or 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.

The agreements had also to provide that if a trade dispute occurred between workers to whom the agreement related and their employers, a strike or lock-out should not take place until the dispute had been submitted for settlement by negotiation in the manner specified in the agreement.

3. It is clear from the judgment of Flood J. in *National Union of Security Employers v. Labour Court* [1994] 10 JISLL 97 that the court

cannot simply rubber stamp a request to register an agreement. In that case a declaration was granted that the purported registration of the agreement was invalid and of no effect as the court had not followed fair procedures.

The trial judge had held that the Labour Court had to approach the question of satisfaction in the light of:

> (a) the fact that the overall purpose of the agreement is to create harmony within the industry as a whole,
>
> (b) the agreement is intended to bind all persons in the industry,
>
> (c) that sanctions will flow from the breach of the agreement by firms in the industry.
>
> (d) that the parties to the agreement are substantially representative of employers in the industry, and workers in the industry.

4. The variation of such agreements is governed by s. 28 of the Act. The section provides as follows:

> "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 the date not being earlier than the date of the order as the court specifies in the order, have effect as so varied."

The court had made an order varying a registered employment agreement for the electrical contracting industry in *Serco Services Limited v. Labour Court*, (High Court, July 12th, 2000). In that case, Carroll J. struck down that order in that it purported to extend the scope of the agreement so as to apply its provisions to workers to whom it did not apply prior to its being made.

5. Proposed amendments to agreement
The proposal was made by CIF and the remaining Unions in the CIC represented by the second named notice party to vary the circumstances in which sub-contractors might be engaged in the industry. The conditions attaching thereto to be incorporated into the agreement by way of the proposed amendment were as follows:

> "The parties agree that contractors and sub-contractors covered by the registered employment agreement for the construction industry should be free to engage approved contractors in any trade or activity in the industry. For the purpose of this agreement, approved sub-contractors are defined as follows:
>
> (a) They must comply with the terms of the registered employment agreement for the industry.
>
> (b) They must employ the appropriate grades of trade union labour.
>
> (c) They must supply materials as well as labour in those sectors of the industry where this has been normal practice.
>
> (d) They must comply with the Social Welfare Acts and section 17 of the Finance Act, 1970 as amended by the Finance Act, 1995 and they must conform to the guidelines issued by the Revenue Commissioners under the Finance Act, 1995.
>
> (e) They must maintain a safe and healthy environment and comply with the provisions of the Safety in Industry Act, 1990.
>
> (f) They must carry employer's liability insurance in respect of their employees and the work in which they are engaged unless this cover is provided by the main contractor or the client.
>
> (g) They must employ appropriate numbers of apprentices relative to the number of craft workers employed.
>
> (h) They must, if in a labour-only category, give security in a manner to be determined from time to time by the NJIC for the construction industry against a fault in respect of any liability as they may have to employees.

6. Submissions of the CIF
It had been submitted that a variation was necessary in relation to rates of pay and conditions, consolidation of a number of agreements and a new agreement on sub-contracting. The latter had been the subject of two previous agreements between the CIF and the CIC of the ICTU which related to the conditions under which workers could be employed by contractors/sub-contractors and was, therefore, suitable for registration. It was pointed out that similar agreements had been registered in the past; that all building unions were involved; that sub-contracting was now a feature of all sectors of the industry; that the agreement arose from a general awareness that existing agreements had not kept pace with the significant growth in sub-contracting over the past decade; there was a need to regulate sub-contracting; that it was remarkably similar to proposals developed by the unions themselves and that the agreement had been ratified by the NJIC for the construction industry which was then fully functional after many years in abeyance.

7. Mr. Fleming's submissions on behalf of the other unions
In 1990, in return for a significant increase in pay, the CIF sought changes in the agreed arrangements for the engagement of sub-contractors. Agreement was not reached and the matter was referred to the court which issued LRC 13340 recommending that the matter be negotiated up to November, 1991. It was not until 1993 when a joint working party was established that discussions on

sub-contracting took place. Agreement was not reached and the matter was referred back to a further hearing on 12th May, 1994 where recommendation LRC 14475 proposed that the working party conclude negotiations within six months or refer it back to the court. The proposals put to the working party by the CIC and CIF were appended to the court's recommendation. The working party eventually reached agreement. All the construction industry unions were fully involved in the process.

The submission urged the court to register the proposed variations, saying that since 1964 all unions in the industry had operated on a single negotiating unit through the Construction Industry Committee (CIC). That arrangement was established after a national building strike initiated by one union. The intention was to ensure cohesion between all unions operating under a common agreement. The continuance was vital to the maintenance of industrial relations stability within the industry.

8. Order Varying the Registered Employment Agreement
The memorandum dated 18th May, 1998, signed on behalf of the Labour Court, recited that fifteen workers' representatives attended the hearing on 31st March, 1998 from seven unions including the applicant's, together with four representatives from the CIF. All of the parties present, with the exception of the representatives from the BATU, were in favour of all of the proposed amendments.

It was recorded that BATU had presented a submission against the proposed variations in that:

> -the application to the court to vary the agreement had not been made by a party to the agreement, as was required by s. 28(1) of the Act
>
> - one of the proposed variations, namely that relating to sub-contractors, was not suitable as a variation to the agreement in that it was not a variation which applied to any of the workers covered by the agreement, and
>
> - the applicant had not been made aware of the proposed variations.

It was noted that the court had recited that it had carefully considered all the submissions made by the parties and rejected the argument that the application to vary was not made by a party to the agreement. A letter of 17th February, 1998 had been signed on behalf of the CIF which was a party to the agreement and by the second named notice party, who was secretary of the Construction Industrial Committee of ICTU, the representing body for the unions in the building industry and as agents for all of the union parties including the applicant. It was noted that the applicant did not support the application insofar as it related to sub-contractors.

The court had also rejected the argument that the variation in relation to sub-contractors was not suitable as a variation to the agreement. It continued:

> "The proposed provision deals with the conditions under which sub-contractors may be employed by a main contractor on a building site. While the proposed provision does apply to the employers covered by the agreement, setting out the conditions on which they may contract others as sub-contractors, the effect of the proposed provision is to ensure that the workers covered by the agreement have the benefit of certain protections in relation to their employment by a sub-contractor. The provision seeks to ensure that employers who are sub-contractors will measure up to certain standards in employment practices. They will be obliged to employ the appropriate grades of labour, comply with social welfare provisions, comply with the Safety in Industry Act, carry employer's liability insurance etc.
>
> The definition of 'employment agreement' in the Act says that such an agreement must 'relate' to the conditions of employment of workers. Section 28 of the Act allows for a variation of an employment agreement 'in its application to any worker or workers to whom it applies'. The proposed variation would be a variation to an existing employment agreement. The proposed variation relates to the conditions under which sub-contractors will be entitled to work for a main contractor, and most of these conditions relate to or affect the protection which must be accorded to the sub-contractor's workers. The agreement would therefore be varied in its application to the workers covered by it."

The court had been satisfied that the applicant was aware at all times of the discussions surrounding the proposed variations. The court had stated that the purpose of the proposed variation was to improve the quality of employment for workers in the industry and to safeguard their interests and, having considered all of the submissions made by the parties and all of the arguments against the variations made by the applicant, the court had decided that it would make an order varying the agreement in the manner sought by the parties.

9. Application for Judicial Review

9.1 Statement grounding application
Leave was granted by Barr J. on 22nd June, 1998 to the applicants to apply by way of judicial review for the reliefs sought in the statement and affidavits of Patrick O'Shaughnessy and Valentine Scott verifying the facts set out in the statement, all of which were filed on 19th June, 1998.

An order of prohibition was sought prohibiting the Labour Court from making the order varying the registered employment agreement or, alternatively, such order relating to the circumstances in which sub-contractors might be engaged in the industry and the conditions attaching thereto.

In addition, an order of *certiorari* and of *mandamus* were sought in relation to the order. Alternatively the applicant sought an order of *mandamus* in relation to its application to have the registered employment agreement varied in relation to the deletion of the word "bricklayers" from the agreement.

Certain related declarations were also sought.

The grounds for seeking relief were, broadly, those contained in the submissions made to the Labour Court on 31st March, 1998, summarised above.

9.2 Grounding Affidavit
Mr. O'Shaughnessy for the applicant, BATU, averred that, prior to the initial registration of the agreement, the Joint Industrial Council (JIC) for the construction industry was established in May, 1965. The council was to consist of sixteen members, eight of which were to be appointed by the trade unions concerned. The council met regularly from 1965 to 1982 when its activities were suspended due to differences between employer and union representatives. The applicant was always represented on the council. Fourteen years later Mr. O'Shaughnessy said that he was informed that the JIC had been reconstituted with six employers and six trade union

representatives. However, there was no alteration of the constitution of the council. In reducing the trade union representatives from eight to six, the applicant was left without any representation on the reconvened council.

At the first meeting of the reconvened council it was agreed that the registration of a sub-contracting agreement was a matter of priority. A sub-committee examined the issue.

Mr. O'Shaughnessy averred that the issue of sub-contracting was the most contentious and divisive, that bricklayers were the only group within the industry who, until recently, had always been employed directly by the main contractor.

He referred to a series of motions in proceedings where the applicant was mandated to make the position clear that its members were totally opposed to sub-contracting.

Mr. O'Shaughnessy, at para. 10 of his affidavit, referred to the applicant union's outright opposition in the following terms:

> "It is clear that before any decision could be taken to alter the union's outright opposition to the use of sub-contracting, this union's members would have to be consulted and then balloted. This has not happened, however. The members of this union were not represented at the main discussions and negotiations which led to the other trade unions agreeing to the first named notice party's proposals on sub-contracting. Consequently what has happened is that a decision has been taken by the other trade unions on an issue which does not affect in any way their members and an attempt has been made to impose that decision on this union and its members by means of an application to vary the registered employment agreement of the construction industry."

The affidavit referred to the agreement being reached at the JIC on the issue of sub-contracting. A formal application had been made by the letter dated 19th February, 1997 from CIF to the Labour Court to vary the registered employment agreement as agreement had been reached between ICTU and CIF. The letter stated that the changes arose "mostly out of the alteration of the descriptions of the workers who are covered by the agreement". Mr. O'Shaughnessy wrote to the Labour Court informing them that the applicant was opposed to what he understood to be some of the proposed variations. The Labour Court informed him of a public hearing which took place a year later on 31st March, 1998, over seven years ago

BATU had submitted to that hearing that a decision had been taken by the other trade unions, in particular of an issue of sub-contracting, which did not affect their members in any way. An attempt was being made to impose that decision on the applicant and its members.

The issue of sub-contracting was something which concerned the applicant Union. Bricklayers were the only group who expected to work for the main contractor. Before any decision could be made to alter the applicant's outright opposition to the use of sub-contracting the applicant's members would have to be consulted and the members would have to be balloted. This, Mr. O'Shaughnessy averred, had not happened. The members of the applicant were not represented at the discussions and negotiations which led to the proposals on sub-contracting. The applicant was advised that the court could not, as a matter of law, make an order varying the agreement in a manner set out in the documents submitted to the Labour Court.

Mr. O'Shaughnessy submitted that, under s. 28(1) of the Industrial Relations Act, only a party to the agreement could apply to have it varied. There was no indication as to which of the parties to the agreement had applied to the court. ICTU, he averred, was not a party to the agreement. None of the seven trade unions had applied to the court to vary the agreement.

The section provided that an application must be to vary the agreement "in its application to any worker or workers to whom it applies". The proposed variation sought to set out the circumstances in which sub-contractors might be engaged. These were not persons who were employed. The department submitted that not only were the changes not agreed by members of the council representative of the workers who would be affected by the changes but also that those changes did not fall within the scope of the definition of "employment agreement". Reference had been made at the meeting of 31st March, 1998 to *National Union of Security Employers v. The Labour Court* (already referred to above) where Flood J. was satisfied that the Labour Court had to approach the question in the light of the overall purpose of the agreement to create harmony within the industry as a whole and to bind all persons in the industry.

If the Labour Court was minded to make an order varying the agreement in the manner proposed by ICTU then the applicant formally invited the Labour Court to treat its objection as an application to vary the agreement by deleting the word "bricklayers" from the proposed amendment to the agreement at 5 above.

9.3 Supporting Affidavit
Mr. Valentine Scott averred that there was a widespread belief among the membership of the applicant that the engagement of sub-contractors was part of an orchestrated policy to eliminate direct employment, which would be a serious challenge to the employment prospects of persons like himself. He referred to the employment of labour-only sub-contractors and believed that employers' contributions to PRSI liability insurance, pension scheme contributions and other provisions of the registered employment agreement added a premium of about 35% to normal wage costs. He referred to social welfare abuse and tax evasion being prevalent and referred to a report in the Irish Times of 11th December, 1997 in relation thereto, by Padraic Yeats, Industry and Employment Correspondent.

Members of the applicant were totally opposed to the use of sub-contracting and the consequent pressure on employees to declare that they are self-employed in order to gain work on construction sites. He was advised and believed that none of the applicant's officials were involved in the discussion with the CIF on the issue.

He had no doubt that, if the proposals were to be put to a ballot vote of the applicant's membership, they would be overwhelmingly rejected, given the depth of feeling on the issue and referred to leaflets entitled "bricklayers, no say – no pay campaign".

He was a member of the applicant for over 25 years and had worked exclusively in the construction industry as a bricklayer. He says the most pervasive of the many changes in the construction industry was the increase in the use by employers of sub-contractors. He said that no-one in his union believed that the CIF proposals on sub-contracting would improve the quality of employment for bricklayers or safeguard their interest.

He was advised and believed that, not only were the sub-contracting proposals not agreed by persons representative of the workers who would be affected by them, but also that those changes did not fall within the scope of the definition of "employment agreement" in the Industrial Relations Act, 1946. The agreement was not one relating to the remuneration and/or conditions of

employment of bricklayers.

10. Statement of Opposition of the Labour Court
10.1 The Labour Court denied it lacked jurisdiction and/or competence to vary the registered employment agreement or that it acted *ultra vires* or that its decision was null and void or was at variance with reason and commonsense, unfair and/or oppressive to the applicants or that it affected unreasonably and/or oppressively and/or arbitrarily and/or capriciously in failing to remove the word "bricklayer" from the agreement. It denied it had misdirected itself and/or misconstrued its powers under the Industrial Relations Act in purporting to vary the said agreement.

10.2 The statement of opposition was grounded on the affidavit of Hugh O'Neill, Solicitor and Registrar of the Labour Court.

Mr. O'Neill said that s. 28 provides that any party may apply to the Labour Court to vary an agreement in its application to any worker or worker to whom it applies. The court is thereupon obliged to consider the application and to hear all persons appearing to the court to be interested and desiring to be heard. He referred to the agreement and the many variations. The previous application for variation, the 21st, was registered with effect from 17th June, 1996. It introduced new classifications of workers in the construction industry. The Labour Court had taken the view that there was a risk of confusion as to which workers were affected by the varied agreement. It was apparent that the existing agreement was out of date in many respects. The court therefore had made suggestions to the parties that the whole agreement might be reviewed and amended to make it more understandable, consistent and up-to-date. The two sides of the construction industry affected by the agreement, the CIC of the ICTU and the CIF reviewed the agreement and submitted for approval the proposed variations in an application to the Labour Court dated 8th September, 1997. That application included an additional variation to define approved sub-contractors and to apply conditions relating to sub-contracting to all sectors of the construction industry. Prior to that application, approved sub-contractors were defined in an industrial relations agreement of 1997 which was only appended to, and not part of, the registered agreement.

Mr. O'Neill made reference to the hearing of 31st March, 1998, to the submissions and to the memorandum of the decision of the court dated 18th May, 1998.

In relation to the allegations that the application to vary the agreement was a matter that did not fall within the scope of s. 28, he believed that the Labour Court was satisfied that it did and that "the affect of the proposed provision is to ensure that the workers covered by the agreement have the benefit of certain protections in relation to their employment by a sub-contractor. The provision seeks to ensure that the employers who are sub-contractors will measure up to certain standards in employment practice."

The definition of an "employment agreement" in the Act provides that such an agreement must "relate" to the condition of workers. Section 28 of the Act allowed for a variation of an employment agreement "in its application to any worker or workers to whom it applies". The proposed variation would be a variation to an existing employment agreement. The proposed variation related to conditions under which sub-contractors would be entitled to work for a main contractor, and most of those conditions relate to or affect the protections which must be accorded to the sub-contractor's workers. The agreement would therefore be varied in its application to the workers covered by it. The Labour Court was satisfied, therefore, that its decision to vary the agreement was made within jurisdiction.

11. Statement of Opposition on behalf of the Construction Industry

Federation
11.1 In its statement of opposition, dated 15th July, 1998, CIF contended that its application to vary the registered employment agreement of 15th March, 1967 by including a provision relating to the circumstances in which sub-contractors might be engaged in the construction industry was a valid, lawful and efficacious application within the meaning of s. 28 and was made by the appropriate parties. It was an agreement relating to the remuneration and/or conditions for employment of workers within the meaning of s. 4(1) of the Act as amended by s. 23(1) of the Industrial Relations Act, 1990. The definition of employment agreement in s. 25 encompassed the variation. The Labour Court had jurisdiction and competence to vary the agreement in the manner sought by CIF.

CIF contended that the application for judicial review was directed towards the aggrandisement of BATU's interests in that it represented an attempt to force bricklayers out of sub-contracting in the construction industry and into membership of

BATU as a leading trade union representing bricklayers. Such objective was an unlawful restraint of trade.

CIF asserted that the affect of the variation order would ensure that workers covered by the agreement would enjoy particular benefits as conditions of their employment by a sub-contractor, including the provisions of the Social Welfare Acts and compliance by the sub-contractor with the provisions of the Safety in Industry Acts.

11.2 Mr. Terence McEvoy, Industrial Relations Director of CIF, confirmed the veracity of the statement of opposition and referred to Mr. O'Shaughnessy's affidavit.

He said that Mr. O'Shaughnessy was aware before December, 1996 that the JIC was being reconstituted and he was a party to the protracted discussions over a period of two to three years. The employees' representation on the JIC was exclusively a matter for the CIC of the ICTU. CIF had no involvement.

Bricklayers were not always employed by the main contractor directly. There were numerous bricklaying sub-contracting firms operating with the knowledge of BATU.

The sub-contracting agreement was negotiated between the years of 1991 and 1996. Mr. O'Shaughnessy had referred to the proposals and his union's rejection of same in correspondence. It was surprising that no ballot had been taken of the membership of BATU in order to ascertain whether the members were opposed to the sub-contracting agreement. Mr. McEvoy concluded that the profusion of sub-contracting bricklayers and bricklaying firms suggested that bricklayers were deeply divided on the benefits of sub-contracting as opposed to direct employment.

He emphasised that the agreement on sub-contracting was reached between the CIF and the ICTU prior to the convening of the JIC established as a *quid pro quo* for the consent of the ICTU to the new sub-contracting agreement and which ratified that agreement.

The availability of sub-contractors would permit greater flexibility in the planning of the larger construction projects. Sub-contractors were more productive and therefore more efficient than direct labour. The sub-contracting agreement posed no threat to employment prospects or conditions of employment as contended for by Mr. Scott. Sub-contracting offered greater prospects for continuity of

employment. There was no direct correlation between lower safety standards and the rise in self-employment. BATU also represented carpenters in relation to whom sub-contracting had been a feature of the industry for many years.

Mr. McEvoy concluded that it was apparent that Mr. Scott was purporting to speak on behalf of union membership on the issue of sub-contracting while the union itself had not conducted a ballot of its members on the issue. All other trades in the construction industry had accepted sub-contracting and its attendant benefits. The case made by the deponents on behalf of BATU was not merely flawed but was anti-competitive and restrictive and contrary to the wishes of the vast majority of persons engaged in the provision of services in the construction industry.

12. Supplemental Affidavit of Patrick O'Shaughnessy
Mr. O'Shaughnessy, in a supplemental affidavit filed on 13th November, 1998 in response to the affidavits of Mr. McEvoy (see above, para. 11.2) and Mr. Fleming (see below, para. 13), reiterated that the JIC was reconvened rather than being reconstituted. There was no special meeting of the JIC to reduce the number of representatives. This led to BATU being denied representation, which issue was raised with the CIC and with the General Secretary of ICTU on 14th February, 1997. The report of the committee convened by the executive council of the ICTU was dated 30th May, 1997. That report stated:

> "Following long negotiations with the employers, agreement was reached to re-establish the Construction Industry National Joint Industrial Council. … The comprehensive agreement reached with the employers, on the issue of sub-contracting, was not acceptable to BATU. This, in the sub-committee's view, may have led to the current difficulties. It would appear (a) to be a factor in BATU's unwillingness, last September, to take part in the selection process for the six NJIC members, and (b) to have given rise to a perception within the CIC that BATU may not fully accept the collective decision-making authority of the NJIC."

Mr. O'Shaughnessy accepted that there were bricklaying sub-contracting firms in the industry but stressed that their operations did not meet with the approval of the union or of its members. The majority of bricklayers were employed by the main contractors directly. Bricklayers were not "deeply divided" on the benefits of sub-contracting as opposed to direct employment. The sub-contracting agreement, while conferring benefits on the employers, would not confer benefits on the labour force, in particular on the bricklaying element of that labour force. The issue of bonding of sub-contractors was not addressed. It was generally accepted that there was a correlation between the rise in so-called self-employment and lower safety standards as acknowledged by the industrial officer of the ICTU with special responsibility for health and safety (Irish Times, 30th October, 1998).

Mr. Fleming's reference to the sub-contracting having been dealt with in previous employment agreements from 1979 to 1981 were, in Mr. O'Shaughnessy's view, merely "industrial relations agreements which were never part of the registered employment agreement". In this regard he referred to a Labour Court recommendation in a dispute between BATU and John Paul Construction.

This recommendation, No. LCR 13374, arose from a dispute concerning alleged breach of sub-contractor clause of the construction industry registered employment agreement for wages and conditions of employment. The Labour Court recommended:

> "The court has fully considered the views of the parties as expressed in their oral and written submissions. The court finds that clause 9 'definitions of sub-contractors' is part of an industrial relations agreement appended to the main agreement. There is no provision in the Industrial Relation Acts for industrial relations agreements, the Acts provide for employment agreements.
>
> Accordingly the court does not consider them agreements in the legal sense of the word.
>
> The court notes that in the past the parties have been requested to submit proposals agreed by both parties which could be considered under s. 28 of the Industrial Relations Act 1946. The court, however, whilst finding in accordance with the above that the Registered Employment Agreement has not been breached also finds the parties have a specific agreement (3rd June, 1981) with regard to sub-contractors and in the interests of good industrial relations this should be applied. The absence of the NJIC is not, it is considered, grounds for breaching the agreement made. The absence of the NJIC has not prevented the parties from conducting negotiations in a forum acceptable to them.
>
> This negotiation forum should implement the clauses of the agreement and vary them where it is considered necessary and agreed.
>
> In the interim the terms of the 1981 agreement should apply and the company should ensure that sub-contractors conform to the terms of the agreement.
>
> The court so recommends."

13. Statement of Opposition on behalf of Gerry Fleming
Gerry Fleming, formerly a trade union official and subsequently a rights commissioner, was at the relevant time the Secretary of the Construction Industry Committee of the ICTU and acted in a representative capacity on behalf of the seven trade unions who together with BATU formed the CIC.

In his statement of opposition dated 5th October, 1998, he stated that the notice parties, CIF and the unions he represented, had properly applied to the Labour Court to vary the relevant employment agreement by the letter dated 17th February, 1998. That application included an application to vary the existing agreement by including a provision in relation to sub-contractors who might be engaged in the construction industry which was a matter which related to the condition of the employment of workers requiring employers, who were sub-contractors, to measure up to certain standards in employment practices. The Labour Court had jurisdiction and competence to vary the agreement by virtue of s. 28.

The statement referred to the Labour Court hearing on 31st March, 1998. Fifteen workers' representatives including representatives of BATU, were heard together with written submissions, *inter alia*, from BATU. A decision was properly made on 18th May, 1998.

BATU was not excluded from the discussions. Mr. O'Shaughnessy attended and chaired most of the twenty meetings from 8th February, 1995 to 11th March, 1998, BATU was aware of the discussion concerning the proposed variations to the agreement.

BATU's submission that the word "bricklayer" be deleted from the proposed varied agreement was considered and rejected by the

Labour Court. The Labour Court did not act unreasonably or oppressively or arbitrally or capriciously. It did not misdirect itself or misconstrue its powers but acted properly.

14. Affidavit of Gerry Fleming
In his affidavit of the 2nd October, 1998, Mr. Fleming referred to Labour Court recommendation LRC 13340 which recommended, *inter alia*, that the issue of subcontracting should be negotiated further. Following that a joint working party was established in 1993. When agreement was not reached the matter was referred again to the Labour Court on 12th May, 1994. Recommendation LCR 14475 issued which recommended that the existing provision in the registered employment agreement in relation to sub-contracting should be amended as a matter of urgency. During 1994 and 1995 there were extensive negotiations between CIS and CIC in which all construction unions participated including BATU and agreement was eventually reached. He referred to the proposed amendments and to the hearing on 31st March, 1998 and the decision of the Labour Court of 18th May, 1998.

He said that there had been elections held for the six union positions on the JIC but that the applicant, BATU, did not put any candidate forward. He referred to minutes of the meetings and, in particular, the meeting of 8th May, 1996. Mr. O'Shaugnessy, who appeared to have chaired that meeting, indicated on behalf of BATU that, due to pressure of other matters, the executive of his union had not had an opportunity to consider the issue and accordingly the matter was deferred.

He also referred to the minutes of the meeting held on 12th June, 1996 attended by Mr. O'Shaughnessy and Mr. Lamon, of BATU, who indicated that they were against the proposals. All other representatives indicated that their unions were in favour of the proposals. BATU was not excluded from the discussions but was given a full opportunity to state its views.

Mr. Fleming said that the position had changed in recent years and that there were now a considerable number of bricklayers engaged by sub-contractors. He referred to the construction industry monitoring agency which maintained a list of some 40 bricklaying sub-contractors who had been reported to them by BATU for non-compliance with the industrial agreement. He also referred to a list of bricklayers who were contractors and who had joined the Construction Industry Operative Pension Employment Mortality Scheme numbering 9 in total. He said that the Construction Industry Monitoring Agency was a body which had been set up the ICTU and CIF.

Mr. Fleming referred to the schedule of voting strengths of the nine unions of the Construction Industrial Committee where out of 32 votes, SIPTU had 9, UCAAT 6 and BATU 5 and others less.

He concluded by saying that BATU had been involved in discussions prior to the application to vary the agreement; that the Labour Court behaved properly and fairly in accordance with s. 28; that the proposed variation related to conditions of employment of workers in the construction industry and would be of great benefit and protection to the many workers who worked for sub-contractors.

15. Submissions on behalf of the applicants
It was contended that the Labour Court had no jurisdiction or competence to vary the agreement by including therein a provision relating to the circumstances in which sub-contractors might be engaged in the constructon industry. The registered employment agreement applied "to every worker … and to his employer notwithstanding that such worker or employer is not a party to the agreement". Section 28(1) permits the party to registered employment agreement to apply to the Labour Court to vary the agreement "in its application to any workers or workers to whom it applies". In *Serco Services Ireland Limited v. Labour Court* [2002] ELR 1 Carroll J. was satisfied that the variation order extended the scope of the agreement so as to apply it provisions to persons to whom the agreement did not apply prior to its being made and that, accordingly, the court had no power to register the variation.

The instant application for a variation is not a variation to the agreement in that it sets out the circumstances in which sub-contractors, rather than workers, may be engaged. A sub-contractor is not an employee in the sense of being employed under a contract of employment. The Labour Court cannot consider such an application under s. 28.

16. Submissions of Labour Court
The Labour Court submitted that there was nothing in the registered employment agreement variation order of 1992 which restricted the definition of a "building or civil engineering firm" to a contractor as opposed to a sub-contractor.

The applicant had suggested that its consent was necessary for the purposes of making the variation. That proposition was unfounded. The broad purpose of the agreement was to create harmony within the construction industry. There was no basis for suggesting that the respondent must operate on the basis of consensus. Section 28(2) required the Labour Court to consider the application and hear all persons appearing to the court to be interested and desiring to be heard and, after such consideration the court had power to make an order varying the agreement or refusing the application. The Labour Court had a clear jurisdiction to act contrary to the wishes and submissions of the applicants. There was no exclusion of the applicant.

17. Submissions of the Construction Industry Federation
The Construction Industry Federation submitted that the variation proposed did not import anything new into the existing registered agreement and, in particular, did not import a new representative capacity.

The amendment was *intra vires* the Labour Court as the sub-contractors were employers within the meaning of s. 25 of the Industrial Relations Act, 1990. Sub-contractors were also "workers" within the meaning of s. 23(1) of the same Act.

Section 23(1) of the 1990 Act provides that worker means:

> "Any person aged 15 or more who has entered into a work contract with an employer, … and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour …"

The section is not restricted to an individual employed under a contract of service. The term "employee" is not used in this subsection and the term "person … who has entered into a work contract with an employer" is wider than the definition of "worker" in s. 8 of the Industrial Relations Act, 1990 (any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises). The Act confines lawful picketing to persons attending at the premises of their employer and, accordingly, worker is an synonym for employee in that Act.

18. Submissions of Gerry Fleming of the Construction Industry Committee
It was submitted on behalf of Mr. Fleming representing the other unions that the effect of the proposed provision was to ensure that the workers covered by the agreement had the benefit of certain protections in relation to their employment by a sub-contractor and to ensure that employers who are sub-contractors would measure up to certain standards in employment practice was a matter

within the jurisdiction conferred upon the Labour Court under s. 28.

The essence of a complaint of BATU was that the respondent Labour Court had acted in excess of jurisdiction. It was essentially a dispute of classification. The decision *in Serco Services Ireland Limited v. Labour Court* was not applicable as it extended the ambit of the relevant agreement to persons to whom the agreement did not apply prior to its being made.

The right of the Labour Court to classify the provisions as variations is within its jurisdiction. It was not manifestly unreasonable or irrational within the sense adopted and reiterated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. There is material upon which the Labour Court could have come to the conclusions reached by it.

The rights of the applicant were restricted to make submissions and to be heard in relation to the matters under s. 28(2).

The Labour Court acted within the framework of the terms and objects of the relevant legislation and within the terms of the decision in *National Union of Security Employers v. The Labour Court*, Flood J., High Court, 4th December, 1992.

19. Decision of the Court
19.1 Industrial relations in Ireland was facilitated by the Industrial Relations Act, 1946. The act was to make further and better provision for promoting harmonious relations between workers and their employers. It provided machinery for regulating rates of remuneration and conditions of employment and for the prevention and settlement of trade disputes. It also set up a body known as the Labour Court to fulfil the functions assigned to it by that Act.

The Industrial Relations Act, 1990 had a similar objective and amended the law relating to trade unions and amended the 1946 to 1976 Act and the Trade Union Acts, 1871 to 1982.

The Department of Labour was established in 1966 when the general state of industrial relations was then, and for sometime thereafter, perceived to be one of serious disorder. Kerr: *Trade Union and Industrial Relations Acts* (2nd Edition) refers to unofficial industrial action as being widespread with frequent disruptions to essential services and a significant number of inter union disputes. Proposals that the rules of a trade union should be deemed to require that, before the service of a strike notice, a majority of members entitled to vote and voting in a secret ballot should have approved of a strike notice and that members taking on official action would lose the immunities provided by the Trade Disputes Act, 1906, evoked strong opposition from the trade union movement. It was conceded that the only legislation that would work was that in which trade unions would co-operate.

The Commission of Enquiry on Industrial Relations reported in July 1981, made some controversial recommendations which were not implemented.

Within the construction building and civil engineering industry the basis of the 1967 Registered Employment Agreement and the establishment of a Joint Industrial Council brought together all parties including the predecessors of both the applicant and the Construction Industry Federation. The agreement applied to workers who were employed, in one of the certain mentioned capacities, by building or civil engineering firms, as defined in the schedule thereto. The capacities mentioned were craftsmen (including brick and stone layers) and apprentices, lorry drivers and labourers.

It is common case that problems did arise in the 1970s with the increase in construction activity, taxes and social welfare problems and health safety and welfare issues. Working "on the lump" involved groups of workers being engaged from site to site as independent contractors.

19.2 The Labour Court had played a leading role in relation to the construction as well as other industries. The registration of agreements relating to wages and conditions of employment was an important contribution. An employment agreement meant an agreement 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. It appears from the Labour Court Annual Report of 2000 that, in relation to that year, there were 43 employment agreements on the register but that, according to Kerr, op. cit, only seven were active. The more active employment agreement was that of the construction industry which, as already stated, was subject to 21 variations. Section 28 of the Industrial Relations Act, 1946, provided that any worker to an agreement which provided for variation, could apply to the Labour Court. The court had to consider the application and hear all persons appearing to the court to be interested and desiring to be heard. After such consideration the court could refuse or make an order varying the agreement in the manner as it thought proper. Once an order was made the agreement had effect as so varied.

19.3 The court finds that the applicant was an active participant at relevant meetings between 1991 and 1996 when the sub-contracting amendment was negotiated. It made submissions to the council meeting of 31st March, 1998. It was a participant in the CIC and ICTU. Through the CIC the unions had properly applied to the Labour Court to vary the agreement of 15th March, 1967. The variation did deal with abuses referred to in Mr. Scott's affidavit. The court notes finds that there was no ballot of the applicant's members. In so far as is relevant neither Mr. Scott's averment that "no one in his union believed that the proposal would improve quality of employment" nor Mr. O'Shaughnessy's statement that members were "deeply divided" on the issue, can be proven.

The applicant says that the introduction of sub-contractors it goes beyond the original agreement of the 15th March, 1967. It does so in relation to extending the definition of worker which, it was submitted, was equivalent to that of employee and accordingly, could not extend to sub-contractor.

19.4 A variation should not extend beyond the registered employment agreement itself. The applicant relies on *Serco Services Limited v. Labour Court*, High Court, July, 12th 2000, where Carroll J. struck down an order made by the Labour Court in 1999 varying the registered employment agreement for the electrical contracting industry on the basis that the variation order purported to extend the scope of the agreement so as to apply its provisions to workers to whom it did not apply prior to its being made.

In that case the applicant was a limited liability company in the business of facilities management, providing a wide range of technical and support services within a single contract to clients, including electrical services. In September 1990, the Labour Court had registered an employment agreement made between the Electrical Contractors Association and the Association of Electrical Contractors (Ireland) which related to conditions of employment and applied to all electricians employed in the general electrical contracting industry and their employers and to all electrical contractors engaged in the industry. An electrical contractor was defined in the agreement as the proprietor of a business whose main activity was the performance of electrical work on a contract or sub-contractual basis for any third party.

The notice party, TEEU, an electrical trade union, had twice requested the applicant to comply with the provisions of the 1990 agreement. The applicant maintained that it was not bound by the provisions of that agreement as it was not an electrical contractor within the meaning of the agreement. The TEEU then sought to vary the scope of the agreement which the Labour Court agreed to do. The variation changed the definition of electrical contracting, removing the requirement that it be the main activity of a business.

Carroll J. found that the Labour Court had acted *ultra vires*. Section 28 provided that a registered employment agreement could only be varied in its application to any worker to whom it applies and the Labour Court had widened the category of employers to whom the agreement applied thereby including workers not previously included.

Carroll J. in dealing with the difference in meaning between the 1990 Registered Employment Agreement and the variation in 1999 stated as follows:

> "The first question is whether there is a difference in meaning between the two versions (1990 and 1999) which cannot be described as mere classification.
>
> The first difference is the addition of 'charge hands, foremen and apprentices' and 'electricians'. I have no problem in accepting this as a clarification as all of these additional categories were mentioned in the 1990 agreement and provision was made for them.
>
> The next difference is in changing the phrase which qualifies electricians from 'who are engaged in the general electrical contracting industry' to 'who are engaged in electrical contracting work' which is defined in the next paragraph as 'the performance of electrical work on a contractual or sub-contractual basis for any third party'.
>
> In my view an electrician who is described as performing electrical work on a contractual or sub-contractual basis for a third party is in a much wider category of worker than an electrician who is engaged in the general electrical contracting industry. If the description of worker is changed and widened then the class of employers is also widened.
>
> …The effect of these changes is to include all electrical contractors whether engaged in the industry or not and regardless of whether the main activity of their business was the supply of electrical work or not. Therefore it widened the category of employer to include electrical contractors who were not engaged in the general electrical contracting industry but who supplied electrical work on a contractual basis to a third party and included electrical contractors whose main activities was not the supply of electrical work on a contract basis for a third party, who had previously been excluded by definition.
>
> Therefore in my opinion the variation widened the scope of the agreement to include workers who were not previously included, thereby widening the category of employers, and it widened the category of employers, thereby including workers who were not previously included.
>
> This was contrary to the express provisions in s. 28 which gives the courts jurisdiction to vary the application of a registered agreement in its application to any worker or workers to whom it applies. This is not an error of law within jurisdiction. It goes to the root of its jurisdiction."

In holding that the Labour Court had acted *ultra vires* Carroll J. was of the view that the applicant was outside the 1990 registered agreement. She said that the reading of the two agreements showed that the type of work arrangements and workers remuneration in working conditions were radically different to those pertaining to the applicants' employees.

19.5 In the present case there is no evidence of any widening of category of employers. The dispute relates to classification rather than to augmentation. There is no evidence of any distinction regarding the main activity of businesses supplying work on a contractual or sub-contractual basis. There would not appear to be any widening of the category of worker or the class of employer such as had occurred in *Serco*. All have been engaged in the general building and civil engineering contracting industry. There is no attempt, as there was in *Serco*, to widen the scope by including those electricians who were engaged in building and civil engineering work generally. There was no evidence whatsoever that the variation sought to include a greater number whether by way of category of worker. Insofar as it could be said that the class of employers' were widened by including sub-contractors, not alone are the circumstances different from that obtaining in *Serco*, but sub-contractors are within the definition of employer as already found.

Accordingly, in the present case, the variation proposed on 8th September, 1997 and referred to in the letter from CIC and CIF of 17th February, 1998 and decided on by the Labour Court on 15th May, 1998, did not change nor widen the definition or description of worker. There was no evidence of a separate category of sub-contractor who had previously been excluded by the Registered Employment Agreement of 15th March, 1967.

In this regard it is necessary to examine the definition of worker.

19.6 "Worker" in the Industrial Relations Act, 1946 to 1976, is defined by s. 23 of the Industrial Relations Act, 1990 as follows:

> " 'Worker' means any person aged 15 years or more who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be express or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or of a contract personally to execute any work or labour…"

Most persons excluded, employees of the State, teachers are governed by separate schemes of conciliation and arbitration.

The definition of worker for the purpose of trade disputes in s. 8 of the same Act is a different definition:

> " 'Worker' means any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises…"

The latter definition, for the purpose of trade disputes, does not appear to be as extensive as the definition under s. 23.

The former definition, which was the relevant definition for the purpose of this application, refers, in addition to a contract of service or of apprenticeship, to "a contract personally to execute any work or labour". This would seem to imply a contract for services and, accordingly, to include an individual worker acting as contractor or sub-contractor. "Person" is not defined but is limited to persons aged 15 years or more and, accordingly, would not appear to include legal persons, such as companies or partnerships.

Employer, on the other hand, is defined by s. 8 of the 1990 Act as meaning:

> "A person for whom one or more workers work and have worked or normally work or seek to work having previously worked for that person."

Such workers are not defined as employees. It seems, accordingly, that a 'worker' is wide enough to include an individual sub-contractor. The sub-contracting company, on the other hand would appear to be an employer as defined by s. 8 of the Act. Accordingly, both a worker as an individual sub-contractor or sub-contractor as an employer of workers would appear to be within the ambit of the Registered Employment Agreement of 1967.

19.7 The Labour Court had regard to the industrial relations practice in dealing with sub-contractors in the industry. Its recommendation LCR 13374 referred to a specific agreement of 3rd June, 1981 and recommended that in the interests of good industrial relations that it should be applied. It is clear from this recommendation that, while the court does not consider the industrial relation agreement as being agreement in the legal sense of the word, it recommends the implementation of the clauses of the agreement and recommends that the company should ensure that sub-contractors conform to the terms of the agreement. Moreover, it is clear from the overall objective of the Industrial Relations Act, to make further and better provisions for promoting harmonious relations between workers and their employers, that the Labour Court was entitled and, indeed, no issue has been taken in relation to that entitlement either then or now, to make recommendations in relation to the industrial relations agreements appended to the main agreement. Despite there being no provision in the Industrial Relations Acts for industrial relations agreements.

19.8 It seems to me that the approach of the Labour Court in its recommendations from the early 90s has been to encourage the parties to the Register of Employment Agreement of the 15th March, 1967 and their successors to meet and attempt to agree on the updating of and not the expansion of the parties to that agreement. In relation to the considerations of the proposed variation in relation to sub-contractors and in considering the submissions and representations of all parties including the applicant at the meeting of 31st March, 1998, which led to the order of May, 1998, the Court acted within jurisdiction. The parties before it were all the relevant parties; all but the applicant had agreed to the changes, the application to vary was made by the appropriate parties. More significantly, the parties and the Labour Court sought to clarify that those that were already within the agreement could not opt out of the terms of the agreement as varied by the expedient of claiming that they were not workers or employers.

Most importantly the Labour Court followed the procedure laid down by s. 28 and achieved substantial agreement after detailed consultation negotiation between 1990 and 1998.

The court is also satisfied that the Labour Court took in to account the opposition of the applicant Union.

Moreover the applicant Union participated, without objection at that time, in the deliberations of the Construction Industry Committee of the ICTU. No objection had been made of the status of the JIC.

While not decisive to the Court's decision, it is noted that the matter did not reach a hearing until almost seven years from the date leave was granted.

The Labour Court did not act in an arbitrary or irrational manner not did it simply rubber stamp a request by the parties to register the variation. Proper procedures were followed. In the circumstances, the court refuses the reliefs sought.