# APPROVED

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 280 J.R.

BETWEEN

NÁISIÚNTA LEICTREACH CONTRAITHEOIR EIREANN
CUIDEACHTA FAOI THEORAINN RATHAIOCHTA

APPLICANT

AND

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

RESPONDENTS

**JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 23 June 2020**

**INTRODUCTION**

1. These proceedings concern the validity of secondary legislation which purports to regulate the remuneration of electricians working in the construction industry. The impugned legislation prescribes (i) minimum rates of remuneration; (ii) the requirements for a pension scheme (including a minimum daily rate of contribution to the scheme by an employee and an employer respectively); and (iii) the requirements for a sick pay scheme.

2. The impugned legislation takes the form of a sectoral employment order made pursuant to the Industrial Relations (Amendment) Act 2015. The defining characteristic of a sectoral employment order is that *all* employers within the economic sector concerned are required to apply the prescribed terms and conditions to their employees. These prescribed terms and conditions take effect in substitution for any less favourable terms

in existing contracts of employment. This represents a significant encroachment on the employers' freedom to contract.

3. Any contravention by an employer of the terms and conditions prescribed under a sectoral employment order can be the subject of a complaint to an adjudication officer, and, on appeal, to the Labour Court. The failure to comply with a determination on a complaint can be enforced by way of an application to the District Court. It is a criminal offence for an employer to fail to comply with an order of the District Court directing them to pay compensation to an employee. In principle, therefore, an employer who employs an electrician at a rate of pay less than that prescribed, or who fails to make the prescribed contribution to a pension scheme, may ultimately find themselves subject to criminal prosecution.

4. The applicant is a company limited by guarantee which claims to represent a number of small to medium sized employers who provide electrical contracting services. The precise number of paid-up employer-members of the company appears to have fluctuated over the course of the proceedings, but it is accepted by the respondents that the company has a "sufficient interest" to pursue certain grounds of challenge. (It is not accepted, however, that the company would have standing to pursue arguments based on the property rights of its individual members).

5. As noted above, the secondary legislation has been made pursuant to the Industrial Relations (Amendment) Act 2015. This legislation had been introduced in the aftermath of the judgment of the Supreme Court in *McGowan v. Labour Court* [2013] IESC 21; [2013] 3 I.R. 718. This judgment held that the provision made for "registered employment agreements" under Part III of the Industrial Relations Act 1946 was invalid having regard to the provisions of Article 15.2.1° of the Constitution. One of the principal issues for determination in the within proceedings is whether the revised

legislative scheme introduced under the 2015 Act has avoided all of the pitfalls identified in the previous legislation.

**NOMENCLATURE**

6. The process which culminated in the making of the sectoral employment order impugned in these proceedings had commenced with the submission of certain applications to the Labour Court. These applications were submitted by a trade union and two employers' organisations. The shorthand "***the joint applicants***" will be used to refer to these parties.

7. The applicant for judicial review had participated in the statutory process as an interested party and had objected to the proposal to make a sectoral employment order. To avoid any confusion in the use of the term "applicant" as between the joint applicants and the applicant for judicial review, the shorthand "***the objecting party***" will be used to refer to the applicant for judicial review.

8. The impugned secondary or delegated legislation, i.e. the sectoral employment order, will be referred to as "***the impugned order***" or "***the electrical contracting order***" where convenient.

9. The shorthand "***the Minister***" will be used to refer to the Minister for Business Enterprise and Innovation.

10. Unless otherwise stated, all references to a "***section***" of legislation and to "***Chapter 3***" should be understood as referring to the Industrial Relations (Amendment) Act 2015.

**STRUCTURE OF THIS JUDGMENT**

11. The case for saying that the impugned order is invalid has been advanced on a number of different fronts. The objecting party's ultimate ambition is, however, to have the relevant provisions of the parent legislation, namely Chapter 3 of the Industrial Relations (Amendment) Act 2015, declared to be invalid having regard to the provisions of

Article 15.2.1° of the Constitution. As explained presently, both parties to the proceedings have invited the High Court to determine this constitutional issue, notwithstanding that the principle of judicial self-restraint dictates that a court should generally avoid ruling on the validity of legislation unless it is unavoidably necessary to do so in order to resolve the proceedings before it. (See paragraph 104 *et seq*. below).

12. The balance of this judgment is divided into four parts as follows. The legislative framework and factual background will be explained in Part I. The non-constitutional grounds of challenge will be addressed in Part II. The constitutional challenge will then be addressed in Part III. Finally, a summary of conclusions will be set out in Part IV.

# PART I

## LEGISLATIVE FRAMEWORK

13. The procedure to be followed in making a sectoral employment order is prescribed under Chapter 3 of the Industrial Relations (Amendment) Act 2015. The procedure can be analysed as involving a number of overlapping stages as follows.

### *(i). Application for an examination*

14. The first stage entails the submission of an application to the Labour Court requesting it to examine the terms and conditions of employment "in the economic sector in respect of which the request is expressed to apply" (section 14). An "economic sector" is defined as meaning a sector of the economy concerned with a specific economic activity requiring specific qualifications, skills or knowledge. As discussed presently, one of the issues to be determined in this judgment is whether the Labour Court is entitled to amend the scope of the economic sector from that set out in the application.

15. An application may only be submitted by (a) a trade union of workers, (b) a trade union or an organisation of employers, or (c) a trade union of workers jointly with a trade union or an organisation of employers. The applicant(s) must be "substantially representative" of either (i) the workers, or (ii) the employers of workers, of the particular class, type or group in the economic sector in respect of which the request is expressed to apply.

### *(ii). Examination by the Labour Court*

16. The second stage entails an "examination" by the Labour Court of the terms and conditions of employment in the economic sector. It is a condition precedent to its embarking upon an examination that the Labour Court be satisfied that the applicant is "substantially representative" of the workers of the particular class, type or group in the economic sector. This assessment is to be carried out by reference to the documentation submitted as part of the application. The objecting party complains that this implies that

the Labour Court must determine whether the "substantially representative" criteria has been satisfied *in advance of* any consultation with interested parties. This is said to be an unfair procedure.

17. It appears from the structure of section 14 that once the Labour Court is satisfied of the threshold issues under subsection (1), it then proceeds to undertake an examination of the economic sector concerned. The Labour Court must publish notice of its intention to undertake an examination, must invite representations from interested parties, and may hold an oral hearing. On the facts of the present case, an oral hearing had been held on 14 March 2019.

18. The section is oddly structured in that whereas express provision is made in respect of *procedural* matters, there is no guidance as to the *substance* of the examination.

***(iii). Recommendation to the Minister***

19. In the event that the Labour Court considers it appropriate to do so, it may make a recommendation to the Minister that a sectoral employment order should be made. This represents the third stage of the process. The Labour Court is precluded, by section 16(4), from making a recommendation unless it is satisfied that to do so—

> (a) would promote harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the economic sector concerned, and
>
> (b) is reasonably necessary to—
>
> (i) promote and preserve high standards of training and qualification, and
>
> (ii) ensure fair and sustainable rates of remuneration,
>
> in the economic sector concerned.

20. In reaching its decision on whether to make a recommendation, the Labour Court must hear all parties appearing to the Labour Court to be interested and desiring to be heard,

and must have regard to their submissions. The Labour Court must also have regard to the following matters:

> (a) the potential impact on levels of employment and unemployment in the identified economic sector concerned;
>
> (b) the terms of any relevant national agreement relating to pay and conditions for the time being in existence;
>
> (c) the potential impact on competitiveness in the economic sector concerned;
>
> (d) the general level of remuneration in other economic sectors in which workers of the same class, type or group are employed;
>
> (e) that the sectoral employment order shall be binding on all workers and employers in the economic sector concerned.

21. It is an express requirement that a recommendation be accompanied by a report to the Minister on the circumstances surrounding the making of the recommendation, including confirmation that the Labour Court has had regard to the matters set out above.

22. This statutory report has a special significance in that it will form the cornerstone of the Minister's subsequent assessment of whether the Labour Court has complied with the provisions of Chapter 3.

23. The terms and conditions which can be included in a recommended sectoral employment order are prescribed under section 17(5) to (7) as follows.

> (5) A recommendation under this section may provide for all or any of the following in respect of the workers of the class, type or group in the economic sector concerned:
>
> (a) a minimum hourly rate of basic pay that is greater than the minimum hourly rate of pay declared by order for the time being in force under [the National Minimum Wage Act 2000];
>
> (b) not more than 2 higher hourly rates of basic pay based on—
>
> (i) length of service in the economic sector concerned, or
>
> (ii) the attainment of recognised standards or skills;
>
> (c) minimum hourly rates of basic pay for persons who—

(i) have not attained the age of 18 years,

(ii) enter employment for the first time after attaining the age of 18 years,

(iii) having entered into employment before attaining the age of 18 years, continue in employment on attaining that age, or

(iv) have attained the age of 18 years and, during normal working hours, undergo a course of study or training prescribed by regulations made by the Minister under section 16 of [the National Minimum Wage Act 2000], reduced to the percentage set out in section 14, 15 or 16 of that Act for the category of worker concerned;

(d) minimum hourly rates of basic pay for apprentices;

(e) any pay in excess of basic pay in respect of shift work, piece work, overtime, unsocial hours worked, hours worked on a Sunday, or travelling time (when working away from base);

(f) the requirements of a pension scheme, including a minimum daily rate of contribution to the scheme by a worker and an employer; and

(g) the requirements of a sick pay scheme.

(6) A recommendation under this section shall include procedures that shall apply in relation to the resolution of a dispute concerning the terms of a sectoral employment order.

(7) Subject to sections 14 and 15, a recommendation under this section may provide for the amendment or cancellation of a recommendation previously made under this section and confirmed by the Minister by a sectoral employment order.

***(iv). Minister's role***

24. The Minister's role, having received a recommendation from the Labour Court to make a sectoral employment order, is prescribed under section 17. The Minister is required, having regard to the statutory report of the Labour Court, to satisfy himself that the Labour Court has complied with the provisions of Chapter 3 of the Industrial Relations (Amendment) Act 2015. If he is so satisfied, then the Minister is required to confirm the

terms of the recommendation by order. This necessitates laying a draft of the order before each House of the Oireachtas.

25. If, conversely, the Minister is not satisfied that the Labour Court has complied with Chapter 3, he must refuse to make a sectoral employment order confirming the terms of the recommendation. The Minister must notify the Labour Court in writing of his decision and the reasons for the decision.

***(v). Draft order to be laid before each House of the Oireachtas***

26. As noted above, where the Minister is satisfied that the Labour Court has complied with the provisions of Chapter 3, the Minister is required to lay a draft of his order confirming the Labour Court's recommendation before each House of the Oireachtas. The order shall not be made by the Minister unless a resolution approving of the draft has first been passed by each such House.

**PROCEDURE LEADING TO MAKING OF IMPUGNED ORDER**

27. To assist the reader in understanding the legal issues which fall for determination in these judicial review proceedings, it is necessary to outline the nature of the debate had before the Labour Court in the statutory procedure leading up to its report and recommendation to the Minister on 23 April 2019.

28. The procedure commenced in October 2018 with the making of a request to the Labour Court for it to examine the terms and conditions relating to the remuneration, sick pay scheme and pension scheme of workers in what was described as the "electrical contracting sector". The precise parameters of the sector are a matter of controversy, but for present purposes it should be noted that the intention seems to have been that the examination would be directed to electricians working in what might be described colloquially as the construction industry.

29. Two applications were submitted as follows. The first application had been made on behalf of Connect Trade Union. This application was accompanied by a statutory declaration to the effect that the trade union represented 9,871 workers out of a total of 13,800 workers of the class, type or group employed in the electrical contracting sector. The application was accompanied by a detailed report from EY - DKM entitled "The Electrical Contracting Sector - An assessment of employment".

30. The second application had been made jointly by two employers' organisations, the Electrical Contractors Association ("***ECA***") and the Association of Electrical Contractors of Ireland ("***AECI***"). The application forms identified the ECA as a constituent association of the Construction Industry Federation. The application forms indicated that the members of the ECA employed 4,044 workers, and the AECI employed 2,250 workers, out of a total of 13,800 workers of the class, type or group employed in the electrical contracting sector. A copy of the same report from EY – DKM as had been submitted by Connect Trade Union accompanied the employers' organisations' application. The conclusions of that report are stated as follows.

> "3.9 Conclusions
>
> The starting point is the Census 2016 adjusted estimate of 9,482 Electricians working in the Construction sector. It is assumed that this figure would exclude electrical workers employed by the ESB in electrical power supply and distribution and in other semi-state and manufacturing companies. Applying the same increase to this figure as in the Labour Force Survey between 2016 and Q2 2018 of 45% would generate an estimate for the total number of electricians employed in Construction in Q2 2018 of almost 13,750.
>
> An alternative approach would be to start with the figure of 15,550 from the Labour Force Survey and deduct the estimate of 1,700 for those electricians who work in the semi-state sector and would not be covered by the SEO. This would provide an estimate for the total number of electricians employed in Construction in Q2 2018 of 13,850.
>
> Thus based on the above methodology, it is concluded that the current estimate of the number of electricians, electrical apprentices, electrical

> chargehands and foremen employed by electrical contractors in the electrical contracting sector is around 13,800.
>
> Based on a figure of 13,800, the ECA and the AECI combined membership of 6,294 represents 46% of the total persons working in construction in the electrical contracting sector.
>
> Using the same base figures, the Connect Trade Union, with 9,871 members working in the construction sector, represents 71.5% of the total persons working in construction in the electrical contracting sector."

31. The Registrar of the Labour Court had notified the two sets of applicants on 31 October 2018 that the Labour Court proposed to treat the applications as one joint application. None of the applicants objected to this proposal.

32. The Labour Court subsequently published notice of its intention to carry out an examination (as required by section 15(2)). Notices were published in three national newspapers, *The Irish Times*, *The Irish Independent*, and *The Examiner* in January 2019. Notice was also published in *Iris Oifigiúil* and *Seachtain*.

33. Written submissions were made to the Labour Court in February 2019 by nine parties, including the three joint applicants.

34. The striking feature of the submissions made by the joint applicants is that they contained drafts of a proposed sectoral employment order. Details as to the terms and conditions sought to be embodied in an order were set out. There were differences between the employers' organisations' draft and the trade union's draft in respect of the appropriate rates of remuneration and contributions. The Labour Court was, in effect, being invited to adopt a version of these drafts. This is so notwithstanding that the legislation envisages that the Labour Court is to undertake its own "examination" of the terms and conditions of employment in the economic sector.

35. Both of the employers-organisation applicants addressed the potential impact on competition which the introduction of a sectoral employment order, with a minimum hourly rate of pay, would have for the electrical contracting sector.

36. The submission from the Electrical Contractors Association summarised its position as follows.

> "[…]
>
> – The tendering process whereby electrical contractors tender to the principal contractor for work has contributed to intensifying competition between contractors. Since the striking down of the REA, this practice has led to an erosion of the quality of employment conditions in the sector as competition between electrical contractors to win work intensified. Where intense competition for work exists, the cost of investing in training is critically examined by employers. An SEO would set legally binding rates which would eliminate the opportunity to erode employment conditions as a means of securing projects.
>
> – As growth in the economy continues, activity in the sector will increase. Investment in new technologies, training and health and safety will be required to ensure the sector can deliver a high quality product. Where labour is taken out of competition, investment in new technologies and training will be required to provide contractors with a competitive advantage when tendering for work.
>
> – Employment levels in the sector are determined by the level of work available. As the economy grows there will be a greater need for new entrants. A sector that provides good quality employment, with reasonable and sustainable rates of pay and conditions of employment will entice new entrants into the apprenticeship system.
>
> – It has been a feature of the industry since the striking down of REAs in 2013 that contractors from outside the State, with a lower cost base, enjoy a competitive advantage over Irish electrical contractors. An SEO will ensure that all electrical contractors, including those from outside the State, can tender for work on a level playing field."

37. An argument in almost identical terms had been advanced by the other employers' organisation, the Association of Electrical Contractors (Ireland).

38. The submission made on behalf of the objecting party, i.e. the applicant for judicial review, Náisiúnta Leictreach Contraitheoir Eireann, can be summarised as falling into two parts as follows. The first part of the submission addressed what might be described as "threshold" issues, i.e. matters in respect of which the Labour Court had to be satisfied prior to embarking upon an examination. In particular, the objecting party contended

that none of the joint applicants fulfilled the "substantially representative" requirement. The accuracy of the figures for the number of workers said to be represented by the joint applicants was queried. It was suggested that there were in excess of 4,000 electrical contractors registered with the Safety Supervisory Board, yet the combined membership of the employers' organisations as stated in the application forms was 229. A concern was also raised as to whether employees in the state and semi-state sector were being reckoned for the purposes of the "substantially representative" requirement, notwithstanding that the definition of the electrical contracting sector as *per* the application forms *excluded* this class of worker.

39. It was also queried whether the trade union or employers' organisations had balloted their members.

40. The first part of the submission addressed the definition of the "economic sector". In particular, it was contended that there are many different sizes of firms within what is called the electrical contracting industry, and that what is financially viable for the largest or the medium sized firms who employ electricians would be "unsustainable" for the smaller contractor.

41. The second part of the submission addressed the substance of the rival drafts of the proposed sectoral employment order which had been submitted by the joint applicants. The principal issues raised by the objecting party included the following (see page 7 of 11).

> "[…]
>
> vii. There has been no legally binding agreement in the sector since the legislation providing for the previous REA was set aside in May 2013 following the Supreme Court decision in *McGowan*. Despite all three applicants (Connect Trade Union, the ECA and the AECI) referring to a current unregistered 'national collective employment agreement' which appears to have been negotiated under the auspices of the unregistered National Joint Industrial Council, there is no such species of agreement. The current arrangement can at best be

described as a 'gentlemen's agreement'. We are not aware of difficulties being caused to the majority of employers and employees. Our members have engaged in one to one agreements with their own employees and have negotiated mutual agreeable terms and conditions which suit the particular requirements of each unique business.

viii. While we are all described as 'electrical contractors', we submit that the sector is so diverse that it is impossible to fairly impose a set of terms and conditions across the industry which will allow all contractors to remain competitive. Our members are in the main small contractors who compete with one another and with one-man operators for small domestic and commercial contracts. Our members do not ordinarily compete with the members of ECA and AECI and clearly those trade organisations wish to ensure that if we did so compete that we would have to pay the same rate of pay to our electricians notwithstanding our margins are much tighter. By way of example, a contractor with one employee is competing with a one-man operator who does not have employees and who is therefore not restricted by any such agreement.

ix. The diversity in the sector includes the end-user – the customer – of our members' services. A domestic customer cannot be expected to absorb the same call-out rate as the biggest employers in the country. The consumer will also suffer if an SEO is imposed on all contractors regardless of their size and nature of their business.

Anti-competitive practices

x. Were a national agreement, an SEO controlling labour costs, to be applied across an industry as diverse as the electrical contracting sector it would be with respect a cartel, and would be anticompetitive. The ECA and AECI are not exempted bodies; they are trade associations. Whereas the Connect Trade Union is a trade union, any agreement by the ECA or the AECI which purported to limit competition between firms by controlling labour costs would be anti-competitive. Such an anti-competitive agreement ought surely to fall foul of competition legislation, particularly where as in this instance there is no benefit to the consumer; it is designed to 'level the playing field' as its proponents repeatedly highlight. Indeed the consumer, particularly the domestic consumer, is hit by the artificially raised wage levels of such agreements."

42. The Labour Court convened an oral hearing on 14 March 2019. It does not appear that a transcript of the hearing has been prepared: certainly, no transcript has been put before the High Court. The objecting party has, however, exhibited a note of the proceedings prepared by a lawyer attending the hearing on its behalf.

43. There is some controversy as to whether, at the conclusion of the oral hearing, the representatives of the Labour Court had indicated that the participants would be notified if and when the Labour Court decided to make a recommendation to the Minister. At all events, the Labour Court did not notify the participants. The objecting party maintains that it only deduced that a recommendation must have been made when the Labour Court indicated to its solicitor by letter dated 25 April 2019 that the Labour Court was now *functus officio*.

44. An official in the Minister's office subsequently confirmed to the objecting party that a recommendation had been made. The objecting party first received a copy of the Labour Court's report and recommendation on 21 June 2019. (See Mr Harry Carpendale's affidavit of 26 May 2020). As of that date, the objecting party had already instituted the within judicial review proceedings, and was pursuing an application for an interlocutory injunction. The report and recommendation had been exhibited as part of the respondents' replying affidavits.

**LABOUR COURT'S REPORT AND RECOMMENDATION**

45. The Labour Court submitted its report and recommendation to the Minister under cover of letter dated 23 April 2019. The rationale for the recommendation is summarised as follows in the report.

> "The Court is satisfied that the proposed SEO will support the maintenance of high levels of employment in the sector. The Court is also satisfied that it will reasonably reflect the terms of the national collective agreement concluded between employers and the trade unions on pay and conditions of employment for the time being in place in the sector. The Court is further satisfied that the introduction of the proposed SEO will, by taking labour costs out of contention, promote competition within the sector based on the efficient use of capital, labour and project management techniques thereby increasing the overall capacity of the economy and improving the economic performance of the sector.
>
> The Court has been mindful of the general levels of remuneration in other related sectors of the economy and has set the rates of pay and conditions of

employment it has proposed in this recommendation in that context to ensure that they have no adverse effect on pay movements, industrial harmony or employment levels in those sectors.

Finally, the Court is satisfied that the proposed SEO will promote harmonious relations between workers and employers in the sector. It is further satisfied that it will assist in the avoidance of industrial unrest in the sector and will attract workers who possess high standards of training and qualifications into the sector.

Statutory minimum rates of pay and conditions of employment in the sector will support the industry's efforts to attract candidates of high calibre into apprenticeships in the sector and attract qualified staff to take up career opportunities as they arise in the sector thereby supporting the long-term sustainability of the industry.

In that context, the Court has decided to recommend the introduction of an SEO for the sector. The Court therefore resolved as follows:-

[…]

# PART II

## NON-CONSTITUTIONAL GROUNDS OF CHALLENGE

### LABOUR COURT'S COMPLIANCE WITH CHAPTER 3

46. It is a condition precedent to the making of a sectoral employment order that the Minister be satisfied, having regard to the statutory report prepared by the Labour Court, that the Labour Court has complied with the provisions of Chapter 3. For the reasons which follow, this condition precedent could not have lawfully been fulfilled in circumstances where the statutory report was deficient. As a consequence, the Minister did not have jurisdiction to proceed to make the impugned order. The Minister erred in law in deciding otherwise.

47. To understand the importance of compliance with the procedural requirements, it should be recalled that one of the criticisms which the Supreme Court had made of the regime under Part III of the Industrial Relations Act 1946 in *McGowan v. Labour Court* [2013] IESC 21; [2013] 3 I.R. 718 was that the Labour Court had no obligation to consider the interests of those who would be bound by a registered employment agreement, but who had not been parties to it. Put otherwise, no proper provision had been made under the previous legislation for consultation with interested parties. The procedures introduced under the Industrial Relations (Amendment) Act 2015 were, presumably, intended to ensure that a similar criticism could not be levelled against the making of a sectoral employment order.

48. Chapter 3 of the 2015 Act now 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 to the Minister on the circumstances surrounding the making of the recommendation.

49. The statutory report submitted to the Minister on 23 April 2019 is deficient in two significant respects. First, the report fails to record even the *conclusions* of the Labour Court on crucial matters, still less does the report state a rationale for those conclusions. Secondly, the report fails to set out a proper summary of the submissions made by those interested parties who opposed the making of a sectoral employment order, and does not engage with those submissions. Each of these points is elaborated upon below.

50. The Labour Court is precluded from recommending that the Minister should make a sectoral employment order unless it is satisfied that to do so:

    (a) would promote harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the economic sector concerned, and

    (b) is reasonably necessary to—

        (i) promote and preserve high standards of training and qualification, and

        (ii) ensure fair and sustainable rates of remuneration, in the economic sector concerned.

51. The report fails to address the last of these three objectives at all. There is no statement to the effect that the Labour Court is satisfied that the recommendation to make a sectoral employment order is "reasonably necessary" to ensure "fair and sustainable rates of remuneration". There is simply no engagement at all with this issue, and indeed the only mention made of this issue anywhere in the report is a one-line reference to a submission made by an interested party.

52. The report does address training and qualification, but does not consider whether the recommended sectoral employment order is "reasonably necessary" to achieve this outcome. The most that is said is that statutory minimum rates of pay and conditions of

employment in the sector will "support" the industry's efforts to attract candidates of high calibre into apprenticeships in the sector and attract qualified staff to take up career opportunities as they arise in the sector. No consideration is given to what might happen in the absence of a sectoral employment order, i.e. the question of whether an order is "reasonably necessary" is not considered.

53. The report does contain a finding in respect of the promotion of "harmonious relations" between workers and employers in the sector, and in respect of the avoidance of "industrial unrest".

54. The Minister is required to satisfy himself, on the basis of the statutory report submitted, that the Labour Court has complied with Chapter 3. Even taking the respondents' case at its height, and accepting for the sake of argument only that the Minister is not required to review the merits of the Labour Court's recommendation, the report must, at a bare minimum, demonstrate that the Labour Court had addressed its mind to the mandatory statutory criteria and had made findings in respect of same. The report in the present case fails to meet even this minimal threshold. A finding that a sectoral employment order is "reasonably necessary" to ensure "fair and sustainable rates of remuneration" is a condition precedent to the Labour Court's entitlement to make a recommendation to the Minister.

55. The second significant respect in which the report is deficient is in its treatment of the submissions made by the interested parties. It will be recalled that the Labour Court gave public notice of its intention to carry out an examination of the electrical contracting sector. Interested parties were invited to make written submissions, and to attend at an oral hearing on 14 March 2019. These steps were taken in purported discharge of the statutory obligations under section 14 and 15.

56. The right to make submissions carries with it, as a corollary, a right to be informed of the reasons for which those submissions are not accepted. See, by analogy, *Balz v. An Bord Pleanála* [2019] IESC 90; [2020] 1 I.L.R.M. 367, [57].

> "[…] It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."

57. The above statement was made in the context of submissions made by members of the public in respect of an application for planning permission. A right to reasons must similarly arise in the context of the procedures leading up to the making of a sectoral employment order. The statutory obligation to notify interested parties and to hear their submissions would be undermined if not accompanied by an implicit obligation to engage with those submissions, and to provide some sort of explanation as to why they have not been accepted (where this is the case).

58. None of this is to say that the Labour Court is required to provide a discursive judgment nor to engage in a line-by-line rebuttal of those submissions it does not accept. It would, for example, be open to the Labour Court to address submissions thematically.

59. On the facts of the present case, the objecting party had advanced detailed submissions on *inter alia* the question of whether the applicants 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. These are all matters to which the Labour Court is required under statute to have regard. Yet, these submissions are engaged with in the statutory report not at all. The report does not accurately or fairly summarise the nature of the submissions made; still less does it provide any rationale for rejecting those

submissions. The most that is said in relation to the "substantially representative" requirement is that the figures offered by those opposed to the order were "not credible". No explanation is provided as to the basis on which this conclusion was reached. The submission made in relation to the impact on the sustainability of small to medium scale electrical contractors is not addressed at all, nor is the more general complaint in relation to anti-competitive effects.

60. These shortcomings in the report would not have been immediately apparent to the Minister in reading the report in April 2019 in that he had not, at that stage, been provided with a copy of the written submissions made by the interested parties.

61. The position since adopted in these proceedings by the Minister is that the statutory report is adequate, and does comply with the requirements of section 16. It is the Minister's stated position that there is no legal requirement upon the Labour Court to summarise, in its report to him, the content of the submissions made by interested parties in opposition to the proposed sectoral employment order. This is so notwithstanding that it is accepted that on the facts of the present case the Minister did not have sight of the written submissions of the interested parties.

62. Insofar as the failure to record the findings of the Labour Court on all of the mandatory statutory criteria is concerned, counsel on behalf of the respondents draws attention to the fact that the provisions of section 16 have been set out in full in the report. This court was invited to draw the inference from the structure of the report that the Labour Court must have been fully aware of the statutory considerations.

63. The respondents have also drawn the court's attention to certain passages in the written submissions made by the joint applicants to the Labour Court. The implication here being that the rationale for the recommendation might be found there.

64. The respondents have thus adopted the paradoxical position of, on the one hand, contending that the requirement that the Minister satisfy himself that the Labour Court had complied with Chapter 3 represents an important procedural safeguard in the context of Article 15.2.1° of the Constitution; yet, on the other hand, undermining the effectiveness of that safeguard by suggesting that the Minister's role is so minimal that it could properly be discharged on the basis of the perfunctory report prepared by the Labour Court in this case. The Minister's function is so limited, it is suggested, that he does not require even a summary of the submissions made, and that he can be satisfied that the Labour Court has had regard to all relevant considerations simply on the basis of its say-so in the report. Indeed, on the logic of the respondents' position, it is sufficient that the report merely cited the provisions of section 16. No further reasoning or analysis is, seemingly, needed.

65. With respect, the respondents' understanding of the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015 is incorrect. The Labour Court is required to carry out an "examination" of the relevant economic sector, having consulted with interested parties. The Labour Court must report to the Minister on the circumstances surrounding the making of the recommendation, and must confirm that the Labour Court has had regard to the prescribed matters. The statutory report is submitted to the Minister for the precise purpose of allowing him to satisfy himself that the Labour Court has complied with Chapter 3. It is implicit in this that the content of the report must, at a minimum, address the following. The report must demonstrate that the Labour Court has addressed its mind to the mandatory statutory considerations. It is not enough that the report recites the relevant statutory provisions. Such a recital is, to borrow the language of the Supreme Court in *Balz v. An Bord Pleanála*, little more than administrative throat-clearing before proceeding to the substantive decision. It certainly is not a substitute for

applying the statutory criteria to the particular circumstances of the economic sector and recording the Labour Court's findings in that regard. The report must also provide a fair and accurate summary of the submissions made by the interested parties, and some statement of the rationale for not accepting those submissions (if that be the case). In the absence of such a summary, the Minister would be hamstrung in determining whether the procedural requirements had been complied with. The report of 23 April 2019 does not meet these minimum standards.

66. Finally, it is no answer to say that the reasoning for the Labour Court's recommendation is to be found, in part at least, in the written submissions made to the Labour Court. It is correct to say that the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453 indicated that all of the reasons for a decision do not necessarily have to be found in the formal decision, but may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion. However, this is subject always to the requirement that the reasons must actually be ascertainable and capable of being determined. This standard is not met on the facts of the present case where there is nothing in the report and recommendation which indicates that the Labour Court was adopting the submissions of the joint applicants.

67. More fundamentally, the argument that the reasoning is to be found in the submissions overlooks the function of the statutory report to the Minister. This is the document upon which the Minister must satisfy himself that the Labour Court has complied with Chapter 3. On the facts of the present case, the Minister received neither a fair and accurate summary of, nor copies of, those submissions. Same cannot therefore be relied upon to supply the reasons.

**DEFINING THE RELEVANT "ECONOMIC SECTOR"**

68. One of the principal objections to the making of the sectoral employment order advanced in the consultation procedure before the Labour Court had been in respect of the precise parameters of the relevant economic sector. In particular, there was controversy, first, as to whether the sector could be said to capture small to medium size electrical contractors; and, secondly, as to whether electricians employed by state or semi-state employers should be included.

69. The joint applicants had, in their application documentation, put forward a proposed description of the economic sector as follows.

> "The Electrical Contracting Sector means the sector of the economy comprising the following economic activity:
>
> The installation, repair, demolition (de-install), fabrication & pre-fabrication commissioning or maintenance of electrical and electronic equipment, including the marking off and preparing for the wiring (whether temporary or permanent) of all electrical and/or electronic appliances and apparatus, fitting and erecting all controllers, switches, junction section distribution and other fuseboards and all electrical communications, bells, telephone, radio, telegraph, x-ray, computer and data cabling, instrumentation, fibre optics and kindred installations; fitting and fixing of metallic and other conduits, perforated cable tray and casing for protection of cables, cutting away of walls, floors and ceilings etc for same; erection, care and maintenance of all electrical plant, including generators, motors, oil burners, cranes, lifts, fans, refrigerators and hoists; adjustments of all controls, rheostats, coils and all electrical contacts and connections; wiring of chassis for all vehicles; erection of batteries and switchboards; erection of crossarms, insulators, overhead cables (LT and HT); fitting of staywires, brackets, lightning arrestors etc and underground mains having regard to any advances in technology and equipment used within the industry.
>
> This Sectoral Employment Order will not apply to employees in state and semi-state companies who are engaged in similar activities and are covered by other agreements. Neither will it apply to electricians and apprentices employed directly by manufacturing companies for the maintenance of those companies' plants."

70. As appears, the proposed description *expressly* excluded employees in state and semi-state companies who are engaged in similar activities and are covered by other agreements.

71. The description ultimately adopted in the sectoral employment order differs from the above in two significant respects. First, the express exclusion of state and semi-state employees is omitted. Secondly, a new activity, namely the "alteration" of electrical and electronic equipment has been added. (There are also a small number of typographical differences, including the substitution of the word "contracts" for "contacts" in the phrase "all electrical contacts and connections").

72. The objecting party submits that the Labour Court does not have jurisdiction to amend or modify the description of the "economic sector" from that initially applied for. Counsel submits that the phrase "the economic sector in respect of which the request is expressed to apply" in section 14 indicates that the scope of the economic sector is fixed at the time of the application. This is the "economic sector" against which the "substantially representative" criterion is to be reckoned.

73. Counsel further submits that the legislation does not allow the Labour Court unilaterally to "create or adopt" its own defined economic sector subsequent to the consultation process. Were the Labour Court to do so, it would not be making a recommendation to the Minister relating to the same economic sector in respect of which it had received a request pursuant to section 14; rather, the Labour Court would be creating a *newly defined* economic sector at the section 16 stage of the process which had not undergone the mandatory scrutiny at the section 14 and section 15 stages of the process. It is also said that there is nothing in the Industrial (Relations) Act 2015 to suggest that an economic sector needs to include an *entire* trade.

74. In reply, counsel for the respondents relies on the wording of subsection 16(3)(a) which states that a recommendation shall specify the class, type or group of workers and the economic sector in relation to which the recommendation shall apply. This, it is said, indicates that the Labour Court is authorised to define the limits of the relevant economic sector.

***Findings of the court***

75. In order to resolve this disagreement between the parties, this court must determine the following two related issues. First, whether the Labour Court has jurisdiction to define the limits of the economic sector itself, or, alternatively, whether it is bound by the terms of the application made to it. Secondly, in the event that the Labour Court does have jurisdiction to define the limits, did it act lawfully in doing so in the present case.

76. The jurisdictional issue can be disposed of shortly. The legislation envisages that the Labour Court will carry out its own "examination" of an economic sector with a view to deciding whether to recommend the making of a sectoral employment order. If, following such examination, the Labour Court decides to recommend the making of a sectoral employment order, then it must specify the class, type or group of workers and the economic sector in relation to which the recommendation shall apply (subsection 16(3)(a)).

77. It is apparent, therefore, that the Labour Court has discretion to define the economic sector itself. The Labour Court has an enhanced role under the new legislation, and is not confined to rubber-stamping the application made to it. It must carry out its own "examination". As the facts of the present case illustrate, the precise parameters of the economic sector may well be one of the principal issues in controversy. Certain interested parties may contend that their activities should not be regarded as falling within the same sector of the economy as those activities in respect of which a sectoral

employment order is to be recommended. It would undermine the effectiveness of the consultation process were the limits of the economic sector to be fixed by the terms of the application submitted. Such a narrow view of the Labour Court's jurisdiction would have the practical effect that interested parties would not have a meaningful opportunity to make submissions on the scope of the economic sector. The parties who had requested that the Labour Court carry out an examination would have the whip hand.

78. It follows that the Labour Court does have *vires* to define the economic sector and is not bound by the terms of the application. This is, of course, subject to the overriding obligation to observe fair procedures. The final definition of the economic sector should not go beyond that which might have been contemplated on the basis of the submissions and the oral hearing. Put otherwise, whereas the Labour Court is not bound by the terms of the application, nor indeed by the submissions of the interested parties, the final definition of the economic sector should not come as a *surpris*e to the parties. Rather, if and insofar as the definition differs from that set out in the application, this is something which should have been evident from the submissions made or from the course of the oral hearing. Interested parties should have had an opportunity to make submissions on the issue. Moreover, the report and recommendation should explain the rationale for the definition of the economic sector, at least in those cases where this had been an issue in controversy in the statutory procedure.

79. Applying these principles to the circumstances of the present case, the precise parameters of the economic sector had been a live issue in the written and oral procedure. In particular, there had been a debate on the diversity of activities carried out by electrical contractors—ranging from domestic repairs to large scale development projects—and whether a "one size fits all" approach was appropriate. This debate has to be seen in the context of an earlier, abortive application for an examination in March 2017. This

application had been made by the Technical Engineering and Electrical Union (now Connect Trade Union). The definition of the "economic sector" put forward at that time had expressly excluded (i) new build one-off houses; (ii) low density new housing developments of three units or less; and (iii) the repair, replacement and modification of electrical systems and equipment in existing single private residential and domiciliary units.

80. The appropriate definition of the economic sector is not engaged with at all in the report and recommendation. Rather, the Labour Court simply adopts the definition of the economic sector as *per* the joint application, subject to the inclusion of a new activity, namely the "alteration" of electrical and electronic equipment. This is something which had been sought by one of the joint applicants in their written submissions.

81. Moreover, the omission of an *express* exclusion in respect of state and semi-state workers undermines legal certainty. A contravention by an employer of the terms and conditions of a sectoral employment order can—following a process of complaint and adjudication—ultimately be the subject of criminal proceedings. It is a criminal offence for an employer to fail to comply with an order of the District Court directing an employer to pay compensation to an employee. Given this criminal context, it is critical, therefore, that the terms of a sectoral employment order be precise.

82. The Labour Court is expressly required to specify the class, type or group of workers to which the recommendation shall apply (subsection 16(3)(a)). If the Labour Court had indeed determined that workers employed by state and semi-state employers were to be excluded—and it is not clear from the report and recommendation that such a determination had been made—then such workers should have been expressly excluded from the recommendation. Given that the concept of an "economic sector" is defined in terms of specific economic activity requiring *specific qualifications, skills or knowledge*,

it is not immediately obvious that qualified electricians employed by the state or semi-state companies would automatically fall outside of the order. This should have been spelt out.

83. Finally, the fact that the issue of the definition of the economic sector is not engaged with in the report and recommendation had the regrettable consequence that the Minister had not been properly apprised of one of the principal issues which had arisen in the statutory consultation process.

**FURTHER DELEGATION TO THIRD PARTY?**

84. A separate complaint is made to the effect that the function of fixing the rate of pension contributions has, in effect, been further delegated to a third party. More specifically, it is said that the decision to peg the rate of pension contributions to those fixed by the trustees of the Construction Workers Pension Scheme breaches the principle that a delegate cannot further delegate their function, i.e. *delegatus non potest delegare*.

85. It will be recalled that, under subsection 16(5)(f), a sectoral employment order may make provision for "the requirements of a pension scheme, including a minimum daily rate of contribution to the scheme by a worker and an employer". The approach adopted by the Labour Court in its report and recommendation had been to accept the submission made on behalf of the joint applicants to the effect that a pension scheme with no less favourable terms than those set out in the Construction Workers Pension Scheme should be included in the proposed sectoral employment order. See page 12 of the report and recommendation as follows.

> "The Court has considered the extensive submissions of all interested parties in this regard and the extensive documentation submitted outlining the structure and operation of the scheme. The Court finds that the structure and operation of the Construction Workers Pension Scheme (CWPS) is well suited to the needs of the sector and makes reasonable pension provision at reasonable cost for both workers and employers in the sector.

> The Court finds that the benefits of that scheme are reasonable and proportionate and facilitate movement within the sector that operates to provide security for workers and certainty for employers. Accordingly, the Court adopts the view that terms no less favourable than contained in that scheme should be reflected in any pension scheme incorporated into a Sectoral Employment Order for this sector.
>
> Recommendation
>
> The Court recommends that a pension scheme with no less favourable terms, including both employer and employee contribution rates, than those set out in the Construction Workers Pension Scheme be included in the Sectoral Employment Order."

86. The Labour Court took the rates of contribution which were then payable under the Construction Workers Pension Scheme, and included them in the recommended order. The daily rates of contribution to be paid into a pension scheme by a worker and an employer, respectively, were as follows.

| Employer Contribution | Worker Contribution | Total combined Employer and Worker Contributions |
|---|---|---|
| €5.32 per day to a maximum of €26.63 per week | €3.52 per day to a maximum of €17.76 per week | €8.84 per day to a maximum of €44.39 per week. |

87. Crucially, however, the recommendation went on to provide as follows.

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

88. The final form of the sectoral employment order, as made by the Minister, includes this same provision. The practical effect of this is that any change made by the trustees of the Construction Workers Pension Scheme to their rates automatically affects the rates payable under the impugned order.

89. The approach adopted under the secondary legislation is *ultra vires* the parent legislation. The Industrial Relations (Amendment) Act 2015 envisages that the rate of any mandatory pension contribution payable will be provided for under the terms of the sectoral

employment order itself (see subsection 16(5)(f)). The Oireachtas has thus delegated the function of fixing the daily rate to the Minister, pursuant to a recommendation of the Labour Court. The principle of *delegatus non potest delegare* applies, and the Minister cannot abdicate this function by pegging the rate to a separate rate fixed by a third party, i.e. the trustees of the Construction Workers Pension Scheme. The terms of the sectoral employment order should be precise and self-contained. It would defeat the purpose of the consultation process which is built into Chapter 3 if the rate of contribution could be changed *subsequently* without any requirement for further consultation with the interested parties.

90. Moreover, it would undermine legal certainty were it necessary for an employer to have to look *outside* the terms of the sectoral employment order to find out what his or her legal obligations are. A failure on the part of an employer to pay the required pension contributions can—following a process of complaint and adjudication under the Workplace Relations Act 2015—result in a criminal prosecution before the District Court. It is essential, therefore, that an employer can readily ascertain what the rate of pension contribution payable is. This should be set out in the sectoral employment order itself.

91. The approach adopted under the impugned order cannot be justified by saying that such an approach is necessary to ensure that the pension contributions keep pace with current economic conditions. The parent legislation is sufficiently flexible to allow for the updating of rates by way of amendment of the order. More specifically, there are two mechanisms available under the Industrial Relations (Amendment) Act 2015 which can result in the amendment of an existing sectoral employment order. First, an application may be made to the Labour Court for a re-examination of the sector. Generally, such an application will not be considered until at least twelve months after the date of the order.

The Labour Court may, however, allow an earlier application if it is satisfied that "exceptional and compelling circumstances" exist. Secondly, the Minister may request the Labour Court to review the terms of a sectoral employment order. Such a request shall not be made until at least three years after the date of a sectoral employment order (or the date of its amendment).

92. These are the only mechanisms by which the mandatory terms and conditions of employment specified in a sectoral employment order can be amended. These mechanisms cannot be short-circuited by making the requirements of an order fluid, i.e. subject to change by reference to the actions of a third party.

**SUMMARY**

93. For the reasons set out above, the Minister could not have been satisfied, on the basis of the report and recommendation submitted, that the Labour Court had complied with the provisions of Chapter 3 of the Industrial Relations (Amendment) Act 2015. In particular, the report does not demonstrate that the Labour Court had made findings in respect of all of the matters of which it is required to be satisfied under section 16(4). The report and recommendation do not engage with the definition of the "economic sector", and do not specify the class, type or group of workers to which the recommendation shall apply (as required by subsection 16(3)(a)) insofar as the position of workers employed by state and semi-state organisations is not expressly addressed. The terms of the recommended sectoral employment order are invalid insofar as they purport to fix the rate of pension contributions payable by reference to the actions of a third party.

94. The report is also deficient in that it fails to properly describe the consultation procedure. In particular, the report fails to set out a fair and accurate summary of the submissions made by those interested parties who opposed the making of a sectoral employment order, and does not engage with those submissions.

**PLEADING POINT**

95. For the sake of completeness, it is necessary to address a pleading point raised by the respondents. The respondents submit that the amended statement of grounds does not make out a case that the Labour Court's report and recommendation are unreasoned. The most that is pleaded is that the Labour Court failed to provide "adequate reasons" to explain (i) why the Labour Court considered the joint applicants to be "substantially representative" of workers and/or employers in the sector, and (ii) the scope of the economic sector.

96. The respondents submit that no complaint has been made in any of the affidavits filed on behalf of the objecting party to the effect that the directors or members of the company did not understand the report and recommendation. It is further submitted that the report and recommendation have to be read in conjunction with the written submissions made to the Labour Court by the joint applicants, and by reference to the events at the oral hearing on 14 March 2019. The objecting party, as an informed participant in the consultation process, would have understood the rationale for making the recommendation. Counsel cites *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453.

97. The point is also made that, by the time the amended statement of grounds had been delivered in November 2019, the objecting party had been in possession of the report and recommendation for several months. Notwithstanding this, no express reference is made to the terms of the report and recommendation in the amended pleadings.

98. In reply, counsel for the objecting party draws the court's attention to the following pleas at grounds (e)(15)(xvi) and (e)(31) of the amended statement of grounds.

> "15. The first named Respondent failed to provide the Applicant with sufficiently clear (or any) information necessary to specify (in relation to requests made pursuant to Section 14 of the 2015 Act by

the Connect Trade Union ('CTU'), the Electrical Contracting Association ('ECA') and the Association of Electrical Contractors Ireland ('AECI') dated 19 and 22 October 2018:

[…]

xvi. the reason(s) for the first named Respondent's recommendation to the second named Respondent pursuant to Section 16(1) of the 2015 Act in respect of the joint application for an SEO."

"31. The Respondents have a duty to exercise their functions, not only with constitutional propriety and due regard to natural justice, but also within the framework of the terms and objects of the Industrial Relations (Amendment) Act 2015 and with basic fairness, reasonableness and good faith. This includes an obligation on the part of the Respondents to provide sufficiently clear reason(s) for any decision taken pursuant to the Industrial Relations (Amendment) Act 2015 particularly given that those decisions materially and/or adversely affect the Applicant's members' rights, including their constitutional and European Convention rights."

***Findings of the court***

99. The pleading objection is not well founded: a "reasons" ground has been properly pleaded. The very first relief sought in the amended statement of grounds is a declaration to the effect that the examination conducted by the Labour Court pursuant to section 15 of the Industrial Relations (Amendment) Act 2015, and the recommendation made by it pursuant to section 16 for a sectoral employment order for the electrical contracting sector, were unlawful and/or *ultra vires* and/or in excess of jurisdiction and, accordingly, void and of no effect. An order of *certiorari* is also sought quashing the statutory examination arising out of which the Labour Court made its recommendation.

100. Much of the pleadings which follow are directed to the specific issues of (i) whether the joint applicants had satisfied the requirement of being "substantially representative", and (ii) the definition of the "economic sector" (in particular, whether the sectoral employment order would relate to electricians working for smaller electrical contractors such as the objecting party's members). The pleadings do, however, contain a more

*general* complaint that the Labour Court failed to provide the reasons for its recommendation, at grounds (e)(15)(xvi) and (e)(31) (set out earlier). This is a sufficient basis for a "reasons" argument.

101. It should also be recalled that the overall thrust of the judicial review challenge is that the Labour Court did not comply with Chapter 3 of the Industrial Relations (Amendment) Act 2015. This goes further than a "reasons" challenge *simpliciter*. As explained under the previous headings, not only did the Labour Court not explain its rationale for making the recommendation and rejecting the submissions of the objecting party, in many instances it does not even record a finding in respect of crucial matters, such as, for example, whether a sectoral employment order was "reasonably necessary" to ensure fair and sustainable rates of remuneration; the precise parameters of the economic sector; and the precise class, type or group of workers to which the recommendation applied.

102. The litmus test for a court in ruling upon a pleading point is whether the pleadings are such that the other side have been put on notice that a particular ground of challenge is being advanced (and thus afforded an opportunity to respond to same). In the present case, the amended statement of grounds is a lengthy document, running to some twenty-seven pages. Counsel for the objecting party referred to her clients' case as having the "kitchen sink" thrown in. It is obvious from the detailed statement of grounds that there was a full frontal attack on the Labour Court's examination and recommendation under Chapter 3. The respondents cannot realistically be said to have been taken by surprise that this attack included a challenge to the reasons.

103. Moreover, counsel for the respondents, having made the pleading point, went on to make detailed submissions on the "reasons" issue *de bene esse*. These are addressed at paragraphs 66 and 67 above.

# PART III

## CONSTITUTIONAL GROUNDS OF CHALLENGE

### JUDICIAL SELF-RESTRAINT

104. The legal consequences of striking down legislation are such that a court will generally only embark upon consideration of a constitutional challenge where it is unavoidably necessary to do so in order to resolve the proceedings before it. If proceedings can be resolved on non-constitutional grounds, then a court will usually seek to dispose of the case on this narrower basis. This principle is sometimes referred to as "judicial self-restraint". There are several strands to the rationale underlying judicial self-restraint, and these are discussed in detail in *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny and Walsh, 5th edition, Bloomsbury Professional, 2018) at §6.2.200 to §6.2.214. As the learned authors explain, the principle is informed by the presumption of constitutionality, and by the inherent limitations of the judicial process, i.e. the court only has jurisdiction to invalidate legislation; it cannot enact new legislation to fill the resultant gap in the law. The principle of judicial self-restraint is, however, subject to the overriding consideration of doing justice between the parties.

105. For the reasons set out at Part II of this judgment, this court has concluded that neither the procedures leading up to, nor the content of, the sectoral employment order complied with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015.

106. A finding to this effect would, in nearly any other case, be sufficient to dispose of the proceedings in their entirety. The impugned sectoral employment order would be set aside as having been made *ultra vires* the parent legislation. It would then become unnecessary to embark upon a consideration of the constitutional challenge, and—applying the principle of judicial self-restraint—the court would decline to do so.

107. The unusual feature of the present case, however, is that both parties are anxious to obtain a ruling in these proceedings on the question of whether the delegation by the Oireachtas of the power to make sectoral employment orders to the Minister is consistent with Article 15.2.1° of the Constitution. Both parties agree that the court should rule on the issue, and not seek instead to resolve the case on narrower, non-constitutional grounds. The logic underlying the position of the parties is that the constitutional issue will inevitably arise again, and that to resolve these proceedings on non-constitutional grounds would simply defer consideration of this issue to another case involving precisely the same parties.

108. I am satisfied that this is one of those exceptional cases where a departure from the principle of judicial self-restraint is justified. It is evident from the chronology of events leading up to these proceedings that there is an intractable dispute between the parties as to whether it is constitutionally permissible for the Oireachtas to delegate the regulation of key terms and conditions of an employment relationship to the Minister. The procedure under Chapter 3 of the Industrial Relations (Amendment) Act 2015 has already been invoked three times in respect of the electrical contracting sector. The objecting party has consistently questioned the legitimacy of the legislation. In the first two instances, the statutory procedure had been terminated before a sectoral employment order had been made. It was only on the third attempt that an order was actually made. It seems inevitable that, following the setting aside of the impugned order in these proceedings, a fourth attempt will be made to invoke the statutory procedure. It also seems inevitable that the objecting party will, again, question the validity of the enabling legislation. The intractable dispute on the "delegation of law-making" issue will thus remain to be resolved if these proceedings are determined on narrower, non-constitutional grounds.

109. In circumstances where (i) both parties are agreed that the constitutional issue should be resolved in these proceedings; (ii) the constitutional issue has been fully argued over the course of a six-day hearing before this court; and (iii) the exercise of judicial self-restraint would merely defer—rather than avoid—the necessity of a court having to rule on the validity of the legislation, I propose to determine the constitutional challenge made by reference to Article 15.2.1° of the Constitution.

110. Some indirect support for this approach can be found in the judgment of the Supreme Court in *McGowan v. Labour Court* [2013] IESC 21; [2013] 3 I.R. 718. The constitutional challenge in that case had been dismissed by the High Court (Hedigan J.) on narrow procedural grounds related to delay and the form of the proceedings. The High Court judgment did not, therefore, address the substance of the arguments which had been advanced by reference to Article 15.2.1° of the Constitution. Ordinarily, an appellate court will not consider an issue of constitutional law which has not been fully argued and decided in the High Court, save in exceptional circumstances. The Supreme Court in *McGowan* treated the appeal in that case as one involving such exceptional circumstances. It was considered necessary to determine the constitutional issue on the appeal notwithstanding that it had not been decided by the High Court.

> "[…] Here there are a number of factors which suggest that the point should be considered and determined by this court. The issue is one which has been mooted for a considerable time, since at least the judgment in *Burke v. Minister for Labour* [1979] I.R. 354. The relevant REA [registered employment agreement] is still in full force and effect. Indeed, the third named appellant has been the subject of a District Court prosecution which was commenced in 2008 and which is awaiting the outcome of this decision. The REA will continue to have effect therefore and the uncertainty over its validity and indeed the validity of the underlying statutory scheme is undesirable. There have been three separate pieces of litigation in relation to this REA alone and a lengthy hearing both in the Labour Court and in the High Court. Considerable costs have been incurred on all sides. The point was fully argued and it was not adjudicated on not because, as sometimes occurs, the trial court had decided the case in the plaintiffs' favour on non-constitutional grounds but rather

> because the court considered that it was preferable that the case be brought by plenary procedure. It is not at all clear that this is a valid ground for declining to address a point otherwise properly before the court.
>
> To decline to hear and determine this issue would mean requiring the parties to incur substantial costs without the issues between the parties being resolved, and exposing the plaintiffs to the possibility of ongoing criminal prosecution and a choice between having to recommence proceedings or submitting themselves to a regime which they consider unconstitutional. Such an outcome would not be consistent with the administration of justice. Accordingly, albeit reluctantly, the court considers it necessary to address the central issue raised in this appeal."

111. There is, of course, a crucial distinction between the present case and *McGowan* in that, here, the non-constitutional issues have been resolved *in favour of* the applicant for judicial review. Thus, the sectoral employment order would still be set aside even if this court did not address the constitutional issue. Accordingly, not all of the concerns informing the approach of the Supreme Court in *McGowan* can be read across to the present case. However, the position in respect of legal costs and the likelihood of further litigation between the same parties is somewhat similar. Were this court to decline to determine the constitutional issue, it seems likely that the parties would end up relitigating the issue in other proceedings, thereby incurring yet further legal costs. This unnecessary duplication of legal costs could be avoided by this court determining the constitutional issue now on the basis of the very full argument heard over six days.

112. Finally, in deciding to embark upon a consideration of the constitutional issue, I have attached some slight weight to the fact that the respondents have objected that part of the *non-constitutional* case has not been properly pleaded. Whereas this pleading point has been dismissed for the reasons set out at paragraphs 99 to 103 above, this finding might be overturned on appeal. There may be some benefit, therefore, in addressing the constitutional issue now rather than decide the case on the non-constitutional grounds

alone, and run the risk that the matter might have to be remitted to the High Court for rehearing following an appeal, with the attendant cost and delay to the parties.

**ARTICLE 15.2.1° (DELEGATION OF LAW-MAKING)**

113. Article 15.2.1° of the Constitution provides as follows.

> 1° 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.

114. It is well established that this provision does not preclude the Oireachtas from delegating to a subordinate or delegate the task of making *secondary* legislation which is merely giving effect to principles and policies which are contained in the primary legislation itself. (*Cityview Press Ltd v. An Chomhairle Oiliúna* [1980] I.R. 381). The Supreme Court has recognised that a power of delegation is "indispensable for the functioning of the modern state". See *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 (at 245) ("***Maher***").

> "An enormous body of subordinate laws is, nonetheless, constantly passed by means of statutory instruments, regulations and orders. This type of delegated legislation is, by common accord, indispensable for the functioning of the modern state. The necessary regulation of many branches of social and economic activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules. They are not, in their nature such as to involve the concerns and take up the time of the legislature. Furthermore, there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances."

115. This passage has recently been cited with approval in *Bederev v. Ireland* [2016] IESC 34; [2016] 3 I.R. 1 ("***Bederev***"). Charleton J., at a later point of his judgment, expressed himself as follows.

> "Indeed, many of the cases emphasise that without delegation the very exercise of legislative authority by the Oireachtas could be undermined. Were the Oireachtas required to legislate for every aspect of a particular statutory scheme, it would quickly become

> enmired in details and in the task of precisely predicting future developments as opposed to legislating for existing trends which may change as to detail. Instead of continual re-legislating, primary legislation can set boundaries as to what can be provided for in subsidiary legislation. This allows subsidiary legislation to flexibly address future developments, so long as those developments are akin to the mischief outlawed in the parent act. In this way, no derogation from the constitutional imperative to exercise the democratic function is involved."

116. More recently again, the Supreme Court in *O'Sullivan v. Sea Fisheries Protection Authority* [2017] IESC 75; [2017] 3 I.R. 751 ("***O'Sullivan***") emphasised that the correct application of the "principles and policies" test does not necessitate a scouring of the parent legislation for detailed guidance for the subordinate rule maker. Rather, a number of factors must be considered, including the function of the parent legislation and the area in which the subordinate has freedom of action. See *O'Sullivan*, at paragraphs 40 and 41, as follows.

> "However, it is in my view an error to approach the issue on the basis that the parent legislation must be scoured to provide detailed guidance for the subordinate rule maker. As observed in *Bederev v Ireland, Attorney General* [2016] IESC 34, every delegate must make some choice. If the parent legislation dictated the outcome, then there would be no benefit gained by the delegation of the task to the subordinate: the parent legislation could, and therefore should, include the provision in the first place. Thus the entire concept of subordinate regulation depends upon and contemplates decisions being made between a range of options. Any decision involves consideration of what the decision-maker considers is the best solution in the circumstances. The question is the scope of the decision making left to the subordinate rule maker.
>
> The test can be approached negatively. Is the area of rule making delegated, so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas by Article 15.2.1? This involves a consideration of a number of factors including the function of the parent legislation and the area in which the subordinate has freedom of action. An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy

> of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily adjusted within the scope left to the subordinate, in the light of changing circumstances. To take a simple example, if a body is given authority to fix all the terms of a licence, that is a power which may on its face appear unlimited, and it may be necessary to consider if there are sufficient policies and principles in the parent legislation to narrow the scope of subordinate decision making, and guide the decision-maker. If however the delegation is merely to fix a licence fee within a minimum and maximum already identified, it may follow that the Oireachtas has already contemplated a range of possible outcomes and considered them compatible with the statutory objective, and was content to leave the decision as to what precise point within that scale was the most appropriate in the light of changing circumstances, to a subordinate body. It would not be necessary to look in addition for detailed principles and policies to guide that task."

117. The term "delegated legislation" is traditionally used to describe subordinate legislation, such as a sectoral employment order, made pursuant to primary legislation enacted by the Oireachtas. Strictly speaking, however, the term "delegated legislation" is not entirely accurate. As noted by O'Donnell J. in *McGowan*,

> "[…] if in truth any piece of regulation amounted to truly delegated legislation, it would offend Article 15, since it is plain from the very language thereof, and indeed the constitutional structure, that the function of legislation is one that cannot be delegated by the Oireachtas to any other body. Indeed the case law since that time can be understood as an attempt to seek to delineate the boundary between permissible subordinate regulation, and the abdication, whether by delegation or otherwise, of the law making authority conferred on the Oireachtas by the People, through the Constitution."

118. The term "delegated legislation" should be understood in this narrower sense.

**APPLICATION TO CIRCUMSTANCES OF THE PRESENT CASE**

119. It was accepted by both parties that the making of a sectoral employment order represents an instance of law-making subject to the "principles and policies" test. Indeed, it would have been difficult to argue otherwise given that the defining characteristic of a sectoral employment order is that *all* employers within the relevant economic sector are required, on pain of criminal sanction, to apply the prescribed terms and conditions to their

employees. This represents a significant encroachment on the employers' freedom to contract. It is, therefore, a significant exercise in law making. Unlike the statutory minimum wage prescribed under the National Minimum Wage Act 2000, the requirement to pay the prescribed rates of remuneration does not apply universally, but only to the employers in the economic sector concerned.

120. The core issue in respect of which the parties seek a ruling from this court is as follows. It is whether the parent legislation, i.e. the Industrial Relations (Amendment) Act 2015, contains sufficient principles and policies to guide the Minister, as delegate, in the making of the delegated legislation, i.e. the sectoral employment order.

121. In addressing this issue, it is useful to bear in mind the twofold purpose which the requirement to prescribe principles and policies is intended to serve (*per* Charleton J. in *Bederev* at paragraph 41).

> "[…] What is not within the terms of the delegation of legislative power cannot authorise secondary legislation. What the Oireachtas intends to delegate should be clear from the text of legislation. Those affected by secondary legislation have an entitlement to challenge whether it was made within jurisdiction. There are two principles: legislation must set boundaries and a defined subject matter for subsidiary law-making and those affected by secondary legislation have an entitlement to know from the text of legislation where those boundaries are and what that subject matter is. Otherwise, challenges by way of judicial review to the *vires* of subsidiary legislation become impossible. This is about what is in the contemplation of the enactment in enabling secondary law-making."

122. The statutory criteria guiding the making of the delegated legislation are set out under section 16 of the Industrial Relations (Amendment) Act 2015. These fall into two categories, as follows. The first are what might be described as "outcomes" which the Labour Court must be satisfied would result from a recommendation to make a sectoral employment order. The second are matters to which the Labour Court must "have regard" in making a recommendation.

123. The "outcomes" are the only direct constraint on the Labour Court, and, by implication, on the Minister's power to make delegated legislation. They are set out as follows at subsection 16(4). The Labour Court is precluded from making a recommendation that the Minister should make a sectoral employment order unless it is satisfied that to do so—

> (a) would promote harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the economic sector concerned, and
>
> (b) is reasonably necessary to—
>
> (i) promote and preserve high standards of training and qualification, and
>
> (ii) ensure fair and sustainable rates of remuneration,
>
> in the economic sector concerned.

124. Whereas these outcomes may well be laudable or desirable, the statutory language used is too imprecise to provide any meaningful guidance to the Labour Court. A decision to impose minimum terms and conditions of employment upon an entire economic sector necessitates making difficult policy choices. This is because the consequences of making a sectoral employment order are so far-reaching, and the interests of the principal stakeholders, namely, the employers, workers and consumers; are not necessarily aligned. The fixing of high rates of renumeration might well be welcomed by workers, but may limit competition, and thus adversely affect consumers.

125. Indeed, as the circumstances of this case illustrate, the interests of even individuals within the *same category* of stakeholder will not always coincide. The objecting party contends that the economic model of small to medium sized electrical contractors is very different from that of large scale contractors. It also appears from the papers that the position of electrical workers employed by state and semi-state employers, such as, for example, the Electricity Supply Board, is perceived as being different from those employed in the

private sector. The former class of workers are said to be implicitly excluded from the impugned order.

126. The policy choices extend beyond a consideration of the impact on the economic sector concerned, to a consideration of the impact on the wider economy of interfering in the market rates of remuneration. If rates of remuneration were to be fixed at too high a level relative to other economic sectors, then this might lead to an influx of workers from other sectors to the electrical contracting sector, thereby creating a shortage of labour in those other sectors.

127. The breadth of the policy choices informing a decision to make a sectoral employment order is tacitly acknowledged under the parent legislation, insofar as it identifies the following as matters to which the Labour Court must "have regard" in making a recommendation:

> (a) the potential impact on levels of employment and unemployment in the identified economic sector concerned;
>
> (b) the terms of any relevant national agreement relating to pay and conditions for the time being in existence;
>
> (c) the potential impact on competitiveness in the economic sector concerned;
>
> (d) the general level of remuneration in other economic sectors in which workers of the same class, type or group are employed;
>
> (e) that the sectoral employment order shall be binding on all workers and employers in the economic sector concerned.

128. However, other than enumerate these as relevant considerations, the parent legislation provides no guidance whatsoever as to how these ofttimes conflicting considerations are to be weighed or reconciled.

129. The practical effect of the open ended drafting of the parent legislation is that it has largely been left up to the Labour Court to make the policy choices itself. The objectives of promoting "harmonious relations" and "high standards of training and qualification",

and of ensuring "fair and sustainable rates of remuneration" are not defined, and are so amorphous as to confer too broad a discretion on the Labour Court. In the absence of a proper statement of principles and policies, the requirement identified in the case law that the parent legislation must set boundaries and a defined subject matter for subsidiary law-making, amenable to judicial review, is not met.

130. Both sides were agreed that the assessment of whether Chapter 3 of the Industrial Relations (Amendment) Act 2015 offends against Article 15.2.1° of the Constitution must be carried out by reference to the terms of the legislation itself, and not by reference to how the legislation might be administered in practice. This approach is undoubtedly correct. See *Bederev*, at paragraph 33, as follows.

> "[…] whether the Oireachtas has wrongly delegated power to a subsidiary law-maker is a matter of statutory interpretation: the task of a court is to analyse what is in the statute. It would be wrong to be lured away from that task by apparent certainty as to what an enactment means in delegating legislation by evidence as to how it is understood by those who administer it."

131. It may nevertheless be of some assistance in assessing the terms of the legislation to tease out the argument by reference to one of the policy issues which had been raised in the procedure before the Labour Court. I hasten to add that this is being done solely for the purpose of examining the breadth of the parent legislation, and without losing sight of the imperative that the parent legislation must be interpreted on its own terms.

132. The setting of sectoral-specific minimum rates of remuneration has, almost by definition, the potential to distort competition. This potential is acknowledged in the parent legislation in that one of the matters to which the Labour Court must have regard is the potential impact of a sectoral employment order would have on competitiveness in the economic sector concerned (subsection 16(2)(d)).

133. That this is not a hypothetical concern is confirmed by the facts of the present case. The written submissions made to the Labour Court had identified at least two potential

impacts on competitiveness. First, the objecting party had contended that the setting of minimum rates of remuneration for electricians would adversely affect competition in that, or so it was said, the electrical contracting sector is so diverse that it is impossible to fairly impose a set of terms and conditions across the industry which will allow all contractors to remain competitive. In particular, it was submitted that *domestic consumers* would suffer and could not be expected to absorb the same call-out rate as the biggest employers in the country.

134. Secondly, the two employers' organisations, who had made the joint application to the Labour Court, had proposed that labour costs should be taken out of competition. It was suggested that this would have certain benefits, including preventing contractors from outside the State, with a lower cost base, enjoying a competitive advantage over Irish electrical contractors. This, it was said, would ensure a "level playing field".

135. Insofar as might be gleaned from the Labour Court's report and recommendation—and as explained at Part II of this judgment the stated reasons are inadequate—it appears that the Labour Court had concluded that one of the outcomes of making a sectoral employment order would be to take "labour costs out of contention" and that this would promote competition within the sector based on the efficient use of capital, labour and project management techniques. The report offers no justification whatsoever for this conclusion.

136. Although not immediately apparent from the report and recommendation, the thrust of (i) the affidavit evidence filed on behalf of the Minister, and (ii) the detailed reference made by counsel to the submissions made by the employers' organisations, is to the effect that one of the objectives of making the impugned sectoral employment order was, indeed, to restrict the ability of contractors from EU Member States to compete for tenders by relying on lower labour costs.

137. The deponent on behalf of the Minister has suggested that one of the precise purposes of the parent legislation is to allow for the regulation of terms and conditions of employment in order to prevent "social dumping" pursuant to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services ("***Posted Workers Directive***"). See paragraph 20 of Tara Coogan's first affidavit, as follows.

> "The SEO system was also developed as a response to the risk of so-called 'social dumping' under EU freedom of movement rules. This involves the bringing of foreign workers into a jurisdiction such as Ireland but paying them at rates in their home countries which may be far below those which an employer would have to pay to an Irish-based worker doing precisely the same employment. The Court of Justice of the European Union confirmed in Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ('*Laval*') that collective bargaining agreements in Sweden could not be enforceable against a company which had brought posted workers from Latvia to Sweden unless they were universally and generally applicable to all other similar undertakings within the sector. In other words, sectoral employment rates can only be applied to posted workers from other EU states if those rates apply to everyone within the sector on the same general basis. Following the decision of the Supreme Court in *McGowan v Ireland,* (in which the Applicant was a notice party but did not make submissions), there was a concern that Irish law did not provide any mechanism which would, under the CJEU's ruling in *Laval,* allow for sectoral remuneration rates to be applied to foreign workers brought into this jurisdiction. This had the potential, in the second-named Respondent's view, to undermine minimum standards of remuneration, training and qualifications within particular sectors; and to generate industrial unrest if Irish-based workers and employers found themselves undercut by contractors bringing in temporary foreign workers for particular projects while paying those workers on the basis of remuneration rates in their countries of origin. I say that this was an important policy consideration in the policy decision to propose the 2015 Act."

138. With respect, there is nothing in the parent legislation which evinces that the Oireachtas has made such a policy choice.

139. The logic of the respondents' case is that the difficult—and potentially controversial—policy decision as to how to balance (i) the principles of competition and the freedom to provide services within the internal market, against (ii) the objective of ensuring

appropriate rates of renumeration for workers, has been left over to the Minister (and, indirectly, to the Labour Court).

140. If the Oireachtas were to take the view that the objective of ensuring better terms and conditions of employment for domestic and posted workers from other EU States is to be prioritised over any potential impact on competition and the freedom to provide services within the internal market, then this should be provided for under the parent legislation itself.

141. Instead, the parent legislation abdicates the making of this significant policy choice 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. In short, Chapter 3 involves a standard-less delegation of law making to the Minister, and one which would be impossible to challenge by way of judicial review.

142. It is to be reiterated that the issue for determination under this part of the judgment is not whether the Labour Court and the Minister were correct to pursue these objectives, nor whether the rationale for such objectives has been set out in the report and recommendation. Rather, the issue is one of *statutory interpretation*, namely whether the Oireachtas has wrongly delegated power to a subsidiary law-maker. The sole purpose in referring to these matters now is to highlight the extent of the policy choices left over to the Minister under the parent legislation.

***No guidance on determining "economic sector" or class of workers***

143. An essential element of the decision-making process leading to the making of a sectoral employment order is the determination of the precise parameters of the "economic

sector" which is to be subject to the order. The obligation to comply with the order only applies in respect of specified workers employed in that economic sector.

144. Again, the parent legislation fails 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 only definition provided under the parent legislation is to the effect that "economic sector" means a sector of the economy concerned with a specific economic activity requiring specific qualifications, skills or knowledge. The concept of "economic activity" is too open-ended to provide meaningful guidance to the Labour Court.

145. The vagueness of this definition can be illustrated by reference to the rival positions adopted by the parties to these proceedings as to how the relevant sector should be delimited. The approach of the Labour Court appears to have been to concentrate on the nature of the activity being carried out by the *employers* rather than by the workers. On this analysis, the sector was confined to those employers who provide electrical services in the context of construction work on a commercial contractual basis. Thus, workers employed by the state and semi-state employers were said to be implicitly excluded even though the type of work being carried out by those workers might be similar to that being carried out by other electricians.

146. In the course of submission, counsel on behalf of the respondents indicated that it would have been *impermissible* to refine the scope of the sector so as to exclude small-scale employers. This submission was made in response to a suggestion that, in the context of an earlier application for a sectoral employment order in 2017, the sector had been defined by the applicant trade union so as to exclude, for example, the provision of electrical services in respect of residential development consisting of less than three units. (See paragraph 79 above).

147. The breadth of the discretion conferred upon the Labour Court is further expanded in that the Labour Court is entitled to specify the class, type or group of workers and the economic sector in relation to which the recommendation shall apply.

148. (For the sake of completeness, it should be noted that subsection 16(2)(c) provides that the sectoral employment order shall be binding on *all* workers and employers in the economic sector concerned. This must be understood as meaning that it applies to all workers of the class, type or group specified).

**MCGOWAN V. LABOUR COURT**

149. The analysis thus far has been carried out without making any detailed reference to the judgment in *McGowan v. Labour Court* [2013] IESC 21; [2013] 3 I.R. 718. I turn now to consider the implications of the Supreme Court judgment. Not only does that judgment contain an authoritative statement of the "principles and policies" test, it also has an especial relevance to the present case in circumstances where it too was concerned with the imposition of mandatory terms and conditions of employment in respect of electricians. More generally, the Industrial Relations (Amendment) Act 2015 is the statutory successor to the provisions struck down by the Supreme Court, namely, Part III of the Industrial Relations Act 1946.

150. Counsel on behalf of the respondents, very properly, urges some caution in reading across the findings in *McGowan* to the new legislation. Counsel points out that the statutory successor to registered employment agreements, the subject-matter of the Supreme Court judgment, is now to be found under Chapter 2 of the Industrial Relations Act 2015. The concept of sectoral employment orders, introduced under Chapter 3, is a new one. Counsel further submits that the range of matters which can be regulated by a sectoral employment order is much narrower than had been the case in respect of a registered employment agreement. The former is confined to what counsel characterises as matters

of renumeration, including pension contributions and sick pay. By contrast, a registered employment agreement could regulate all and any matters touching upon the employment relationship. The following passage at paragraph 24 of *McGowan* is cited.

> "A [registered employment agreement] can make provision not merely for remuneration, as was the case in *Burke v. Minister for Labour* [1979] I.R. 354, but can make provision for any matter that may be regulated by a contract of employment. Thus, it can determine wages, pensions, pension contributions, hours of work, health insurance, grievance procedures, discipline procedures, staffing levels, production procedures, approved machinery or equipment, and anything else in the employment relationship. It is in the words of Henchy J. in *Burke v. Minister for Labour* at p. 358, a delegation of a 'most fundamental … and far-reaching kind'. It involves a fundamental part of the person's life (if an employee), and their business (if an employer)."

151. By way of illustration of the breadth of matters which might have been included in a registered employment agreement, counsel directed my attention to the terms of the registered employment agreement of 24 September 1990 (as amended). This agreement had been included as part of Connect Trade Union's submission to the Labour Court, and has been exhibited in these proceedings. The agreement regulated matters such as the tools to be provided and maintained by a worker, the number of annual leave days, and the application of "shop conditions".

152. Counsel also observed that, under the previous legislation, the terms and conditions of employment were, in effect, drawn up by the employers' organisation and the trade union, and that the Labour Court's function was very limited. This is contrasted with the procedures now provided for under Chapter 3 of the Industrial Relations (Amendment) Act 2015 where the Labour Court is required to carry out its own "examination" of the economic sector concerned.

153. These points are well made. It is correct to say that the terms and conditions that may be included in a sectoral employment order are not open-ended, but are confined to the prescription of (i) minimum rates of remuneration; (ii) the requirements for a pension

scheme (including a minimum daily rate of contribution to the scheme by an employee and an employer respectively); and (iii) the requirements for a sick pay scheme. A sectoral employment order must also prescribe a dispute resolution procedure. The scope of a sectoral employment order is thus narrower than a registered employment agreement.

154. Nevertheless, even bearing these crucial differences in mind, certain aspects of the judgment in *McGowan* have a strong resonance for the present case. First, notwithstanding that the precise legal effects of each instrument are not the same, the nature of the intrusion given rise to by a registered employment agreement and a sectoral employment order is of a similar scale of magnitude. Both forms of legal instrument can fairly be said to regulate a "broad and important area of human activity" to adapt the language in *McGowan*. In each instance, employers are obliged under law to meet certain minimum terms and conditions of employment which have been prescribed by way of delegated legislation. This represents a substantial interference with the employers' freedom to contract. Whereas this interference might well be justified in the common good, what is relevant for the purposes of the analysis under Article 15.2.1° of the Constitution is that the *breadth* of the delegated legislation is such that detailed principles and policies must be prescribed under the parent legislation.

155. As explained by the Supreme Court in *O'Sullivan* (in the passage cited at paragraph 116 above), the extent of the principles and policies required under the parent legislation is proportionate to the extent of the delegation. A very narrow area of delegation may require very little in terms of principles and policies in the parent legislation. By contrast, the regulation of remuneration in an economic sector entails broad policy choices, and accordingly more is required in terms of principles and policies in the parent legislation.

156. The second aspect of *McGowan* which resonates with the present case is the Supreme Court's examination of the underlying legislation. The structure of Chapter 3 of the

Industrial Relations (Amendment) Act 2015 is much more elaborate than that found under Part III of the Industrial Relations Act 1946. As discussed earlier, the 2015 Act expressly identifies relevant considerations to which the Labour Court is required to have regard, a feature which was noticeably absent from the earlier legislation. Notwithstanding this difference, the general approach taken by the Supreme Court in assessing whether sufficient guidance was to be found under the parent legislation is instructive. In particular, the Supreme Court held that whereas certain objectives of the legislation were laudable and desirable, they did not constitute a sufficient restriction, on an otherwise unlimited power of regulation, to bring the power within the constitutional limits. The same sentiment applies to the amended legislation, for the reasons outlined at paragraphs 124 *et seq.* above.

157. Finally, certain of the procedural safeguards now found in the Industrial Relations (Amendment) Act 2015 appear to be intended to address shortcomings in the previous legislation which had been identified by the Supreme Court. These are discussed in more detail under the next heading below.

**PROCEDURAL SAFEGUARDS**

158. It is submitted on behalf of the respondents that, in assessing whether Chapter 3 of the Industrial Relations (Amendment) Act 2015 offends against Article 15.2.1° of the Constitution, some weight must be given to the procedural safeguards provided for under section 17. First, the Minister must satisfy himself that the Labour Court has complied with the provisions of Chapter 3. Secondly, the Minister is required to lay a draft of his order confirming the Labour Court's recommendation before each House of the Oireachtas. The order shall not be made by the Minister unless a resolution approving of the draft has first been passed by each such House.

159. Counsel draws attention to paragraphs 24 and 30 of the judgment in *McGowan*, where the provisions of Part III of the Industrial Relations Act 1946 were contrasted unfavourably with the provisions of the Industrial Training Act 1967. (The latter enactment had been held to comply with Article 15.2.1° in *Cityview Press Ltd v. An Chomhairle Oiliúna* [1980] I.R. 381). O'Donnell J. observed that had the pattern of the Industrial Training Act 1967 been conformed to, then the relevant terms of a registered employment agreement would be set by the Labour Court, perhaps after consultation with other public bodies, and subject to Ministerial approval and Oireachtas review.

160. Counsel submits that similar safeguards are now to be found in the Industrial Relations (Amendment) Act 2015. These are described as "subsequent powers of oversight and supervision" in the written legal submissions. Counsel concedes that the form of Ministerial approval provided for is not as extensive as that under the Industrial Training Act 1967. The function of the Oireachtas is, however, more robust in that a resolution of each House of the Oireachtas is required. This is contrasted favourably with the more usual formula whereby an instrument laid before the Houses of the Oireachtas takes effect unless *annulled* by resolution within a stated period of time.

161. I address each of these two safeguards under separate headings below.

***(i). Minister's role***

162. The role of the Minister under the parent legislation is ambiguous. On the one hand, the Minister is the delegate upon whom the power of making the secondary legislation has formally been conferred by the Oireachtas. On the other hand, however, the Minister is constrained by the recommendation of the Labour Court. The Minister is required, having regard to the statutory report of the Labour Court, to satisfy himself that the Labour Court has complied with the provisions of Chapter 3. If he is so satisfied, then the Minister is required to confirm the terms of the recommendation by order. If,

conversely, the Minister is not satisfied that the Labour Court has complied with Chapter 3, he must refuse to make a sectoral employment order confirming the terms of the recommendation. The Minister cannot amend or revise the terms of the recommendation: he must reject it outright.

163. The Minister's role is too limited to represent a meaningful safeguard against a breach of Article 15.2.1°. Although the language of section 17 is somewhat obscure, what seems to have been intended is that the Minister would merely ensure (i) that the prescribed procedures have been followed by the Labour Court, and (ii) that the Labour Court has taken into account all relevant considerations and made findings on the matters identified in subsection 16(4). It does not seem 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 recommendation.

164. (As it happens, on the facts of the present case, even these limited safeguards should have resulted in a refusal to accept the recommendation, in that the report and recommendation did not *ex facie* comply with Chapter 3. See Part II of this judgment.)

165. The practical effect of Chapter 3 is that broad policy choices which should have been made by the Oireachtas have largely been left over to the Labour Court, and although the Minister is the formal delegate, his function is very limited.

166. More generally, even if the Minister had full discretion to determine the terms of a sectoral employment order, untrammelled by the Labour Court's recommendation, this would not rescue what would otherwise be a breach of Article 15.2.1°. It is not an answer to a breach to say that the power of making delegated legislation is being exercised by a member of the executive branch of government. Article 15.2.1° is intended to ensure there is no improper trespass on the role of the Oireachtas. See *Cityview Press Ltd*. [1980] I.R. 381 at 399 as follows.

> "Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution."

167. Provided that the "principles and policies" test (as elaborated upon in *O'Sullivan*) has been complied with, then a power to make secondary legislation can properly be delegated, and there is no requirement that the delegate or subordinate be a member of the executive branch of government. This is because the focus is on the separation of powers and the role of the Oireachtas in the tripartite system of government. An improper abdication of the Oireachtas' law-making function is not saved by the fact that the delegate is a member of a *different* branch of government.

***(ii). Draft order to be laid before each House of the Oireachtas***

168. The respondents' barristers produced a very useful table identifying cases in respect of Article 15.2.1° in which the delegated legislation at issue had been subject to some form of review by the Houses of the Oireachtas. The thrust of this case law is to the effect that whereas a requirement to lay delegated legislation before each of the Houses of the Oireachtas is a useful safeguard, it cannot save an enactment which is otherwise clearly in breach of Article 15.2.1°.

169. The starting point is the judgment in *Cityview Press Ltd*. [1980] I.R. 381 at 399.

> "Sometimes, as in this instance, the legislature, conscious of the danger of giving too much power in the regulation or order-making process, provides that any regulation or order which is made should be subject to annulment by either House of Parliament. *This retains a measure of control, if not in Parliament as such, at least in the two Houses*.* Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution. In discharging that responsibility, the Courts will have regard to where and by what authority the law in question purports to have been made. In the view of this Court, the test is whether that

> which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of legislative power."
>
> *Emphasis (italics) added.

170. The position has been put as follows by Keane J. (as he then was) in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 at 93.

> "It is quite usual to find that the exercise of the rule making power is subject to annulment by either House and I do not underestimate the value of such a provision. However, even in the hands of a vigilant deputy or senator, it is something of a blunt instrument, since it necessarily involves the annulment of the entire instrument, although parts only of it may be regarded as objectional. In any event, I do not think that it could be seriously suggested that a provision of this nature was sufficient, of itself, to save an enactment which was otherwise clearly in breach of Article 15.2."

171. Similar sentiments have been expressed in the more recent judgment of the Supreme Court in *Bederev* (at paragraph 41) as follows.

> "[…] Further, there is a fundamental difference between the Oireachtas launching the possibility of subsidiary legislative enactment as a boat which is never to return to the harbour of oversight at Leinster House and one which, as under s. 38(3) in the present case, requires a subsidiary order to be subject to parliamentary scrutiny. That difference may not necessarily be decisive in upholding a subsidiary enactment if the purpose and scope under which it was made constitutes an abrogation of responsibility, but it is a factor in the analysis of whether democratic control has been retained. Again, this is a question of degree. No such analysis is easy. Would that it were so simple. Indeed, the complexity of the decided cases means that even an analysis such as that of Feeney J. in *John Grace Fried Chicken Ltd. v. Catering J.L.C.* [2011] IEHC 277, [2011] 3 I.R. 211 may be no more than a guide, albeit a very useful one."

172. The form of parliamentary oversight provided for under the Industrial Relations (Amendment) Act 2015 is more robust than that usually provided for in the case of

delegated legislation. A sectoral employment order cannot be made by the Minister unless a resolution approving of the draft has first been passed by each House of the Oireachtas. This is to be contrasted with the legislative provisions at issue in, for example, *Cityview Press Ltd.* or *Laurentiu*, where the delegated legislation took effect unless *annulled* by resolution passed within a limited period of time.

173. It is apparent from the case law discussed above (and the other cases referred to in the respondents' table of cases) that the existence of parliamentary scrutiny is a relevant consideration in determining whether the parent legislation has given rise to a "democratic deficit". Nevertheless, the passing of separate resolutions in the individual Houses of the Oireachtas does not represent the exercise of a legislative function. The power of making laws for the State can only be exercised by the Oireachtas as defined under Article 15.1.2° as follows.

> 2° The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann.

174. In circumstances where I have concluded, for the reasons set out earlier, that there has been a breach of Article 15.2.1°, the existence of a requirement for a resolution cannot rescue the parent legislation.

**"SUBSTANTIALLY REPRESENTATIVE" REQUIREMENT**

175. One of the fundamental criticisms made by the objecting party—both in the procedure before the Labour Court and again in these judicial review proceedings—is in respect of the "substantially representative" requirement. It will be recalled that an application to the Labour Court requesting an examination may only properly be made by a trade union or employers' organisation or employers' trade union which is "substantially representative" of workers in the relevant economic sector.

176. The phrase "substantially representative" had also featured under Part III of the Industrial Relations Act 1946. The Labour Court had to be satisfied that the parties to an employment agreement were "substantially representative" of workers of a particular class, type or group and their employers. The Supreme Court in *McGowan* held that the legislation provided no guidance or instruction to the Labour Court as to how "representativity" was to be gauged.

177. The Industrial Relations (Amendment) Act 2015 elaborates upon the concept of "substantially representative" to the extent that it emphasises that the focus is on the number of *workers* represented, i.e. rather than employers. Thus, in order to be allowed to make an application for an examination, an employers' organisation must be "substantially representative" of workers in the economic sector concerned. The Labour Court is to consider the number of *workers* employed by employers represented by the trade union or organisation of employers concerned (section 15(1)(a)). It seems to follow that an employers' organisation which represented a large number of employers who only employed a small number of workers might not qualify.

178. Notwithstanding this elaboration, counsel for the objecting party submits that the concept of "substantially representative" is still too vague. Counsel is also sharply critical of the Labour Court for its refusal to provide clarification of the definition in response to queries raised in correspondence.

***Findings of the court***

179. There are two strands to the objecting party's argument under this heading. First, counsel submits that the assessment of representativity must involve consideration of more than just the number of workers who are members of the trade union or are employed by members of the employers' organisation concerned. It is said that representativity cannot simply be a "numbers game", but requires consideration of the level of support among

workers for the proposed sectoral employment order. This might be demonstrated, for example, by way of a ballot of the members. Secondly, the structure of section 15 necessitates that the Labour Court reach a conclusion on whether an applicant fulfils the "substantially representative" requirement *in advance* of consultation with any of the interested parties. Counsel submits that, in accordance with subsection 15(1), the assessment must be made by reference to the documentation submitted by the applicant alone. This is said to be an unfair procedure.

180. With respect, neither of these two strands of argument is well founded. The first argument is misconceived in that it overstates the legal significance of the "substantially representative" requirement. In truth, it entails no more than a threshold which must be met in order to make an application to the Labour Court. Once this threshold is met, the applicant enjoys no special status in the subsequent examination to be undertaken by the Labour Court. The applicant is but one of a number of interested parties who are all entitled to be heard in the context of the Labour Court's examination of the relevant economic sector. This is to be contrasted with the status which a "substantially representative" trade union or employers' organisation had enjoyed under Part III of the Industrial Relations Act 1946. Under that legislation, such bodies were, in effect, the authors of the delegated legislation.

181. Given the lesser significance of the concept under the Industrial Relations (Amendment) Act 2015, the fact that the concept is concerned solely with the numbers of workers represented is not unconstitutional. It is a legitimate legislative choice to say that an entitlement to make an application should be restricted to organisations which represent, directly or indirectly, a substantial number of workers in the economic sector concerned. Thereafter, provided that all other interested parties are afforded a fair hearing, there can be no complaint as to the structure of the legislation.

182. This analysis is not affected by the fact that, in the particular circumstances of this case, the Labour Court's report and recommendation does not demonstrate that the submissions of all interested parties were properly considered. This is a finding to the effect that the legislation was not properly observed in this instance, rather than a criticism of the legislation itself.

183. As to the second argument, there is a well-established presumption that procedures prescribed under legislation will be conducted in accordance with the principles of constitutional justice. (*East Donegal Co-operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 at 341). Whereas section 15 is somewhat oddly structured, it is nevertheless capable of being interpreted in a manner which allows interested parties to be heard on the threshold issue of whether the applicants meet the "substantially representative" requirement.

184. The judgment of the Supreme Court in *Callaghan v. An Bord Pleanála* [2018] IESC 39; [2018] 2 I.L.R.M. 373 is instructive in this regard. The case concerned the statutory procedures governing consent applications for "strategic infrastructure development". Provision was made for a two-stage procedure, consisting of a pre-application consultation process between the developer and the consent authority, An Bord Pleanála, followed by the formal application process.

185. It had been argued in *Callaghan* that certain issues would be determined conclusively at the first stage, in the absence of any public participation. The Supreme Court rejected this argument, and reiterated that—unless the relevant legislation contains clear provision to the contrary—the proper interpretation of legislation involving a two stage process must be that any matters determined at an earlier or preliminary stage where an interested party is not entitled to be heard must remain open for full re-consideration at the stage

when a final decision, potentially affecting the rights or obligations of any individual, is to be made.

186. This principle is applicable to the interpretation of sections 14 to 16 of the Industrial Relations (Amendment) Act 2015. It is evident from the detailed procedure prescribed that the legislative intent is that interested parties have a right to be heard prior to the making of a recommendation to the Minister. As part of this right, an interested party is entitled to contest the question of whether the applicant who requested the Labour Court to carry out an examination of the economic sector had satisfied the threshold requirement of being "substantially representative".

187. The fact that the Labour Court will, as a matter of practical necessity, have addressed its mind to this issue in advance of deciding to commence the consultation process is not dispositive. (The Labour Court can only commence public consultation where it has formed an initial view that the threshold has been met). It is always open to the Labour Court thereafter, having heard submissions from interested parties, to rule that the application is invalid and to terminate the process.

**ENFORCEMENT OF BREACHES**

188. Any contravention by an employer of the terms and conditions of a sectoral employment order can be the subject of a complaint to an adjudication officer, and, on appeal, to the Labour Court. Thereafter, a failure on the part of the employer to comply with a determination on a complaint can be enforced by way of an application to the District Court. It is a criminal offence for an employer to fail to comply with an order of the District Court directing an employer to pay compensation to an employee. In principle, therefore, an employer who employs an electrician at a rate of pay less than that prescribed, or who fails to make the prescribed contribution to a pension scheme, may ultimately find themselves subject to criminal prosecution.

189. Counsel for the objecting party made reference to the judgment of this court in *Zalewski v. Workplace Relations Commission* [2020] IEHC 178. It was submitted that the role of the District Court in enforcing a determination in respect of a sectoral employment order was more limited than in the case of the determination in issue in *Zalewski* and that this might represent a deficiency in the legislation.

190. In circumstances where there is no plea in the amended statement of grounds to the effect that the enforcement provisions involve an unauthorised administration of justice in breach of Article 34 of the Constitution, it is neither necessary nor appropriate to consider this submission further.

**EXEMPTION PROCEDURE UNDER SECTION 21**

191. Counsel on behalf of the respondents placed emphasis on the availability of a procedure whereby an employer can apply for a *temporary* exemption from the requirements of a sectoral employment order in the case of financial distress. More specifically, section 21 of the Industrial Relations (Amendment) Act 2015 prescribes an elaborate procedure whereby a temporary exemption, for a period between three and twenty-four months, may be allowed. This is contingent on either (i) the agreement of a majority of employees or their representative, or (ii) there being a substantial risk that, in the absence of an exemption, a significant number of workers would have to be laid off or made redundant, or, alternatively, the sustainability of the employer's business would be significantly adversely affected.

192. In reply, counsel for the objecting party submits that the practical benefit of an exemption is negated by the reputational damage which would necessarily follow from having to plead "severe financial difficulties" or a risk of unsustainability. Attention is also drawn to the fact that the Labour Court is required to establish and maintain a register of all

exemptions, and to publish that register on the internet. Counsel characterises this as a public register of failing businesses.

193. In truth, the existence of this exemption would be of more relevance in the context of a constitutional challenge predicated on property rights or on the right to earn a livelihood. In such proceedings, an exemption for what might be described as "hard cases" is something which would have to be weighed in the balance in assessing the *proportionality* of the legislation. The exemption is, however, of little bearing in the context of an alleged breach of Article 15.2.1°. The gravamen of the objecting party's case is that there has been an impermissible delegation of legislative power by the Oireachtas to the Minister. It is not an answer to this to say that the employers represented by the objecting party might have been able to avoid having to comply with the impugned secondary legislation by pleading severe financial difficulties. The parent legislation is either constitutional or it is not. If, as has transpired, an employers' organisation has been able to persuade the court that the legislation is unconstitutional by reference to Article 15.2.1°, it is entitled to a declaration to that effect. The objecting party has standing to pursue a constitutional challenge by reference to Article 15.2.1°, and its employer-members cannot be required to submit, in principle, to the invalid sectoral employment order merely because there is a possibility that they might secure a short term exemption from same under the very legislation which the objecting party says is invalid.

# PART IV

## SUMMARY OF CONCLUSIONS

194. These proceedings seek to challenge the validity of the Sectoral Employment Order (Electrical Contracting Sector) 2019. For the reasons set out at Part II of this judgment, this court has concluded that the Minister for Business Enterprise and Innovation acted *ultra vires* in purporting to make the impugned order. It is a condition precedent to the Minister's jurisdiction to make a sectoral employment order that he be satisfied that the Labour Court had complied with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015. The Minister erred in law in concluding, on the basis of the report and recommendation submitted to him, that the Labour Court had complied with these provisions. Neither the procedures leading up to, nor the content of, the recommended sectoral employment order complied with Chapter 3.

195. The statutory report submitted to the Minister on 23 April 2019 is deficient in two significant respects. First, the report fails to record even the *conclusions* of the Labour Court on crucial matters, still less does the report state a rationale for those conclusions. Secondly, the report fails to set out a fair and accurate summary of the submissions made by those interested parties who opposed the making of a sectoral employment order, and does not engage with the issues raised in those submissions. The applicant for judicial review had advanced detailed submissions on *inter alia* the question of whether the trade union and employers' organisations 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. These are all matters to which the Labour Court is required under statute to have regard. Yet, these submissions are engaged with in the statutory report not at all.

196. The report and recommendation do not adequately address the definition of the "economic sector" concerned, and do not specify the class, type or group of workers to which the recommendation shall apply (as required by subsection 16(3)(a)) insofar as the position of workers employed by state and semi-state organisations is not expressly dealt with. The terms of the recommended sectoral employment order were also invalid insofar as they purported to fix the rate of pension contributions payable by reference to the actions of a third party. This breached the principle that a delegate cannot further delegate their function, i.e. *delegatus non potest delegare*.

197. On receipt of the report, the Minister should have *refused* to make a sectoral employment order confirming the terms of the recommendation. The Minister acted without jurisdiction in purporting to make the order.

198. Given that the order falls to be set aside as having been made *ultra vires* the parent legislation, it is not, strictly speaking, necessary to consider the challenge made to the constitutional validity of the parent legislation by reference to Article 15.2.1° of the Constitution. However, I propose to determine the constitutional challenge in the following exceptional circumstances: (i) both parties are agreed that the constitutional issue should be resolved in these proceedings; (ii) the constitutional issue has been fully argued over the course of a six-day hearing before this court; and (iii) the exercise of judicial self-restraint would merely defer—rather than avoid—the necessity of a court having to rule on the validity of the legislation.

199. The constitutional challenge is addressed in detail at Part III of this judgment. In brief, the parent legislation 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. This is because

the consequences of making a sectoral employment order are so far-reaching, and the interests of the principal stakeholders, namely, the employers, workers and consumers; are not necessarily aligned. The fixing of high rates of renumeration might well be welcomed by workers, but may limit competition, and thus adversely affect consumers.

200. The making of a sectoral employment order 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.

201. The parent legislation 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. In short, Chapter 3 involves a standard-less delegation of law making to the Minister, and one which would be almost impossible to challenge by way of judicial review. The parent legislation is, therefore, invalid by reference to Article 15.2.1° of the Constitution.

**PROPOSED FORM OF ORDER**

202. It is proposed to make a declaration that the provision made for sectoral employment orders under Chapter 3 of the Industrial Relations (Amendment) Act 2015 is invalid having regard to the provisions of Article 15.2.1° of the Constitution. The effect of this declaration is that the entire of Chapter 3 is to be struck down.

203. It follows that the Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019) is also invalid and must fall with the parent legislation. It is proposed to make an order of *certiorari* setting aside the impugned order.

204. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

205. The parties are requested to correspond with each other on the question of the precise form of order, and on the question of legal costs. In default of agreement between the parties on these issues, short written submissions should be filed in the Central Office within twenty-one days of today's date. A copy of the submissions should also be emailed to the Registrar.

*Appearances*

Helen Callanan, SC and David O'Brien for the applicant instructed by H.G. Carpendale & Co.
Oisín Quinn, SC and Eoin Carolan for the respondents instructed by the Chief State Solicitor

Approved