Supreme Court's 'broad perspective' saves WRC, but changes afoot

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Last week's major Supreme Court judgment found that the WRC is not unconstitutional; a relief for the Commission and for the Government, which needs specialist tribunals. However, the WRC can no longer "blanket" ban public hearings, which could lead to more settlements and parties opting for mediation.

The majority judgment of the Supreme Court in *Zalewski v An Adjudication Officer & Ors* concludes that the WRC and Labour Court are in the administration of justice, but given the various limitations on the bodies, they comply with Article 37 of the Irish Constitution.

Yet, the Court found aspects of the WRC's procedures to be repugnant to the Constitution, such as the blanket prohibition on public hearings and the lack of statutory basis for adjudication officers (AOs) to take evidence on oath.

Trade unions and employers had preferred private hearings

Mr Justice O'Donnell was also critical of the lack of an explicit provision in the Act for the right to cross-examine witnesses (though the right to cross-examine is already detailed in a WRC guidance note for adjudication hearings).

The WRC will have to adjust its procedures to make it more fit for purpose – a reminder that the legislature cannot cut corners with bodies that are in the 'administration of justice.'

The changes demanded by the SC judgment mean the 2015 Workplace Relations Act will have to be amended. However, it does not mean current cases before WRC adjudication cannot be heard. Nor does it impact cases already decided.

IRN understands that the WRC has already instructed AOs that hearings are now in public, but with a few caveats to consider (detailed below).

The requirements for public hearings and taking evidence on oath do not affect industrial relations cases, for which recommendations are non-binding and non-justiciable. For the WRC, it applies only to "rights" based claims.

END OF ANONYMITY?

While the precise nature of how the WRC will meet the constitutional requirement of public hearings has yet to be decided, this fundamental change in running hearings is contrary to what trade unions and employer organisations had sought when the WRC was being established – and which had been the norm for the equivalent LRC Rights Commissioner hearings prior to 2015.

Non-legal practitioners at WRC adjudication hearings have not had a pressing desire for public hearings, or for decisions to name the parties involved.

An informed trade union source told IRN that they have never had a member claimant who was disappointed their hearing was not in public.

The main reason why worker claimants may not prefer public hearings is that they don't want the publicity; they merely want resolution to whatever problem they have. They may also be apprehensive about going in front of a tribunal/court against their (former) employer.

For employers the main advantage of private hearings is that they may avoid any reputational damage that a public hearing could carry.

Heretofore, WRC adjudication hearings were to be held "otherwise than in public" and the Commission was to publish "on the internet in such form and in such manner as it considers appropriate every decision (other than information that would identify the parties in relation to whom the decision was made) of an adjudication officer."

However, whether there was a right to anonymity remained a grey area. Some argued there was a legitimate expectation to anonymity but the anonymity requirements were imposed on the WRC alone.

There always was the potential for a party to go public with their adjudication decision, or for a party to be identified by an entity other than the WRC, without repercussion.

Maintaining an anonymity clause is now moot if a hearing is to be held in public. However, O'Donnell J noted in his judgment that proceedings "may, but not must, be heard in public". This suggests that the private hearings and anonymity could still be requested and granted, particularly for sensitive cases – this is the approach the Labour Court takes.

INCREASE IN SETTLEMENTS & MEDIATION?

Depending on what new form WRC adjudication hearings will take, as a result of the SC judgment, it could, in theory, encourage more settlements, outside of "tribunal."

The publicity of a new adjudication hearing may act as a deterrent to one or both parties to a claim and encourage more binding private settlements. Somewhat paradoxically, if there are more settlements before a claim gets to the stage of an adjudication hearing, then it would result in a higher rate of cases with a stricter confidentiality outcome.

The undesirable event of a public hearing for some could also lead to more cases being channelled into mediation. This is something the WRC will have to be aware of, if the demand for mediation increases. A mediation agreement also carries stricter confidentiality than an adjudication decision has done to date.

If a pattern of increased private settlements and mediation does emerge, and the number of adjudications recede, it would reduce the rate of adjudication decisions being published – the original intent of which was to act, in part, as an educational tool.

MORE ADJOURNMENTS

The WRC will now have to work out the logistics of having to provide for public hearings. The current Covid-19 restrictions might buy them some time in this regard, but when in-person hearings are running again it might result in increased costs to the Commission.

Currently, adjudication hearings are run virtually, via WebEx. IRN understands the WRC has informed AOs that parties to an adjudication can now share the WebEx link to the hearing with members of the public, “or if the WRC receives a request it can provide the link.”

However, if the numbers wishing to attend “is significant and has an impact on the quality of the IT connection, which could in turn impact on the fairness of the hearing, then AOs may decide to limit external participants to one or two and should in any event mute them for the duration of the hearing.”

An immediate impact of the SC’s requirement that AOs should be able to take evidence on oath is that it could lead to more adjournments.

In fact, the WRC has told AOs that “where there is any conflict of evidence in the complaint before an Adjudication Officer, that will require the adjournment of the hearing to await the amendment of the Workplace Relations Act, 2015 to grant Adjudication Officers the power to administer the oath and to provide for a punishment for the giving of false evidence.”

AOs have also been instructed to make a note of the parties’ views and the decision taken on these matters, and to include such in the adjudication decision which follows.

MODERN NEEDS OF GOVERNMENT

The reasoning of the majority judgment in *Zalewski*, authored by Mr Justice O’Donnell, is influenced by what was referred to in the 1980 *Madden v. Ireland* judgment, as the “needs of modern Government.”

In that judgment, McMahon J stated that, “experience has shown that modern Government cannot be carried on without many regulatory Bodies and those Bodies cannot function effectively under a rigid separation of powers” and that the introduction of Article 37 to the Constitution “is to be attributed to a realisation of the needs of modern Government.”

Had the judgment gone against the WRC on the Article 37 aspect, it could well have had ramifications for other tribunals and decision-making bodies, such as the Residential Tenancies Board, for example. In fact, that point is understood to have been strenuously argued by the respondents at the Supreme Court.

Before arriving at his conclusions, O’Donnell J traced the historical developments of employment dispute resolution, touching on the preference, since the Industrial Revolution, for low-cost, relatively informal non-judicial decision making in the field of industrial relations.

ADMINISTRATION OF JUSTICE

The two main thrusts of deciding whether the WR Act was constitutional or not were (1) determining whether the WRC is in the ‘administration of justice’ and, if so, (2) whether it is compliant with Article 37, which requires that a body with powers of a judicial nature (in matters other than criminal matters) to have limited functions.

The main test for assessing whether a body is in the administration of justice is the 1965 decision in *McDonald v Bord Na gCon*, which includes five limbs.

Yet, since 1922, case law and commentary "have struggled to provide a satisfactory definition, or even description, of the field of the administration of justice", O'Donnell J noted.

Simons J of the High Court had held that all but the fourth limb of the McDonald test were satisfied, which meant that the WRC was not in the administration of justice.

The Supreme Court outlined, however, that a narrow "checklist" approach to this test "risks missing the wood from the trees", adding that "it is important to apply any test with an understanding of the substance it is meant to determine."

Nevertheless, the Court found that the McDonald test was met. That the District Court has the power of enforcement of a WRC adjudication decision did not "save" the WRC from being in the administration of justice, because such enforcement is "near-automatic" and mandatory.

WRC 'SAVED' BY ARTICLE 37

On the Article 37 question – on whether the WRC (and Labour Court) have limits on their functions – the Court took a broad approach, considering matters cumulatively, rather than opting for a narrow view of what Article 37 can permit.

Firstly, the bodies are limited "by subject matter to those areas of employment law specifically identified in the Act. It has no inherent jurisdiction, and no jurisdiction under, or in relation to, common law."

Secondly, there is a limitation on awards which can be made by the WRC and Labour Court; for example, in cases of unfair dismissals, it is limited to an award of compensation of 104 weeks' remuneration.

Thirdly, there is the limitation on enforceability coupled with the limited capacity of the District Court to substitute compensation for redress by way of reinstatement or reengagement.

Fourthly, a decision of the WRC is subject to appeal to the Labour Court, and a decision of the Labour Court is subject to a point of law appeal to the High Court.

Fifthly, the Court noted, "it is appropriate to have regard to the limitation imposed by the fact that the WRC is a body subject to judicial review." A judicial review can look at not just what the WRC or Labour Court has done, but also how it was done.

These matters, considered cumulatively, O'Donnell J concluded, meant that the WRC "is exercising limited powers and functions of judicial nature, which exercise of power is therefore covered by Article 37 and does not, therefore, offend the Constitution."

INDEPENDENCE AND IMPARTIALITY

Though not a ground being challenged at the Court, O'Donnell J did touch on the issue of the independence and impartiality of adjudication officers, which are "fundamental components of the capacity to administer justice."

An authorised officer/adjudicator is appointed by the Minister, but section 40(7) provides that the Minister may revoke an appointment without specifying the circumstances in which this can occur.

Section 40(8) of the WR Act does contain a guarantee that an adjudication officer "shall be independent in the performance of his or her functions". However, the Act does not reconcile this with the unqualified power of the Minister to revoke appointments.

"This is troubling", the judge said, "particularly as it is likely that the adjudication officers will be civil servants in the Minister's department with other responsibilities where they will routinely be required to accept direction."

Looking at the Labour Court, the judge recorded that membership of the Labour Court is not regulated by the WR Act but by the provisions of the Industrial Relations Act 1946, which provides for appointments for a fixed term and removal for stated reasons "but does not contain any express statement of the independence of such members."

While this issue was not contested in the *Zalewski* challenge, it would, "at a minimum , require careful scrutiny in the light of the conclusion of this Court that the functions being performed are functions of a judicial nature involving the administration of justice under the Constitution", the judge warned.

JUDICIAL CONTROVERSY

There have been at least two other judicial reviews of the WR Act lodged at the High Court since the Zalewski challenge was first initiated in 2017.

One of which, a challenge by Joseph Brennan Bakeries *(see Legal Highlight in IRN 09/2020)*, was adjourned generally in April of last year, and is unlikely to be pursued any further.

It could be assumed that the new *Zalewski* judgment will dispose of other, similar challenges against the Act, but the WRC and Department of Enterprise will know there is a willingness to challenge the WRC, if even just on individual cases, via judicial reviews.

The fact there are two dissenting judgments published speaks volumes as to the level of contentiousness around WRC procedures.

MacMenamin J, in his dissenting judgment, argued that Article 37 has to be construed narrowly, as it is an exclusion clause. Essentially, he took the oppositive view of the majority of the Court, which favoured a broader approach to Article 37.

He argued that the WRC procedures were the administration of justice but that they were contrary to Article 34 of the Constitution and, therefore, should have been ruled as repugnant to the Constitution.

In his distinct decision, Mr Justice Peter Charleton described what happened to Tomasz Zalewski as a "judicial controversy."

He said that the constitutional right to seek a judicial decision on unfair dismissal claims was "completely lost" with the establishment of the WR Act.

Unfair dismissal claims are neither limited or technical, he argued. These claims "go to the very core of what defines a person in their social standing or conduct."

Therefore there “must be a choice to either the employee or the employer to seek justice in a court by way of a final factual appeal that requires a rehearing.”

“Wisdom, experience, independence, application to duty and legal knowledge is what is expected of judges and that is what is therefore to be found in a court. But, that is also the path blocked by [the WR Act] to those who may have a fundamental need to be vindicated as to their honesty and their competence as working people”, he concluded.

SERIOUS CONCERNS

A judicial review of the WR Act did not come as a surprise, but the mishandling of *Zalewski* case was arguably too irresistible not to tee up a judicial review of the WR Act and to ventilate the grievances that some employment lawyers have carried on the design and practice of the dispute resolution system.

That the “calamitous” handling of his claim could happen in the first place suggested, at the very least, there were infirmities in the system that needed resolving.

The lawyers’ submissions, that the mishandling of Mr Zalewski’s claim was more symptomatic of the performance of some WRC adjudication practices, was not accepted by the High Court but appeared to get more currency before the Supreme Court.

O’Donnell J remarked: “I do not think that the evidence of the practising lawyers can be discounted as readily as the respondent suggests.”

“The system established must, therefore, be capable of providing a satisfactory resolution for all the cases, whether complex or simple, and whether the awards are small or more substantial… I consider it disturbing, therefore, that experienced practitioners would consider it necessary to express in a measured and responsible way the serious concerns which they have.”

Both legal and non-legal practitioners may claim a modest victory with the SC’s judgment, as the two worlds of representation continue to hold divergent views on how employment claims should be handled.

But the ultimate vindication is for the WRC and its intent on keeping, as the Court put it, a “cheap, relatively informal, and efficient decision-making function, staffed by persons with expertise in the areas of employment law and with practical experience in industrial relations”.

Justice O’Donnell remarked that the “concept of speedy dispute resolution close to the workplace and in a manner not hidebound by either formality or procedure has much to recommend it, and I would reject unhesitatingly the contention that such a body must be staffed by people with formal legal training and sufficient legal experience to be appointed judges.”