Are the current Registered Employment Agreements and Employment Regulation Orders which are enforceable in the Republic of Ireland in breach of Freedom of Movement and Right of Establishment provisions of the Treaty of Lisbon?

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A Notice was published in the Irish Times on the 10th February 2011 requiring submissions to be made with regard to the Independent Review of ERO and ERA Wage Setting Mechanisms: Closing Date 25th February 2011.

The Terms of Reference are on the attached Link :

http://www.deti.ie/publications/employment/2011/ToR080211.pdf

but, in summary, the Department of *Enterprise, Trade & Innovation* sought Submissions on reforms required to the labour market aimed at removing barriers to employment creation and disincentives to work allied with a commitment by the Government to review the framework of *Registered Employment Agreements* ("REAs") and *Employment Regulation Orders* ("EROs") within a 3 month period.

Brian Morgan of Morgan McManus solicitors, Clones, County Monaghan (www.morganmcmanus.com) made the Submission detailed below on behalf of a Northern Ireland Electrical Contractor. The Report of the Independent Review, named after its authors the chairman of the Labour Court, Kevin Duffy, and Dr Frank Walsh of UCD, known as the "Duffy/Walsh" Report issued on the 24th May last. The Report is on the attached Link :

http://www.deti.ie/publications/employment/2011/Report_ERO_REA.pdf

In summary, the Duffy/Walsh Report recommends the retention of the basic framework of the REA / ERO system but with substantial reform. The Minister for *Enterprise, Trade & Innovation*, Richard Bruton, has issued a Press Release through the website of the Department. The Press Release is on the attached Link :

http://www.deti.ie/press/2011/20110524.htm

While the Press Release records that the Minister commits merely to have Recommendations for the overhaul of the framework completed by the end of June, this has however been interpreted by the media as meaning that there may be more radical reform than that recommended in the Duffy/Walsh Report. The writer refers in particular to a front page Report in the Irish Times dated 26th May 2011 titled "*Thousands face pay cuts in proposed reform of wage deals*" and copied on the attached Link :

http://www.irishtimes.com/newspaper/ireland/2011/0525/1224297714624.html

The area in this debate which was not considered by the Duffy Walsh Review was whether the REA / ERO framework is in breach of European law. The writer made a

submission to the Independent Review that the framework was in breach of the Lisbon Treaty. This was not considered by Duffy Walsh as they explain that they were prohibited from considering such submissions due to the fact that the legal and constitutional validity of the system did not come within their Terms of Reference. It is in those circumstances that this Submission has been published with the consent of our client. Certain extracts have been excluded in order to protect the identity of our client.

It is submitted that the REA / ERO framework conflicts with :

(i) The fundamental principle of freedom of movement contained in Article 39 of the Treaty of Lisbon;

(ii) The right of freedom of establishment as provided by Article 49 of the EU Treaty of Lisbon, which right provides for prohibition of restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State in the territory of any other Member State, and also includes the right to set up and manage undertakings in particular companies or firms within the conditions laid down for its own nationals by the law of the country where such establishment is effected;

(iii) The prohibition of restrictions on the freedom to provide services within the European Union as provided by Articles 56-57 of the Treaty of Lisbon.

It is submitted that this European aspect to the debate requires consideration before the Government finalizes its recommendations.

The following is an extract of the Submission furnished :

Re: INDEPENDENT REVIEW OF ERO AND REA WAGE SETTING MECHANISMS

To: Ms Helena McDermott
Independent Review of EROs and ERAs
C/O Room 218b
Davitt House
65a Adelaide Road
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By E-Mail:wagereview@deti.ie

Submission Made By Morgan McManus Solicitors On Behalf Of A Northern Ireland Electrical Contractor

Trading Difficulties for Northern Ireland Companies in Republic of Ireland by reason of Registered Employment Agreement

This Submission is made to the Department of Enterprise Trade and Innovation ("the Submission Recipient") in response to a Notice published in the Irish Times on the 10th February 2011 requiring submissions to be made with regard to the Independent Review of ERO and ERA Wage Setting Mechanisms: Closing Date 25th February 2011.

It is noted that submissions are requested from the stated parties *"including all of the parties directly involved in the current mechanisms in the context of evolving private sector pay policy".* Insofar as our client, a Northern Ireland Electrical Contractor, is directly affected by decisions which would be made by the Independent Review but will not necessarily be represented by the *"Main Representative Bodies of Employers and Workers"* who currently represent Republic of Ireland Associated Employers, it is assumed that the Independent Review will accept this Submission from Morgan McManus Solicitors on behalf of its Northern Ireland Employer Client and will seriously consider the terms of this Submission in its Independent Review.

It is noted in any case that the Terms of reference, as published on the Department website confirm that the Review will take account, inter alia, of *the current levels of domestic competition and international competitiveness of the sectors covered by EROs and REAs* … and it is submitted in the circumstances that this Submission is very relevant to the Review.

SUBMISSION

1. Client Profile:

Our client is an Electrical and Maintenance Contractor in Northern Ireland . . ***(extract excluded from this Article to protect client`s identity)***

Client has explained that they do not have a liability in Northern Ireland to provide for Life Insurance or Pensions for their employees. Whereas such Life Insurance and Pensions are provided for workers in the Construction Industry in Northern Ireland and facilitated by the *Construction Engineers Federation*, there is no such facility for Electrical Contractors. Client makes available to its employees a Stakeholder Pension but there is no obligation on the employee to take up this facility.

Section 2	**Industrial Relations Act 1946**

This Act forms the basis of Industrial Relations law in the Republic of Ireland. The relevant Sections are the references to the *Labour Court* at Part 2 and the registration of employment agreements at Section 27 of the Act.

Whereas the *National Minimum Wage Act 2002* sets the legal minimum hourly rates payable by employers in Ireland, certain industries, including the electrical contractors, are obliged to comply with Employment Regulation Orders ("EROs") and Registered Employment Agreements ("REAs'"), generally, the EROs and REAs stipulate hourly rates in excess of the national minimum wages. They also impose additional obligations, for example in relation to Pension entitlements, overtime and sick pay.

The *Industrial Relations Act, 1946* made provision for the Employers` Organisations and the Employee Representatives from particular sectors of the relevant industry to agree rates and in turn to arrange to have the new rates registered as *Employment Agreements* with the *Labour Relations Commission.*

The Submission Recipient will be aware of the Labour Court Hearing Reference CD/09/158 which took place before the Labour Court in January and February 2009 and that the Court decided to retain registration of the current *Registered Employment Agreement*. This was subsequently confirmed by the High Court.

It is noted that the *Industrial Relations (Amendment) Bill 2009* makes provision for the cancellation and registration of new *Registered Employment Agreements* to be submitted to the Minister for Enterprise Trade and Employment for confirmation by Ministerial Order, before approval by the Labour Court. It is important however to point out that this Bill is unlikely to be enacted in the near future and it does not make any specific provision for Northern Ireland companies.

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

This was referred to in the Labour Court Case Ref. CD/09/158 Decision where, at paragraph 32.6, the Labour Court stated that it was satisfied that the EU Worker's Directive was transposed into Irish Law by the above statute.

Section 4	**Relevant EU Legislation/Directives**

The EU Council Decision 96/800/EC of 22nd December, 1994 with regard to the *General Agreement on Trade in Services within the European Community* is of relevance to this Submission. This effectively records that businesses from member states of the EU are obliged to provide services of similar standard to all other EU member states. We would submit that, to do so, the suppliers therefore should not be unduly restricted by the legal regulations of the supply receiving country.

We have noted information from the europa.eu website with regard to the "*Posted Workers*" Directive Reference 96/71 on the posting of workers to other EU member states. Effectively, in supplying its employees to undertake Contracts in the Republic of Ireland, the employees come under the Workers Directive. The Worker's Directive records that employees who are posted to another EU member state shall be entitled to "*minimum standards of employment conditions that prevail in the posted worker country"*.

Of relevance is the fact that documents viewed record that the EU Commission is conscious that such control mechanisms should not impinge on Article 49 EC governing companies' provision of cross-border services. Submission Recipient is referred to the text of directive 96/71/EC.

Submission Recipient is referred to Article 49 which records that "*restrictions on freedom to provide services within the Community shall be prohibited*" in respect of nationals of member states who are established in a state of the community other than that of the

person for whom the services are intended. This is relevant insofar as, without the obligation to comply with the REA's, our client has most certainly been in a position to trade more freely within the Republic of Ireland and provide services at a more competitive rate to its ROI competitors. This is not to say that it is only by reason of non-compliance with the REA that client is in a position to be more competitive but lack of compliance with the REA would certainly contribute to that competitiveness.

We have noted a guideline document issued by the EU Commission on the 13th June, 2007 which records that there are indications that some collective bargaining systems "*are excessive as they go beyond the protection of posted workers and are unjustified obstacles to the free movement of services, a fundamental right under the Treaty. The European Court of Justice has ruled that any control measure must be proportionate to the goal in view*". The issue here is whether the REA agreement is excessive and whether it goes beyond the protection of posted workers. There would appear to be no doubt that the REA Agreement is a collective agreement and, as such, has the protection of the *Posted Workers* directive.

Of relevance also is the EU Directive 2006/123/EC on the *Provision of Services in the Internal Market*. This Directive establishes a general legal framework which favours freedom of establishment for providers as well as the free movement of services, while guaranteeing a superior level of quality. Our client would obviously submit that it is entitled to the protection of this Directive in the supply of electrical services to its ROI customers.

Of relevance is the "*Laval*" case which was heard by the European Court of Justice in 2007. This related to a dispute over the provision of services within Sweden by a foreign company in circumstances where the posted workers earned around 40% less than their Swedish counterparts. In that Case the ECJ, while acknowledging that collective action is permissible as provided by the EU Workers Directive, in this instance decided that minimum standards (eg, wages etc) were not applicable in this case since there was no legal provision for the relevant collective agreement to be incorporated into Swedish Law.

Section 5	**Revenue Commissioners Income Tax Statement of Practice SP-IT/3/06 September 2007**

Our client is fully compliant with their RoI tax liability.

Section 6	**Determination of Labour Court – Hearing CD/09/158**

The Labour Court was requested to consider the application of the various applicant companies to vary the employment agreement for the electrical contracting industry. Various companies, such as NECI and the *Unaligned Group of named Electrical Contractors* were requesting the Labour Court to cancel the registration of the latest agreement and Counsel will note that the Labour Court decided against cancellation of the registration of the agreement.

Of relevance was an argument made (at paragraph 30.2 of the Decision) that there were now significant numbers of electricians from other EU member states who were willing to work for less than the REA rates. Paragraph 30.4 records that "*obvious difficulties would arise for employers who could not realistically be expected to agree rates of pay in circumstances where they could have no idea whether or not their competitors would agree similar rates. This, in all likelihood, would lead to significantly greater incidence of industrial disputes"*. Paragraph 32.4 records that a troubling consequence of cancellation, which was canvassed by the Unions, "*concerns the difficulty that would arise in seeking to enforce locally agreed rates against contractors from other EU Member states*". Counsel will note that reference was made to the "*Laval"* case but the Court was of the view that the *Laval* case would not apply in the Republic of Ireland and (at paragraph 32.6) recorded that the *Posted Workers* Directive was transposed into Irish Law by Section 20 of the *Protection of Employees (Part-time Work) Act, 2001*. At Paragraph 32.8 the Court stated that it was satisfied that the REA was enforceable against an employer of a posted worker and it was satisfied that (paragraph 32.10) by virtue of Section 20 of the Act of 2001, the terms of the REA where applicable to, and can be enforced against, contractors based outside the state.

What is of relevance, insofar as EU competition law applies, is that at paragraph 32.11 of the Decision, the Labour Court commented that "*in the absence of an REA contractors from other member states could exercise their freedom to provide services in this jurisdiction under the EC Treaty at the same rates and conditions of employment as apply in their country of origin. Depending on the Country of origin this could seriously undermine the competitive position of Irish contractors".* **Surely this statement in itself is grossly anti-competitive?** That is, the Labour Court was, inter alia, justifying its decision to impose the REA on the fact that "*the competitive position of Irish contractors*" would be seriously undermined if Northern Ireland contractors could supply services at lesser cost. Our client takes issue with this position which has been adopted by the Labour Court.

There is an argument to be made (we appreciate that ultimately this may require justification by an economist) that the rates under the REA Agreements were unjustifiably risen in the Republic of Ireland over the last few years in order to avoid industrial unrest in circumstances where the Irish economy was undergoing huge growth. However, as history has shown, this huge growth was not justified and was based on an over-extended construction industry and low interest rates. There is no doubt that many Irish contractors are now uncompetitive but the Labour Court would impose the REA rates on Northern Ireland and other EU suppliers simply because Irish contractors have become uncompetitive. Surely this in breach of EU Competition Law?

Our client has considered investigating what redress might be available through the European Courts based on the fact that the client is UK based and already have obligations with which it must comply under UK Law. For instance, if the client was to concede that they had liability under the ROI REA and in those circumstances gave to their posted workers the benefit of pension benefit and wages increases which were not available to their northern Ireland based employees, is there not a case for the Northern Ireland based employees claiming that they have received unfair treatment and that the

company is therefore in breach of its Equality obligations within Northern Ireland? We have no doubt that there will be many other consequences.

Counsel's Opinion.

We have taken Counsel's Opinion on the above issues and have quoted below extracts from that Opinion :

1. FACTS:

The Querist is an electrical and maintenance contractor established in ***…(excluded from this Article to protect client`s identity)***

At section 6 of the written particulars of employment for the Querist's workers provide at section 6 that the worker will be based at a certain location but that "you are required to work at any place where the employer has clients or prospective clients". Moreover, at section 19 of the written particulars of employment, it is provided that such an employee will not be required to work outside the UK for than one continuous month. At section 16 of the written particulars of employment, it is stated that;

The Company administers both a Personal Pensions Scheme and a Stakeholder facility which you are eligible to join, details are available from the Office Manager.

If you choose not to participate in this scheme there is no contracting-out certificate in force for the employment in respect of the statement given.

……

Section 33 of the Industrial Relations Act 1946 recites:

33.*—(1) The Court may at any time, on the application of any person, give its decision on any question as to the interpretation of a registered employment agreement or its application to a particular person.*

(2) A court of law, in determining any question arising in proceedings before it as to the interpretation of a registered employment agreement or its application to a particular person, shall have regard to any decision of the Court on the said agreement referred to it in the course of the proceedings.

(3) If any question arises in proceedings before a court of law as to the interpretation of a registered employment agreement or its application to a particular person, the court of law may, if it thinks proper, refer the question to the Court for its decision, and the decision of the Court thereon shall be final.

Dissatisfaction with this position led to a reference to the Labour Court [CD/09/158]. It is unfortunate to note that none of the applicants on behalf of the employers' side to this litigate were based in Northern Ireland. The Labour Court decided to retain registration of the current REA. This case originated in a number of companies, such as the NECI and the Unaligned Group of named Electrical Contractors requesting the Labour Court to cancel the registration of the latest REA. The Labour Court decided against such cancellation, holding that it was satisfied that the REA was enforceable against the employer of a posted worker as it was satisfied that, by reason of section 20 of the 2001 Act, the terms of the REA were applicable to and enforceable against, contractors based outside the Republic of Ireland. At paragraph 32.11, the Court held;

32.11 Conversely, it seems reasonably if not absolutely clear to the Court that in the absence of REA contractors from other Member States could exercise their freedom to provide services in this jurisdiction under the EC Treaty at the same rates and conditions of employment as apply in their country of origin. Depending on the country of origin this could seriously undermine the competitive position of Irish contractors.

32.12 The point was made in the course of the hearing that it is difficult to enforce the REA against firms from Northern Ireland,which undertake short-term assignments in this jurisdiction. There is considerable validity in that contention. However, the extent to which cancellation of the REA could detrimentally expose the industry as a whole to external competition from contractors established in law wage Member States would, in the Court's view, far outweigh any benefit that might accrue to contractors who could more easily compete in terms in the cross border segment of the market.

……

By a guidelines document issued by the EU Commission on 13 June 2007, the Commission stated there are indications that some collective bargaining systems are "excessive as they go beyond the protection of posted workers and are unjustified obstacles to the free movement of services, a fundamental right under the Treaty". In this regard, EU Directive 2006/123/EC on the Provision of Services in the Internal Market establishes a general legal framework which favours freedom of establishment for providers as well as the free movement of services.

Accordingly, since the REA in force in the Republic of Ireland is disadvantaging the Querist (making it less able to compete with other comparable companies), the Querist asks if the REA in force in the Republic of Ireland is excessive insofar as it goes beyond the protections provided by the Posted Workers Directive?

The above is of concern to the Querist, not least because;

(a) The current REA makes it very difficult for it to compete in the Republic of Ireland; and

(b) There is apprehension that EPACE will then take enforcement action against non-Irish companies providing services in Ireland which could result in criminal convictions against such companies or employers, and in turn lead to the withdrawal of C2 certificates. The effect of this sequence of actions would be that such companies would be unable to trade in Ireland; and

(c) Were the Querist to concede that it is bound by the REA in the Republic of Ireland for its Northern Ireland workers who work there, it queries if there is then a liability for it to equate those working conditions for its workers working in Northern Ireland.

……..

2. ***Law***

2.1 Given this most recent correspondence from the Querist, I have not attempted to set out the potential constitutional legal provisions at play within the Republic of Ireland as regards the decision of the Labour Court. Nor, given the contents of the Querist's letter of 1 June 2010, do I think it appropriate to dilate at any great length on the potential for a conflict of laws between Irish law and European Union law. However, I do feel it may be helpful to set out the basic tenets which I regard as of assistance to your client ……..

2.2. The departure point for the Querist's contentions must be Article 45 (ex Article 39 TEC) of the Treaty of Lisbon, which provides;

Article 39

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

2.3 Article 49 of the Treaty of Lisbon provides a Right of Establishment;

Article 49 (ex Article 43 TEC)

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

2.4 Moreover, Articles 56-57 of the Treaty provides;

Article 56

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respectof nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57 (ex Article 50 TEC)

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

(a) activities of an industrial character;

(b) activities of a commercial character;

(c) activities of craftsmen;

(d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so,temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

2.5 The Posted Workers Directive [Council Directive 96/71/EC} provides at Article 3;

Article 3

Terms and conditions of employment

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

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

  (a) maximum work periods and minimum rest periods;

  (b) minimum paid annual holidays;

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

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

  (e) health, safety and hygiene at work;

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

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

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

2. In the case of initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking,

the first subparagraph of paragraph 1 (b) and (c) shall not apply, if the period of posting does not exceed eight days.

This provision shall not apply to activities in the field of building work listed in the Annex.

....

7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.

Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

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

In the absence of a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on:

- collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or

- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,

provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.

Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:

- are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and

- are required to fulfil such obligations with the same effects.

2.6 The Posted Workers Directive was construed by the European Court of Justice in ***LAVAL UN PARTNERI LTD (applicants) v. SVENSKA BYGGNADSARBETAREFÖRBUNDET and others (respondents)*** *[2008] IRLR 160. In* ***LAVAL*** *the applicant was a company incorporated in Latvia. Between May and December 2004, it posted around 35 workers to Sweden to work on building sites. It had signed collective agreements with the Latvian building sector's trade union, but it was not bound by any collective agreements with the relevant Swedish trade unions, none of whose members were employed by it. The Respondent was the Swedish building and public works trade union. It sought to persuade Laval to sign its collective agreement for the building sector. That collective agreement provided for more favourable terms than those applicable to posted workers established by Swedish law in accordance with Article 3 of Posted Workers Directive, while other terms in the collective agreement related to matters not referred to in Article 3. Laval refused to sign the collective agreement. The local branch of the Swedish building and public works trade union commenced collective action against Laval. It blockaded one of Laval's building sites, preventing, amongst other things, the delivery of goods onto the site, placing pickets and prohibiting Latvian workers and vehicles from entering the site. Svenska initiated sympathy*

action, with the effect that the Swedish undertakings belonging to the organisation of electricians' employers were prevented from providing services to Laval. Other trade unions announced sympathy actions, consisting of a boycott of all Laval's sites in Sweden, with the result that Laval was no longer able to carry out its activities in that member state. Laval commenced proceedings in the national courts against the Swedish building and public works trade union, its relevant local branch, and the Swedish electricians' trade union, seeking a declaration that both the blockade and the sympathy action were illegal, an order that such action should cease, and an order that the trade unions pay compensation.

It fell to be determined whether Articles 12 EC and 49 EC and Directive 96/71 precluded trade unions from attempting, by means of collective action, to force a foreign undertaking which posted workers to Sweden to apply a Swedish collective agreement. Swedish national law ("MBL") prohibited a trade union from taking collective action with the intention of circumventing a collective agreement concluded by other parties, but that prohibition was in practice not applicable to collective action against a foreign undertaking which was temporarily active in Sweden and which had brought its own workforce.It also fell to be determined whether that constituted an infringement of the freedom to provide services and discrimination on grounds of nationality.

Accordingly, the national court stayed the proceedings, and referred the matter to the Court of Justice for a preliminary ruling;

2.7 The Court of Justice of the European Communities on 18 December 2007 ruled as follows:

"(1) Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union, in a member state in which the terms and conditions of employment covering the matters referred to in Article 3(1), first sub-paragraph, (a) to (g) of that Directive are contained in legislative provisions, save for minimum rates of pay, from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider o fservices established in another member state to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the Directive.

(2) Where there is a prohibition in a member state against trade unions undertaking collective action with the aim of having a collective agreement between other parties set aside or amended, Articles 49 EC and 50 EC preclude that prohibition from being subject to the condition that such action must relate to terms and conditions of employment to which the national law applies directly."

(3) Although the right to take collective action must be recognised as a fundamental right which forms an integral part of the general principles of Community law, the exercise of that right may nonetheless be subject to certain restrictions. It is to be protected in accordance with Community law and national law and practices. ***The protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods or the freedom to provide services.***

(4) The exercise of fundamental rights must, however, be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality. It follows that the fundamental nature of the right to take collective action is not such as to render Community law inapplicable to such action, taken against an undertaking established in another member state which posts workers in the framework of the transnational provision of services.

(5) ***The right of trade unions of a member state to take collective action by which undertakings established in other member states may be forced to sign the collective agreement for the building sector, certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment, is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC[1].***

(6) *The right to take collective action for the protection of the workers of the host state against possible social dumping may constitute an overriding reason of public interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty. However, collective actions such as that at issue in the present proceedings cannot be justified in the light of that public interest objective, where the negotiations on pay, which that action seeks to require an undertaking established in another member state to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.*

(7) *It follows that Article 49 EC and the Directive preclude a trade union, in a member state in which the terms and conditions of employment, covering the matters referred to in Article 3(1) of the Directive save for minimum rates of pay, are contained in legislative provisions, from attempting to force a provider of services in another member state to enter into negotiations and to sign a collective agreement laying down more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the Directive.*

(8) *The freedom to provide services implies, in particular, the abolition of any discrimination against a service provider on account of its nationality or the fact that it is established in a member state other than the one in which the service is provided. Such discrimination may only be justified on grounds of public policy, public security or public health. National rules, such as those at issue in the present case, which fail to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the member state in which they are established, give rise to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement.*

(9) *Accordingly, the Court concluded that it was clear that the application of the rules Laval is intended to allow trade unions to take action to ensure that all employers active on the Swedish labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden, and to create a climate of fair competition, on an equal basis, between Swedish employers and entrepreneurs from other member states. None of those considerations constitute grounds of public policy, public security or public health, and therefore it must be held that discrimination such as that in the present case cannot be justified.*

2.8 *The Posted Workers Directive came under consideration by the European Court of Justice in **RÜFFERT (applicant) v. LAND NIEDERSACHSEN (respondent)** [2008] IRLR 467, where the issue before the Court was whether it was an unjustified restriction on the freedom to provide services under the EC Treaty if a public contracting authority is required by statute to award contracts for building services only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed*

[1] Emphasis added

(i.e. the host Member State). The Court held the Directive, as interpreted in the light of Article 49 EC, precludes a legislative measure that requires a state authority to award public works contracts only to undertakings which agree in writing to pay their employees at least the minimum wage prescribed by a collective agreement.

The Court held the Directive cannot be interpreted as allowing the host member state to make the provision for services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. Such an interpretation would amount to depriving the Directive of its effectiveness. The Directive expressly lays down the degree of protection for workers of undertakings in other member states who are posted to the territory of the host member state which the latter state is entitled to require those undertakings to observe.[2]

The Court went on to state that, without prejudice to the right of undertakings established in other member states to sign of their own accord a collective labour agreement in the host member state, ***the level of protection which must be guaranteed to workers posted to the territory of the host member state is limited, in principle, to that provided for in Article 3(1) of the Directive, unless pursuant to the law or collective agreements in the member state of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.***

The Court concluded that, on that basis, the Directive precludes such a legislative measure as that at issue in the present case, which does not fix a rate of pay according to one of the procedures laid down in Article 3(1) and (8) of the Directive. Such a legislative measure does not itself fix any minimum rates of pay for the purposes of Article 3(1), and merely refers to a collective agreement which has not been declared of universal application and cannot be treated as of universal application for the purposes of Article 3(1) and (8). Such a rate of pay cannot be considered to be a term and condition of employment which is more favourable to workers within the meaning of Article 3(7) of the Directive. Moreover, the Court held that such a legislative measure is capable of constituting a restriction on the freedom to provide services within the meaning of Article 49 EC. It may impose on service providers established in another member state where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host member state.

The Court concluded in ***RÜFFERT*** *that such a restriction could not be justified by the objective of the protection of workers. The rate was applicable only to a part of the construction sector within the geographical area of the collective agreement, since the legislation applied solely to public contracts, and the collective agreement had not been declared universally applicable. The restriction also could not be justified by the objective of ensuring protection for independence in the organisation of working life by trade unions, or by the objective of ensuring the financial balance of the social security system.*

2.9 *The most recent consideration of the Posted Workers Directive came in* ***COMMISSION OF THE EUROPEAN COMMUNITIES (applicant) v. LUXEMBOURG (defendant)*** *[2009] IRLR 388. There, the European Commission brought proceedings against Luxembourg, claiming, amongst other things, that national legislation was incompatible with the Directive, and that Luxembourg had failed to fulfil its obligations under Article 3(1) and (10) of Directive 96/71 and Articles 49 and 50 of the EC Treaty, establishing the principle of the freedom to provide services. The Commission took objection to four of the specified matters:*

(i) the requirement of a written contract or document informing employees of their terms and conditions;

(ii) the automatic adjustment of rates of remuneration to the cost of living;

[2] Emphasis added

(iii) rules related to the treatment of part-time and fixed-term work; and

(iv) the requirement relating to imperative provisions of national law in respect of collective agreements.

The Commission argued that the matters did not fall under Article 3(1) of the Directive; could not fall under the public policy exception in Article 3(10); and constituted an infringement of the principles of the freedom to provide services. Some of the requirements were already required by EC law, and therefore the member state of the undertaking which had posted the workers to Luxembourg should have provided the protections required already.

Moreover, the Commission objected to monitoring arrangements whereby undertakings had to supply information on demand to the Labour and Mines Inspectorate before the posted workers commenced work. It considered that the arrangements were too ambiguous and would constitute a restriction on the freedom to provide services.

2.10 The European Court of Justice held:

(1) The laws of the member states must be co-ordinated in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers there. Accordingly, Article 3(1) of Directive 96/71 provides that member states are to ensure that, whatever the law applicable to the employment relationship, undertakings established in another member state which post workers to their territory in the framework of a transnational provision of services, guarantee the posted workers the terms and conditions of employment, covering the matters set out in that Article, which are laid down in the member state in which the work is carried out. For that purpose, Article 3(1) sets out an exhaustive list of the matters in respect of which the member states may give priority to the rules in force in the host member state.

(2) Nevertheless, under Article 3(10) of Directive 96/71, ***member states can, in compliance with the EC Treaty, apply in a non-discriminatory manner to undertakings which post workers to their territory terms and conditions of employment on matters other than those referred to in Article 3(1), in the case of public policy provisions.*** *The exception is a derogation from Article 3(1) and should be interpreted strictly. Moreover, the public policy exception is a derogation from the fundamental principle of freedom to provide services which must also be interpreted strictly. It is limited to those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. Article 3(10) did not exempt member states from their obligations under the EC Treaty, and in particular those relating to the freedom to provide services.*

(3) ***The freedom to provide services, as one of the fundamental principles of the EC Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the state where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the member state where he is established.***

(4) ***The reasons that may be invoked by a member state in order to justify a derogation from the principle of freedom to provide services must be accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that state, and precise evidence enabling its arguments to be substantiated.***

Applying those principles to the present case the Court held, inter alia, that;

(i) *The requirement relating to the automatic adjustment of rates of remuneration to the cost of living did not fall within Article 3(1), which was limited to matters relating to minimum rates of pay. With regard to the public policy exception in Article 3(10), Luxembourg had not put forward evidence to show whether and to what extent the application of the rule to posted workers was capable of contributing to the achievement of its policy objective of protecting workers from the effects of inflation and ensuring good labour relations. Accordingly, it had not established to the required legal standard that the requirement fell under the public policy exception in Article 3(10).*

(ii) *The requirement relating to the rules on part-time and fixed-term work were likely to hinder the exercise of the freedom to provide services by undertakings wishing to post workers to Luxembourg, and member states were obliged to implement provisions to guarantee the principle of equal treatment between full-time and part-time workers, so such a restriction was not justified. The requirement was rendered redundant by the general aim of Directive 96/71.*

(iii) ***The requirement relating to imperative provisions of national law in respect of collective agreements did not fall within Article 3(1), as it was not limited to collective agreements which have been declared universally applicable. Such a requirement could not constitute a public policy exception within the meaning of Article 3(10). There was no reason why such provisions should per se fall under the definition of public policy, and such a finding had to be made as regards the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derived from that type of measure, could not fall under that definition either.***

3. CONCLUSIONS

…….. the Querist may find it helpful to cite;

(iv) *The fundamental principle of freedom of movement contained in Article 39 of the Treaty of Lisbon [2.1];*

(v) *The right of freedom of establishment as provided by Article 49 of the EU Treaty of Lisbon, which right provides for prohibition of restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State in the territory of any other Member State, and also includes the right to set up and manage undertakings in particular companies or firms within the conditions laid down for its own nationals by the law of the country where such establishment is effected [2.2];*

(vi) *The prohibition of restrictions on the freedom to provide services within the European Union as provided by Articles 56-57 of the Treaty of Lisbon [2.4];*

(vii) *That the Posted Workers Directive provides for **minimum standards,** and in particular that Article 3 of same does not require that posted workers shall have the right to an occupational retirement pension scheme [2.5];*

*In the **Laval** case in 2008 the European Court of Justice ruled that a trade union organising a strike blockade on the deployment of posted workers from Latvia into Sweden was a restriction on the freedom to provide services within the meaning of Article 49 of the EC Treaty, by that this restriction was justified to ensure the protection of fundamental rights provided by Community law. However, Article 49 of the Directive provides that it is not justifiable for a member state to compel a provider of services to enter into negotiations and to sign a collective agreement laying down more favourable conditions than those*

resulting from the relevant legislative provisions. Restrictions on Article 49 can only be justified on the ground of public policy, public security or pubic health. Otherwise, such national laws which compel the conclusion of draconian collective agreements give rise to discrimination against undertakings [2.6].

*In **Rüffert** [2008] the European Court of Justice held the Posted Workers Directive cannot be interpreted as allowing the host Member State to make the provision for services in its territory conditional on the observance of terms and conditions of employment which **go beyond the mandatory rules for minimum protection** provided by Article 3 of the Directive. Such an interpretation would amount to depriving the Directive of its effectiveness. The Court held the Directive expressly lays down the degree of protection for workers of undertakings in other member states that are posted to the territory of the host member state which the latter state is entitled to require those undertakings to observe. The Court went on to state that, without prejudice to the right of undertakings established in other member states to sign of their own accord a collective labour agreement in the host member state, **the level of protection which must be guaranteed to workers posted to the territory of the host member state is limited, in principle, to that provided for in Article 3(1) of the Directive, unless pursuant to the law or collective agreements in the member state of origin, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision. Moreover, the Court ruled that a legislative measure of a host state which attempts to strike a rate of pay is beyond the parameters of the Directive, and is therefore unlawful, since the Directive refers merely to "collective agreements". Such host state attempts to protect its own workers were thus unjustifiable on the grounds of protection of indigenous workers [2.8].***

The most recent declaration from the European Court of Justice is to be found in the Luxembourg case, where one of the Commission's objections was the attempt to have cost of living adjustment rates in the host state. The Court of Justice held that a host state can provide in legislation only non-discriminatory terms for posted workers, and that any derogation from the minimum standards provided by Article 3 of the Directive are to be interpreted strictly, as must any derogation on grounds of public policy. It held that the freedom to provide services, as one of the fundamental principles of the EC Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and businesses operating in the territory of the state where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the member state where he is established. Were an exemption is sought by a Member State, such an exemption would only be permitted where it is accompanied by appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that state, and precise evidence enabling its arguments to be substantiated. The Court ruled that attempts to enforce index-linking and compulsory collective agreements fell outwith the provisions of Article 3(1) and were not intended by the Directive [2.9].

It seems to me, therefore, that of late the European Court of Justice is much more careful to allow a host Member State to go beyond the strict minimum requirements provided by Article 3 of the Directive.

I am of the view that it is key for the Querist to be able to show that its written particulars of employment satisfy the provisions of Article 3(1) of the Posted Workers Directive, and that, together with the founding principles of European Law cited above, it is punitive and discriminatory for it to be required to comply with the REA which EPACE seeks to enforce. Moreover, if needs be, and if neither the High Court Judgment in the CD/09/158 case nor legislative reform in the Republic of Ireland provides a favourable outcome to the Querist, then I am of the view that citation of the above cases of Laval, Rüffert and Luxembourg will help persuade that there is no binding requirement on the Querist to go beyond the contractual provisions it has already provided to its workers, and that any such requirement would

(a) not be required on grounds of public policy, public security or public health; and

(b) constitute the breach of the fundamental rights to freedom of movement of workers, and the right to freedom of establishment, and would be unlawful and discriminatory.

SUBMISSION CONCLUSION

It is submitted; bearing in mind the above information and Advices received from Counsel, that this Independent Review of the Employment Regulation Orders and Registered Employment Agreement Wage Setting Mechanisms cannot be considered solely in the context of how they affect the main representative bodies of Employers and Workers in the Republic of Ireland. While not published in the Notice in the Irish Times dated 10th February 2011, this would appear however appear to be accepted in the Terms of Reference published on the website of the Department of Enterprise, Trade & Innovation where reference is made to the *National Recovery Plan 2011 to 2014* which commits to a range of structural reforms to the labour market aimed at removing barriers to employment creation and disincentives to work. No such review therefore can be undertaken without considering the effects of Employment Regulation Orders and Registered Employment Agreements on Northern Ireland companies and how those mechanisms affect the operation of such companies; particularly where such companies also have employees in Northern Ireland who could suffer unfair disadvantage where employees of that company working in the Republic of Ireland could avail of greater Terms of Employment.

It is also submitted that the Independent Review must take account of the effect of the current Wage Setting Mechanisms under the Employment Regulation Orders and Registered Employment Agreements as they currently operate insofar as they would appear to be in contravention of the Freedom of Movement of Workers and the right to Freedom of Establishment as provided by Article 49 of the EU Treaty of Lisbon.

Dated 25th February 2011

Signed _____

Morgan McManus Solicitors
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