MAPLES GROUP

UPDATE

SEOs Declared Invalid – Key Issues for Employers in Ireland

The recent decision of the Irish High Court in *National Electrical Contractors of Ireland v the Labour Court, the Minister for Business Enterprise and Innovation Ireland and the Attorney General (2019 No. 280 JR)* will have a significant impact on employers and employees currently bound by Sectoral Employment Orders (SEO) in the electrical contracting, mechanical engineering, building and construction sectors.

The High Court ruled last week that the SEO applying to electrical contractors and their employees is invalid. In summary, this was because:

- The Labour Court's decision making process breached statutory requirements because it failed to adequately report on the reasons for its recommendation to make an SEO;
- Third parties unconnected to the SEO could influence pension contribution rates which would then be binding on employers; and
- The primary legislation under which the SEO was made (Chapter 3 of the Industrial Relations (Amendment) Act 2015) was unconstitutional because it devolved law making power to a Minister without adequate safeguards.

This means all SEOs are invalid where the primary legislation on which they are based has been declared unconstitutional.

This creates uncertainty for employers and employees in the sectors impacted by SEOs. Some employers may seek to walk away from the terms of the SEOs but employees and trade unions will very likely seek to protect their existing SEO pay conditions by asserting contractual entitlements.

This may not be the end of the road for the SEO and for Chapter 3 of the Industrial Relations (Amendment) Act 2015) as there may be an appeal to the Court of Appeal or possibly directly to the Supreme Court. This means that this matter may not be resolved for some time.

Background

This case concerned a challenge in the High Court to the Sectoral Employment Order (Electronic Contracting Sector) 2019 (S.I. No.251 of 2019) by a relatively small employer representative body, the National Electrical Contractors of Ireland ("NECI"). The SEO had already been the subject of a long running challenge by NECI before it became law in 2019.

What is an SEO?

An SEO is a piece of secondary legislation. In effect, it is a collective agreement governing pay rates, pension and sick pay entitlements in the defined economic sector to which it relates.

An SEO only applies to employers and employees in defined economic sectors. Three SEOs are currently in force in Ireland covering about 90,000 workers in the electrical contracting, mechanical engineering and construction sectors.

An SEO is legally binding. For example, any contravention by an employer of an SEO can result in a statutory claim by employees to the

Workplace Relations Commission ("WRC"). Failure to comply with a WRC determination can result in enforcement proceedings and criminal penalties for the employer.

SEOs are made under primary legislation (the Industrial Relations (Amendment) Act 2015 (the "2015 Act")). The 2015 Act was introduced to repair the defects identified in an older piece of legislation (Part III of the industrial Relations Act 1946) which governed the old system of collective agreements, registered employment agreements. That system was declared unconstitutional in the Supreme Court decision in McGowan v. Labour Court [2013] IESC 21.

Why was the SEO Declared Invalid?

The Court ruled that the SEO was invalid for three reasons:

- The Labour Court had not discharged its statutory duties to report to the Minister for Business, Enterprise and Innovation regarding the making of an SEO;
- The SEO envisaged that a third party (namely the trustees of a sectoral pension scheme) could make changes to pension contribution rates which could in turn affect binding rates of pay which was not permissible; and
- Chapter 3 of the 2015 Act is unconstitutional because it granted law making powers to the Minister (rather than to the Oireachtas or Parliament) without the proper safeguards and as such breaches Article 15.2.1 of the Irish Constitution.

The High Court in examining this challenge by NECI acknowledged that the making of an SEO is a "substantial interference" with the employers' freedom to contract. It also acknowledged however that such an "interference" can be justified but "the breadth of the delegated legislation" cannot be unfettered and "detailed principles and policies must be prescribed" to guide the Labour Court and the Minister in the use of their powers to make SEOs which ultimately bind thousands of employees and employers.

What was the Issue with the Labour Court?

Under the 2015 Act, the Labour Court is the body charged with adjudicating on any application by a trade union or an employer body or a combination of both in relation to making an SEO for a particular sector.

The Labour Court has a statutory obligation to prepare a comprehensive report to accompany its recommendation to the Minister on the making of the SEO. The High Court ruled that the Labour Court report to the Minister was deficient and as such the Minister could not be satisfied that the Labour Court had adequately considered the matter. As a result, the Minister could not accept the Labour Court recommendation to make an SEO on foot of a deficient report.

The report did not provide a fair and accurate summary of the submissions made by the interested parties. It omitted an adequate statement of the rationale for not accepting those submissions. The High Court noted that NECI had advanced detailed submissions on the question of whether the Labour Court had 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, none of which was adequately addressed by the Labour Court in its report to the Minister.

Interestingly, the High Court confirmed that the Labour Court has discretion to define the economic sector itself based on the evidence it hears. It is "not confined to rubber-stamping the application made to it". In this case, NECI had argued that the Labour Court did not have the power to broaden or reduce the scope or reach of

the "economic sector" from that set out in the original application but this was rejected by the High Court. There were material discrepancies between the economic sector set out in the application which was first made to the Labour Court in this case and the final definition in the SEO. An express exclusion of state and semi-state employees was omitted and the SEO as finally approved included "alteration" works in respect of electrical and electronic equipment.

The SEO Must be a "Stand Alone" Contract

The SEO contained terms that permitted the rates of pension contributions under the SEO to be influenced by decisions made by the trustees of the Construction Workers Pension Scheme.

The High Court ruled that the "terms of the SEO should be precise and self-contained". It found that it would undermine the legal certainty were it is necessary for an employer to have to look outside the terms of the SEO to find out what his/her legal obligations are. The SEO was invalid if it fixed the rate of pension contributions by reference to the actions of a third party.

The Legislation Governing SEOs is Invalid

The High Court found that the delegation by the Oireachtas (Parliament) of the power to make SEOs to the Minister was inconsistent with Article 15.2.1 of the Constitution which reserves law making power to the Oireachtas except where significant safeguards are in place.

The High Court applying the "principles and policies" test ruled that the language of Chapter 3 of the 2015 Act was too imprecise and broad to guide the Labour Court in assessing an application. The judge noted that the direction to impose "fair and sustainable remuneration" was "hopelessly vague and too subjective". The High Court was also critical of the fact that the legislation provided no guidance on determining the "economic sector" of a class of workers.

What Next?

Although this decision may be appealed, the net effect of this decision is that Chapter 3 of the 2015 Act is no longer a valid basis for making SEOs. Therefore, any SEOs that are currently being negotiated fall away. Existing SEOs also fall away in so far as they are secondary legislation. Attempts by trade unions to bring employers within the scope of the SEOs must also be halted.

However, employees may have contractual entitlements to the pay terms set out in the SEOs in so far as those terms are incorporated into their contracts of employment, either expressly or through custom and practice or acquiescence.

SEOs only govern pay rates and remuneration. They do not govern the wider range of provisions which together make up the contract of employment including working hours, place of work, notice, termination and all other conditions of employment. That said, it now ushers in a period of uncertainty for employers and workers as the sectoral pay mechanism disintegrates.

Further Information

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