Former adjudicators can take claims against Minister, not WRC

ANDY PRENDERGAST

A series of claims taken by former WRC adjudication officers cannot be brought against the Workplace Relations Commission, as any possible employment relationship they had was not with the Commission, but with the Minister.

WRC adjudicator (AO) Enda Murphy, in eagerly anticipated decisions on employment claims brought by four former rights commissioners/adjudication officers, determined that the claims were impleaded against the wrong respondent, the WRC.

However, with the Minister's permission, leave was granted to the complainants to pursue their claims against the Minister, in fresh proceedings (as is permitted under section 39(4) of the Organisation of Working Time Act, 1997).

The four complainants are Michael Hayes, David Iredale, Mark McGrath and Sean Reilly. All four were rights commissioners at the LRC, before assuming the role of adjudication officers when the WRC was established in October 2015 (one complainant began as a Rights Commissioner in 2003; another in 2004, and two other complainants in 2007).

The four were "office holders", appointed by the Minister for specific terms. All four had their warrant for appointment as adjudicators revoked by the Minister between September and October 2018.

They are pursuing claims under Part-Time Work Act, the Fixed-Term Work Act, the Organisation of Working Time Act and the Minimum Notice & Terms of Employment Act.

Mr Murphy has found that the power to make appointments to the position of adjudicator, to remove adjudicators and to extend their terms of appointment "are all vested in the Minister."

It was also the case that the complainants were not retained pursuant to a contract of employment with the WRC, "but rather [were] appointed to the position of adjudicator by way of a warrant which was promulgated by the Minister under the relevant statutory provisions."

The complainants were paid a set fee on a per diem basis by the Minister for work they carried out as adjudicators. Their appointment to the role of adjudicator "contained all of the characteristic features of a statutory office", said Mr Murphy.

NO OBLIGATION TO WORK

The claims that their "employer" was the WRC was on the basis that the Commission "exerted a large degree of control in relation to the manner in which the work was conducted" and they were required to comply with certain procedural guidelines and standard templates for the drafting of decisions.

They claimed that the WRC “had responsibility for all aspects relating to the management of his work including the processing of travel/expenses claims, performance management, payment of adjudication fees and the provision of human resources functions.”

The WRC counter argued that the terms of the appointment of the adjudicators “do not envisage a relationship of employment” between them and the WRC. They are “office holders and therefore not employees.”

It continued that the complainants “can never surmount the formidable hurdle posed by the question of mutuality of obligation, since there was never any obligation or indeed any power on behalf of the [WRC] to provide work to the complainants, whose appointment (and revocation) is controlled and decided by the Minister.”

CARRY OUT WORK ELSEWHERE

A former manager of the WRC adjudication service, giving evidence at the hearing, outlined how adjudication work is scheduled.

Adjudicators were requested to provide advance confirmation of their availability to facilitate the scheduling of cases. The WRC “would endeavour to schedule the adjudicators for work on any dates upon which they were available, but this was dependent on a number of factors such as the availability of sufficient cases … geographic considerations and the availability of hearing facilities.”

Adjudicators “had the opportunity to maximise their income by increasing their level of availability for adjudication work.” The WRC “was not obliged to provide or guarantee a minimum or specific number of days work … in any given period and there was no sanction or penalties applied in respect of periods of unavailability.”

Adjudicators can carry out work outside of their role with the WRC and are not required to obtain permission for periods of unavailability or for annual leave. They are paid a set fee on a per diem basis for their work; these fees are validated by the WRC but are paid from the Department’s budgetary allocation.”

The WRC does not have any control of the rate of fees paid to adjudicators and any changes to the rate are “within the remit of the parent Department and Department of Public Expenditure.”

FUNDAMENTALLY MISINTERPRETED

The Minister, who participated in the proceedings, told Mr Murphy that he is the correct respondent in law to the claims by the former AOs. He added that the claims are, in any event, statute barred, as the complainants’ warrant as adjudicators ceased in 2018, with the claims initiated in 2020 – except for where leave is granted under s.39(4) of the Organisation of Working Time Act, 1997.

Mr Murphy observed that the judgments the complainants relied upon, from other jurisdictions, in support of their argument that the WRC was their employer, do not support their position on this matter “but rather they significantly undermine [the] contention that the [WRC] was the correct respondent/employer in the circumstances of the instant complaints.”

Section 39(4) of the 1997 Act allows for a fresh complaint to be brought against an employer in the circumstance where a wrong party was initially impleaded as the respondent.

The complainant's solicitor had maintained that the Minister could be added to the instant claim as a co-respondent. However, Mr Murphy noted that s.39(4) of the Act does not allow such a move and that the complainants "fundamentally misinterpreted the true import of the provisions of section 39(4)."

Instead, the Act allows the complainants to initiate their claims afresh against the correct party – the Minister – through the established procedures of the WRC.

OBJECTIVE BIAS?

The complainants' solicitor had initially objected to Mr Murphy's appointment as adjudicator for the instant claims, arguing there was a dimension of 'objective bias.'

Mr Murphy noted that the complaints in question "must be heard by one of the existing cadre of adjudicators" appointed under the Workplace Relations Act, and that the Oireachtas legislated to provide that claims of this kind "must, by necessity, be heard by the [WRC]."

Using the 'objective bias' test as explained by Denham CJ in *Goode Concrete v CRH* (2015), Mr Murphy concluded that the complainants "failed to establish that a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that they would not be afforded a fair and impartial hearing in the event that I was to proceed with my investigation of these complaints."

The complainants were represented by Myles Gilvarry, Solicitor, Gilvarry & Associates; the WRC was represented by Desmond Ryan BL, instructed by WRC in-house solicitor. *(ADJ-00020182, 20185, 20187, 20191, AO: Enda Murphy)*