Sectoral wage setting declared unconstitutional - *Back to the drawing board?*

The High Court has upheld a claim brought by the National Electrical Contractors of Ireland (**NECI**) that a sectoral employment order (**SEO**) made last year, which set out pay rates, pension and sick pay entitlements of electricians working in the construction industry, is invalid and unconstitutional.

The implications of this decision are far reaching in that, not only is this particular SEO no longer legally operable, the SEOs in the construction and mechanical engineering sectors are now also equally inoperable. This is due to a declaration by the High Court that the sections of the Industrial Relations (Amendment) Act 2015 ("the 2015 Act"), which provide for the making of SEOs, are unconstitutional.

Background

Article 15.2.1 of the Irish Constitution provides that the sole and exclusive power to make laws for the State is vested in the Oireachtas. In 2013, the Supreme Court held[1] that a predecessor to the SEO system, the Registered Employment Agreements (**REA**) system for determining pay rates and working conditions, was unconstitutional. That system involved parties to a sectoral employment agreement applying to the Labour Court for registration of the agreement, with the agreement thereafter becoming legally enforceable. The Supreme Court found that while legislation may provide for delegated authority, such delegated authority should not and could not extend to law making.

Following on from that decision, the 2015 Act was enacted (see our briefing here). Chapter three of the 2015 Act makes provision for Sectoral Employment Orders (**SEOs**). SEOs are orders setting out minimum rates of remuneration and minimum pension and sick pay entitlements of workers within a sector, made by the Minister for Business, Enterprise and Innovation ("the Minister") on recommendation of the Labour Court and approved by resolution of both houses of the Oireachtas.

The defining characteristic of an SEO is that all employers within the economic sector concerned are required to apply the prescribed terms and conditions to their employees.

The 2015 Act provides for a process by which the Labour Court undertakes an examination of the terms and conditions in the sector having consulted with interested parties. If the Labour Court considers it appropriate, it may make a recommendation to the Minister to make an SEO. It must not make such a recommendation unless it is satisfied:

a. 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

b. it is reasonably necessary in the economic sector concerned to:

   - promote and preserve high standards of training and qualification; and
   - ensure fair and sustainable rates of remuneration

If the Minister is satisfied that the 2015 Act has been complied with, the Minister is then required to lay a draft of the SEO confirming the recommendation before each House of the Oireachtas.

[1] McGowan v Labour Court [2013] IESC 21

What did the High Court decide?

The High Court found that the requirements of the 2015 Act had not been complied with in the creation of the SEO. The High Court's findings included that the statutory report submitted by the Labour Court to the Minister was deficient and failed to address the objectives set out above in addition to submissions made by the parties. The implication of this pronouncement is that the Minister should have therefore refused to make the order.

In a somewhat surprising development, the High Court did not stop at concluding that the electrical contracting SEO should be struck down, it went on to examine whether the provisions of the 2015 Act which provide for the delegation by the Oireachtas of the power to make SEOs is consistent with Article 15.2.1 of the Constitution. It is well established that Article 15 does not preclude the Oireachtas from delegating the making of secondary legislation, which is merely giving effect to principles and policies which are contained in the primary legislation itself. The High Court therefore examined whether the 2015 Act contained sufficient principles and policies to guide the Minister, as delegate, in the making of the SEO. In accordance with previous case law[2], parent legislation, in this case the 2015 Act, must set boundaries and a defined subject matter for subsidiary law making.

The High Court commented that what is relevant for the purposes of the analysis under Article 15.2.1° of the Constitution is that the breadth of the delegated legislation is such that detailed principles and policies must be prescribed under the parent legislation. It found that this requirement was not met by the 2015 Act.

The decision to impose mandatory minimum terms and conditions of employment across an entire economic sector necessitates making difficult policy choices. The High Court found that the 2015 Act provides no guidance whatsoever as to how the Labour Court's considerations when making a recommendation are to be weighed up and reconciled. The practical effect of the open-ended drafting of chapter three of the 2015 Act is that it is largely left up to the Labour Court to make the policy choices itself. The High Court found it "involves a standard-less delegation of law making to the Minister, and one which would be impossible to challenge by way of judicial review" and is therefore invalid.

The result of this decision is that the entire chapter of the 2015 Act dealing with SEOs has been struck down and the SEOs made thereunder invalid.

Are we back to the drawing board?

The immediate impact for employers in any sector previously covered by an SEO is that they could be in a position to hire new employees under terms and conditions that are less favourable than those set by the SEOs. Existing employee terms and conditions however are unlikely to be affected, as the terms of the formerly legally operable SEOs are likely to have been incorporated into employees' contracts of employment and accordingly are only capable of variation by agreement.

Employers impacted by this decision should note however that since the decision has issued trade unions have reacted by intimating the likelihood of industrial action in the event of any employer cutting the pay or varying conditions of its members in these sectors, including of personnel hired in the future.

It is also noteworthy that there has been a suggestion at political level that the relevant SEOs could be converted into primary legislation, which would have to be debated and adopted by the Houses of the Oireachtas in the normal way.

The High Court's decision may well be appealed and there is a possibility of a legal stay being put in place to ensure the SEOs remain in force pending the outcome of an appeal. Employers should therefore keep a close eye on developments and take legal advice as necessary. Either way, it looks like one of the many challenges facing the Government is addressing the implications of this decision and potentially having to introduce a new, more legally robust, way of setting employee terms and conditions at a sectoral level.

A link to the High Court's decision is here.

For more information in relation to this topic, please contact Triona Sugrue or any member of the A&L Goodbody Employment team.

[2] Bederev v Ireland [2016] IESC 34