Neutral Citation Number: [2011] IEHC 277

THE HIGH COURT

2008 10663 P

BETWEEN

JOHN GRACE FRIED CHICKEN LIMITED, JOHN GRACE AND

QUICK SERVICE FOOD ALLIANCE LIMITED

PLAINTIFFS

AND

THE CATERING JOINT LABOUR COMMITTEE, THE LABOUR COURT,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 7th day of July, 2011.

1. The three plaintiffs in these proceedings seek declarations that certain provisions of the Industrial Relations Act 1946 (the 1946 Act), and the Industrial Relations Act 1990 (the 1990 Act), are invalid having regard to the provisions of the Constitution. The plaintiffs also seek a declaration that the Employment Regulation Order made by the second named defendant on the 12th May, 2008 (S.I. 142 of 2008), fixing the statutory minimum remuneration of workers outside the County Borough of Dublin and Borough of Dun Laoghaire, is unreasonable and constitutes an unlawful and disproportionate interference with the property rights of the first and second named plaintiffs as guaranteed by the Constitution and is invalid and they seek a consequential order of *certiorari* quashing that Employment Regulation Order. The plaintiffs also seek a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003, that the provisions of certain sections of the Industrial Relations Act 1946, and a section of the 1946 Act, are incompatible with the State's obligations under the European Convention on Human Rights and, in particular, are in breach of Article 6 and Article 1 of the First Protocol thereof.

2. The two Acts in respect of which a declaration is sought by the plaintiffs in this case are the 1946 Act and the 1990 Act. That legislation originates from earlier Acts, namely, the Trade Board Act 1909 and the Trade Board Act 1918. Part IV of the 1946 Act dealt with the regulation by the Labour Court of remuneration and conditions of employment of certain workers. Section 35 of the 1946 Act gave power to the Labour Court to establish Joint Labour Committees. Such a committee was to be established in respect of a class, type or group of workers. The scheme provided for under the Act was that under s. 36 of the 1946 Act, an application for the establishment of a Joint Labour Committee could be made to the Labour Court by the minister or a trade union or any organisation or group of persons claiming to be representative of such workers or such employers. Section 37 identifies the criteria which the Labour Court must apply in determining whether or not to establish a Joint Labour Committee. Section 38 deals with the process of an inquiry into an application for an establishment order requiring consultation and public notification. Having gone through the statutory process laid down in the Act, the Labour Court has the power under s. 39 of making an establishment order either in the terms of a draft prepared in accordance with the provisions of s. 38 or with such modifications as to the terms of the draft as the Court considers necessary. When the Labour Court makes an establishment order it is obliged under s. 39(2) to publish an establishment order in a prescribed manner. Section 42 and subsequent sections of the 1946 Act deal with Employment Regulation Orders (EROs) which can be dealt with by Joint Labour Committees once such committees have been established. Section 42 provides that a Joint Labour Committee may submit to the Labour Court proposals "for fixing the minimum rates of remuneration to be paid either generally or for any particular work to all or any of the workers in relation to whom the committee operates, and such proposals may provide for a minimum weekly remuneration for all or any of such workers". Section 42(3) provides:

> "A joint labour committee shall not submit proposals under this section (s. 42) for revoking or amending an employment regulation order unless the order has been in force for at least six months."

Section 48 of the 1990 Act alters and amends the procedure to be followed once a Joint Labour Committee has formulated proposals for an ERO. But the statutory scheme remains unaltered in that proposals or amended proposals are submitted by a Joint Labour Committee to the Labour Court and it is the Labour Court pursuant to s. 43 of the 1946 Act which makes an order giving effect to the proposals or amended proposals.

Section 43 of the 1946 Act and s. 48 of the 1990 Act sets out the procedure for the making of EROs and also provides that the Labour Court can refer proposals back to a committee and can also make either an order giving effect to the proposals as from such date as the Labour Court thinks proper and specifies in the order or refuse to make an order.

3. The statutory scheme provided for in the 1946 and 1990 Acts gives to the Labour Court the power to fix statutory minimum rates of pay and statutory terms and conditions in respect of all or any of the workers in relation to whom a Joint Labour Committee operates. It is therefore the Labour Court which has the power to establish Joint Labour Committees and those committees determine the terms and content of any proposed orders in the form of a proposal and the Labour Court can then confirm the draft proposal which has been prepared by a Joint Labour Committee. The scheme under the Act results in a statutory scheme where the Labour Court has the power to fix statutory minimum rates of pay and conditions of employment without any supervision from the Oireachtas and an order comes into effect when determined by the Labour Court without any referral back to the minister or without any form of supervision by the Oireachtas. Section 17 of the 1946 Act provides:

> "No appeal shall lie from the decision of the (Labour) Court on any matter within its jurisdiction to a court of law."

4. A Joint Labour Committee entitled the Catering Joint Labour Committee was established by Statutory Instrument No. 225 of 1977 and in 1992 the Labour Court amended the 1977 order by Statutory Instrument No. 236 of 1992 entitled Catering Joint Labour Committee Establishment (Amendment) order 1992. It was the Catering Joint Labour Committee established thereunder which

prepared the draft proposals which led to the making of the ERO by the Labour Court on the 12th May, 2008. It is that order which is the subject of challenge within these proceedings and which the plaintiffs seek to quash.

5. In these proceedings, the plaintiffs seek as a first relief a declaration that the provisions of ss. 42, 43 and 45 of the 1946 Act and s. 48 of the 1990 Act are invalid, having regard to the provisions of the Constitution. A second relief that the Court will address is the claim by the plaintiffs that the ERO is unreasonable and constitutes an unlawful or disproportionate interference with the property rights of the first and second named plaintiffs. As set out later in this judgment, the Court is satisfied that the plaintiffs are entitled to the declaration sought that the provisions of ss. 42, 43 and 45 of the Industrial Relations Act 1946 and s. 48 of the Industrial Relations Act 1990 are invalid having regard to the provisions of Article 15.2.1 of the Constitution of Ireland and also that the plaintiffs are entitled to the declaration sought that the ERO is unreasonable and unlawful and constitutes a disproportionate interference with the first and second named plaintiffs' property rights. It follows that the declaration sought pursuant to the European Convention on Human Rights Act 2003 does not arise at this time.

6. The sections challenged by the plaintiffs in their claim include a challenge in relation to s. 45 of the 1946 Act. That section deals with the enforcement of EROs which have been made under s. 43 of the same Act. Section 45 provides that if an employer fails to pay the remuneration fixed under an ERO that the employer is guilty of an offence and shall be liable to pay a fine on summary conviction. Section 45(2) provides that where an employer has been found guilty of the offence of paying an employee remuneration less than the remuneration fixed by the ERO the Court, where the employer is convicted, may order the employer to pay to the worker such sum as is found by the Court to represent the difference between the statutory minimum remuneration and the remuneration actually paid. Sub-section (3) of s. 45 provides for an offence by an employer if that employer fails to comply with statutory conditions of employment fixed by an ERO and provides that if an employer is guilty of the offence of failing to comply with statutory conditions of employment the employer is liable on summary conviction to a fine and the Court may also order the employer to pay to the worker such compensation as the Court considers fair and reasonable in respect of such non-compliance.

7. The first plaintiff is a limited company which carries on the business of a restaurant including the business of the provision of takeaway food. The second named plaintiff is a shareholder in the first named plaintiff and is the operator and managing director of the first named plaintiff. The third named plaintiff is a limited company which was incorporated to represent the interests of the owners of "fast food restaurants". The first named defendant is a committee established by the second named defendant pursuant to s. 36 of the 1946 Act, and pursuant to the Catering Joint Labour Committee Establishment Order 1977 (S.I. No. 225/1977) as amended by the Catering Joint Labour Committee Establishment (Amendment) Order 1992 (S.I. No. 236 of 1992). The second named defendant is a body established pursuant to the provisions of the 1946 Act. In the statement of claim, the plaintiffs identified that the third named defendant is a juristic person answerable in law for the second named defendant and that the fourth named defendant is joined to the proceedings for the purposes of effecting service on the third named defendant.

8. In these proceedings, the plaintiffs seek to challenge the constitutionality of identified provisions of the 1946 Act and the 1990 Act, and of an ERO made by the second named defendant on the 12th May, 2008. Pursuant to the provisions of the 1946 Act (as amended), Joint Labour Committees can be and have been established. Those Committees make ERO's which determine the minimum rates of remuneration and/or regulate the conditions of employment of workers in respect of whom the Committees operate. The effect of those Regulations is that there is in place a system to identify the minimum wage rates and employment terms and conditions within the relevant regulated sector. On the 12th May, 2008, S.I. 142 of 2008, fixed the statutory minimum rates of remuneration and regulated the statutory conditions of employment of workers employed in catering establishments anywhere throughout the State, except the County Borough of Dublin and the Borough of Dun Laoghaire. That order applied to the first named plaintiff and it covered employees who were engaged in identified work, that is to say, the preparation of food or drink, the service of food or drink or work incidental to the preparation of food or drink or the service of food and drink and performed at any store or warehouse or similar place in the catering establishment. The Catering Joint Labour Committee Establishment (Amendment) Order of 1992 (S.I. 236 of 1992), defined a catering establishment and the first named plaintiff's restaurant was within that definition. In the other two Boroughs a different order applied which provided for different terms and conditions.

9. The plaintiffs' claim is, in essence, that the sections identified in the 1946 Act and the 1990 Act do not prescribe sufficient principles and policies to govern the exercise of the law making power carried out in the making of S.I. 142 of 2008.

10. The first named plaintiff operates a small business in Cork city involved in the preparation and sale of fried chicken and other snack foods. The second named plaintiff and his wife are the shareholders of that company and the first named plaintiff is operated by the second named plaintiff. The third named plaintiff was incorporated in 2008 and as indicated above was established for the purposes of representing the interests of the businesses and persons involved in the quick food service industry.

11. The ERO of 12th May, 2008 (S.I. 142 of 2008), is the ERO which gives rise to these proceedings. The proposals which were ultimately incorporated in the 2008 ERO were advertised on the 7th March, 2008, and submissions were sought within a period of twenty one days. The evidence to the Court was that those proposals were also sent by either e-mail or post to every employer within the relevant sector who was on the Labour Court's mailing list. No submission was received within the specified period and one submission which was received outside that period was not considered. A draft ERO was considered by the Labour Court at a meeting on the 14th April, 2008 and the proposals were approved and the Labour Court directed that an order be made. That order was made by the Labour Court on the 12th May, 2008 (S.I. 142 of 2008) and the making of that order was published by way of advertisement on the 16th May, 2008 the order coming into effect on the 2nd June, 2008. The 2008 ERO provided for an increase in the previously identified minimum wage rates and provided for certain terms and conditions of employment in respect of persons working in the catering sector and in businesses such as the business of the first named plaintiff. The 2008 ERO dealt with not only the minimum wage rate, providing for two increases on specified dates, but also dealt with such issues as holidays, Sunday work, overtime and rates of pay in respect of overtime.

12. The consequence and effect of the introduction of the 2008 ERO on the 2nd June, 2008, was to incorporate into the first named plaintiff's employees' contracts of employment, certain terms and conditions as identified in the order. The scheme under the legislation provides that an employer, such as the first named plaintiff, is required in law to observe the terms and conditions in the order and that a breach of an order is a criminal offence.

13. The plaintiffs, in making their claim that certain provisions of the 1946 and 1990 Acts are contrary to the provisions of Article 15.2.1 of the Constitution, claim that the Industrial Relations Acts do not provide any guidance as to the principles or policies which are to be applied in the making of EROs. The plaintiffs also rely on the fact that EROs are not made by a member of the Executive but are made pursuant to a power delegated to the Joint Labour Committees and the Labour Court under the 1946 Act. The plaintiffs claim that the power delegated to the Joint Labour Committees and the Labour Court under the 1946 Act and the discretion given to those bodies thereunder is given in circumstances where there is no legislative guidance as to how such discretion is to be exercised.

14. Subsequent to the institution of these proceedings, the 2008 Order, was replaced by a later order made in 2009 (S.I. 217 of 2009), which came into effect on 15th June, 2009. These proceedings do not seek to challenge that later order. The plaintiffs continue to seek relief in respect of the 2008 Order, notwithstanding that it has been rescinded since 2009, and do so based upon a claim that the 2008 Order continues to have effect in respect of the first named plaintiff as an employer who employed staff pursuant to the terms of the 2008 Order and are thereby subject, as a matter of law, to the obligations and requirements set out in the 2008 Order for the period during which that order was in force as for that period the terms and provisions of the order were in effect absorbed into the contracts of employment of the first named plaintiff's employees. The evidence to the Court was that these proceedings were instituted in circumstances where the National Employment Rights Agency had expressed its opinion to the first named plaintiff that the terms and conditions of employment being operated by the first named plaintiff after the introduction of the 2008 Order were in breach of that order and did not comply with the first named plaintiff's obligations thereunder. The first named plaintiff therefore contends that if it has underpaid its employees pursuant to the terms and provisions of the 2008 ERO that, notwithstanding the subsequent revocation of that order, the first named plaintiff is still subject to both civil claims and criminal prosecution in respect of any failure to comply with the provisions of the 2008 Order during the period for which it was in force. The first named plaintiff remains subject to the provisions of the ERO of 2009. In submissions to the Court, counsel on behalf of the plaintiffs sought to have the Court address in the first instance the plaintiffs' challenge to the constitutionality of certain provisions of the Industrial Relations Act 1946 and 1990. Counsel argued for such approach, notwithstanding a recognition that the conventional and established practice of the Court was only to address the issue of the constitutionality of legislation as the final issue and when all other matters have been determined. In making such application, counsel for the plaintiffs relied on the facts and circumstances of this case which were that even if the 2008 Order was struck down by the Court, the first named plaintiff would remain subject to the Joint Labour Committee system established by the legislation challenged and later, the ERO's made thereunder. There was agreement between the parties that any issue in relation to damages, if it were to arise, should be dealt with at a subsequent hearing but counsel on behalf of the defendants contended that the Court should only address the issue of the constitutionality of the impugned Acts as a last consideration. Having considered the matter, the Court is satisfied that the correct approach for this Court to adopt, in the circumstances of this case, is to adopt the approach contended for by the plaintiffs. This judgment will, therefore, first deal with the issue of the constitutional challenge to the provisions of the 1946 and 1990 Acts. It is also the case that given the judgment that this Court makes on the issues of the constitutionality of sections of the Acts and the issue as to whether the 2008 Order is unreasonable and constitutes an unlawful and disproportionate interference with the property rights of the first and second named plaintiffs that a declaration sought pursuant to s. 5 of the European Convention on Human Rights Act 2003 should only be relevant in relation to damages and since any issue as, to damages arising from this judgment will be dealt with following a further hearing by this Court, there is no need at this point to address the claim under the 2003 Act.

15. Counsel for the plaintiffs identified as a first issue the question as to whether or not the 1946 Act, as amended by the 1990 Act, prescribes sufficient principles and policies to govern the exercise of the lawmaking power in issue.

16. The Article of the Constitution relied upon by the plaintiffs in their claim that the provisions of the 1946 and 1990 Acts are invalid is Article 15.2.1. The powers of government are identified in Article 6 of the Constitution which states as follows:

> "1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.
>
> 2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

The task of enacting legislation falls within the exclusive competence of the Oireachtas and has been recognised as being beyond the scope of judicial review. The Courts cannot and do not interfere with the enactment of legislation. Article 15.2.1 of the Constitution states as follows:

> "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

That Article is the core provision in the Constitution dealing with legislative power and provides exclusive legislative power to the Oireachtas which has been identified as being absolute and all-embracing.

Article 28.2 states:

> "The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

Article 34.1 states:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

Article 15.2.1 of the Constitution vests the sole and exclusive power of making laws for the State in the Oireachtas. The role of that Article and its applicability and interpretation was considered by the Supreme Court in *Kennedy v. The Law Society of Ireland* [2002] 2 I.R. 458. Fennelly J. recognising the core democratic principle contained within Article 15.2 and addressing the rationale for the *ultra vires* doctrine in the light of Article 15.2.1 did so in the following terms (at p. 486):

> "The issue was essentially one of *ultra vires*. The delegatees of statutory power cannot be allowed to exceed the limits of the statute or, as here, the secondary legislation conferring the power. The rationale for this is simple and clear. The Oireachtas may, by law, while respecting the constitutional limits, delegate powers to be exercised for stated purposes. Any excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle and, ultimately, the rule of law itself. Secondly, the courts have the function of review of the exercise of powers. They are bound to ensure respect for the laws passed by the Oireachtas. A delegatee of power which pursues, though in good faith, a purpose not permitted by the legislation by, for example, combining it with other permitted purposes is enlarging by stealth the range of its own powers. These principles, in my view, must inform any test for deciding whether a power has been exercised *ultra vires*."

It is open to the courts to consider whether or not delegated legislation amounts to an excessive exercise of delegated discretion thereby defeating the legislative intent. The manner in which Article 15.2.1 has been interpreted by the Supreme Court is that

Statutory Instruments are constitutional provided they are confined to matters of detail as opposed to principle. This approach was enunciated in a case which has been identified as "the seminal decision of the Supreme Court on Article 15.2.1", (see p. 234 of J. M. Kelly: *'The Irish Constitution',* 4th Ed.) in *Cityview Press Co. Ltd. v. AnCO* [1980] I.R. 381. O'Higgins C.J. in the *Cityview Press* case held (at p. 398/399):

> "The giving of powers to a designated Minister or subordinate body to make regulations or orders under a particular statute has been a feature of legislation for many years. The practice has obvious attractions in view of the complex, intricate and ever-changing situations which confront both the Legislature and the Executive in a modern State. 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. Therefore, it is a safeguard. Nevertheless, the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor 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. In the view of this Court, the test is 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. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits — if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body — there is no unauthorised delegation of legislative power."

In that case, the plaintiff challenged s. 21 of the Industrial Training Act 1967 which permitted the Industrial Training Authority to impose levies on firms for the purposes of financing its training activities. The Supreme Court determined that, even though there were no principles in the Act regarding the fixing of the amount of the levy, the impugned section was still constitutional. They did so on the basis that there were guiding principles contained in and capable of being identified within s. 21 of the Act and that under that section AnCO had an obligation to consult with a relevant industrial training committee and was obliged to keep the funds collected in a separate account and to apply them to meet the expenses of training expenses. Even though the identifiable principles were of an extremely limited scope, they were held to be sufficient so that it could not be said that there had been a delegation of a law making function by the Oireachtas. In a decision delivered on the day prior to its decision in the *Cityview Press* case, the Supreme Court had also considered the issue of delegated legislation in the case of *Burke v. Minister for Labour* [1979] I.R. 354. The Supreme Court in that case considered the powers delegated to a Joint Labour Committee to make proposals to the Labour Court for fixing statutory minimum wages and in giving the judgment of the Court, Henchy J. (at p. 358/359) in describing the power delegated to the Joint Labour Committees stated as follows:

> "It will be seen, therefore, that the power to make a minimum-remuneration order is a delegated power of a most fundamental, permissive and far-reaching kind. By the above provisions of the Act of 1946 Parliament, without reserving to itself a power of supervision or a power of revocation or cancellation (which would apply if the order had to be laid on the table of either House before it could have statutory effect) has vested in a joint labour committee and the Labour Court the conjoint power to fix minimum rates of remuneration so that non-payment thereof will render employers liable to conviction and fine and (in the case of conviction) to being made compellable by court order to pay the amount fixed by the order of the Labour Court. Not alone is this power given irrevocably and without parliamentary, or even ministerial, control, but once such an order is made (no matter how erroneous, ill-judged or unfair it may be) a joint labour committee is debarred from submitting proposals for revoking or amending it until it has been in force for at least six months. While the parent statute may be amended or repealed at any time, the order, whose authors are not even the direct delegates of Parliament, must stand irrevocably in force for well over six months.
>
> In the present case the order is not challenged on constitutional grounds. What is contended is that the manner of its making has tainted it with invalidity."

The Supreme Court in the *Burke v. Minister for Labour* case did not have to consider a challenge on constitutional grounds and therefore did not have to consider or apply "the principles and policies" test which the Court was to identify in its judgement in the *Cityview Press* case on the following day.

17. Article 15.2.1 provides a means of curbing the excessive use of executive power and the decision of the Supreme Court in the *Cityview Press* case identifies a test which should be applied in considering whether or not a Statutory Instrument is constitutional. The *Cityview Press* case identifies that the Oireachtas may delegate a power to put flesh on the bones of an Act, thereby giving effect to principles and policies but that a delegation of parliamentary power which goes beyond that is not authorised and would amount to a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. The law must be laid down in the statute and the Statutory Instrument made under an Act is constitutional only if that Statutory Instrument is no more than the giving effect to principles and policies which are contained in the statute.

18. Since the Supreme Court decision in the *Cityview Press* case, the principles and policies test has been applied in a number of varying circumstances. Those cases include the Supreme Court considering a Statutory Instrument made under the Health Act 1970 in the case of *Cooke v. Walsh* [1984] I.R. 710, a further Supreme Court consideration of the powers to delegate under the Social Welfare Act 1952 in the case of *Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232, a further consideration of the Supreme Court of delegated legislation under the Duties Act 1957 in *McDaid v. Sheehy* [1991] 1 I.R. 1, and an extensive Supreme Court review of the validity and lawfulness of the delegation of legislative power in the case of *Laurentiu v. Minister for Justice* [1999] 4 I.R. (at p. 26), and a further Supreme Court consideration of delegated legislation in relation to the European Communities (Milk Quota) Regulations 2000 (S.I. No. 94) and whether the Constitution required that there be a primary Act of the Oireachtas to make the exercise of a delegated power lawful in *Maher v. Minister for Agriculture* [2001] 1 I.R. 139. The Supreme Court further addressed delegated legislation under the Aliens Act 1935 in *Leontjavn v. D.P.P.* [2001] 1 I.R. 591. Consideration of those cases confirm a consistent application of the principles and policies test and the Courts have reiterated that the Oireachtas is the sole body with the power to legislate and it is for the Oireachtas to establish the principles and policies of legislation. The decisions of the Supreme Court demonstrate that the principles and policies test is a flexible one which must be applied to the differing factual scenarios and legislative contexts with due regard to the complexity involved. It is also clear from the *Laurentiu* decision that the principles and policies test is to be applied in accordance with constitutional presumptions as to the interpretation of legislation and that the actions of Ministers and officials are to be presumed to be constitutional. For a delegation to be unlawful the power delegated must exceed the mere giving effect to principles and policies contained in the statute.

19. In applying the flexible test, the courts have recognised the need for subordinate legislation. The courts, however, whilst

recognising the need for subordinate legislation, have in applying the principles and policies test consistently used as a cornerstone of that test the issue as to whether or not the subordinate legislation achieves and applies principles policies and purposes identified in legislation.

20. In considering the issue of the Constitution and the Oireachtas as sole legislature, Fennelly J. in the Supreme Court decision of *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 stated (at pp. 245/246):

> "Article 15. 2.1 of the Constitution provides:-
>
> > 'The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.'
>
> An enormous body of subordinate laws is, nonetheless, constantly passed by means of statutory instruments, regulations and orders. This type of delegated legislation is, by common accord, indispensable for the functioning of the modern state. The necessary regulation of many branches of social and economic activity involves the framing of rules at a level of detail that would inappropriately burden the capacity of the legislature. The evaluation of complex technical problems is better left to the implementing rules. They are not, in their nature such as to involve the concerns and take up the time of the legislature. Furthermore, there is frequently a need for a measure of flexibility and capacity for rapid adjustment to meet changing circumstances. Without suggesting that a different approach is required for the present case, by reason of the fact that it concerns the implementation of European Community legislation, it is obvious that the adoption of detailed rules regulating production and trade in agricultural products is a particularly notable example of the exigencies of this type of law-making. There is, for example, an obvious need to be able to react rapidly and often severely to sudden trading problems or so as to protect human and animal health in the face of the outbreak of disease.
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> On the other hand, it is obvious that secondary legislation largely by-passes parliamentary scrutiny and the democratic process. Thus, the courts have found it necessary to strike an appropriate balance between the protection of the exclusive law-making domain of the Oireachtas and the proper function of the executive. The distinction is a functional one, aimed at designating the proper bounds of legislative and executive power. Delegated legislation is permitted and does not infringe Article 15. 2.1, provided that the principles and policies which it is the objective of the law to pursue, can be discerned from the Act passed by the Oireachtas, so that the delegated power can only be exercised within the four walls of the law. This serves the double purpose of preserving the legislative prerogatives of the Oireachtas and assuring to those affected by orders or regulations that the courts may be asked to police the bounds set by the law and, if necessary, to declare them to be *ultra vires* the powers of the relevant Minister or other delegated authority."

In an unreported judgment delivered on 23rd November, 2006, in *Bupa Ireland Ltd. and Another v. The Health Insurance Authority and Others*, McKechnie J., in commenting on the *Maher v. The Minister for Agriculture* case and other authorities stated (at para. 146, p. 122):

> "These decisions offer a clear view that in adjudicating upon an issue involving Article 15 of the Constitution, the court must reflect the reality of the subject which the legislature is addressing and of the implementing method best chosen by it for that purpose. If what is involved, or thought to be achieved is complex, technical or designed to operate as part of a dynamic and evolving model, capable of businesslike adjustment, then a subordinate body may be a much more suitable vehicle (indeed, on occasions, perhaps the only suitable vehicle) for the implementation and achievement of legislative objectives. If, on the other hand, the subject matter is easily capable of exact definition with established parameters, then there may be no justification whatsoever in the exercise of delegatory power. So it all depends on the individual circumstances of a given case, which, however, must always be determined against the backdrop of a statutory framework in which 'the principles and policies' of the legislature are set forth. This should not be the situation, as the High Court held in *McDaid v. Sheehy* [1991] 1 I.R. 1, then the delegation is, and will always remain, invalid."

21. The plaintiffs in this case ask the Court to police the bounds set by law and to declare the power exercised by the delegated authority to be *ultra vires*. If the Court did not have such power a party affected by an *ultra vires* delegation of authority would lack an effective remedy. The claim in this case is not that the delegated authority has exceeded its powers, giving rise to a claim based on judicial review, but rather that the powers sought to be exercised by the delegated authority are *ultra vires*.

22. From a consideration of the decided cases, identified above, dealing with the principles and policies test, this Court can identify certain principles, factors and considerations to apply and take into account in addressing the principles and policies test. They are as follows:

> (1) In applying the test it is necessary to strike a balance between the protection of the exclusive lawmaking domain of the Oireachtas and the proper function of the legislature.
>
> (2) In carrying out that balance the Court is carrying out a function which it must exercise, in an appropriate case, to ensure that a party affected by an *ultra vires* delegation of power has an effective remedy.
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> (3) The principles and policies test is a flexible test.
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> (4) If the legislation being considered is technical or complex, due account must be paid to that fact.
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> (5) In addressing the test, the Court must first look at the particular legislation and seek to identify and ascertain the principles laid down by the Oireachtas.
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> (6) In addressing the principles and policies test, the purpose of the legislation under consideration is of real significance and provides the backdrop against which the test is to be applied.
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> (7) In the event that the Court can identify principles and policies it is permissible for the delegated body to fill in the details and to make choices and decisions within those principles and policies without such actions on the part of the delegated body being deemed *ultra vires*.
>
> (8) In seeking to identify the principles and policies, the Court should have regard to the entire statute and not just the section challenged. The full terms of the statute require to be considered as is any policy or guiding principles which can be identified within the Act.

(9) One of the factors to consider in addressing the question as to whether or not there has been an *ultra vires* delegation is whether the Oireachtas has reserved to itself a power of supervision including the power of revocation or cancellation.

(10) The effect and consequence of an order made by a delegated body can be a factor to take into account particularly if the effect is to create a criminal offence.

(11) In addressing the principles and policies test, the Court should consider the circumstances and context of the legislation including an evaluation of what is fundamental and a consideration of whether the matters are fundamental. The Court must consider whether the fundamental matters dealt with by the delegated body are identified in the principles and policies in the Act.

(12) A central issue underlying all consideration by the Court of the principles and policies test is the question can standards, goals, factors and/or purposes be identified?

(13) A potentially useful way to address the issues in a particular case include the Court carrying out the task of determining whether the principles and policies (including goals, factors, standards and purposes) identified and relied upon by the defendant or defendants can properly be identified and located within the legislation.

(14) The absence of any particularity does not render a delegation *ultra vires* if it can truly be said that standards, goals, factors and purposes have been specified.

(15) If the principles and policies test is satisfied by a defendant or defendants the Court has no function in adjudicating on whether the decision taken by the delegated body is one the Court would have made.

(16) In looking at the question as to whether principles and policies have been identified and have been identified adequately to comply with Article 15.2.1, the Court can recognise that Administrative Bodies can be given tasks or delegated functions under Statute, and that these will vary, and that when given such tasks or functions, the delegate can exercise expert judgment, using accumulated knowledge, but the judgment always requires to be guided by specified principles and policies.

(17) If the legislation and/or Statutory Instrument impugned no longer applies or is no longer of any importance the Court should abstain from deciding the issue. That is not the position in this case where the first named plaintiff can still be prosecuted or sued in respect of actions taken by it during the period when the ERO Order in question was in force.

23. In support of the plaintiffs' claim for a declaration that the provisions of ss. 42, 43 and 45 of the 1946 Act and s. 48 of the 1990 Act are invalid, having regard to the provisions of Article 15.2.1 of the Constitution, the plaintiffs contend that neither the 1946 Act or the 1990 Act identify any standards, goals or factors which are to be applied by the catering Joint Labour Committee and/or the Labour Court in exercising the powers conferred upon them under the said Acts. The plaintiffs contend that the respondents have the power to fix minimum rates of pay and conditions of employment in excess of those decided upon by the Oireachtas, in other legislation, and that they do so based on the basis that the Acts "specify a number of principles and policies". What was in issue before the Court was whether or not the 1946 Act and the 1990 Act contained sufficient principles and policies to satisfy the requirements of Article 15.2.1. The plaintiffs submitted that those Acts did not identify principles or policies and did not identify any standards, goals or factors to be applied by the catering Joint Labour Committee or the Labour Court in exercising the powers conferred upon them under the said Acts. The defendants contended that it was clear that "the 1946 Act contains sufficient principles and policies to satisfy the requirements of Article 15". The defendants contended that the 1946 Act contained numerous principles and policies which necessarily limit and guide the exercise of powers under that Act.

24. The nature and scope of the power delegated to Joint Labour Committees and the Labour Court under the 1946 Act was addressed by Henchy J. in his judgment in *Burke v. Minister for Labour* case (at p. 354). One of the factors which the Court must take into account in considering delegated power and the authority to make orders is the effect and consequences of an order made by a delegated body. The actual power delegated to Joint Labour Committees and the Labour Court under the 1946 Act was considered and characterised in the judgment of Henchy J. (at p. 358 and 359), where the learned Judge stated:

> "It will be seen, therefore, that the power to make a minimum-remuneration order is a delegated power of a most fundamental, permissive and far-reaching kind. By the above provisions of the Act of 1946 Parliament, without reserving to itself a power of supervision or a power of revocation or cancellation (which would apply if the order had to be laid on the table of either House before it could have statutory effect) has vested in a joint labour committee and the Labour Court the conjoint power to fix minimum rates of remuneration so that non-payment thereof will render employers liable to conviction and fine and (in the case of conviction) to being made compellable by court order to pay the amount fixed by the order of the Labour Court. Not alone is this power given irrevocably and without parliamentary, or even ministerial, control, but once such an order is made (no matter how erroneous, ill-judged or unfair it may be) a joint labour committee is debarred from submitting proposals for revoking or amending it until it has been in force for at least six months."

He went on to state (at p. 361):

> "Apart from the skeletal provisions in the second schedule to the Act of 1946 as to its constitution, officers and proceedings, the Act of 1946 is silent as to how a committee are to carry out their functions in making orders."

Those descriptions of the effect, consequence and nature of the power delegated by the 1946 Act are ones which this Court adopts and notes that, notwithstanding the subsequent amendment of the 1946 Act by the 1990 Act, such delegated power remains unaltered. That power can properly be described as being of a most fundamental, permissive and far-reaching kind. It also remains the case that orders made by the Labour Court under s. 43 of the 1946 Act come into effect without the Oireachtas exercising any power of supervision and without the Oireachtas having a power of revocation or cancellation. The power delegated to the Labour Court under the 1946 Act continues to be the power to fix minimum rates of remuneration and conditions of employment enforceable by criminal prosecution.

25. The defendants contend that the 1946 Act contains numerous principles and policies which necessarily limit and guide the exercise of powers under the Act. In their defence the defendants set out at paragraph 11 their plea that sufficient statutory guidelines by way of principles and policies are set out in the 1946 and 1990 Acts. The defendants pleaded that:

"It is contended that the 1946 and 1990 Acts contain sufficient principles and policies to satisfy the requirements of Article 15.2.1. In particular, it is contended that the said Acts specify a number of principles and policies, including but not limited to:

(i) the importance of promoting harmonious relations between workers and employers;

(ii) the desirability of providing machinery to regulate rates of remuneration and conditions of employment;

(iii) the desirability of preventing and/or settling trade disputes;

(iv) the desirability of ensuring the existence of effective rather than inadequate machinery for regulating rates of remuneration and conditions of employment;

(v) the necessity for substantial agreement between workers and employers as to the establishment and maintenance of such machinery;

(vi) the necessity for matters relating to the exercise of such machinery to be widely publicised;

(vii) the necessity for consultations for all parties expressing an interest in the exercise of such machinery;

(viii) the necessity that such machinery be used to regulate rates of remuneration and conditions of employment only where it is proper to do so and in accordance with all the aforementioned principles and policies."

The defendants went on to plead, at paragraph 12 of their defence, that the 1946 and 1990 Acts provided further principles and policies in relation to the establishment and maintenance of Joint Labour Committees and further provide for the revocation or variation orders establishing an Joint Labour Committee where appropriate and that the said principles include, but are not limited to, the following:

"(i) The establishment of a Joint Labour Committee, such as the first respondent, cannot occur unless the Labour Court is satisfied that the claim for its establishment is well founded and second, either that there is substantial agreement between the relevant workers and their employers; or that the existing machinery for effective regulation of remuneration and other conditions for such workers is inadequate or potentially inadequate; or that, having regard to the existing rates of remuneration or conditions of employment of such workers, or any of them, it is expedient to establish such a committee.

(ii) The 1977 order establishing catering Joint Labour Committee expressly acknowledges that the Labour Court was satisfied that the existing machinery for effective regulation of remuneration and other conditions of employment of the relevant workers was inadequate."

The above matters were relied upon by the defendants as establishing sufficient principles and policies to satisfy the requirements of Article 15.2.1 of the Constitution. The matters set out in the pleadings were expanded upon in the submissions made by counsel on behalf of the defendants. They added to the matters identified in paragraphs 11 and 12 of the defence the following matters, namely:

"(a) the necessity for any claim by an organisation or a group of persons claiming to be representatives of such workers or such employers, to be well founded;

(b) the desirability of there being substantial agreement between workers and their employers about the establishment of a Joint Labour Committee, (this is in fact the same as part of what is claimed at paragraph 12(i) of the defence);

(c) the desirability of a Joint Labour Committee being established for the existing machinery for effective regulation of remuneration and other conditions of employment of workers as inadequate or as likely to cease or to cease to be adequate, (this also is in fact part of 12(i) of the defence);

(d) the expediency, having regard to the existing rates of remuneration or conditions of employment of such workers or any of them, of a Joint Labour Committee should be established; and

(e) the necessity for terms of EROs to be appropriately applied and enforced."

The first four of these deal solely with the establishment of Joint Labour Committees and say nothing about how a committee, once formed, is to act or what that body or the Labour Court are to use as standards or principles or policies in making EROs. Those four matters do not add to the matters pleaded. The fifth item at (e) uses the word "appropriately" which entirely begs the question of what is appropriate and leaves the delegated body at large to decide what is appropriate. This also does not add to the matters pleaded.

26. The defendants contend that the 1946 Act and the 1990 Act contain sufficient principles and policies and it is for this Court to consider whether or not the matters pleaded and identified by the defendants can be identified as principles and policies and if some or all of them can be so identified whether such principles and policies are sufficient to satisfy the requirements of Article 15.2.1. The matters relied upon by the defendants at (i) and (iii) of paragraph 11 of their defence, namely, the importance of promoting harmonious relations between workers and employers and the desirability of preventing and/or settling trade disputes are matters set out in the long title to the Industrial Relations Act 1946. The Court accepts that when endeavouring to ascertain whether principles or policies have been identified within legislation that it is both appropriate and necessary to have regard to the entire statute and not just the sections challenged within a particular case. The full terms of a statute require to be considered to ascertain whether or not any principles or policies have been identified within the Act. Whilst it is correct that the long title of the 1946 Act refers to the importance of promoting harmonious relations between workers and employers and the desirability of preventing and/or settling trade disputes, those matters are not mentioned or referred to in Part IV of the Act which is the part where ss. 42, 43 and 45 are set out. Whilst in the long title the regulations of terms and conditions is expressed to be for the "purpose" of promoting harmonious relations, there is no reference to that matter or to the desirability of preventing and/or settling trade disputes in Part IV of the 1946 Act. Consideration of the entire Industrial Relations Act 1946 and the context of its various parts and sections identifies that the reference in the long title to the importance of promoting harmonious relations between workers and employers and the desirability of preventing and/or settling trade disputes relates to Part VI of the 1946 Act which deals with trade disputes. It is that section of the Act which gives to the Labour Court the power to investigate trade disputes and make recommendations and provides for the appointment of a

conciliation officer to mediate in trade disputes. It is also the case that none of the paragraphs in (i) to (iii) inclusive could properly be regarded as principles or policies. Particularly, they provide no principles or policies in relation to the basis upon which wages or remuneration are to be fixed or terms or conditions of employment established are fixed. The matter being dealt with in Part IV of the Act is the creation of a scheme and the identification of procedures leading to orders fixing the rate of remuneration and conditions of employment for employees. The fundamental power delegated is the entitlement to make binding orders and these paragraphs do not in any way deal with how or on what basis such power is to be exercised. There is no indication how such power is to be exercised. The items pleaded at paragraph 11(i) and (iii) are objectives and provide no indication as to how such objectives are to be achieved. The item identified at (ii) is again taken from the long title to the 1946 Act and relates to the machinery and not to any principles or policies to apply in determining the rate of remuneration or the conditions of employment of an employee. The item pleaded at paragraph 11(ii) identifies the desirability of having machinery but it is not any guidance or direction as to how such machinery is to operate. It is not a statement of an objective by reference to which that process can be measured. This matter is not and cannot be read as identifying a principle or policy.

27. In considering the full terms of the 1946 and 1990 Acts, the position is that whilst the Joint Labour Committees and the Labour Court might be said to be entrusted with promoting harmonious industrious relations and preventing and/or settling trade disputes through the regulation of terms and conditions of employment, the Acts are entirely silent and leaves to the Labour Court and the Joint Labour Committees an unfettered discretion as to what to take into account and the basis upon which the rates of remuneration and terms and conditions of employment are to be determined. Given that the fundamental power under Part IV of the Act is the determination of the content and the making of EROs and given the complete absence of any principle or policy upon which such matters are to be determined, the absence of any principle or policy results in a situation where the delegated body is establishing its own principles and policies and not just filling in details or making choices or decisions within principles and policies. The only potential guidance is in "the skeletal provisions" in the second schedule to the 1946 Act.

28. The items relied upon by the defendants at (iv) and (v) of paragraph 11 of their defence repeat part of the provisions contained in s. 37(b). That section deals with the establishment of Joint Labour Committees. Those provisions provide no assistance, guidance, principle or policy in relation to the making of recommendations by the Joint Labour Committees or of orders by the Labour Court. Nor do they identify any principles or policies to be considered and applied when making recommendations or orders. The matters set out at (iv) and (v) concern the making of establishment orders. The Catering Joint Labour Committee was established by Order (S.I. 225 of 1977) in 1977 and there is no basis either in logic or from the text of the statute to suggest that the matters required to be taken into account in making that order are to be read as providing a policy or a framework for the later making of recommendations by that Committee or Orders by the Labour Court. As with sub-paragraphs (iv) and (v) of the pleas contained in sub-paragraphs (vi) to (vii) inclusive of paragraph 11 of the defence are also derived from the sections of the Act dealing with Joint Labour Committees. The defendants have failed to identify any basis for a claim which would require the Court to proceed on the basis that the conditions governing the establishment of a committee can be said to effect or guide the exercise of a power by that committee or the Labour Court. The principles and policies contended for by the defendants at sub-paragraphs (iv) to (viii) of paragraph 11 of the defence relate to circumstances and conditions which must exist prior to the Labour Court making an order for the establishment of a Joint Labour Committee. They do not relate to how the Joint Labour Committee or the Labour Court is to operate or what matters they are to take into consideration as matters of principle or policy when making an ERO. An ERO can only be made when a Joint Labour Committee has been appointed and the circumstances and requirements for the appointment of such a Joint Labour Committee do not and cannot provide assistance in identifying the principles or policies to be followed by such Committee or by the Labour Court in considering the rates of remuneration or conditions of employment to be contained in an ERO. In sub-paragraphs (iv) to (viii) of paragraph 11 of the defence, the defendants seek to rely, in establishing matters of principle and policy, on matters concerned with the establishment process. The Court does not accept that a full or realistic reading of the Act can allow or permit substantive principles and policies concerning the making of EROs to be identified from the sections of the Act dealing with the establishment of Joint Labour Committees. The identification and the adequacy of the legislative articulation of what are the principles or policies to be applied by a delegated body can be difficult to ascertain or isolate. No standard test or checklist can be established and the context and precise terms of the legislation will always have to be considered. In answering the question as to whether or not principles and policies can be identified the Court must further address the issue as to whether the delegated body is exercising a fundamental power and if it is, then does the State making the delegation to it as a delegated body can the legislation identify principles and policies to the extent that it can be said that the delegate is filling in details and making judgments within identified principles and policies. In the Act the power to make EROs is of a fundamental nature and is untrammelled and no guidance as to principle or policy is provided. In relation to the plea contended in sub-paragraph (viii) of paragraph 11 of the defence that the necessity that such machinery be used to regulate rates of remuneration and conditions of employment only where it is proper to do so and in accordance with all the aforementioned principles and policies, there is no principle or policy identified in establishing what is proper remuneration and conditions of employment. The Act is entirely silent as to the basis upon which proper rates of remuneration or conditions of employment are to be identified. The use of the word proper begs the question how proper is to be determined and on what basis. The 1946 Act allows all choices and decisions as to the rates of remuneration and conditions of employment to be made by a delegated body without providing any identification of the principles or policies upon which that body is to act.

29. The matter pleaded at sub-paragraph (i) of paragraph 12 of the defence is a reiteration of what is contained in s. 37 of the 1946 Act which is the section dealing with the restrictions on the making of establishment orders. That section deals with the establishment of a Joint Labour Committee and the basis upon which such Committee can be established but does not and cannot be said to provide assistance as to the basis upon which such Committee should operate after it has been established. The same observations which the Court makes in relation to sub-paragraphs (iv) to (viii) of paragraph 11 of the defence equally apply in relation to sub-paragraph 1 of paragraph 12 of the defence.

30. Sub-paragraph (ii) of paragraph 12 seeks to identify principles and policies on the basis that the 1977 order establishing the Catering Joint Labour Committee expressly acknowledges that the Labour Court was satisfied that the existing machinery for effective regulation of remuneration and other conditions of employment of the relevant workers was inadequate. As with sub-paragraph (i) of paragraph 12, sub-paragraph (ii) also deals with the establishment of the Catering Joint Labour Committee under the provisions relating to Joint Labour Committees in the 1946 Act. The matters sought to be relied upon by the defendants relate to the establishment of Joint Labour Committee. The sections of the Act, relied upon, which set out the principles and policies necessary for the establishment of a Joint Labour Committee do not relate to or impact on the power in s. 43 to make an ERO. They are entirely separate. The establishment of the first named defendant is not in issue in these proceedings and none of the principles or policies purported to be relied upon by the defendants in paragraphs 11 and 12 of their defence are directed to how or on what basis the Joint Labour Committee or the Labour Court are to perform their delegated duties leading to the making of an ERO. It is not the establishment of the first named defendant which is in issue in these proceedings but rather the fact that there is an absence of principle or policy contained in the legislation to guide the making of an ERO. The provision allowing for the establishment of a Joint Labour Committee provide no assistance on how the Joint Labour Committee is to perform its functions after establishment. It is the case that the Catering Joint Labour Committee was established in circumstances where it was determined that the machinery for the regulation of pay and conditions was inadequate. It was also the case that that Committee operates in such a manner as to make

recommendations in relation to pay and conditions and that the Labour Court makes orders in relation to pay and conditions. Therefore it can be said that those two bodies are part of the machinery dealing with that matter but that does not explain what principles are to be applied in deciding the rate of pay or the conditions to be included in an ERO.

31. In the *Leontjava* case, which was extensively relied upon by the defendants, the Supreme Court held that the delegation under the Aliens Act 1935 was not in breach of Article 15.2.1. The judgment in the Supreme Court identified that the delegation was lawful in that the law making power was constrained by the provisions in s. 5(1) of the Aliens Act 1935, where, registration, change of abode, travelling, employment, occupation and other like matters were set out. In that case, prior to the Minister making an order, such order had to be referable to the matters identified in section 5(1). That statutory framework resulted in the Supreme Court identifying principles and policies sufficient to ensure that an order was not in contravention of Article 15.2.1 of the Constitution. In this case, no such identification of matters can be gleaned from the statute. The statutory framework is that the delegated body, the Labour Court, in making an order under s. 43, is effectively at large in relation to what matters to take into account in considering and fixing wage rates and conditions of employment. In this case, the statutory provisions are such that there are no core policies or principles identified in the Act to guide the exercise of delegated power. It can properly be said that there is present no touchstone, or policies or principles, against which a party wishing to challenge the legality of an order, can measure or evaluate whether an order was made in accordance with the intent of the Oireachtas. The provisions contained in the 1946 Act, and insofar as is relevant in the 1990 Act, identify no discernable standard against which the delegated lawmaker's decision can be measured.

32. In conclusion, the Court has viewed the legislation in issue in its context and has had regard to the entire statute. In recognising that the principles and policies test is a flexible test, the Court has considered the question as to whether the scheme and provisions in issue herein could be viewed as a delegation of power or a transfer of power. Whilst it is possible to identify certain objectives in the legislation, when one considers its full terms and context, there is no indication, direction, statement of policy or identification of principles or policies present to indicate how the objective identified in the legislation is to be achieved. The far reaching nature of the delegation within the 1946 Act was identified by Henchy J. in *Burke v. Minister for Labour* and the absoluteness of the delegation which he identified remains unaltered. Since that judgment which was given in December 1978, the 1946 Act has been amended and a universal statutory minimum wage has been enacted by the National Minimum Wage Act 2000. The 1990 Act did not address the concerns obvious from the judgment of Henchy J. in *Burke v. Minister for Labour.* The enactment of the National Minimum Wage Act 2000 and the identification of principles and policies which were to inform the Minister in making an order for a national minimum hourly rate of pay as set down in s. 11 of that Act did not result in any amendment to the 1946 Act and the principles and policies contained in the 2000 Act were not extended to the 1946 Act. This was the situation notwithstanding the identification of real concerns concerning the scope and extent of the delegation in the 1946 Act apparent from the judgment of Henchy J.

33. This is a case where the delegated power is excessive. Such a delegation would be lawful if the Act delegating the power had either in 1946 or by subsequent amendment provided policies or principles to guide, inform and direct the Labour Court or the Joint Labour Committees established under the 1946 Act. If that had occurred then those expert bodies could have used their expertise and knowledge to fill in the details, on an ongoing basis, based upon principles or policies identifying standards, goals, factors and purposes laid down by statute. As that did not occur, the delegation in issue in this case amounts to a transfer of power. The legislation in issue in this case permits not even the executive to be at large but the Labour Court and permits that body to make laws.

34. Having carefully perused the entire 1946 Act (and the 1990 Act insofar as it is relevant) and paying full regard to its context and the technical difficulties of investigating, considering and ascertaining wage rates and conditions of employment on an ongoing basis, the Court has been unable to find any matters which could properly be described as policy or principle within the terms of the Act directing or informing the delegated body. The matters identified by the defendants as a specification of principles and policies cannot properly be regarded as policies or principles and are in no way directed to informing the delegated body as to how that body is to carry out its functions or what that body is to take into account in carrying out the fundamental task of fixing wage rates and conditions of employment. Where the consequences are an ERO which is to place an obligation on an employer to apply particular wage rates and conditions of employment which can be enforced by criminal sanction, those rates and conditions must be determined and based upon principles and policies laid down by the Oireachtas and not as determined by a delegated body acting in the absence of stated principles and policies.

35. It is possible to discern within the legislation in issue the objectives sought to be achieved but it is not the objectives which are required to make a delegation lawful but the identification of principles and policies. The legislation is silent as to how the delegated body is to carry out its functions in making orders.

36. In this case, the defendants contended in submissions to the court that what the plaintiffs were seeking to do was to require the Oireachtas to specify in advance a minimum remuneration and terms and conditions should be determined on an ongoing basis, within a specific sector, following discussions by representative groups and a supervision of an expert body. It was claimed that the approach argued for by the plaintiffs would defeat the whole aim of the Oireachtas in establishing flexible participatory and sector specific machinery. This Court in its judgment is not seeking to require that there be legislation specifying in advance how wages and conditions of employment should be determined but rather ascertaining if a policy or principle can be identified for the delegated body as to how such matters are to be determined. In the absence of such principles and policies, delegation is a breach of Article 15.2.1 and results in a situation where the insufficiency of legislative articulation of any policy and principle for determining wage rates and conditions offends the provisions of Article 15.2.1.

37. In paragraph 8 of the defence it is pleaded;

> "In the alternative, if the exercise of the statutory powers of the first and second named defendants does constitute an interference with the property rights of the plaintiffs (which is denied), it is now that any such interference is unjust or disproportionate. To the extent that the exercise of the first and second named defendants' statutory powers does constitute an interference with the property rights of the plaintiffs (which is denied), any such interference constitutes a permissible regulation of the property rights of the plaintiffs in accordance with the provisions of the Constitution of Ireland, the principles of social justice and the exigencies of the common good."

Central to the defendants' plea in relation to property rights, as set out at paragraph 8 of the defence, was reliance by the defendants on the provisions of Article 43(2) of the Constitution. That provision provides:

> "The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property."

The core issue for consideration by the Court in considering the plaintiffs' property rights challenge is the contention by the plaintiffs

that there is an interference with such rights due to the fact that the challenged legislation and the ERO made thereunder requires the first and second named plaintiffs, as a condition of legally carrying on their business, to pay wage rates and apply conditions of employment to their employees which it is claimed have been determined in an arbitrary and illegal manner. As set out in this judgment, this Court is satisfied that the plaintiffs have established that such pay rates and conditions of employment have in effect been determined in an arbitrary and unfair manner. The legislation upon which the Joint Labour Committee operates is silent as to how that Committee is to carry out its functions in making orders. That situation was identified by Henchy J. in the Burke case in 1978 and remained the position up to the date when S.I. 142 of 2008 was introduced. As this Court is satisfied that that Statutory Instrument was made in the absence of any principles or policies and was in effect therefore arbitrary or subjective, such order cannot be enforced where the consequences of the failure to comply with such order can include criminal prosecution. Absent a court order declaring the ERO (S.I. 142 of 2008) an unlawful and disproportionate interference with the property rights of the first and second named plaintiffs, the first named plaintiff would remain at risk of criminal prosecution in respect of an arbitrary and illegal statutory provision. In those circumstances this Court is satisfied that it is not open to the defendants, on the facts of this case, to contend that the provisions contained in the ERO do not constitute an interference with the property rights of the first two plaintiffs nor is it open to the defendants to contend that such interference is not unjust or disproportionate.

38. Insofar as the defendants contend in paragraph 8 of their defence that if there is an interference in the plaintiffs' property rights that such interference is permissible within the provisions of the Constitution of Ireland, this Court is satisfied that the defendants cannot rely on Article 43 of the Constitution. The defendants have not contended that Article 43 of the Constitution provides "principles and policies". By their plea, in paragraph 8 of the defence, the defendants are endeavouring to introduce, what in reality amounts to, a claim that principles and policies under the 1946 and 1990 Acts should be established or introduced by reference to the provisions of the Constitution. This Court is satisfied that there is no basis for such claim. The statutory position is that a Joint Labour Committee cannot be established unless the provisions of the 1946 Act are satisfied. Establishment orders made by the Labour Court are based upon and confirm that particular conditions have been satisfied for the making of an establishment order. The facts of this case are that the Labour Court did not decide that having regard to the rates of pay or conditions of employment prevailing in the relevant sector that it was expedient that a Joint Labour Committee should be established as the conditions recorded in the Instrument establishing the first defendant were those set out in s. 37(B)(ii) of the 1946 Act, which deals with the absence of effective machinery to regulate wages and conditions and not with actual rates or conditions.

39. In the Supreme Court decision of *Brennan v. Attorney General* [1984] ILRM 355, the Court considered the valuation system in force in respect of agricultural land and held that the valuation system constituted an unjust attack on the property rights of the plaintiff. O'Higgins C.J. held (at p. 365):

> "With regard to Article 40.3 the court is of the opinion that the plaintiff's complaints that this Article has not been observed are justified and should be upheld. In the opinion of the court the complaints are proper to be considered primarily under the provisions of Article 40.3.2.
>
> The evidence and facts as found by the learned trial Judge was that the use of the 1952 valuations was continued as a basis for agricultural rates, long after the lack of uniformity, inconsistencies and anomalies had been established and, long after methods of agricultural production had drastically changed. This in itself was an unjust attack on the property rights of those who like the plaintiff found themselves with poor land paying more than their neighbours with better land. When this injustice became obvious the State had a duty to take action in protection of the rights involved. This it failed to do. In continuing by means of s. 11 of the Local Government Act 1946, the same system without revision or review the State again, in the opinion of the Court, failed to protect the property rights of those adversely affected by the system from further unjust attack. In the assessment of attacks such as a country rate reasonable uniformity of valuation appears essential to justice. If such reasonable uniformity is lacking the inevitable result is that some ratepayer is required to pay more than his fair share ought to be. This necessarily involves an attack upon his property rights which by definition becomes unjust. The plaintiffs have established such injustice in this particular case."

The evidence which this Court heard established that terms and conditions of employment provided for under the ERO system of orders could result in businesses immediately adjacent to one another being required to adhere to significantly different statutory obligations. These included extra and different rates of pay for Sunday and night work. There was not any reasonable uniformity of terms which would be required by justice. The Court also heard evidence that the rates of remuneration and conditions of employment determined by the ERO in issue were in excess of those laid down by the Oireachtas in statute by the National Minimum Wage Act 2000 where principles and policies giving rise to such rates of remuneration and conditions of employment are identified. On the facts of this case no such principles and policies were identified in the ERO or in the 1946 or 1990 Acts which would enable persons affected by the ERO to ascertain the principles and policies or supervisory measures which resulted in different rates from those established under the 2000 Act, where principles and policies are identified.

A body which has delegated to it a power of subordinate legislation must exercise that power within the limitations which are expressed or necessarily implied in the provisions providing for such delegation. One implication which arises in the circumstances of such delegation is that the power to make subordinate legislation should be exercised reasonably. On the facts before this Court that is not what has occurred. The ERO which was made introduced fixing wage rates and conditions of employment and was made in an arbitrary manner in that certain rates were set out for a geographical area when significantly different and more restrictive rates and conditions of employment applied in an immediate adjoining area without there being any identifiable basis for such discrimination. In the light of the above, this Court is satisfied that the plaintiffs have established that the ERO made on the 12th May, 2008 (S.I. 142 of 2008) unlawfully interferes with the first two plaintiffs' property rights under Article 40.3 of the Constitution.

40. On the basis of the findings made by this Court, the plaintiffs are entitled to a declaration that the provisions of ss. 42, 43 and 45 of the 1946 Act and s. 48 of the 1990 Act are invalid having regard to the provisions of Article 15.2.1 of the Constitution of Ireland and also the declaration sought that the ERO is invalid. The Court will hear the parties in relation to the terms of such declarations. The court will also hear the parties in relation to the procedure to be followed in relation to outstanding matters for consideration by the court including the issue of the damages, if any, to which the plaintiffs might be entitled.