

**SCREENING RIA
PROPOSED AMENDMENT TO INDUSTRIAL RELATIONS ACTS
ARISING FROM HIGH COURT CHALLENGE TO JOINT LABOUR
COMMITTEE SYSTEM**

1. POLICY CONTEXT, OBJECTIVES AND OPTIONS

Policy Context

Joint Labour Committee System

Joint Labour Committees (JLCs) are statutory bodies established under the Industrial Relations Acts 1946-2004 to provide machinery for the fixing of minimum rates of pay and the regulation of conditions of employment. JLCs are established by order of the Labour Court. Applications for the establishment of a JLC can be made to the Labour Court by the Minister, or representative employers or employees.

JLCs operate in areas where collective bargaining is not well established and wages tend to be low (e.g. hairdressing, hotels sector). They are composed of representatives of employers and workers in a particular sector and they meet periodically to discuss and agree terms and conditions to apply to specified workers in that sector. When a JLC agrees terms and conditions, it makes proposals to the Labour Court on foot of which it makes Employment Regulation Orders (ERO). EROs are statutory instruments which set out terms and conditions applying to specified workers in a particular sector. It is estimated that in the region of 250,000 workers are currently covered by terms and conditions set out in EROs.

Legal Challenge

On 15 November, 2007 the High Court granted an interim injunction preventing the implementation of an Employment Regulation Order for the Hotels Sector which was due to come into effect on 16 November.

The Court also granted an application by the Irish Hotels Federation, Vaughan Lodge Ltd and Michael Vaughan to bring judicial review proceedings against

the Hotels Joint Labour Committee, the Labour Court, Ireland and the Attorney General.

The applicants contended that the provisions of Sections 42 and 43 of the Industrial Relations Act 1946 and Section 48 of the Industrial Relations Act 1990, which provide for the making of EROs, are invalid in regard to certain provisions of the Constitution: Article 15.2.1 (unlawful delegation of functions that should be properly reserved to the Oireachtas), Article 40.3 and 40.3.1 (interference with property rights).

The applicants also contended that these Sections were in breach of their rights to fair procedures and due process as guaranteed under the European Convention of Human Rights (ECHR) in circumstances where there is no appeal or effective review of a decision made by the JLC and Labour Court.

In addition, the judicial review sought a Declaration that the Employment Regulation Order in question was invalid on the grounds that proper procedures were not followed by the Joint Labour Committee, in particular by its Chairman, and by the Labour Court when processing the Employment Regulation Order.

The case was heard in February 2008 and, following agreement between the parties, the High Court made an order quashing the Employment Regulation Order made by the Labour Court and remitting the matter back to that Joint Labour Committee. In effect the State side conceded on procedural grounds while the plaintiffs agreed that it was not necessary for the High Court to consider the constitutional issues raised in the case.

It became clear during the course of the High Court challenge that a number of issues needed to be addressed in order to deal with weaknesses in the current legislation governing the JLC system which leave it open to potentially successful challenge on constitutional grounds. Any future successful challenge could put the entire JLC system in doubt.

Registered Employment Agreements

Separately a legal challenge has more recently emerged to the system of Registered Employment Agreements (REA), also provided for under the Industrial Relations Acts, when, on 13 June 2008, the High Court granted to a number of electrical contractors leave to seek judicial review of the REA in the electrical contracting industry agreed between employers and the Technical Engineering and Electrical Union.

Employment Agreements negotiated by the two sides in an industry or enterprise, may be presented to the Labour Court for registration. If the Labour Court is satisfied that the agreement meets the statutory requirements, it will register it. Registration has the effect of making the provisions of the agreement legally enforceable in respect of every worker of the class, type or group to which it is expressed to apply and to his or her employer, even if such worker or employer is not a party to the agreement. Construction and Electrical Contracting are the main sectors covered by REAs.

While the judicial review focuses primarily on challenging compliance with the existing legislative requirements, constitutional issues similar to those in the ERO challenge are raised. However, it is considered that REAs are less susceptible to successful constitutional challenge on these grounds. Firstly, they can only come into being following agreement between trade unions and employers who are substantially representative of the workers and employers to which the agreement applies. Secondly, Section 27 of the 1946 Industrial Relations Act would appear to provide adequately in terms of 'principles and policies' and procedures to be followed by the Labour Court in deciding whether to register an agreement. However, as REAs could, like EROs, be vulnerable to challenge on the ground of lack of Oireachtas scrutiny, it is proposed to also make legislative provision to address this weakness.

2. Objectives

The objective of the proposed legislation is to amend the existing Industrial Relations Acts to address the weakness that have been identified as a result of the High Court challenge to the JLC system. To this end it is proposed legislation would be amended to provide for the following:

- Principles and policies to which regard should be had in making proposals for an Employment Regulation Order
- Oireachtas scrutiny of Employment Regulation Orders. The perceived deficit in Oireachtas scrutiny under the present arrangements would be addressed through the Minister making the Order giving effect to the ERO rather than the Labour Court as is currently the case, and
- Procedures to be followed when formulating proposals for an Employment Regulation Order
- Power to amend an ERO within six months in case of error
- 5-year term of office for chairman of JLC
- Oireachtas scrutiny of Registered Employment Agreements. The Minister to make an Order giving effect as an REA to an agreement registered by the Labour Court.

3. Options/Choices

The two policy options considered were:

- **Option 1** – “Do nothing”, and
- **Option 2** – Legislate to deal with the deficiencies in the existing legislation.

Option 1. Do Nothing

To maintain the status quo with regard to the existing legislation would leave the opportunity for another legal challenge to the making of an Employment Regulation Order or to the constitutionality of the Industrial Relations Acts as they apply to the JLC and REA systems. A successful constitutional challenge to the JLC and REA systems would result in two of the main legal mechanisms governing minimum terms and conditions for many workers being removed. The only legally binding control on wage rates would then be the National Minimum Wage. While the wage rates provided for in EROs are often little above the minimum wage, they also provide for entitlements on overtime, shift and other premia, which are not covered under the National Minimum Wage Act.

Given the current partnership context, and the centrality of the ERO/REA mechanisms to our voluntary industrial relations system, it is considered essential to strengthen existing industrial relations structures in the manner proposed. In any event, it is considered that any fundamental change to these structures should emanate from proactive policy consideration and a positive intervention by the Government, rather than an uncontrolled outcome to a legal challenge by a third party.

Accordingly, the “do nothing” option is not considered a realistic one.

Option 2. Amend IR legislation to address the deficiencies identified.

Given the objective of addressing identified weakness in the existing legislation governing the Joint Labour Committee and the Registered Employment Agreement systems and the importance of ensuring the integrity of both, it is considered that introducing amending primary legislation is the only realistic option available in the time frame envisaged.

2. IDENTIFICATION OF COSTS, BENEFITS & IMPACTS OF EACH OPTION

A. COSTS

Option 1- “Do nothing”

A successful challenge in the future to the making of an individual ERO would prevent the introduction of increases in the minimum rates of pay for workers in the relevant sector. As EROs generally deal with the conditions of low-paid workers, the pay increases at issue would be relatively modest. A successful constitutional challenge to the existing legislation would result in the collapse of the JLC system and some 250,000 workers would lose the benefits of the terms and conditions provided for under EROs.

A successful challenge to the REA system would have similar significant implications for workers in sectors covered by REAs (particularly the electrical and construction sectors) whose wages and conditions are set under the system.

Option 2 – Legislate

It is not anticipated that introducing amending legislation will result in any additional direct or indirect costs to the Exchequer, consumers or business.

B. BENEFITS

Option 1

There are no benefits for employees in maintaining the status quo and failing to address the legal uncertainty that now exists around the JLC/REA systems. There is no guarantee that even a successful legal challenge resulting in the collapse of the entire JLC and/or REA system would result in any benefit to employers. In particular, the absence of sectorally agreed terms and conditions could result in a major increase in local level negotiations being sought on pay and terms of conditions of with consequent implications for industrial relations within these sectors.

Option 2

Amending the existing Industrial Relations legislation as proposed would ensure that, insofar as the identified weaknesses are concerned, the integrity of the JLC and REA systems are maintained. This ensures that the workers involved continue to be entitled to the agreed terms and conditions as set out in the relevant EROS/REAs. It will also help to ensure a “level playing field” for all employers in the relevant sector as regards labour costs. In addition, the proposed provision that, in formulating proposals for an ERO, regard must be had to competitive and employment considerations should be of benefit to employers.

C. IMPACT

Impacts on Socially Excluded or Vulnerable Groups

As EROs, in particular, generally deal with the terms and conditions of low-paid and vulnerable workers, it is expected that the proposal, which aims to protect the integrity of the JLC/REA systems, will have clear benefits for this category of worker.

3: CONSULTATION

In the context of Towards 2016, the social partners agreed that the Joint Labour Committee system should be retained, albeit with a number of non-legislative actions

necessary to modernise the system. To this end, The Labour Court set up a Working Group, which included representatives from IBEC and ICTU, to progress the commitment to modernise the JLC system. The group has completed its work and a number of operational measures have been agreed to improve the functioning of the system.

It is not proposed to widely consult in advance of the decision being sought to draft the legislation, not least because of the litigious and adversarial atmosphere that currently exists. The proposals would be unobjectionable to the Social Partners and actively sought by the trade unions. It has been clearly signalled by the (then) Minister (Martin) that the Government will take necessary action to support the JLC system. Further consideration can be given to advance consultation when the Bill has been drafted.

4: ENFORCEMENT AND COMPLIANCE

The proposed amending legislation will not, in itself, require any new enforcement arrangements. Enforcement of employment rights legislation, including EROs and REAs, is carried out by the National Employment Rights Authority.

5: REVIEW

The measures proposed in the Bill, when enacted, will be subject to normal ongoing review by the Department and separately through the Social Partnership monitoring and review arrangements provided for under Towards 2016.