National Electrical Contractors Ireland -v- Labour Court & Ors:
Supreme Court upholds the Constitutionality of Sectoral Employment Orders

Introduction

On 18 June 2021, the Supreme Court delivered its unanimous judgment in *National Electrical Contractors Ireland -v- Labour Court, the Minister for Business Enterprise and Innovation Ireland and the Attorney General*.[1] The Court overturned part of the High Court's judgment which found that Chapter 3 of the Industrial Relations Act 2015 (the "**2015 Act**"), which allowed for minimum pay and conditions to be set by sectoral employment orders ("**SEOs**"), was unconstitutional. However, the Supreme Court agreed with the High Court's finding that the Labour Court acted ultra vires its powers conferred under the 2015 Act. As a result of this, the SEO for the electrical sector was struck down by the Supreme Court as unlawful.

What are SEOs?

An SEO is a form of secondary legislation, which sets minimum terms and conditions for employees in a particular sector. This means that where an employee's contract of employment provides less favourable terms and conditions than those set out under the SEO, the terms in the SEO will override those in the employment contract. SEOs are signed into law following acceptance by the Minister of State at the Department of Enterprise, Trade and Employment (the "**Minister**"), of recommendations from the Labour Court.

The relevant SEO for the electrical contracting sector is the Sectoral Employment Order (Electrical Contracting Sector) 2019, (the "**Order**"). The Order was implemented by the Labour Court by way of S.I. 251 of 2019 and sets various terms and conditions for workers specifically in relation to the electrical contracting sector, such as minimum pay, pension and sick pay entitlements. The Order was signed into law by the Minister as a result of applications from the Connection trade union, the Electrical Contractors' Association and Association of Electrical Contractors of Ireland.

High Court Challenge[2]

By way of judicial review proceedings in 2020, the National Electrical Contractors Ireland (the "**Respondent**") successfully challenged the validity of the Order based on the following:

(i) That Chapter 3 of the 2015 Act was unconstitutional, as it empowered the Labour Court to make decisions which were legislative in nature, contrary to Article 15.2.1° of the Constitution.

(ii) That the Labour Court had acted ultra vires the 2015 Act by failing to give reasons for its recommendation, on foot of which, the S.I was promulgated.

Justice Simons found in favour of the Respondent on both of these issues and as a result, granted a suspended declaration that Chapter 3 of the 2015 Act violated Article 15.2.1° of the Constitution.

The Supreme Court's decision

The Labour Court, the Minister and the Attorney General (the "**Appellants**") appealed the High Court's finding of unconstitutionality arguing, *inter alia*, that the procedure set out in the 2015 Act was permissible delegated legislation. The Supreme Court examined two key questions:

1. **Is Chapter 3 of the 2015 Act compatible with the Constitution?**

   The Supreme Court found that the powers conferred upon the Labour Court under the 2015 Act were compatible with Article 15.2.1° of the Constitution, as the 2015 Act does not require the Labour Court to legislate but rather to engage in a decision-making power which is *"subject to safeguards"* provided for in the legislation. Mr Justice McMenamin stated that the *"fact that the choices vested [in the Labour Court] were broad did not, in itself, turn those choices into legislation"* and concluded that there was *"no impermissible delegation of legislation in this instance."*

[1] [2021] IESC 36
[2] [2020] IEHC 303

2. **Did the Labour Court and the Minister act *ultra vires* when making the recommendation and implementing the Order?**

   It was on this point that the Supreme Court agreed and upheld the decision of the High Court. The Supreme Court held that the Labour Court failed in its statutory duty to furnish a full description of how and why it reached its decision to recommend the Order and when dealing with queries raised by the Respondent in relation to the Order. Mr Justice McMenamin stated that this was a *"breach of its duty as a statutory decision-making body"*. No proper reasons were contained in the report and the Minister should not have accepted the report or made the Order as he could only have been satisfied with a report *"which had fairly set out a summary of the arguments and the decision dealing with these"*. As a result, the Supreme Court held that the Minister and the Labour Court acted *ultra vires* in making the Order.

   Accordingly, the Court remitted the matter to a panel of the Labour Court who will prepare and furnish a recommendation in relation to the Order.

Conclusion

While this case is testament to the constitutionality of SEOs generally, the status of the Electrical Contractors SEO remains to be seen, as it is remitted to a different division of the Labour Court.

Indeed, while SEOs have withstood constitutional scrutiny, their future nonetheless remains subject to mixed reviews. On the one hand, the Tánaiste and Minister for Enterprise Leo Varadkar has stated that the judgment "places current and future sectoral employment orders on a firm footing". However, IBEC has expressed concern regarding the existence of a collective bargaining mechanism which can "unilaterally impose an Order on employers who are not a party to its formulation, and yet are legally bound to comply with it."

In any case, there can be little room for doubt that the Labour Court will take account of the Supreme Court's detailed and balanced analysis of the 2015 Act, which will prove helpful as it makes its recommendation.

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