THE SUPREME COURT

[RECORD NO.: 97/20]

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.

BETWEEN:

NÁISIÚNTA LEICTREACH CONTRAITHEOIR EIREANN CUIDEACHTA FAOI THEORAINN RÁTHAÍOCHTA (NECI)

RESPONDENTS

AND

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

APPELLANTS

Judgment of Mr. Justice John MacMenamin dated the 18th day of June, 2021

Introduction

1. This appeal arises from a judgment of Simons J. in the High Court delivered on the 23rd June, 2020 ([2020] IEHC 303). In the proceedings, NECI ("the respondent"), a company limited by guarantee representing small and medium sized electrical contractors, successfully applied for a judicial review of a Sectoral Employment Order ("SEO"), the subject of a recommendation by the Labour Court, under procedures laid down in Chapter 3 of Industrial Relations (Amendment) Act, 2015, ("the 2015 Act"), and subsequently embodied in a statutory instrument, S.I. 251/2019. The effect of this Order was to set terms and conditions for workers across the entire electrical contracting area in the State. The recommendation was made in response to applications to the Labour Court from

Connect trade union, and two employers' groups, namely, the Electrical Contractors' Association ("ECA"), and the Association of Electrical Contractors of Ireland ("AECI"), which were treated as a joint applicant by the Labour Court.

2. Simons J. had to deal with a range of issues in what is, by any standards, a complex case. Two of the most significant questions were firstly, a challenge to the constitutionality of Chapter 3 of the Industrial Relations (Amendment) Act, 2015, on foot of which the statutory instrument was promulgated; and secondly, NECI's alternative case that, in making the recommendation on foot of which the statutory instrument in question was promulgated, the Labour Court had acted *ultra vires* the 2015 Act, specifically by failing to give reasons for its recommendation. NECI was successful on both of these claims. On the first issue, the High Court judge subsequently granted a suspended declaration that Chapter 3 of the 2015 Act violated Article 15.2.1 of the Constitution, which vests sole legislative power for the State in the Oireachtas, as he held the impugned provision empowered the Labour Court to make decisions which were legislative in nature. As a matter of logic, any procedures conducted under the impugned section would also be invalid.

3. This introductory section of the judgment is necessarily detailed and contextual. It presently sets out a brief summary of the issues and a description of the legislative history of the impugned legislation, including a description of its predecessor, that is, s.27(3) of the Industrial Relations Act, 1946. There is then an account of the judgment of this Court in *McGowan v. The Labour Court* [2013] 3 I.R. 718, which struck down s.27(3). This introduction then considers other judgments and decisions which had consequences to the 2015 legislation. There is then a discussion of the purposes of Chapter 3 of the 2015 Act. Finally, there is a description of the scheme of that Chapter.

4. Five main issues then arise for consideration. These are:

   (I) The interpretation of certain terms contained in Chapter 3 of the 2015 Act, "Statutory Interpretation";

   (II) Whether Chapter 3 of the 2015 Act complies with Article 15.2.1 of the Constitution;

   (III) Whether the enforcement provisions contained in the 2015 Act comply with Article 6 ECHR;

   (IV) The statutory *vires* issue, namely, whether the Labour Court furnished adequate reasons for its recommendation; and

   (V) Whether in adopting and appending the Construction Workers Pension Scheme to the recommendation, the Labour Court acted *ultra vires*.

5. These issues were dealt with in a different sequence in the High Court judgment. Simons J. dealt with the statutory vires issue prior to addressing questions under Article 15.2.1. In proceeding to deal with the constitutional issue, he made clear that he would normally have considered himself bound by the doctrine of judicial restraint, but went on to deal

with the constitutional issue at the express invitation of the parties. I am satisfied that he was correct in deciding to do so. What now follows is a brief description of each of the questions which fall to be considered.

I. Statutory Interpretation

6. This first issue arises from a cross-appeal by NECI. It is sub-divided into two main headings. First, it is necessary to consider how the Labour Court interpreted and applied the words "*economic sector*" in the statutory procedure in question. A definition of this term is contained in s.13 of the 2015 Act. In fact, this issue itself may again be sub-divided under two headings. First, in the application, the Labour Court had to consider a question as to whether the category of workers the subject of the application should include or exclude two sub-groups, namely, electricians working in semi-state bodies, and electricians and apprentices working in maintenance work for companies. The original application to the Labour Court had included both these sub-groups. The question that subsequently arose was whether it was lawful for the Labour Court to exclude these two sub-groups of workers, who had been included in the original application. Simons J. held that the Labour Court had not erred in its jurisdiction in redefining the class of workers to exclude these two sub-groups in the course of the procedure leading to the making of a recommendation to the second named State appellant, ("the Minister"), that he should adopt the draft SEO, prepared by the Labour Court, and then later promulgated in the form of a statutory instrument.

7. The second sub-heading relating to the term "economic sector" arises as an Article 15.2.1 constitutional issue under Heading (II) above. Simons J. rejected the argument that Chapter 3 contained sufficient principles and policies to comply with Article 15.2.1. He observed that the term "economic sector" was, itself, too open-ended as sufficient guidance to the Labour Court in making a recommendation. This finding must also be considered. These are the two "economic sector" sub-headings.

8. A second substantive interpretation question also arises. This concerns the application of the term "substantially representative" in the application. As a precondition to exercising its jurisdiction, the Labour Court must be satisfied that the applicants are "*substantially representative*" of the class, type or group of employer or worker in a particular industrial area. The words are not specifically defined in Chapter 3, but are contained in a number of provisions, including s.14(2)(a) and s.15(1)(i) and (ii). In the High Court, counsel for NECI submitted that the effect of the way in which the Labour Court determined that the joint applicants were "*substantially representative*" violated NECI's rights to fair procedure under the Constitution. Simons J. rejected this submission. This decision is also appended.

II Article 15.2.1

9. Article 15.2.1 of the Constitution vests the sole and exclusive power of making laws for the State in the Oireachtas. Simons J. held that, in enacting Chapter 3 of the 2015 Act, the Oireachtas had abrogated its constitutional role as the sole legislator for the State. He concluded the procedure leading to a recommendation vested the Labour Court with powers which were those of a legislator, rather than a delegated statutory body. The

judge, therefore, held that Chapter 3 of the 2015 Act, which provided for the making of such Orders, was invalid, having regard to Article 15.2.1 of the Constitution.

10. Simons J. concluded that a number of the terms in Chapter 3 were too vague, and did not provide sufficient guidance or limitation on the power of the Labour Court. He observed that making an SEO involved significant policy choices, with far-reaching effects, where the interests of those affected might not necessarily be aligned. He held that the Chapter not only contained insufficient statutory guidance, but also inadequate legislative safeguards, and might potentially have significant anti-competitive effects. He was of the view that the range of choices delegated was so broad as could not be seen as a delegated power to make decisions, but, rather, was itself legislative in nature, thereby violating Article 15.2.1.

III The ECHR Question

11. Section 24 of the 2015 Act deals with an enforcement mechanism for SEOs. It allows for prosecution for failure in compliance with an Order. NECI contend this contravenes the duties of the State said to arise under Article 6 ECHR, as expressed through the European Convention on Human Rights Act, 2003. Simons J. held that he should not consider this right to a fair trial issue for a number of reasons. These included the fact that NECI could not be said to have been directly affected by this provision, and that these enforcement provisions were effectively those contained in other legislation, that is, the Workplace Relations Act, 2015, which had not been challenged in these proceedings. He held that dealing with an ECHR question, without first considering its constitutionality was procedurally inappropriate.

IV The Statutory *Vires* Issue

12. The statutory instrument now challenged was made subsequent to a recommendation made by the Labour Court, under ss. 15 to 16 of the 2015 Act. The Minister approved the impugned draft statutory instrument on foot of this recommendation. The draft statutory instrument was, in turn, was submitted to the Oireachtas. In the High Court, whilst relying on its case under Article 15.2.1, NECI made the alternative case that, even were Chapter 3 of the 2015 Act constitutionally valid, the Labour Court's recommendation was itself procedurally flawed. NECI's case is that, in purporting to carry out the procedures laid down in s.16, the Labour Court failed to set out adequate reasoning for its conclusions, and instead engaged in what might be characterised as a *pro forma* exercise, rather than engaging with significant legal issues which NECI raised.

13. Simons J. accepted these submissions. He concluded that, independently of the constitutional question, the Labour Court had acted *ultra vires* the statute by not giving reasons, and so, too, had the Minister in promulgating the statutory instrument.

V The Construction Workers' Pension Scheme

14. There is also, finally, a different *vires* issue. It is whether, in dealing with the provisions of its recommendation of the contents of an SEO, the Labour Court acted *ultra vires* in appending and adopting details of the Construction Workers' Pension Scheme ("CWPS") as part of its recommendation. Without prejudice to its submissions under the Constitution, NECI contend that this process was, effectively, a double-delegation of

power, whereby the Labour Court, already a delegate, had, in turn, devolved its power to the trustees of the CWPS, who could determine the rates of contribution to the scheme by workers and employers. It is said this was, in effect, a delegation by the subordinate, and offended against the principle *delegatus non potest delegare* – a delegate may not itself delegate.

15. Having set out a summary of the issues, it is necessary to deal with the legislative history of Chapter 3 of the 2015 Act, bearing in mind that the earlier background to an enactment is a relevant consideration in determining whether the provisions in question comply with Article 15.2.1.

Legislative History of Chapter 3 of the 2015 Act

16. The Labour Court was established by the Oireachtas by the Industrial Relations Act, 1946 ("the 1946 Act"). Section 27(3) of that Act empowered the new statutory body to make "Registered Employment Agreements" ("REAs"). Such agreements, made between trade unions and employers, could cover a wide range of activities, including remuneration and working conditions of workers of a particular "class, type or group" in a sector of the economy. These had binding legal effect, governing conditions throughout a particular economic sector. Breach of an REA was punishable by law. In succeeding decades, the Labour Court performed a highly significant public service in resolving many disputes between workers and employers. The REA system was part of this process. However, certain groups of employers, such as NECI, objected to such arrangements. Their objection was largely based on the belief that such agreements favoured larger employers, who could apply economies of scale, and pay higher rates of remuneration which would be unsustainable for small or medium sized employers.

Section 27(3) Industrial Relations Act, 1946

17. Chapter 3 of the 2015 Act is challenged in these proceedings. But it can only be understood by reference to material parts of its predecessor provision, in the Industrial Relations Act, 1946. In fact, the practice of making industry-wide agreements between various bodies, both statutory and non-statutory, goes back well before that legislation. A number of terms contained in s.27(3) of the 1946 Act are material. Some of these are emphasised in heavy type, as the same words, or analogues of them, recur in its 2015 successor.

18. Under 27(3) of the 1946 Act the Labour Court was obliged to register an employment agreement if it was satisfied that: in the case of an agreement to which there were two parties only, both parties consented to its registration. An agreement to which there were more than two parties might be registered, if there was substantial agreement amongst the parties representing the interests of workers and employers respectively, that it should be registered (s.27(3)(a). The effect would be that the terms of the agreement would apply to all workers of a **particular class, type or group** and their employers where the Court was satisfied that it was a **normal and desirable practice**, or that it was "*expedient to have a separate agreement* ***for that class, type or group***" (s.27(3)(b)). The Labour Court had to be satisfied that the parties were "***substantially representative***" of such workers and employers (s.27(3)(c). It also had to be shown that

the agreement was "***not intended to restrict unduly employment generally*** *or the employment of workers of a particular class, type or group or to ensure or protect the retention in use of inefficient or unduly costly machinery or methods of working*" (s.27(3)(d). Finally, the agreement had to provide that if a trade dispute occurred between workers to whom the agreement relates and their employers a strike or lock-out should not take place until the dispute has been submitted for settlement by negotiation in the manner specified in the agreement (s.27(3)(e).

19. The effect of this provision was that trade unions and employers in any given economic sector could come to a mutually acceptable agreement, without provision for a right of objection from any other party, and thereafter apply to have it registered as an REA, thereby giving it the force of law. NECI contend this situation was constitutionally objectionable.

McGowan v. The Labour Court

20. In 2013, this Court had to consider a constitutional challenge to such an REA. As here, it concerned the electrical contracting sector (*McGowan v. The Labour Court* [2013] 3 I.R. 718 ("*McGowan*")). The Court held that the wide powers vested in the Labour Court to make REAs offended against Article 15.2.1 of the Constitution.

21. Delivering judgment, O'Donnell J. concluded that s.27(3) of the 1946 Act was incompatible with Article 15.2.1 of the Constitution; and that what appeared to be law was, in fact, being made by persons other than the Oireachtas. Instead of imparting a limited power to a subordinate body, the 1946 Act vested a "wholesale grant" of law-making power, to private persons who applied for an REA. Such persons or bodies were unidentified and unidentifiable at the time of grant in respect of a broad and important area of activity, subject only to a very limited power of veto by the Labour Court. The effect of Part III of the 1946 Act, of which s.27(3) was part, was to allow parties entering into an employment agreement to make any law they wished in relation to employment, provided the Labour Court considered those parties to be "substantially representative" of workers and employers in the sector, and what was proposed as an REA did not offend against the other provisions in the section, including the prohibition on restrictive practices.

22. The Court concluded, therefore, that s.27(3) was constitutionally flawed, in that it gave no guidance or instruction to the Labour Court as to how matters of representation, restrictions on employment, inefficiency, or costly methods of work (the guidance provisions) could be gauged. The procedures permitted under the Act could not be said to be a mere "filling in of gaps", in a statutory scheme already established by the Oireachtas. These were the words of O'Higgins C.J. in the seminal case of *Cityview Press v. An Comhairle Oiliúna* [1980] IR 381. The Oireachtas had not retained any capacity for review of an agreement, either by itself, or by any member of the executive responsible to it. Once registered, an agreement had the effect of binding law, capable of being enforced by criminal proceedings, even on parties who had not been involved in the process. For these reasons, the Court held an REA had passed "unmistakably" into the field of legislation, when the limited, and essentially negative, limitations imposed by

s.27(3)(a) of the 1946 Act, were inadequate to bring the exercise of such power within constitutional limits.

23. In so holding, O'Donnell J. made reference to the observations of Hanna J. in *Pigs Marketing Board v. Donnelly (Dublin) Ltd.* [1939] I.R. 413, that if any piece of regulation actually amounted to truly delegated *legislation*, it would, by virtue alone of being *legislation*, offend Article 15, since it was plain from the text of that Article, and the structure of the Constitution, that the function of legislation was one which simply could not be delegated by the Oireachtas to any other body.

Ryanair

24. Chapter 3 of the 2015 Act must be seen as a substantive response to *McGowan*. But it will be recollected that six years earlier, this Court delivered judgment in the case of *Ryanair v. The Labour Court* [2007] 4 I.R. 199. There, the Court ruled that the Labour Court had failed to follow fair procedures in determining that it had jurisdiction to decide on a range of industrial relations issues which had been referred to it by the trade union, IMPACT. This Court made three observations about the procedure then adopted by the Labour Court in the application to it. These were that, in dealing with the dispute, the Labour Court had, first, proceeded to a hearing without having evidence before it as to whether a trade dispute actually existed between a group of pilots and Ryanair; second, acted on the basis that it was not Ryanair's practice to engage in collective bargaining negotiations; and, third, concluded that Ryanair had no effective internal dispute resolution procedure.

25. In addressing these three questions, this Court pointed out that no evidence had been called before the Labour Court to make out IMPACT's claims. Thus, in the absence of oral evidence, it was not open to the Labour Court to reach the conclusion that a trade dispute existed, or that Ryanair did not engage in collective bargaining, or that it had no operative internal dispute resolution procedure. This Court held that a clear test would be necessary in order to establish whether an internal company staff council or body, where it existed, could be defined as what is described as "an excepted body", or a "collective bargaining unit". Such entities were defined in the Trade Union Acts of 1941 and 1942 as a body of members who were employed by the same employer, and which carried on negotiations to determine wages, or other conditions of employment, of its own members, but of no other employees. In so finding, the Court rejected a definition of the term "collective bargaining", which had been previously accepted by the High Court (Clarke J.). (See *Ashford Castle v. SIPTU* [2007] 4 I.R. 70, and, now, s.27.1A and 1B of the 2015 Act).

26. In his judgment in *Ryanair*, Geoghegan J. ruled that the Labour Court had wrongly concluded that Ryanair's employee representation committee was not "an excepted body", as defined. He held the Labour Court was wrong to conclude that, as the employees concerned did not wish to be represented by the representation committee, but by the trade union, then the representation committee could not have the status of an independent excepted body. He found that insufficient evidence was presented to the Labour Court to support these conclusions. Additionally, he concluded that an "excepted

body" need not be a trade union; indeed, such a body could be established by an employer, as long as it contained a degree of independence, had a system of elections, and was capable of operating effectively.

John Grace Fried Chicken Ltd. v. Catering Joint Labour Committee

27. Four years after *Ryanair*, and two years prior to *McGowan*, in 2011, Feeney J. held, in the High Court decision in *John Grace Fried Chicken Ltd. v. Catering Joint Labour Committee* [2011] 3 I.R. 211, that, while the provisions of the 1946 and 1990 Industrial Relations Acts contained general guidelines for Joint Labour Committees in making employment regulation orders, these were insufficiently focused on the business activity in question, and consequently could not withstand constitutional scrutiny under Article 15.2.1. (cf. Doherty, "*Representation, Bargaining and the Law: Where next for the Unions*", (2009) 60(4) N.I.L.Q. 1-45).

28. *McGowan*, *Ryanair* and *John Grace* all had a bearing on the 2015 Act. But, dealing now only with sector-wide agreements, as a consequence of the judgment in *McGowan*, it was certainly necessary that the Oireachtas re-address the Article 15.2.1 questions, seeking to put constitutionally compliant legislation in place. (See, generally, Kerr, "*The Trade Union & Industrial Relations Act*", Dublin Round Hall, (2015))

The purpose of the Impugned Legislation: Chapter 3 of the Industrial Relations Act, 2015

29. The State appellants' case is that the 2015 Act was not only a response to these three judicial decisions. Other evolutions in the law had taken place, which were reflected in legal instruments and judgments of the CJEU and ECtHR. These are discussed later. What is, at present, material is that the 2015 Act divided the process of registration of agreements into two. First, Part II, Chapter 2, of the 2015 Act continued the usage of the term "Registered Employment Agreement", but, now, used in a different context, confined to dealing only with agreements which were not sector-wide, but, instead limited to the parties to the agreement (s.6).

30. The provisions contained in Part II, Chapter 3 were different. They now lie at the centre of this appeal. As outlined earlier, these vested the Labour Court with powers to make what were called "Sectoral Employment Orders" ("SEOs") which governed the conditions of employment of workers and employers in an entire sector of the economy. But the legislative purpose must be seen as a clear response. In order to address the constitutional deficiencies found in the 1946 Act, the 2015 Act contained a series of new provisions seeking to set out procedures and statutory guidelines. NECI argues in this appeal that these changes were effectively a reconstituted form of the old legislation which did not address what it considered were fundamental issues. These included their complaints that the terms "*economic sector*" and "*substantially representative*" lacked clarity and, in fact, created unfairness.

31. But this was not the only purpose of the 2015 Act. In other provisions, and in response to the judgment in *Ryanair*, the Oireachtas sought to address the issue of business undertakings which did not recognise trade unions, and where there was no independent collective bargaining procedure. (See s.27.1A and 1B of the Act, and *Freedom of*

Association and Statutory Recognition; A Constitutional Impossibility? (2020) Irish Jurist, D'Art, pp 82-112.) This issue, too, is a significant part of the background.

32. This introductory section moves next to a description of the scheme of Chapter 3, then, later, at Section I, the judgment considers the terms "*economic sector*" and "*substantially representative*", as they appear respectively in ss. 13 and 14 of Chapter 3 of the 2015 Act.

The Scheme of Chapter 3

33. Section 13 deals with a series of definitions, which include the term "economic sector". Sections 14 to 19 of the Act outline how an application for the registration of an SEO is to be dealt with. The process moves in a number of stages.

Request

34. Under s.14, the first step is a *request* to the Labour Court. This may be made either by a trade union of workers, or a trade union or organisation of employers, or jointly. Such parties can request the Labour Court to examine the terms and conditions in relation to remuneration, sick pay schemes, or pension schemes, of the workers of a category described as a "*particular class, type or group*" in the economic sector in respect of which the request is expressed to apply (s.14(1)). Applicants must show that they are substantially representative of their category, whether that be employers, workers, or both (s. 14(2)(a) and (b)).

Examination

35. This request is followed, in turn, by an "*examination*" of the various conditions of employment identified. The Labour Court is then to *publish notice of its intention* to undertake an examination, and to invite representations, following which it is to conduct a hearing in public (ss.15(2) to (4)). This procedure, too, may be seen as a response to criticisms in *McGowan*, to the effect that the process under s.27(3) of the 1946 Act lacked transparency, and could be confined to the relevant parties, and done in private.

Recommendation

36. If satisfied that the application complies with the statutory conditions laid down in ss. 15 and 16, the Labour Court then makes a *recommendation* to the Minister, upon which basis an SEO may be made (s.16). If satisfied that the Labour Court has complied with the relevant provisions of the Act, the Minister may, then, in turn, place a draft of the SEO before each House of the Oireachtas. Once approved by resolution of each House, the SEO is then promulgated in the form of a statutory instrument (s.17(1) to (4)). This, in essence, is the procedure leading to a statutory instrument.

Review

37. The Chapter contains provisions for review of an existing Order. Section 18 of the 2015 Act contains provisions setting out the conditions under which the Minister may request the court to review the terms of an SEO. By contrast, s.29(2) of the 1946 Act had simply provided that the Labour Court could review an SEO, if satisfied that there had been a substantial change in the circumstances of the trade or business to which it related since the registration of the agreement.

Section 19

38. Section 19 provides that an SEO is to apply to "*every worker of the class, type or group in the economic sector to which it is expressed to apply, and his or her employer, notwithstanding that such worker or employer was not a party to a request under section 14, or would not, apart from this subsection, be bound by the order*" (s.19(1)).

39. Counsel for the State appellants submit that this is one of the main policy guidelines or considerations which underlie the 2015 Act. That policy is intended to curb the potential for foreign employers to engage in unfair competitive practices by bringing in workers from other E.U. member-states to work in this State at lower rates of remuneration than those fixed in an SEO. These are referred to as "posted workers".

40. But the provision then goes further. It provides that, if an employment contract provides for the payment of remuneration at a lower rate than that provided for in an SEO, such contract shall, in respect of any period during which the SEO applies, have effect as if the "order rate" set in the SEO is substituted for the contract rate. Similar provisions apply in relation to any conditions in a contract of employment which set lesser conditions regarding pension or sick pay than those which may be promulgated in the order. Sections 20 and 21 are not directly material.

Section 24

41. Section 24 of the Act, as mentioned, deals with the question of enforcement of an SEO, if necessary by way of criminal sanction. It is dealt with later.

42. Having dealt with the general scheme of the Chapter, this part of the judgment now moves to a closer, section-by-section, analysis.

Section I

Statutory Interpretation

43. At first sight, a question of statutory interpretation might appear to be of little significance in the order of things when it comes to an assessment of whether the 2015 Act accords with Article 15.2.1 of the Constitution. But, in fact, these objections are quite fundamental to NECI's case. They go to a key question underlying Chapter 3; that is, whether there is a right for trade unions and employer groups to engage in sector-wide agreements to be thereafter registered? NECI's objections here can actually be seen as a challenge to the concept of such agreements, where the definition of an "economic sector" would obviously be fundamentally important, if the agreement was to be binding across every electrical contracting undertaking. NECI contends that there are such wide divergences in interest between various types of enterprise in the electrical contracting area that to place them in one category is inherently objectionable. Hence, the focus on the terms "economic sector", and "substantially representative". The questions may nonetheless be dealt with quite shortly.

Section 13: "Economic Sector"

44. Section 13 of the 2015 Act defines an "*economic sector*", within which an SEO might be made. It is to be understood as a sector "*concerned with a specific economic activity requiring specific qualifications, skills or knowledge*". This definition came in response to

McGowan, where this Court held that the 1946 Act lacked any effective definition of the *scope* of an REA (para. 23). Earlier, in *Burke v. Minister for Labour* [1979] I.R. 354, regarding a claim brought under the 1946 Act, Henchy J. made, *obiter*, comments as to the power of a decision-maker or an adjudicator to make provision for any matter that might be regulated by a contract of employment. He described such a form of delegation as being of a "*most fundamental … and far-reaching kind*" (quoted in *McGowan*, para. 24). In *McGowan*, therefore, the Court held that the grant of power was not to make regulations over a "limited area", but rather one without any significant statutory limitations. Thus, the Court held that s.27(3) was, therefore, a "facial" breach of Article 15.2.1. While an application might be made for a particular REA to be made concerning a specific industry, there was no statutory guidance even as to which industry, or in what way, such an agreement once registered would apply. The significance of this sectoral issue, first raised in *McGowan*, is now best understood against the factual background of this application in the Labour Court.

Definition of the category involved

45. The two employers' groups, ECA and AECI, together with Connect brought a proposed definition of the "economic sector" which was:

> "*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."*

46. In its examination process, the Labour Court excluded two categories of workers from the "economic sector" covered by the draft SEO. Those in the excluded category were electricians employed in State and semi-state bodies, and those workers in the same group directly employed by manufacturing companies for the maintenance of those companies' plants. NECI submitted in the High Court, and submit now, that, once it had embarked on an investigation, the Labour Court had no jurisdiction to amend the definition to exclude this latter sub-group. Counsel submits that s.14 of the Act provided

only that a trade union of employers or workers might apply to the Labour Court to embark on an assessment of the terms and conditions of such an SEO. It is contended that such application and examination could only concern the "*workers of a particular class, type or group in the economic sector in respect of which the request was expressed to apply*", as provided for in s.14. NECI argue that, once the application was made identifying a defined group, the die was effectively cast, and the Act simply did not permit the Labour Court to redefine or refine the class, type or group in question.

47. To this, Simons J. responded that the Labour Court must necessarily have a discretion to define the "economic sector", as that court had been provided an enhanced role under the 2015 Act, which, by contrast to the 1946 Act, was not confined to a task of "rubber-stamping" applications (para. 77). He pointed out that the Labour Court must now carry out its *own examination* under s.14. He held it would undermine the effectiveness of the consultation process were the limits of an economic sector to be fixed irrevocably by the terms of an application submitted, and that such a narrow view of the Labour Court's jurisdiction would have had the practical effect that interested parties would not have a meaningful opportunity to make submissions on the scope of an economic sector. The High Court judge's reasoning was both full and comprehensive on this issue. I agree with his conclusions.

"Substantially Representative"

48. The next issue concerns the meaning and application of the term "*substantially representative*". This section must be set out fully. It provides:-

> *"14(1) Subject to subsection (3) -*
>
> *(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,*
>
> *may request the Court to examine the terms and conditions relating to the remuneration and any sick pay scheme or pension scheme, of the workers of a particular class, type or group in the economic sector in respect of which the request is expressed to apply.*
>
> *(2) A request under this section shall include confirmation, in such form and accompanied by such documentation as the Court may specify that -*
>
> *(a) where the request is made by a trade union of workers or jointly with the trade union of workers, the trade union of workers is substantially representative of the workers of the particular class, type or group in the economic sector in respect of which the request is expressed to apply, and*

(b) where the request is made by a trade union or an organisation of employers or jointly with a trade union or an organisation of employers, the trade union or organisation concerned is substantially representative of the employers of the workers specified in paragraph (a).

(3) Where the Minister has made a sectoral employment order in relation to a class, type or group of workers in a particular economic sector, the Court shall not consider a request under subsection (1) in relation to the same class, type or group of workers in that sector, until at least 12 months after the date of the order, unless the Court is satisfied that exceptional and compelling circumstances exist which justify consideration of an earlier request. …"

The drafting of this section is admittedly a little difficult. The effect of s.14(2)(a) is that an applicant trade union of *workers* must be shown to be substantially representative of the *workers* in that particular class, type or group in the relevant economic sector. Where the request is made by a trade union or organisation of *employers*, or jointly with a trade union or organisation of workers, it must be shown that *the* trade union or organisation of *employers* is substantially representative of the *employers* of the *workers* of the class, type or group and economic sector specified in para. (a). The section also provides for a degree of flexibility, in that it avoids the possibility of repeated applications. It provides that there must be a 12 month elapse of time between the date of the making of an SEO, and any subsequent new application, unless there are exceptional and compelling circumstances.

49. In this appeal, counsel on behalf of NECI, submits that the effect of s.14 was, essentially, to create a framework whereby the *only* parties who could be "*substantially representative*", if employee numbers only were to be counted, would be the same category of parties who, under the 1946 Act, had had the power to apply for an REA. She submitted that the effect of this was that the applicants would "maintain a grip" on the process, thus leaving NECI unable to embark on a review of or apply for an SEO.

50. I agree with Simons J. that these objections are unsustainable. The High Court judge pointed out that what was provided for was a simple statutory threshold issue. But, once the threshold was met, an applicant thereafter enjoyed no special status in a subsequent examination before the Labour Court. Thus, it was open to an objector, such as NECI, to then raise the question of whether or not an applicant was actually substantially representative. Subject to a right on the part of an objector to make effective submissions to vindicate its rights in relation to the question of representation, I do not see that there can be a constitutional objection to the terms of s.14 in itself. In fact, the argument would, I think, require an unconstitutional reading of the Act, based on precluding an objector from ever making submissions on the representivity issue.

51. Just as in the case of the objection raised on the definition of "economic sector", NECI's argument seems to proceed on the basis of an objector being presented with a *fait accompli* by the Labour Court, once a decision is made to embark on an examination. The objection is predicated on an assumption that an objector would actually be precluded at

a hearing from raising such questions at any stage. Such preclusion would necessarily limit an objecting party's constitutional and statutory rights to make submissions as to how the 2015 Act should be applied in any given case. On an application of the double-construction rule, a court should not adopt what would be an unconstitutional approach.

52. This submission is not only incorrect, but, in fact, demonstrably so. As a matter of fact, NECI did seek to have the question of representation raised in its pre-hearing submissions to the Labour Court, and at the hearing itself. The question as to whether the Labour Court adequately dealt with the issue is a different matter entirely. It is considered later in the judgment under the heading "IV: The Statutory *Vires* Issue". But, while the term "substantially representative" is not defined, this does not raise a constitutional fair procedures issue. Each application to the Labour Court must necessarily depend on its own facts and circumstances. These may vary substantially. The Labour Court has made a number of decisions where it can be said that the level of representivity in each case was real, identifiable, and far beyond insignificant. This is not, of course, to say that the Labour Court would be free to arrive at any determination regarding substantial representation without there being a basis for it.

Section II

Article 15.2.1 of the Constitution

The Legal Principles

53. The principles and policies test is best understood as a means whereby, recognising the present day realities of the administrative state, the Oireachtas, when it delegates power by law, does so only in a manner that the delegate or subordinate body does not, itself, become a legislator. This fundamentally important core requirement of democracy is attained by ensuring that the power thus delegated is subject to boundaries and limitations as to the scope within which the delegated power may be exercised. It recognises the reality that, on occasion, persons or bodies entrusted with delegated power may test the limits or boundaries of the power vested in them. Just as organs of State have defined responsibilities and duties in the Constitution so as to operate within their respective spheres, so, too, by analogy, must delegates.

54. The modern day exposition of the principles and policies test, as applied to considerations of whether delegated law-making offends Article 15.2.1 of the Constitution begins forty years ago in *Cityview Press*. It is more recently explained in *Bederev v. Ireland* [2016] 3 I.R. 1, and *O'Sullivan v. Sea Fisheries Protection Authority* [2017] 3 I.R. 751. Thus, save as necessary, this judgment does not have to consider earlier judgments such as *Cooke v. Walsh* [1984] I.R. 710; *Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232; and *McDaid v. Sheehy* [1991] 1 I.R. 1.

55. As explained in *Cityview*, the identification of principles and policies in legislation is to be seen as a series of indicators or pointers to the ultimate issue: whether or not the Oireachtas has acted as sole *legislator*, or has impermissibly delegated legislative power.

56. The words "principles and policies" do not occur in the Constitution. They are, therefore, best seen as an indispensable foundation-stone to assist courts in deciding the

fundamental issue as to whether there has been an unlawful delegation of legislative power.

57. It seems an earlier judgment of this Court, *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 came to be understood as setting out two tests. The first was whether there had been a delegation of legislative power. But the idea developed that there was a second, and independent, but related, "principles and policies test". But such an independent test could not acquire some status of constitutional equivalence, standing side-by-side with the words of the Constitution itself. The essential task is to determine whether the Oireachtas had failed to comply with its constitutional duty as sole legislator. Any gauge must be seen as one derived from the words of Article 15.2.1 itself. An identification of principles and policies cannot, therefore, be seen as a form of free-standing vantage-point permitting a court to engage in what might be seen as a critique of the essential substance or *policy*, in a political sense, of what the Oireachtas chooses to provide for in legislation. Absent a violation of the Constitution, for a court to criticise such underlying policy would necessarily offend against the fundamental principle of separation of powers identified throughout the framework of the Constitution, but rooted in Article 5, which describes the nature of the State as sovereign and democratic. Later, this judgment touches on areas where, I think the judge adopted an incorrect starting point in what is an admittedly difficult area of law.

58. That said, the *thinking* behind a principles and policies approach is fundamentally important to the protection of the principle of separation of powers. That underlying intent is to ensure that delegated bodies, or the executive, do not trespass on the constitutional power of one of the vital organs of the State, that is, the legislature, by ousting its exclusive role, by such delegate-body itself engaging in "legislation".

59. Article 15.2.1 must be seen within the framework of the entire Constitution. The simple words of Article 5, that Ireland is a sovereign independent democratic state, seen in conjunction with the provisions identifying the three organs of government, each with their specific powers, functions and duties, define how the principle of separation of powers is to operate. It is imperative that courts and the public be in a position to ensure that those entrusted with a regulatory role by the Oireachtas, or members of the executive, do not exceed their constitutional or statutory remit by straying into a legislative role. If they do, it must follow that they are not acting in accordance with the principles contained in the Constitution. Whether legislation contains sufficient identifications of the principles and policies must, therefore, be the means whereby the Court can determine whether there has been a limited or unlimited delegation of power (*Bederev*, paras. 40 - 44).

60. As O'Higgins C.J. pointed out earlier in *Cityview*, the ultimate responsibility rests with the courts to ensure that constitutional safeguards remain, and that the authority of the national parliament in the field of law-making is not eroded by the exercise of powers not 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.

As described earlier, therefore, the question will be 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.

61. The fundamental precept contained in Article 15.2.1 is therefore the prohibition of delegated law-making. The literal translation of the Irish text assists in understanding this point. The words "*Bheirtear don Oireachtas amháin leis seo an t-aon chumhacht chun dlíthe a dhéanamh don Stát; níl cumhacht ag údarás reachtaíochta ar bith eile chun dlíthe a dhéanamh don Stát".* Translated literally, this conveys the sense that "*the power to make laws for the State is hereby given to the Oireachtas alone; no other legislative authority has power to make laws for the State*" (*Bunreacht na hÉireann: A Study of the Irish Text, Ó Cearúil*, Oireachtas p.226-7). Ultimately, the test, therefore, is whether there has been a usurpation, arrogation, or trespass on the legislative power of the Oireachtas, which, by the Constitution, can only be vested or given to the Oireachtas itself.

Bederev

62. I have had the opportunity of reading, in draft form, Charleton J.'s illuminating concurring judgment in this appeal. I entirely agree with his helpful and useful comments on the origins and nature of the principles and policies test. His earlier judgment in *Bederev* emphasised that the legislation under scrutiny must be considered as a whole, with a view to discerning the "mischief" or issue to be addressed in the legislation. A court may look to the long title, the individual sections, and the schedule in order to discern the power delegated, its limitations or boundaries. A court is entitled to consider the purpose and effect of the provisions, the historical frame of reference within which they are to operate, and previous enactments that are required to be repealed. A court is entitled to analyse particular words within their immediate and overall context. The legislation must set boundaries, and a defined subject matter, such that those affected by the legislation could discern those boundaries, and the subject matter of the legislation (*Bederev*, paras. 40 – 44).

63. But there are limits to the scope of inquiry. Thus, Charleton J. identified the following as being constraints. First, an assessment of the Act in order to determine whether or not it contains sufficient principles and policies, should be based on a reasonable, but not far-reaching, examination of the provisions. Second, the purpose of the various principles and policies criteria is to ask whether the legislation sets boundaries, in the sense of defining rules of conduct, or guidelines. Third, does the legislation have defined subject matter, and contain basic conditions of fact and law? Fourth, is the legislative purpose of the provisions discernible by identification of objectives or outcomes, as well as principles? Fifth, is the power delegated sufficiently delimited? Sixth, does the exercise of the subordinate power contain sufficient safeguards? Seventh, the primary question, is there an abdication by the Oireachtas of its constitutional role? These are the key questions.

64. But legislation may nonetheless contain broad definitions, provided they are sufficiently definite and precise to permit a court to determine compliance with Article 15.2.1. The Oireachtas does not vest a decision-making body with a decision-making power which

involves choices. These may be broad, or more narrow, dependent upon the legislation. A court will ensure that a subordinate body is not vested with an absolute and untrammelled discretion. A court may also have to assess the extent to which a policy is discernible within viable legislative choices. (See paras. 40 – 46 of *Bederev*.)

O'Sullivan

65. In *O'Sullivan v Sea Fisheries Protection Authority* [2017] 3 I.R. 751, this Court gave further consideration to this question, looking at the same criteria as raised in *Bederev*, but seen in a different way, focusing on the breadth and nature of the choices delegated. O'Donnell J. considered that it would be an error to "*scour the statute in an effort to discern detailed guidance for the subordinate body*" (para 39). Instead, the judgment in *O'Sullivan* laid emphasis on the concept that the entire concept of subordinate legislation necessarily depends upon decisions being made within a range of options. For this reason, a test asking the question in the negative will often be of assistance. Such a question will enquire whether the area of rule-making authority delegated is so broad as to constitute a trespass by the delegate, or subordinate, on an area reserved to the Oireachtas. This surely is the ultimate question, based as it is on the words of the Constitution. The judgments in *Bederev* and *O'Sullivan* both acknowledge that there may be areas where a subordinate may engage in a degree of freedom of choice; there may be relatively wide areas which are circumscribed by principles and policies; or a more narrow area which may need a lesser enunciation of principles and policies, because there are only a limited number of outcomes available.

66. I mention here an issue which arises later in this judgment, where it is necessary to consider how E.U. law evolved subsequent to four judgments of the CJEU. The State appellant's case is that this evolution had a significant bearing on Chapter 3. The judgment in *O'Sullivan* makes the point that the range of permitted available choices within the legislation may itself be a very important consideration. The earlier judgment of Fennelly J. in this Court in *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 also makes the point that, in some instances, for example, because the range of decision-making is restricted by E.U. law, an area of delegation may be narrowed, as a result of other legislation, whether of national or E.U. derivation. Thus, the effect can be to narrow the area of choice. In *O'Sullivan*, O'Donnell J. compared the position in the case before him with the range of the choices available to the Minister in the earlier case of *Maher v, Minister for Agriculture*. In *Maher*, a decision to be made by a Member State could have undeniable significance for individuals concerned, but, as a consequence of E.U. legislation, the choice of policy available to the relevant Minister had been reduced almost to vanishing point. As Fennelly J. explained in *Maher*, arising from E.U. law a Minister could be seen as acting as the delegate of the Community. As a result, the area of delegation in which that Minister was operating was small and constrained. Later, in *O'Sullivan*, O'Donnell J. pointed out that, the same way as in *Maher*, the area of policy left to the Member State on this aspect of fisheries regulation had been severely reduced. He emphasised that the fact that there is a choice does not imply a capacity to determine policy. In fact, the matters dealt with in the Fisheries Regulations, considered in

O'Sullivan, could be seen as simply incidental, supplemental and consequential to the provisions of the relevant European Regulations.

67. As has been perceptively observed, this characterisation in *O'Sullivan* presages a "negative recasting" of the test. This involves an approach whereby, rather than seeking all principles and policies, a court should ask the question as to whether the absence of such principles and policies actually trespasses on the power of the Oireachtas? For this purpose, a focus on the breadth or narrowness of the delegation may be a useful heuristic. This may involve an approach whereby, within a narrow area of delegation, a court should consider whether the legislature has considered the possible choices, and found them all to be acceptable. This must, surely, be the correct approach, again based on the text of the Constitution itself. (See *Kelly* on the Irish Constitution, 4.2.46.)

Some Conclusions

68. It can be said, therefore, that while each part of the Act, provision by provision, must be considered, the approach ultimately will be a holistic one, perhaps comparable to a viewer examining a picture at an exhibition. The court must examine the words and phrases. There may be close scrutiny of particular words. The judge may look at the long title and the schedules. He or she must take care to ensure that there is no over-close examination of some individual part of the picture, to the detriment of understanding the entirety. But a judge must also ensure that he or she has correctly understood each part of the picture, as part of their totality. A misapprehension in relation to one important part of the legislation, may distort and lead to a wrong conclusion as to the entirety.

69. Thus, in this case, an assessment of Chapter 3 must impart suitable weight to each of its provisions in their context. Then the analysis may turn to the context of the legislation, seen as a whole, having regard to the range or scope of the delegation, and to the range of choices vested on a subordinate, or delegate. The questions will then be whether there are sufficient limiting principles and policies so as to confine the area of choice, or does the legislation in question actually trespass on the legislative power? Such assessment must acknowledge the reality of the Constitution as a living document and a continuously operative charter of government, which does not, and cannot, require the Oireachtas to predetermine every choice made by a subordinate or delegate. What is necessary, rather, is to lay down basic, discernible rules of conduct or guidelines which the subordinate body must observe.

70. The fact that delegates will necessarily have to make choices is inevitable. Some such choices will depend on expertise. It must be acknowledged there are some significant areas of decision-making in which the Oireachtas itself would not be the appropriate forum to make choices of the type involved in this case. The question, then, is whether the Oireachtas has set sufficient standards by way of policies or objectives, so as to ensure what is taking place is regulatory, rather than legislative? The delegated choice may be narrow or broad, but the Constitution will not be interpreted in a manner which would deny the Oireachtas the necessary attributes of a legislature in a democratic society, including a degree of legislative flexibility, provided the exercise of the choice is consistent with the terms of the Constitution itself. Subject to the Constitution, the test

must not be understood as one whereby a court should second-guess or express views or judgements on policies which have been made by the Oireachtas. The range of choices may arise from statutory provisions which either give effect to, or reflect, principles or concepts of E.U. law which have the effect of setting parameters to the scope of the delegated choice.

Comparisons

71. I pause here to refer to a number of judgments from a different jurisdiction for comparative purposes. I acknowledge that the cases all arise from different eras, are derived from a different constitutional tradition, and were decided against the background of different economic understandings than arise in this case.

Schechter Poultry Corporation v. United States and Panama Refining Co. v. Ryan

72. The judgment of the Federal Supreme Court in *A.L.A. Schechter Poultry Corporation v. United States* [1935] 295 US 490, nonetheless involves facts and circumstances which bear a considerable resemblance to this case. The observations of that court afford an interesting and useful contrast to the considerations arising here. Like Article 15.2.1 of the 1937 Constitution, Article 1 of the Constitution of the United States provides that all legislative powers therein granted are vested in a Congress of the United States, which consists of a Senate, and a House of Representatives.

73. The judgment in *Schechter* is, of course, to be seen in the context of then contemporary concerns as to how executive power should be controlled. The Supreme Court of the United States concluded that Congress was not permitted by the Constitution to abdicate or transfer to others the essential legislative functions with which it was vested. The court referred back to its judgment in *Panama Refining Co. v. Ryan* [1935] 293 U.S. 388, decided earlier in the same year, and in *Schechter* concluded that Congress might leave to "selected instrumentalities" the making of subordinate rules within prescribed limits, and the determination of facts to which the *policy*, as declared by Congress, was to apply; but only Congress itself could lay down the *policies* and establish standards (p.530 *Schechter*). The Court held that the extent of the delegation of legislative power sought to be made to the President of the United States by the National Industrial Recovery Act 1933 was so great as to violate Article 1 of the Constitution of the United States. Earlier in the same year, in *Panama Refining*, Chief Justice Hughes explained that the constant recognition of the necessity and validity of legislative provisions, and the wide range of administrative authority which had been developed by means of them, should not be allowed to obscure the limitations of the power of a delegate, if the Federal Constitution system was to be maintained.

74. Then, in *Schechter*, the court noted that s.3 of the National Industrial Recovery 1933 Act provided that "codes of fair competition", which were to be the "standards of fair competition" for the trades and industries to which they related, might be approved by the President upon application of representative associations of the trades or industries to be affected, or might be prescribed by him on his own motion. But the court observed that the meaning of the term "fair competition" was not expressly defined in the Act, and

was clearly not the mere antithesis of unfair competition, as known to the common law, or "unfair methods of competition" under the Federal Trade Commission Act (p.531).

75. But the court held that a delegation of legislative authority to trade or industrial associations, empowering them to enact laws for the rehabilitation and expansion of trades and industries, would be "utterly inconsistent" with the constitutional prerogatives and duties of Congress (p.537). Congress could not delegate such legislative power to the President to exercise an "unfettered discretion" to make whatever laws he thought might be needed for the rehabilitation and expansion of trade and industry, in circumstances where the limits set by the Act to the President's discretion were, essentially, based on presidential findings only, and did not offer standards for a trade, industry, or activity. As will be seen, the legislative constraints on the Labour Court imposed by the Oireachtas in this instance were very much more limited than those under consideration in *Schechter*.

Mistretta v. United States

76. More than half a century later, in *Mistretta v. United States* [1989] 488 U.S. 361, Blackmun J. returned to these themes. He referred to an earlier decision, *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), 406 [1928], where the court posed the material question as being whether Congress had, by legislation, identified an "*intelligible principle*" to which the person or body authorised to exercise the delegated authority was directed to conform? In *Mistretta*, Blackmun J. also referred to a further judgment, *American Power & Light Co. v. SEC*, 329 US 90 (1946), where the Federal Court deemed it sufficient if the legislation laid down the *general policy* to public authority which was to apply it, and the boundaries of the delegated authority. (See, too, the informative background in the judgment of Denham J. in *Laurentiu*.) These United States authorities, therefore, pose two further helpful questions to a court's inquiry: first, what are the "*policies*" underlying the legislation; and, secondly, are there "*intelligible principles*" laid down in that legislation, whereby those policies are to be attained?

77. As this judgment now seeks to explain, the underlying policy of Chapter 3 of the 2015 Act was to create a statutory framework containing sufficient guidance to assist the Labour Court in arriving at conclusions consistent with criteria and values identified in the Chapter itself. The question then is whether there are identifiable or discernible principles contained in the legislation which are the means to attain those ends, and which do not offend Article 15.2.1? The answers to these various questions requires a more detailed consideration of the provisions, now seen in light of what was held in the High Court.

"Economic Sector", and the statutory guidelines contained in the Act

78. The main question, therefore, is does Chapter 3 of the 2015 Act comply with Article 15.2.1 of the Constitution? This may be conveniently considered under a number of main sub-headings. These include, first, whether the statutory criteria identified in ss. 15, 16 and 19 of the Act, constitute sufficient guidance to the Labour Court in making recommendations? There must then be an analysis of the term "competitiveness", a term found in s.16 of the Act, to be seen in conjunction with s.19. Thereafter, this judgment considers the question of statutory safeguards, in the form of the power of the Oireachtas to review the legislation. This is dealt with under s.17 of the Act. In *McGowan*, this Court

criticised the fact that, the 1946 Act, contained insufficient guidelines or criteria, which would set out a road-map whereby the Labour Court could decide whether or not to register an employment agreement.

79. In this part of the judgment, which deals with Article 15.2.1, there are areas where I regret I disagree with the learned High Court judge's interpretation of the law. This disagreement may be seen as arising from a misapprehension as to how the legal authorities in this complex area, should now be interpreted and applied.

80. I begin with an issue touched on previously in the judgment. As set out earlier, Simons J. rejected a submission made on behalf of NECI in relation to the application by the Labour Court of the term "economic sector". But, later, when engaged in an Article 15.2.1 analysis, the judge appears to have concluded that the term itself was "too open-ended" to provide meaningful guidance to the Labour Court (para. 144). He sought to illustrate this conclusion by reference to the fact that there had been a dispute between the applicants and objectors in this particular application as to how the sector should be defined.

81. I think the term "economic sector" is one commonly used, and well understood. The fact that there was a dispute between the parties as to how the term should be *applied* does not logically lead to a conclusion that the term itself is too open-ended. As a matter of fact, the Labour Court did reach a conclusion on the question, and the High Court judgment did not take exception to that decision. A conclusion that the term is too open-ended does not sit comfortably with the earlier correct ruling that the Labour Court must have the power to redefine a class, type or group of workers, the subject matter of an application to it. If the provision was sufficiently precise to allow for a clear determination on jurisdiction, it is hard to conclude that the same definition was itself too open-ended, when seen from an Article 15.2.1 perspective.

82. The fact that the words used by a drafter raised a question of *how* they should be applied in a given situation does not mean there was any deficiency in the definition itself. NECI's objection was as to the Labour Court's *application* and decision on the issue, based on the term "economic sector" itself. But the legislature is entitled to express itself in broad terms, provided there are limitations and safeguards. The fact that a decision had to be made does not lead to a conclusion that the term itself was too open-ended. I think it is difficult to reconcile these two observations made in the judgment in relation to the term "economic sector". I respectfully differ from the judgment of the High Court on the conclusion that the definition is too open-ended.

83. I turn now to other key parts of Chapter 3 contained in ss. 15 and 16. As elsewhere, s.15(1) of the 2015 Act also sought to deal with the concerns expressed in *McGowan*. That section provides that, once it has engaged in an examination of the economic sector, and considered the question of representivity, the Labour Court is to be satisfied that it is *normal and desirable practice*, *or that it is expedient*, to have separate terms and conditions relating to remuneration, sick pay schemes or pension schemes in respect of workers of the particular class, type or group in the economic sector in respect of which

the request is expressed to apply. The court must also be satisfied that any recommendation is likely *to promote harmonious relations between workers of the particular class, type or group and their employers* in the economic sector in respect of which the request is expressed to apply. (s.15(1)(c) and (d)).

84. Then, s.16(2) and (4) contain a description of what the learned High Court judge described as "*outcomes*". These sections provide that, when making a recommendation under this section, the Court shall have regard to the following matters: the "*potential impact on levels of employment and unemployment in the identified economic sector concerned*"; the "*terms of any relevant national agreement relating to pay and conditions for the time being in existence"*; "*the potential impact on competitiveness in the economic sector concerned*"; the "*general level of remuneration in other economic sectors in which workers of the same class, type or group are employed*; *and that the sectoral employment order shall be binding on all workers and employers in the economic sector concerned*" (s.16(2)(a), (b), (c), (d), (e)). The Court is not to make a recommendation under this section unless it is satisfied that to do so would *promote harmonious relations between workers and employers* and assist in the avoidance of industrial unrest in the economic sector concerned, and the making of an SEO is reasonably necessary to *promote and preserve high standards of training and qualification, and ensure fair and sustainable rates of remuneration, in the economic sector concerned* (s.16(4)). As is obvious, there is some textual overlap between s.15 and s.16. The promotion of "harmonious relations" arises both in s.15(1)(d) and s.16(4)(a). Section 15(1)(c) also refers to what is "*normal and desirable practice*", or what is "expedient". I deal with these provisions in that same sequence.

85. The High Court judge was not persuaded that the various provisions in s.16 were sufficient:-

> *"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."*
> (Emphasis added)

86. Addressing the potential impact on employment levels, the terms of a national pay agreement, competitiveness, and general levels of remuneration, and the binding scope of an SEO, the judgment observed that these "outcomes" were "*the only direct constraint on the Labour Court, and, by implication, on the Minister's power to make delegated legislation.*" (para. 123)

87. The judgment expresses the view that, whereas these outcomes might well be laudable or desirable, the statutory language used was 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 was because the consequences of making a sectoral employment order were so far-reaching, and the interests of the principal stakeholders, namely, the employers, workers and consumers; were not necessarily aligned. The fixing of high rates of remuneration might well be welcomed by workers, but may limit competition, and thus adversely affect consumers (para. 124).

88. The judge cited passages from *Bederev* and *O'Sullivan*, and other earlier authorities. The law, as now clarified, continues to acknowledge the fundamental importance of a principles and policies test. Both must be discernible for the purpose of discerning how the legislature sets out boundaries. I accept there is a risk of being over-simplistic in analysing what is a rigorously reasoned judgment. But I think that, in the analysis of s.15 and s.16, there were points where there was too great a focus on particular terms, rather than an assessment of the overall and cumulative effect of the provisions when seen as a whole. The passages quoted above illustrate the difficulty in seeing a principles and policies test as being something free-standing, that is, as one independent of whether or not there has been an unconstitutional delegation.

89. Thus, a question as to whether outcomes might be "laudable" or "desirable" is not material to a challenge under Article 15.2.1. The fundamental question for a court is not whether outcomes are meritorious, it is, rather, whether the legislation trespasses on the power of the Oireachtas, which sought to vest particular powers in the Labour Court, a subordinate body? By its very nature, the Oireachtas as sole legislator, is empowered to provide broad or narrow statutory guidelines. The test, therefore, raises the question as to whether there *are* discernible intelligible policies in the legislation, not as to whether the policies are meritorious, or otherwise.

90. I think the reference in the passage quoted to the word "*outcomes*" seems to avoid the consequence of using that term. The word "outcome" is not itself value-neutral in the context in which it is used. It must be seen as inextricably linked to the legislative *means* chosen to achieve those outcomes. This leads necessarily to the conclusion that these antecedent means to attain those *outcomes* must be policies. The term "policy outcome" is well known. If the Oireachtas has identified the type of *outcome* or *result* it wants achieved, it must also, necessarily, be setting out guidelines whereby those particular goals or results are to be achieved. These are, in fact, legislative goals, to use the term employed in *Mistretta*.

91. It may well be true that setting minimum terms and conditions for an economic sector might require choices by the Labour Court. However, such decisions made by that body are not themselves *legislative* policy choices. They are, rather, decisions to be made by that delegated statutory body within a prescribed legislative framework, as set out in s.15 and s.16, within safeguards identified in s.17, and, as will be seen, in *conjunction* with the guidelines also contained in s.19, regarding the question of "competitiveness", all of which narrow the choices substantially.

92. The fact that the consequences of such choices may be "*far-reaching*", or the fact that the interests of the principal stakeholders are not necessarily be aligned, may be so. Choices

have consequences. But this is not the Labour Court legislating; it is, rather, engaging in the decision-making power which the Oireachtas actually vested in it by law, and which power, as will be seen, is subject to safeguards. In the earlier case law, there are illustrations of powers vested that were so inordinately broad as to be incapable of being rescued by any safeguards, even an attenuated power of review by the Oireachtas. *McDaid v. Sheehy* [1991] I.R. 1, provides an example of a very broad power vested in the relevant Minister, where there was a limited form of Oireachtas review, but that must be seen as a very extreme case. The fact that a power may be broad does not absolve a court from considering the extent of the safeguards provided for review of the legislation by the legislature itself.

93. Earlier, the words "*normal and desirable*" practice, contained in s.15(1)(c), were touched on. I do not think these words are to be seen as pure happenstance, or anodyne generalities. The word "normal" again goes to legislative policy. It expresses the thinking of the Oireachtas that the Labour Court continue with the processes in which it had previously engaged over decades, albeit now subject to Chapter 3 statutory conditions, to be applied in the context of making SEO's, rather than registered agreements. The same words "*normal and desirable*" were actually contained in s.27(3)(b) of the 1946 Act. Even at that time, the words referred back to even earlier sectoral arrangements between workers and employers. The guidance contained in the relevant sections of the 2015 Act shows that this, in fact, was a clear legislative intention; it was limited by the consideration that the rates of remuneration, as set, should be "fair and sustainable". In any such choice, there may obviously be advantages for employees or employers in the promotion and preservation of high standards of training and qualification. Such benefits may arise, in particular, for employees, but also for employers. This does render the range of choice into one without conditions.

94. I do not think, either, that the references to *protection* and *preservation* of harmonious relations between employers and employees (s.15(1)(d); s.16(4)(a)) should be seen as purely aspirational. The words are to be viewed, rather, as a legislative acknowledgement of the process in which the Labour Court, and even non-statutory bodies preceding it, had historically engaged in dealing with these important issues. The words give expression to the value of the common good, referred to explicitly in the Preamble, and which resonate in Article 1 of the Constitution. (*O'Callaghan v. Commissioner of Public Works* [1985] ILRM 364; *Crotty v. An Taoiseach* [1987] I.R. 713; *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, at para 154.) To a greater extent than might first be appreciated, the powers vested by s.27(3) of the 1946 Act were, in large part, being *re-vested*, but subject to procedural limitations and guidelines by which these objectives were to be attained. What was imparted to the Labour Court by the 2015 Act was not something entirely new, rather, it was the legislative endeavour to create a constitutionally compliant structure for a decision-making process in this area, which had been ongoing for decades prior to *McGowan* in 2013.

95. Standing back, even after a consideration of just these two sections, I think the State appellants' argument must already be seen as strongly persuasive. These provisions

contain what were actually legislative policy choices made by the Oireachtas, in vesting these powers in the Labour Court. The Labour Court was, in turn, entrusted with making these choices, within limitations, which in some respects may indeed be broad and far-reaching. But, provided it can be shown this was the intent of the Oireachtas, and there were adequate safeguards to ensure this was not *legislation*, then it was within the province of the Oireachtas to identify outcomes sought to be achieved, and to leave the facts to be determined in any individual case to the Labour Court. The fact that the choices vested were broad did not, in itself, turn those choices into legislation. The position is entirely different from that which obtained, for example, in *McDaid*, or *Laurentiu*, where few, if any, statutory limits or guidance were discernible in the legislation then under consideration.

96. The judgment under appeal went on to hold that even the interests of individuals within the same category of stakeholder would not always coincide. NECI contends that the economic model of small to medium sized electrical contractors is very different from that of large scale contractors. Here again, what is in question is actually a *legislative* policy choice. The fact that the interests of those involved might, potentially, diverge is implicit in that choice. But the parameters defining it were identified by the Oireachtas, not by the Labour Court.

97. It is an inescapable fact that, in response to the judgment in *McGowan*, one of the purposes of the 2015 Act is to legislate for the process of collective bargaining between employers and trade unions, or what are termed "excepted bodies" (s.27(1A) and (1B). For this purpose, Part III of the Act contains a definition of "collective bargaining" and "excepted bodies" which, independent of employers, may carry out negotiations regarding wage and other working conditions. The *effect* of such policy choices may well be that there might be differences in interest between what are described as the same categories of stakeholder. The consequence of such sectoral bargaining may be that there will be employers who might well prefer to have had lower wage rates, or remuneration. But this is the choice made by the Oireachtas, though objectors, such as NECI, are entitled to make submissions under Chapter 3 (s.16(1)). If a decision is made on foot of the Act by the Labour Court, and thereafter made law, this may necessarily involve a process of adjustment by all employers in the sector. But, subject to these provisions, this is the consequence of the structure and text of the Act, and the policy of the Oireachtas as laid down therein.

98. The judgment then held, at para. 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." (Emphasis added in para. 83)

99. I respectfully disagree that these were policy choices made by the Labour Court. They were, rather, decisions to be made within a set of given parameters laid down in legislation, so as to achieve outcomes with particular effects, or consequences. I respectfully disagree that the terms are amorphous, when seen in their full context. Here, and elsewhere, I think the judgment under appeal reflects an approach to the principles and policies issue which is no longer favoured. At risk of repetition, *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 came to be understood as suggesting that there were two, albeit related, tests, (i) the principle that the Oireachtas may not delegate the power to make, repeal or amend legislation, and (ii) a "*principles and policies test*". But to adopt such an approach might, for example, raise a potentially very difficult question as to the standard by which a court would assess whether there was a "*proper*" statement of principles and policies in legislation? Such a question, in turn, would raise an issue as to the meaning of the word "*proper*", and who should make such assessment? It would also beg the question, never fully answered in *Laurentiu*, as to the *constitutional* derivation of a test with two strands, where the second, a "principles and policies" element, might be seen as partially independent of the first. The law is as now set out in *Bederev* and *O'Sullivan*. Applying the legal principles as now set out, I do not agree that a constitutionally compliant statement of principles and policies was absent from the legislation. In the words of O'Donnell J. in *O'Sullivan*, the 2015 Act does not trespass on the function of the Oireachtas.

100. As a comparison, the powers vested by the 2015 Act are very significantly more limited than the very wide powers vested in the President of the United States, described in *Schechter*. I think the passage from the judgment quoted above indicates a misapplication of the test, where the ultimate issue is whether there has been an unlawful delegation of legislative power. In any such process, there may often be a line to be drawn between the power delegated, and the choice to be made within that power. But the ultimate question is whether the delegation was within the scope of Article 15.2.1? In my view, it was.

"Competitiveness"

101. The judgment contains passages which express concerns on the effect of an SEO on *competition* within the open market. Here, I think, there was a misapprehension. Counsel for the State appellants submit that what was in contemplation is not free market *competition*, but a different concept; that of "*competitiveness*". Section 16(2)(c) provides that, when making a recommendation, the Labour Court shall *"have regard" to "the potential impact on competitiveness in the economic sector concerned …".* The judge observed:-

"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." (Emphasis added)

102. The emphasised passage raises the question as to how the term "*market rates*" is to be understood? In fact, in a number of subsequent passages, the terms "competition", and "competitiveness", are used interchangeably. I instance here para. 132, where the judgment stated:-

> *"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))."* (Emphasis added)

103. Whether there were objectives in the Act which might, on one understanding, be inconsistent with each other, is not material. In fact I think this was an incorrect inference. Even were there a conflict of objectives in legislation, it would require something very radical indeed to raise a delegation of powers issue. A court should not second-guess the Oireachtas on policy options. But, additionally, there was, I think, an underlying misapprehension regarding the legislative choice made when the term "competitiveness" was used. This must now be explained.

E.U. Competition Law

104. The High Court judgment raises the issue concerning whether an SEO in the sector could accord, or be compatible with, national or E.U. *competition law*. This again raises the issue of the scope or range of choices available to the Labour Court, a matter discussed in *O'Sullivan*. The State's case is not that the range of choices available were dictated or mandated by E.U. law, but, rather, that the 2015 Act must be seen against the background of an evolving understanding of E.U. law on the concept of competitiveness.

105. At para. 135, the judge comments that the Labour Court had concluded in its recommendation that one of the outcomes of making an SEO 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* (para. 136). He held that, while it was not immediately apparent, counsel's submissions and the State's affidavit evidence, were both to the effect that one of the objectives of making an SEO was to restrict the ability of contractors from E.U. Member States to compete for tenders within this State by relying on lower labour costs and practice, known as social dumping. Having cited passages from an affidavit sworn on behalf of the State appellants referring explicitly to the SEO system as a legislative response to the risk of social dumping under E.U. freedom of movement rules, the judgment held:-

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

106. The judgment concludes that the logic of the State appellants' case was that the difficult and potentially controversial policy decision as to how to balance (i) the principles of competition and freedom to provide services within the internal market, against (ii) the objective of ensuring appropriate rates of remuneration for workers, has been left over to the Minister (and, indirectly, to the Labour Court) (para. 139). The judge observed:-

> *"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."* (para. 140)

This had not happened, and:-

> *"… 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."* (para. 141)

107. The issue of how the term "competitiveness" is to be understood is actually quite fundamental. It goes to the issue of a relatively narrow range of choices, when seen against the background of E.U. law (*O'Sullivan*). As I now seek to explain, the judgment under appeal contains a misapprehension as to this part of the legislative picture, which, in turn, led to a misunderstanding of the scope of the overall legislative choice. For context, several sections of Chapter 3 must be considered in conjunction with each other.

Section 19 of the 2015 Act

108. I refer, first, to s.19 of the Act which must be quoted in full. It provides:

> *"19(1) A sectoral employment order shall apply, for the purposes of this section, to every worker of the class, type or group in the economic sector to which it is expressed to apply, and his or her employer, notwithstanding that such worker or employer was not a party to a request under section 14 , or would not, apart from this subsection, be bound by the order.*
>
> *(2) If a contract between a worker of a class, type or group to which a sectoral employment order applies and his or her employer provides for the payment of remuneration at a rate (in this subsection referred to as the "contract rate") less than the rate (in this subsection referred to as the "order rate") provided by such order and applicable to such worker, the contract shall, in respect of any period*

during which the order applies, have effect as if the order rate were substituted for the contract rate.

(3) If a contract between a worker of a class, type or group to which a sectoral employment order applies and his or her employer provides for conditions in relation to a pension scheme or a sick pay scheme (in this subsection referred to as the "contract conditions") less favourable than the conditions (in this subsection referred to as the "order conditions") fixed by the order and applicable to such worker, the contract shall, in respect of any period during which the order applies, have effect as if the order conditions were substituted for the contract conditions."

109. Significantly, perhaps, the judgment under appeal does not directly refer to the wording of this provision. Had such direct reference been made, I think this would have led to a different conclusion, and the learned trial judge would have come to the view that the parent legislation did indeed have the effect for which the State appellants contend.

Posted Workers

110. Counsel for the State appellants argues that one of the purposes of Chapter 3 is as a legislative response to the problem of employers bringing in posted workers from one E.U. member state to this State, and seeking to engage in unfair competition on the basis of lower wage rates. Here, again, one must look to the *effect* of s.19, coupled with other provisions. Do they exhibit a policy to be attained in accordance with principles set out in the statute? That question must be answered in conjunction with the reference in s.20(5)(c) which prohibits victimising an objector to an unlawful contract by changing such objector's "location or place of work". This makes sense in the context of posted workers from outside this State. So, too, do the words of s.16(2), where the Labour Court is not only to "*have regard*" to levels of employment and unemployment in the identified economic sector, and the terms of any relevant national agreement relating to pay and conditions, but also *"(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; and (e) that the sectoral employment order shall be binding on* **all workers and employers in the economic sector concerned***".* (Emphasis added) When seen together, these linked and thematically consistent provisions make sense, and can be seen as a response to the issue of posted workers, reflecting an evolution of E.U. law, including in European Court of Justice case law, to which it is now necessary to refer.

The *Viking/Laval* Quartet

111. Four CJEU judgments form part of the background. These are, namely, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet & Others*, Case C-341/05; *International Transport Workers' Federation & Anor. v. Viking Line ABP & Anor.,* Case C-438/05; and see also Case C-319/06, *Commission v. Luxembourg* [2007] ECR I-4323; Case C-346/06, *Rüffert v. Land Niedersachsen* [2008] ECR I-1989.

112. These four judgments, consequential in all senses, are now known as the "*Viking/Laval* quartet". In the first two, *Laval* and *Viking*, employees in enterprises had sought to

engage in industrial action in protest against plans to replace workers from one E.U. member state with lower paid employees from another member state. The central issue, which arose in both instances, was the tension between freedom of movement and establishment, guaranteed under Articles 43 and 49 of the then EC Treaties, and the lawfulness of industrial action which might limit those freedoms. In both judgments, the Court of Justice held that the right to take industrial action was a "fundamental right" which formed an integral part of the general principles of community law. However, that court also held that the right was qualified, as it would only be lawful if the restrictions to freedom of movement, and freedom of establishment were both justified and proportionate. But, while the two tests of "justification" and "proportionality" were matters for national courts to determine, justification was to be interpreted as meaning that there was a right to take collective action for the protection of workers, as a legitimate interest, which, in principle, could justify a restriction of one of the fundamental freedoms guaranteed by the Treaty. With regard to proportionality, the court held that national courts could assess whether a trade union taking industrial action had other means at its disposal less restrictive of freedom of establishment, and had exhausted those means. Rightly or wrongly, both judgments were perceived as giving effect to a principle that industrial action could be challenged by an employer on E.C. law grounds, even if it resulted only in a relatively small restriction of free movement or establishment. The judgments, in turn, gave rise to a perception that there was scope for companies to plan their business affairs in such a manner as to enable them to rely on an international element in order to challenge industrial action. They also had an effect on how the then European Community was perceived in the context of the role of social partnership.

Developments Subsequent to the *Viking/Laval* Judgments

113. Prior to *Viking/Laval*, Directive 96/71/EC concerning the Posting of Workers, and the Framework of the Provision of Services, had been seen by many as a protection against this form of "social dumping". The Directive was transposed into national law (s.20 Protection of Employees (Part-Time Work) Act, 2001).

114. Subsequent to the judgments, the European Commission moved to clarify its view that the concept of competitiveness within the Community, and later the Union, was to be seen as based on a social market economy which aimed at full employment and social progress (See Commission Working Document SWD 2012 (Final) 21st March, 2012, page 8). In the *travaux préparatoires* to an amended Posted Workers Directive, EU/2018/957, the Commission asserted that the Union attributed shared competences between itself and member states, among which were the objectives of promoting employment, improving living and working conditions, and proper social protection, with a view to lasting high employment and combatting of social exclusion. The *travaux* expressed recognition of the roles of social partners, taking into account the diversity of national systems, and the need for facilitating dialogue between social partners. These expressions must now also be seen in light of the fact that, under the Charter of Fundamental Rights, workers are prescribed a right to information and consultation within the undertaking within which they work (Article 27), and hold a right to collective bargaining and action (Article 28).

115. In the course of this appeal, Counsel for the State appellants referred to all these provisions as seeking to ensure that, while cross-border provision of services was facilitated, workers' rights had to be protected, based on an internal market legal basis, and reliant on Article 53(1), and 62 TFEU. It is useful now to describe briefly how E.U. law evolved post *Viking/Laval*.

The Amended Posted Workers Directive, EU/2018/957

116. The amended Directive EU/2018/97 contained expressions of the then social market principles. That instrument explicitly espoused aims of bringing about genuine social convergence, and ensuring that proper provision was made on a cross-Union basis, in order to ensure that, in an integrated and competitive internal market, undertakings would compete on the basis of factors such as *productivity, efficiency, and education and skill level of the labour force*, as well as the quality of goods and services, and the degree of innovation (see Article 2 of the Directive).

CJEU Case Law Post-*Viking/Laval*

117. In case law subsequent to *Viking/Laval*, notably *FNV Kunsten Informatie en Media v. Staat der Nederlanden* (the Dutch musicians' case), C-413/13, the CJEU held that agreements entered into within the framework of collective bargaining between employers and employees, and intended to improve employment and working conditions, must, by virtue of their nature and purpose, be regarded as not falling within the scope of Article 101(1) TFEU. (See also Case C-67/96 *Albany*; Case C-117/97; *Brentjens'*; Case C-219/97 *Drijvende Bokken*). In Case C-437/09, *AG2R Prévoyance*, the court held that, having regarding the principle of social solidarity, the Treaties must be interpreted as not precluding a decision by public authorities to make compulsory, at the request of organisations representing employers and employees within an occupational sector, an agreement *which is the result of collective bargaining*, and which provides for compulsory affiliation to a scheme of supplementary reimbursement of health care costs for all undertaking within the sector concerned.

The Legislative Provisions in Question

118. Seen against this background, the policy behind s.16(2),(4), and s.19 of the Act of 2015, comes into clear focus. Among other considerations, the principles and policies in the Chapter were directed at a particular understanding of *competitiveness*, to be seen as applying on the basis of factors such as productivity, efficiency, education and skill level of the labour force, as well as the quality of goods and services, and the degree of innovation. This understanding is to be contrasted with *laissez-faire* free market *competition*, sometimes based on reducing pay and salary levels. The effect of this was again to significantly narrow the scope of the potential choices available to the Labour Court (*O'Sullivan*).

119. The conceptual similarity between these E.U. instruments and case law, and the words used in s.16(4) of Chapter 3, as setting principles and policies, is not coincidental. The concepts underlying ss. 15, 16 and 19 of the Act are to be seen in the context of the intention of the Oireachtas in delegating these powers to the Labour Court. This is not some form of test external to the legislation itself. The concepts must be found in the

statute itself. But it is this context which explains and identifies what is actually to be found in the Act. This delegation of power came linked with substantial review safeguards. I now move to those protections.

Statutory Safeguards in Chapter 3: Section 17 of the Act

120. In *McGowan*, this Court criticised the fact that an REA might be made without "any possibility of intermediate review". Seeking to address this finding, s.17 of the 2015 Act created a review process at two levels. First, the Minister had to be "*satisfied*", having regard to the report referred to in s.16(3)(b), that the court had *complied with the provisions of Chapter 3*, in which case he or she could "*accept the recommendation*" (s.17(1)), or could otherwise refuse the proposed SEO. The second level of the review is completed by the Oireachtas. The Act provided that a draft of the order was to be "*laid before each House of the Oireachtas"*, and the order was not to be made unless a resolution approving of the draft had been "*passed by each such House*" (s.17(4)).

Section 17: The Minister's Review Role

121. The concerns expressed in the High Court judgment refer back to paras. 24 and 30 in the *McGowan* judgment. There the general provisions of Part III of the 1946 Act were unfavourably contrasted with the safeguarding review provisions of the Industrial Training Act, 1967 considered in *Cityview*. Simons J. observed that, while the form of *ministerial* approval provided for in Chapter 3 was not as extensive as that under the Industrial Training Act, 1967, the function assigned to the Oireachtas was more robust, in that a resolution of each House of the Oireachtas was required (para. 161).

122. Under s.17(1), within six weeks of having received a recommendation, if the Minister is satisfied, having regard to the report referred to in s.16(3)(b), that the court has complied with the provisions of the Chapter, he or she is to accept the recommendation, and confirm its terms. If not so satisfied, the Minister is to refuse to make an order, and notify the court in writing of his or her decision, *and the reasons for it* (s.17(3).

123. The High Court judgment concluded that the role of the Minister, under s.17, was ambiguous. On the one hand, the Minister was a delegate, upon whom the power of making secondary legislation had been conferred by the Oireachtas. On the other hand, the Minister was constrained by the recommendation of the Labour Court, and required, having regard to the statutory report of the Labour Court, to satisfy himself or herself that the Labour Court had complied with the provisions of Chapter 3. If so satisfied, then the Minister was required to confirm the terms of the recommendation by order. If, conversely, not satisfied that the court had complied with Chapter 3, he or she could refuse to make an SEO confirming the terms of the recommendation. I do not see that this role is "ambiguous"; rather, the Minister had, in fact, to make a reasoned decision. If accepting the recommendation, the Minister had to be satisfied that there has been statutory compliance. If rejecting it, he or she must set out reasons in greater detail.

124. The judgment observed:-

> *"162.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."

125. It continued:-

> *"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."* (para. 164).

126. The judgment under appeal expresses the view that these provisions were "somewhat obscure". I think the provisions envisage a staged process. The first stage is that the Minister may accept or reject the Labour Court recommendation or report. But if the decision is to accept, the function is narrow; the Minister must merely be "*satisfied that the court has complied with the provisions of Chapter 3*". This must be seen as simply asking the question did the Labour Court comply with the procedures? If the Minister is not so *satisfied*, the scope of review is, however, broader; he or she will refuse to make an SEO, and must write to the Labour Court *setting out his or her reasons for rejection*. I do not agree, therefore, that the Minister, although a formal delegate, had an "*entirely limited function*".

The Review Role of the Oireachtas

127. Having quoted Keane J. in *Laurentiu*, to the effect that that, even if the Minister had actually had an untrammelled discretion, it would not rescue what would otherwise be a broad breach of Article 15.2.1, the judgment continued:-

> *"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."*

128. Turning then to the safeguard that a draft order was to be laid before each House of the Oireachtas, Simons J. quoted O'Higgins C.J. in *Cityview*, to this effect:-

> *"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 *…".* (Emphasis added) (at para. 167 of the judgment under appeal)

129. The learned trial judge went on to quote Keane J. in *Laurentiu*, to the effect that, even if there is a power of *annulment* by *either* House, the value of such a provision was not to be under-estimated (para. 170). Keane J. is quoted as saying:-

> *"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 objectiona[ble]. 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."*

130. Having referred to these passages, the High Court judge correctly acknowledged that the form of parliamentary oversight provided for under the 2015 Act was "more robust" than usually provided for in the case of delegated legislation (para. 172). An SEO could not be made by the Minister unless a resolution approving of the draft had first been passed by each House of the Oireachtas. This was to be contrasted with the legislative provisions at issue in *Cityview* or *Laurentiu*, where the delegated legislation took effect unless simply *annulled* by resolution passed within a limited period of time (para. 172).

131. But I think the reasoning on this issue did not give sufficient weight to the statutory safeguards. The judgment accepted that the existence of parliamentary scrutiny was a "relevant consideration", in determining whether the parent legislation had given rise to a "democratic deficit", but it went on to observe:-

> *"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."* (para. 173)

132. On this, the judge held:-

> *"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."*

133. It is clear that the two Houses of the Oireachtas were given a very substantial power of review under Chapter 3. This power was not simply to *annul an SEO*, but the legislation rendered it necessary for *both Houses to positively approve such an order*. This cannot be treated as simply a "relevant consideration". It goes further. The effect of this

safeguarding provision was to make for a high degree of continuing review of any SEO which might subsequently be promulgated by way of a statutory instrument.

134. In *Bederev*, Charleton J. compared the safeguards contained in legislation impugned there to a legislative "*boat which, once launched, might never to return to the harbour of oversight at Leinster House*" (para. 41). Here, once launched, not only did an SEO have to return to its legislative harbour, but it then fell to be double checked by both Houses for constitutional compliance. In *Laurentiu*, Keane J. referred to the power of review as being something of a blunt instrument, which could hardly rescue legislation which did not contain sufficient principles and policies. Blunt it may be, but in a statute which does contain principles and policies, I think it must be seen as not only blunt, but effective; it is a very weighty consideration.

135. I add here that the judgment under appeal appears to express the view that, when engaging in a review of this type, the Oireachtas is not engaging in a *legislative function*. This conclusion reflects a similar conclusion in *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329. There, Johnson J. in the High Court took the view that an annulment procedure confined to the two Houses "without the President", was not legislation emanating from the *Oireachtas* (cf. Kelly, The Irish Constitution, 4.2.08). I am not persuaded this is a material distinction in this context. I think, here, one must look to *substance*, asking the question whether the *two* Houses of the Oireachtas abdicated their role? This statutory instrument was, in fact, approved by both Houses. NECI objected to the form and substance of the review, and submit that the process did not address what it saw as the issues of concern, including the statutory interpretation questions discussed earlier. But the extent of parliamentary scrutiny cannot be a material consideration for a court which, under the Constitution, is subject to the separation of powers principle. The degree to which the two Houses of the Oireachtas choose to exercise their power is a matter for those constitutional bodies. In short, I think these observations undervalued the reality of the situation, and failed to give due weight to the extent of the protections or safeguards contained in s.17.

136. There is, too, a more practical consideration, touched on earlier. While not by any means determinative, a court is entitled to ask itself a simple question first raised in *Bederev*. It is whether the matter delegated is apt for the legislative process in a legislature, when the issues delegated can be very detailed, highly case sensitive, and not easily predictable in every future eventuality? It is precisely for this reason that, instead of continually re-legislating, primary legislation sets boundaries as to what can be provided for in subsidiary regulatory power, which regulation may, in turn, flexibly address future developments, so long as these developments fall within the scope of the delegated power.

Conclusions on the Article 15.2.1 Issue

137. This judgment seeks to explain that the High Court proceeded from what I think was an incorrect premise as to the nature of the tests involved. Referring back to the discussion of the legal concepts earlier, I conclude that there was no impermissible delegation of legislation in this instance. The legislation does not trespass on the function of the

legislature. It cannot be denied that the extent of the delegation here is significant. The power to make a recommendation which may have the force of law is nothing if not substantial. But the recommendation must take place in conformity with the statutory procedure, each step of which is laid down by the Oireachtas. The Chapter sets out both rights and duties for the protection of the parties, and for objectors. The deliberations are to take place in public. Objectors may appear and make their case. When considered closely, the statutory criteria are perhaps more subtle and nuanced than might first be thought. This analysis concludes that, in fact, the sections just analysed do set out discernible and intelligible goals; they express a set of legal principles whereby the policy of the Oireachtas is to be achieved. When analysed in context, the scope of choice is narrower than might appear at first sight. Amongst other aims, the legislation is intended to have the effect of preventing social dumping. The intent of the Oireachtas in passing the 2015 Act was that the Labour Court was to proceed with the *substance* of the process in which it had previously engaged, but hedged about with clear constraints and limitations which are of greater substance and consequence than might be thought. It is true that an SEO may acquire the force of law, but the Oireachtas has laid down a high level of legislative safeguard in relation to any potential SEO. For the reasons set out, therefore, I would set aside this part of the High Court judgment, together with the suspended declaration of unconstitutionality. It follows that Chapter 3 of the Act does not offend Article 15.2.1 of the Constitution.

138. However, I leave this consideration with some reflections. The first is that the statutory process involved is a highly unusual one, perhaps *sui generis*. It seeks to establish a statutory procedure which creates entitlements for applicants, but also for objecting parties. At the same time, however, the process has a clear policy dimension, in the sense that, subject to compliance, the result is intended to be that sector-wide agreements can be made. There will, therefore, necessarily be a tension between this policy-objective, on the one hand, and ensuring that the rights of objectors are vindicated in an area of law in which, whilst not directly invoked, the constitutional right of freedom of association may well arise for consideration.

Demir v. Turkey

139. I add that while not mentioned in submissions, in *Demir v. Turkey*, Application 34503/97, the ECtHR observed that the right to bargain collectively with an employer had, in principle, become one of the essential elements of the right to form and join trade unions, for the protection of interests set forth in Article 11 of the Convention. Collective bargaining is now seen as a recognised feature of the social market within the Union. The Oireachtas sought to give effect to such entitlement, as long ago as 1946. It is given statutory recognition in the Act of 2015, a post-1937 statute. (See s.27.1A and 1B.) This judgment now moves to the next issue, raised by NECI in its cross-appeal.

Section III

Article 6 ECHR

140. NECI has sought to cross-appeal the High Court decision not to make any findings in relation to its submissions concerning the validity of the system reflected in the Industrial

Relations (Amendment) Act, 2015 Act for dealing with complaints of alleged breaches of an SEO. Here, I think the High Court judge acted entirely correctly.

141. The 2015 Act seeks to apply enforcement provisions expressed elsewhere, involving procedures before a District Court in the event of non-compliance with an SEO, and the potential for a prosecution through the courts. These provisions are set out in ss.43 to 51 of the Workplace Relations Act, 2015. This issue of statutory enforcement was, however, actually recently considered in the judgments of this Court in *Zalewski v. Workplace Relations Commission* [2021] IESC 24. But, in this case, the High Court judge found that there had been no plea in the statement of grounds to the effect that the enforcement provisions involved an unauthorised administration of justice, thereby breaching Article 34, nor, I should now add, any other Article of the Constitution. Consequently, Simons J. held it was neither necessary nor appropriate to consider the submissions further. The High Court judge correctly pointed out that, insofar as any challenge might have been made, it should have been to the enforcement provisions to be found in the Workplace Relations Act, 2015, considered in *Zalewski*. I agree with both conclusions. I agree, too, that Simons J. was correct in finding that it would have been inappropriate for this Court to consider the matter simply because there were no relevant findings of fact from the High Court, upon which this Court could conduct an analysis, nor had NECI adduced any factual evidence regarding the operation of the enforcement system in the context of this case, or how it, NECI, was affected. What was raised here was, effectively, a collateral attack on s.43 to 51 of the Workplace Relations Act, 2015, in circumstances where there had been no pleadings or evidence to that effect in this case. I would uphold the High Court judgment on these findings. No more need be said.

Section IV

The Statutory Vires Issue

142. This judgment now moves to the statutory *vires* issue, asking the question whether the Labour Court, and the Minister complied with the provisions under Chapter 3 of the Industrial Relations (Amendment) Act, 2015. Any assessment of this issue must begin with an acknowledgment of the fact that the Labour Court has performed a most valuable public service since its inception. Its duties have evolved from being largely those of a mediator and conciliator, to that of a body charged with determining sometimes very complex matters of fact and law. (See *Evelyn Owens, The Labour Court: Past, Present and Future, 21st Countess Markievicz Memorial Lecture, 18 November 1996, Google: https://www.ul.ie/lair/sites/ default/ files/1996of20 lecture %byofEvylyn%OwensProf*).

143. A consideration of what happened on this application must also recognise that, in dealing with these questions, the Labour Court must operate within constitutional and statutory constraints, often under highly pressurised circumstances at the difficult intersection between the Constitution, statute law, and industrial relations. The discussion must have regard to the consequences of a misstep, including the possibility of industrial action in a vital sector of the economy. To ignore these facts would be naive and unreal. But this does not mean that constitutional or statutory duties can be short-circuited or set to one side. The ultimate question under this heading is whether, in performing its statutory role

in this instance, the Labour Court can be said to have addressed its mind to the mandatory statutory criteria and made findings thereon? Here, a court should not set artificially high standards as to what should be in a recommendation or report. But this Court has been referred in argument to the carefully reasoned and detailed determination, REP 091, made by the Labour Court itself in an earlier application to vary the earlier registered agreement made between the ECA, the AECI, and the then TEEU. Not every determination must necessarily reach that high standard, but recommendations and reports must give adequate reasons.

144. The scope of this judgment is limited in another way. It is not the task of this Court to engage in a detailed description of how the Labour Court performed each step of its statutory role in this instance. But a consideration of the interaction between NECI and the Labour Court, both before, during and after the hearing which took place, raises questions as to how, precisely, the legislation in question is required to operate, and how the Labour Court actually perceived its statutory role, bearing in mind the important issues with which it had to deal? At the very minimum, it can be said that, in order for there to be constitutional compliance on a fair procedures basis, objectors are entitled to be dealt with in an even-handed way, by the observance of the substance of fairness in procedure, and, in particular, by a recommendation and report which set out clear reasons for the conclusions.

The High Court's Finding on the Statutory *Vires* Issue

145. At para. 49 of the judgment, the learned trial judge concluded:-

> *"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."*

146. Here, Simons J. was referring to the provisions of s.16(4)(b) of the Act, which provides that the Labour Court shall not make a recommendation under this section *unless it is satisfied that to do so is reasonably necessary* to promote and preserve high standards of training and qualification, and, secondly, to ensure fair and sustainable rates of remuneration in the sector concerned. The judge held that the report "*failed 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."* I agree, but it is necessary to consider these conclusions in more detail; first, setting out relevant jurisprudence on the duty to give reasons.

Legal Principles: The Duty to Give Reasons

Connolly v. An Bord Pleanala

147. In *Connolly v. An Bord Pleanala* [2018] ILRM 453, this Court held that it was possible to identify two separate, but closely related, requirements regarding the adequacy of any reasons given by a decision-maker. First, any person affected by a decision should at least be entitled to know, in general terms, why the decision was made. Second, a person was entitled to have enough information to consider whether they can or should seek to

avail of any appeal, or to bring a judicial review of a decision. The court held that the reasons provided must be such as to allow a court hearing an appeal, or reviewing a decision, to actually *engage properly in such an appeal or review*. The court went on to explain that it may be possible that the reasons for a decision might be derived in a variety of ways, either from a range of documents, or from the context of the decision, or some other fashion. But this was subject to the overall concern that the reasons must actually be ascertainable and capable of being determined (see *Connolly*, para. 7.1 to 7.6).

Meadows v. Minister for Justice

148. In *Meadows v. Minister for Justice* [2010] 2 I.R. 701, Murray C.J. stated:-

> *"An administrative decision affecting the rights and obligations of persons should at least disclose* ***the essential rationale on foot of which the decision is taken****. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective."* (para 93-94)

Rawson v. Minister for Defence

149. In *Rawson v. Minister for Defence* [2012] IESC 26 Clarke J. (as he then was) stated, on behalf of this Court, that:-

> *"How that general principle may impact on the facts of an individual case can be dependent on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned … the particular basis of challenge."* (para 6.8)

EMI Records (Ireland) v. Data Protection Commissioner

150. In *EMI Records (Ireland) v. Data Protection Commissioner* [2013] IESC 34, Clarke J. (as he then was) concluded that a party was entitled to sufficient information to enable it to assess whether the decision was lawful and, if there be a right of appeal, to enable it to assess the chances of success, and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.

Oates v. Browne

151. In *Oates v. Browne* [2016] 1 I.R. 481, Hardiman J., in this Court, stated that it was a practical necessity that reasons be stated with sufficient clarity so that, if the losing party exercises his or her right to have the decision reviewed by the Superior Courts, those Courts have the material before them on which to conduct such a review. But to this he added:-

> *"Secondly, and perhaps more fundamentally, it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must "satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it".* (para 47.)

Balz & Anor. v. An Bord Pleanála

152. Finally, the judgment of this Court in *Balz & Anor. v. An Bord Pleanála* [2019] IESC 90 contains a number of observations which strike home in this case. *Balz* concerned a decision on a planning application. The judgment makes the point that the imbalance of resources and potential outcomes between developers, on the one hand, and objectors, on the other, means that an independent expert body, carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function.

153. Having pointed out that the Board and its inspector had carried out their functions with a high degree of technical expertise, the judgment went on to describe that, on the facts of that case, it was nonetheless unsettling that there should be an absence of direct information on one of the central planning issues which arose. O'Donnell J. stated that this might have occurred as a result of an unfortunate misunderstanding at the time of the appeal, and the Board's decision might have become entrenched in the defence of these proceedings. He allowed that there might be valid reasons why a board, or other decision-making body, might draft its decisions in a particularly formal way, and that, in most cases, interested parties would be able to consult an inspector's report to deduce the reasons behind the Board's decision. But, on the facts before the court, he observed:-

> *"However, some aspects of the decision give the impression of being drafted with defence in mind, and to best repel any assault by way of judicial review, rather than to explain to interested parties, and members of the public, the reasons for a particular decision."* (para. 45)

154. But the judgment in *Balz* made clear that when an issue had arisen where it was suggested that the Inspector, and the Board, had not given consideration to a particular matter, it was also unsettling that the issue raised should be met by the bare response that such consideration was given (for a limited purpose) and nothing had been proven to the contrary. Similarly, while an introductory statement in a decision that the Board had considered everything it was obliged to consider, and nothing it was not permitted to consider, might:-

> *"… charitably be dismissed as little more than administrative throat-clearing before proceeding to the substantive decision, it has an unfortunate tone, at once defensive and circular. If language is adopted to provide a carapace for the decision which makes it resistant to legal challenge, it may have the less desirable consequence of also repelling the understanding and comprehension which should be the object of any decision."* (para. 46)

155. This last passage has a particular resonance in this case. *Balz* makes clear that a decision-maker must engage with significant submissions. The judgment emphasises that 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 was 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. (Para. 57 et seq of the judgment.)

The Duty to Give Reasons: Summary of Principles Applicable

156. The questions applicable in this case are, therefore:

(a) Could the parties know, in general terms, why the recommendation was made?

(b) Did the parties have enough information to consider whether they could, or should, seek to avail of judicial review?

(c) Were the reasons provided in the recommendation and report such as to allow a court hearing a decision to actually engage properly in such an appeal, or review?

(d) Could other persons or bodies concerned, or potentially affected by the matters in issue, know the reasons why the Labour Court reached its conclusions on the contents of a projected SEO, bearing in mind that it would foreseeably have the force of law, and be applicable across the electrical contracting sector?

157. Obviously, the test must be an objective one. The views of an aggrieved party having recourse to a tribunal may be a consideration. But, when determining whether the reasons given were sufficient, the test must be more dispassionate and detached. In this case, the potential audience is relevant. The Labour Court was engaged in a statutory role, involving compliance with statutory duties to protect rights, where public interest required transparency. The reasons had to be sufficient, therefore, not just to satisfy the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, *and the public at large*, that the Labour Court had truly engaged with the issues which were raised, so as to accord with its duties under the statute.

State Appellants' Submissions on the Recommendation and Report

158. Counsel for the State appellants made a number of complex points clearly and succinctly. He submitted that NECI had access to the documentation grounding the application for the examination; that NECI was entitled to make a submission, and had done so addressing the documentation attached to the application made by Connect, and the two employer bodies. He submitted that NECI had access to all of the submissions filed by other interested parties and by the applicant bodies, within the 28 day deadline that ran up to the period in January and February 2019, before the hearing on the 14th March, 2019. Counsel contended NECI were entitled to, and did, participate at a public hearing before the Labour Court, where six other individuals or representative bodies were present, where the submission of the bodies who were present were read out, and where there was engagement; he submitted that NECI received a report which set out the nature of the recommendation, and the rationale for it. That report was published in the Department's website in early June, 2019.

The initiation of these proceedings

159. Here, it is necessary to point out that NECI launched these proceedings before the SEO had been approved. It applied to the High Court for an interlocutory injunction. Before its application came on before Meenan J. in July, 2019, NECI received a letter from the Labour Court to the Minister dated the 23rd April, 2019, containing the recommendation on the SEO, and the accompanying report. On the 30th August, 2019, Meenan J. rejected an application to restrain the SEO coming into force, but granted an order restraining the implementation of those parts of the SEO that related to the requirement that employers make minimum pension contributions on terms no less favourable than those set out in the Construction Workers' Pension Scheme (CWPS) dealt with later.

160. There is a sense in which the State appellants' argument might be understood as similar to a respondent to a decision being said to "well-know" the reasons, even though such reasons may not have been as clearly stated as they might have been. NECI, however, contend that they never knew, or was aware of the reasoning behind the making of the SEO. In truth, of course, they are not the only concerned party, as the requirement to give reasons has a wider scope and potential audience in this case.

What was contained in the Recommendation and Report

161. The Labour Court report accompanying the recommendation contained an extensive description of the circumstances surrounding its making. There were detailed quotations of the legislation. It contained descriptions of matters "examined" and "noted". It identified the submissions which were received. It gave a brief description of what happened at the hearing. The recommendation set out matters it had taken "into consideration", such as that it was "satisfied" as to the number of matters which were required conditions under s.16. It contained the statutory definitions of the "economic sector" and "worker". It identified the question of scope and categories of worker, and thereafter identified proposed pay rates, normal working time payments, other working conditions, and, later, details of the pension scheme which would work out the benefits set out in the "*long established and widely supported Construction Workers Pension Scheme"*.

162. But, when asking whether the issues were actually *addressed*, it is necessary to be more focused. Under the heading "*submissions received*", the report recited the number of submissions which had been received from interested parties. Some of those supported the application before the court, and others were opposed to it. The report observed that those opposed to the making of an SEO focused substantially "*on whether the parties making the application were substantially representative of the workers, and/or employers, in the sector"*. It said that NECI also had raised concerns about how the sector would be defined, and that an SEO, which regulated labour costs, was anti-competitive. The report stated that, within the submissions which supported the application, there were "*differing views*" as to what should be encompassed, and what changes, if any, should be made to the existing pay rates, and other terms and conditions that could be covered by an SEO.

163. The Labour Court went on, stating that, in deciding to recommend the introduction of an SEO, it had "*taken into consideration*" the potential impact on levels of employment and

unemployment in the identified economic sector concerned. But neither the recommendation nor report indicated in what manner the court took this issue into consideration, an issue to which, as per s.16(2) of the Act, the court "*shall have regard*". The Labour Court stated that it was "satisfied" that the proposed SEO would support the maintenance of high levels of employment in the sector. But it did not say upon what basis it was so satisfied.

164. The recommendation and report stated that the Labour Court had taken into consideration the terms of any relevant national agreement relating to pay and conditions for the time being in existence. Again, the Labour Court stated that it was satisfied that the SEO would 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.

165. It was stated that the Labour Court had taken into consideration the potential impact on competitiveness in the economic sector concerned. On this, the recommendation stated that the Labour Court was 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. But, further than this, the recommendation simply did not go.

166. Counsel for the State referred to the fact that the answer to the question as to whether the applicants were "substantially representative" can be discerned from NECI's submission. It is true that there were references to the question of representation in the EY-DKM report. In fact, those references *to that report* tended to undermine NECI's case on numbers and representivity. What NECI actually did was selectively quote from the report, and then put forward an argument that did not have a proper basis. A proper reading of the report made it clear that 9,800 Connect members did not include those members who were in semi-state body employment.

167. In order to support this part of the State's case, counsel referred the court to notes of the hearing taken by NECI's solicitor. At one point, a member of the Labour Court did put questions to the Assistant General Secretary of Connect in relation to the issue of representation. On this rather fragile basis, it is now contended that NECI were to know that the point they were making on representation was not correct. But, even hypothetically accepting the validity of this submission, it is surely more than curious that even this salient point was not dealt with in the recommendation, where surely it should have been addressed.

168. Counsel for the State appellants engaged in a detailed, comprehensive and highly sophisticated analysis of the circumstances in which the recommendation and report was made. He referred not only to the recommendation itself, but also much to of the surrounding documentation. But it should not require what can only be described as an iterative process of exegesis in order to explain a recommendation of this nature. A decision giving reasons on a matter of public importance should do just that – give

reasons. It must be more than a series of recitations of issues raised, but not actually engaged with.

Conclusions on Statutory *Vires* Issue

169. What was absent from the recommendation or the accompanying report, therefore, was any full description as to the *reasons as to how or why* the Labour Court had reached its conclusions. I would emphasise that these issues were capable of explanation, as much of the discussion earlier in this judgment actually shows. It was not necessary to respond to each and every point raised by NECI, any more than it is necessary for a court of law to engage in such a process in giving judgment. But, from the 6th February, 2019 onwards, the Labour Court had before it a series of significant questions raised by NECI as to the criteria which it intended to employ in reaching its decision, including how it was intended to approach the issues of "economic sector" and representivity. Having been legitimately raised, these points required to be dealt with by a response, in substance, giving reasons. These questions were capable of being considered and answered.

170. More generally, a consideration of the correspondence up to the date of the hearing, and later report, shows that the Labour Court simply was unwilling to address the issues which NECI were seeking to raise, having led NECI to believe those matters *would* be considered at the hearing. That did not happen. There is a fundamental difference between mentioning "issues raised", and actually addressing those questions substantively by a response giving reasons. The significant issues which were raised in correspondence were never addressed in the report or recommendation. By way of illustration, a seven page letter from NECI's solicitor received a response of seven very brief paragraphs.

171. I do not say all NECI's issues needed to be determined by the Labour Court in a discursive, reasoned judgment. But there is no indication in the recommendation or report as to whether any of these important questions raised were actually considered, other than a recital that documentation had been put before it by the applicants, including three statutory declarations regarding representivity. The Labour Court had "*satisfied*" itself that the applicants were substantially representative for the purposes of s.15 of the 2015 Act. The court added "*At the hearing itself, no credible alternative figures were put before the court to cause it to depart from that position."* It must be said that many of the statements were very reminiscent of the type of descriptions which were criticised by this Court in *Balz*. The duty is to *give reasons*. The Labour Court did not do so.

172. It is important that the findings in this judgment should not be misunderstood. It was perfectly within the remit of the Labour Court to state that it would deal with the issues raised in correspondence during the course of the hearing, and in its recommendation. But where the Labour Court failed to comply with its statutory duty was that it simply did not address these issues in a manner compliant with the case law by giving reasons. This was a breach of its duty as a statutory decision-making body. The issues raised were not unanswerable. It would have been open to the Labour Court to make observations and findings on the questions of "economic sector" and "substantially representative", based on the facts of the application before it. How competition or competitiveness were to be

understood could have been explained. The Labour Court might have referred to some of the E.U. material, referred to earlier, as being the yardstick by which the question of competitiveness was to be determined. It could have stated its understanding that collective sectoral agreements of this type are outside the scope of E.U. competition law and treaties. It might have said that competition policy is not dealt with in any cognisable part of the Constitution. It did not do so.

173. Instead, in terms of very broad generality, the recommendation said it had taken into consideration the general level of remuneration in other economic sectors in which workers of the same class, type or group are employed: "*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*". But, it went no further. While it is unnecessary to explore, it might be said that the differences between the parties on the main issue, that is, pay, were significant, but were not so large as to be incapable of ready resolution in a manner satisfactory to the joint-applicants.

174. The court indicated that it was "*satisfied*" that the proposed SEO would promote harmonious relations between workers and employers in the sector; and "*satisfied*" that the SEO would assist in the avoidance of industrial unrest in the sector, and attract workers who possess high standards of training and qualifications into the sector. It added that statutory minimum rates of pay and conditions of employment in the sector would 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 arose in the sector, thereby supporting the long-term sustainability of the industry. But, again, the recommendation does not say how, or upon what basis, these conclusions, based on s.15 and s.16(2) and (4), were arrived at.

175. The conduct of the Labour Court and the absence of clear responses to NECI's solicitor, both before and subsequent to the hearing, do nothing to disabuse one from concluding that, the Labour Court simply avoided addressing these issues, and then avoided ever giving reasons in a real sense. The tone of the correspondence was undoubtedly, to quote *Balz*, "defensive, and circular". The approach in the recommendation was to give no hostages to fortune, and insofar as possible to process the matter in a manner which suggested no more than a desire to achieve what would, at minimum, be a *fait accompli* prior to any litigation. The Labour Court failed in its statutory duty under s.16 to give reasons for its decision to make a recommendation. The report which accompanied the recommendation did not assist in an elucidation of the reasoning. Strictly speaking, the issue here is whether the Labour Court gave sufficient reasons. It is not necessary to make a finding on whether, its interaction with NECI, the Labour Court fell below the standards of fairness that it has so frequently upheld in the past.

The Minister's Role

176. Under s.17 of the Act, the Minister has the power to either *approve*, or *refuse to approve*, the recommendation. Here, the State appellants' case faced a paradox. On the one hand,

it was said on the principles and policies issue, that the Minister's role was significant, as it provided an important limitation on the power of the Labour Court. Yet, on the other hand, for the purposes of the *vires* issue, it was submitted that the Minister's role should be seen as more narrow, or "tight". If he was disposed to accept the recommendation, his statutory duty was simply to be "satisfied" that there had been statutory compliance. But the Minister could only have been satisfied on the basis of a recommendation, and report, which had fairly set out a summary of the arguments and the decision dealing with these.

177. Also under s.17(1) of the Act, the Minister, not later than six weeks after receiving a recommendation, where he or she is satisfied, having regard to the report, that the court has "complied with the provisions of this Chapter", can accept the recommendation and by order confirm its terms from such date as may be specified. By s.17(3), the Act provides that, where the Minister *is not satisfied* that the court has complied with the provisions of this Chapter, he or she shall (a) refuse to make a sectoral employment order confirming the terms of the recommendation, and (b) notify the court in writing of his or her decision and the reasons therefor. The Minister could not have been satisfied that there had been statutory compliance. It must follow that the Minister, too, acted *ultra vires,* though it would be hard to conclude that he himself did anything blameworthy. On the basis of the information before him, his scope for action was, effectively, very constrained.

Section V

The Construction Workers' Pension Scheme

178. One final issue remains. It relates to the Construction Workers' Pension Scheme. The High Court judge dealt with this under the heading "Further delegation to third party?". He said this:-

> *"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."*

179. He continued:-

> *"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****."* (Emphasis added)

180. The judgment continued:-

"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.

181. The judgment then observed:-

"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."

182. Simons J. added:-

"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)."

183. The judge concluded:-

"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."

184. This is a closely reasoned and succinct summary. The High Court judgment discusses this issue in the context of whether this was an impermissible further delegation from the Labour Court to the trustees of the CWPS, applying the principle *delegatus non potest delegare* (a delegate may not delegate). I think a slightly narrower approach is more apt. At first sight, resort to an existing pension scheme might appear to have all the attractions of a helpful shortcut, and be administratively inconvenient. But, in fact, as Simons J. pointed out, the pay-figures relating to construction workers might be different from those in the electrical contracting sector.

185. Here, it is necessary to refer back to s.16(5) of the 2015 Act. This provides that a recommendation may provide for *"… (f) the requirements of a pension scheme, including a minimum daily rate of contribution to the scheme by a worker and an employer …".* But it is then necessary to refer back to the words emphasised earlier, quoted from para. 85 of the High Court judgment. The Labour Court recommendation was that there should be a pension scheme which would contain terms no less favourable, including employer and employee construction rates, than those set out in the Construction Workers' Pension Scheme. But the words "*no less favourable*" do not comply with what is required by s.16(5)(f) of the 2015 Act. What was required, rather, was to set out a *minimum daily rate of contribution to the scheme* by a worker, and an employer. This the recommendation did not do. For this reason, what was contained in that part of the recommendation must also be seen as non-compliant with the section, and therefore, itself, *ultra vires.*

Conclusions in this Judgment

186. I would, therefore, set aside that part of the High Court judgment, which held that Chapter 3 of the Act of 2015 was repugnant to Article 15.2.1 of the Constitution. I would uphold the High Court judgment on the ECHR issue, the statutory *vires* issue, and in relation to the adoption of the CWPS in the SEO, for the reasons set out. I would remit the matter to a different panel of the Labour Court to prepare and furnish a recommendation giving reasons, in accordance with the statute. Such procedures as may be necessary in order to give effect to these orders are, of course, a matter for the Labour Court, subject to the legislation. I would hear counsel on the form of the orders which follow.