‘Custom and practice’ disputes: a review of Irish industrial relations

Gerry McMahon*

The subject of ‘custom and practice’ has long been a source of contention in Irish industrial relations. Whilst it’s common for employers to try to ignore it in the face of preferred changes, it’s also common for workers to try to retain traditional ways of doing things that are in their interests.

Already this year there have been at least three consequential cases where ‘custom and practice’ has influenced third-party decisions:. on bonuses *(ADJ-00047744),* unfair dismissal *(ADJ-00048496)* and the mandatory retirement age *(ADJ-00048496)*.

Accordingly, for the benefit of practitioners, it may be worth assessing its legal status and the manner of its treatment at third-party fora.

The more frequent the benefit, the more likely there is a right to it

The relevance of ‘custom and practice’ is based upon the fact that terms governing an employment relationship can be implied into a contract of employment.

When determining whether a benefit has been elevated to contractual status via ‘custom and practice’, the Courts tend to assess the frequency and duration that the benefit has been available.

So, the longer the period and the higher the frequency of the benefit, the more likely it is that employees can successfully contend that there is a right to the relevant benefit.

Put plainly, even if a term of employment is not expressly stated in the contract or other written sources, in certain circumstances it can be implied into contracts via ‘custom and practice’.

INFLUENTIAL CASES

In this regard, the statutory adjudication bodies in Ireland have repeatedly relied on the U.K. Court of Appeal’s (C.A.) decision in *Albion Automotive Ltd v Walker* (2002 - EWCA Civ 946).

The case held that an employer who made enhanced redundancy payments on the same basis for several years had created a ‘custom and practice’ by which the employer intended to be legally bound. In judgement, it listed the following as some of the relevant factors to be considered in such scenarios:

- the repeated practice, arrangement or policy was drawn to the attention of employees;
- the employer’s communication of the practice, arrangement or policy shows that the employer intended to be contractually bound by it;
- it was followed without exception for a substantial period;
- it was followed on a number of occasions (and, if so, how many); and/or
- the terms were consistently applied.

A 2014 High Court case in Ireland, *Elmes v Vedanta Lisheen Mining* (IEHC 73), provides a good (and frequently quoted) example of a superior court ruling on how ‘custom and practice’ (even where there are written contractual terms to the contrary) creates contractual rights.

In summary, in this instance, the employees (successfully) claimed that written provisions had been overwritten in practice and that a right (to continuing sick pay) had effectively been implied into their contracts by virtue of *'established custom and practice'*.

A similar approach has been adopted by other third-party fora, as reflected in the following year (2015), when the Labour Court held that 'custom and practice' should be regarded as equivalent to a collective agreement and that in the instant case *'the current arrangements in that regard cannot be altered other than by agreement' (LCR20979)*.

Similar advice was issued by employer body Ibec to its members during the post-2008 economic recession, as it informed them that: 'the unilateral revision of the terms of any contract is fraught at the best of times … It is best to communicate these changes collectively, and where there is a strong practice of doing so within a company … through a union'.

POWER OF PRECEDENT

It is also noteworthy that though third parties are not obliged to follow the decision or precedents established by other relevant fora, the demands of legal certainty dictate that they normally do so.

That is, it is a generally accepted legal principle that similar cases lead to similar results *(see Metock v Mins. for Justice [2008] IEHC 77* and *Irish Trust Bank v Central Bank of Ireland 1975 WJSC-HC 1231)*. In support thereof, in 2022 the Labour Court acknowledged that it: '*… should normally follow its own decisions and must follow the decisions of higher Courts' (PWD2216)*.

Hence, it follows that the contractual status of 'custom and practice' has long been acknowledged by third parties in Ireland, across a range of fora *(see AD1487/2014; ADJ-00030932; ADJ-00034486; LCR16618; LCR16845; LCR17232; LCR18164; LCR18576; LCR19616; LCR20757; EDA1632; UD858/1999; UD1047/2013; DEC-E2012-086; and in the High Court judgment in Finnegan v J&E Davy, 26/1/2007 Unreported Smyth J.)*.

Directly related thereto has been the Labour Court's rider to its recommendations in such scenarios, directing parties to resolve their differences via negotiation, stating:

'Although the company has the right to vary conditions, this must be done by negotiation ..' (LCR17232); '… the parties should have discussions with a view to reaching agreement' (LCR19616); '… if the college wished to discontinue the practice, it should enter into discussions with the workers with a view to reaching an agreement to that effect. The Court therefore recommended the concession of the union's claim' (LCR16618); '… any change to the arrangements should be negotiated and agreed between all of the parties to the original agreement' (LCR16432); 'further negotiations should take place' (LCR16491) and 'meet to regularise the practice, based on the experiences of both sides' (LCR16845).

Notably, even if it is apparent that a benefit or perk seems discretionary, the 'custom and practice' pertaining thereto is commonly taken into account, as the employee(s) may well have reasonable expectations regarding such benefits or perks and it may be implied into the employment contract.

CONTRACT AMENDMENTS

As flagged by Ibec, arising from such precedents, it is now widely acknowledged, in legal and other circles, that amendments to an employment contract must be agreed between the parties

to the contract and a failure to obtain that agreement could result in a finding of a breach of contract.

Directly related thereto, an employer has a duty to act reasonably in relation to its employees. So, if an employer chooses to change or end a long-standing custom or practice, they may well be deemed to be in breach of the employment contract.

Of course, it may be the case that there are exceptional reasons necessitating immediate or urgent decisions by employers relating to such revisions.

However, this does not allow for changes to the core terms of employment contracts, unless: (a) there is a change in the law; (b) both parties consent to the change or (c) a contractual provision exists that allows for variation (though this is no 'carte blanche' to wilfully exploit).

In the absence of such provisions, employers risk exposure to legal action if making unilateral variations. If an employee is not notified and/or does not consent to the terms of their contract being varied they can pursue a claim for damages, a claim of constructive dismissal etc.

THE PRICE TAG

However, some succour may be gleaned by employers from precedents that enable them to legitimately deduct money from employees' wages, if the repayment is in respect of an overpayment of wages or expenses.

That is, the recoupment of overpayments made in error can be legitimately justified *(e.g. see ADJ-00031803 and PWD1822)*. However, the case for successfully securing repayments is not necessarily a 'fait accompli' *(see AD145 and LCR21325)*.

Employers will also note (the rare) third party findings that have deemed a traditional practice void and not deserving of compensation *(see LCR17466; LCR17848; AD1562 and LCR21142)*.

Though when 'push comes to shove' before a third party, a 'quid pro quo' or price tag is frequently applied, enabling the 'custom and practice' to be removed and the affected cohort to be compensated *(e.g. see LCR16806; LCR17138; LCR17206; LCR17185; LCR21721; LCR 21734; LCR22666; IR-SC- 00002701 and ADJ-00049830)*.

NO CUSTOM & PRACTICE AT DUBLIN AIRPORT

A noteworthy example of relevance to an alleged 'custom and practice' – a withdrawn overpayment – surfaced in 2024, when a claim by airfield technicians at Dublin Airport for public holiday entitlements above their contractual entitlement. This payment had been made in error over several years and the claim was rejected by the Labour Court.

In this instance, the Court held that an ongoing entitlement to higher public holiday payments did not arise through custom and practice, adding that when such errors are made, the employer should be able to correct them.

In this instance, up to 2010, most employees got 16 hours of pay or time off in lieu when rostered to work on a public holiday. But this was reduced in that year to 11 hours of pay or time off in lieu (TOIL) for all staff recruited after 2010. Fifteen technicians (represented by the Connect trade union) were appointed from 2019 (on post-2010 contracts), but received 16 hours of TOIL when rostered to work a standard day on a public holiday. The Dublin Airport Authority told the Labour Court that this error only came to light in November 2023, when implementing a new time and attendance system.

Up to then, the workers' entitlements had been *'incorrectly recorded manually'*. Whilst the union accepted that the workers were receiving above their contractual entitlements, it asserted that the contractual provision was *'void for want of prosecution',* as the company had several opportunities to remedy the anomaly but never did.

The union also told the Court that the issue was discussed when an individual was appointed in 2019. He was awarded 16 hours when working public holidays and that error was replicated for employees subsequently recruited. As a result, the union argued that *'it has all the hallmarks of a policy decision rather than an error'*.

However, the Labour Court held that it was accepted that the entitlement was as set out in the new contract and that the higher payment *'resulted from human error during a time when such entitlements were manually recorded'*.

As a result, the Court concluded that it *'does not accept that an ongoing entitlement to 16 hours public holiday entitlement arises through custom and practice in the circumstances of this case. In the view of the Court where an error of this nature occurs, the employer should be able to correct that matter'*.

Accordingly, it recommended that the relevant arrangement continue until the end of 2024, after which the workers should receive the public holiday entitlements set out in their contract *(LCR23064)*.

WISHED TO CORRECT

Notably, a quid pro quo formula was applied by the Labour Court in 2008, when a dispute across a range of issues between the trade union SIPTU and the Cork-based oil refinery Conoco Phillips went before the Court. This included a dispute in relation to the interpretation of an agreement relating to time off for providing shift cover.

The union argued that when a day worker provides shift cover, the agreed time off should not include Saturdays or Sundays (or Bank Holidays), on the basis that these days were already considered as rest days. This, it claimed, was in line with the provisions of an agreement and 'custom and practice'.

The company responded that it had incorrectly applied the agreement in the past, but now wished to correct it. The Court was satisfied that the company had allowed the disputed arrangement to operate for an extended period and *'in so doing the Company gave credence to the belief that those arrangements were acceptable and in accordance with the Agreement'*.

However, it also concluded that the disputed arrangement was out of line with industry practice and wasn't sustainable. Accordingly, it recommended that it cease and that the arrangement proposed by management apply, concluding that *'having regard to the background circumstances in which this practice came about and was allowed to continue, the Court believes that some element of compensation should be provided to those affected'*, recommending that they receive two additional days annual leave in the forthcoming 2 years as a once-off and non-recurring concession. (LCR19110).

CONCLUSION

Though third parties are not obliged to follow the decisions or precedents established by other relevant fora, the demands of legal certainty dictate that they normally do so.

From the array of case precedents referenced above, it is clear that a 'buy-out' or 'once-off' compensatory award in respect of 'custom and practice' is common.

For practitioners, the key question is often whether this is done via 'in-house' negotiation or a third-party judgement designed to bring the matter(s) to finality.

Dr. Gerry McMahon, B.Comm., M.B.S., M.Phil. (Labour Law), F.C.I.P.D., M.I.I.T.D., Cert. Adjudication Studies. Gerry is the M.D. of Productive Personnel Ltd., specialising in H.R./Employee Relations and training assignments. He is a former Adjudicator at the Workplace Relations Commission and lecturer at T.U.D. Email: ppl1gerry@gmail.com