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Dublin's Future: New Visions for Ireland's Capital City

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Abstract

On the 9th May 2013 the Supreme Court in *McGowan and Ors v The Labour Court and Ors*¹ found Registered Employment Agreements to be incompatible with the Constitution. Registered Employment Agreements (REA) are provided for in Part III of the Industrial Relations Act 1946. Collective bargaining has traditionally been the method for employees and employers to negotiate terms of employment within the construction industry. These agreements would then be registered with the Labour Court and they would have legal effect. Registered Employment Agreements are particularly suited to the construction industry due to the labour intensive nature of the industry and the fact that labour costs make up such a large proportion of the overall costs within a construction project.

Since the *McGowan* decision finding the agreements unconstitutional, there has been a lack of clarity regarding how this affects all the interested parties. The National Electrical Contractors of Ireland (NECI) has welcomed the ruling² and believes that it will allow contractors to be more competitive in their tendering process, while the Technical, Electrical & Engineering Union (TEEU), the trade union representing employees, is of the opinion that it will allow overseas contractors to come in and undercut Irish contractors who are bound by contracts of employment. It is, however, unclear how each of these parties will be affected and the real implications for the Construction sector. This research intends to investigate the consequences and effects of the ruling and in doing so examine the implications for collective bargaining within the Construction Industry.

¹ [2013] IESC 21

² www.neci.ie accessed 09 December 2013

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During the research of this document, I have encountered many who helped along the way. Some I encounter briefly but they gave me invaluable assistance such as Mr. Eddie Conlon and Dr. Lorcan Sirr, both of whom helped me to initially define the aims of my research. Others were there to call on when required such as the always efficient and ever helpful staff of the Dublin Institute of Technology Library.

The interview process would not have been possible without the generosity of all the participants with their time and their knowledge. To all of these people, I am very grateful.

All through the research there is one person who has been assigned to you to ensure that you do not lose focus and keep motivated. For me that person was my supervisor Dr. Fergus Ryan and I am truly grateful for all his help and advice along the way.

Now that I completed my research, I know that I have gained enormously from the experience. For that I will always be indebted to my wife Antoinette, who created the opportunity and time for my studies and who encouraged me along every step of the way.

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Chapter 1

Introduction

1.1 Introduction

The Industrial Relations Act 1946 was introduced at a time when there was little statutory protection for employees and when employees were more vulnerable to exploitation. In Ireland, as in many democratic countries, collective bargaining is the predominant way of determining wages and conditions of employment. Where there are a number of employers in the same industry the negotiation of terms and conditions can be set as industry wide conditions. Employers in the Construction Industry who are sensitive to price competition see collective bargaining as an advantage as it sets a level playing field in the tendering process.

Part III of the Industrial Relations Act allows for "Agreement relating to wages and conditions of Employment"¹. This agreement will be set between the Employers' Representative and the Employee Representative (Trade Union). The representatives negotiating must substantially represent both the employees and the employers who will be bound by the agreement. On completion of negotiations the parties will bring their agreement to the Labour Court for registration. Once registered, parties will be legally bound by the pay and conditions set out in the agreement.

The REAs (Registered Employment Agreements) are particularly suited to sectors such as the construction sector as it is a labour intensive industry with a transient workforce. The REAs provide protection to the employee as well as reducing the risk of industrial action for the employer. The REAs have allowed contractors and clients to proceed with development projects with confidence of relative industrial peace for the duration of their projects. However Compton and Dillon² point out that

"[Employer groups have long sought to reform other systems of setting pay and conditions in industry by REAs".

In 2009 IBEC Director of Industrial Relations Brendan McGinty stated that

¹ Industrial Relations Act, 1946

² Ali Compton and Myra Dillon, "Overview of employment regulation and registered employment agreements", (2009) I.L.E.J, 3, 83-87 (IELJ?)

"[i]t is time to reform the outdated way we set pay and conditions in these industries. Some of these systems were set up in the early part of the last century and are no longer appropriate or necessary."

In 2008 Camlin Electrical Ltd took a case³ challenging the constitutionality of the REAs. The High Court, however, found that the constitutional question was out of time. In March 2011 in a similar case⁴ but in relation to Joint Labour Committees (JLC) as opposed to REAs, the High Court found the JLC system to be unconstitutional. In its decision the High Court ruled that the provisions of the Industrial Relations Act "permit an excessive delegation of law making power to the Labour Court." Article 15.2.1 of the Constitution states that

"The sole legislative power of the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws or the State."

The Court in the *McGowen* decision goes further to emphasise the point that "participants in the industry who were empowered to make regulations for themselves and for all others within that industry who may be competitors and whose interests may not be aligned with the makers of the REA" The conclusion the Supreme Court found that the Industrial Relations 1946 Act gives power that it is not entitled to give under Art. 15.2.1 of the Constitution.

On 28 July 2011, the Minister for Jobs, Enterprise and Innovation, Richard Bruton, announced legislation reforming JLCs and REAs. In 2012 the Government introduced the Industrial Relations Act 2012 which made "extensive amendments to the provisions of the 1946 Act"⁵. This was introduced to deal with the *John Grace Fried Chicken*⁶ decision and with Part III of the 1946 Act referring to REAs. However on 9th May 2013 the Supreme Court in *McGowan and Ors v The Labour Court and Ors*⁷ "found that provisions of Pt. III of the 1946 Act were incompatible with Art. 15.2.1 of the Constitution". In this decision there was no reference made to the 2012 Act, but because the 2012 act was built upon the foundations of an act found to be unconstitutional it floundered. This research will explore

³ *Minister for Enterprise Trade and Employment v Camlin Electric Limited* (2008/1864/SS)

⁴ [2011] 3 IR 211

⁵ Doherty, M. "Emergency Exit? Collective Bargaining, the ILO and Irish Law" (2013) European Labour Law Journal, 4:171 - 195

⁶ [2011] IEHC 277

⁷ [2013] IESC 21

that decision and examine the effect this is likely to have on the Construction Industry. It is the purpose of the research to consider how the law might be shaped in the future to ensure contractors' legitimate interests can be met. However workers' interest should be the first and paramount concern, but ensure that contractors (particularly those contractors who give their staff a fair wage and good conditions) are also protected and not undercut by more unscrupulous employers.

1.2 Aim

The aim of this research is to examine the decision of the Supreme Court *in McGowan and Ors v The Labour Court* and explore the implications on the Construction Sector.

1.3 Objectives

To examine the legislation and case law that has brought about the current position of Registered Employment Agreements in Employment law.

To explore the public policy on collective bargaining within Ireland

To assess the consequences the McGowan decision has on current construction contracts and future Government project procurement.

To assess the future of Registered Employment Agreements and to examine if the statutory protections in place are sufficient to protect the conditions of employees and the legitimate concerns of employers?

1.4 Summary

This thesis is composed of six chapters, strategically positioned to provide the reader with a logical sequence, initially conducting a literature review and exploring theoretical perspectives underpinning the research, before conducting the research itself and analysis of same.

Chapter Two provides an extensive review of existing literature relating to Industrial relations and the legal frameworks within the construction industry. In doing this it gives a background to the origins of the REA and explores the public policy that has underpinned collective agreements in all industries over the last 30 years. It investigates collective bargaining in the construction industry and examines the role it plays in a modern construction industry. The issue of compliance is also investigated in detail, as it was identified as a major issue for any new legislation. It also examines literature dealing with the European legislation and the significance it has on the current vacuum in legislation and any future legislation.

Chapter Three establishes the theoretical perspective from which the research is conducted, and provides a clear and precise picture of the foundations which underpin this research. It clarifies the chosen methodology and defends its selection. It provides a road map with regard to participants and stakeholders involved in this study and explain data collection techniques adopted, and how this data is utilised.

Chapter Four documents the findings gathered during the interview process under major themes. It provides a platform for interrogation and analysis of the data collected which is conducted in chapter five.

Chapter Five presents an in depth analysis and interpretation of the findings. It discusses the data gathered under key themes, and explores the implications of these findings in relation to the overall aims and objectives of this study.

Chapter Six, the concluding chapter revisits the aims and objectives outlined in chapter one, and reflects on the degree to which these objectives have been achieved. It also advises on areas where further research may be conducted in this area.

Chapter 2

Research Methodology

2.1 Research Design

“A good research design provides a blueprint for research activity; it provides a timetable of what is to be done and shows how the various parts fit together”⁸

2.2 Introduction

Bryman⁹ states that a research design provides a framework for the collection and analysis of data. The research design will prioritise the data collection techniques and will examine how the different research methods will be used to validate each other. Blaike¹⁰ (p.13) views research designs as “the fundamental structure that is developed by one or more researchers and is used by them as a guide throughout the research”. The research design will be used as a constant point of reference and will provide guidance throughout the research. Bryman¹¹ advises that the research design relates to the criteria that are employed when evaluating social research. Robson¹² suggests that a framework for research design should be kept in mind when carrying out research projects. Robson’s¹³ model is one that will be used in this research and will follow the guidelines set out by Robson.

⁸ Martynne Denscombe, *The Good Research Guide: For Small-Scale Social Research Projects* (4th edn, McGraw-Hill International 2010)

⁹ Alan Bryman, *Social Research Methods*, (3rd edn. OUP Oxford 2008)

¹⁰ Norman Blaike, *Designing Social Research* (2nd edn. Polity Press 2009)

¹¹ Bryman (n9)

¹² Colin Robson, *Real World Research*, (3rd edn. John Wiley & Sons 2002)

¹³ Robson (n12)



Framework for Research Design¹⁴

Crotty¹⁵ views research design as a form of scaffolding or framework to support the research. The research design will focus on the framework set out by Robson and will endeavour to establish the five key points early in the research to allow the research questions to be successfully answered. These points are

- Purpose
- Methods
- Sampling Strategy
- Theory
- Research Questions

All these aspects shall be interrelated and may change throughout the research. This research will use a flexible design strategy. This allows the design to evolve during the data collection.

2.3 Research Methods

The research methods for this thesis were formulated using two main forms of research. The first of these was a desk based study followed by an interview process. The desk based research concentrated on using the library in DIT Aungier St. with a focus on utilising their

¹⁴ Robson (n12)

¹⁵ Michael Crotty, *The Foundations of Social Research: Meaning and Perspective in the Research Process* (SAGE Publications Ltd 1998)

electronic resources. This library will ensure that the level of detail required is met. The databases available through the DIT website will also be employed to provide access to both primary and secondary sources of information. The following databases will be referred to during the process of this research.

Westlaw.ie

LexisNexis

Justis

Irishstatutebook.ie

Courts.ie

Labourcourt.ie

Lrc.ie

The research methodology will be completed in four stages. These stages will ensure that all available resources are fully exploited and allow the different resources to complement each other through the research. According to Mason¹⁶ qualitative research “engages us with things that matter, in ways that matter”, and the methods which will be used to meet the aims and objectives on this research will be qualitative in nature.

Stage one will involve investigating all the relevant secondary sources of information. Secondary sources of information are those sources that are not of a primary nature. This will include opinions of experts, books and published articles. Care will be taken during stage one to identify and understand the limitations on the reliance of secondary sources. Stage one will allow a background to the research question to be obtained and to direct the researcher towards the relevant case law and legislation. The secondary sources will also focus the research and allow the research question to be refined further. Stage one commenced prior to the submittal of the research proposal as it is an essential process in the writing of the proposal.

Stage two of the research will be the major part of the research and along with stage one will be the main part of the desk study. Stage two of the research will examine the primary

¹⁶ Jennifer Mason, *Qualitative Researching* (2nd edn. SAGE Publications Ltd 2002)

authorities that can answer the research questions. This section will look at the Legislation, court decisions, commentary on the court decisions and examine the cited case law within the decisions. Chatterjee¹⁷ states that “primary sources are those sources which directly authoritatively and not including by anyone’s opinion.” In legal documents this represents accurate records or statements of events.

The third stage of the research will involve interviewing a number of key stakeholders that are affected by the McGowan decision. This will include stakeholders from the Construction Industry, Construction Trade Unions and Academics in the area of Employment Law and Industrial Relations. The in-depth interviews will adopt a semi structured format aimed at exploring and resolving key issues by gathering rich and deep information. The interview schedule will combine open and closed ended questions to allow the interviewer scope to examine responses in detail¹⁸. The interviews will be transcribed and analysed to find similarities and differences between respondents¹⁹.

2.4 Interviews

Naoum²⁰ advises that the personal interview is a major technique for collecting factual information as well as opinions. This research will use interviews as a data collection method. Greener²¹ suggests that interviews can take three forms, the structured, unstructured or semi structured. This was the starting point in the formulation of the interview questions for this research. When formulating the interview questions it was decided that the interviews would be semi structured in nature. A semi structured interview is more formal than the unstructured interview in that there are a number of topics around which the interview is built. Bryman²² suggests that questions may not follow on exactly in the way outlined on the schedule. A number of open ended questions have been used in interviews. Oppenheim²³ advises that this will allow the respondents to say what they think and to do so with great richness and spontaneity. Another advantage the interviews brought was that the researcher was able to create a relationship with the respondent which allowed them to feel more comfortable in their replies to the questions. It was important that the respondents were allowed to express

¹⁷ Charles Chatterjee, *Methods of Research in Law*(Old Bailey Press Limited)p23

¹⁸ Shamil Naoum, *Dissertation Research & Writing For Construction Students*, (Oxford, Butterworth 1998)

¹⁹ Chris Hart, *Doing your masters dissertation*,(Sage Publications, 2005)

²⁰ Naoum (n18)

²¹ Ian Greener *Designing Social Research: A Guide for the Bewildered* (Sage Publications 2011)

²² Bryman (n9)

²³ Bram Oppenheim, *Questionnaire Design, Interviewing and Attitude Measurement* (Continuum-3PL 1998)

themselves and add to the knowledge of the interview. In preparing the interview questions Lofland et al.²⁴ suggests asking yourself “just what about this thing is puzzling me”

Simons²⁵ gives direction on interviewing techniques when conducting an in-depth interview.

- Do understand the interviewee's perspective on the topic. Find out what is important to them.
- Active engagement and learning must be inherent in the interview. It can aid the interviewer and interviewee in identifying and analysing issues.
- There must be flexibility in structure; it offers to change direction to pursue emergent issues, to probe a topic or deepen a response, and to engage in dialogue with participants.
- There must be potential for uncovering and representing unobserved feeling and events that cannot be observed.

Initial approaches have been made to a number of key stakeholders and they have agreed to be interviewed as part of this research. Chatterjee²⁶ states that “[i]nterviewing in legal research is certainly necessary in order to find out about the practical application of certain rules of law”. Selecting in-depth interview participants is based on a process referred to as purposeful sampling that seeks to maximise the depth and richness of the data to address the research question. This approach operates on the principle that we can get most information through focusing on a relatively small number of instances deliberately selected on the basis of their known attributes²⁷. The researcher handpicked on the basis of knowledge and relevance. This research has selected the people below to interview to attempt to get a balance of opinions on the research question. It is envisaged that the number of interviews will increase on completion of these interviews.

²⁴ John Lofland, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (4 edn. Cengage Learning 2005)

²⁵ Helen Simons, *Case Study Research in Practice* (Sage Publications 2009)

²⁶ Charles Chatterjee, *Methods of Research in Law* (Old Bailey Press Limited)

²⁷ Denscombe (n8)

Participant	Position
John Curtin	Director, PJ Hegarty and Sons
Jean Winters	Director, Industrial Relations & Employment Services, CIF
Eamon Devoy	General Secretary, TEEU
Prof Michael Doherty	Law Professor NUI Maynooth
Chris Lundy	Executive Secretary, Association of Electrical Contractors of Ireland. (AECI)
Fergus Whelan	Irish Congress of Trade Unions
Dave Butler	Former National Secretary of NECI
Mel O'Reilly	Director MDY Construction, former President of the Master Builders and Contractors Association (MBCA)

Table 1. list of Interviews

The interviews were held between the months of April and May 2014 in the premises of the interviewees in most cases. The McGowan decision was not yet one year old and the interviews' responses show an in-depth knowledge of the case and the consequences on the industry.

Purposive sampling was used to select the interviewees. Bryman²⁸ recommends this method of sampling in qualitative research like this. Bryman states that this sampling is "strategic in that it entails an attempt to establish a good correspondence between research questions and sampling". In doing this the researcher has to identify the key stakeholders affected by the McGowan decision. It was also important that a balance between both sides of the decision was sought.

²⁸ Bryman (n9)

The interview process was intended to follow an unstructured path but tended in some cases to form “narrative interview”. Burn Gaskell²⁹ describe the narrative interview as encouraging and stimulating an interviewee to tell a story. The author recognised early in the interview that the interviewees have a story to tell. Bauer understands story telling

“ as an elementary form of communication of human experiences with some useful features. It realises a universal competence to tell about social events independent of stratified language performance. Members of social groups or subcultures tell stories with words and meanings specific for a certain social group.”

This process when used was effective, as it allowed the interviewee to use their own time to explain their view in a chronological order familiar to them. When the first question was asked they tended to start their story, when they finished answering question one, I would realise that up to 6 or 7 questions would have been answered through the story the interviewee had told.

2.5 Ethnographic Coding

Once the interviews were completed, the author began to pick out the themes which emerged from the notes. Initially this involved noting any type of event interaction or comment which occurred more than once. After generating a very long list of such instances, these were then grouped into a set of themes which had begun to emerge. A coding system was used to identify the key themes and to systematically link the elements of data that relate to each other. Coding is crucial in the production of meaningful inferences. The decision to use coding allows the elements of information that relate to the research problem to be extracted from the data and related to the literature in the area and to the opinions of other participants completing the research.

The next task was to categorise the coded data. Denscombe³⁰ believes “the categorisation is a number of terms under which a number of individual observations are placed”. The key skill of the researcher at this point is to link themes that at first reading may not be apparent but are in fact very closely under the same general idea. Once this is complete a hierarchy of themes will be created which will allow some themes to be incorporated into more general themes.

²⁹ Martin Bauer and George Gaskell, *Qualitative Research with text images and sound, A practical handbook* (Sage Publications, 2009)

³⁰ Denscombe (n8)

2.6 Ethical Issues

Within the area of social research there are a number of different ethics codes. Greener believes that “this guideline is a good starting point or thinking about the implications of the research on individuals and the research”. When completing this research the following points set out by Blaike³¹ (p31) were closely adhered to.

- Voluntary Participation
- Obtaining informed consent
- Protecting the interest of the research participants
- Researching with integrity

Responsibility to the wider research community involves adapting a code of personal conduct that does not harm their participants and colleagues or undermine public confidence in the research process. Denzin and Lincoln³² stress that “subjects must voluntarily participate – that is without physical or psychological coercion”. The intention of the interviews have already been approached and there has been a positive response to the proposed research. Simons³³ points out that senior management should be approached before research is initiated so access to intended participants is agreed from the start.

These ethical issues will be addressed by sending all participants a letter containing a Request for Consent Form, and a detailed information sheet explaining the purpose of the research, extent of the participant's involvement, handling of storage of data, assurances regarding confidentiality and explaining their right to withdraw at any time. The participants in the interview were all senior management level within their organisation and the researcher was careful not to cause any undue intrusion. This was unlikely as the questions had been sent to the participants prior to the interview and if they wanted any changes to the questions they could request this. On completion of the research analysis it will be forwarded to the participants for their approval.

This research will be conducted based on best practice ethical guidelines such as those published by the British Educational Research Association. These guidelines set out responsibilities to participants, sponsors, and the wider research community. Simons also stresses that ethics is how we behave or should behave with people with whom we interact,

³¹ Blaike (n10)

³² Norman K. Denzin and Yvonna S. Lincoln, *Handbook of Qualitative Research*, (Sage Publications, 2000), p.13

³³ Helen Simons, *Case Study Research in Practice* (Sage Publications, 2009)

and that the fundamental ethical principle, no matter what methodology is adapted is to do no harm. What constitutes harm however can be interpreted differently by different people.

2.7 Analysis

The interviews completed through the research allowed common themes to be extracted and to be further analysed to identify the differing view of the key stakeholders interviewed. Creswell³⁴ advises on the importance of identifying significant statements that explain the experience of the situation and draw out key themes to produce rich descriptions. Different respondents to the same question, naturally, will respond differently by using words or phrases that don't match yet are still conceptually related. Codes were used to attach to the raw data. These took the form of names that were used systematically to link the data to the ideas related to the analysis. The research codes will be drawn from the opinions of the respondents to the interviews. From this data themes will be further merged to allow broader categories of particularly relevant data to develop.

The data will then be prioritised giving the relevant themes a hierarchical structure that can be used in relating the data to the objectives of the research. The themes that meet the requirement of the research will be prioritised while other themes may be examined within the research or be recommended for further research. Once this process is complete the data analysis will be reviewed in the light of other research analysis in the area. A particular focus was given to analysis that might appear to contradict the emerging analysis in the area.³⁵

2.8 Validity and Reliability

The qualitative analysis of the literature review was supplemented with the information gathered through the interviews to satisfy the principle of triangulation and increase trust in the validity of the study's conclusions. "Triangulation is the use of two or more research methods to investigate the same thing".³⁶ The analysis of the recorded interviews along with observational notes and documents presented by the respondents themselves allowed the researcher to validate the information from the literature review. The purpose of multiple sources of data is corroboration and converging evidence.

³⁴John W. Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (2nd edn. SAGE Publications 2002)

³⁵Denscombe (n8)

³⁶Richard Fellows and Anita Lui, *Research Methods for Construction* (3rd edn. Wiley-Blackwell 2007)

Denscombe³⁷ describes 'respondent validation' as returning to the participants of their research with the data and findings as a means of checking the validity of the findings. This allows the respondents to confirm or to alter any data where there may have been ambiguity. As part of the interview process it was agreed with all participants that no data will be published without the final consent of the participants. This process while initially introduced to ensure participation will also act as a process of validating the research findings.

2.9 Summary

This chapter has provided an in depth analysis of the various research design models available when commencing a research study of this nature. It has defended the particular methodology utilised with regard to this research. The design is interpretivist and qualitative in nature. The aim of this research is providing insights in the context of today's Construction Industry and its Industrial Relations framework. These findings are presented and discussed in later chapters.

³⁷ Denscombe (n8)

Chapter 3

Literature Review

3.1 Background

The first sitting of the Labour Court in Ireland took place on the 26th September 1946. The Labour Court was set up under the Industrial Relations Act 1946 which transferred responsibility for securing a reasonable settlement of differences between employers and workers by negotiation discussion and agreement from a Government Department to a specially constituted court. The creation of the court was based on the principle that whenever possible, employers and workers should reach a right and reasonable settlement of their differences. The Act was introduced at a time when there was little statutory protection for workers and complaints could only be dealt with through trade union strike action.

During World War II an advisory tribunal was set up in order to foster relations between employers and employees. Mr Buckley SC at the time said "that almost invariably the recommendations of the tribunal had been accepted by both sides as fair and impartial decisions on the various matters submitted" ³⁸ Hendy QC³⁹ described how collective bargaining was perceived in Europe, North America and Australia as a central element of economic recovery from the Wall Street crash of 1929 and the depression that followed.

The Industrial Relations Act 1946 provides for the regulation by the Labour Court of remuneration and conditions of employment of certain workers. The Industrial Relations Act was

"signed into law with a situation where a majority of employers and a majority of employees in a particular industry were prepared to make an agreement providing for rates of wages etc. but could not make agreement effective because a small number of employers refused to conform with it"⁴⁰.

This allowed employers and employees come together to negotiate rates of pay and conditions, which could then be registered with the Labour Court and be legally binding on

³⁸ The Irish Times, 9 September 1946, page 6

³⁹ Hendy QC, *McGowan & Collective Bargaining in Ireland*, (A Lecture by John Hendy QC1 at Trinity College, Dublin in conjunction with the Irish Congress of Trade Unions and Merchants' Quarterly Chamber), [2013]

⁴⁰ Neville Cox, Val Corbett and Des Ryan, *Employment Law in Ireland* (Clarus Press, Dublin, 2009)

all within the given industry. The construction industry is very dependent upon the sectorial agreements made through Part III of the 1946 Act. Prior to the *McGowan* decision there were six Registered Employment Agreements: two in the construction sector and one in the electrical sector.⁴¹ Part III of the 1946 Act is of particular importance to the construction industry as it is “labour intensive in labour costs and of high proportion of the overall cost”⁴². It would be difficult to envisage a construction industry with no mechanism in place to deal with collective bargaining, as the transient nature of the workforce and the diversity of the industry would result in major industrial unrest.⁴³

3.2 Public Policy

The Irish system of employment relations has derived itself from the British model as its origins were set up when the Republic of Ireland was part of the United Kingdom of Great Britain and Ireland. Collective bargaining began in the 19th century and was later formally established with the UK Wage Council systems being introduced under the Trade Boards Act 1909. The Statute’s role under the Trade Boards Act was to establish a mechanism for collective bargaining about pay in a small number of trades which were not susceptible to trade union organisation. Winston Churchill famously declared at the time;

“[i]t is a serious national evil that any loss of his Majesty’s subjects should result in less than a living wage in return for their utmost exertions”⁴⁴

The Trade Boards Act was introduced for sectors where there was an absence of trade union representation. However it should also be noted that the Act was seen as necessary to prevent the undermining of good employers. This argument still holds with Curtin⁴⁵ recently stating that

“[I]n the absence of any REA there is a real risk that any “race to the bottom” would have destabilising effects upon the industry”

The UK and Irish models sat alongside each other to carry out similar objectives until the late 1970’s when the Conservative Party came into power and the new philosophy of the

⁴¹ Richard Bruton, 27 June 2013, Statement from Minister Bruton re Registered Employment Agreements <http://www.djei.ie/press/2013/20130627c.htm> accessed 14 March 2014

⁴² Kevin Duffy and Frank Walsh, *Report of Independent Review of Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms*, (2011)

⁴³ Duffy (n42)

⁴⁴ Chris Wrigley, *Winston Churchill: A biographical Companion*, (1st Edition, ABC-CLIO, California 2002)

⁴⁵ John Curtin, ‘A working agreement: the McGowan Judgement’ SCSJ Journal (Autumn 2013)

Conservatives moved away from collective bargaining and instead saw the free market as being preferable to regulations. The Irish method of collective bargaining as set out in the 1946 Act however did not follow the UK trends in contrast in Ireland. O'Sullivan⁴⁶ gives three important factors that were central in the retention of the Irish system of collective bargaining. These factors are:

- The growth of the service sector
- The importance of the political landscape
- The views of employers

The growth of the service sector is evident by the fact that in 1990, 43% of JLCs covered services employment and by 2006 this had risen to 53%⁴⁷.

3.3 Political Influence

A major contributor to the retention of the JLC system in Ireland has been the political framework of both countries. The two main political parties in Ireland are Fine Gael and Fianna Fáil. Fianna Fáil is a centralist party that had close links to the trade union movement and has had up until recently little interest in the neo-liberal policies of the UK Conservative Party. Fine Gael has only ever held power as a coalition with the Labour Party and thus has been unable to pursue strong neo-liberal policies. The Progressive Democrats were a small neo-liberal party which enjoyed influence as part of coalition government with Fianna Fáil from 1989-1992 and from 1997-2008. The Fianna Fáil/Progressive Democrat coalition government had advocated neo-liberal policies such as low personal and corporate tax rates and privatisation of the state bodies however they have been reluctant to move towards a deregulation of the labour market.⁴⁸

Since 1987 successive Irish Governments have implemented a social partnership process in Ireland. Social partnership involves agreements between the Government, the Trade Union movement and employer organisations to address wage moderation, fiscal restraint and tax concessions. Between 1987 and 2009 there were 7 social partnership agreements setting out labour market issues.⁴⁹ In 2009 social partnership collapsed due to the deterioration in the

⁴⁶ M O'Sullivan and J Wallace, 'Minimum Labour Standards in a Social Partnership System - the Persistence of the Irish Variant of Wages Councils' [2012] *Industrial Relations Journal*;42(1) 18, 35

⁴⁷ O'Sullivan and Wallace,(n11)

⁴⁸ T McDonough and T Dundon, '*Thatcherism Delayed? The Irish Crisis and the paradox of social partnership*' *Industrial Relations Journal*, 41 (6): 544-562

⁴⁹ W. Roche, *Social Partnership in Ireland and New Social Pacts*, *Industrial Relations: A Journal of Economy and Society* [2007] Vol 46, Issue 3, pages 395–425.

public finances, a collapse in the housing market and the banking crisis.⁵⁰ The Government could no longer fund such partnership and quickly reverted to a unilateral cut on public service spending, welfare cuts and tax increases⁵¹. Since this breakdown in the partnership process there has been a deliberate move towards more neo-liberal policies under the current Fine Gael/Labour Government. From the late nineties to the banking collapse it has been strongly debated that employee protection has played second fiddle to that of foreign direct investment. McDonough et al⁵² puts this down to three factors. The first of these is that income inequality has risen; the second is that the government over this period have favoured a light touch regulation and the third has been the decline in trade union membership across all sectors.

The decline in union membership is worrying for employees' rights in the future.⁵³ One factor that has contributed to this has been the high level of inward foreign direct investment by multinational companies⁵⁴. The government policies of a low level of corporation tax to attract multinational companies has been very successful in bringing investment into the country with foreign direct investment of US\$211 billion in 2005. Lavelle et al⁵⁵ have shown a growth in union avoidance in US multinational companies in Ireland especially since the 1980s. This trend has continued over the years with US multinational companies much less likely to recognise unions than their Irish counterparts.

The growth in foreign direct investment and our clear dependence on this investment along with the breakdown in social partnership has been extremely damaging to the industrial relations model over the last 100 years. The current government's unwillingness to further negotiate under the Haddington Road Agreement and the introduction of the Financial Emergency Measures in the Public Interest Act 2013⁵⁶ indicates a move away from collective agreements and a more adversarial approach by the Government towards collective bargaining. This along with the media campaign that has pitted the public and private sectors against each other with the strongly unionist public sector portraying "overpayment

⁵⁰D D'Art and T Turner, *Irish trade unions under social partnership: a Faustian bargain?*, Industrial Relations Journal [2011]Vol 42, Issue 2, pages 157–173.

⁵¹ Michael, Doherty *It must have been love...but it's over now: the crisis and collapse of social partnership in Ireland. Transfer:* (2011) European Review of Labour and Research, 17 (3). pp. 371-387. ISSN 1024-2589

⁵² McDonough and Dundon, (n 14)

⁵³ J Lavelle, P Gunnigle, A McDonnell, , 'Unions on the edge? Industrial relations in multinational companies' [2008] non-peer-reviewed. Kemmy Business School, University of Limerick.

⁵⁴ Doherty (n51)

⁵⁵ Lavelle (n53)

⁵⁶ Financial Emergency Measures in the Public Interest Act 2013

public sector”⁵⁷ has brought about a very different approach to collective bargaining. Doherty⁵⁸ argues that this hostility towards the public sector will ultimately result in a less supportive state approach to the public sector which will be disastrous for the unions in the public sector and ultimately for employee representation and collective agreements across all sectors. The current Minister for Jobs, Enterprise and Innovation Richard Bruton has said that in light of the McGowan decision he intends

“as soon as possible to put in place legislation that will be fully informed by the Supreme Court Judgement, but will introduce a revised framework to deal with the matters”⁵⁹.

The structure of this legislation will give clear guidance on Government's policy in relation to collective bargaining and protection of lower paid workers.

The collapse of the banking system caused confidence in the Irish economy to plummet. Ireland was forced to enter an EU-IMF loan programme in November 2010. The Memorandum of Understanding⁶⁰ outlining the terms of a financial support package for Ireland included a specific commitment to review the REA and JLC systems with follow-up actions to be agreed with the European Commission. The review was commissioned by the Government and was completed by Kevin Duffy, the Chairman of the Labour Court and UCD economist Frank Walsh.⁶¹ The report concluded that the basic framework of the current JLC / REA regulatory system should be retained. The report also states that “many of those who advocated the abolition of the present system contend that it acts as a barrier to job creation and retention”. However, Duffy and Walsh review literature in their conclusion that: „lowering the basic JLC rates to the level of the minimum wage rate is unlikely to have substantial impact on employment.”

3.4 Collective Bargaining

Industrial Relations in Ireland has operated on the basis of voluntarism. This allows employees and employers to agree terms and conditions between themselves with little intervention from third parties or the law. Under Article 40.6.1.iii° of the Constitution,

⁵⁷The Irish Examiner, August 30 2012, Public v private sector - Growing pay gap is unfair

⁵⁸ Doherty (n51)

⁵⁹ Richard Bruton, 27 June 2013, Statement from Minister Bruton re Registered Employment Agreements <http://www.djei.ie/press/2013/20130627c.htm> accessed 14 March 2014

⁶⁰ EU/IMF Programme of Financial Support for Ireland Programme Documents, 01 December 2010

⁶¹ Duffy (n42)

employees have a right to form and join trade unions. This enumerated right however does not oblige employers to recognise such unions as having a right to represent their members in negotiation over employment issues. This is confirmed in the Industrial Relations (Amendment) Act 2001.⁶² The Act does not provide for union recognition

“but ordering employers to allow unions, with members in organisations where employers do not recognise unions for bargaining purposes, to seek to have specific disputes with regard to pay and conditions of employment and dispute resolution procedures.”⁶³

In 2011 Richard Bruton Minister for Trade Enterprise and Employment stated that

“there are no proposals in the Government’s legislative programme that would require an employer to recognise a trade union or compel an employer to engage in collective bargaining with a union.”⁶⁴

While employees are free to join a trade union as was set out in *National Union of Railwaymen v Sullivan*⁶⁵ they cannot insist their employers negotiate with that trade union regarding pay and conditions.⁶⁶ This was confirmed in the Supreme Court decision in *Ryanair v Labour Court*⁶⁷ when Gough J. stated “this matter of law Ryanair is perfectly entitled not to deal with trade unions nor can a law be passed compelling them to do so.”

This lack of recognition of unions differs with many Western developed economies. In the United States the introduction of the National Labor Relations Act 1934⁶⁸ (Wagner Act) clearly sets out the general principle that employees have the right to join a trade union and engage in collective bargaining. The Act also prohibits employers from refusing to bargain with any union that has been certified as being the choice of a majority of employees. Hendy⁶⁹ states Krichos when he states that in 2009, “through a majority (21 out of 27) EU Member States had in place mechanisms to make collective bargaining agreements

⁶² Industrial Relations (Amendment) Act 2001

⁶³ B Ryan, Leaving it to the experts-In the matter of the Industrial Relations (Amendment) Act 2001, [2006], Irish Employment Law Journal, 3

⁶⁴ Dail Deb 9 June 2011, vol, 14989 col,11

⁶⁵ *National Union of Railwaymen v Sullivan* [1947] IR 77

⁶⁶ Michael Doherty, 'When you ain't got nothin', you ain't got nothin' to lose.... Union recognition Laws, Volunteerism and the Anglo-model' [2013] Industrial Law Journal 369,

⁶⁷ *Ryanair v Labour Court* [2007] 4 IR199

⁶⁸ National Labor Relations Act [1934] (US)

⁶⁹ Hendy (n39)

legally binding on all employers in respect of or in the interests of their employees". It should also be remembered that as a member state of the EU we are bound to respect the provisions of Article 28 of the Charter of Fundamental Rights⁷⁰, which protects the rights of collective bargaining and collective action. Doherty⁷¹ has also pointed out that Ireland has incorporated the European Convention on Human Rights into domestic law at a sub-Constitutional level. Article 11 of the European Court of Human Rights states as follows:

Freedom of assembly and association

- 1) Everyone has the right to freedom to peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of interests.

Industrial relations in Ireland cannot be fully understood without examining EU legislation as although Irish Legislation may indicate no legal recognition of collective bargaining there are objectives of the EU that include "harmonising the working and living standards of workers throughout the EU". Article 151 of the Treaty on the functioning of the EU lists that

"the Union and the Member States, having in mind fundamental social rights, have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour and the development of human resources."

Fay⁷² points out that the EU has undoubtedly had a positive effect on the individual and collective rights in EU Countries as opposed to non EU Countries.

The European Convention on Human Rights has examined the issues of union recognition in *Wilson v United Kingdom*⁷³ noting that the "absence under UK law of an obligation on employers to enter into collective bargaining is not giving rise to violation of Article 11". The guarantee of freedom of association did extend so far as to compel an employer to recognise a union for collective bargaining purposes. Article 11 of the European Convention on Human Rights states that

⁷⁰ European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html> [accessed 24 March 2014]

⁷¹ Doherty (n51)

⁷² Fay (n33)

⁷³ *Wilson v United Kingdom* (2002) 35 EHRR 523

“Every one has the right to form or to join a trade union for the protection of his interests.”

This does not however extend to imposing on an employer an obligation to recognise a trade union. Howlin⁷⁴ has cited *National Belgian Police v Belgium*⁷⁵ to highlight the point that although an employer may be obliged to recognise a union in respect to individual grievances this recognition is not extended to collective bargaining. In *Abbot and Whelan v ITGWU*⁷⁶ McWilliams J. stated that

“[t]here is no duty upon any employer to negotiate with any particular union or unions.”

Section 5(2) of the Industrial Relations Act 2001⁷⁷ and the Industrial Relations (Miscellaneous Provisions) Act 2004⁷⁸ allows for “a communication under subsection (1) shall not provide for arrangements or collective bargaining.”

In *Ryanair v The Labour Court*⁷⁹ the Supreme Court found that the Labour court did not have jurisdiction in giving its conclusion that the company's internal procedures should resolve the dispute. In a decision critical of the Labour Court Geoghegan J. held

“If there is a machinery in Ryanair whereby the pilots may have their own independent representatives who sit around the table with representatives of Ryanair with a view to reaching agreement if possible, that would seem to be "collective bargaining" within the ordinary meaning.”

The *Ryanair* case has had the greatest impact on union recognition in recent years with the decision giving a certainty to employers that they are not obliged to recognise trade unions. The *Ryanair* decision was welcomed by many employers who aim to reduce the power of the trade union. Whether this decision and its support from the business community had any

⁷⁴ N Howlin and R Fitzpatrick, The Feasibility of mandatory Trade Union recognition in Ireland,[2007] Dublin City Law Journal, Vol 29 178-208.

⁷⁵ *National Belgian Police v Belgium* (1979) 1 EHRR 578

⁷⁶ *Abbot and Whelan v ITGWU* (1982) 1 JISLL 56

⁷⁷ Industrial Relations Act 2001 s5(2)

⁷⁸ Industrial Relations (miscellaneous Provisions) Act 2004

⁷⁹ [2007] 4 IR199

effect on the *McGowan*⁸⁰ decision is unclear. It could, however be looked at as a catalyst of influence for the non-aligned contractors in their action.

3.5 Representation v Regulation

Doherty⁸¹ cites Ewing when describing the distinction between 'representational' and the 'regulatory' functions of trade unions. The representational function sees collective bargaining as a private activity between employee and employer. The employees choose to be represented by a trade union, any agreement however, is only agreeable with members of that trade union. Individual workers can opt out of a negotiation on an individual basis. The regulatory function is premised on the idea that trade unions are involved in a process of rulemaking that has an impact beyond their members. This is the model used most commonly in Ireland; an example of this is the Registered Employment Agreements within the Construction Industry. There are many contractors who are not party to the negotiations and do not have any representation in those negotiations but were legally obliged to meet the standards set in these negotiations. The regulatory system has many benefits and it is utilised in the public sector,⁸² as it allows pay and conditions to be set for all across particular sectors and grades even for those who are not members of the representative trade unions. This was also the case for REAs but outside these exceptions there is no statutory procedure whereby trade unions can apply to obtain negotiation rights with employers. The legal recognition of collective bargaining has been considered in *The Pharmaceutical Union, Mark Gouldson, Gouldson Pharmacy Ltd, Hunters Pharmacy v Minister for Health and Children*⁸³ where Kenny J. pointed out that collective bargaining agreements are generally are not intended to create legal relations and they do not give rise to contractual obligations. The Pharmaceutical case along with *Kenny v An Post*⁸⁴ clearly illustrates the legal standing of collective bargaining in Ireland. While Part III of the Industrial Relations Act 1946 has set out a number of exceptions, the general legal stance would seem to suggest no legal recognition for collective bargaining.

⁸⁰ [2013] IESC 21

⁸¹ Doherty (n51)

⁸² F Meenan, *Regulation of pay and conditions of employment* [2009], Irish Employment Law Journal, Vol 4, 92-97

⁸³ *The Pharmaceutical Union, Mark Gouldson, Gouldson Pharmacy Ltd, Hunters Pharmacy v Minister for Health and Children* [2010] IESC 23

⁸⁴ *Kenny v An Post* [1988] IR 285

3.6 Registered Employment Agreements

Registered Employment Agreements (REA) along with Employment Regulation Orders (ERO) are two mechanisms that are provided for under the 1946 Act which allow terms and conditions in specific industries to be set and become legally enforceable on all within that industry. REAs are collective agreements on pay and conditions of employment negotiated by employer and employee representatives from a particular industry. Any party to the agreement may apply to the Labour Court to have it registered. If the Court is happy that it meets the six criteria set out in section 27(3)⁸⁵ of the 1946 Act, it is obliged to register the agreement. Once registered the agreement becomes legally binding on all parties working within the industry to which it applies. Of the six criteria set out in section 27(3) of the 1946 Act⁸⁶, one should note the requirement that the agreement illustrate “the growth of harmonious relations between workers and employers by setting rates of pay and conditions of employment while at the same time preventing trade disputes. Employers in the Construction Industry who are sensitive to price competition see collective bargaining as an advantage as it sets a level playing field in the tendering process.”⁸⁷

3.6.1 Compliance with Registered Employment Agreements

The Employment Law compliance Act 2008⁸⁸ was introduced with the purpose of ensuring greater compliance with employment legislation. The National Employment Rights Authority (NERA) was established under the Act. NERA is responsible for monitoring a range of employment rights in Ireland through inspections of workplaces to ensure all records are in place and through following up on complaints made. A similar role had previously been carried out by the Labour Inspectorate who was responsible for ensuring compliance with Employment Regulation Orders and Registered Employment Agreements under the Industrial Relations Act 1946. In 2007 NERA carried out 416 inspections within the Construction Sector, breaches of regulations were detected in 56% of those inspections with a total of €1,336,824 being recovered.⁸⁹ These figures highlighted the problem of non-compliance with employment legislation within the Construction Industry and the importance of legislation and compliance with the legislation.

⁸⁵ 1946 Act, s.27(3)

⁸⁶ Industrial Relations Act 1946 s.27(3)

⁸⁷ Curtin (n 45)

⁸⁸ Employment Law compliance Act 2008

⁸⁹ NERA Quarterly, National Employment Rights Authority, Issue 1, 2008.

In 2002 a survey of apprentices in the construction industry that examined the application of the REA for the construction industry showed that 47% of those surveyed were not getting the correct take-home pay⁹⁰. This research highlighted the changes taking place in the industry and the undermining of the formal REA system that had been in place since 1967 in the construction industry. This research also called for greater coordination between the various agencies in regulating the industry.

In 2013, the Minister for Education and Skills introduced random audits on school and third level projects funded by the Department of Education and Skills⁹¹. All public works contracts include a clause specifying the payment of appropriate REA. The audits completed by Contractors Administration Services (CAS) to ensure that building contractors operating legitimately were protected and those who avoid their obligations were penalised.

Of the twenty-eight complaints received, nineteen have been referred to CAS for review (fourteen Construction Sites), six complaints no action taken as projects are not being funded by Department or the projects are nearing completion, two projects being referred to CAS for review and one complaint referred directly to NERA as they confirmed they were proposing to carry out a review

CAS completed 13 audits on school and third level construction sites in 2012. As a result of the audits, five projects have been referred to the Revenue Commissioners, one to the Department of Social Protection and one to NERA.⁹² These figures show the difficulty with compliance of employment regulations within the industry. This action and the insistence of public works contracts to compel contractors to pay the REA would seem to be in breach of the European Court of Justice's decision on *Rüffert*⁹³.

3.7 Legal Challenges

The REA system has often been criticised by many employers' organisations who express the view that it puts too many restrictions in place and prevents the creation of employment.⁹⁴ Up until recently social partnership has been lauded as a contributing factor to the success of

⁹⁰ Eddie Conlon, *Report highlights apprenticeship abuse*, Irish Construction Industry Magazine, March 2002, P32

⁹¹ Department of Education and Skills, Press Release, 24 April, 2013, Random audits to verify pay and conditions on building projects in the education sector to be introduced by Minister for Education & Skills.

⁹² <http://www.education.ie/en/Press-Events/Press-Releases/2014-Press-Releases/PR14-02-28.html>

⁹³ *Dirk Rüffert v. Land Niedersachsen* 3 April 2008 Judgment of the Court of Justice in Case C-346/06

⁹⁴ „Ristorio no w g -sting ommitt s „jrr tio n l', Ib s ys,' Th Irish Tim s, (Dublin, 02 O to b r 2013)

the Irish economy over the last 20 years.⁹⁵ The current economic crisis has seen the collapse of social partnership and has brought into focus legislation allowing for REA's in ERO's. The current economic climate and the public policy towards pay and conditions in the public sector has shone a spot light on the current REAs and has put pressure on the legislator to react to these changing conditions.

In *Serco Services Ireland Ltd v The Labour Court*⁹⁶ the applicant sought a declaration that the Labour Court had no power to vary the terms of a registered agreement. In this situation the Labour Court had found that the applicant was obliged to meet the requirements of the REA even though it had never been engaged in the general electric contracting industry. Serco Services was a facilities management company and they argued that the Labour Court could not extend the REA to include them. On appeal to the High Court it was found that under s.28 of the 1946 act⁹⁷ the the Labour Court could not include a variation widening the scope of the agreement to include workers who were not previously included. In this case the High Court ruled that there was an error of law in the Labour Court's interpretation of the Act. This was an indication on how important it was to employers to be outside the REA. This can also be evidenced from *Building and Allied Trade Union v Mythen Brothers Ltd*.⁹⁸ In this case Mythen Brothers Ltd. claimed that a number of carpenters engaged with them were self-employed contractors and therefore were not covered by the construction industry REA. In this case the Labour Court found that those working for the respondent provided their services personally and whether engaged on a contract for service or a contract of service are nonetheless workers under the 1946 Act. Murphy J. summarised the resulting position as follows,

“[I]t seems, or in any event, that the term ‘work’ is wide enough to include an individual subcontractor. The subcontracting 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 subcontractor or subcontractor as an employer of workers would appear to be within the ambit of the Registered Employment Agreement of 1967”.

This case differed to the Serco case, as the employer did not claim that they were outside the industry rather that they were independent sub-contractors and did not constitute a worker

⁹⁵ Kieran Allen, *The Celtic Tiger: The Myth of Social Partnership in Ireland*, (Manchester University Press, 2000)

⁹⁶ *Serco Services Ireland Ltd v The Labour Court* [2001] 11 I.C.L.M 27

⁹⁷ Industrial Relations Act 1946 s.28

⁹⁸ *Building and Allied Trade Union v Mythen Brothers Ltd*[2006] 17 E.L.R. 237

under the agreement. The High Court in accordance with s.32(1)(b) of the Industrial Relations Act 1946⁹⁹ directed the employer to comply with the REA. Much of the case law around the REAs involves the conflict between parties over whether they are covered or not covered by the REA. This can also be evidenced in the case of *Abama and Others v Gama Construction Ireland Ltd. and another*.¹⁰⁰ In this case the plaintiff issued proceedings against Gama Construction Ireland. The plaintiff was seeking to have their contract of employment governed by the REA and to recoup for lost wages, pension contributions and expenses due. The defendant argued that the case was being dealt with in the wrong jurisdiction and that it should be dealt with in Turkey, the home country of Gama Construction. Murphy J. found that the plaintiff's "having demonstrated that this jurisdiction has the most relevant substantial connection with this jurisdiction." This has shown that there is no binary result with the jurisdiction or who is covered by the legislation by the REAs but not with the actual legislation itself; however there have been a number of challenges to the ERO and REA method of setting pay and conditions.

3.8 McGowan and Ors V Labour Court and Ireland

As has been discussed earlier there is very little difference between EROs and REAs. Although they are contained in different parts of the Industrial Relations Act, their purpose is the same namely setting minimum terms and conditions of employment for groups of workers from particular industries. The *McGowan*¹⁰¹ case was brought by appeal to the Supreme Court to challenge the operation, effectiveness and validity of the electricians REA within the construction sector.

The validity of collective bargaining agreements under the Industrial Relations Act has been tested in the late 1970s in the case of *Burke v Minister for Labour*¹⁰². This case was taken by representatives of the employers on the grounds that an ERO set in the hotel industry was unconstitutional. It was held in the Supreme Court that the relevant JLC had failed to comply with fair procedures. Henchy J. in describing the power delegated to the JLCs to make proposals to the Labour Court for fixing statutory minimum wages stated

“[I]t will be seen, therefore, that the power to make minimum-remuneration order is a delegated power of a most fundamental, permissive and far-reaching kind. By the

⁹⁹ Industrial Relations Act 1946 s.32(1)(b)

¹⁰⁰ *Abama and Others v Gama Construction Ireland Ltd. and another* [2011] IEHC 308

¹⁰¹ [2013] IESC 21

¹⁰² *Burke v Minister for Labour* [1979] IR354

above provisions of the Act of 1946 Parliament, without reserving to itself a power of supervision or a power of revocation or cancellation (which would apply if the order had to be laid on the table of either House before it could have statutory effect) has vested in a joint labour committee and the Labour Court the conjoint power to fix minimum rates of remuneration so that non-payment thereof will render employers liable to conviction and fine and (in the case of conviction) to being made compellable by court order to pay the amount fixed by the order of the Labour Court. Not alone is this power given irrevocably and without parliamentary, or even ministerial control, but once such an order is made (no matter how erroneous, ill-judged or unfair it may be) a joint labour committee is debarred from submitting proposals for revoking or amending it until it has been in force for at least six months. While the parent statute may be amended or repealed at any time, the order, whose authors are not even the direct delegates of Parliament, must stand irrevocably in force for six months.”

The court held that given the extensive nature of the delegation, it was necessary to conclude that the Oireachtas had intended that the power would be exercised within the terms of the relevant Act and based on fairness and reasonableness and good faith. In the circumstances the particular order was quashed. This decision was delivered within a day of the *Cityview Press v An Chomhairle Oiliúna*¹⁰³ and in light of this the Burke decision was reflective of the „principles of political tests set out in *Cityview Press*”.

In *Cityview Press v An Chomhairle Oiliúna* the question as to whether the Oireachtas could delegate certain powers to a defendant body was answered in the Supreme Court. The Supreme Court specified that principles and policies of any legislation should be dealt with by primary legislation of the Oireachtas while details may be handled by secondary legislation. In this case the plaintiff complained that only the legislature could impose levies supported by the Industrial Training Act 1967. O’Higgins C.J. found that there was no unauthorised delegation of authority because

“In the view of this Court, the test is whether that which is being done is an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an

¹⁰³*Cityview Press v An Chomhairle Oiliúna* [1980]IR381

authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power.”

In the case of *Laurentiu v Minister for Justice, Equality and Law Reform*¹⁰⁴ the Aliens Act 1935 was found to be unconstitutional in the manner in which it gave the Minister for Justice, Equality and Law Reform the power to deport. In effect the Minister was found to be without statutory powers in relation to deportation of non-Irish nationals from the State. In this case there were simply no principles or policies in the legislation for the Minister to follow. Ryan¹⁰⁵ states “that where no constraints, minimum or no principles or policies, leaving the Minister to his own devices, the measures will more than likely be unconstitutional.”

The decision of Burke had very little effect on the employment law landscape until the economic downturn in 2007. At this point employers started to question the validity of JLCs and the setting of minimum wages outside the Oireachtas. It was argued that the task of enacting legislation falls within the exclusive competence of the Oireachtas. Article 15.2.1 of the constitution states;

“the sole and exclusive power of making laws or the statute is hereby vested in the Oireachtas; no other legislative authority has power to make laws or the statute”

In 2008, the Irish Hotels Federation (IHF) challenged the ERO set by the hotels JLC.¹⁰⁶ The Irish Hotels Federation challenged the procedures adopted in making an ERO and also challenged the JLC system on the basis that it amounted to a delegation of the law making function to a body not subject to the supervision of the Oireachtas. The applicant sought a declaration that the provisions of s.42 and s.43 of the Industrial Relations Act 1946 and s.48 of the Industrial Relations Act 1990 were invalid as they allowed an impermissible delegation of legislative function. A further claim was also sought “pursuant to art.5 of the European Convention on Human Rights that these sections are incompatible with the State's obligations under the European Convention on Human Rights and in particular parts 6 and 1 of the First

¹⁰⁴ *Laurentiu v Minister for Justice, Equality and Law Reform* [2000] 1 ILRM 1

¹⁰⁵ Fergus W. Ryan, *Constitution Law Nutshell*, 2nd Edn., (2008)

¹⁰⁶ *Vaughan Lodge Limited, Michael Vaughan and The Irish Hotels Federation v The Hotels Joint Labour Committee, The Labour Court, Ireland and the Attorney General*, (Record Number 2007/1508 JR)

Protocol.” The statement on the IHF should submit on right in procedural aspects of the case. The challenges of the constitutional issues were not pursued.

It wasn't long before it was pursued in another session in *John Grace Fried Chicken v The Labour Court*¹⁰⁷ the plaintiff claimed that the provisions of the Industrial Relations Act 1946 and 1990 allowing JLCs and the Labour Court to set terms and conditions of employment in the catering sector were unconstitutional. The arguments made were broadly the same as those made by the Irish Hotels Federation. In *John Grace Fried Chicken v The Labour Court* the constitutionality of the JLC was tested when Feeney J. stated that,

“[I]n considering the full terms of the 1946 and 1990 Acts, the position is that whilst the Joint Labour Committees and the Labour Court might be said to be entrusted with promoting harmonious industrial relations and preventing and/or settling trade disputes through the regulation of terms and conditions of employment, the Acts are entirely silent and leaves to the Labour Court and the Joint Labour Committees an unfettered discretion as to what to take into account and the basis upon which the rates of remuneration and terms and conditions of employment are to be determined. Given that the fundamental power under Part IV of the Act is the determination of the content and the making of EROs and given the complete absence of any principle or policy upon which such matters are to be determined, the absence of any principle or policy results in a situation where the delegated body is establishing its own principles and policies and not just filling in details or making choices or decisions within principles and policies. The only potential guidance is in “the skeletal provisions” in the sections which relate to the 1946 Act.”

In the *John Grace*¹⁰⁸ case Feeney J. referred to the case of *Leontjava v DPP*¹⁰⁹ which was relied upon by the defendants. In this case the Supreme Court held that delegation under the Aliens Act 1935¹¹⁰ was not in breach of Article 15.2.1. The Supreme Court identified principles and policies sufficient to ensure that the order was not in contravention of Article 15.2.1 of the Constitution. Feeney J. stated in *John Grace* that the statutory provisions are such that there are no core policies or principles identified in the Act to guide the exercise of delegated power. Feeney J. also went on to say that the delegated power was excessive. He

¹⁰⁷ *John Grace Fried Chicken v The Labour Court* [2011]3 IR 211

¹⁰⁸ [2011] IEHC 277

¹⁰⁹ *Leontjava v DPP* [2001]1 IR 591

¹¹⁰ Aliens Act 1935

did however state that the delegation would be lawful if the Act delegating the power had either in 1946 or by subsequent amendments provided policies and principles to provide guidance. As this did not occur the JLC was deemed to be an illegitimate transfer of legislative power. In the findings made by the court, the plaintiffs were entitled to a declaration that the provisions of s 42, 43 and 45 of the 1946 Act and s48 of the 1990 Act are invalid having regard to the provisions of Article 15.2.1 of the Constitution and also the declaration sought that the ERO is invalid.

This decision was the first time since *Burke*¹¹¹ that the constitutional question regarding the 1946 Act was answered and it was not a positive answer for employees of the catering sector. The decision was welcomed by employer representative groups, with many calling for the abolition of the ERO system in its entirety. IBEC believes that the JLC system is archaic and should be abolished completely¹¹². The Trade Unions on the other hand have expressed concern that the abolition of JLCs would be an attack on the structure in place to protect the lowest paid workers in our society.¹¹³

The John Grace¹¹⁴ chicken decision was followed by *McGowan and Ors v The Labour Court*.¹¹⁵ This case involved a REA made in respect of the electrical trade in the construction sector. The case involved a group of electrical contractors organised in the National Electrical Contractors Association. The employers argued that they are bound by the wages set and the conditions of the REA, even though they were not party to the agreement. They also argued that the employers' interests were not represented by parties that negotiated the REA. The McGowan's submitted proposals to the Labour Court by the employers' trade union to vary the REA and to increase the minimum pay of electricians in the construction sector. At the same time an application was made to the Labour Court by 500 contractors seeking a cancellation of the REA. The Labour Court held an 11 day hearing and issued a determination refusing the application to increase the remuneration, but also refusing the application made on behalf of the contractors for the cancellation of the existing REA. The representatives of the contractors sought judicial review to challenge the decision refusing cancellation and from this the *Bunclody proceedings*¹¹⁶ commenced. The relief sought by the applicants included a declaration that the 1946 Act is unconstitutional and breaches the

¹¹¹ [1979] IR354

¹¹² <http://agenda.ibec.ie/jwfhq221wuc>

¹¹³ http://archive.unitetheunion.org/regions/ireland/news_from_ireland/unite_calls_for_emergency_legi.aspx

¹¹⁴ [2011] IEHC 277

¹¹⁵ [2013] IESC 21

¹¹⁶ *Bunclody Electrical Contracting Limited & Others v The Labour Court & Others* (Record No. 2009/507 JR)

European Convention of Human Rights as it permits parties to enter an agreement which is binding on persons who are not party to the agreement itself. The *Bunclody proceedings* which were heard with the McGowan case in the High Court were struck out in July 2012 following the appointment of a liquidator to the last remaining appellant in the case.

The *McGowan Case* is what was left from the previous challenges to the REA. The case was taken by a number of contractors with many of them falling away due to the economic crisis and the downturn in the construction industry. The appeal to the Supreme Court was extremely complex in the number and nature of the challenges and it was agreed to narrow the issue on this appeal to two questions:

- A. Are the appellants entitled to raise the issue and; is the Supreme Court entitled to determine this issue in circumstances where although the issue was raised in the proceedings from which the appeal is taken, and argued before the High Court, the learned High Court judge expressly did not determine the issue?
- B. Does Part III of the Industrial Relations Act of 1946 or any section thereof contravene Article 15.2.1 of the Constitution by delegating the making, variation and cancellation of registered employment agreements to the Labour Court and the parties to such agreements?

Although there was no determination in the High Court the Supreme Court determined that it could hear an appeal on an issue which for whatever reason, the High Court has heard no determination. The second issue was more complex and dealt with the constitutional question of delegated legislation. Article 15.2.1 of the Constitution states

“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws or the State.”

In the decision, the Supreme Court felt it would be instructive to compare the extensive area and nature of authorisation involved in the McGowan case and that in *Cityview Press v An Chomhairle Oiliúna*¹¹⁷ case. In *Cityview Press* the Supreme Court had to consider whether levies imposed on a designated industry were an unauthorised delegation of parliamentary power or merely giving effect to principles and policies contained in the statute itself, that is

¹¹⁷ [1980]IR381

the law is contained in the statute and the Minister or subordinate body is only filling in the details. Denham J. confirmed this in *Laurentiu*¹¹⁸ when she stated that the

“[I] gisl tur shoul s t out “ st n r s, go ls, tors n pur pos s”

The *John Grace*¹¹⁹ decision has brought more clarity to the delegation of power as set out in a REA and ERO. Hogan and Whyte¹²⁰ sets out Article 15.2.1 as providing important means of curbing ex ssiv us o x utiv pow r on th on h n whil “ nsuring rigorous h r n to th ultr vir s o trin in th int rpr t ion o st tut s on th oth r”. In *Kennedy v Law Society of Ireland*¹²¹ Fennelly J. explained the rationale for the ultra vires doctrine in light of Article 15.2.1,

“Th Oir ht s m y, by l w, whil r sp ting th onstitution l limits, l g t powers to be exercised for stated purposes. Any excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle and, ultimately, the rule of law itself. Secondly, the courts have the function of review of the exercise of powers. They are bound to ensure respect for the laws passed by the Oireachtas. A delegation of power which pursues, though in good faith, a purpose not permitted by the legislation by, for example, combining it with other permitted purposes is enlarging by stealth the range of its own powers. These principles, in my view, must inform any test for deciding whether a power has been x r is ult r vir s.”

The courts have also understood the necessity of delegated legislation due to the enormous body of subordinate legislation. In the *State (Walsh) v Murphy*¹²² Finlay J. gave a very useful analysis of the nature of the legislative power conferred by Article 15.2.1 on the Oireachtas, h st t th t “this pow r w s bsolut n ll-embracing subject to the qualifications impos upon it by th Oir ht s.”

In the *McGowan* decision the Supreme Court found that Part III of the 1946 Act was unconstitutional because the power conferred on the representative parties in an industry or s tor to m k oll tiv gr m nt by th L bour Court w s „l w m king’ pow r. Th Supreme Court ruled that

¹¹⁸ *Laurentiu v. Minister for Justice* [1999] IESC 47

¹¹⁹ [2011] IEHC 277

¹²⁰ Hogan, G and Whyte G, JM Kelly: *The Irish Constitution* (2003)

¹²¹ *Kennedy v Law Society of Ireland* [2002] 2 IR458

¹²² *State (Walsh) v Murphy* [1981] IR275

“Wh t pp rs to b l w is b ing m by p rsons oth r th n th O ir ht s”.

The Supreme Court also importantly noted that

“[n]o gui n or instru tion is giv n to th L bour Court s to how th m tt r s o representativity or restriction on employment or inefficiency or costly methods of work r to b g ug .”

The court also went on to say that

“P rt III nnot b s i to b m r ly th illing in o g ps in s h m lr y st bli sh by th O ir ht s.”

The Supreme Court allowed the appeal and made a declaration the provisions o “[P] rt III o the Industrial Relations Act are invalid having regard to the provisions of Article 15.2.1 of th Constitution o Ir ln” . Doh rty¹²³ suggests that the language of the judgement is noteworthy when the court stated that the provisions of P rt III giv ris to th “prosp t o burdensome restraint on completion for prospective employers and intrusive paternalism for prosp tiv mploy s”. Doh rty¹²⁴ submits the argument that this decision is reflective of the absence of legislation on Union recognition and the statutory right to collective bargaining.

3.9 Industrial Relations (Amendment) Act 2012

In response to the decision of John Grace, the Minister for Jobs, Enterprise and Innovation, Richard Bruton, announced that legislation reforming JLCs and REAs would be introduced. The Industrial Relations (Amendment) Act, 2012 sets stricter conditions for the establishment and variation of EROs and REAs. Section 7(6) of the 2012 Act makes fundamental changes to REAs by allowing for an agreement to be cancelled if it is satisfied that the employer r pr s nt tiv is no long r subst nti lly r pr s nt tiv o th mploy rs’ work rs. S tion 5 of the 2012 Act inserts a new section 27 of the 1946 Act, which lays down matters to which the Labour Court must have regards when formulation proposals for a REA. These are new policies and principles to be taken into account by the Labour Court before an agreement is registered including ratification by the Oireachtas. Measures for cancellation and variation as well as the capacity to allow a party who is not party to the agreement to seek changes to that

¹²³ Doherty (n66)

¹²⁴ Doherty (n66)

agreement are included. S.9 of the 2012 Act has amended Part III by inserting a new s.33. Section 33 allows for exceptions from the obligation to pay the rates provided for under the Act. After registration of an REA by the Labour Court, the REA must be forwarded to the Minister for Jobs, Enterprise and Innovation who must, before signing such an order, be satisfied that the Labour Court has had due regard to the principles set out in the 2012 Act, as well as the technical requirements for registration. Following such Ministerial approval, the Houses of the Oireachtas have an opportunity, within twenty-one days, to cancel such registration and failing such a cancellation the REA is legally binding. Section 7 of the 2012 Act amends s.29 of the 1946 Act and provides for further detailed procedures in respect of variation, review, cancellation and indeed enforcement of REAs. The 2012 Act also provides for a limited exemption for employers applying REAs in respect of a worker or a number of workers for a period of not less than three months, and not greater than 24 months. The Labour Court must have regard to multiple factors in deciding whether or not to grant such an exemption. It should however be noted that the McGowan decision did not refer to this legislation as it dealt with an REA constructed under the 1946 Act and the constitutionality of the 2012 Act has not been tested in the courts.

3.10 European Legislation

Any new legislation that will incorporate proposals for the introduction of legally binding collective agreements must take into account European legislation and European case law. EU legislation in employment law sets up minimum requirements at EU level. The Member States then have to transpose it into their national law and implement it. Ryan states that “wh r th r is on li t b tw n th l w o th Europ n Union n Irish l w , in lu in g th Constitution, Europ n Union l w lw ys pr v ils.”¹²⁵ Hendy¹²⁶ points out that the law of the European Union both recognises the right to engage in effective collective bargaining as a fundamental social right and positively encourages collective bargaining.

3.10.1 Posted Workers Directive

The Posted Workers Directive¹²⁷ was introduced to protect workers who are temporarily transferred from one member state to another to complete a contract of work. The member state the worker is being transferred to, will have certain minimum terms and conditions of

¹²⁵ Fergus W. Ryan, *Constitution Law Nutshell*, 2nd Edn., (2008)

¹²⁶ Hendy (n39)

¹²⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

employment and these must also apply to the worker being transferred. The member state hosting a posted worker must ensure he is protected by the minimum standards in article 3(1). These are in the building and construction trades, collective agreement standards that 'have been declared universally applicable' across a geographical area. In Ireland, all employment legislation covered by the Directive applies to posted workers.¹²⁸ REAs were considered to be applicable to all posted workers in the area to which they applied and it was not considered necessary to devise a specific mechanism for applying an agreement to posted workers. With the registration of the employment agreements gone it is not clear as to whether the posted workers work under the employment agreement or to the national minimum standards. However Article 3(8) states that

“In the absence of a system of bringing collectively agreed standards or arbitration awards to be of universal application within the meaning of the first subparagraph, member states may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory”

3.10.2 Ireland

The Laval¹²⁹ case followed the decision of *International Transport Workers Federation v Viking Line ABP*¹³⁰, this case involved a shipping company who wanted to operate under the Estonian flag so that it could use Estonian workers on lower wages than the higher Finnish wages for the existing crew. The International Transport Workers Federation (ITWF) opposed such "reflagging" for convenience by companies registering their ship abroad in a low labour cost jurisdiction, when their real origin is in another country. The European Court of Justice held that it was possible that collective action taken by workers to protect their interests could be unlawful because it infringed the employer's interests under TFEU article 56.

¹²⁸ Section 20, Protection of Employees (Part-Time Work) Act 2001, Part 3

¹²⁹ *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160

¹³⁰ *International Transport Workers Federation v Viking Line ABP* [2008] IRLR 143

The Laval¹³¹ decision was given very soon after that of *International Transport Workers Federation v Viking Line ABP* and has direct significance to the Irish Construction Industry since the McGowan decision. A Latvian company, Laval Un Partneri Ltd. won a contract from the Swedish government to renovate schools. Laval Ltd. posted Latvian workers to Sweden to work on site. These workers were on less favourable conditions to that of their comparable Swedish workers. The Swedish Building Workers' Union (Svenska Byggnadsarbetareförbundet) asked Laval Ltd. to sign its collective agreement. This collective agreement would have been more favourable than the terms required to protect posted workers under the Posted Workers Directive, and also contained a clause for setting pay that would not allow Laval Ltd. to determine in advance what the pay would be. Laval Ltd. refused to sign the collective agreement. The Swedish Builders Union, supported by the Electricians Union called a strike to blockade Laval Ltd's building sites. As a result, Laval Ltd. could not do business in Sweden. It claimed that the blockade infringed its right to free movement of services under TEC article 49 (now TFEU article 56). The Swedish court referred the matter to the European Court of Justice.

The Court stated that Directive 96/71/EC, concerning the posting of workers to another member state in the framework of the provision of services, allows the host Member State to make the provision of services in its territory by posted workers conditional on the observance of a set of terms and conditions of employment, more specifically mandatory rules for minimum protection provided for in Article 3(1)(a) to (g) of the Directive. This makes it possible to ensure both minimum protection for posted workers and a climate of fair competition between national undertakings and undertakings which provide services internationally.¹³² However Article 3 of the Posted Workers Directive preclude a union from taking collective action to attempt to force a foreign service provider to negotiate with it on the rates of pay for posted workers and to sign a collective agreement, some terms of which are more favourable than the member state's legislative provision. This would seem to suggest that since the McGowan decision foreign contractors cannot be bound by any conditions set through the collective agreements between the Unions and the Employer representatives unless they are universally applicable.

¹³¹ *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160)

¹³² http://ec.europa.eu/dgs/legal_service/arrets/05c341_en.pdf

The *Rüffert*¹³³ case concerned a law from the German federal state of Lower Saxony on the work of public contractors, applying to all contractors with a value of more than €10,000. The law, similar to the REA, was aimed at preventing unfair competition within the construction and transport sectors that could arise through the use of cheap labour, by limiting the right to contract to those undertakings prepared to pay the wages laid down in the relevant sectorial collective agreement. The law also extended beyond the contract to sub-contractors and provided for a penalty on the contractor for any breach of the law by the sub-contractor. The court noted that the German law did not itself fix a minimum rate but merely applied the terms of a collectively agreed rate and noted also that the requirement was not universally applicable, as it only applied in relation to public service works. The fact that private sector workers did not benefit from the German law meant that it was not arguable that it was for the protection of workers or had the objective of ensuring the protection of independence in the organisation of working life by trade unions.

This summary has significant implications for the ability of public authorities to advance certain social goals through the exercise of their procurement function. In brief, the judgment indicated that, in the context of the Posted Workers Directive, it is a violation of the EC Treaty to impose working conditions for those working on public contracts that do not apply to workers in general. The Court ruled that such an action would be in breach of the freedom to provide cross border services under Article 56 of the Treaty on the Functioning of the European Union¹³⁴. The ruling brings into question the effect of any condition in a public works contract that compels a contractor to meet the conditions of a REA.

The current vacuum also highlights problems for the Construction Industry as Article 1 of Directive 96/71/EC¹³⁵ provides that “the Member States shall ensure that the terms and conditions established by law or by universally applicable collective agreements apply to workers who are all upon to work or limit prior in no other Member State.” However as the *Laval*¹³⁶ case made clear, the absence of a law or a universally collective agreement means that there is no term that must be applied. If an overseas contractor was to tender a public works contract they may not have to meet the requirements of the REA based on the *Laval* in Regulations.

¹³³ *Dirk Rüffert v. Land Niedersachsen* 3 April 2008 Judgment of the Court of Justice in Case C-346/06

¹³⁴ Treaty on the Functioning of the European Union – TFEU (2009)

¹³⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

¹³⁶ *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160

3.11 Construction Contracts

The principal argument advanced in favour of the maintaining of the REA system is that they provide for stable industrial relations in the sector to which they relate. In light of the McGowan decision, the absence of a legally binding REA reduces this stability and removes the level playing field for contractors. This not only has consequences for employers and employees, it is also hazardous for clients engaged in construction contracts. Under clause 4 of the RIAI (Royal Institute of Architects of Ireland) Form of Contract a variation may arise from legislative enactment. The clause states

“Wh r t r th sign t t th ost o th p r orm n o this ontr t in r s s or decreases as the result of any legislative enactment, rule or order or the exercise by the Government powers vested in it, whether by way of imposition of new duties or tariffs or the alteration of existing duties or tariffs or the restriction of licences for the importation of any commodity, or by way of affecting the cost of labour otherwise, the amount of such increases or decreases as certified by the Architect shall be added to or u t rom th Contr t Sum s th s m y b .”¹³⁷

With this in place a contractor who tendered for a project after the McGowan decision could legitimately make a claim if the Oireachtas creates new legislation imposing duties on an employer to meet the requirements of an REA that they were not obliged to meet when the contract was formed. The vacuum that currently exists leaves clients exposed to a genuine claim under this clause. Under the Public Works Contracts for Building Works the contractor accepts the risk of any cost increase arising out of changes in legislation during the lifetime of the contract. Under the NEC3 contract the client can choose to add in from a list of additional on it ions o ontr t. Z18 ls with “p y n on it ions o mploy m nt,” l us Z18.2 states

“Th Contr tor nsur s th t th r t o p y n th conditions of employment, including pension contributions, for all workers comply with the applicable law and that those rates and conditions are at least as favourable as those for the relevant

¹³⁷ The RIAI Articles of Agreement 2012 Editions (Yellow and Blue)

category of worker in any employment agreement registered under the Industrial Relations Acts 1946 – 2004.”¹³⁸

The contractor takes on the risk of the REA increasing and it becomes a cost that they must bear. Contracts that make direct reference to the REA may be difficult to implement in the absence of any firm legislation.

3.12 Conclusion

It has been argued on ideological and ethical grounds as to why collective bargaining is required within the construction industry. The challenges made in respect to the JLC and REA systems were brought by groups of small employers in the catering and electrical contracting sectors, while in the electrical sector the larger employers remained in support of the retention of the REA. The McGowan decision has left the construction industry in a state of uncertainty with regard to its industrial relations mechanism for setting pay and conditions. It is unclear whether the 2012 Act¹³⁹ satisfies the criteria in the McGowan decision, however as noted earlier many academics believe that it does not meet the requirements set out in the judgment. In Curtin’s¹⁴⁰ opinion the REA has delivered industrial relations stability. Curtin also believes that in the absence of a REA there is a real risk of a race to the bottom in tendering with the employee being the one who ultimately bears the burden of this practice. This is confirmed by Doherty¹⁴¹ when he articulates that the current collective bargaining situation is in Ireland in a state of “limbo” until the provisions are successfully implemented in this chapter. The Government must now put in place legislation that will ensure stability to all within the construction industry. This should be guided by EU legislation as well as a duty to ensure good industrial relations across all sectors especially lower paid workers and transient workplaces like that created through the construction process. Cusack¹⁴² has expressed the view that “human capital holds the key to competitive advantage” and with this in mind any governance of the labour market must keep at its core the collective needs of both employer and employee.

¹³⁸ NEC 3, The New Engineering Contract (NEC), of which the Engineering and Construction Contract (ECC) forms a part, is a suite of standard form construction contracts created by the Institution of Civil Engineers.

¹³⁹ Industrial Relations Act 2012

¹⁴⁰ Curtin (n 45)

¹⁴¹ Doherty (n66)

¹⁴² A Cusack, *Too Many Cooks: Overcrowded in the Labour Law Landscape and the Decline of Collective Negotiations* [2012] 2, 45-52

Minister Bruton's unwillingness to legislate for collective bargaining in light of the Ryanair case is worrying for any future legislation. In order to promote industrial peace, collective bargaining must be seen as a public good. How any future legislation is to be drafted will be dependent upon the Government's commitment to finding a solution that is fair for both employers and employees. Without a duty on employers to enter into collective bargaining it will be difficult to see how any legislation will contribute to industrial rest. In the absence of any REA there is a real risk that any "right to the bottom" would have a destabilising effect upon the industry, and would cause an increase in trade union activity, leading to local bargaining, uncertainty and ultimately to strike action. This thesis will examine how this legislation could be drafted to ensure that it promotes industrial harmony for all within the industry.

Chapter 4

Presentation of findings

4.1 Introduction

The key findings of the research gathered through the interviews will be presented under the main themes of the research. The presentation of the results will be accompanied with some discussion of their meaning or significance to the research aim. The semi structured interviews were prepared with a set list of questions that were forwarded to the participant a number of days prior to the interview. The questions were designed with the main themes in mind and dealt with on a question by question basis.

Further themes arose from the interview process and participants were encouraged to expand on their answers to facilitate the inclusion of new themes.

4.2 Reaction to the McGowan Decision

There was a consensus among all participants that the McGowan decision was not unexpected and that any other outcome would have been a surprise. This tended to be based on the facts of the John Grace decision and the similar facts of both cases. Michael Doherty (NUIM) described the decision as the “most predictable decision ever” but admitted that the legislation set out in the Industrial Relations Act 2012 would probably fulfil the requirements to ensure REAs are Constitutional. He believed that any future legislation could probably mirror the 2012 Act. Dave Butler (formally NECI) welcomed the decision as he felt that the REAs had “still not surprised”. The two contractors interviewed, Michael O’Rielly (MDY Construction) and John Curtin (PJ Hegarty) felt that the industry had not yet been affected by the decision due to the depressed state of the industry. Both contractors had continued to pay all their employees the REA rate and have compelled their subcontractors to do the same. They did however feel that it was dangerous for the industry to continue without a REA in place as it allowed new entrants into the market to compete unfairly with only the national minimum wage as a regulatory base for wages.

Fergus Whelan (ICTU) saw the decision as a death nail to collective bargaining in the construction industry and said that “it couldn’t be more pronounced and wouldn’t be more motivating in the industry”. John Winters (CIF) isn’t satisfied with the decision saying that she believed the legislation proposed by Richard Bruton (Minister for Jobs, Enterprise and

Innovation) would fulfil the requirements of the industry. She did believe however, that the decision could have been prevented if the Unions were more responsive to the economic climate and had implemented a cut in the rate set in the REA.

“I think we were willing to negotiate the rate (electrical contracting REA rate) things could have been very different”

Dave Butler (formally NECI) confirmed this when he stated that the case would not have been pursued had the unions been more flexible. The unions had a different view on this, Eamon Devoy (TEEU) was of the opinion that the TEEU were very flexible and had agreed a 10% decrease in the rate¹⁴³. Fergus Whelan felt that the Unions were quite aware of the economic problems within the industry and pointed out that his members had taken a 7.5% cut in their rate with the possibility of another rate cut had the McGowan decision not been passed. Fergus felt that the introduction of National Employment Rights Authority (NERA) and EPACE had brought about a situation where smaller contractors that were never under the radar of the unions had now become obliged to pay the REA rates. Fergus felt through the inflexibility of NERA and EPACE, it was inevitable that the legality of the REA was going to be tested within the Courts. He stated that

“we brought some of this on our own heads by insisting that NERA come into the industry to replace the REA.”

Interestingly both Michael Doherty (NUIM) and Fergus Whelan (ICTU) both referred to the hostility the Higher Courts had towards collectivism and the preference that they had to protecting individual rights above collective rights. Fergus believed that the Judiciary have an “ideological aversion to signing employment contracts differently to any other form of contract”. Fergus still has no numbers to support this including their recent injunction Aer Lingus sought against SIPTU taking strike action. He also felt that the timing of the decision was crucial and suspects a different decision may have been concluded if there wasn't such an economic downturn in the industry with the prospect of a strike of construction workers was real.

¹⁴³ This rate was never implemented as it was not registered with the Labour Court

4.3 Reinstating the Legislation

The reinstating of legislation allowing a REA was of great priority to the CIF, the contractors and the unions. The only participant who did not believe it necessary to reinstate the REA was Dave Butler (formally NECI). It was pointed out by John Curtin (PJ Hegarty) that the Industrial Relations (Amendment) Act 2012 would have satisfied the Constitutional question as it had provided principles and policies for the Labour Court, the 2012 act was not in of itself unconstitutional but because the 2012 act was built upon the foundations of an act found to be unconstitutional it floundered. Jean Winters (CIF) was of the understanding that any new legislation introduced would include many of the provisions of the 2012 Act. Michael Doherty (NUIM) was of the same opinion and emphasised the importance of Government support for any legislation introduced through monitoring and future policy.

During the course of the interviews many of the respondents made reference to a draft framework document that they had been furnished with by the Government as a possible replacement for the 1946 Act. Fergus Whelan (ICTU) was very despondent about this draft framework document and is of the opinion that any new legislation will restrain workers from taking industrial action once an agreement is signed off on in the Labour Court. In contrast Eamon Devoy (TEEU) felt that his hand was very much strengthened by the proposed new legislation and that any future grievances that he may have with an employer will be dealt with in a more effective manner. Jean Winters (CIF) and Michael O'Reilly (MDY Construction) were of a similar viewpoint and believed that any new legislation needs to ensure that the construction sector remains competitive and remains an attractive route to a career. Jean wanted the REA to be reinstated and explained

“[t]he reason we went into the construction industry to start a company is so that our members can continue to employ people with other contractors”

4.4 The Current Vacuum

The current vacuum was a concern to the contractors (Jean Winters, Michael O'Reilly and John Curtin) as well as the unions (Eamon Devoy and Fergus Whelan), the only person not concerned with the vacuum was Dave. John Curtin stressed that

“PJ Hegarty's competitive advantage is that they are compelled because of existing employment obligations to pay the REA rate while contractors coming from outside the state are not”.

MI O'Rilly (MDY Construction) returned to the tender which he initially failed to win. He pointed out that the contractor who had won the tender was 20% lower than his tender. He claimed that based on his tender, that there was no way that the successful contractor could be meeting the REA rates with the tender submitted. Chris Lundy (AECI) believed that tendering had become impossible with no employment structure in place and with contractors unaware as to what their competitors are paying their employees.

All were confident that any employment contracts that predated the McGowan decision would have to be honoured and that it was only new contracts that were open to variation from the REA. Michael Doherty (NUIM) did feel however, that the rate could now be changed by agreement between the employer and employee which previously it could not. Dave Butler (formally NECI) was aware of a number of employers within the electrical industry who had agreed a reduced rate with their employees in order to stay competitive.

4.5 Construction Tendering

The CIF and the two contractors were unequivocal in their views on the tendering process, with all expressing great concern over "rate to the bottom" in the tendering of construction projects, with the wages of the construction workers being used to facilitate a downward spiral in tendering. Chris Lundy (AECI) expressed concern with contractors coming from outside of Ireland and only being obliged to pay the national minimum wage, while his members are tied to contracts that compel them to pay the REA rate. The unions were in no doubt that the "rate to the bottom" had begun in that there were rates of pay in Dublin that were less than 50% of the REA rate. Fergus Whelan (ICTU) was aware of many projects, where all the bricklayers were travelling from Northern Ireland, were not being paid the REA rate and had no pension contribution paid on their behalf.

With the exception of Dave Butler (formally NECI) all agreed that the absence of an REA has allowed contractors to use rates of pay to drive down tender prices. Dave felt that the market would dictate what an employee is paid and that if an electrician was worth €21.49 p/h, then he would probably get it. Dave compared the construction industry with the airline industry and asked the question

"what would Michael O'Leary or Iohanna Campbell do to pay the same rates as Aer Lingus?"

Jean Winters (CIF) was of the belief that making a comparison with other industries was not appropriate as the construction industry is a labour intensive transient industry with a different relationship between employee and employer than most other industries.

4.6 Contractors from outside the state

The CIF were very concerned about foreign contractors coming from outside the state having a competitive advantage over Irish contractors. They are of little doubt that if things stay as they are that their members will lose out and subsequently their employees. Fergus Whelan (ICTU) was of the opinion that any upturn in the construction sector has not been seen by Irish employees. He also believed that the contractors coming down from the Northern Ireland were very unlikely to go to a trade union and they are quickly undermining the rights that the unions have fought for years to get. Chris Lundy (AECI) also referred to specialist contractors coming into Ireland to complete work on a temporary basis and was of the view that these contractors were not adhering to the REA. An example of this is the large multinational chain stores that would have their own specialist teams brought in on a short term basis to complete a fit-out. Eamon Devoy (TEEU) was aware of this, but said that his experience was that if this was investigated, by the time the investigation is complete, the contractor has finished the job and returned to their home state. Jean Winters (CIF) feared that without legislation “foreign contractor could come in with reduced tenders and our members will not get any work”.

4.7 Foreign Direct Investment FDI

The construction industry has become more dependent on the FDI with any future investment being a very welcome boost for the construction sector. Since the McGowan decision, 5,000 construction workers have been employed on the construction of new premises and facilities through FDI clients¹⁴⁴. The opinions of the FDI companies was seen as very important to all who took part in the interview process, as they saw them as a major investor in the Irish Construction sector. John Curtin (PJ Hegarty) gave evidence of projects that his company had tendered, where they were compelled by the FDI to pay the REA rate. Michael Doherty (NUIM) was of the view that the FDI companies were not concerned about what agreement was in place as long as it was complied with by their contractors. He asserted that the FDI

¹⁴⁴Frank Conlon, *Bringing them home: foreign direct investment in Ireland* SCSI Journal (Autumn 2012)

companies were more concerned with ensuring industrial peace and preventing bad publicity for the company. John Curtin (PJ Hegarty) was in little doubt

“that the REA has brought about industrial peace within the construction industry and that if there was industrial unrest, it is unlikely that many of the FDI would have come to Ireland in the first place.”

Eamon Devoy (TEEU) was of the view that FDI companies may bring in foreign contractor if they felt it would reduce their costs. However he stated that

“if you have a regulated system in place then the foreign company must pay their workers the REA which takes away that competitive advantage and promotes Irish contractors.”

He was strongly of the view that the REA protects Irish employment. John Curtin (PJ Hegarty) also expressed the view that FDIs, especially the pharmaceuticals and the high tech industries, were much more concerned with completion dates than they were with a slight reduction in construction costs and they were willing to pay for that certainty.

4.8 Compliance

All participants in the research brought up the issue of compliance with the REA and how it was monitored within the industry. The CIF and the Contractors saw compliance as a huge issue with M1 O'Rielly (MDY Construction) on the view that NERA should be the compliance body in the same way the Health and Safety Authority (HSA) complete inspections. This would include more frequency of inspections and greater consequences to those not complying.

Fergus Whelan (ICTU) was of a different view and saw NERA as part of the problem, he thought that the stringent approach of NERA was not helpful to anyone in the industry. Fergus was of the opinion that compliance was monitored by union members on the ground prior to the introduction of NERA and that this was successful since the introduction of the Construction Industry REA. Eamon Devoy (TEEU) agreed with this to a certain extent in that he felt EPACE may have been a little inflexible in their approach to the noncompliance issues.

Through the interviews with the CIF, the contractors and the unions it became clear that in relation to industrial relations there were two sectors to the construction industry. The first

sector was the house and apartment building that had low union membership and tended to be far less compliant with the employment legislation. The second sector was the commercial and industrial sector, this sector was of far greater concern to the unions and the contractors. The TEEU membership tended to come from the second sector and for this reason the TEEU were much more concerned with compliance within this second sector. Eamon Devoy (TEEU) was of the opinion that the housing sector tended to be populated with very small contractors with little or no union representation. Eamon Devoy (TEEU) tended to be less concerned with the housing sector and stated

“w n v r w nt t r th hous b sh rs¹⁴⁵, th y i n ’t on rn us”

Fergus Whelan (ICTU) also alluded to this when he mentioned some high profile projects in Dublin and claimed that these projects were 100% unionised while house and apartment building had far less unionised workers. The contractors were not involved in housing or apartments and tended to complete most of their work in the commercial and industrial sector. It appeared that the respondents from industry were much more concerned with the commercial and industrial sector rather than the residential sector.

The CIF, the contractors and the unions were all very complimentary of Ruairi Quinn for his insistence that all the workers on the Department of Education and Skills projects be paid the REA rate. They felt that this showed a commitment on behalf of the Government to have the REA reinstated. Eamon Devoy (TEEU) did however have concern that CAS (Contract Administration Services) was reporting back to the Government and the Government were doing very little with those reports. It was put to him that the reason for this was because legally the Minister may not be able to compel his contractors to pay an REA rate. Jean Winters (CIF) dismissed this and believed the Minister was well within his rights to compel payment of the rate as it formed part of the Public Works Contract. Fergus Whelan (ICTU) saw CAS as a positive commitment from the Government but also said “th t th t w h v to us thir p rty s r l tr union w kn ss”. Michael Doherty (NUIM) was unambiguous when he stated that “it is unacceptable that the state should take out contracts with contractors who are in breach of employment law”

¹⁴⁵ „Hous b sh rs’ is t rm used in the electrical industry for electricians working in the housing sector.

4.9 Collective Bargaining

Collective bargaining was seen as an essential part of the construction industry by all of the key stakeholders except Dave Butler (formally NECI). Dave felt that each tradesperson should negotiate his own contract and that the terms of that contract would be based on the skill and experience of the individual. Michael Doherty (NUIM) predicted that the removal of collective bargaining in the construction industry would lead to “return to the bottom”. Eamon Devoy (TEEU) held that without a collective agreement you return to a master and servant relationship where all the power lies with the employer. Jean Winters (CIF) has seen a move away from collective bargaining since the McGowan decision but believes that the nature of the industry requires a collective bargaining system. Dave Butler (formally NECI) didn't appear to have a major problem with the principle of collective bargaining but was strongly opposed to legislation were a collective bargaining agreement was legally binding. He was of the view that there was sufficient employment legislation in place that “if the government wanted employment to grow they need to make it easy to do”.

Michael Doherty (NUIM) believed that collective bargaining was being moved away from and the coverage of collective bargaining decreasing with the decrease in union membership. He saw the “regulation on the employer's side” as a problem for the unions, since there are so many sub-contractors within the industry it becomes difficult to negotiate with them all and compel them to comply with any such agreements. John Curtin (PJ Hegarty) was of the view that collective bargaining is an essential practice in a properly functioning construction industry.

4.10 Future Legislation

One of the objectives of the research is to examine the future structure a REA may take; in identifying a structure the opinions of industry were critical to ensure that any structure met the needs of the industry. Most respondents gave an opinion in relation to the structure of any new legislation and the structure of the REA. Most believed that any new legislation should reflect the 2012 Act as they believed that the 2012 Act satisfies the Constitutional question. Fergus Whelan (ICTU) went further and believed that the threat of legal prosecution should be erased from any future legislation. He was of the opinion that

“if you walk people down to the minimal level or not complying with a REA, it will not be long before the Constitution itself will be taken”.

Dave Butler (formally NECI) was unequivocal in his views and felt that there should be no reinstatement of the REA system. All others were supportive of the REA and most had an opinion on the structure that it should take. Dave argued that the stakeholders wanted to keep the REA in place as part protectionism of all within the industry. Fergus Whelan (ICTU) gave this argument some credence when he stated that “M G o w n ’ s vision was the beginning of the end of the construction unions in the C I F”.

John Curtin (PJ Hegarty) commented that the structure the REA took did not overly concern him so long as it was agreed between the industry and the unions, this argument was dismissed by Jean Winters (CIF) who felt that the structure was critical to all within the industry and should be structured in such a way so as to promote employment and entrepreneurship. Jean was firm in her stance that any new structure should meet the requirements of the employees and the employers equally. Michael Doherty (NUIM) saw legislation that is equal employer and employee as being pointless, as whilst legislation must take into account competitiveness, it must primarily look at protecting employees.

Jean Winters (CIF) also argued that the Irish construction industry has a highly skilled, well trained labour force, which has been attracted into the industry by good rates of pay. Mel O’R illy (MDY Construction) backed this up in view of the opinion that if the industry is not maintain its high level of training and skill there would be a major shortage in the future. This was very important to all and it was felt that any new legislation should be mindful of this and consider the consequences on the industry of no structured pay rates. The unions reinforced this assertion and were fearful that if a REA was not re-established that “so called dumping” would take place in the Irish Construction Sector. John Curtin (PJ Hegarty) believed that if you have “run to the bottom” you will attract less skilled work or that will require more supervision on site and inevitably a larger final cost for people who want to procure buildings.

4.11 Structure of a REA

The structure of any new REA did come up on a number of occasions through the interviews. It was forwarded by Chris Lundy (AECI) that the current REA for the Electrical industry was antiquated and not fit for a modern construction industry. He gave the example of the payment of travel money and country money which he felt may have been reasonable in the 1960s but unreasonable with our modern network. Mel O’R illy (MDY Construction) tended to support this and emphasised that

“any introduction of a new REA should have an initial minimum should be reviewed in time”.

He was strongly of the view that any new REA should only deal with rates of pay and pensions only. The contractors, the CIF and the unions were hopeful that any new REA would include a section that dealt with pensions.

A second issue relating to a new REA was the introduction of a banding of rates. Chris Lundy (AECI) suggested that this banding may be based on the size of the project or perhaps on a geographical basis. Eamon Devoy (TEEU) did not dismiss this idea but did see complications with its implementation. Mícheál Ó'Rielly (MDY Construction) saw geographical banding as overly complicated to implement as many employees may be working in Dublin and living outside Dublin. Jean Winters (CIF) was of the view that

“when a system is put in place then try and address the concerns of all contractors, then I think we have some chance of getting it right”

She did however see agreement of any new REA as being very difficult with the number of vested interests involved. Fergus Whelan (ICTU) predicted any future negotiations of an REA would involve a pragmatic approach from all sides and would not eliminate any possible proposals.

4.12 Economic Climate

The economic climate and the meltdown of the construction sector was an underlying theme that a number of respondents referred to during the interviews. As the number of projects commencing declined, construction firms lowered employment to a level that caused mass emigration and undermined the REA as a system of maintaining wage rates. It would have been fair to assume that employers participating in the research would have been enthusiastic about employing trades people at lower rates so as to improve their competitiveness. However this was not the case. Mícheál Ó'Rielly (MDY Construction) was of the view that in order to ensure the industry maintained its high skill levels, legislative control was needed to uphold a minimum standard. It did however become clear that most did not see it as a dangerous time to enact legislation as most felt that the current vacuum was unacceptable and needed to be addressed. The unions however, did see it as a difficult time to agree a new REA due to the low level of activity in the Construction Industry. Fergus Whelan (ICTU) saw the agreeing of wage rates at the current time as very difficult. Since the economic crash he has

seen a concerted effort by the European Commission to drive down wage rates across Europe.

4.13 Social Policy

In correspondence received by the author from the Minister for Jobs, Enterprise and Innovation Mr. Richard Bruton TD, he has asserted that it is a priority of Government to introduce legislation that will fill the current vacuum in place. In introducing legislation he stated that,

“It has been the consistent policy of successive Irish Governments to promote collective bargaining through the laws of the country and through the development of an institutional framework supportive of a voluntary system of industrial relations that is premised upon promotion of a voluntary system of industrial relations.”

Michael O'Rielly (MDY Construction) agreed with the principle of a partnership approach between the unions and the employers but recommended caution to ensure that it does not go too far. He felt the Irish social partnership model went outside the scope of pay and conditions which he did not necessarily see as a good thing. Michael Doherty (NUIM) asked the question “what would be the minimum standard?” regarding this social partnership political question that needed to be addressed when formulating legislation.

4.14 Summary of findings

The interview process has been a very beneficial and rewarding process in light of the information gathered from the various participants. Within the constraints of this document, it is not possible to discuss every aspect of every interview conducted. However, by isolating key themes, a detailed and informed view can be formulated based on the information gathered. The respondents were very well aware of the key facts and consequences of the McGowan decision. Many also realise that in order for the industry to function efficiently into the future they must have an input into any future legislation. The interviews gave a great insight into how the industry perceives collective bargaining and brought about a situation where the industry representatives were agreeing with the employee representatives on many key issues. There would appear to be a protection of the institutions that they represent and the roles that they play in the creation of a new agreement. The absence of collective bargaining legislation seriously undermines the order within the industry and the respondents fear that this lack of order may diminish their function. There can be little doubt that the REA system has a significant role to play in the future landscape of the Construction Industry. The

structure of that legislation is still unclear but the research has shown that it may be extremely difficult to implement successfully.

Chapter 5

Discussion of Findings

5.1 Introduction

Having concluded an extensive literature review and concluded the interviews this chapter discusses the findings and carries out an analysis of those findings. This analysis chapter centres on the key themes that address the pivotal question, what are the implications of the *McGowan and Ors v The Labour Court*¹⁴⁶ on the construction industry. This chapter allows for a detailed discussion of the main findings and to utilise the information to build solid and well informed conclusions. The analysis allows the findings from the interview process to be validated through the literature review. This chapter will conclude with a summary of the key points of discussion.

The main findings arising from the key issues have been grouped into five main themes for discussion. These are

1. Support for collective agreements
2. The current vacuum
3. Future legislation
4. Enforcement and Compliance
5. Social and public policy

5.2 Support for collective agreements

It became apparent from an early stage in the research that the McGowan decision did not come as a surprise to anyone within the industry or within the legal profession for that matter. This seemed to be based on the decision of *John Grace fried chicken v The Labour Court* and that the fact of both cases were very similar. The overarching response from industry was that even though the legislation may have been found to be unconstitutional, it had worked well for the industry and was fair to both the employers and the employees. The CIF was of the opinion that it was the intransigence of the unions that brought the case to the Supreme Court forcing the constitutional question to be answered. This is contested by the unions who were more inclined to blame a neo liberal agenda being driven through the NECI and the

¹⁴⁶ [2011] IEHC 277

inflexibility of the compliance bodies NERA and EPACE. Establishing the culprits for the case going to the Supreme Court would seem like a fruitless exercise at this point as it is apparent that few are willing to take responsibility. It is however prudent to note that it was ultimately the structure of the legislation that brought it down. On that basis it is imperative that any future legislation addresses that constitutional question while at the same time does not make any future REA too inflexible to change.

The CIF and the unions saw the decision as having a very negative consequence on its members and it would appear that their concerns are well justified, with much of the literature pointing towards “r... or th bottom” or onstru tion t n ring. Th r s r h woul appear to favour legislative employment agreements for the construction industry due to its transient nature and unique employment relationship between employer and employee. The bs n o l gisl tiv ppro h will l to th xploit ion o work rs n “social umpi ng” in th onstru tion in us try.

It was clear during the interview process that it was a priority for the CIF, the contractors and the unions to have a system in place that controlled wages within the construction industry. The protection of its members was the main reason for this, rather than a greater social good or a better functioning construction industry. The CIF wanted to protect how their members tendered for projects and did not want to have a scenario were foreign contractors tender for work with an unfair advantage over their members. The unions wanted to ensure that their members were covered by minimum terms and conditions. The common thread with all the stakeholders was that the required order in their industry. Doherty¹⁴⁷ cites Ewing when s ribing th ist in tion b tw n „r pr s ntational’ n th „r gul tor y’ un tions o tr unions. There is little doubt that the unions and the CIF see their role as being a regulatory one, with an insistence that any agreement between them would have to be compulsory on all within the industry.

5.3 The Current Vacuum

The lack of legislation as it currently stands has highlighted a number of problems with the current vacuum. The contractors realise that they are at a competitive disadvantage to contractors who are new into the industry or are coming from abroad. There seems little doubt that the contractors who are contractual obliged to pay the REA are losing out on

¹⁴⁷ Doherty (n51)

projects to contractors who are not paying the REA. The research has shown that there are many contractors who have renegotiated rates of pay with workers and consequently are able to undercut their competition. The evidence has also shown that there are tradesmen coming from outside the state and are working for rates well below the REA. It is the author's opinion that the lack of legislation is putting jobs in the Irish construction industry at risk as it is supporting or ignoring contractors in promoting "social dumping" in the Irish construction industry.

One of the most interesting findings from the research was the consequence the vacuum may have on the Government Public Works Contract. It would appear that without legislation in place, the Government is unable to compel a contractor on public works contracts to pay the REA rates. During the interview process, Ruairi Quinn was commended by a number of parties for the inspections he has requested on projects being funded by the Department of Education and Skills, it would however appear that there is little he can do to contractor he finds to be non-compliant. This finding is based on the *Laval*¹⁴⁸ and *Rüffert*¹⁴⁹ decisions which formed part of the literature review.

5.4 Future Legislation

The Irish construction environment is highly fragmented and comprises clients, financiers, contractors, designers, government agencies, trades unions, and several other diverse interest groups. Against this background, it is an enormously diverse industry producing everything from structures valued from several millions of euro, down to routine building maintenance and repairs which are priced on hourly rates. When one combines these factors, it is not surprising that the creation of any new legislation is extremely complex and difficult to negotiate.

The construction industry differs from other industries in that its products (the buildings to be constructed) are often of a one off nature and the team that is used to produce this product (client, designer, suppliers, contractors and subcontractors) is disbanded once the product is completed.

Over the course of the last year a number of comprehensive submissions and presentations have been sent to the Government from a range of interested parties ranging from trade union

¹⁴⁸ *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160

¹⁴⁹ *Dirk Rüffert v. Land Niedersachsen* 3 April 2008 Judgment of the Court of Justice in Case C-346/06

representatives, employer representatives, State bodies and others. These submissions contained a range of often conflicting but rationally espoused positions submitted constructively in the interest of their members. It should however be the function of any new employment legislation to primarily protect the welfare of the workers while at the same time promoting competitiveness in the market.

5.5 Enforcement and Compliance

The research has highlighted major issues with the compliance of any new REA that may be introduced. Conlon¹⁵⁰ details the issue of compliance for apprentices within the sector while the Department of Education and Skills have released their figures presenting a bleak picture of compliance on Government funded educational projects. It is critical that any new legislation gives the powers and resources to a compliance body to ensure the issue of compliance is resolved. Although Fergus Whelan (ICTU) viewed compliance as a role of the union it is essential that compliance goes beyond union membership and includes all construction workers in all sectors. There was reference made to a lack of compliance in the housing sector and it would appear that there is support in ignoring this sector in the introduction of any new legislation. However if the legislation is to be enforced it should be enforced on all within the construction sector. It needs to be understood that it is not excusable to insist on minimum terms and conditions in one sector while ignore another sector of the same industry. The interested groups had reasons for excluding the housing sector. The CIF didn't see the housing sector as being important something that is not a ring process wasn't used in thus it isn't not to put their members at risk. The unions don't have strong representation in this area and find it problematic to recruit due to its fragmented nature and difficulties in organising it. The smaller employers saw the REA as stifling enterprise and felt it restricted the amount of work they could do and the jobs they could create.

The labour market segmentation that exists is an important factor for consideration in the structure of any new legislation. The segmentation of the market results in a differential in terms and conditions for employees between housing and commercial and industrial. The CIF and to a lesser extent the unions appear satisfied for this divide to exist. This would seem to contradict much of their arguments and brought about a realisation that it was only their

¹⁵⁰ Eddie Conlon, *Report highlights apprenticeship abuse*, Irish Construction Industry Magazine, March 2002, P32

members that they were concerned with. The research showed a contradiction in the aspirations of the unions, as it showed a protection of a certain number of workers rather than protection for all. It would be prudent that the Government is aware of the self-interest of the parties involved and ensures that the primary focus of any new legislation is to protect the workers in the construction sector.

The Government will have to create a framework that will ensure compliance is adhered to. This framework could use an existing framework such as the framework implemented by the Health and Safety Authority (HSA). This would most likely be completed by NERA. Whoever takes on the role of compliance will have to be allocated appropriate resources to develop, maintain and improve its compliance program. The construction industry needs to create and support a culture of compliance to encourage employment rights while managing its cost and competition.

5.6 Social and Public Policy

Social and Public Policy was a theme that needed to be thoroughly investigated if any new legislation was to be fully understood. In order for legislation to have authority it must be fully supported by the legislature. It would not be sufficient to enact legislation and then not fully support it through guidance, public policy and recourses. The research highlighted the question “What are the minimum standards?” in the answers were ambiguous at best. The author sees the question of minimum standards as being the role of the unions and the employers. If a proper mechanism is in place, establishing this should transpire through pragmatic negotiation rather than the Government enforcing a minimum standard on the interested parties. The Government have given a commitment to establishing a mechanism to facilitate collective bargaining, what form this take is still unclear. The author however is of the view that any mechanism should maintain the traditional volunteerism system.

The research has shown a decline in union membership over that last quarter century. This along with the breakdown in social partnership has seen a move away from collective agreement across all industries. The construction industry has clearly shown a preference to collective bargaining and sees it as an essential instrument to ensure industrial peace and to prevent workers' wages being used as a bargaining tool. The research has also shown a growing trend in FDI companies avoiding recognising trade unions, it did however highlight their support for REAs on their construction projects. This was motivated by the

need for certainty on their construction projects and the reputational damage an industrial dispute may cause them.

The lack of union recognition legislation did not appear to be of great importance to most within the industry. It became clear that legislation could not be enacted without a change to the Constitution, this is based on *Ryanair v Labour Court* decision. The enactment of legislation although not impossible is very unlikely at the present time. The unions see the legislation that will replace the Industrial Relations Act 1946 as more of a priority than union recognition.

5.7 Summary of Findings

The research has shown a clear support for a regulatory system of collective bargaining in the construction industry. The unions and the CIF see it as a necessity in order to maintain order within the industry. It is clear that their reasons may be self-motivated but there is little doubt that the alternative would fundamentally change the construction industry and not necessarily in a positive way. The maintenance of a highly skilled labour force and the regulatory system which prevents exploitation must be the aim of any new legislation. When formulating any new legislation the Government must be cognisant of the Constitution as well as European legislation.

The research findings have included interesting opinions in the context of a construction industry going through probably the most turbulent period it has ever experienced. The positive views expressed by all of the participants with regard to collective bargaining and the willingness to engage presents a strong rationale for the introduction of new legislation as a matter of priority.

Chapter 6

Conclusions and Recommendations

6.1 Introduction

In this chapter a number of recommendations arising from the study will be proposed. Concluding remarks and reflections on the research findings will follow. The recommendations have been informed by both the existing literature and the findings of the interviews.

6.2 Review of Research Aim and Objectives

The aim of this research is to examine the decision of the Supreme Court in *McGowan and Ors v The Labour Court* and explore the implications on the Construction Sector. In order to achieve this aim it was crucial to identify a number of objectives which would contribute to the research question. These objectives were outlined in the following way.

1. To examine the legislation and case law that has brought about the current position of Registered Employment Agreements in Employment law.

The literature review in chapter 2 examined the legislation and case law relating to the *McGowan and Ors v The Labour Court*. It extensively examined the rationale behind the decision and explored the Constitutional aspect of the decision. The literature review considered the historical context of the decision and came to a conclusion that the decision was strongly driven by structure of the Industrial Relation Act 1946 and the lack of guidance given to the Labour Court on registering an agreement. European legislation was also investigated and through this investigation it became clear that the current vacuum may be problematic for Government project if they insist on compelling contractors to pay the REA. The *ffert*¹⁵¹ and *Laval*¹⁵² cases highlighted the complexity of European Legislation that needs to be considered when drafting any new legislation.

The investigation of the literature highlighted a key concern of compliance within the construction sector towards employment legislation. This was confirmed through the interviews with most seeing it as a major issue. Any new legislation should be conscious that

¹⁵¹ *Dirk Ruffert v. Land Niedersachsen* 3 April 2008 Judgment of the Court of Justice in Case C-346/06

¹⁵² *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2008] IRLR 160

compliance will have to be properly supported if a new framework is to be successful and satisfactory to all within the industry.

2. To explore the public policy on collective bargaining within Ireland

This research found that the public policy on collective bargaining has altered over the last twenty years. It considered the political influence on public policy and traced the relationship between collective bargaining and the political parties in government. It found that the breakdown of social partnership and the introduction of the Financial Emergency Measures in the Public Interest Act had brought about a more adversarial approach towards collective bargaining and partnership. The respondents to the interviews displayed a clear preference towards a partnership approach with some fearing that it was a dangerous time to introduce legislation with the current lack of support for collective bargaining within the Government and the general public. The interviews also pointed towards an aversion on behalf of the judiciary towards collective rights and the belief that individual rights were given preference to that of collective ones.

The interviews have highlighted the importance of collective bargaining to the construction industry and have displayed how it is a key tool in the business processes involved in construction. The industry without collective bargaining was not investigated as the prospect was not entertained by the industry stakeholders. It would appear that future bargaining processes will have to be facilitated by Government with clear guidance for the Labour Court on legal registration.

3. To assess the consequences the McGowan decision has on current construction contracts and future Government project procurement.

The research found that the consequences on the contracts could be quite substantial. It established that most construction contracts in Ireland had a term that compelled contractors to pay the REA rate. The results from the interviews varied on this question with many of the view that the Government could compel contractors to pay the REA rate. However, this was contradicted by the literature which set out the problem of compelling a contractor to pay a rate on a public contract that he is not compelled to pay on a private contract. This arose from the *ffert* decision, which ruled that it did not allow a collective agreement to be enforced as there was no legislative agreement in place. The author would be of the view that the contractual requirements of construction contracts requires further research, but is satisfied

that it should be an area of great concern for the Government and should be the catalyst to introducing new legislation.

4. To assess the future of Registered Employment Agreements and to examine if the statutory protections in place are sufficient to protect the conditions of employees and the legitimate concerns of employers?

The research has clearly identified a need for Registered Employment Agreements within the construction industry. As well as the contractual issues mentioned above, the literature review has clearly shown that the construction industry requires a mechanism that can deal with setting rates of pay. The reasoning for this was twofold, the first being to create a protection of construction workers in a fragmented transient industry and the second to create a level playing field for all contractors when tendering for construction projects. This was confirmed during the interviews, with the contractors looking for certainty in tendering and the unions looking for protections for their members. Initially it was surprising that all the contractors were of this view but as the interviews progressed, their reason became clear. The contractors did not look at collective bargaining as a labour protection for employees but rather a necessary mechanism for successful tendering. The unions did not see the current employment legislation as sufficient to protect their members in the construction industry. They regarded the industry as a difficult environment to work with numerous health and safety concerns which requires great legislative mechanisms than the National Minimum Wage Act. The author is of little doubt that the nature of the industry and the uncertainty of constant employment require craftspeople to be paid accordingly. What rate this should be was touched upon during the interviews but is not a question the author would like to give an opinion on.

Two strong themes that emerged from the interviews were competitiveness and skills shortages. It was forwarded that any new legislation would have to consider the competitiveness of Ireland in attracting foreign direct investment. The literature however concluded that foreign companies invest in Ireland for a vast number of reasons for coming here and that construction costs would be a minor consideration in their decision.

Future skills shortages were emphasised as a difficulty if a proper mechanism for collective agreements is not in place. This is due to the craft area becoming a much less attractive career option for young people. This was connected to status of employment as well as pay. It

was perceived that if the REA structure was to be removed permanently from the industry that the pay, conditions and status of craftspeople would be diminished.

6.3 Recommendations

The recommendations arising from this research are based on the literature review and the views gathered from the stakeholders within the industry. The findings of the study suggest a number of recommendations in relation to certain legal aspects of any new legislation, the compliance of any new legislation and the provision protecting employees while ensuring that employers remain competitive. The following are the key recommendations to be considered from the legislation.

1. Policies and principle of the legislation should be clearly set out in the legislation giving the Labour Court clear guidance on the setting of a REA. (These policies and principles should satisfy the Cityview press test)
2. A clear definition for the meaning of „substantially representative“ is required to ensure any agreement can be applied across a sector.
3. Any new REA should have a finite life and should be flexible in its ability to change.
4. The threat of criminal prosecution should not be included in any new legislation.
5. Government policy should cognisant that the construction industry is a large employer and should promote it maintaining its high skill levels and continuing to be an attractive career option for young people.
6. Any new legislation should allow for a more structured REA with perhaps more than one pay rate band.
7. Trade unions should become more organised in the domestic sector and it should be a real objective to protect all workers within the industry.
8. The employer representatives should cooperate to ensure that they are substantially representative of the employer in a given sector. They should recommend support what is best in the long term for the industry rather than in the short term for its members.

6.4 Further Research

The research has focused on the Registered Employment Agreements in the construction sector and the effects of the *McGowan* decision. It has concluded that the reinstatement of legislation is necessary for a properly functioning construction industry. The support from the

stakeholders was reassuring. There is an opportunity to go further with this research by completing a survey of a large number of members of the CIF and the unions. The economic condition within the construction industry has a significant impact on the views of the stakeholders within the industry. The conditions have to be observed on an on-going basis and the findings revised to reflect the ever-changing nature of the industry.

New legislation is anticipated in the coming months and the implementation of this legislation will need to be monitored and any potential difficulties would have to be highlighted before they become problematic. The consequences of any new legislation will have to be researched in detail in order to ensure a smooth transition from the current vacuum to a regulated environment.

Legislation

Aliens Act 1935

Employment Law compliance Act 2008

Financial Emergency Measures in the Public Interest Act 2013

Industrial Relations (Amendment) Act 2001

Industrial Relations (miscellaneous Provisions) Act 2004

Industrial Relations Act 2001

Industrial Relations Act 2012

Industrial Relations Act, 1946

National Labor Relations Act [1934] (US)

National Minimum Wage Act 2000

Protection of Employees (Part-Time Work) Act 2001

European Legislation

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html> [accessed 24 March 2014]

¹Treaty on the Functioning of the European Union – TFEU (2009)

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Abbot and Whelan v ITGWU (1982) 1 JISLL 56

Building and Allied Trade Union v Mythen Brothers Ltd[2006] 17 E.L.R. 237

Bunclody Electrical Contracting Limited & Others v The Labour Court & Others
(Record No. 2009/507 JR)

Burke v Minister for Labour [1979] IR354

Cityview Press v An Chomhairle Oiliúna [1980]IR381

Dirk Rüffert v. Land Niedersachsen 3 April 2008 Judgment of the Court of Justice in Case C-346/06

International Transport Workers Federation v Viking Line ABP [2008] IRLR 143

John Grace Fried Chicken v The Labour Court [2011]3 IR 211

Kennedy v Law Society of Ireland [2002] 2 IR458

Kenny v An Post [1988] IR 285

Laurentiu v. Minister for Justice [1999] IESC 47

Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2008] IRLR 160

Leontjava v DPP [2001]1 IR 591

McGowan and Ors v The Labour Court [2013] IESC 21

Minister for Enterprise Trade and Employment v Camlin Electric Limited (2008/1864/SS)

National Belgian Police v Belgium (1979) 1 EHRR 578

National Union of Railwaymen v Sullivan [1947] IR 77

Ryanair v Labour Court [2007] 4 IR199

Serco Services Ireland Ltd v The Labour Court [2001] 11 I.C.L.M 27

State (Walsh) v Murphy [1981] IR27

*The Pharmaceutical Union, Mark Gouldson, Gouldson Pharmacy Ltd, Hunters Pharmacy
v Minister for Health and Children* [2010] IESC 23

Vaughan Lodge Limited, MichaelVaughan and The Irish Hotels Federation v The Hotels Joint Labour Committee, The Labour Court, Ireland and the Attorney General,
(Record Number 2007/1508 JR)

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Appendix A
Interview Questions and Correspondence