SUMMARY

2011/64: Irish system of setting sectoral terms of employment is unconstitutional (IR)

<p>The plaintiffs in this case sought a declaration that certain provisions of the Industrial Relations Acts 1946 and 1990 were invalid having regard to the provisions of the Constitution, and a declaration that an Employment Regulation Order (‘ERO’) made by the Labour Court in May 2008 was an unlawful and disproportionate interference with the plaintiffs’ property rights. The High Court agreed with the plaintiffs and found that the system of setting sectoral wage rates and conditions of employment was unconstitutional.</p>

Summary

The plaintiffs in this case sought a declaration that certain provisions of the Industrial Relations Acts 1946 and 1990 were invalid having regard to the provisions of the Constitution, and a declaration that an Employment Regulation Order ('ERO') made by the Labour Court in May 2008 was an unlawful and disproportionate interference with the plaintiffs' property rights. The High Court agreed with the plaintiffs and found that the system of setting sectoral wage rates and conditions of employment was unconstitutional.

Facts

Industrial Relations Act 1946[1] gives power to the Labour Court to establish Joint Labour Committees ('JLC's'). Such Committees were established in respect of a class, or group of workers. The 1946 Act[2] provides that a JLC may submit proposals to the Labour Court 'for fixing the minimum rates of remunerationÉ'. The Catering Joint Labour Committee (Catering

JLC) is a body established under the Industrial Relations Act 1946 and the Catering JLC Establishment Order 1977. The Catering JLC is responsible for formulating proposals for pay and conditions of workers employed in establishments engaged in the preparation or service of food or drink. The JLC proposals are submitted to the Labour Court, and, if approved, the Labour Court creates an Employment Regulation Order (ERO) which legally binds employers to wage rates and conditions of employment.

The Industrial Relations Act 1946 prohibits JLCs from submitting a proposal to revoke or amend an ERO unless the order had been in force for at least six months. Once the proposals are submitted, the Labour Court can refer the proposals back to the JLC or make an ERO[3]. There is no supervision from the Irish Parliament (Oireachtas) under this statutory scheme. With regard to the enforcement of an ERO, the 1946 Act[4] provides that if an employer fails to pay the remuneration fixed under an ERO, the employer is guilty of an offence and shall be liable to pay a fine on summary conviction.

The Quick Service Food Alliance (QSFA) whose members include multi-national franchise operations such as Burger King and Subway, as well as numerous national and local operators of takeaways and sandwich bars, argued that the Oireachtas had already put in place a statutory national minimum wage, under the Minimum Wage Act 2000, and provided for the payment of a fair Sunday premium under the Organisation of Working Time Act 1997. In addition, they outlined that there is a raft of employment legislation establishing minimum conditions of employment. The QSFA argued that this existing employment legislation properly protects employees, and that the Catering JLC and the Labour Court had fixed minimum wages and Sunday premia in excess of the national statutory minimum, and set conditions for catering staff that were more favourable than those provided for in employment legislation enacted by the Oireachtas. These proceedings were instituted by the plaintiffs in circumstances where the National Employment Rights Agency[5] had expressed the opinion that the first named plaintiff was not meeting its obligations under the 2008 ERO. The plaintiff continued to challenge the 2008 Order, notwithstanding that it had since been replaced, on the basis that if the plaintiff had underpaid its employees under that Order, it would still be subject to both civil and criminal prosecution in respect of its failure to comply with the Order for the period it was in force.

The QSFA sought a declaration from the High Court that certain sections of the Industrial Relations Acts, 1946 and 1990, from which the JLC's derive their power are unconstitutional on the grounds that:

- Article 15 of the Constitution states that the sole and exclusive power to make laws is vested in the Oireachtas and no other authority has power to make laws for the State, and therefore,

the ERO's created by the Labour Court were an unconstitutional delegation of this law making function which should be done by the Oireachtas;

- the imposition of higher rates of pay and conditions on QSFA employers represented an unwarranted and disproportionate interference with their property rights under the Irish Constitution;

- the application of different rates for Sunday pay for employers in the Dublin/Dun Laoghaire area unlawfully infringed property rights of members outside of that area; and

- the relevant sections of the Industrial Relations Acts, 1946 and 1990, were incompatible with the State's obligation to protect property rights under the European Convention of Human Rights.

In effect, the QSFA were seeking to quash the current EROs and the entire JLC system.

Judgment

Mr Justice Feeney found that the plaintiffs were entitled to a declaration that the relevant sections of the Industrial Relations Acts 1946 and 1990 were invalid having regard to Article 15.2.1[6], Article 40.3.1[7] and Article 43[8] of the Constitution.

Article 15.2.1 of the Constitution vests the sole and exclusive power of making laws for the State in the Oireachtas. In considering whether there had been an unconstitutional delegation of this law making function, the Court referred to the principles and policies test as set down in the seminal decision of the Irish Supreme Court in Cityview Press Co. Ltd v AnCo[9]. Mr Justice Feeney identified this test in the following terms: *'The Cityview Press case identifies that the Oireachtas may delegate a power to put flesh on the bones of an Act, thereby giving effect to principles and policies but that a delegation of parliamentary power which goes beyond that is not authorised and would amount to a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution."*

In essence, this test provides that such a power may be delegated only where it amounts to giving effect to the principles and policies contained in the legislation. Mr Justice Feeney found that the power to make EROs is a power of a fundamental nature and that there was no guidance as to principle or policy provided in the legislation. In the circumstances, the Court held that the delegation of this power to the Labour Court offended against the provisions of Article 15.2.1.

Mr Justice Feeney also found that the plaintiffs were entitled to a declaration that the ERO

was an unreasonable, unlawful and disproportionate interference with the first and second named plaintiffs' property rights. The Court found that the determination of rates and conditions had been undertaken in an arbitrary and illegal manner, in breach of the plaintiffs' property rights. The Court also considered the lack of uniformity in terms and conditions, where businesses immediately adjacent to one another (e.g. food establishments in Dublin/ Dun Laoghaire next to establishments in neighbouring counties) were required to adhere to significantly different statutory obligations. Mr Justice Feeney found that there was no identifiable basis for this discrimination. On this basis, the Court found that 2008 ERO[10] unlawfully interfered with the property rights of the first two plaintiffs.

As a result of the Court's finding on the above issues, the declaration sought pursuant to the European Convention on Human Rights Act did not arise.

Commentary

This was a landmark judgment in Ireland. The decision has ramifications for other sectors in the economy, including the contract cleaning, agriculture and hotel sectors, which are governed by the JLC system. Following this judgment and the Report of the Independent Review of Employment Regulation Orders (EROs) and Registered Employment Agreement Wage Setting Mechanisms[11] published in May which concluded that the current JLC/ REA regulatory system should be retained but "requires radical overhaul so as to make it fairer and more responsive to changing economic circumstances and labour market conditions", the Minister for Jobs, Enterprise and Innovation Richard Bruton announced reforms to the JLC and Registered Agreement Agreement ('REA') wage setting mechanisms on 28 July 2011. The principal planned measures include inter alia:

(a) The number of JLCs will be reduced from 13 to 6, either through a process of abolition or amalgamation;

(b) JLCs previously set more than 300 different rates of pay. They will now have the power to set only a basic adult rate, and will have the discretion to set two additional higher rates to reflect experience. Sub-minimum rates which will be a percentage of the basic adult rate will apply to employees aged under 18 years, first time job entrants, and employees undergoing training;

(c) JLCs will no longer set Sunday premium rates, instead Sunday working will be governed by the Organisation of Working Time Act 1997. The Minister will also request the LRC to prepare a statutory Code of Practice on Sunday working in these sectors. Employees will be able to bring a complaint to a Rights Commissioner about any breach of the Code of Practice

governing Sunday working, with appeal to the Labour Court in the event of non compliance with the Rights Commissioner's decision;

(d) Companies will be able to derogate from EROs in cases of financial difficulty, this might be similar to the 'inability to pay' mechanism which exists in National Minimum Wage legislation;

(e) The Government will legislate to provide the new criteria (principles and policies) to be observed in the making of EROs. JLCs will have to take into account factors such as unemployment rates, competitiveness and wage trends. Legislation will also provide changes to the decision making process of JLCs, where there is no agreement by both parties within the JLC, new adjudication procedures will be introduced whereby the matter can be referred to the Labour Court for a recommendation and the casting vote of the Chair of the JLC can only be exercised having regard to that recommendation; and

(f) Record-keeping requirements for employers in these sectors will be reduced. Whilst the ruling may not affect existing workers employed in areas covered by the JLC system, depending on the particulars of their contractual arrangements, pending the implementation of this legislative reform, employers will be permitted to pay new employees the national minimum wage, currently set at ||8.65. Employers will not be obliged to pay JLC rates for employees recruited going forward, and such employees will, in many cases, be engaged on lesser terms and conditions but subject to the National minimum Wage Act 2000, and other relevant statutory minima.

Footnotes

1. Section 35.

2. Section 42.

3. Pursuant to section 43 of the 1946 Act.

4. Section 45.

5. The National Employment Rights Authority (NERA)'s primary purpose is to promote a national culture of employment rights compliance in the labour market and to assume responsibility for the enforcement of employees' rights. NERA is responsible for the Labour Inspectorate units that investigate non-compliance in a range of areas including annual leave, wages, working hours, notice, redundancy and dismissal. NERA can request redress on any discrepancies or, alternatively, can prosecute employers.

6. Article 15.2.1 of the Constitution (State's exclusive powers): '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.'

7. Article 40.3.1 of Constitution (personal rights) : 'The State guarantees in its laws to respect, and, as far as is practicable, by its laws to defend and vindicate the personal rights of citizens.'

8. Article 43 of the Constitution (property rights): 'The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.'

9. [1980] IR 381.

10. SI 142/2008 Employment Regulation Order Catering Joint Labour Committee (For areas other than the area known, until 1 January, 1994, as the County Borough of Dublin and the Borough of Dun Laoghaire), 2008.

11. Authored by Kevin Duffy and Dr Frank Walsh, May 2011.

Subject: Constitutional challenge to Industrial Relations Acts 1946 and 1990

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