

No recusal of Labour Court division in case taken by former Court member

ANDY PRENDERGAST

Labour Court worker member, Paul Bell, does not have to recuse himself from hearing an appeal pursued by former Labour Court worker member, Andy McCarthy, according to a new determination.

The Court determined that an “objective bystander informed of all the relevant facts would not be concerned that any member of the division as currently constituted, would be incapable of an objective, and impartial hearing of the substantive case.”

The two parties to the Labour Court appeal, the respondent Department of Enterprise, Trade and Employment and the complainant Andy McCarthy, both sought separately the recusal of the Court’s ordinary member, Paul Bell, from hearing the case, on the basis of the “apprehension of bias.”

Mr McCarthy had claimed against the Department over his exit from the Court in 2020. He won one of his claims but his main claims of discrimination and a breach of the Fixed-Term Work Act – in which he was seeking a contract of indefinite duration – were unsuccessful at the WRC (*see IRN 36/2022*).

Both Mr McCarthy and Mr Bell are former employees of SIPTU and were both nominated by ICTU at different times, to become ordinary members of the Court. Mr Bell, in effect, replaced Mr McCarthy in 2020.

The Department said it wanted to avoid a scenario where a Court decision could later be challenged on the grounds of bias. It noted that in Mr McCarthy’s claim submission, he criticised the ICTU process that involved the nomination of three persons to the Minister, one of whom would be appointed to the Court.

While the complainant did not mention anyone by name, his submission noted that “internal developments in one of the member unions of the Irish Congress of Trade Unions [...] presented a difficulty for management of that Union in respect of its internal leadership structure. As a means of resolving this internal difficulty, the Irish Congress of Trade Unions nominated an individual to the Court notwithstanding that there was no vacancy at that time because Mr McCarthy had a CID.”

ASSERTION OF BIAS

The case was assigned to a division of the Court by the Labour Court Chairman. The division comprises of Louise O'Donnell (Deputy Chairman), Paul O'Brien (Employer Member) and Paul Bell (Worker Member).

How cases are assigned to members of the Court is detailed in the 1946 and 1969 Industrial Relations Acts. The Court noted that "all matters that come before the Court must be dealt with from within that cohort of people [the Court's members]."

In the complainant's submission for recusal, it was implied that the request for recusal could reach beyond the division assigned to hear the appeal, relying on the case of *Findlay v United Kingdom* (1997) in this regard. However, the Court found little similarity between that case (involving a court martial) and the case at hand.

Reference was made to an email by the Labour Court Chairman, which, the complainant's representative argued, was sufficient to create a bias. The Court clarified that the Court Chairman is not a member of the division and has not been involved in any discussion of the case with the assigned division.

INDIVIDUALLY AND COLLECTIVELY

On the complainant's suggestion that internal union management issues led to Mr Bell's nomination to the Minister in 2020, the Court found that this is "an assertion by the complainant, not supported by either documentation or witness evidence."

The question then was "whether a mere assertion is sufficient to invoke a reasonable apprehension of bias such that a member of the Court should recuse themselves."

The recusal application was considered with reference to decisions by the Supreme Court that deal with the topic of bias, such as *Bula limited v Tara Mines*, *Orange v Director of Telecoms*, *O'Callaghan v Judge Alan Mahon* and *Goode Concrete v CRH*.

It said that an "objective bystander informed of all the relevant facts would not be concerned that any member of the division as currently constituted, would be incapable of an objective, and impartial hearing of the substantive case."

The Court concluded "both individually, and collectively" that it does not believe that facts or circumstances of such import as to require one or all of the members of the division to recuse themselves have been established.

The division of the Court said it would now move to reschedule the case management conference in advance of hearing the substantive case.

DETE was represented by Frances Meehan SC and Cathy Smith SC, instructed by CSSO. Mr McCarthy was represented by AOM Management. (*EDA2324, Deputy Chairman: Louise O'Donnell*).

