APPROVED

[2020] IEHC 342

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 31 July 2020

INTRODUCTION

1. This judgment addresses the form of orders to be made in consequence of this court's finding that a statutory instrument, which purported to regulate the remuneration of electricians working in the construction industry, had not been validly made. The statutory instrument had been promulgated by the Minister of State at the Department of Business, Enterprise and Innovation, Mr Pat Breen, T.D., on 4 June 2019. It is entitled the Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019).

2. The principal judgment, *Náisiúnta Leictreach Contraitheoir Eireann v. The Labour Court* [2020] IEHC 303, was delivered on 23 June 2020 ("***the principal judgment***"). The parties were then allowed a number of weeks within which to file written

submissions in respect of the form of orders. The Applicant filed its initial submissions on 15 July 2020. The State respondents filed their submissions on 23 July 2020. Thereafter, the Applicant filed short replying submissions on 27 July 2020. Both parties indicated that they did not require an oral hearing, and that the court should rule upon the form of orders on "the papers", i.e. on the basis of the submissions filed.

3. The written submissions filed on behalf of the parties present three issues in respect of which a ruling is required from the court, as follows. The first issue to be considered is the nature and extent of the substantive orders to be made in consequence of the principal judgment. The second issue is whether a stay should be imposed on the High Court orders pending an intended appeal to the Supreme Court. The third and final issue is the appropriate costs order to be made.

4. Each of these issues is addressed, in turn, under separate headings below. Before turning to that task, however, it may be of assistance to identify first the precise basis upon which the case was decided in the principal judgment. This is relevant, in particular, to the question of a stay and to the appropriate costs order to be made.

FINDINGS MADE IN THE PRINCIPAL JUDGMENT

5. The principal judgment held that the statutory instrument regulating the remuneration of electricians working in the construction industry, i.e. the Sectoral Employment Order (Electrical Contracting Sector) 2019, had not been validly made. As appears from the principal judgment, this conclusion entailed two distinct findings. The first, narrower, finding had been that the Minister of State, to whom the powers had been delegated, did not have jurisdiction to promulgate the secondary legislation in circumstances where the Labour Court had not complied with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015. This finding was fact-specific, and peculiar to the

particular circumstances leading up to the making of the sectoral employment order in June 2019. There was nothing in this finding which would preclude the making of a *subsequent* sectoral employment order. The principal judgment had simply identified a number of procedural errors in the process leading up to the making of this specific sectoral employment order. It also identified errors in the content of the order, e.g. in terms of the fixing of the rate of pension contribution, and the definition of the "economic sector" concerned.

6. The second finding was of much broader effect. The court found that the relevant chapter of the parent legislation, which purported to authorise the making of sectoral employment orders, is invalid having regard to the provisions of Article 15.2.1° of the Constitution. The implications of this finding go far beyond the individual sectoral employment order made in June 2019. Were this finding to be upheld on appeal, it would cast doubt on the validity of *any* sectoral employment order made pursuant to the provisions of Chapter 3 of the Industrial Relations (Amendment) Act 2015. It would also preclude the making of further sectoral employment orders by the Minister for Business Enterprise and Innovation or the Minister of State.

7. Crucially, however, even this second, broader, finding would <u>not</u> preclude the putting in place of primary legislation imposing minimum rates of pay and remuneration in any particular economic sector. Nor would it preclude the regulation of such matters by way of secondary legislation, provided always that the requisite principles and policies were stated in primary legislation. The principal judgment was concerned solely with the identification of which branch of government, i.e. legislative or executive, is entitled to regulate the terms and conditions of employment. This court held that the extensive regulation of the terms and conditions of employment envisaged by Chapter 3 of the Industrial Relations (Amendment) Act 2015 required more by way of the statement of

principles and policies than had been provided for under the primary legislation. Put shortly, the principal judgment found that the impugned legislation trespassed upon the exclusive law-making power of the Oireachtas, by leaving significant policy choices over to the delegate, i.e. the Minister of State.

8. It should be emphasised that there is nothing whatsoever in the principal judgment which suggests that the imposition of minimum rates of pay and remuneration in any particular economic sector is *per se* unconstitutional. Nor is there anything in the principal judgment which suggests that the rates of remuneration set out in the sectoral employment order were overly generous or unreasonable. This court was concerned with an entirely different issue, namely the separation of powers under the Constitution, and, in particular, the proper division of function as between the legislative branch and the executive branch of government.

9. The limited effect of the findings in the principal judgment are especially relevant when it comes to considering the question of whether a stay should be placed upon the orders pending the intended appeal to the Supreme Court. I will return to discuss this issue at paragraph 29 below.

10. There is a further aspect of the principal judgment which is relevant to the issues now to be determined. As explained in detail at paragraphs 104 to 112 of that judgment, the first, narrow, finding 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, would, in nearly any other case, have been sufficient to dispose of the proceedings in their entirety. Unusually, however, both parties had been 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. The attitude of the parties in this regard is relevant both to the form of the order and to the question of costs.

FORM OF ORDER (ABSENT APPEAL)

11. It is proposed to address first the form of order which follows from the findings in the principal judgment, before going on to address, under the next heading, whether this order should be stayed pending the intended appeal to the Supreme Court.

12. The State respondents have submitted that a distinction should be drawn, in perfecting the final orders, between the narrow finding that the making of the sectoral employment order in June 2019 was *ultra vires* the primary legislation, and the broader finding that the primary legislation is itself invalid. Specifically, it is submitted that the orders referable to the *broader* finding should be "suspended" or "stayed". No stay has been sought in respect of the narrow finding: this is in recognition of the interests of the Applicant, and of the fact that it—unlike persons affected by other sectoral employment orders—had initiated legal action. See paragraph 36 of the State respondents' written legal submissions.

13. (It should be noted that, strictly speaking, the type of stay at issue here is distinct from the type of stay which is imposed pending an appeal to an appellate court. Whereas the practical effect of the two types of stay may be similar, the objective of same is very different).

14. The State respondents have cited a number of recent judgements which emphasise that a court may, in exceptional circumstances, defer making a declaration of constitutional invalidity. These include, in particular, the judgments in *N.H.V v. Minister for Justice and Equality* [2017] IESC 35, [2018] 1 I.R. 246; and [2017] IESC 82.

15. The Court of Appeal (*per* Hogan J.) described the effect of the former judgment as follows in *A.B. v The Clinical Director of St. Loman's Hospital* [2018] IECA 123, [2018] 3 I.R. 710 (at paragraph 112).

> "The lesson of *N.H.V. v. Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246 is that the judiciary should not have to watch on helplessly as a finding of unconstitutionality leads on with remorseless logic to invalidate and unravel a large variety of administrative decisions, often in a chaotic and disruptive fashion and with possibly unforeseen consequences for third parties. If that were indeed the law, then there would then be a grave danger that, in the words of Geoghegan J. in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88, at p. 203 'judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences'."

16. In its subsequent judgment in *P.C. v. Minister for Social Protection* [2018] IESC 57, the Supreme Court elaborated upon the principles in *N.H.V v. Minister for Justice and Equality*. MacMenamin J. summarised the position as follows (at paragraph 28).

> "In summary then, the courts have adopted a relatively flexible approach to declarations when questions of complexity of the social order arise. The power of deferral or suspension of a declaration of invalidity should be 'exceptional', not the rule. The approaches should not be permitted to evolve into being a rule of universal exceptionality. The courts, the legislature and the Executive, must each recognise that their powers and functions are separate, but operate differently under the Constitution. Declarations of these categories are to be seen as integral to the maintenance of overarching principles of legal and social order. In *A.C. v Cork University Hospital and Ors.* [2018] IECA 217, Hogan J., in the Court of Appeal, suspended a declaration concerning the constitutional validity of powers exercised by the HSE under mental health legislation, where the consequence of an immediate declaration might well be detrimental both to the rights and interests of the persons concerned and the social order generally."

17. O'Donnell J. put the matter as follows (at paragraph 21).

> "[…] The obligation to render invalid any offending provision of legislation, which is determined to be repugnant to or inconsistent with the Constitution is, a function of the highest importance. As emphasised by Clarke C.J. in the ruling in *N.H.V.*, the normal remedy when unconstitutionality is identified would be the consequential declaration of invalidity of the provision with immediate effect, and that is the position from which the court should be slow to depart, and

> against which any other remedy should be measured and justified. But I see no justification for an *a priori* rule that this is the only remedy available. In this regard, I agree with the observations of MacMenamin J. The precise circumstances in which it is appropriate to make any other order, and in particular to suspend a declaration of invalidity, is however, a matter to be considered carefully, cautiously, and on a case by case basis, and will be exceptional. I would, however, reject the argument that it is in principle impermissible for a court to make any other order other than one of an immediate declaration of invalidity."

18. For the reasons which follow, I have concluded that this is an appropriate case in which to exercise the exceptional power to suspend the effect of a declaration of unconstitutionality for a short period of time (six months).

19. First, the making of a declaration of unconstitutionality with immediate effect is not necessary to ensure an effective remedy for the Applicant. The specific sectoral employment order impugned in these proceedings can be set aside on the narrow basis that the order was not made in compliance with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015. It is not necessary to go further, at this stage, in order to vindicate the rights of the Applicant. The sectoral employment order in respect of which the Applicant makes complaint will have been struck down with immediate effect. The State respondents have not sought a stay on this aspect of the principal judgment.

20. The second reason is closely related to the first. As appears from the principal judgment, it would have been possible to resolve these proceedings on a narrow basis, without any necessity for embarking upon a consideration of the challenge to the constitutional validity of Chapter 3 of the Industrial Relations (Amendment) Act 2015. This court only proceeded to do so in circumstances, *inter alia*, where both parties were anxious to obtain a ruling on the constitutional issue within the existing proceedings. (See paragraphs 104 to 112 of the principal judgment).

21. It might be thought to follow as a corollary of the general principle of judicial self-restraint that, where a court has embarked upon consideration of a constitutional challenge in circumstances where it may not strictly speaking have been necessary to do so, consideration should be given thereafter to whether any declaration of unconstitutionality should be suspended for a short period. Part of the rationale underlying the principle of judicial self-restraint is to avoid, where possible, the disruption which a finding of constitutional invalidity may have. If a court elects to determine a constitutional issue which might have been avoided entirely, then a compromise might be to lessen the disruption by a short suspension of the declaration.

22. Some indirect support for this approach might be found, by analogy, in the following passage from the judgment of O'Donnell J. in *P.C. v. Minister for Social Protection* [2018] IESC 57 (at paragraph 21).

> "[…] I recognise that the force of the argument that the suspension of a declaration of invalidity has the effect of permitting a situation of unconstitutionality, identified and determined by the only body empowered to do so, to continue and have effect. But the fact that litigation determined *inter partes* has effect *erga omnes* may mean that the court should take all such matters into account. The system established by the Constitution, as judicially interpreted, is a balanced one, which recognises other values as well as the identification of legislation in some respect repugnant to, or inconsistent with, the Constitution. Thus for example, a provision may be in theory unconstitutional, but if not challenged in a properly constituted proceedings by a party entitled to do so, and before a court vested with the jurisdiction in that regard, a court, although established under the Constitution and bound to uphold it, is not empowered to do anything about it no matter how patent the unconstitutionality. The rules of *locus standi*, and the requirement to reach constitutional issues last, and to a lesser extent, the double construction rule, all necessarily involve the judgment that the striking down of an unconstitutional provision must be balanced against, and sometimes outweighed by, other countervailing factors."

23. (The remainder of this passage has been set out earlier at paragraph 17 above).

24. It might be said that a litigant who, on a strict application of the principle of judicial self-restraint, would not have been entitled to any declaration of unconstitutionality, cannot reasonably complain if that declaration is suspended for a short period.

25. Thirdly, even the broader finding in the principal judgment, i.e. the finding that the primary legislation is invalid, is limited in its effect. As discussed earlier, there is nothing whatsoever in the principal judgment which suggests that the imposition of minimum rates of pay and remuneration in any particular economic sector is *per se* unconstitutional. Rather, the judgment is concerned with an entirely different issue, namely the separation of powers under the Constitution, and, in particular, the proper division of function as between the legislative branch and the executive branch of government.

26. It would be fully consistent with this finding for the Oireachtas to put in place a different legislative regime providing for the regulation of terms and conditions of employment in a specific economic sector. To borrow from the language of the Court of Appeal (*per* Hogan J.) in *Agha (A Minor) v. Minister for Social Protection* [2018] IECA 155, [2018] 2 I.L.R.M. 351, the Oireachtas should be allowed a reasonable "breathing space" to introduce amending legislation if it so wishes. It would be disproportionate to bring about a situation whereby the validity of *all* sectoral employment orders would be put in doubt in circumstances where, even if the principal judgment were to be upheld on appeal, the Oireachtas would be entitled to introduce amending legislation which achieves a similar regulation of the terms and conditions of employment. Put otherwise, there may be a stronger case for suspension where the finding of unconstitutionality might be characterised as procedural rather than substantive. This is not to lessen the importance of proper compliance with the separation of powers as ordained under the Constitution, but merely to suggest that the necessity for an *immediate* remedy may be less urgent.

27. The fourth and final factor informing the decision to suspend the declaration of invalidity for a short period is the widespread and unpredictable consequences which the making of a declaration with immediate effect would have. To do so would be to cast doubt on the validity of other sectoral employment orders ("***SEOs***") made under the Industrial Relations (Amendment) Act 2015. These subsisting SEOs affect large numbers of workers, and a declaration of invalidity with immediate effect could cause financial hardship to at least some of those workers were their employers to refuse to continue to pay rates of remuneration in accordance with the relevant sectoral employment order. This might, ultimately, lead to industrial unrest which is the very thing which the enactment of Chapter 3 of the Industrial Relations (Amendment) Act 2015 had been intended to avoid. (See section 16). The disbenefits which would be caused by the making of a declaration of invalidity with immediate effect would be disproportionate to any benefit which would accrue to the Applicant over and above that achieved by the setting aside of the electrical contracting sectoral employment order on the narrow finding.

28. In summary, therefore, the declaration that Chapter 3 of the Industrial Relations (Amendment) Act 2015 is invalid would, even absent an appeal, be suspended for a period of six months.

STAY PENDING APPEAL

29. Having settled the terms of the substantive orders which this court proposes to make, it is necessary next to consider the terms of a stay, if any, to be placed upon these orders pending the intended appeal. The State respondents have indicated, in their written legal submissions, that they intend to apply for leave to appeal directly to the Supreme Court.

Even if leave to make a "leap frog" appeal were to be refused, the State respondents have an untrammelled right of appeal to the Court of Appeal.

30. The considerations relevant to the grant of a stay pending an appeal have very recently been considered by the Supreme Court in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42. As explained in that judgment, a risk of injustice will often arise in the case of an appeal because of the unavoidable time which must elapse between the determination of the High Court and an appellate hearing and decision. In the event that the order made on the stay application is *different* to the order made on the outcome of the appeal proper, then one of the parties may have suffered injustice in the interim. This risk can be reduced, but cannot always be eliminated. One approach is to seek to align the decision on a stay application, so far as possible, with the likely outcome of the appeal.

31. Factors to be taken into consideration in deciding whether or not to impose a stay include, *inter alia*, the strength of the grounds of appeal, and the public interest in the enforcement of the law: even the *temporary* disapplication of legislation gives rise to damage that cannot be remedied in the event that a constitutional challenge does not ultimately succeed.

32. Applying these principles to the present case, the balance of justice clearly lies in favour of imposing a stay on those reliefs associated with the constitutional grounds of challenge. First, no stay has been sought in respect of the reliefs associated with the (narrow) finding that the impugned sectoral employment order was not validly made in accordance with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015. Accordingly, the court order setting aside the electrical contracting sectoral employment order will be effective immediately. The Applicant will, therefore, have achieved one of its principal objectives in bringing the proceedings. For reasons similar

to those discussed under the previous heading, the disbenefits which would be caused by refusing to stay the declaration of invalidity would be disproportionate to any benefit which would accrue to the Applicant over and above that achieved by the setting aside of the sectoral employment order, with immediate effect, on the narrow finding.

33. Secondly, whereas this court has sought, in its principal judgment, to faithfully apply the case law on the "principles and policies" test under Article 15.2.1°, it is possible that an appellate court would reach a different conclusion. In such a scenario, the failure to impose a stay would have had the consequence that the operation of primary legislation—which on this assumption would have been found to be valid by the appellate court—would have been suspended for a period of months.

34. Thirdly, for the reasons explained under the previous heading, the effect of the declarations in respect of the constitutional challenge would have been suspended for a period of six months in any event. This would be so irrespective of whether or not an appeal had been taken. The practical effect of the imposition of a stay pending appeal will, therefore, be very limited. It is possible that the appeal proceedings would have been heard and determined within the six months. Even if not, any time over and above the six months is likely to be marginal. In either contingency, the position of the parties will not have been prejudiced by the stay. If the appeal is successful, no damage will have been done to the rule of law in that the primary legislation will not have been disapplied in the interim. If the appeal is unsuccessful, then primary legislation which will have been found by the appellate court to be invalid, will have remained in force temporarily. This would have been so even if the appeal had not been taken: this is because of the intended six month suspension on the declaration of constitutional invalidity.

COSTS ORDER

35. Both parties are agreed that the costs of the proceedings fall to be determined by reference to the Legal Services Regulation Act 2015 ("***the LSRA 2015***"). This position has been adopted notwithstanding that the proceedings had been *instituted* prior to the commencement of the new costs regime in October 2019. This approach seems sensible given that the bulk of the legal costs, i.e. those associated with the six-day hearing in June 2020, would have been incurred subsequent to the commencement date. Given the agreed position of the parties, it is unnecessary for the purposes of this judgment to address the question of whether the new costs regime is intended to have retrospective effect. Moreover, as explained below, the costs order in this case would be the same irrespective of whether the "old" or the "new" costs regime is applied.

36. The Court of Appeal (*per* Murray J.) has summarised the principles under the new costs regime as follows. See *Chubb European Group SE v. Health Insurance Authority* [2020] IECA 183, at paragraph 19.

> "(a) The general discretion of the Court in connection with the ordering of costs is preserved (s.168(1)(a) and O.99, r.2(1)).
>
> (b) In considering the awarding of costs of any action, the Court should '*have regard to*' the provisions of s.169(1) (O.99, r.3(1)).
>
> (c) In a case where the party seeking costs has been '*entirely successful in those proceedings*', the party so succeeding '*is entitled*' to an award of costs against the unsuccessful party unless the court orders otherwise (s.169(1)).
>
> (d) In determining whether to '*order otherwise*' the court should have regard to the '*nature and circumstances of the case*' and '*the conduct of the proceedings by the parties*' (s.169(1)).
>
> (e) Further, the matters to which the court shall have regard in deciding whether to so order otherwise include the conduct of the parties before and during the proceedings, and whether it was reasonable for a party to raise, pursue or contest one or more issues (s.169(1)(a) and (b)).

(f) The Court, in the exercise of its discretion may also make an order that where a party is '*partially successful*' in the proceedings, it should recover costs relating to the successful element or elements of the proceedings (s.168(2)(d)).

(g) Even where a party has not been '*entirely successful*' the court should still have regard to the matters referred to in s.169(1)(a)-(g) when deciding whether to award costs (O.99, r.3(1)).

(h) In the exercise of its discretion, the Court may order the payment of a portion of a party's costs, or costs from or until a specified date (s.168(2)(a)).''

37. There is disagreement between the parties as to how the costs of one particular aspect of the proceedings should be determined. The State respondents submit that whereas the Applicant has succeeded in having the sectoral employment order struck down, certain of the Applicant's arguments were unsuccessful. In particular, an argument, to the effect that the statutory requirement that a trade union or employers' organisation should be "substantially representative" of the economic sector concerned was impermissibly vague, had been rejected in the principal judgment.

38. The State respondents draw attention to the wording of section 169(1) of the LSRA 2015 which provides that a party who has been "entirely successful" in civil proceedings is entitled to an award of costs against a party who is not successful. It is said that the Applicant has not been "entirely successful", and that considerable time at the hearing had been devoted to an issue in respect of which the court ruled *against* the Applicant, namely, the meaning of the "substantially representative" requirement under sections 14 and 15 of the Industrial Relations (Amendment) Act 2015. The State respondents characterise this issue as "the primary legal concern" of the Applicant, and as an issue which was consistently raised by the Applicant during the statutory process and then relied upon as the basis for the commencement of the litigation. The State respondents estimate that the majority of time over the course of the first two days of the hearing had been dedicated to these issues and the provision of background information.

39. The State respondents submit that the appropriate costs order in this case would be to award the costs of four days of the six-day hearing to the Applicant, and to award two days' costs to the State respondents. The two costs award should then be set-off against each other, with the result that the Applicant would be entitled to two days' net costs.

40. With respect, I do not think that this is an appropriate case in which to apportion costs as between individual arguments. As observed by the Court of Appeal in *Chubb European Group*, in many cases the splitting of costs as between different issues and arguments in a case is likely to create satellite applications around costs, which will not usually represent an economical use of the court's time, and may involve the parties incurring further costs in arguing about costs. On the facts of the present case, the only clear-cut distinction between issues in the proceedings was as between (i) the non-constitutional grounds of challenge, and (ii) the constitutional grounds of challenge. As explained in the principal judgment, it might have been possible to resolve the case on the narrow non-constitutional issues. Both parties were anxious, however, that the court deal with the constitutional issues also. The Applicant succeeded under both headings, and to this extent can be said to have "succeeded entirely" in the proceedings. It follows that, subject always to the application of the criteria under section 169(2) of the LSRA 2015, the Applicant is *prima facie* entitled to its costs.

41. There has been some discussion in the recent case law as to whether the concept of a party having "entirely succeeded" in proceedings is narrower than the concept of having won the "event". See, for example, *Chubb European Group* (at paragraph 37).

> "[…] Issues will arise in other cases as to what exactly '*entirely successful*' means. Depending on the precise construction placed on that phrase, the pre-existing position that a party who won '*the event*' but succeeds in respect of only some of the issues addressed in support of the relief it obtains is presumptively entitled to all its costs, may have been changed by the Act."

42. Approaching the matter from first principles, "success" in proceedings might, in theory, be measured in a number of different ways. The first approach would be to measure success solely by reference to the *relief* obtained. If a litigant is successful in obtaining relief (or in resisting the other side's claim, if a respondent), then they might be said to have succeeded in the proceedings. Such an approach would, however, be overly simplistic. It makes no allowance for the fact that the successful party may have unnecessarily increased costs by its unreasonable conduct of the litigation.

43. The second approach would be to look beyond the overall result of the case, and to consider, instead, whether the proceedings involved separate and distinct issues which might be characterised as individual "events". This point can be illustrated by reference to the present case. The Applicant's case consisted of two planks: first, that the making of the sectoral employment order was *ultra vires* the parent legislation, and, secondly, that the parent legislation itself was invalid. Whereas these two planks were both directed to the same ultimate result, namely the setting aside of the sectoral employment order, they can legitimately be characterised as separate "events". The legal basis for the challenge is very different in each instance. (A loose analogy might be drawn here between the separate statutory appeal and judicial review application in *Chubb European Group*. These were treated as separate events, notwithstanding that their objective was the same).

44. The third approach to costs would be to parse out a case further, and apportion costs not simply as between "events", but also as between the specific arguments relied upon. This would necessitate a granular examination of the time spend on different arguments at the hearing.

45. It occurs to me that the second approach is the most pragmatic one. One can readily envisage a scenario where an applicant may have lost one or more event, yet nevertheless

have obtained the relief it was seeking. For example, suppose that the Applicant in the present case had lost on all of its non-constitutional grounds, but prevailed on its constitutional grounds. On this hypothesis, the Applicant would still have "succeeded" in the sense of having secured the relief it wanted, i.e. the setting aside of the impugned sectoral employment order. It would, however, have failed entirely on one of the two planks of its case. There would be a logic to saying that this (hypothetical) failure should have consequences in terms of the appropriate costs order. In such a scenario, it might be proper to distinguish between different "events" in the proceedings. However, the justification for going further, and breaking down events into the individual arguments, and then apportioning costs to each argument, is less obvious.

46. For the reasons which follow, I am satisfied that this is not a suitable case in which to parse out the proceedings further, and to attempt to separate out individual strands of the arguments advanced. This is especially so in respect of what might be described as the "substantially representative" requirement. As appears from the principal judgment, the "substantially representative" requirement featured as part of both the non-constitutional grounds and the constitutional grounds of challenge. The Applicant had made detailed submissions to the Labour Court as to why it said that the joint applications made on behalf of the trade union and the two employers' organisations did not meet this requirement. These submissions were not engaged with at all by the Labour Court. This failure on the part of the Labour Court fed into the overall finding in the principal judgment that there had not been compliance with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015. To this extent, the Applicant *succeeded* in its argument that its submissions to the Labour Court in respect of the "substantially representative" requirement had not been properly considered.

47. In order to make this argument, it had been necessary for the Applicant to open the relevant materials which had been before the Labour Court, including, the correspondence between the Applicant and the Labour Court on this issue; the written submissions made to the Labour Court by the interested parties; the application documentation submitted by the trade union and the employers' organisations (including the Ernst Young report); and the report and recommendation of the Labour Court. It was also relevant to refer, briefly, to the two earlier (abortive) applications for an examination of the sector in order to explain that the "substantially representative" requirement had been a live issue even at that stage. All of this took some time at the six-day hearing, but it was necessary for the Applicant to bring these matters to the attention of the court in order to advance its argument.

48. The "substantially representative" requirement also featured as part of the constitutional challenge. The argument here was a more technical one, namely that the statutory criteria were too imprecise, and involved an excessive delegation to the Labour Court. The Applicant sought to argue that, notwithstanding the introduction of an express reference to the number of workers, the legislative amendments introduced under the Industrial Relations (Amendment) Act 2015 suffered from infirmities similar to those identified in the previous legislation by the Supreme Court in *McGowan v. Labour Court* [2013] IESC 21, [2013] 3 I.R. 718.

49. It is correct to say, as the State respondents do, that this argument was not successful. For the reasons set out at paragraphs 179 to 187 of the principal judgment, this court found that the statutory criteria were valid. Yet, the time spent on this (unsuccessful) argument did not add materially to the length of the hearing. This is because the argument itself was a net one, and much of the material which had to be opened to the court in support of the argument was also relevant to *other* issues in the proceedings, which issues

were resolved in favour of the Applicant. The argument was predicated, in large part, on the judgment in *McGowan*. For obvious reasons, however, it would have been necessary for the judgment in *McGowan* to be opened extensively to the court in any event, irrespective of whether this particular argument had been advanced. The Supreme Court's judgment is, self-evidently, relevant to many of the issues in the proceedings.

50. In summary, the Applicant is entitled to its costs on the basis of a six-day hearing. The application on the part of the State respondents that the costs should be discounted to reflect time spent on a specified, unsuccessful argument is refused in circumstances where the time spent on this (unsuccessful) argument did not add materially to the length of the hearing.

51. Finally, I should indicate that the same result would have eventuated even had the costs been determined by reference to the "old" costs regime, i.e. prior to the commencement of the LSRA 2015. There is some overlap between (i) the requirement under the new regime to consider whether it was "reasonable for a party to raise, pursue or contest" one or more issues in the proceedings, and (ii) the principles in *Veolia Water UK Plc v. Fingal County Council* [2007] 2 I.R. 81. On either analysis, I am satisfied that the extent to which the argument in respect of the "substantially representative" requirement was pursued in the proceedings was reasonable, and did not add materially to the length or costs of the proceedings.

CONCLUSION AND FORM OF ORDER

52. For the reasons set out above, a stay will be placed on the reliefs related to the High Court's finding that Chapter 3 of the Industrial Relations (Amendment) Act 2015 is invalid having regard to the provisions of Article 15.2.1° of the Constitution. This stay

is to remain in force until the determination of the intended appeal (or any further order of the appellate court).

53. No stay has been sought by the State respondents in respect of the reliefs associated with the (narrow) finding that the impugned sectoral employment order was not validly made in accordance with the requirements of Chapter 3 of the Industrial Relations (Amendment) Act 2015. Accordingly, the court order setting aside the Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019) will be effective immediately.

54. The Applicant is entitled to an order for costs in its favour. The costs are to be measured on the basis of the six-day hearing before the High Court in June 2020. The application on the part of the State respondents that the costs should be discounted to reflect time spent on a specified, unsuccessful argument is refused in circumstances where the time spent on this (unsuccessful) argument did not add materially to the length of the hearing.

55. The form of order is as follows.

(i) 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, such declaration to stand suspended until the determination of this issue on appeal or until such further order may be made by an appellate court.

(ii) A declaration that the Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019) is invalid as a consequence of the declaration of invalidity in respect of the provisions of Chapter 3 of the parent act, i.e. the Industrial Relations (Amendment) Act 2015, such declaration to stand suspended until the determination of this issue on appeal or until such further order may be made by an appellate court.

(iii) A declaration that the Minister acted without jurisdiction in purporting to make the Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019).

(iv) An order of *certiorari* quashing the Sectoral Employment Order (Electrical Contracting Sector) 2019 (S.I. No. 251 of 2019) on the grounds that it was made *ultra vires* the Industrial Relations (Amendment) Act 2015 and in breach of fair procedures.

(v) An order directing that the respondents do pay the applicant's legal costs, (to include reserved costs and the costs of three sets of written legal submissions). The legal costs are to be adjudicated, i.e. measured, by the Office of the Legal Costs Adjudicator in default of agreement between the parties. A stay is placed on the execution of the costs order pending the determination of the intended appeal.

(vi) The stay on the execution of the costs orders applies equally to the costs order made by the High Court (Meenan J.) on 9 October 2019 in respect of the Applicant's application for an interlocutory injunction.

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 Gerrett Simons