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Articles

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# Changes to state's dispute resolution bodies to be "profound and revolutionary"

**KYRAN FITZGERALD & ANDY PRENDERGAST**

**The Labour Court and Workplace Relations Commission will be "profoundly impacted" by the "revolutionary developments" that will come about following the enactment of the Workplace Relations Bill 2014, the heads of the Labour Court and the LRC told a IR/HR conference last week.**

"Many challenges will be presented and the overall architecture will be very different. I hope that we are up to it and that we can continue to deliver the level of service that has been there since the Court's inception," according to Labour Court chairman, Kevin Duffy.

***..."We anticipate a 56% increase in our workload" – Kevin Duffy...***

This was echoed by LRC chief executive and Workplace Relations Commission (WRC) director general designate, Kieran Mulvey, who described the changes as "revolutionary developments" which are part of an "exciting time."

Mr Duffy said the resources available to the Court are expected to increase by around 30%, but its workload could increase by much more than this. Both Mr Duffy and Mr Mulvey suggested that they may need more resources made available to both the WRC and expanded Labour Court, something which needs to be worked out with the Department of Jobs, Enterprise & Innovation ongoing.

They were speaking at Resolve Ireland's symposium on employee relations in Dublin last Thursday. Resolve is the new HR consultancy headed up by Turlough O'Sullivan, the former director general of Ibec and which includes Brendan McGinty - the former Ibec director of IR & HR - on its board.

## PRIMARY'PEACE MAKER'

"We anticipate a 56% increase in our workload, perhaps more. The principal change is that the Labour Court will now have appellate jurisdiction in respect of cases brought under the Unfair Dismissals Acts -

such cases account for around 90% of the case load of the Employment Appeals Tribunal", outlined Mr Duffy.

The bulk load of Labour Court cases under the new system will be rights-based cases, he suggests – somewhere in excess of 60% of cases (largely due to the adoption of cases that would have usually been heard at the present EAT).

Though a majority of its case load is expected to be concerned with rights-based cases, Duffy stressed that the Court "must retain its primary role as the final industrial relations peace maker in disputes of interest."

"Our industrial relations role will be unaffected. There will continue to be disputes - such as threatened strikes at Aer Lingus that will require our urgent attention. This is the bread and butter of the Court and I hope that it always will be."

Much attention will be paid to the task of managing the Court's workload under the new dispensation.

At present, the rate of appeal in employment cases runs at between ten and eighteen per cent while the settlement rate is around sixty per cent.

"I confidently expect that the changes in the Bill, particularly the provisions in respect of mediation and early resolution, will increase the settlement rate and that cases will settle earlier on, and not at the date of the hearing where the resources of the Court are wasted."

## LESS TIME WASTED

There will be much greater emphasis on "better use of case management techniques," with less time being wasted on 'peripheral issues.'

Current procedures set out in the 1967 Redundancy Payments Act are "very complex ... replicating the procedures in the ordinary courts. They are not conducive to the efficient disposal of cases", he said.

There is to be a greater emphasis on the pre hearing stage, with the filing of written submissions. As a result, the Court should be in a position to determine the likely length of proceedings, which ones that could take a day to hear, or those that can be disposed of in ninety minutes.

A chair or deputy chair of the Court will always be available, on a given day, to conduct pre-hearing examination of files and ascertaining facts that are agreed between the parties or are 'non contentious.' As a result, it should be possible "to get to the core of the case, litigating what is genuinely contestable".

“Hearings will be shorter, facilitated by the greater emphasis on pre-hearing. Our procedures will continue to be a hybrid of the inquisitorial and the adversarial.”

## ‘WE DON’T WANT THESES’

The Labour Court chairman stressed, however, that they are keen to “avoid the situation where the initial stage of the hearing is a voyage of discovery. We don’t want theses or telephone books. What we will desire is a statement of the facts, a summary of the evidence.”

“We intend to provide, in the rules, that an appellant must file a written submission within three weeks of the date of lodgement of the appeal. The other side will have three weeks in which to put in a replying submission... no one is going to be ambushed.”

The process should establish whether there is any need for particular witnesses to be present at the full hearing. This is to avoid a situation where several witnesses come along and repeat the same testimony. “The object of the exercise is to reduce significantly the waiting time for hearings. At present, this can run up to two to three years which, quite frankly, is appalling.”

“Currently, one could be in and out of the High Court several times in the time that it takes to get a hearing at the Employment Appeals or Equality Tribunal.” Speedier hearings should result in a reduction in the burden of expense on the parties, and on the State. It should also provide for greater justice: “You lose some of the nuance if there is a long delay.”

Labour Court recommendations on IR disputes are expected to be furnished within three weeks of the hearing, and decisions on rights cases within six weeks of the hearing.

## MIGHT NEED FLEXIBILITY

Mr Mulvey informed delegates that the expected commencement of the new WRC will by the end of January 2015. He pointed out that all existing services of the LRC – such as conciliation and mediation – will continue under the new WRC.

Concerns around the conciliation function of the WRC have been expressed recently, notably by Mr Brendan McGinty, director of Resolve Ireland (also speaking at the symposium – *see news item in this issue*), who noted that nowhere in the Workplace Relations Bill does it mention the word “conciliation”.*(see IRN 35/2014).*
Both the WRC and Labour Court will run on a single schedule, under a service level agreement.

An external panel of adjudicators will augment the current Rights Commissioners and Equality Officers (both will become Adjudication Officers); the application phase for recruiting this panel has finished, with

members of this panel to start training next January. The panel is expected to be operative by May 1, 2015. Adjudicators on this panel will be selected according to three streams: IR, HR, and legal.

With the amalgamation of Rights Commissioners and Equality Officers into Adjudication Officers, he noted (in response to a question by John Agnew of Resolve) that one possible loss is the level of engagement RCs would usually have had – that their new equivalent role will be more deliberative.

This could be a risk, said Mulvey, but one which may be offset by the enhanced role of mediation officers at the early stages. Regardless, the new function "might need some flexibility initially."

## ROLE IN TALKS?

The HQ of the WRC will be at Lansdowne House (where the public sector agreement talks of 2013 were held).

Mr Mulvey referred to the public sector talks, expected sometime in the spring of 2015, on pay restoration following the gradual unwinding of FEMPI that has begun, describing such as a "pandora's box." Yet he was cautious about prefiguring the role the WRC might play in such talks.

While the Labour Court may expect to deal with more rights-based cases in the future, Mr Mulvey maintains IR disputes are on the increase, pressing home the importance of an improved State's role in resolving such rows.

On the subject of fees, the WRC director designate noted the introduction of fees in the UK employment tribunals has been quite controversial, with a drop of over 70% of case referral due to the heavy fees associated (which can go up to £1,200).

The first legal challenge against the UK's decision to bring in these fees (taken by the Unison union) is understood to have failed.

Under the section 72 of the Workplace Relations Bill (as amended) it states: "The Minister may, in respect of (a) such services provided by the Commission as may be prescribed, and (b) such services provided by the Labour Court as may be prescribed, charge the recipient of any such service a fee for the purpose of defraying the cost of the provision of that service by the Commission or the Labour Court, as the case may be."

In parting, Mr Mulvey said that "the great thing about [the WRC] is that it's free... for the moment."

# Anti-victimisation measures in new ‘bargaining’ legislation may be ‘Trojan Horse’

**ANDY PRENDERGAST**

**Ex-Ibec HR & IR director, Brendan McGinty, has said that the expected new IR amendment Act’s provision on victimisation may open up new avenues for agitation and claims.**

Mr McGinty said that enhanced protection measures on victimisation in the IR Act may be a “trojan horse” and that it is “an agenda that worries me.”

Now a consultant and director of Resolve Ireland, he was speaking at the latter’s symposium in Dublin last week,

The revised Industrial Relations Act (2001-2004) will meet a promise by the Government parties to address the right of workers to collective bargaining, and also enhance the level of protection from victimisation for union members.

The new definition of victimisation is to be updated to take account of the European Court of Human Rights judgment in *Wilson*, and which will explicitly prohibit inducements by employers for employees to relinquish their trade union membership.

But this prohibition is, McGinty says, already covered by s.8(3) of the 2004 Act, which holds that to “‘victimise’, in relation to an employee, means to do any act (whether of commission or omission) that, on objective grounds, adversely affects the interests of the employee or his or her well being and includes any act specified in a code of practice…” (emphasis by Mr McGinty)

The new protections are confined to workers who invoke the 2001 Act, but Mr McGinty pointed out that the case was advanced for increased penalties for unfair dismissal if there is a victimisation dimension; there may also be implications of access to ‘interim relief’ by civil courts where a dismissal is involved.

If relief is granted, the case will go before a WRC adjudicator.

## IRISH SOLUTION, IRISH PROBLEM

In recalling the tenets of the original 2001 Act, Mr McGinty said it was an “Irish solution to an Irish problem”, which retained the voluntarist nature of industrial relations.

Referring to the Programme for Government's statement on ensuring compliance with European Court rulings – *"We will reform the current law on employees' right to engage in collective bargaining (the Industrial Relations (Amendment) Act 2001), so as to ensure compliance by the State with recent judgements of the European Court of Human Rights"*– Mr McGinty said his first response to this was "ho hum, what problems might that be?"
He said he didn't believe there was a difficulty in the standing law.

Since the Ryanair decision, unions have looked at collective bargaining on a fundamental level, whilst employer bodies have focused on fixing the Act, he added.

The outcome of discussions DJEI held with ICTU, Ibec and American Chamber of Commerce in March 2014 was that there would be no mandatory measures on union recognition or on collective bargaining. Mr McGinty maintains that compulsory recognition "remains unrealistic."

By way of contrast, in the UK there is a trigger mechanism whereby if a union can prove it has a membership (over 40%) the employer is obliged to negotiate with it.

Under the new measures, where an employer asserts that it engages in collective bargaining with an excepted body for the grade, group or category, it is for the employer to satisfy the Court that this is the case.

The definition of collective bargaining under the new amendment comprises "voluntary engagements or negotiations between any employer or employers' organisation on the one hand and a trade union of workers or excepted body on the other, with the object of reaching agreement regarding working conditions or terms of employment or non-employment of workers."

Mr McGinty questioned whether 'consultations' should be included alongside 'engagements' and 'negotiations', and if the structure that features in the Information and Consultation Act be considered collective bargaining in the new IR Act.

When bringing a claim against an employer, a trade union must provide a statutory declaration of how many members it has in the employment. Union members can remain anonymous, however – this is a "contentious issue", said Mr McGinty, as employers want to know who is taking a claim against them.

## EMPLOYERS “COMPLACENCY”

Brendan McGinity noted also that the Court must look at the totality of remuneration and terms and conditions, and that non-union companies can potentially be a comparator (claims brought under the 2001 Act used unionised firms as the comparator).

He wondered if independent assessors will be utilised and said there is a need for guidance on what constitutes “insignificant”, where the Court can decline to hear a claim, and to sustainability in respect of the consideration of the sustainability of the employer’s business in the long term.

The 18-month period, within which just one claim can be taken in respect of the same grade, group or category of workers, should reduce the risk of a “revolving door” for cases.

He also stated that there has been “huge complacency from some companies” on matters on representation in the workplace; since 2007 there has been 380 cases at the LRC and 160 Court recommendations on recognition, and these have involved big companies (such as Dell and Meteor) – “it is not just an issue for the small guys”, Mr McGinty added.

# Protected Disclosures Act presents big challenges for employers

**KIERAN FITZGERALD**

**The Protected Disclosures Act, in force since mid July, has had a big impact already and will present a host of new challenges to employers, according to one of the country’s leading employment lawyers.**

In a speech at a conference organised by Resolve Ireland last week, Seamus Given, a senior partner at the leading law firm, Arthur Cox, warned HR managers to be aware of the fact that even if they put in place procedures to deal with disclosures by workers, there is no obligation on those making the disclosures to comply with those procedures.

Whistleblowers do not have to satisfy a particularly high test: it is enough that there is a "reasonable belief" on the part of that person that the relevant facts "tend to show" that wrongdoings exist.

There is no requirement that a particular wrongdoer, or wrongdoing be identified. The test is somewhat higher in the case of disclosures to outsiders.

## WIDE COVERAGE

Significantly, the protections contained in the Act apply to disclosures made before the Act came into force and the legislative umbrella covers not just employees, but also agency workers, contractors, and trainees, though "probably not volunteers".

Self-employed contractors paid on an invoice basis are "workers" for the purposes of the Act. "Relevant wrongdoings" covered include acts of omission such as a failure to comply with a legal obligation.

Importantly, the motivation of the 'whistleblower' in making the disclosure(s) is irrelevant, except insofar as it may impact in the calculation of any compensation payable to the person concerned at a later stage.

Up until 2013, the UK legislation on protected disclosures contained an 'in good faith' test, but this was removed and replaced by a test based on whether the disclosure was made 'in the public interest.'

Under the Protected Disclosures Act, a disclosure is presumed to be a protected one unless it can be proved to the contrary. The list of 'relevant wrongdoings' includes: failure to comply with a legal obligation; committal/likely committal of a miscarriage of justice; endangerment of health and safety; misuse of public funds; concealment/destruction of information.

There is no requirement for the wrongdoing to be material. The wrongdoing can be that of the person making the disclosure. However, the 'whistleblower's own contract of employment is not covered.

There are five channels of disclosure:

- Internal, such as disclosure to a designated recipient.
- To a regulator. Seventy two such regulators have been listed. (Examples include the Central Bank, the Competition & Consumer Commission and the Comptroller & Auditor General).

- To the responsible Minister.
- To an advisor: barrister, solicitor, or union official.
- Public disclosure, such as to the media.

## "TALK TO JOE"

"There are circumstances when it is ok to talk to Joe (Duffy), according to Seamus Given."There is no requirement that the disclosure be made in writing. An employer may be put on notice informally of information that may be later sought to be a protected disclosure."

"The employee has a choice as to which channel to use - there is not an escalation procedure."

Seamus Given warns of the difficulties in applying the test of reasonableness contained in the Act. There are tests in Section 10 of the Act justifying external disclosure.

## PROTECTIONS, PAYMENT

Six protections are available to persons making protected disclosures, including protections against dismissal, penalisation and a protection under the law of Tort where someone is held to have suffered a detriment when they made a disclosure.

There is provision for payment of up to five years' remuneration by employers held to be in breach.

There are also three shields available to the 'whistleblower', including a bar on a defamation action in respect of 'protected disclosures of confidential information'. These also enjoy immunity under the Criminal Law.

Mr Given says the most important protection is the entitlement to privacy or secrecy, except in special circumstances. If these protections are infringed, the employer is civilly liable.

"Anonymous disclosures are allowed, but are not encouraged."

The requirement not to disclose a person's identity "creates difficulties in the context of an investigative or disciplinary process". When a third party is brought in to investigate, their contract should include a confidentiality obligation.

He warns employers that "contracting out of the legislation is prohibited". Every organisation to have a procedure in place, he advises.

People should be discouraged from bringing their information outside the organisation. “It is important to separate the singer from the song … An extraordinary level of nuancing is required.”