

‘Grave concern’ with DPER instructing DETE to not attend AOs Court hearing

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The Labour Court has criticised a remarkable instruction by DPER to the Department of Enterprise not to attend a Court hearing on a pay claim by WRC external adjudicators.

The Labour Court has made clear its disapproval of a recent instruction by the Department of Public Expenditure & Reform (DPER/DPENDR) to DETE not to attend a hearing of a pay claim brought by 31 external adjudicators (AOs) of the WRC – an instruction that undermines the standards of the voluntarist IR system in Ireland that the Government is keen to uphold.

The interplay between DPER and other government departments on the implementation on Labour Court recommendations has been the subject of discussion before (*see News Feature in IRN 04/2024*), but this is the first recorded example of DPER telling another department to refuse an invitation of the Labour Court to attend a hearing.

External adjudicators of the Workplace Relations Commission referred a section 20(1) pay claim under the 1969 IR Act, to the Labour Court, which was heard by the Court on 16 August. This claim seeks an increase to the ‘daily rate’ as well as an increase in ‘writing days’.

The Department of Enterprise, Trade and Employment (DETE) was listed as the respondent to the claim by the 31 adjudicators (AOs), as the “employer” for the purposes of the claim. (The AOs maintain they are ‘workers’ within the meaning of the 1969 IR Act).

DETE did not attend the 16 August hearing, noting to the Court a number of reasons why. Chief among these reasons was a letter sent by DPER to DETE, which stated: “Without a complete understanding of the clear basis for attendance at the Labour Court, the Labour Court’s invitation to avail of its services in relation to this matter should not be accepted by your Department”.

In response to this, the Court said, “it is a matter of grave concern that the DPENDR should instruct/advise a Government Department to decline an invitation from the Court to attend the hearing of the Court in this matter.”

ORDERLY RESOLUTION OF IR

The Court explained that while any employer is, “in our voluntarist industrial relations framework, free to participate or not participate in hearings of the Court convened to investigate a trade dispute”, it is “an underpinning reality of the State’s institutional framework that the operation of our voluntarist system, enshrined as it is in the governing legislation since 1946, relies upon parties who value the orderly resolution of industrial relations trade disputes demonstrating respect for the institutions of the state by participating in the procedures employed by those institutions.”

“Successive Governments and Ministers since 1946 have consistently re-iterated this reality, and in doing so have publicly endorsed the proposition that disputing parties should engage with the institutions of the State to assist in the resolution of trade disputes.”

As with other Court hearings where the respondent does not attend – but with particular significance in this instance as it is a government department – by not attending the hearing, the Court is “deprived [...] of the opportunity to fully comprehend the position of that party”.

“This lack of engagement is particularly problematic when the statutory obligation resting upon the Court is to issue a Recommendation regardless of whether the alleged employer participates in the hearing or not”, the Court stressed.

‘INSUFFICIENT EVIDENCE’

Prior to the hearing of the AOs’ pay claim, DETE had sought sanction from DPER to raise the ‘daily rate’ of external AOs (currently €525), which has not increased in at least five years.

However, DPER refused to sanction this increase on the basis that “sufficient evidence has not been provided in the business case submitted to justify sanction of an increased rate”.

It was not clear if DETE had shared the correspondence it had from DPER with the 31 AOs, with the Court having to state that it “does not regard it as its function to share correspondence between two Government Departments with other parties.”

The Court noted the “infrastructure around the spending of public money and the decision-making role of the DPENDR in sanctioning increases in such spending” to describe why there are “no other means is available to advance the matter.”

DETE had informed the Court, prior to the hearing, that it could not implement a pay increase even if it was backed by the Court, due to DPER’s position.

In the circumstances of DETE not attending the Court hearing (and DPER having refused to sanction the increase in AO pay last July) the Court could not make a recommendation on the merit, or otherwise, of the pay claim; such was not a “realistic formula for the resolution of the within alleged trade dispute.”

BROADER BUSINESS CASE

Despite these constraints, the Court recommended that DETE “engage again, in full consultation with the WRC, on the matter so as to develop a broader and deeper business case analysis of all matters relevant to a fresh assessment of the claim before the Court.”

This analysis should include:

- An assessment of the contention that, in practical terms, an allowance of 48 writing days per annum is insufficient to allow for the writing up of decisions by Adjudicators.
- Consideration of the operation of the ‘fall days’ system.
- Consideration of the justification or otherwise for an adjustment in the ‘daily rate’ having regard to the fact that no adjustment has taken place since January 2019 and whatever other factors might be considered relevant to the matter.

This analysis should be “fair, reasonable and comprehensive”, taking account of all relevant factors impinging on the matters in dispute, to enable the parties “to arrive at an outcome to the within alleged trade dispute which can be considered realistic and reasonable”.

Both parties should exercise “realism, pragmatism and common sense” in this endeavour.

The Court gave a timeline of three months from 22 August to complete this analysis, which can then proceed to a “fresh business case” that can be made to DPER. (*LCR23031, Chairman: Kevin Foley*)

For more on the WRC adjudicators' pay claim and the Court's recommendation, see News Analysis in this issue.