

## EMPLOYMENT

# High Court Finds Sectoral Employment Orders and Relevant Industrial Relations Legislation are Unconstitutional

1 July 2020

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On 23 June, the High Court delivered a much anticipated judgment holding that the provision in the Industrial Relations (Amendment) Act 2015 for the making of sectoral employment orders was unconstitutional and setting aside the 2019 Electrical Contracting Sector Sectoral Employment Order.<sup>1</sup> Sectoral Employment Orders set rates of pay, sick pay, and pensions across the construction, mechanical engineering and electrical sectors.

## High Court Challenge of NECI

The National Electrical Contractors Ireland (NECI) represents a number of small to medium sized employers who provide electrical contracting services. NECI sought to challenge the validity of the Sectoral Employment Order (Electrical Contracting Sector) 2019 and Chapter 3 of the Industrial Relations (Amendment) Act 2015 (the “2015 Act”) on the basis that they were invalid having regard to Article 15.2.1° of the Constitution.

NECI sought a declaration from the High Court that the Labour Court breached its duties in making a recommendation to the Minister for Business, Enterprise and Innovation (the “Minister”) to register the SEO, including the duty to act with constitutional propriety and natural justice and the duty to provide clear reasons for its decisions. NECI sought a

declaration that the examination of the sector by the Labour Court was ultra vires and that the SEO breached the personal rights of NECI members.

## What is an SEO?

- SEOs are orders made by the Minister (on receipt of a statutory report and the recommendation of the Labour Court) and approved by both Houses of the Oireachtas, which set out the minimum rates of remuneration and the minimum pension and sick pay entitlements of workers of a particular class, type or group within a specified economic sector.
- Significantly, they apply to employees and employers who were not involved in their formulation at any stage. SEOs will apply to every worker of the class, type or group in the economic sector to which they are expressed to apply, and to their employers.
- If the contract of employment of an SEO worker provides for a lower rate of remuneration or less beneficial sick pay or pension entitlements than those in the SEO, the more favourable SEO provisions will be substituted in place of the inferior provisions in the contract of employment.
- If an employer fails to comply with an SEO's terms, an employee may bring a

<sup>1</sup> Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Rátháíochta v The Labour Court, The Minister For Business Enterprise And Innovation Ireland, The Attorney General, 2019 No. 280 J.R. Available [here](#).

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complaint to the Workplace Relations Commission (with an appeal to the Labour Court) and be awarded up to two years' remuneration, together with an order directing the employer to comply with its obligations. An order of the District Court is required to enforce the decision of the Labour Court. Failure to comply with an order of the District Court is a criminal offence.

### Background to the 2015 Act

The 2015 Act was introduced following the decision of the Supreme Court in [McGowan v Labour Court \[2013\] IESC 21](#). This judgment held that the provision made for "registered employment agreements" under Part 3 of the Industrial Relations Act 1946 was invalid having regard to the provisions of Article 15.2.1° of the Constitution. The concept of sectoral employment orders, introduced under Chapter 3 of the 2015 Act is a new one and narrower than registered employment agreements under the 1946 Act.

### Decision of the High Court - 23 June 2020

#### Electrical Contracting Sector Order

One of the criticisms made by the Supreme Court in *McGowan* was that the Labour Court had no obligation to consider the interests of those who would be bound by the registered employment agreement, but who had to be parties to it.

Chapter 3 of the 2015 Act imposes an obligation on the Labour Court to notify interested parties of its intention to carry out an examination of the relevant economic sector; confers a right to make submissions (with the possibility of an oral hearing); and expressly provides that the Labour Court must have regard to those submissions. Thereafter, the Labour Court is required to submit a statutory report (the "Report") to the Minister on the circumstances surrounding the making of the recommendation.

In the present case, Mr. Justice Simons held that the Minister acted *ultra vires* in making the Electrical Contracting Sector Order. The Minister is required to be satisfied that the Labour Court had complied with the requirements of Chapter 3 of the 2015 Act. The Minister erred in law in concluding, on the basis of the Report and recommendations submitted to him, that the Labour Court had complied with its obligations under Chapter 3 of the 2015 Act.

The Judge held that neither the procedures leading up to, nor the content of, the recommended SEO complied with Chapter 3 of the 2015 Act. The Report failed to:

- record the conclusions of the Labour Court or the rationale for those conclusions;
- set out a fair and accurate summary of the submissions made by those interested parties who opposed the making of the SEO, and did not engage with the issues raised in those submissions.

As part of the statutory consultation process prior to the Labour Court's Report and recommendations, NECI had advanced detailed submissions to the Labour Court on the question of whether the applicants to the Labour Court complied with the "substantially representative" requirement; the definition of the "economic sector"; the implications for small to medium sized electrical contractors; and the potential anti-competitive effect of fixing a minimum wage for electricians.

Referring to NECI's submissions to the Labour Court, the Judge remarked that "these submissions are engaged with in the statutory report not at all."

The Report and recommendation of the Labour Court to the Minister did not adequately address the definition of the "economic sector" concerned, and did not specify the class, type or group of workers to which the recommendation should apply (as required by the 2015 Act). The Labour Court should have set out its rationale for the definition of the economic sector (in this case the 'electrical contracting sector'), in particular where this was an issue of controversy leading up to its recommendation. It also failed to expressly exclude state and semi-state workers. As a result the Minister was not properly apprised of one of the principal issues which had arisen in the statutory consultation process.

Further, the terms of the recommended SEO were invalid insofar as they purported to fix the rate of pension contributions payable by reference to actions of a third party (in this case the trustees of the Construction Workers Pension Scheme). This breached the principle that a delegate cannot further delegate their function.

On the basis of the above, it was held that the Minister should have refused to make the recommended SEO and acted without jurisdiction in doing so.

#### Constitutionality of the 2015 Act

The Judge departed from the principle of **judicial self-restraint** and dealt with the constitutional validity of the 2015 Act in the "exceptional circumstances" where the parties had agreed it should be resolved, it had been fully argued over a six-day hearing, and failure to do so would only defer (not avoid) the necessity of a court having to rule on it.

Article 15.2.1° provides that 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.*" This does not preclude the Oireachtas from delegating to a subordinate or delegating the task of making secondary legislation which is merely giving effect to the principles and policies in primary legislation.

The parties accepted that the making of a SEO is an example of law-making subject to the "principles and policies" test.

The statutory criteria guiding the making of a SEO are set out in Part 3 of the 2015 Act. However the Judge found that the statutory language used is "*too imprecise to provide any meaningful guidance to the Labour Court.*" The Judge found that the 2015 Act does not contain sufficient principles and policies to guide the very broad discretion conferred upon the Minister (and indirectly, upon the Labour Court). "*A decision to impose mandatory minimum terms and conditions of employment across an entire economic sector necessitates making difficult policy choices. The consequences of making a SEO are so far-reaching, and the interests of the principal stakeholders, namely, the employers, workers and consumers; are not necessarily aligned.*"

In examining the breadth of the 2015 Act, the Judge looked at the setting of sectoral-specific minimum rates of remuneration as an example. The fixing of high rates of remuneration might well be welcomed by workers, but may limit competition, and thus adversely affect consumers.

The making of a SEO also presents difficult choices as to how to resolve the potentially conflicting objectives of (i) promoting fair competition and the freedom to provide services within the European internal market, and (ii) ensuring appropriate terms and conditions of employment for domestic workers and posted workers from other EU Member States.

The Judge noted that if it was a decision of the Oireachtas to prioritise the objective of ensuring better terms and conditions of employment for domestic and posted workers from other EU States over any potential impact on competition and the freedom to provide services within the internal market, this should be provided for in the 2015 Act.

The 2015 Act abdicates the making of these significant policy choices to the Minister (and, indirectly, to the Labour Court). The delegates are directed to "have regard to" the potential impact on competitiveness, but are at large as to the choice as to which objective is to prevail. The concept of "fair and sustainable" remuneration is hopelessly vague and too subjective.

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The 2015 Act failed to provide guidance to the Labour Court and the Minister as to the principles and policies to be applied in delimiting the economic sector. The definition in the 2015 Act is *"too open-ended to provide meaningful guidance to the Labour Court."*

The Judge considered the safeguards provided for under the 2015 Act. First, the Minister must satisfy himself that the Labour Court has complied with Chapter 3, and secondly, the Minister must lay a draft of his order confirming the Labour Court's recommendation before each House of the Oireachtas. A resolution must be passed by each House. However, the Judge found that the Minister's role is too limited to represent a meaningful safeguard against a breach of Article 15.2.1°. It does not appear that the Minister is entitled to carry out his own "examination" of the economic sector, nor is he entitled to review the underlying merits of the Labour Court's recommendation. The Judge noted however that even these limited safeguards should have resulted in the refusal to accept the recommendation as the Labour Court had not complied with Chapter 3.

Mr. Justice Simons made a declaration striking down the entirety of Chapter 3 of the 2015 Act which sets out the procedure for the making of sectoral employment orders on the grounds that it is unconstitutional. He also made an order of certiorari setting aside the Electrical Contracting Sector SEO.

### What next?

The Department of Business, Enterprise, and Innovation has 21 days to consider whether or not to appeal the decision. If the DBEI appeal the decision it is possible that a legal stay could ensure the terms of the existing SEOs continue to apply pending the outcome of the appeal. However the NECI are likely to argue that any such stay would unduly burden its members.

If DBEI does not appeal the decision, legislation will need to be enacted to address the deficiencies identified by the High Court if sectoral employment orders are to continue to have a place in the Irish labour market. Where the Irish Courts have three times in the last decade struck out sectoral wage systems on the grounds of unconstitutionality, any legislation will need to be robustly drafted to withstand any further challenges.

As a result of the High Court's decision all three existing SEOs for the electrical contracting, mechanical crafts and general construction industries are now invalid. On this basis, workers previously covered by these SEOs will be entitled to the terms and conditions in their contracts of employment or, where no contract is in place, the protection of legislation such as National Minimum Wage Acts 2000 and 2015.

### Implications for those working in the construction sector

SEOs in construction have given rise to

a number of issues, with compliance mandated, for example, in public sector contracts, but with no relief in the event of any increase in the rates governed by a particular SEO. Many construction contracts in the market provide for a fixed price, with no allowance for increases in the costs of labour and consequently (subject to consistent drafting for change in law provisions), no entitlement to any uplift as a consequence of adjustments to the rates included in SEOs.

This recent decision, however, will still have implications for the construction sector. For the moment, the position of the Construction Industry Federation ("CIF") is that workers in the industry are currently employed in accordance with the terms of the applicable SEO and that a contract is in place between employers and workers. CIF is therefore advising members to continue to adhere to the terms of the relevant SEO until the Court issues a Declaration (which could, however, potentially be stayed pending any appeal).

If the High Court decision is not overturned on appeal, operatives covered by SEOs will no longer have the protection of the minimum hourly SEO rates and, whilst this may be welcomed in some quarters, particularly in the current climate, its potential impact in driving down wages for those working in construction may present new challenges.

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