AN BILLE CAIDRIMH THIONSCAIL (LEASÚ), 2011
INDUSTRIAL RELATIONS (AMENDMENT) BILL 2011

EXPLANATORY MEMORANDUM

Introduction

The main purpose of this Emergency Bill is to provide statutory protection for workers whose remuneration is governed by Employment Regulation Orders imposed pursuant to the Industrial Relations Acts 1946 and 1990. The reason such emergency legislation is required is because of the judgment of the High Court delivered on 7 July 2011 in proceedings entitled The High Court, Record No. 2008/10663P 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.

In that judgment the High Court determined that the Employment Regulation Order made by the Labour Court on 12 May 2008 (S.I. No. 142 of 2008), fixing the statutory minimum remuneration of catering workers outside the County Borough of Dublin and Borough of Dun Laoghaire, unlawfully interfered with the first two Plaintiffs' property rights under Article 40.3 of the Constitution. The Court also declared that the provisions of Sections 42, 43 and 45 of the Industrial Relations Act 1946 and Section 48 of the Industrial Relations Act 1990 are invalid having regard to the provisions of Article 15.2.1 of the Constitution of Ireland. The Court reached its conclusion on the basis 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 lawmaking power carried out in the making of S.I. No. 142 of 2008. In particular, the Court determined 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 was given in circumstances where there was no legislative guidance as to how such discretion was to be exercised.

This Bill provides for the amendment of the Acts of 1946 and 1990 so that the statutory mechanism in place for the fixing of remuneration by an Employment Regulation Order is consistent with the requirements of Bunreacht na hÉireann. The Bill also decriminalises any failure on the part of an employer to comply with an ERO (as recommended by the Duffy Walsh Report at Recommendation 19 of their Report) and replaces it with a civil enforcement mechanism.

This Bill is required because all workers whose remuneration was governed by Employment Regulation Orders on or before 7 July 2011 no longer have the statutory benefits of those Employment Regulation Orders because of the judgment of the High Court. If this Bill is enacted it shall enable the Minister for Jobs, Enterprise and Innovation to make new Employment Regulation Orders in respect of all such workers under a new statutory mechanism that takes into account and rectifies the failings in the Acts of 1946 and 1990 as identified by the High Court in its recent judgment.

Part 1

Preliminary and General

Section 1 provides for the short title, collective citation, construction and commencement provisions of the Bill.

Section 2 provides for the definitions associated with the Bill.

Part 2

Amendments to Part IV of Industrial Relations Act 1946 and Section 48 of Industrial Relations Act 1990

Section 3 provides for a new definition of ''Employment Regulation Order'' (''ERO'') to limit it to those Orders made after the commencement of this Act (i.e. by Ministerial Order).

Section 4 provides detail as to what is the purpose of Part IV of the 1946 Act. One of the criticisms of the statutory mechanism made by the High Court was that Part IV of the Act does not contain any detail about the purpose of that Part of the Act being to promote harmonious relations between workers and employers and the desirability of preventing and/or settling trade disputes. This Section provides details of the purpose of the Act and the statutory basis for the making of EROs.

Section 5 provides for the ''principles and policies'' to which a Joint Labour Committee (''JLC'') must have regard when formulating proposals to submit to the Labour Court for Employment Regulation Orders. In this context, a JLC must have regard to—

(*a*) the legitimate interests of the workers,

(*b*) the legitimate interests of the employers,

(*c*) the prevailing economic circumstances,

(*d*) the prevailing employment circumstances of the workers,

(*e*) the prevailing commercial circumstances of the employers,

(*f*) the terms of any National Agreement relating to pay and conditions, for the time being enforced.

The fundamental criticism by the High Court of the statutory scheme was that it failed to identify principles and policies as to how power should be exercised by the JLCs in fixing the rate of remuneration and conditions of employment for employees. The High Court stated at paragraph 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 industrial relations and preventing and/or settling trade disputes relating to the regulation of terms and conditions of employment, the Acts are entirely silent and leaves (sic) 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 were 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.''

This Section overcomes and responds to the High Court determination that the statutory mechanism contains a complete absence of any principles or policies.

Section 5 also provides that where an Employment Regulation Order has been in force for less than six months, a Joint Labour Committee may submit proposals for revoking or amending the Order where it is satisfied that—

(*a*) the Order contains an error, or

(*b*) exceptional circumstances exist which warrant the revocation or amendment.

This provision is included in order to respond to one of the other failings in the statutory mechanism identified by the High Court in its judgment. At paragraph 23 of its judgment the High Court quoted, with approval, the previous decision of the Supreme Court in *Burke v Minister for Labour [1979] IR354* where Henchy J stated:

''*Not alone is this power [to make a minimum Remuneration Order] 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*.''

Section 6 provides for the making of an ERO by the Minister. Following adoption of a proposal for an ERO by the Labour Court, the proposals will be forwarded to the Minister who shall make an Order giving effect to the proposals. The Minister will therefore make all ERO's, not the Labour Court. The standard legislative provision dealing with the laying of the Order before the Oireachtas by the Minister will apply. This Section seeks to overcome the problem in the statutory mechanism, identified by the High Court, that the power of the JLC and the Labour Court to fix minimum rates of remuneration is a power given without parliamentary or even ministerial control. Under this Section the Minister now makes the ERO and it can be annulled by either House of the Oireachtas. The High Court declared Sections 42, 43 and 45 of the 1946 Act and Section 48 of the 1990 Act unconstitutional because they were invalid having regard to the provisions of Article 15.2.1 of Bunreacht na hÉireann which provides that the sole and exclusive power of making laws for the State vests in the Oireachtas. This Section remedies that failure in the statutory mechanism since all EROs will now be subject to Oireachtas approval or disapproval.

Section 7 repeals Section 45 of the 1946 Act which makes it an offence for an employer to pay to a worker remuneration less than the statutory minimum remuneration, or to fail to comply with statutory conditions of employment. This Section, which the High Court ruled was unconstitutional, was the subject of Recommendation 19 in the Duffy Walsh Report. It recommended that the mechanism for enforcing EROs be brought into line with that for Regulated Employment Agreements (REA) and that, as an alternative to a criminal prosecution, a complaint could be brought before the Labour Court. Duffy Walsh recommended that NERA be authorised to bring such a complaint in respect of either an REA or an ERO.

Section 8 provides for improved procedures to be followed when formulating proposals for an ERO. This is achieved through an amendment to Section 48 of the 1990 Act which was held to be unconstitutional by the High Court. Under the current legislation Section 48 merely requires that, when proposals for the making of an ERO are being forwarded to the Labour Court, the JLC Chairman must submit a report to the Court on the circumstances surrounding their adoption by the JLC. Section 8 provides that, in future, the Chairman of the JLC shall forward to the Labour Court, in addition to a report on the circumstances surrounding their adoption, copies of all written submissions and any other documentation considered by the JLC in formulating its proposals. The Labour Court will consider the material forwarded to it in considering the JLC's proposals and may hold a hearing where there are objections to the proposals.

Section 9 provides for consequential amendments to the Employment Permits Act 2006 and the Organisation of Working Time Act 1997.

Financial implications of the Bill

The Bill has no direct financial implications for the Exchequer.

Willie O'Dea T.D.,
Iúil, 2011.

Wt. 52960. 635. 7/11. Clondalkin Parma and Healthcare. (X57998). Gr. 30-15.