[2019] IEHC 873

THE HIGH COURT

[2019 No. 280 JR]

BETWEEN

NAISIUNTA LEICTREACH EIREANN
CUIDEACHTA FAOI THEORAINN RÁTHAÍOCHTA

APPLICANT

AND

THE LABOUR COURT, THE MINISTER FOR BUSINESS, ENTERPRISE AND INNOVATION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 15th day of August , 2019

Introduction

1. The applicant is an employer representative body for small and medium sized electrical contractors throughout Ireland. It has approximately 32 members and claims to have some 203 members for the purposes of this application. These proceedings concern the recommendation by the first named respondent to the second named respondent of a sectoral employment order (SEO) pursuant to the provisions of the Industrial Relations (Amendment) Act, 2015 (the Act of 2015). Also in dispute are the terms of the SEO itself.

2. The Act of 2015 was passed by the Oireachtas following a decision of the Supreme Court, *McGowan v. the Labour Court* [2013] 3 I.R. 718. In its decision the Supreme Court allowed an appeal declaring Part III of the Industrial Relations Act, 1946 to be invalid having regard for Article 15.2.1 of the Constitution. This Article provides: -

> "the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

3. Part III of the Act of 1946 provided for the registering by the first named respondent of an employment agreement in a particular sector which became incorporated into employment contracts and was enforceable by criminal prosecution. It applied not just to parties to the agreement but to every worker and employer in that sector.

4. The Act of 2015 set out new procedures under which employment agreements could be arrived at and have the force of law in various sectors of the economy. This was achieved through an SEO. In summary, s. 14 of the Act of 2015 provided that a trade union of workers, a trade union or organisation of employers or a trade union of workers jointly with a trade union or organisation of employers could request the first named respondent to examine the terms and conditions relating to the remuneration, sick pay, or pensions of the workers of a particular class, type or group in the relevant economic sector. S. 15 provided that the first named respondent could only undertake such an examination where it was satisfied that those seeking the examination were substantially representative of workers and/or employees in the particular economic sector. The first named respondent was also obliged to give notice of its intention to undertake such an examination. S. 16 provided that following such an examination the first named respondent may make a recommendation to the second named respondent. S.17

provided that the second named respondent after receiving a recommendation from the first named respondent could accept the recommendation and, by order, confirm its terms in an SEO. In particular, s. 17(4) provides: -

> "Where it is proposed to make an order under this section, a draft of the order shall be laid before each House of the Oireachtas and the order shall not be made unless a resolution approving of the draft has been passed by each such House."

5. S. 18 makes provision for a review of an SEO after a specified time. Finally, s. 19 provides that the SEO shall apply to every worker and employer in the particular economic sector, "notwithstanding that such worker or employer was not a party to a request under s. 14 …". This gives legal effect to the SEO in question.

6. In this case the first named respondent received a request pursuant to s. 14 of the Act of 2015 from Connect Trade Union and from two employer bodies, the Association of Electrical Contractors Ireland and the Electrical Contractors Association. It was stated that the Connect Trade Union represented more than 9,800 workers, the Association of Electrical Contractors Ireland represented 190 contractors employing 2,250 personnel and that the Electrical Contractors Association represented 40 electrical contractors employing in excess of 4,000 workers in the sector. The documentation submitted to the first named respondent indicated that there were 13,800 workers of the class, type or group to which the application related employed in the particular economic sector.

7. Following the application, the first named respondent published it on its website, in three national newspapers and in Iris Oifigúil and Seachtain indicating an intention to undertake an examination under s. 15 of the 2015 Act.

8. Following a hearing in March, 2019 by the first named respondent a recommendation was made by the second named respondent pursuant to s. 16 concerning a proposed SEO for the sector. The second named respondent informed the first named respondent that the recommendations were accepted pursuant to s. 17. Subsequently, a draft of the order was laid before each House of the Oireachtas on 9 May 2019.

9. The second named respondent presented the draft order to the Joint Committee on Business, Enterprise and Innovation on 28 May 2019 for its consideration. Messages were then sent by this Committee to both Houses confirming that the Committee had concluded its consideration of the draft order. A resolution approving the draft order was passed by Seanad on 29 May 2019 and a resolution approving the draft order was passed by the Dáil on 30 May 2019.

10. The Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019) will come into operation on 1 September 2019.

Sectoral Employment Order (S.I. No. 251 of 2019)

11. The SEO provides for pay and pay categories, working hours, pensions, a sick pay scheme and a dispute resolution procedure. On the issue of pensions the SEO provides for the following: -

"A worker to whom this Sectoral Employment Order relates shall be entered by his or her employer into a pension scheme the terms of which, including both employer and employee contribution rates, shall be no less favourable than those set out in the Construction Workers Pension Scheme."

12. There are then provisions concerning the level of employer contribution and worker contribution to the pension scheme. The pension provision continues: -

"Any changes to the rates for the Construction Workers Pension Scheme should be applied to the categories of workers covered by this SEO."

Application for judicial review

13. On 13 May 2019 the High Court (Noonan J.) granted the applicant leave to apply by way of application for judicial review for, *inter alia*, the following reliefs: -

(i) A declaration that the first named respondent in making the recommendation to the second named respondent to register an SEO for the electrical contracting industry breached its duties: -

(a) To act with constitutional propriety and due regard to natural justice and with basic fairness, reasonableness and good faith and/or;

(b) To provide sufficiently clear (or any) reason(s) for its decision(s) to be understood and, if necessary, challenge by the applicant (whose members may be materially and adversely affected by the first named respondent's decision making process);

(ii) A declaration that the examination conducted by the first named respondent pursuant to s. 15 of the Act of 2015 and the recommendation made by it pursuant to s. 16 of the said Act or SEO was unlawful and/or ultra vires and/or in excess of jurisdiction and, accordingly, void and of no effect.

(iii) A declaration that the recommended SEO constitutes a breach of the applicant's members' personal rights.

14. On the same day the High Court granted an interim injunction prohibiting the second named respondent from taking any further steps in relation to the recommendation made by the first named respondent and laying draft recommendation before both Houses of the Oireachtas. The matter was made returnable to 16 May 2019.

15. On 16 May 2019 the High Court refused to continue the injunction as the Act of 2015 prescribed a six-week period within which the second named respondent had to act and thus the continuation of the injunction would, effectively, have determined the proceedings.

The application before the Court

16. By notice of motion the applicant seeks, *inter alia*: -

"1. An interlocutory injunction prohibition the perfection and/or commencement and/or coming into operation of the (draft) Sectoral Employment Order (electrical contracting sector) 2019, pending the full determination and disposal of the issues raised within the above entitled judicial review proceedings."

Principles to be applied

17. The applicant is asking the court to prevent the operation of a law that has been passed by both Houses of the Oireachtas. In this case we are dealing with a statutory instrument which has been considered by Joint Committee of the Oireachtas and subsequently passed by resolution of the Dáil and Seanad. The court has jurisdiction to grant such an injunction but a heavy burden lies on the applicant. In this case, the court is concerned with a statutory instrument which, like primary legislation, has been passed by both Houses of the Oireachtas and could be considered to be primary legislation which enjoy presumption of constitutionality. The relevant authorities were reviewed recently by Simons J. in *Friends of the Irish Environment Limited v. the Minister for Communications, Climate Action and Environment & Others* [2019] IEHC 555 where, having referred to the judgment of Finlay C.J. in *Pesca Valentia Limited v. the Minister for Fisheries and Forestry* [1985] I.R. 193 stated: -

"62. Subsequent case law, which emphasises that the jurisdiction to restrain the operation of legislation by way of interlocutory injunction should be exercised most sparingly, appears to be informed, in part at least, by the presumption of constitutionality see, for example, *M.D. (an infant) v. Ireland* [2009] IEHC 2006; [2009] 3 I.R. 690".

18. More generally, the principles to be applied in an application for an interlocutory injunction in judicial review proceedings have been set out in the judgment of Clarke J. (as he then was) in the judgment of the Supreme Court in *Okunade v. Minister for Justice, Equality & Law Reform* [2012] 3 I.R. 152: -

"104. As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) Give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;

(ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and

(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public

interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also

(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages;

(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

Application of principles

19. In the course of submissions, no case was made that damages would be an adequate remedy. However, the applicant gave an undertaking as to damages.

20. For the purposes of this judgment it appears to me that the grounds for the application for judicial review fall into two categories. Firstly, there are "general" grounds which include the procedures adopted by the first named respondent in making its recommendation to the second named respondent and its interpretation of the term "economic sector" for the purposes of Chapter 3 of the Act of 2015. Also, the validity of the second named respondent's decision that the first named respondent had complied with the provisions of Chapter 3 (see s. 17 of the Act of 2015) is questioned. The second category grounds relate to the provisions in the SEO that require the applicant to make contributions to a pension scheme the terms of which "shall be no less favourable than those set out in the Construction Workers Pension Scheme." I will examine each of these categories under the headings "arguable case" and "balance of convenience". In doing so it must be noted that, as yet, the respondents have not filed a statement of opposition nor made substantive submissions on the merits of the application. I take matters as they stand on the date of the application for an interlocutory injunction. It may well be that at the hearing of the substantive action a different picture will emerge.

General grounds

Arguable case

21. As the applicant has obtained leave to seek reliefs by way of judicial review it is accepted that an arguable case has been established.

Balance of convenience

22. The terms of the SEO provide for pay rates for various categories of workers and working time in this economic sector. Provision is also made for a sick pay scheme. Also set out are the various steps and procedures that should be followed in the event of a dispute arising. All of this clearly has commercial and financial implications for the applicant. However, the extent of this is not entirely clear. Though the applicant states that it has approximately 32 members which appears to increase to 203 members for the purposes

of the application only two members have put on affidavit the financial implications for them. In the case of Mr. John Smith, the CEO of the applicant, he states that the mandatory wage increase will result in having to make redundant at least one staff member out of six currently employed. Also, the SEO will result in a new pricing structure which will require, what he describes, as fundamental changes in his business model and the necessity to recalibrate tenders.

23. Mr. Sean Moroney, Managing Director of Moroney Electrical Contractors Limited, also filed an affidavit. In this affidavit he outlines the effect of the SEO on his business. On Mr. Moroney's calculation his company will experience an increased mandatory expenditure of some €265,210.73 (including pension contributions). As his company did not make a profit last year he fears for its future.

24. Both Mr. Smith and Mr. Moroney state that failure to comply with the terms of the SEO will expose them to criminal charges. They refer to s. 22 of the Act of 2015 and s. 51 of the Workplace Relations Act, 2015.

25. As against this, Ms. Niamh Hyland S.C. on behalf of the respondent submitted that the balance of convenience lay clearly against granting the orders sought. Ms. Hyland submitted that as only two affidavits were filed setting out the commercial and financial implications of the SEO that this was well short of what would be required to shift the balance in favour of the order sought. These affidavits only related to two businesses whereas the SEO could give benefits to some 13,800 workers in the economic sector. In any event, the applicants had the benefit of s. 21 of the Act of 2015 which provided that the first named respondent may exempt an employer from paying remuneration provided by the SEO where the employer's business is experiencing severe financial difficulties.

26. On the issue of criminal charges Ms. Hyland submitted that failing to observe the terms of a SEO is not of itself, a criminal offence. The offence created by s. 22 of the Act of 2015 relates to a failure to keep records. The offences under s. 51 of the Workplace Relations Act, 2015 are in respect of failing to comply with a decision of an adjudication officer or a decision of the first named respondent. In both these cases before criminal charges can be brought a lengthy process in the District Court has to be gone through. In any event, s. 50(2) of the Workplace Relations Act, 2015 provides that there shall be a defence for the "defendant to prove on the balance of probabilities that he or she was unable to comply with the order due to his or her financial circumstances."

27. Given the limited commercial and financial information the applicants put before the court, the provisions of the Act of 2015 that deal with an inability to pay, the nature of what criminal charges may be involved and the defences provided for, I am satisfied that the balance of convenience lies against granting the orders sought.

Pension provisions of the SEO

28. As stated earlier, the SEO requires the applicants to pay into a pension scheme "the terms of which… shall be no less favourable than those set out in the Construction Workers Pension Scheme." (CWPS). In his affidavit Mr. John Smith stated that "it is

commonly known that no other pension scheme exists in the Irish market which fits this required criteria." Further, even if there was such an alternative pension scheme, under the terms of the SEO, it would have to follow the terms of the CWPS. Therefore, in effect, it is mandatory for the applicants to join this pension scheme. Ms. Helen Callanan S.C., on behalf of the applicant, submitted that it follows from this that a private pension scheme with which the applicant has no connection has the power to prescribe pension contribution rates which the applicant and its employees must comply with. Under s. 19 of the Act of 2015 the terms of the SEO are contractually binding between the relevant employees and employers. Ms. Callanan contends that this is in breach of the provisions of Article 15.2.1 of the Constitution. In support of this submission the applicant relies upon, *inter alia, Cityview Press Limited v. An Chomhairle Oilina* [1980] I.R. 381; *John Grace Fried Chicken Limited and Others v. Catering Joint Labour Committee and Others* [2011] 3 I.R. 211 and *O'Sullivan v. The Sea Fisheries Protection Authority* [2018] 1 ILRM 245.

29. Though in her replying affidavit on behalf of the respondents, Ms. Tara Coogan does take issue with the applicant's description of the CWPS, it seems to me that whether or not the pension provisions breach Article 15.2.1 of the Constitution will be a matter of legal submission. Though a statement of opposition has not been filed, I am of the view that the applicant's case on the issue of the pension goes beyond being simply "arguable".

Balance of convenience

30. Should the pension provisions provided by the SEO come into force on 1 September 2019, the applicant would be legally obliged to pay monies into a pension scheme over which it has no control. Further, the applicants have no control over the amounts that would be payable. The administrators of this pensions scheme are, clearly, not parties to these proceedings. In the event of the applicant being ultimately successful in these proceedings it may be that the repayment of such monies would be problematic. Thus, I am of the view that the balance of convenience lies in favour of granting a limited stay. I also appreciate the position of employees concerning their pension entitlements. However, in granting a limited stay it should be noted that in the event of the applicant being unsuccessful in these proceedings the stay would be lifted and payments backdated to 1 September 2019. Further, the applicant has given an undertaking as to damages.

31. In deciding to grant a stay I have considered the following passage from Clarke J. (as he then was) in *Okunade*: -

> "(95) Finally, so far as the cases where the risk of injustice may be evenly balanced are concerned, it does seem to me that there may be greater scope, in the context of judicial review proceedings, for the court to take into account the strength of the case, as it appears on the occasion of the application for a stay or injunction, than may apply in an ordinary injunction case. …"

Conclusion

32. By reason of the foregoing, I will not grant the reliefs sought in the notice of motion but will grant the applicant a stay on the implementation of so much of the Sectoral

Employment Order (Electrical Contracting Sector), 2019 (S.I. No. 251/2019) as requires the applicants to make contributions into a pension scheme provided for therein, pending the determination of the proceedings.

33. Given the issues involved and the implications for the livelihoods of both employers and employees in this economic sector it is very desirable that an early trial take place.