SUMMARY

2020/34 Challenge to validity of Workplace Relations Act 2015 unsuccessful (IR)

A recent challenge to the constitutionality of the Irish Workplace Relations Commission (WRC) has failed. The applicant in the case at hand argued that the WRC was unconstitutional for two reasons: (a) that the WRC carries out the administration of justice in breach of the general constitutional rule that only the courts may administer justice; and (b) several of the statutory procedures of the WRC were so deficient that they failed to vindicate the applicant's personal constitutional rights. The High Court of Ireland dismissed both arguments.

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Legal background

Prior to the enactment of the Workplace Relations Act 2015 (the '2015 Act'), a variety of mechanisms for the resolution of individual employment rights had been provided on an ad

hoc and sometimes incoherent basis with multiple points of entry and diverse routes of appeal. The purpose of the 2015 Act was to transform these various dispute resolution procedures by a single point of entry and a single route of appeal. All employment rights disputes would now be dealt with by adjudication officers of the newly established WRC with a right of appeal to the Labour Court.

The 2015 Act was generally welcomed although some sections of the legal professions expressed concern that unfair dismissal cases would now be heard in private by persons with no legal qualifications and whose decisions would be anonymised. Before the 2015 Act, such cases would have been heard in public by a three-person tribunal, whose chair would have had a professional legal qualification, with decisions being issued in the name of the parties.

Facts

In this case, the applicant Mr Zalewski instituted claims for unfair dismissal and payment in lieu of notice with the WRC after he was purportedly dismissed from his employment. A hearing had commenced in front of the adjudication officer and written submissions and documentation had been submitted. Thereafter the matter was adjourned to allow for the attendance of a witness for the employer. When the parties attended on the adjourned date, however, they were informed that a decision had already been issued and the claims had been dismissed.

The applicant initiated judicial review proceedings claiming these circumstances were indicative of systemic or structural failings in the operation of the adjudication process provided for under the Workplace Relations Act 2015.

The applicant sought an order of certiorari quashing the decision of the WRC and also sought declarations that:

certain statutory provisions were invalid, particularly because the powers and functions granted to adjudication officers and the Labour Court in deciding employment claims constituted the administration of justice, and thus ought to have been carried out by the judiciary;

the procedures in the WRC were invalid as they failed to respect his rights to constitutional justice and fair procedures.

The WRC accepted there was an ‘administrative error’ and proposed to the applicant that the

matter be disposed of by its consenting to an order quashing the decision and remitting it to be heard by a different adjudication officer. The applicant refused.

Judgment of the High Court

The WRC does not exercise judicial functions

The High Court held that the fact the WRC does not have the ability to enforce its own decisions crucially means the WRC is not exercising judicial functions. The fact that a claimant must make an application to the District Court to enforce a WRC decision, and this was not simply a 'rubber stamping exercise' as the District Court could overrule that decision as to the appropriate remedy, meant that they could not be said to be carrying out the administration of justice.

The statutory procedures of the WRC are unconstitutional

The applicant made four arguments each of which was unsuccessful:

That adjudication officers and members of the Labour Court were not required to have legal qualifications, training or experience. The High Court found that it was not necessary for officers of a body whose decision making falls outside the administration of justice to have the type of legal qualifications required of people being appointed to carry out a judicial function.

That adjudication officers cannot take evidence on oath or affirmation. The High Court noted that the requirements of constitutional justice existed on a spectrum, and held that there was no requirement that evidence in claims of unfair dismissal be sworn, particularly if the entire decision-making procedure is taken in the round. Sworn evidence could be taken by the Labour Court on appeal.

That the legislation did not expressly provide for a right to cross-examine witnesses rendered it in breach of fair procedures. The Court found there was nothing in the legislation that excluded a right to cross-examine and the presumption of constitutionality meant that adjudication officers are presumed to allow for cross-examination in cases where it was so required. If they failed to do so it would represent a good ground for judicial review; therefore, express provision was not required.

That the fact that hearings before adjudication officers were heard in private breached the applicant's rights under both the Constitution and Article 6 of the European Convention on

Human Rights. The Court held that even in the case of the judiciary administering justice there were exceptions to the requirement that it be done in public, on the basis that sometimes the loss of privacy was too high of a price to pay. In this regard the judge noted that while the hearings were in private, the anonymised decisions were published, and that an acceptable compromise had been reached between the privacy of claimants and the requirement of publicity of the reasoning of the decision maker. Again, the judge noted that, looking at the process in the round, appeals heard by the Labour Court were heard in public and thus, if there was such a requirement, it was met.

Commentary

While the procedures introduced by the Workplace Relations Act 2015 were much maligned by practitioners on their introduction, subject to any appeal of this determination, they have now been declared sufficient from a fair procedures perspective by the High Court. In a subsequent decision, the applicant was awarded one half of his legal costs.

Comment from other jurisdiction

Finland (Janne Nurminen, Roschier, Attorneys Ltd): In Finland, claims regarding dismissals are primarily heard by the general courts, the District Court being the first instance, where the judges are legally qualified, the hearings are as a rule held in public and the decision are not anonymized.

However, in Finland there is also a special court which can on some occasions hear unfair dismissal cases, the Labour Court. The Labour Court, in its capacity as a special court, hears and resolves civil cases concerning collective bargaining agreements and public service collective agreements, as well as civil cases deriving from the Collective Agreements Act (436/1946).

If a collective bargaining agreement includes provisions regarding dismissals, it is possible in practice that the dispute can be brought forward to the Labour Court, e.g. cases where elected shop stewards have been dismissed. The right to bring cases to the Labour Court belongs primarily to employee and employer associations. A single employee has only a secondary right, without the contribution of an employee association, to bring his/her case to the Labour Court. Usually, collective bargaining agreements also include a clause regarding mandatory negotiations between the collective agreement parties before taking the matter to the Labour Court.

The operation of the Labour Court is based on the principle of tripartism. The president and

the vice-president of the Labour Court are legally qualified and neutral full-time members of the Court whereas the other members of the Court are appointed for a fixed period and work part-time. Other members are appointed upon the nomination by the most representative central organizations of the employers' and employees' associations and are not required to have a legal qualification (although they typically do have). As in the general courts, the hearings in the Labour Court are held in public and the decisions are not anonymized.

An interesting question is the non-appealability of the Labour Court's decisions even though it can be considered as the court of first instance in some cases. However, mandatory negotiations must take place before the matter is taken to the Labour Court and the so-called extraordinary means of appeal are available. In this procedure, judgments of the Labour Court may be annulled by the Supreme Court upon demand due to severe procedural flaws.

Germany (Nina Stephan and Leif Born, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the Labour Courts decide on dismissal cases. The Labour Courts are specialized courts which rule exclusively on disputes in connection with employment relationships. Different provisions apply to managing directors who are not considered employees under German law. For these persons it depends on whether the working relationship is terminated before/together with or after they have been removed from office as managing director. If the termination of the working relationship is given after the removal, the Labour Courts are responsible for deciding the matter. If the working relationship is terminated before or simultaneously with the removal, the Regional Courts (ordinary jurisdiction) are responsible.

Just as with the ordinary civil courts, the Labour Courts consist of a professional judge and two honorary judges. The honorary judges are not legally trained and are selected in equal numbers from employees and employers.

The court hearings are held in public. Exclusion of the public is only possible in exceptional cases, for example to protect business, trade, inventor or tax secrets or to protect the privacy of one of the parties involved which may be necessary in the event of an employee's dismissal due to illness.

The publication of court decisions is obligatory if there is a public interest in the decision, which can especially result from the fact that the decision has significance beyond the individual legal dispute. In order to protect the personal rights of the parties the decisions are only published anonymously.

In this context, however, the following should be noted in addition. Although the Labour

Courts decide exclusively on dismissal cases various other bodies may be involved in the course of the dismissal process. For instance, employers must consult the works council before giving notice of termination. Special State authorities must be involved in the dismissal of a severely disabled person, a pregnant woman or an employee on parental leave. These bodies may not decide on the termination, but in the absence of participation, the termination is invalid.

United Kingdom (Richard Lister, Lewis Silkin LLP): The great majority of employment claims in the UK are heard by Employment Tribunals (ETs). These are statutory bodies that were set up over 50 years ago to provide a speedy, informal and inexpensive forum for the resolution of disputes between employees and employers. They have an exclusively statutory jurisdiction, but this has expanded enormously over the years to encompass a wide variety of claims including unfair dismissal, discrimination, unlawful deduction from wages, whistleblowing, family rights, redundancy and many others.

In relation to termination of employment in the UK, there is an important (albeit perhaps confusing) distinction between two different types of claim which employees may pursue:

– Wrongful dismissal. This is a common law claim that the dismissal was in breach of the terms of the contract of employment. It is normally brought in the ordinary civil courts (High Court or County Court), although ETs have jurisdiction to hear breach of contract claims for up to GBP 25,000.

– Unfair dismissal. This is a statutory claim which must be brought in the ET. It focuses on whether the employer can show a valid reason for termination and, if so, the reasonableness of the decision to dismiss the employee and/or the way in which the dismissal was carried out procedurally.

As UK employment law has become more complex and technical, ETs generally have become more legalistic and moved away from their original conception of an accessible, informal and cheap forum for dispute resolution. Legal representation and longer hearings have become increasingly common, along with ever-more detailed rules of procedure.

An ET normally comprises three persons – a legally qualified Employment Judge flanked by two wing members, one from a list consisting of employers and the other from a list representing workers. The idea is that the wing members contribute their everyday experience of workplace practices. Each of the three ET members is of equal status and decisions are reached by majority voting. The Employment Judge may sit alone to hear certain types of

cases, or if the parties agree – this is an increasing trend.

ET hearings are generally held in public and there are no restrictions as to who may attend – there is a strong presumption that 'justice should be seen to be done'. Proceedings can be freely reported in the media (unless specific restrictions are in place – see below). Nonetheless, the ET rules of procedure recognise that there may be exceptional circumstances in which the hearing or some parts of it – or material that would otherwise be disclosed – needs to be kept private. In addition, there is specific provision for privacy in proceedings that potentially involve issues of national security.

Similarly, ET decisions are public documents which are normally made available on an online database. While the general rule is that decisions are not anonymised, it is possible for parties to obtain a 'restricted reporting order' (RRO) in a range of circumstances under the ET rules. RROs used to be rare because they were only available in cases involving national security, sexual misconduct or disability, but they have become more commonplace. The ET rules have been amended to allow for restrictions on publicity and even permanent anonymity orders in a wide variety of situations, particularly where an individual's privacy rights under Article 8 of the European Convention on Human Rights are engaged.

Subject: Unfair Dismissal, Fair Trial, Miscellaneous

Parties: Tomasz Zalewski – v – The Workplace Relations Commission, An Adjudication Officer (Rosemary Glackin), Ireland and the Attorney General

Court: High Court of Ireland

Date: 21 April 2020

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Creator: The High Court

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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