THE HIGH COURT

[RECORD NO. 2017 645 JR]

BETWEEN

NAISIUNTA LEICTREACH CONRAITHEOIR EIREANN

APPLICANT

AND

THE LABOUR COURT

RESPONDENT

AND

TECHNICAL ENGINEERING AND ELECTRICAL UNION, THE ELECTRICAL CONTRACTING ASSOCIATION

AND

THE ASSOCIATION OF ELECTRICAL CONTRACTORS, IRELAND

NOTICE PARTIES

JUDGMENT of Ms. Justice O'Regan delivered on Thursday the 5th day of July, 2018

Issues

1. On the 31st July 2017, the within applicant secured leave to maintain judicial review proceedings seeking the relief contained in the statement of grounds of the 31st July 2017.

2. By way of background, the notice parties had applied to the respondent pursuant to s. 14 of the Industrial Relations (Amendment) Act 2015 (hereinafter '2015 Act') for a Sectoral Employment Order (hereinafter referred to as an "SEO") pursuant to the provisions of the 2015 Act. It appears that if such an order was afforded by the respondent it would be the first SEO for the electrical contracting industry. The challenge in the statement of grounds is directed at the manner in which the respondent made its decision to conduct an examination on the issue as to whether or not to make a recommendation to the Minister for the making of an SEO based upon the s. 14 application of the notice parties.

3. On the 28th August 2017, an injunction was secured by the applicant restraining the progress of the examination process.

4. In or about the 4th October 2017, the notice parties advised the respondent that its application for an SEO was withdrawn.

5. By reason of the foregoing the respondent argues that the issues in the statement of grounds have now been rendered moot (i.e. there is no live issue between the parties with potential legal consequences for the applicant). However, the applicant disputes this on the basis that the challenge in the proceedings is to the respondent's general approach to an SEO application and to compliance with s.15 of the 2015 Act. The applicant identifies reliefs 4 – 9 inclusive as remaining of huge significance to the applicant and states that arguably the declaratory relief at paras. 10, 11 and 12 of the statement of grounds continue to be relevant in the context of the fact that the applicant anticipates that a further SEO will be applied for in or about September 2018.

6. Looking at the statement of grounds, the applicant therefore suggests that the following issues remain live: -

> (4) Under this heading an order of mandamus is sought compelling the respondent to set out the basis upon which it has complied with the conditions precedent contained in s. 15 of the 2015 Act for the purposes of establishing its entitlement to conduct an examination.
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> (5) An order of mandamus compelling the respondent to set out the relevant economic sector which the examination would affect is required.
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> (6) An order of mandamus requiring a definition of the term "substantially representative" in s. 15 of the 2015 Act relevant to the electrical contracting industry is required.
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> (7) An order of mandamus requiring the respondent to determine which employer bodies, if any, are substantially representative of employers in the electrical contracting industry is required.
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> (8) An order of mandamus compelling the respondent to determine whether the TEEU is substantially representative of workers in the sector to which the examination relates is sought.
>
> (9) An order of mandamus compelling the respondent to provide for a full public hearing in respect of the examination is sought.

7. The applicant argues that all the foregoing issues remain in contention between the parties notwithstanding the withdrawal of the s. 14 application by the notice parties in the light of the imminent (September 2018) further SEO application to be made by the notice parties and/or other parties.

8. The respondent argues that: -

(4) The respondent has already set out the basis it considered an examination would be made when it furnished the applicant with the application of the notice parties and the cover letter of the respondent of the 14th January 2017 associated therewith of the 14th January 2017. Further, the respondent argues that no examination is now to be conducted under that particular application.

(5) The respondent argues that the precise economic sector has been identified by furnishing to the applicant the application of the notice party.

(6) The Legislature has not included a definition of "substantially representative". Therefore, what is sought in this paragraph is an order compelling the Labour Court to supplement the legislation. This would amount to an abstract advisory or hypothetical opinion that, in any event, would require an undefined process to be undertaken by the respondent, which is not provided for by statute.

(7) Determining which employment bodies are "substantially representative" of employers in the electrical contracting industry would be impossible without substantial matters before the Labour Court so as to enable the Labour Court in a specific set of circumstances to consider the evidence and argument before it.

(8) Determining that the TEEU, in the abstract with no examination now intended, as being "substantially representative", or not, of workers in the sector would not be a matter mandated by the legislation. In any event, at any given time the membership of any particular union may rise or fall.

(9) The holding of a private or public hearing must be case-sensitive and should not be determined in the absence of argument or representation in respect of the particular issues that may arise in any given situation.

The 2015 Act
9. The 2015 Act was introduced following a decision of the Supreme Court in the matter of *McGowan v. Labour Court & Ors*. [2013] 3 IR 718, where the Supreme Court held that Part 3 of the Industrial Relations Act, 1946, contravened Article 15.2.1 of the Constitution.

10. The phrase "substantially representative" also arose in the 1946 Act.

11. In addition, under s. 20, subsection 7 of the 1946 Act, which survived *McGowan*, the Labour Court is enabled to hold a sitting or part of a sitting in private.

12. Under s. 14 of the 2015 Act, certain groups may request the respondent to examine a proposed SEO and the relevant request of the applicant to the Labour Court must include confirmation that a statement to the effect that the applicant is "substantially representative" of the relevant group.

13. Under s.15, where the Labour Court receives a s.14 request, an examination will not be undertaken unless the Labour Court is satisfied that following consideration of any documents submitted by the applicant, together with any other information sought by the respondent under s.14 (2), that the applicant is substantially representative of workers of a particular class and the Court shall take into consideration the number of workers in that class, type or group represented by the applicants.

14. Based on the foregoing, the respondent argues that, in accordance with s. 15, the respondent in determining whether or not the notice parties were substantially representative of the relevant sector took into account the documentation presented by the notice parties and advised the applicant accordingly in a cover letter of the 14th June 2017, when the respondent explained that it complied with the legislation and enclosed a copy of the application of the notice parties.

Moot
15. In *Copymoore Ltd & Ors v. The Commissioners of Public Works in Ireland* [2015] IECA 119 the Court of Appeal delivered a judgment on the 11th June 2015 and, at paras. 23 – 29 inclusive, dealt with whether or not an appeal is moot. The Court identified the well-established principle that the court will not determine issues which have become moot unless special or exceptional circumstances justify doing otherwise. Reference was made to *Lofinmakin (a minor) & Ors. v. Minister for Justice & Ors*. [2013] IESC 49 and the judgment of Denham C.J., which in turn approved the dictum of the Supreme Court of Canada in *Borowski v. Canada* [1989] 1 SCR 342 to the effect that an appeal is moot when a decision would not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties and that a controversy must be present when the action is commenced and when the court is called upon to reach its decision. Denham C.J. also quoted from Murray C.J. in *Irwin v. Deasy* [2010] IESC 35 to the effect that: -

> "In exceptional circumstances where one or both parties had a material interest in a decision on a point of law of exceptional public importance, the Court could, in the interests of the due and proper administration of justice, determine such a question."

The Court of Appeal also referred to *O'Brien v. PIAB* [2007] 1 IR 328 where the supreme court allowed the appeal to continue notwithstanding that the plaintiff had no continued interest in the proceedings on the basis that PIAB retained a real current interest in the issue and therefore its appeal should be determined. As to the jurisdiction of the court to hear an appeal where there is no longer a live controversy between the parties, the Court of Appeal quoted from *Irwin v. Deasy* aforesaid to the effect that this discretion should be exercised with caution and academic or hypothetical appeals should not be heard.

16. In *Irwin v. Deasy* aforesaid, Murray C.J. also observed: -

> "The mootness doctrine was applied by the courts to restrain parties from seeking advisory opinions on abstract, hypothetical or academic questions of the law by requiring the existence of a live controversy between the parties to the case in order for the issue to be justiciable."

17. In *Borowski* aforesaid, the rationale for the policy was identified as threefold, namely:

> -(I) The court's competence to resolve legal disputes is rooted in the adversarial system and a full adversarial context in which both parties have a stake in the outcome is fundamental;
>
> (II) Concern for judicial economy and awareness of the need to examine whether or not scarce judicial resources should be spent on resolving a moot issue are worthwhile;
>
> (III) The courts need to be sensitive to the effectiveness or efficiency of judicial intervention and should be aware of the judiciary's role in the political framework.

18. It appears to me to be significant that in the *Copymoore* matter, which was before the Court of Appeal aforesaid, the respondent to the appeal argued that the appeal was manifestly moot, since there was no longer any live issue between the parties, no issue of exceptional public importance arose nor were there any special circumstances in the public interest for the hearing of the appeal. The fact that a case raises an important point of law is not of itself a reason to bring it within the exceptional category. This argument

was countered by the respondents to the effect that the appeal was not moot because a similar set of circumstances involving the same applicants might arise again if there were to be another tendering for a framework agreement, and therefore the current circumstances had a continuing impact. It was argued that the effect of the judgment of the High Court was not spent, and that the case involves matters of principle that go beyond the circular and would have ramifications for the State's operation of framework agreements in the future. Accordingly, even if the matter was moot, the discretion of the court should be exercised to hear the appeal. Notwithstanding the arguments aforesaid, and based upon the jurisprudence, the Court of Appeal concluded that by the withdrawal of the relevant circular, the issues between the parties were at an end and the appeal was therefore moot. In my view the argument currently being made on behalf of the applicant is particularly similar to the argument made by the appellant before the Court of Appeal in *Copymoore*.

Applicant's submissions
19. The applicant argues that the issue of representative capacity is a significant ongoing controversy between the parties since at least 2008 and in this regard refers to the 2009 Flood Cassells report. That having been said, however, the applicant also acknowledges that the 2015 legislation is new, there has been no prior SEO in respect of the electrical industry and the s. 14 application, which was withdrawn on or about the 4th October 2017, is the second occasion in which an application under s. 14 has been made and subsequently withdrawn.

20. The applicant states that requiring the applicant to deal with a prospective application to be made in September 2018, without resolving the issue as to representative capacity and public hearing, would be to require the applicant to duplicate the proceedings and to repeat what is again likely to be an uncontested but on notice application for an injunction, which would increase the cost incurred by the applicant and represent a waste of court time. The applicant argues that the determination of the issues raised in the statement of grounds at paras. 4- 9 aforesaid would confer huge practical benefits on the applicant precisely because the same issues are about to be raised again (in the forthcoming September 2018 application). The applicant states that it is at a loss to understand how the respondent complies with or considers itself in compliance with s. 15 of the 2015 Act in the circumstances.

Decision
21. In my view the applicant's arguments presented to the court are dependent upon various assumptions to be made in respect of the prospective s. 14 application in September 2018 and the process which would be adopted by the respondent at that time. Therefore, to consider that there is any real live issue between the parties at present would be to make assumptions with regard to a future process and application not yet in being.

22. The 2015 Act applies to all industrial sectors and is not limited to the electrical sector.

23. The argument advanced by the applicant is essentially an argument that the dealing with the issues would be in ease of the applicant as opposed to dealing with an issue of exceptional public importance while raising special reasons in the public interest to hear the matter.

24. I am in agreement with the arguments put forward by the respondent to the effect that there is no live issue between the parties at this time.

25. The reliefs sought at paras. 4 and 5 are specific to the examination which was to follow the s.14 application of the within notice parties and as this examination will now not take place, in my view such reliefs fall away and are manifestly moot. Furthermore, the respondent has in fact indicated what matters were taken into account in its fulfilment of the s. 15 requirement. The applicant may consider this to be unsatisfactory however that does not alter the fact that the basis was identified by the applicant.

26. The applicant in seeking a definition of what the term "substantially representative" means (para. 6 of the statement of grounds) is making a request to the Labour Court to supplement legislation in a process which is not defined or covered by statute and would in all of the circumstances by definition be abstract, advisory or hypothetical.

27. Furthermore, the relief at para. 7 of the statement of grounds is also abstract, advisory and hypothetical given the prospect of any particular body changing in numbers. A similar position prevails in respect of the reliefs sought at para. 8.

28. It appears to me that the jurisprudence on a moot issue is such that it would be entirely inappropriate to insist on a public hearing without the benefit of argument or representation. Therefore, the relief sought at para. 9 is particularly within contemplation of the jurisprudence suggesting that a determination on this issue should not be made in the current circumstances.

29. Considering the matter in the context of the statement of grounds, the relief therein sought and the jurisprudence hereinbefore set out I am satisfied that:

> (a) there is no outstanding live issue between the parties with potential legal consequences since the withdrawal of the s.14 application of the notice parties and accordingly the issues raised are moot;
>
> (b) there is no issue of exceptional public importance and special reasons in the public interest arising;
>
> (c) the convenience of the applicant is not a proper determinative factor;

Accordingly, the proceedings should be struck out.