Labour Court Report to the Minister for Enterprise, Trade and Employment pursuant to section 16 of the Industrial Relations (Amendment) Act 2015 ("the 2015 Act") relating to a Recommendation to amend a previous Recommendation of the Court which was confirmed by the Minister by a Sectoral Employment Order (SEO) [*S.I. No. 234 of 2019]* for the Construction Sector

Background

The matter before the Court is the request of five Trade Unions to the Court to examine the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme, of the workers of a specified class, type or group in the Construction Sector.

Section 14 of the 2015 Act provides as follows:

> *(1) Subject to subsection (3)—*
>
> > *(a) a trade union of workers,*
> >
> > *(b) a trade union or an organisation of employers, or*
> >
> > *(c) a trade union of workers jointly with a trade union or an organisation of employers, may request the Court to examine the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme, of the workers of a particular class, type or group in the economic sector in respect of which the request is expressed to apply.*
>
> *(2) A request under this section shall include confirmation, in such form and accompanied by such documentation as the Court may specify that—*
>
> > *(a) where the request is made by a trade union of workers or jointly with the trade union of workers, the trade union of workers is substantially representative of the workers of the particular class, type or group in the economic sector in respect of which the request is expressed to apply, and*
> >
> > *(b) where the request is made by a trade union or an organisation of employers or jointly with a trade union or an organisation of employers, the trade union or organisation concerned is substantially representative of the employers of the workers specified in paragraph (a).*
>
> *(3) Where the Minister has made a sectoral employment order in relation to a class, type or group of workers in a particular economic sector, the Court shall not consider a request under subsection (1) in relation to the same class, type or group of workers in that sector, until at least 12 months after the date of the order, unless the Court is satisfied that exceptional and compelling circumstances exist which justify consideration of an earlier request.*
>
> *(4) A request under subsection (1) shall be in a form prescribed by the Court.*

The Court confirms that the Section 14 Request and all accompanying documentation was published on the website of the Court www.labourcourt.ie on 29th June 2021 and that all submissions in connection with a hearing convened in accordance with Section 15(4) of the Act were similarly published on 6th August 2021 which was in advance of the hearing convened on the 2nd September 2021.

Receipt of a section 14 request

On 28th May 2021 the Court received a joint request from BATU, Connect, OPATSI, SIPTU and UNITE Trade Unions to examine the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme, of persons employed in the Construction Sector as craftspersons, construction operatives and apprentices.

The request stated that the Sector was as defined in **S.I. 234 of 2019 – Sectoral Employment Order (Construction Sector) 2019.**

That Sectoral Employment Order (SEO) defines the Sector as follows:

> *the sector of the economy comprising the following economic activity:*
>
> > *The construction, reconstruction, alteration, repair, painting, decorating, fitting of glass in buildings and demolition of buildings;*
> >
> > *The clearing and laying out of sites for buildings, the construction of foundations of such sites, the construction, reconstruction, repair and maintenance within such sites of all sewers, drains and other works for use in connection with sanitation of buildings or the disposal of waste;*
> >
> > *The construction, reconstruction, repair and maintenance on such sites of boundary walls, railings and fences for the use, protection or ornamentation of buildings, the making of roads and paths within the boundaries of such sites;*
> >
> > *The manufacture, alteration, fitting and repair of articles of worked stone (including rough punched granite and stone), granite, marble, slate and plaster;*
> >
> > *The construction, reconstruction, alteration, repair, painting, decoration and demolition of roads, paths, kerbs, bridges, viaducts, aqueducts, harbours, docks, wharves, piers, quays, promenades, landing places, sea defences, airports, canals, waterworks, reservoirs, filter beds, works for the production of gas or electricity, sewerage works, public mains for the supply of water or the disposal of sewerage and all work in connection with buildings and their sites with such mains; rivers works, dams, weirs, embankments, breakwaters, moles, works for the purpose of road drainage or the prevention of coastal erosion, cattle markets, fair grounds, sports grounds, playgrounds, tennis-courts, ball alleys, swimming pools, public baths, bathing places in concrete, stone tarmacadam, asphalt or such like material, any boundary walls, railings, fences and shelters erected thereon;*
> >
> > *The painting or decoration of poles, masts, standard pylons for telephone, telegraph, radio communication and broadcasting;*
> >
> > *Ground levelling, ground formation or drainage in connection with the construction or reconstruction of grass sports grounds, public parks, playing fields, tennis-courts, golf links, playgrounds, racecourses and greyhound racing tracks.*

The request was accompanied by a Statutory Declaration from the Industrial Officer of the Irish Congress of Trade Unions, Liam Berney, which the five Trade Unions authorised him to make on their behalf. That authorisation took the form of a signed statement to that effect given by senior officials of all five Trade Unions which was appended to the statutory declaration submitted to the Court.

The procedure followed by the Labour Court

On 22nd June 2021 the Court met to consider the documentation submitted by the applicant Trade Unions.

Section 14(2)(a) of the Act

The Trade Unions, in the documentation submitted in pursuance of the request made under Section 14(1) of the Act, have provided the detail of the numbers in their memberships of the relevant class, type or group of worker employed in the Construction Sector. The matter before the Court in Section 14(2)(a) of the Act is to determine, for the purposes of deciding whether the request meets the statutory requirements of the Section, whether the Trade Unions have provided confirmation in such form and accompanied by such documentation as the Court has specified, that the Trade Unions are substantially representative of the workers to whom the request relates.

Section 14(2)(a) of the Act states as follows:

> *(2) A request under this section shall include confirmation, in such form and accompanied by such documentation as the Court may specify that—*
>
> > *(a) where the request is made by a trade union of workers or jointly with the trade union of workers, the trade union of workers is substantially representative of the workers of the particular class, type or group in the economic sector in respect of which the request is expressed to apply, and*

The Court at its meeting of 22nd June 2021, determined that the request of the five Trade Unions was accompanied by confirmation in the form the Court had specified in its Rules drawn up in accordance with Section 20 of the Industrial Relations Act, 1946, as regards the number of workers of the class, type or group to which the request related who were members of the five Trade Unions. Those Rules are entitled **Labour Court (Sectoral Employment Orders) Rules 2016** (the Rules of the Court) and are published on the Court's website *www.labourcourt.ie*.

The Rules of the Court at Rule 3 specify that an applicant that is a Trade Union must furnish the Court with a statutory declaration within the meaning of the Statutory Declarations Act, 1938 made by a person authorised in that behalf by the Trade Union which details, inter alia, (a) the number of workers of the class, type or group to which the request relates who are members of the trade union of workers on whose behalf the request is made, and (b) the number of workers of the class type or group to which the request relates who are normally employed in the sector to which the request relates.

The statutory declaration accompanying the request of the five Trade Unions confirmed that 29,962 workers of the class, type or group to which the request relates were in membership of the five Trade Unions. It also confirmed that the number of workers of the class, type or group to which the request relates who are normally employed in the Construction Sector was estimated at between 50,900 and 54,300.

The Court decided, having regard to the requirements of Section 14 of the Act and the Rules of the Court, that the Trade Unions had provided, in the form specified by the Court, confirmation that the trades unions are substantially representative of the workers to which the request was expressed to apply.

The Court's decision in this matter arises in the context of Section 14 of the Act and the obligation set out therein and resting upon the Court to, in effect, be satisfied that the requirements of the Rules of the Court referred to above have been complied with. The Court will be required separately under

Section 15 of the Act to address the question of substantial representativity as a condition precedent to the Court undertaking an examination in accordance with that Section of the Act.

Section 14(3) of the Act

The Act at Section 14(3) provides as follows:

> *(3) Where the Minister has made a sectoral employment order in relation to a class, type or group of workers in a particular economic sector, the Court shall not consider a request under subsection (1) in relation to the same class, type or group of workers in that sector, until at least 12 months after the date of the order, unless the Court is satisfied that exceptional and compelling circumstances exist which justify consideration of an earlier request.*

The current SEO having application to the particular class of workers in this particular sector specified in the Section 14 request was made in 2019 [**S.I. No. 234 of 2019**]. On that basis, the Court decided at its meeting on 22nd June that it was satisfied that at least 12 months had elapsed between the date of making of the last SEO and the date of receipt of this request.

Section 14(4) of the Act

Section 14(4) of the Act provides as follows

> *(4) A request under subsection (1) shall be in a form prescribed by the Court.*

The Court, at its meeting of 22nd June, determined that the request of the five Trade Unions was in the form the Court had prescribed in its Rules drawn up in accordance with Section 20 of the Industrial Relations Act, 1946. Those Rules are entitled **Labour Court (Sectoral Employment Orders) Rules 2016** (the Rules of the Court) and are published on the Court's website *www.labourcourt.ie*.

Section 15(1)(a)(i)

The matter before the Court concerns a request by five trade unions under Section 14 of the Act.

The Act at Section 15(1)(a)(i) of the Act provides as follows:

> *(1) Where the Court receives a request under section 14 it shall not undertake an examination in accordance with this section unless it is satisfied that—*
>
> > *(a) following consideration of any documentation submitted under subsection (2) of section 14 —*
> >
> > > *(i) the trade union of workers is substantially representative of the workers of the particular class, type or group in the economic sector in respect of which the request is expressed to apply, and in satisfying itself in that regard, the Court shall take into consideration the number of workers in that class, type or group represented by the trade union of workers, and*

The Section requires the Court, in satisfying itself as to whether the Trade Unions are substantially representative of the workers of the particular class, type or group in the economic sector to which the request is expressed to apply, to take into consideration the numbers of such workers represented by the Trade Unions concerned. The Act requires the Court to so satisfy itself following consideration of any documentation submitted under subsection (2) of section 14.

The Court, at its meeting of 22nd June 2021, recognised that no guidance is given in the Act as to the meaning of the term 'substantially representative'. The Act could have provided specificity in terms of

quantum of members of a trade union, level of penetration of trade union representation in the sector concerned, numerical or percentage relationship between the numbers of workers in membership of the Trade Unions and numbers of workers overall in the sector of the class, type or group to whom the request relates or as regards any other matter. The legislation however makes no specific provision in these respects and consequently the Court concludes that the absence of such specificity reflects the intention of the Oireachtas.

McMenamin J. in the Supreme Court decision **Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta - and - The Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General [2020] IESC 000** states as follows:

> *181. Given the lesser significance of the concept under the Industrial Relations (Amendment) Act 2015, the fact that the concept is concerned solely with the numbers of workers represented is not unconstitutional. It is a legitimate legislative choice to say that an entitlement to make an application should be restricted to organisations which represent, directly or indirectly, a substantial number of workers in the economic sector concerned.*

In that decision the learned Judge also considered the nature of the consideration to be given by the Court under Section 15(1)(a)(i) of the Act when he found

> *"In truth, it entails no more than a threshold which must be met in order to make an application to the Labour Court. Once this threshold is met, the applicant enjoys no special status in the subsequent examination to be undertaken by the Labour Court. The applicant is but one of a number of interested parties who are all entitled to be heard in the context of the Labour Court's examination of the relevant economic sector. This is to be contrasted with the status which a "substantially representative" trade union or employers' organisation had enjoyed under Part III of the Industrial Relations Act 1946. Under that legislation, such bodies were, in effect, the authors of the delegated legislation."*

This Court's decision under Section 15 (1)(a)(i) of the Act is, therefore, a decision on a threshold matter which may be further addressed in the written and oral submissions of parties interested and desiring to heard at a hearing of the Court convened in accordance with the Act at Section 15(4) and, in those circumstances, would fall to be further considered by the Court in consideration of any such submissions.

The Court decided at its meeting on 22nd June 2021 that, based on a consideration of the documentation submitted by the requesting Trade Unions, (a) the number of workers of the class, type or group in membership of the Trade Union was 29,962, (b) that this number was substantial in the sense that this word is normally understood, and (c) that, because the workers are in membership of the Trade Unions, those Trade Unions are representative of those workers.

The Court decided that any consideration as to whether these factual parameters allow a conclusion that the Trade Unions were substantially representative of the workers of the class, type or group to whom the request relates should, reasonably, have regard to the overall presence of such workers in the sector concerned. The Court did not however consider that the statute requires that any specific or general numerical or percentage relationship between numbers in membership of the Unions and numbers in employment in the Sector overall must exist in order to allow a conclusion that the test of substantial representativity is reached. In the view of the Court, its consideration of the matter of numbers employed in the sector overall is contextual and in the manner of ensuring that any conclusion as regards substantial representativity takes reasonable account of the relevant context

within the sector of the level of representation by the requesting Trade Unions of workers to whom the request relates.

The Court noted that the requesting Trade Unions had confirmed in the documentation submitted that a total of 29,962 workers of the class, type or group to whom the request relates were in their combined membership and that a total of between 50,000 approx. and 54,000 approx. such workers were normally employed in the sector. On this basis, the number of such workers in membership of the Trade Unions as a percentage of all such workers normally employed in the Sector is, in round numbers, between 55% and 60%.

The Court concluded, based on the number of workers of the class, type or group represented by the five Trade Unions and having regard to the overall number of such workers estimated to be employed in the sector, that the level of representativity by the five Trade Unions is real, identifiable, and far beyond insignificant and consequently that it is reasonable to conclude that the five Trade Unions are substantially representative of such workers.

The Court therefore was satisfied that the request made by the five trade unions meets the requirements of the Act at Section 15(1)(a)(i).

As the requestors were Trade Unions of workers only, the Court was of the view that **section 15(a)(ii)** was not applicable to the immediate request and as such did not need to be considered.

Section 15(1)(b)

The Act at Section 15(1)(b) provides as follows:

> *(1) Where the Court receives a request under section 14 it shall not undertake an examination in accordance with this section unless it is satisfied that—*
>
> > *(b) the request is expressed to apply to all workers of the particular class, type or group and their employers in the economic sector in respect of which the request is expressed to apply,*

The request of the five Trade Unions made under Section 14 of the Act stated that the request related to "*the construction sector as defined in SI 234/2019 – Sectoral Employment Order (Construction Sector) 2019*" and to *"persons employed in the sector as craft persons, construction operatives and apprentices"*

The Court, at its meeting of 22nd June 2021, decided that the request therefore was expressed to apply all workers of the particular class, type or group and their employers in the economic sector in respect of which the request is expressed to apply,

Section 15(1)(c)

The Act at Section 15(1)(c) provides as follows:

> *(1) Where the Court receives a request under section 14 it shall not undertake an examination in accordance with this section unless it is satisfied that—*
>
> > *(c) it is a normal and desirable practice, or that it is expedient, to have separate terms and conditions relating to remuneration, sick pay schemes or pension schemes in*

respect of workers of the particular class, type or group in the economic sector in respect of which the request is expressed to apply, and

The Construction Sector is the subject of a Sectoral Employment Order since 2019 (S.I. No. 234 of 2019) in respect of the workers to which the within request relates. The five Trade Unions have asserted in the documentation submitted as part of the request made under Section 14 of the Act, that, in respect of workers in the Sector to which the request relates

"Since the enactment of the Industrial Relations (Amendment) Act, 2015 the terms and conditions relating to remuneration, sick pay, and pension have been determined by the making of a Sectoral Employment Order. There have been two such orders made to date. Matters not covered by the Sectoral Employment Order are negotiated through the National Joint Industrial Council"

The Court, on the basis of the history of the sector since 2015, concluded that it is normal and desirable practice to have separate terms and conditions relating to remuneration, sick pay schemes or pension schemes in respect of the class, type or group to which the request of the five Trade Unions relates

Section 15(1)(d) of the Act

The Act at Section 15(1)(d) provides as follows:

(1) Where the Court receives a request under section 14 it shall not undertake an examination in accordance with this section unless it is satisfied that—

(d) any recommendation is likely to promote harmonious relations between workers of the particular class, type or group and their employers in the economic sector in respect of which the request is expressed to apply.

The Court notes that any Recommendation of the Court to amend an existing Sectoral Employment Order will, in accordance with the Act at Section 16(6), result in an SEO which will include procedures that shall apply in relation to the resolution of a dispute concerning the terms of a sectoral employment order. The Court concluded that the presence of procedures which shall apply in relation to the resolution of disputes between employers and workers to whom such a recommendation would relate will promote harmonious relations between those parties.

In an environment where such procedures did not apply, it is reasonable, in the Court's view, to expect less orderly dispute resolution practices and consequently less harmonious relations between parties.

In those circumstances the Court, at its meeting on 22nd June 2021, was satisfied that any recommendation is likely to promote harmonious relations between workers of the particular class, type or group and their employers in the economic sector in respect of which the request is expressed to apply

Section 15(2) and (3) of the Act

Having regard therefore to its consideration of the Act at Section 15(1)(a) to (d), the Court concluded that the requirements of that Section which must be satisfied before the Court can publish a notice of its intention to conduct an examination under the Section were satisfied.

Having so concluded, the Court, in accordance with Section 15(2) of the Act, placed a notice of its intention to undertake an examination under Section 15. That notice was published on the 29th June 2021 in the following newspapers / publications: Irish Times, Irish Independent, Irish Examiner, Seachtain and Iris Oifigiúil; and on the Court's website www.labourcourt.ie The Court was satisfied that this manner of publication was best calculated to bring the request to the notice of all interested

persons concerned. That notice, in accordance with Section 15(3) of the Act, invited representations to be made to the Court from any interested parties by 5p.m. on 27th July 2021 which was not later than 28 days after the date of notice.

Section 15(4) of the Act

Written representations were received within the specified timeframe from (a) the Construction Industry Committee of the Irish Congress of Trade Unions (the CIC), (b) The Construction Industry Federation (the CIF) and (c) the Construction Workers Pension Scheme (the CWPS). The written representations of all three parties were published by the Court on its website www.labourcourt.ie on 6th August 2021.

The Court, at a meeting on 4th August 2021, decided that the three parties who had made written representations within the time allowed were the only parties appearing to the Court to be interested and desiring to be heard in relation to the request. The Court on that date also decided, in accordance with Section 15(4) of the Act, to hear these parties at a hearing in public.

The Hearing

The Court, on 10th August 2021, published on its website and social media platforms a notice of the time and date of the hearing which was 2nd September 2021 at 9.30am. That notice advised the public that the hearing would be held in a virtual Court room and advised of the means to secure the appropriate details in order to be able to attend the hearing.

The hearing commenced at 9.30 a.m. on the 2nd September 2021. Representatives of the CIC, the CIF and the CWPS attended the hearing.

At the outset the Chairman advised the parties that it had reached conclusions as regards the threshold issues set out at Sections 14 and 15(1)(a) to (d) of the Act as follows:

(a) it had decided that the applicant trade Unions were substantially representative of the workers to whom the request relates, (b) that it was expressed to apply to all workers of the class, type or group to which the request was expressed to relate, (c) that it is normal and desirable practice to have separate terms and conditions relating to remuneration, sick pay schemes or pension schemes in respect of such workers and (d) that any Recommendation of the Court is likely to promote harmonious relations between these workers and their employers in the sector to which the request relates.

The Chairman advised all parties that any conclusion which had been reached by the Court under Section 15 could be the subject of submission or contest at the hearing.

All three parties responded to the Court to state that they agreed with the conclusions of the Court as had been outlined and that they would not intend to contest any element of the conclusions of the Court in relation to matters set out at Section 14 or 15 of the Act in the course of the hearing.

The Chairman advised the parties that the following procedure would be followed by the Court at its hearing:

1. Each party would be invited to read their written submission to the Court in turn.
2. When that phase had been completed, each party would be invited to comment on each other's submissions and to make any further oral submission they might wish to make to the Court in doing so.

3. When that phase had been completed, the members of the Court would address any question or query they might have to the parties arising from their written and oral submissions.
4. When that phase had been completed the Chairman of the Court would ask each party in turn to make an oral submission or draw the Court's attention to an element of their written submission which addressed the matters referred to in section 16 (2) (a) to (e) of the Act and section 16(4)(a) and (b). The Chairman clarified that the Court would hear from the parties in relation to each subsection before advancing to invite oral submissions on the next subsection. The members of the Court would ask any question of clarity to the parties as this process proceeded.

The Chairman finally set out that the Court would invite comment in relation to the matters addressed in Section 16(7) of the Act.

All parties present confirmed to the Court that they were agreeable to the procedure as outlined.

The Submissions of the parties

The written submissions of the parties are appended to this report and should be read as part of this report.

The parties each read out their submissions which can, in broad part, be summarised as conveying the following:

The CIC

The CIC submitted that that the existing SEO for the Sector should be amended so as to provide for:

- An increase in Basic pay of 4% per year for three years commencing on the 1st October 2021
- The payment of not less than a minimum of one hour's basic pay per day in recognition of time spent travelling to construction sites that are not designated bases
- The payment of two additional hours' pay per day in recognition of specialist work carried out by crane operators
- A guarantee of a minimum of 39 hours' work per week
- An increase in employers' and workers' pension contributions in line with the movement in basic pay
- An amendment to the disputes procedure to clarify that the requirement to use the procedure is confined to disputes on matters covered by the SEO

The submission, which forms part of this report, contended that the sector had been going through a period of rapid expansion prior to the onset of the COVID-19 pandemic and could be expected to be able to 'bounce back' swiftly and robustly over the coming months and years.

According to the CSO, the average hourly rate in the sector in quarter one of 2021 was €23.25 which was well below the €29.64 average for the economy as a whole and the €27.76 average in the private sector. Average weekly earnings in the sector of €815.08 are lower than in the economy as whole where the average is €867.52 while marginally higher than in the private sector average of €810.78.

The CIC pointed out that the Low Pay Commission has recommended to Government that the national minimum wage should increase by 2.94%.

The CIF

The CIF is supportive in principle of an SEO in the sector. The industry is labour intensive, and an SEO provides a 'level playing field' for contractors when tendering for work. It is however essential that remuneration and pension contribution rates are set at realistic and sustainable levels.

While the outlook for the industry is positive, a range of challenges exist including the disruption caused by COVID-19, Brexit and a global shortage of materials and a substantial increase in the cost of these materials.

The current rate of pay of construction workers is higher than comparable workers employed in the public sector even after implementation of the "Building Momentum" collective agreement. Current average earnings of €888.54 in the industry also exceed the average weekly earnings nationally of €847.21 and in the private sector of €792.63 according to fourth quarter 2020 data provided by the CSO.

The current SEO for the sector should be amended so as to provide for:

- An increase in hourly rates of 1.6% on 1st April 2022 and a further increase of 1.6% on 1st April 2023.
- An increase of 1.6% in pension contribution rates on 1st April 2022 and a further increase of 1.6% to apply from 1st April 2023.

The CWPS

The CWPS support an SEO for the Sector which specifies the minimum requirements for pension, death benefits and sick pay entitlements.

Minimum contributions should be at an adequate but reasonable level and employees should be required to contribute.

Current entitlement to death benefits and sick pay benefits under the SEO for the sector can be supported at existing contribution rates. Current terms and conditions in relation to pension contributions, sick pay and death in service benefits are reasonable and are at an appropriate level to ensure sufficient protection to the workers concerned.

The SEO should provide for not only a daily rate of contribution to a pension scheme or sick pay scheme but should also and necessarily provide for the requirements of such schemes, including as regards benefits, as provided for in section 16(5)(f) &(g) of the Act.

Summary Comments of the parties on each other's submissions

The parties commented on each other submissions, in summary, as follows:

CIC of ICTU

The CIC of ICTU made no comment on the submission of the CWPS.

In respect of the submission of the CIF the CIC submitted that it was more optimistic about prospects for the sector.

The CIF in its submission had compared rates of pay in the public and private sector but did not take account of the fact that the work in the private sector is more labour intensive than that in the public sector. In addition, no mention is made of the fact that travel time is paid in the public sector when commonly it is not paid in the private sector.

When the CIF makes a comparison between pay rates in the sector and pay rates in the public sector or generally, no account is taken of the disparity in working hours as between the sector and comparators. International pay rates have no relevance because of the fact that an SEO has application to all workers working in the state.

The matter of travel time of one hour per day is a significant priority for the CIC. That benefit is paid in the public sector, is also being paid by many employers in the private sector. Historically, Registered Employment Agreements in the sector made provision for travel time.

CIF

The CIF confirmed its support for the CWPS submission that the SEO should make provision for a pension scheme and a sick pay scheme in the sector.

The CIF is optimistic for the sector but submitted that the CIC did not acknowledge the challenges faced by the sector which are set out in the CIF submission. Excessive wage growth could affect competitiveness especially in the context of foreign direct investment.

The CIC is incorrect to draw a relationship between pay rates in the sector with growth of the National Minimum Wage which is far below the rates set out in the SEO.

The CIF does not accept the CIC contention that the majority of workers in the sector are in receipt of travel time payments.

The CIC submission seeking an allowance for Crane Drivers is not achievable. Such workers make up only a small element of the category A worker group specified in the SEO and the legislation makes no provision for the inclusion of special payments to a sub-group in an SEO.

If the SEO were amended to reduce the extent to which the dispute resolution procedure contained in the current SEO has application, such an amendment would have a negative effect on the conduct of industrial relations and risk a decline in harmonious relations and would not promote the avoidance of industrial unrest in the sector.

Section 16 of the Act

The Act at Section 16(1), (2) and (4) provides as follows:

> *16. (1) Subject to this section, the Court shall, where it considers it appropriate to do so, having heard all parties appearing to the Court to be interested and desiring to be heard, and having regard to the submissions concerned and the matters specified in subsection (2), make a recommendation to the Minister.*
>
> *(2) When making a recommendation under this section, the Court shall have regard to the following matters:*
>
> > *(a) the potential impact on levels of employment and unemployment in the identified economic sector concerned;*
> >
> > *(b) the terms of any relevant national agreement relating to pay and conditions for the time being in existence;*
> >
> > *(c) the potential impact on competitiveness in the economic sector concerned;*
> >
> > *(d) the general level of remuneration in other economic sectors in which workers of the same class, type or group are employed;*

(e) that the sectoral employment order shall be binding on all workers and employers in the economic sector concerned.

(4) The Court shall not make a recommendation under this section unless it is satisfied that to do so—

(a) would promote harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the economic sector concerned, and

(b) is reasonably necessary to—

(i) promote and preserve high standards of training and qualification, and

(ii) ensure fair and sustainable rates of remuneration,

in the economic sector concerned.

The Court, at its hearing, set out the detail of Section 16(1), (2) and (4) of the Act and outlined that, in accordance with the Act, the Court would, in reaching a decision as regards a recommendation to the Minister, have regard to the matters set out therein**.** The Court then took the parties through each subsection of section 16 and asked each party to set out their view on the sub-section orally or to draw the Court's attention to the relevant element of their written submission. The Court heard from the parties as follows and, having had regard to the matter set out in each subsection of Section 16(2) and the parties' submissions relating thereto, reached a conclusion on each subsection as also set out below:

Section 16(2)(a)

CIC

The amendment of the existing SEO could only have a positive impact on the sector. The sector is currently experiencing labour shortages and an improvement in the minimum rate of pay and conditions of employment would attract workers to the sector at a time of growth

CIF

The industry provides employment for a range of workers including skilled craftspersons. The SEO will provide decent rates of pay which will entice a skilled workforce.

In addition, the fact that an SEO will take wages out of competition for work will mean that enterprises and companies will invest in technology, upskilling and training as a means to achieve competitive advantage and this will result in attracting greater numbers of workers and the creation of employment.

CWPS

The CWPS made no submission on this subsection

Conclusion of the Court

The Court concludes that, for the reasons submitted by the parties, the amendment of the current SEO is likely to have a positive impact on levels of employment in the sector and consequently a negative effect on the levels of unemployment in the sector.

Section 16(2)(b)

CIC

The CIC submitted that no relevant national agreement is in being

CIF

The CIF submitted that the "Building Momentum" national agreement affected similar workers in the public sector and should be considered by the Court as relevant to the matter.

CWPS

CWPS made no submission on the subsection

Conclusion of the Court

The Court concludes that a national agreement is in being which deals with the pay and conditions of public sector workers. This agreement does not apply to the workers to whom the application relates but its existence is an indication of a basis for addressing such matters in a significant employment. It is also the case that the national agreement has application to workers in the public sector with the same skills and qualifications as the workers to whom the application relates. The Court notes that no information has been put before it as regards the history of the pay relationship between workers to whom the application relates and relevant public sector workers or as regards the history of the relationship between agreements or SEO's in the sector and national agreement in the public sector.

Section 16(2)(c)

CIF

Contractors in the sector have to tender for work and labour cost is a significant feature of the cost of tender. The existence of an SEO means that labour does not become the basis for competition in that this area of cost is a 'level playing field'.

The absence of competition on labour cost will ensure that contractor competition is based on matters associated with delivery of work including quality, productivity, levels of training provided to staff and investment in technology.

The absence of an SEO would leave the sector in a position where competitiveness could be undermined by the presence of contractors coming from jurisdictions where rates of pay and labour cost reflect their home jurisdiction rather than the cost of labour generally in Ireland and consequently undermining competitiveness in the sector.

CIC

The CIC shared the analysis of the CIF on this matter

CWPS

The CWPS made no submission on this subsection.

Conclusion of the Court

The Court concludes that, for the reasons submitted by the parties, the amendment of the current SEO is likely to have the effect of removing from the sector competition between contractors based on lower pay rates of workers and is likely to promote competition based on a range of other factors.

The Court is satisfied that the effect of removing competition between firms based on lower wage rates is a clear effect of establishing minimum wage rates which have application across the sector and must be understood to have been an intention of the legislation. The Court concludes that the effect of an SEO on competition in the sector therefore is likely to be positive rather than negative.

Section 16(2)(d)

CIC

As of quarter one of 2021, the average hourly labour cost in the construction sector, according to the CSO, was €23.25 per hour which was well below the €29.64 for economy as a whole and the average of €27.76 in the private sector. Prior to the pandemic, the average hourly labour costs in the construction sector were just 91.2% of the economy wide average. Hourly labour costs in construction increased by 4.7% in the five years between the start of 2016 and the start of 2021. This compares with a growth of 13.7% in the economy generally.

Nominal wage increases in the Irish economy are likely to average close to 3.5% over the long term based on the ECB revised inflation target of 2% and an economy wide productivity growth averaging 1.5%. Average nominal wage increases lower than 2% represent a cut in real wages.

The CIC proposes annual increases of 4% for each of the next three years which is modestly above the expected long run average rate of 3.5%.

Average hourly earnings in the construction sector in the first quarter of 2021 are €24.06 which is lower than in the economy as a whole, where the average hourly rate was €26.89 and the private sector where the average was €25.25.

CIF

As of the last quarter of 2020 the national average weekly earnings, according to the CSO, was €847.21. The average weekly earnings in the construction sector was €888.54 and in the private sector generally it was €792.63. At that time therefore the average weekly earnings in the construction sector were 4.8% greater than the national average and 12% greater than the national average in the private sector.

Having regard to international comparisons, a recently concluded one year agreement in the Building and Allied Trades sector in Northern Ireland provided for an advanced craft rate euro equivalent of €15.53, an intermediate craft rate of €13.47 and a general operative rate of €12.63. Craft workers and operatives in the sector in Ireland are paid substantially higher rates than their equivalents employed in the UK.

CWPS

The CWPS made no submission in relation to this matter.

Conclusion of the Court

The CIF and the CIC shared their assessments as regards comparative pay rates of similar workers to the workers to whom the application relates. The Court was not provided with any historical context setting out the relationship between pay rates in the sector and pay rates of the comparator employments, sectors or jurisdiction. The Court has noted carefully the information supplied by the parties and has had regard to this when setting the hourly rate.

Section 16(2)(e)

CIC

The CIC submitted that an SEO, having regard to the provisions of the Act and the operation of the law, will have binding effect on all workers of the class, type or group in the sector and specified in the SEO. Similarly, the SEO, by operation of the law, will have binding effect on employers in the sector defined in the SEO

CIF

The CIF supported the submission of the CIC in relation to this subsection

CWPS

The CWPS made no submission in relation to this subsection

Conclusion of the Court

The Court concluded that, by operation of the law, an amended SEO will have binding effect on all workers of the Class, type or group specified in the SEO and will, similarly, have binding effect on all employers in the sector defined in the SEO**.**

Section 16(4)(a)

CIC

The CIC submitted that the existence of an SEO of itself promotes harmonious relations between workers and employers in the sector and assists in the avoidance of industrial unrest in the sector. The SEO has the effect of removing the majority of conflict in relation to the matters covered by the Order and in addition, it contains a dispute resolution clause which, by definition, promotes the avoidance of industrial unrest and promotes harmonious relations. In the absence of an SEO, all matters concerning terms and conditions of employment in the sector would have the potential to be disputed between workers and employers and the absence of a binding disputes procedure would mean that such disputes would be more likely to lead to industrial unrest.

CIF

The dispute resolution procedure contained in the current SEO has the effect of promoting the avoidance of industrial relations unrest and consequently promotes harmonious relations in the sector.

If the scope of disputes procedure contained in the current SEO were to be narrowed by an amendment to the current SEO so as to include only matters covered by the order, such an amendment would not have the effect of promoting harmonious relations between workers and employers in the sector and would not promote the avoidance on industrial unrest.

CWPS

The CWPS made no submission on this subsection.

Conclusion of the Court

The Court notes carefully the submissions of the parties and in particular their shared belief that the existence of an SEO promotes harmonious relations and assists in the avoidance of industrial unrest in the sector. The Court has earlier concluded that the trade unions are substantially representative

of the workers in the sector and recognises that the CIF is an authoritative voice in relation to the operation of employment relations in the sector**.**

The current SEO or any amended SEO, in accordance with the Act at Section 16(6), contains or will contain binding procedures that apply in relation to the resolution of industrial disputes, and the Court is satisfied that this has the effect of ensuring an orderly exercise of such procedures in advance of the occurrence of any strike, lock out or other form of industrial action in the sector.

Having regard to the widely accepted effectiveness of the dispute resolution mechanisms specified in the current SEO of Adjudication or conciliation by the Workplace Relations Commission, and of the Court in exercise of its functions under the Industrial Relations Acts, the Court is satisfied that a requirement placed upon workers and employers to utilise such procedures will have the effect of promoting harmonious industrial relations and the avoidance of industrial unrest.

In addition, the current SEO removes central elements of the relationship between employers and workers such as pay and other conditions of employment from conflict and consequently reduces the potential for industrial unrest in relation to such matters. It is clear that the parties believe that an increase in pay is required in the sector, and it is also clear that they are in conflict as regards the level of such an increase. An amendment to the current SEO addressing the matter of pay growth in the sector will, in the view of the Court, remove this conflict between employers and workers in the sector and consequently promote harmonious relations and the avoidance of industrial unrest in the sector in relation to the matter of pay growth in the sector.

In all of the circumstances and for the reasons set out, the Court is satisfied that a Recommendation to amend the current SEO will promote harmonious relations and assist in the avoidance of industrial unrest in the sector.

Section 16(4)(b)(i)

CIC

If an SEO did not exist for the sector, workers with high levels of training and qualification would not be attracted to the industry because competition on rates of pay would have the effect of reducing pay levels in the sector over time.

CIF

The CIF agreed with the submission of the CIC on this point. Additionally, the absence of competition on rates of pay in the sector will encourage employers to invest in training and qualifications of staff as a means of competition both for labour and for work.

CWPS

The CWPS made no submission on this subsection.

Conclusion of the Court

The Court notes carefully the submissions of the parties and in particular their shared belief that an amendment to the current SEO will promote and preserve high standards of training and qualification in the sector. The Court has earlier concluded that the trade unions are substantially representative of the workers in the sector to which the application relates and has recognised that the CIF is an authoritative voice in relation to the operation of employment relations in the sector.

It is clear that reasonable rates of pay and reasonable terms and conditions of employment are likely to encourage rather than discourage workers to a particular employment. This logical conclusion has been submitted to the Court by both the CIC and the CIF.

The Court is satisfied that the current SEO and any amendment to that SEO to advance, for example, pay rates in the sector, will have the effect of eliminating competition between employers in the sector based on lower wage rates. It is likely therefore that the existence of minimum assured wage rates and other conditions of employment will have the effect of attracting workers with higher levels of training and qualifications to the sector and increasing the likelihood of retention of those workers in the sector.

The Court has noted carefully the assertion of the CIF that the elimination of competition between employers based on lower wage rates will encourage employers to invest in training and accepts this assertion as being a reflection of the view of the many employers in membership of that organisation.

In all of the circumstances, the Court is satisfied that a Recommendation to amend the current SEO is likely to promote and preserve high standards of training and qualification in the sector

Section 16(4)(b)(ii)

CIC

The fact of an SEO in the sector would ensure that the fair and reasonable rates of remuneration would be a mandatory minimum standard in the sector. The absence of an SEO would mean that competition on rates of pay would, over time, lead to employers competing for work on the basis of lower labour cost leading to lower and unfair rates of pay in the sector. Competition for work based on lower rates of pay would undermine the industry and would not be sustainable.

CIF

The current SEO provides a minimum level of remuneration in the sector which is both fair and sustainable, and an amended SEO will ensure that situation remains. The absence of an SEO would lead to competition, including with employers based outside the state, based on reducing rates of remuneration and such an outcome is will not ensure fair or sustainable rates of pay in the sector.

CWPS

The CWPS made no submission on this subsection.

Conclusions of the Court

The Court notes carefully the submissions of the parties and in particular their shared belief that an amendment to the current SEO will ensure fair and sustainable rates of remuneration in the sector concerned. In all of the circumstances, the Court is satisfied to conclude that a Recommendation to amend the current SEO is reasonably necessary to ensure fair and sustainable rates of remuneration in the sector concerned.

Section 16(7) of the Act

The CIC and the CIC both submitted to the Court that a previous Recommendation of the Court which was confirmed by the Minister by a Sectoral Employment Order (SEO) **[S.I. No. 234 of 2019**] for the Construction Sector should be amended rather than cancelled.

The Court therefore gave consideration to the proposals of the parties for amendment of that previous recommendation and its conclusions in that respect are set out in a later section of this report.

Proposed amendment of the existing SEO and Court conclusions

In this section of the Report the Court addresses the proposals of the CIC, CIF and CWPS for amendment of a previous Recommendation of the Court which was confirmed by the Minister by a Sectoral Employment Order (SEO) **[S.I. No. 234 of 2019**]

Basic pay

CIC

The CIC submitted that the current SEO should be amended so as to increase all basic rates of pay by 4% per year for three years. The last increase provided for by the current SEO occurred on 1st October 2020 and a further increase should be applied from 1st October 2021, 1st October 2022 and 1st October 2023. Such an increase is not only affordable but entirely justified.

CIF

The CIF submitted that the current SEO should be amended so as to provide for hourly rate increases of 1.6% on 1st April 2022 followed by a further 1.6% on 1st April 2023. The industry is recovering from the effect of lock downs due to COVID 19 in 2020 and 2021. It is essential that any amendment to the SEO is prudent so as to enable the sector to withstand current pressures. In addition, the imposition of an increased basic rate of pay must allow for a sufficient lead in time to allow firms to include increased rates in tenders for work.

CWPS

The CWPS had no view on basic pay.

Conclusion of the Court

The Court has considered carefully the written and oral submissions of the parties including as regards the economic circumstances of the industry, comparative pay rates and developments in terms of pay growth generally. It is clear that the parties have reached divergent conclusions as regards the level of pay growth that is appropriate in the sector and that is, in the view of the Court, a normal and unremarkable state of affairs.

In its view, the function of the Court in this matter is to evaluate all that has been said and written by the parties and to apply its own particular understanding of such matters generally across the economy and in the sector itself. In exercise of that function, it is not appropriate to articulate in a detailed manner the basis for any conclusion it might reach as regards the reasonableness of one rate of pay growth versus another. It is rather the function of the Court to make a judgement based on the nature of the submissions of the CIC and the CIF and the divergence between them and on its own understanding, insights and expertise as regards disputation and the resolution of disputes of this nature across the economy generally.

On that basis, it is the view of the Court that the current SEO should be amended to as to provide for an increase of 2.8% from 1st February 2022 and further 2.8% from 1st February 2023. The Court has given weight to the shared optimism of the CIF and the CIC for the economic performance of the sector over the coming period and the fact that there is agreement between these authoritative stakeholders that pay growth is essential in the sector at this time.

The Court therefore **recommends** an amendment of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order (SEO) **[S.I. No. 234 of 2019**] so as to delete the section headed **Pay Rates** and to replace that section with the following:

Pay Rates

The following basic hourly rates of pay will apply in the sector from 1st February 2022 to 31st January 2023.

Craftsperson	€20.52 per hour
Category A Worker	€19.91 per hour
Category B Worker	€18.47 per hour
Apprentice	Year 1 - 33.33% of Craft rate
	Year 2 - 50% of Craft Rate
	Year 3 - 75% of Craft Rate
	Year 4 - 90% of Craft Rate

An hourly rate of pay of €14.93 will apply for two years after entrance to the Sector to all **New Entrant** Operative Workers who are over the age of 18 years and entering the sector for the first time.

The following basic hourly rates of pay will apply in the sector from 1st February 2023.

Craftsperson	€21.09 per hour
Category A Worker	€20.47 per hour
Category B Worker	€18.99 per hour
Apprentice	Year 1 - 33.33% of Craft rate
	Year 2 - 50% of Craft Rate
	Year 3 - 75% of Craft Rate
	Year 4 - 90% of Craft Rate

An hourly rate of pay of €15.35 will apply for two years after entrance to the Sector to all **New Entrant** Operative Workers who are over the age of 18 years and entering the sector for the first time.

Travelling time

CIC

The CIC submitted that travelling time has traditionally formed an important part of the remuneration of workers in the construction sector. It is paid in recognition of the fact that workers are required to travel to numerous different work locations which is not their actual place of employment. It is now

the case that the significant majority of workers in the sector have an additional payment in recognition of time spent travelling to construction sites that are not their base. In addition, the MEBSCA and Electrical Contracting JIC agreements provide for the payment of travelling time in the sector.

CIF

The CIF submitted that an amendment to the current SEO to provide for travelling time would result in an increase of 12.8% in the remuneration provided for by the SEO. This would be in addition to any amendment to increase basic pay. No binding arrangements for payment of travelling time have existed in the sector for seven years. Prior to that, while provision was made for payment of travelling time in the urban areas of Dublin, Cork, Limerick, Waterford and Galway; no provision was made for payment of travel time outside these areas. In addition, whereas provision was made for payment of travelling time in Cork, Limerick, Waterford and Galway, a series of conditions were attached to relevant agreements so as to mean that in the latter years of such agreements the majority of workers in these city areas were not entitled to travelling time payments. The current practice in the industry is that many contractors pay a tax-free subsistence allowance / country money payment to the value of €182 per week paid in accordance with Revenue Guidelines to workers who are transferred to sites which are over 20 miles from the contractor's base.

CWPS

The CWPS made no observation on this proposed amendment.

Conclusion of the Court

The Court notes that the submissions of the parties diverge in relation to the degree of application of travelling time in the sector currently. It appears clear that wherever such payments are not currently paid, any amendment of the SEO to make provision for such payment would result in a substantial increase in remuneration which would not be reflective of the general trends in the economy as set out in the submissions of the parties in the context of their submissions in relation to basic pay.

The Court notes the assertion of the CIC that the majority of workers in the sector are already in receipt of travelling time payments and the submission of the CIF that this is not the case. The Court notes also that at no time historically was travelling time a universal feature of the industry.

The Court concludes that there is no clarity as regards the potential impact of an amendment to the current SEO to provide for a universal entitlement to travelling time in the sector where no agreement for such an arrangement across the sector nationally has existed previously. It is clear however that the universal application of travelling time across the sector would be a very significant development. Having regard to these circumstances and the fact that the Court is recommending growth in the basic pay provisions of the current SEO; the Court does not recommend an amendment of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order (SEO) **[S.I. No. 234 of 2019**].

Crane Drivers allowance

CIC

The CIC submitted that the current SEO should be amended so as to provide for payment of an additional two hours' basic pay per day to crane drivers in recognition of specialist tasks they perform including greasing. It is now the practice in the sector that all crane drivers are paid this amount and

the amendment of the SEO to make provision for payment of this allowance will have no economic impact on the sector and will not impact on competitiveness in the sector.

CIF

The CIF submitted that the provision within an SEO of allowance to one specific category of worker, which is a subset of the Category A General Operative specified in the SEO, is outside of the jurisdiction of the Court under the Act at Section 16(5)(e). That section allows only for a recommendation of the Court, outside of basic pay, to include *"any pay in excess of basic pay in respect of shift work, piece work, overtime, unsocial hours worked, hours worked on a Sunday or travelling time".*

Crane drivers are currently in receipt of two hours pay per day in respect of greasing and consequently there is no reason to include such a payment in the terms of an SEO.

CWPS

The CWPS made no observation ~~n~~on this proposed amendment.

Conclusion of the Court

It is clear to the Court that the matter at issue is a proposal to amend the SEO so as to provide for payment of an allowance to a specific group of workers which is, by agreement of the parties, already paid universally in the sector to such workers. The Court notes the submission of the CIF as regards the limits of the Court's jurisdiction having regard to the Act at Section 16(5)(e).

Having regard to the circumstances prevailing in the sector as regards the voluntary universal payment of such an allowance to crane drivers, the Court does not conclude that the case for inclusion of that same allowance in an SEO has been made out. The Court therefore does not recommend an amendment in this respect of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order (SEO) **[S.I. No. 234 of 2019].**

Pension Scheme

The Court invited oral submissions from the parties in relation to the implications of the Supreme Court decision in **Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta - and - The Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General [2020] IESC 000**. The CWPS submitted that the decision of the Supreme Court did not mean that an SEO could not make provision for contribution rates and benefits of a pension scheme. It was submitted that the Act at Section 16(f) provided that a Recommendation of the Court may make provision for *"the requirements of a pension scheme, including a minimum daily rate of contribution to the scheme by a worker and an employer"*. The CWPS submitted that the fundamental requirements of a pension scheme are that parties contribute to it and that it provides benefits to scheme members. On that basis, the CWPS submitted that a recommendation of the Court in relation to a pension scheme should specify daily minimum contribution rates and minimum benefits to members.

The CIC and the CIF expressed no disagreement with that contention, and both supported the proposition that a Recommendation of the Court confirmed by the Minister by an SEO should make provision for the contribution rates and benefits to be provided by a pension scheme.

Conclusion of the Court

The Supreme Court, in its decision in **Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta - and - The Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General [2020] IESC 000** makes clear that[1] it is impermissible to provide within an SEO that the requirements of a pension scheme should be '*no less favourable*' than a particular pension scheme which is in being. The current SEO provides, under the heading of Pension Scheme as follows:

> "*A pension scheme with no less favourable terms, including both employer and employee contribution rates, than those set out in the Construction Workers Pension Scheme be in place in the industry*."

Applying the Supreme Court decision, the Court **recommends** an amendment of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to delete this sentence and to replace that sentence with the following:

> *"Every employer employing workers to whom the Order applies must have in place a pension scheme that provides pension benefits for each employee covered in the Order."*

The current SEO sets out in relation to Pension contribution rates as follows:

> *"Contribution rates will increase in line with wage inflation in the sector after 1st October 2019."*

Applying the Supreme Court decision, the Court **recommends** an amendment of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to remove this sentence.

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[1] Para 184 of the judgment of Mac Menamin J. judgment: *This is a closely reasoned and succinct summary. The High Court judgment discusses this issue in the context of whether this was an impermissible further delegation from the Labour Court to the trustees of the CWPS, applying the principle delegatus non potest delegare (a delegate may not delegate). I think a slightly narrower approach is more apt. At first sight, resort to an existing pension scheme might appear to have all the attractions of a helpful shortcut, and be administratively inconvenient. But, in fact, as Simons J. pointed out, the pay-figures relating to construction workers might be different from those in the electrical contracting sector.*

Para185. Here, it is necessary to refer back to s.16(5) of the 2015 Act. This provides that a recommendation may provide for "… (f) the requirements of a pension scheme, including a minimum daily rate of contribution to the scheme by a worker and an employer …".
But it is then necessary to refer back to the words emphasised earlier, quoted from para. 85 of the High Court judgment. The Labour Court recommendation was that there should be a pension scheme which would contain terms no less favourable, including employer and employee construction rates, than those set out in the Construction Workers' Pension Scheme. But the words "no less favourable" do not comply with what is required by s.16(5)(f) of the 2015 Act. What was required, rather, was to set out a minimum daily rate of contribution to the scheme by a worker, and an employer. This the recommendation did not do. For this reason, what was contained in that part of the recommendation must also be seen as non-compliant with the section, and therefore, itself, ultra vires.

Pension scheme daily contribution rates

The pension daily contribution rates currently provided for by the SEO are

Employer contribution €5.62 (weekly - €28.09)

Worker contribution €3.75 (weekly - €18.73)

CIC

The CIC submitted that the current SEO should be amended so as to apply an increase to the daily contribution rates of employers and workers of 4% per year for three years in line with its submission as regards an amendment to the SEO to provide for increases in rates of pay in the sector.

CIF

The CIF submitted that the current SEO should be amended so as to apply an increase to the daily contribution rates of employers and workers of 1.6% per year for two years in line with its submission as regards an amendment to the SEO to provide for increases in rates of pay in the sector.

CWPS

The CWPS did not make a submission that an increase should be applied to the daily contribution rates contained in the current SEO. The CWPS did submit that the terms and conditions in relation to pension contributions are at an appropriate level to ensure sufficient protection to these workers and their families.

Conclusion of the Court

The Court places weight on the submissions of the CIC and the CIF that contribution rates should increase. The Court notes that both of these parties believe that pension contribution rates should increase exactly in line with the rate of pay growth in February 2022 and February 2023.

The Court also takes account of the submission of the CWPS, the only pension scheme provider to make a submission to the Court, as regards sustainability of the pension scheme it provides for the sector. While the circumstances of the CWPS provided pension scheme cannot be determinative of the matter of the requirements of a pension scheme for the sector in terms of pension scheme contributions, it is nevertheless relevant to have regard to those circumstances.

The Court has been persuaded that it is prudent to amend its previous Recommendation so as to provide for an increase in pension contributions but has not been persuaded that an increase exactly in line with wage growth is warranted at this time.

Balancing all of the factors which have been put before the Court through the submissions of the parties and in particular the support from the CIF and the CIC for an increase in pension contribution rates, the Court concludes that the current SEO should be amended so as to provide for an increase in the daily contribution rates of both employers and workers of 2% with effect from 1st February 2022 and a further 2% with effect from 1st February 2023.

The Court therefore **recommends** that its previous Recommendation, which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** be amended so as to delete the current reference to pension contribution and to replace that text with the following

Pension Contribution

Pension Contribution from 1st February 2022 *Employer daily rate - €5.73 (weekly - €28.65)*

Employee daily rate - €3.82 (weekly €19.10)

Total contribution daily into the scheme per worker - €9.55 (weekly €47.75)

Pension Contribution from 1st February 2023 *Employer daily rate - €5.84 (weekly - €29.22)*

Employee daily rate - €3.90 (weekly €19.50)

Total contribution daily into the scheme per worker - €9.74 (weekly €48.70)

Sick Pay Scheme

The Court invited oral submissions from the parties in relation to the implications of the Supreme Court decision in **Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta - and - The Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General [2020] IESC 000**. The CWPS submitted that the decision of the Supreme Court did not mean that an SEO could not make provision for contribution rates and benefits of a Sick Pay scheme in the sector. It was submitted that the Act at Section 16(g) provided that a Recommendation of the Court may make provision for *"the requirements of a sick pay scheme,"*. The CWPS submitted that the fundamental requirements of a sick pay scheme are that parties contribute to it and that it provides benefits to scheme members. On that basis the CWPS submitted that a recommendation of the Court in relation to a sick pay scheme should specify daily minimum contribution rates and minimum benefits to members.

The CIC and the CIF expressed no disagreement with that contention, and both supported the proposition that a Recommendation of the Court confirmed by the Minister by an SEO should make provision for the contribution rates and benefits to be provided by a sick pay scheme.

Conclusion of the Court

The current SEO makes provision as follows in relation to a sick pay scheme;

> *"A sick pay scheme in line with the Construction Industry Sick Pay scheme, including no less comparable benefits and contributions by both workers and employers, will be maintained in the sector*
>
> *The current weekly Sick Pay Contribution in force in the Construction Industry Sick Pay Scheme provided for in the current order for the sector are as follows*
>
> *Employer €1.27*
>
> *Employee €0.63*
>
> *Total €1.90"*

Applying the Supreme Court decision, the Court **recommends** an amendment of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to delete this text and to replace that text with the following:

"Every employer employing workers to whom the Order applies must have in place a sick pay scheme for each employee covered in the Order. Weekly contributions to a scheme are as follows:

Employer €1.27

Employee €0.63

Total €1.90"

The current SEO sets out in relation to sick pay scheme contribution rates as follows:

"Contribution rates will increase in line with wage inflation in the sector after 1st October 2019."

Applying the Supreme Court decision, the Court **recommends** an amendment of its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to delete this sentence.

Pension Scheme Death in Service contribution rates

The CIC

The CIC submitted that the current SEO should be amended so as to apply an increase to the daily contribution rates of employers and workers to the death in service element of the pension scheme provided for by the current SEO of 4% per year for three years in line with its submission as regards an amendment to the SEO to provide for increases in rates of pay in the sector.

The CIF

The CIF submitted that it was not seeking an increase in daily contribution rates of employers and workers to the death in service element of the pension scheme provided for by the current SEO by way of an amendment to the current SEO.

The CWPS

The CWPS submitted that the death in service element of the pension scheme provided by the CWPS can support the payment of benefits at the levels specified in the current SSEO based on the contributions specified therein. The CWPS made no proposal for the amendment of the current SEO in that respect.

Conclusion of the Court

The CIC has submitted that contributions to the Death in Service provision should be exactly in line with wage growth. The only submission made to the Court from a provider of such a scheme, the CWPS, contended that no increase in contribution rate is appropriate. The CIF also submitted that no increase in contribution rate is appropriate.

The Court concludes that no objective basis has been put forward to the Court to support the proposition that the provision of a Death in Service scheme requires an increase in the rate of contribution required by the current SEO.

The Court therefore concluded that no objective basis for a Recommendation to amend its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to alter the current provisions as regards death in service contributions had been put before the Court.

Sick Pay scheme daily contribution rates

The CIC

The CIC submitted that the current SEO should be amended so as to apply an increase to the daily contribution rates of employers and workers of 4% per year for three years in line with its submission as regards an amendment to the SEO to provide for increases in rates of pay in the sector.

The CIF

The CIF submitted that it was not seeking an increase in sick pay scheme contributions by way of an amendment to the current SEO and referenced the expected cost to employers of the likely introduction of statutory sick pay obligations in 2022.

The CWPS

The CWPS submitted that the sick pay scheme provided by the CWPS can support the payment of sick benefits at the levels specified in the current SEO based on the contributions specified therein. The CWPS made no proposal for the amendment of the current SEO in that respect.

Conclusion of the Court

The Court notes that the only provider of a sick pay scheme to the sector to make a submission to the Court has asserted that the circumstances of that scheme do not require such an increase. The Court, while noting that the requirements of the CWPS provided scheme cannot be determinative of the matter, also notes that no provider of a sick pay scheme to the sector has made a submission to the Court supporting an increase in contribution rates.

The Court, having regard to the submissions of the parties before the Court, concluded that no objective basis for a Recommendation to amend its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to alter the current provisions as regards sick pay scheme contributions had been made out.

Guaranteed Week

The CIC

The CIC submitted that the SEO should be amended so as to provide a guarantee to workers of a minimum working week of 39 hours. The current SEO identifies that the standard working week is 39 hours and that overtime payments are payable for hours worked beyond that threshold.

Where work is not possible due to inclement weather, the workers in the sector to whom the application relates have traditionally been paid. A practice has developed in recent years that workers are being sent home without pay in circumstances of adverse weather. For that reason, the SEO should make provision for a guarantee to workers of 39 hours per week.

The Employment (Miscellaneous Provisions) Act, 2018 requires an employer to specify to a worker the hours that he or she is reasonably expected to work and consequently the CIC believes that it is appropriate that an amendment should be made to the current SEO to provide a guaranteed minimum working week of 39 hours.

The CIF

The CIF submitted that the Act makes no provision for inclusion of a guaranteed working week to be recommended by the Court. Section 16(5) of the Act allows for a Recommendation to provide for

hourly basic rates of pay, pension and sick pay requirements and any pay in excess of basic pay in respect of sick pay, piece work, overtime, unsocial hours working, hours worked on a Sunday or travelling time.

Any provision as regards inclement weather must therefore be excluded from a Recommendation of the Court. In any event, many contractors in the sector do make payment to workers during inclement weather and consequently no requirement exists for that protection to be provided by an SEO.

The CWPS

The CWPS made no submission to the Court on this matter.

Conclusion of the Court

The Court notes that a basis for the submission of the CIC is that the provisions of the **Employment (Miscellaneous Provisions) Act, 2018** place obligations upon an employer as regards the hours which a worker is reasonably expected to work. In the view of the Court, the existence of legislation providing certain protections to workers cannot be relied upon as a basis for an amendment of the current SEO so as to provide the same protections.

The CIF has submitted that no provision of the Act allows for an SEO to make provision for a guaranteed minimum working week.

While contrasting assertions have been made by CIF and the CIC as regards the current practice in the sector as regards inclement weather arrangements, no detail has been provided to the Court which establishes the factual position in that respect.

In all of these circumstances, the Court does not recommend an amendment to its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]**

Disputes procedure

The current SEO makes provision in relation to dispute procedures as follows:

> ***Dispute Resolution Procedure***
>
> *If a dispute occurs between workers to whom the SEO relates and their employers, no strike or lock-out, or other form of industrial action shall take place until the following procedures have been complied with. All sides are obliged to fully comply with the terms of the disputes procedure.*
>
> ***Individual Dispute***
>
> > *a) The grievance or dispute shall in the first instance be raised with the employer at local level with a requirement to respond within 5 working days. Notice in writing of the dispute shall be given by the individual concerned or his trade union to the relevant organisation representing employers or to the employer directly.*
> >
> > *b) If the dispute is not resolved it shall be referred to the Adjudication Service of the WRC*
> >
> > *c) Either party can appeal the outcome of the Adjudication Hearing to the Labour Court.*

Collective Dispute

a) The grievance or dispute shall be raised in the first instance with the employers with a requirement to respond within 5 working days. Notice in writing of the dispute shall be given by the workers concerned or their trade union to the relevant organisation representing employers or to the employer directly.

b) If a dispute is not resolved the issue shall be referred to the Conciliation Service of the WRC

c) If the issue remains unresolved, it shall be referred to the Labour Court for investigation and recommendation.

The CIC

The CIC submits that employers in the sector contend that the disputes procedure set out in the current SEO has general application and applies to all disputes, including disputes which relate to matters that are not contained within the SEO. Therefore, the SEO should be amended so as to clarify that the disputes procedure has application only to disputes concerning a matter contained in the SEO. The CIC submitted that such an amendment would reflect the meaning of the Act at Section 16(6)

The CIF

The CIF submitted that no amendment to the SEO in relation to the disputes procedure contained therein should take place. In oral submissions, the CIF contended that any restriction on the scope of the procedure would not contribute to harmonious relations between employers and workers in the sector and would not promote the avoidance of industrial unrest in the sector.

The CWPS

The CWPS made no submission in relation to this matter.

Conclusion of the Court

The Court, having regard to the submissions of the parties, concluded that the disputes procedure contained in the current SEO relates to disputes between workers to whom the SEO relates and their employers. The procedure as set out in the current SEO is clear and no suggestion has been made by any party that an amendment should be made so as to extend its application in the sector.

The Court therefore concludes that the amendment proposed by the CIC can only have the effect of limiting the application of the procedure or of having no effect on the scope of the procedure at all.

The Court therefore cannot conclude that an amendment to the current SEO in the manner contended for by the CIC will promote harmonious relations between employers and workers or promote the avoidance of industrial unrest in the sector. On that basis, the Court does not recommend an amendment to its previous Recommendation which was confirmed by the Minister by a Sectoral Employment Order **(SEO) [S.I. No. 234 of 2019]** so as to alter the dispute resolution procedures contained therein.