AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2023:000046

[2024] IESC 8

O'Donnell C.J.
Woulfe J.
Hogan J.
Murray J.
Donnelly J.

Between/

H.A. O'NEIL LIMITED

Plaintiff/ Respondent

-and-

UNITE THE UNION, PATRICK JAMES GOOLD, WILLIAM MANGAN AND DAMIAN JONES

Defendant/ Appellants

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 6th of March 2024

1. While the background to this appeal concerns a routine trade dispute, the issues raised thereby are of considerable significance regarding the proper interpretation and application of the Industrial Relations Act 1990 ("the 1990 Act"). HA O'Neill Ltd. is a specialist mechanical engineering firm. In early March 2023 it sought (and later obtained) an interlocutory injunction in the High Court restraining certain of its employees (who are the second, third and fourth defendants) engaging in picketing at the sites of various third-party properties where the company had been engaged in various building projects. The employees were members of Unite the Union, a British/Irish union. Unite holds a negotiating licence under the Trade Union Act 1941.

2. It is accepted that prior to taking industrial action concerning what are described as travel time payments (i.e., a form of travel allowance in respect of the cost of travelling to building sites) a secret ballot in favour of such industrial action was duly taken and that the requisite notice was given to the employer. The essence of the case made by the employer was principally that by reason of a ministerial Sectoral Employment Order made in 2015 the contracts of employment of the employees had been statutorily adapted so that no industrial action could lawfully take place unless and until the dispute resolution procedure provided for in that order had been exhausted. It was said that in those circumstances the anti-injunction provisions of s. 19(2) of the 1990 Act did not apply.

3. As it happens the SEO in question was subsequently found by the High Court in October 2023 to be invalid. One consequence of this was that it was accepted at the hearing of the appeal that there was now no continuing basis for the injunction. The issue was then reduced to whether the High Court should have granted the interlocutory relief which it did in March 2023 by reference to the law as it was then understood to be, the provisions of s. 19(2) of the 1990 Act notwithstanding.

4. While the case for such an injunction was powerfully and carefully made, I agree entirely with the thorough analysis of the interpretation and application of the 1990 Act rejecting this argument which is to be found in the judgments of O'Donnell C.J. and Murray J. I simply wish to make some observations regarding some of the broader issues which would also seem to arise on this appeal.

5. While it may seem somewhat remarkable in the modern era, it was difficult to avoid the impression that the shadows of *Quinn v. Leathem* [1901] AC 495 still lurked somewhere in the background to this case. Yet, for the reasons, I am about to set out briefly, I consider that it is quite wrong to approach the entire question of the lawfulness (or otherwise) of industrial action principally through the prism of the common law economic torts which were deployed by Victorian judges in response to the emergence of the trade union movements in the second half of the 19th century.

6. If, for example, the picketing otherwise complies with the requirements of the 1990 Act, s. 11(1) provides that such conduct is lawful, irrespective of whether the employees have broken the terms of their contracts of employment in

engaging in strike action. In these circumstances it is, as O'Higgins J. observed in *Kire Manufacturing Co. Ltd. v. O'Leary*, High Court, 29th April 1974 by reference to the corresponding provisions of s. 2 of the Trade Disputes Act 1906, "wholly irrelevant" that there has been a breach of their contract of employment "once they are doing so in furtherance of a trade dispute and once the fact of picketing is the only complaint made against them."

7. There are essentially two reasons for this wider conclusion regarding the need to banish, once and for all - at least in the industrial relations context - the shade of *Quinn v. Leathem* to some legal Hades from whence it should not be allowed to escape save, perhaps, for the purposes of understanding legal history. The first is the provisions of Article 40.6.1.iii° of the Constitution. It is arguably implicit in these provisions that the right to form trade unions implies in turn at least some – perhaps as yet undefined – zone of freedom for those unions to organise and campaign. The *effet utile* of this constitutional provision would otherwise be compromised.

8. It is true of course that Article 40.6.1.iii° expressly provides that laws may be enacted "for the regulation and control in the public interest" of this right to form trade unions. This means that the Oireachtas can regulate and control by law the right to engage in industrial action. This regulatory power might mean, for example, that it would be lawful for the Oireachtas to restrict the right to form trade unions in particular sectors of the economy or even to abridge the right to take collective action in certain circumstances. Yet the substance of this right must also be safeguarded, so that the constitutional right to associate and to form a trade union is given real meaning. I cannot help thinking but that the

case-law to date has given wholly insufficient weight to these constitutional considerations.

9. This brings me to the second reason for my conclusion, namely, the enactment of the 1990 Act itself. This Act carefully safeguards the right to engage in industrial action, provided that certain important safeguards are complied with. The union organizing the strike action must accordingly be the holder of a negotiating licence under Part II of the Trade Union Act 1941 (s. 9(1)); agreed procedures for resolving the trade dispute must have been exhausted where it concerns the terms or conditions of or affecting the employment of an individual worker (s. 9(2)); and there must be a secret ballot in favour of the industrial action in question (ss. 14 and 17). Yet where these statutory conditions are satisfied any peaceful industrial action which follows is presumptively *lawful.* After all, s. 11 provides that "it shall be lawful" to engage in peaceful picketing of the employer's premises where this is "in contemplation or furtherance of a trade dispute."

10. The other major change effected by the 1990 Act – namely, the restriction on the right on the part of an employer to obtain an injunction under s. 19 of the 1990 Act to restrain peaceful industrial action which has followed a secret ballot organized in accordance with the rules of trade union and in respect of which at least one week's notice has been given – is, as I have already indicated, at the heart of the present appeal. As both the Chief Justice and Murray J. have pointed out in their respective judgments, this section was enacted in response to what can only be described as the frequent abuse of the injunction remedy in the pre-

1990 Act era, the effect of which was to prohibit or otherwise restrain what not uncommonly was prima facie lawful industrial action.

11. In my view, the enactment of this restriction must, along with the rest of Part II of the 1990 Act, be seen as giving effect to the right of the Oireachtas to control or regulate trade union activity for the purposes of Article 40.6.1.º The Oireachtas has thereby delineated the circumstances in which industrial action would be held either to be lawful or else immune from legal proceedings and could not be restrained by judicial order. I agree that the courts should not readily circumvent or otherwise frustrate what the Oireachtas has ordained for this purpose.

12. In the present case it is plain for all the reasons so carefully set out in the judgments of the Chief Justice and Murray J. that in view of the provisions of s. 19(2) of the 1990 Act there was no proper basis by which an interlocutory injunction could have been granted in the present case. In the circumstances it is not necessary for me to express any view as to whether the s. 19 restrictions apply to applications for final (as distinct from interim or interlocutory) injunctions. Nor is it necessary for me to express a view as to whether a "no-strike" clause is legally enforceable or whether the existence of such a clause would take any subsequent industrial action taken in breach of that clause outside the scope of the protections found in the 1990 Act.

13. I would accordingly allow the appeal for the reasons given by the Chief Justice and Murray J.