Employment Bar Association

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THE WORKPLACE RELATIONS ACT 2015

New Statutory Framework to Protect Worker's Rights

Kevin Duffy, Chairman of the Labour Court

The latest decision by the Minister is that the Act will commence on 1st October. That now appears to be a firm date.

There has been considerable debate concerning the reforms that are now provided for by the Act. There were, and continue to be, many different opinions on the desirability of what has been put in place. However, that debate, as far as the policy decision underlying these reforms is concerned, is over and the Oireachtas has legislated.

In these circumstances there is little point in rehearsing again the arguments for or against the decisions that have been taken and are now being implemented. Consequently, I do not intend to go into those questions this evening. Nor do I intend to comment on the desirability of the reforms or their compatibility with the Constitution or the Convention on Fundamental Rights and Freedoms. I attend here as Chairman of the Labour Court and hence as a creature of statute. I do what the statute tells me to do. The debate has moved on. It is now about how the reformed institutions will operate and what is expected of those who use the service. That is what I intend to address.

Suffice it to say, that having been enacted by the Oireachtas the statute enjoys a presumption of Constitutionality. It also enjoys a presumption of compatibility with the State's international obligations. Those presumptions can only be displaced by the Superior Courts. It is not within either my competence or my brief to express any opinion on what the Court's might decide if called upon to address those questions.

Overview

The new arrangements provide an integrated and streamlined system of resolving disputes concerning statutory employment rights and obligations and promoting adherence to statutory obligations in employment.

There are to be two principal changes. Firstly, new statutory body, the Workplace Relations Commission (WRC), will be established. It will provide a number of services directed at ensuring compliance with employment and equality legislation and in providing first instance adjudication of disputes. Secondly, the Labour Court will assume the appellate jurisdiction from all first decisions made by the WRC. A further appeal on a point of law will lie to the High Court, but not beyond. In practice this will mean that following a transition period the full appellate jurisdiction of the Employment Appeals Tribunal will transfer to the Labour Court. The EAT will then be dissolved.

The process of initiating claims will be streamlined as will such matters as time limits and the process of bringing and hearing appeals.

The Process

The new arrangement essentially contains four tiers, namely, inspection, mediation, adjudication and appeals to the Labour Court. Each of these stages will be considered in turn.

Inspection

Inspection and related matters is provided for at Part 3 of the Act. Under this Part the old inspectorate of the Department of Enterprise Trade and Innovation (and more recently of NERA),will become a service of the WRC. Inspectors will continue to exercise their current role in conducting inspections for the purpose of ensuring compliance with employment related statutes which will be augmented with new and additional powers.

Hitherto, the role of inspectors was confined to enforcing statutory provisions the contravention of which constituted a criminal offence. That will continue but inspectors will have an additional role in enforcing statutory provisions that normally give rise only to a civil remedy.

Section 28 of the Act authorises an inspector to issue what is referred to as a ‘compliance notice’. A compliance notice can be issued where it appears to the inspector that an employer has contravened a provision of an employment enactment specified in the schedule 3 of the Act. This schedule contains a limited range of infringements that can give rise to the serving of a compliance notice. They are: -

Act	Section	Provision
Unfair Dismissals Act 1977	14(1), (2) and (3)	Failure to provide a notice in writing setting out the procedure that will be followed in the case of dismissal
Payment of Wages Act 1991	Section 5	Making of unauthorised deductions
Maternity Protection Act 1994	Section 18	Provision of health and safety leave
Terms of Employment (Information) Act 1994	Sections 3(1) and 5	Provision of a statement in writing of the particulars of the terms of employment Notification of a change in terms of employment
Organisation of Working Time Act 1997	Sections 6(2), 11, 12, 13, 14(1), 15(1), 16(2), 17, 18, 19(1), 19(1A), 21, 22 and 23(1) and (2)	Various provision on compensatory rest, daily and weekly rest, maximum working hours, night working hours, provision of information on working hours, zero hours contracts, Public Holidays and annual leave entitlements, cessor pay.
Carers leave Act 2001	Section 13(2)	Entitlement in respect of Public Holidays in first 13 weeks of carers leave.
Protection of Employees (Temporary Agency Work) Act 2012	Section 14	Access of agency workers to collective facilities of the hirer

This is a new provision and it cannot be fully predicted how it will operate in practice. However, the intention is that where clear infringements of a relevant statutory provision come to light in the course of an inspection, the process may be utilised. A compliance notice can direct the employer to take a course of action, or to desist from a course of action. But beyond that no other redress can be provided for. It is anticipated that in many cases the serving of a compliance notice will dispose of the issue to which the notice relates by ensuring that the employee concerned gets what he or she is entitled to under the relevant legislation. However, an aggrieved employee may still pursue an individual complaint in respect of the contravention seeking any

additional redress to which they may be entitled under the relevant statute. That is clear from s. 28(15) of the Act which provides that the serving of a compliance notice shall not prevent or restrict an employee from bringing proceedings for any infringement in accordance with the Act.

A compliance notice can be appealed to the Labour Court and there is a further appeal to the Circuit Court by way of a rehearing. A failure to comply with a compliance notice constitutes an offence.

Fixed-Payment Notices

Section 36 of the Act provides for the issuing of what are referred to as 'fixed-payment notices'. An inspector may issue a fixed-payment notice where he or she forms the opinion, on reasonable grounds, that a person has committed a 'relevant offence'. Subsection (5) of that section provides that a relevant offence is one that involves a contravention of:

Act	Section	Offence
Protection of Employment Act 1977	Section 11	Failure to initiate consultation under s.9 or s.10 of the Act
Payment of Wages Act 1991	Section 4(4)	Failure to provide a pay-slip
National Minimum Wage Act 2000	Section 23	Failure to provide a statement of average hourly pay for a reference period

If the person to whom a fixed-payment notice is address makes a payment in the amount specified in the notice (up to €2,000) within 42 days from the date of the notice a prosecution in respect of the offence will not be brought. If the payment is not made within that period a prosecution in respect of the offence may be initiated[1]. An appeal against the issuance of a fixed-payment notice lies to the District Court.

Mediation

The Equality Tribunal currently provides a mediation service in employment equality claims. It is intended to extend mediation to, potentially, all claims under employment and equality enactments[2]. Mediation will be provided by trained mediation officers of the WRC. Mediation will be offered on a voluntary and selective basis. The criteria against which cases will be selected for mediation has yet to be published. Where

[1] Section 37 of the Act provides that the prosecuting authority for all offences under employment legislation will be the Commission rather than the Minister.
[2] Section 39.

mediation fails, anything disclosed in the process remains confidential and privileged. Where it succeeds, the terms of settlement will be reduced to writing and will, in effect, be enforceable as a contract[3].

Adjudication

Section 40 of the Act provides for the establishment of an adjudication service to hear all employment and equality disputes at first instance. The model upon which this service is based is broadly in line with the current Rights Commissioner Service. It is intended that the process of adjudication will, like the current mode of procedure adopted by Rights Commissioners and Equality Officer, be more inquisitorial or investigative in nature rather than the adversarial mode of procedure adopted at the EAT.

In this regard it is relevant to point out that the Rights Commissioner service of the LRC currently deals with all first instance claims other than those arising under equality legislation, the Redundancy Payments Acts and the Minimum Notice and terms of Employment Act. Rights Commissioner's also have an optional first instance jurisdiction under the Unfair Dismissals Acts. The rate of throughput of cases of this service has been consistently impressive relative to that of the other adjudicative fora.

In 2013 the Rights Commissioner service dealt with 10,253[4] referrals which were disposed of by 12 Rights Commissioners. 1,282 of those referrals were under the Industrial Relations Acts with the remaining 8,971cases related to claims under various employment rights enactments. It is also significant that the appeals rate from decisions of a Rights Commissioner has remained consistent at between 10% to 18% . It follows that over 80% of all cases referred to a Rights Commissioner under the current arrangements go no further.

This compares with 4,168 referrals to the EAT in the same period, 957 referrals to the Labour Court and 538 referrals to the Equality Tribunal. Hence 12 Rights Commissioner currently deal with 65% of all employment rights referrals. I am unaware of any Rights Commissioner hearings or decision being the subject of judicial review and, as previously observed, there is a low level of appeals for their decisions. If the experience of the Rights Commissioner service is replicated with the new adjudication service there will be little cause for complaint.

A panel of adjudicators has already been established. They will be regionally based. The adjudicators will have the first instance jurisdiction currently exercised by the

[3] Section 39(8)
[4] LRC Annual Report 2013

Equality Tribunal, the EAT and the Rights Commissioner Service[5]. An adjudicator will be independent in the exercise of his or her adjudicative functions under the Act[6]. Persons who currently stand appointed as either a Rights Commissioner or an Equality Officer will become adjudicators on the coming into effect of the Act.

Appointment of Adjudicators

The adjudicators were recruited by open competition and have been drawn from candidates whose background is in industrial relations, human resource management and the law. They have been trained to an accredited standard of competence.

Procedural Matters

The Act provides for the making of regulations by the Minister in matters relating to the presentation of complaints and the conduct of hearings before an adjudicator[7]. Work is being currently being undertaken on the drafting of regulation to be made for these purposes. However the Act itself makes provision for certain procedural matters, in particular: - .

- Adjudicators will be expected to produce reasoned decision which will be published on the internet.

- The proceedings will be in private (as is currently the case with the Rights Commissioners, the Equality Tribunal and the Labour Court).

- The parties will be anonymised in the decision[8]. While not expressly provided for in the Act it is anticipated that witnesses will also be anonymised.

- Adjudication officers will have powers of compellability[9] but they are not authorised to take evidence under oath.

Parties can be represented by: -

- An official of a trade union[10]

- An official of an employers' representative body

[5] Adjudicators will also exercise the industrial relations functions currently exercisable by Rights Commissioners under s.13 of the Industrial Relations Act 1969.
[6] Section 40(8) of the Act.
[7] Section 40(17) of the Act.
[8] Section 40(13) and (14)
[9] Section 40(10)
[10] This is a reference to a paid official, or an officer of a trade union or a branch of a trade union which is the holder of a negotiating licence under the Trade Union Act 1941.

- Counsel or solicitor

- Any other person, if the adjudicator so permits.

Issues that may arise in adjudication

The basic framework within which the adjudication service will operate has been set out in the Act. There are, however, a number of issues that may arise in the operation of the new adjudication service which might usefully be addressed in regulations, including: -

- Prehearing procedures, case management and programming so as to reflect the content of cases and requests for further particulars in advance of hearings

- The filing of written submissions

- Adjournment of cases at hearing

The object is to reduce considerably the delay currently experienced in many cases, both in providing a hearing date and in the issuance of a decision. It is expected that cases will be allocated a hearing date within a reasonable timeframe after they are referred. It is also anticipated that a decision will issue promptly after the hearing. The programming function will be centralised and will be managed technologically. The stated objective is to have a decision within six-months of the referral. There will, however, be significant differences in the time requirements of cases depending on such matters as the degree to which facts are in issue and the number of witnesses that may need to be examined. These are practical matters that will have to be addressed in the management of the new system.

Appeals

The reforms will result in the most significant change in the role and functioning of the Labour Court since its inception. The Court was established as an industrial relations tribunal and remained so exclusively up to 1974. At various stages it was given appellate jurisdiction in equality and other employment rights disputes[11]. Yet it remains the body that is ultimately responsible for the maintenance of industrial peace. The centrality of that role cannot be diminished.

[11] The Court was established in 1946. It was given appellate jurisdiction in equal pay disputes in 1974 and in disputes concerning equal treatment in 1977. The next expansion in its jurisdiction came in 1997 when it was designated as the appellate tribunal under the Organisation of Working Time Act 1997. It now had appellate jurisdiction under the National Minimum Wage Act 2000, the Protection of Employees (Part-Time Work) Act 2001, the Protection of Employees (Fixed-Term Work) act 2003, the Safety Health and Welfare at Work Act 2005, and the Protection of Employees (Temporary Agency Work) Act 2012. It also has jurisdiction in respect to claims of penalisation under certain other statutory provisions.

At present approximately 58% of the Court's caseload is in industrial relation and 42% is in employment rights, including equality claims. In terms of workload, employment rights appeals accounts for a significantly greater proportion of the Court's time.

Impact on the Labour Court

It follows that there will be nothing new in the Labour Court being required to determine cases with involve the application of the law. At present the Court has jurisdiction in cases that require it to analyse and apply statute law and the case law of the Superior Courts and the Court of Justice of the European Union as well as taking account of persuasive authorities of the UK Courts. That is apparent from even a cursory examination of any of the employment law determinations issued by the Court. It is also apparent that the Court adopts, without difficulty, a very different approach to the exercise of its employment rights jurisdiction to that which it adopts in fulfilling its industrial relations functions.

The full impact of the reforms will result in a significant increase in both the caseload and the workload of the Court in respect to employment rights. In order to meet these increased demands the Court will be expanded by the creation of a fourth division and the appointment of an additional deputy chairman. The appointment of an additional deputy chair will facilitate a more efficient use of divisions in the hearing of cases while allowing the chairs to attend to such matters as drafting decisions and case management.

Two new deputy chairs have already been selected through an open recruitment process conducted by the Public Appointments Service[12]. Under the revised system for appointing ordinary members of the Court, both ICTU and IBEC have submitted a panel of three persons each for consideration for appointment by the Minister. The Ministers has recently announced his intention of making two appointments when the Act commences[13]

The Act also provides for the making of regulation on the circumstances in which the business of the Court can be conducted by a chair sitting alone. No decision has yet been made as to what those circumstances might be. However, it is not anticipated that substantive hearings will be conducted other than by a full division of the Court. Rather, it is likely that this provision will be utilised to deal with such routine matter as case management conferences or adjournment application or other similar business.

[12] Alan Haugh B.L, a practicing barrister and Kevin Foley, currently Director of Conciliation and Mediation Services of the LRC have been selected for appointment.
[13] Laoise O'Donnell, national secretary of IMPACT and Gavin Marie, HR Manager with the Central Bank have been selected for appointment

The adequacy of the additional resources provided to the Court will largely depend on the current rate of appeals being at least maintained in the new system. Given that the current rate of appeals has not fluctuated greatly over time and has applied across the full range of cases within the Court's jurisdiction, there is no particular reason to anticipate any significant deterioration in the overall proportion of cases being finally resolved at first instance.

By far the biggest increase in the Court's workload under the new arrangements will be in determining appeals under the Unfair Dismissals Acts. Unfair dismissal claims currently account for 85% -90% of the work of the EAT. In 2013 (according to the most recent report published by the EAT) the Tribunal heard 1, 578 cased under that Act of which 83%, or 1,308, were at first instance. There were 206 appeals under the Act from the recommendation of a Rights Commissioner and 64 applications for enforcement of a Rights Commissioner recommendation[14].

Of the 1,308 first instance cases listed for hearing 821(62%) were withdrawn prior to or at hearing. Of the 206 appeals listed 104 (50%) were withdrawn. While the settlement of cases is always to be welcomed, the late withdrawal of cases results in an unacceptable waste of resources. A priority in the new arrangements will be to encourage parties to attempt settlement at a much earlier stage, and in any event before the case is listed for hearing.

Rules of procedure

The Act has amended s.20 of the Industrial Relations Act 1946 so as to allow the Court to make rules regulating its procedures over a wider spectrum that was provided for in the 1946 Act. In particular rules can be made covering: -

(a) the bringing of appeals to the Court under *Part 4* of the *Workplace Relations Act 2015*;

(b) the hearing of appeals by the Court

(c) the times and places of hearings of such appeals;

(d) the representation of parties at the hearing of such appeals[15]

(e) the notification and publication of decisions of the Labour Court on the hearing of such appeals;

(f) the giving of notice of appeal from decisions of adjudication officers;

[14] According to the 2013 Annual Report of the LRC Rights Commissioners received 981 referrals under the Unfair Dismissals Act in that year. This showed a decrease on previous years.

[15] There is an overlap between this provision and s.44 (9) of the Act which in fact prescribes the mode of representation.

(g) any matters consequential on, or incidental to, any of the foregoing matters.

As soon as the Act commences, the Court will make rules under this provision dealing with the procedures to be followed by parties in preparing for hearings. While the decisions yet to be taken by the Court in that regard cannot be pre-empted, it can be anticipated that the procedures adopted will not differ greatly from the current procedural requirement of the Court, although some tightening of the current timelines can be expected.

The procedures of the Court are directed at ensuring that the issues arising in a case are known in advance, both to the Court and the parties. Hence, there is a strong emphases on the filing of written submissions in which the issues of fact and law relied upon by the parties are fully set out. This facilitates proper case management in ensuring that the time allocated to the case reflects its relative complexity. It is also likely that there will also be a requirement for the exchange of submissions in advance of the hearing, thus ensuring that neither parties is taken by surprise. As is currently the position in employment equality cases, it is likely that the Court will require a list of intended witnesses and an outline of the evidence that they are expected to give. The combined effect of these provisions will be to expedite hearings and eliminate the need to deal with background and uncontroverted facts at hearings.

Certain internal changes will also be made in the management of cases. The chairs of divisions will take responsibility for ensuring that cases are ready for hearing before they are listed and they will also have responsibility for estimating the time required for hearings having regard to the content of cases. In recent years the Court has adopted a practice of convening pre-hearing case management conferences in appropriate case where it appears from the papers filed that the issues upon which the case may turn can be better refined or more fully addressed. It can be anticipated that this will continue.

All hearings (other than hearings to investigate a trade dispute) are to be in public with the Court having a residual power to conduct a hearing or part of a hearing in private in exceptional circumstances.

The Labour Court can refer a question of law that arises in an appeal to the High Court for determination. This replaces a provision in many employment enactments with allowed the Court to request the Minister to make such a reference. The change is seen as more in keeping with the independence of the Court.

Where a question involving the interpretation of a provision of European Law arises the Court can make a reference to the CJEU for a preliminary ruling under Article 267 TFEU[16]

Timescales

At present the Court has a target of providing a hearing date within 13 weeks from the receipt of an appeal. It then seeks to issue a determination within six weeks of the close of the hearing. Those targets are met in 80% of cases.

It is hoped that these timescales can be maintained.

Time –Limits for initiation of complains

There will be a standard time-limit for the presentation of claims of six months from the occurrence of the event giving rise to the complaint. This can be extended by a further six months where reasonable cause is shown. The lower standard of 'reasonable cause' will now apply consistently in all cases and replaces the higher standard of 'exceptional circumstances' that applies under some statutes[17].

Time –Limits for Appeals

The standard time limit for bringing an appeal is fixed at 42 days for the date of the decision being appealed. This differs from the current position where in some cases the time-limit runs from the date that the decision is 'communicated' to the parties. That provision has given rise to uncertainty concerning the date of communication.

There is a new power vested in the Court to extend time for bringing an appeal in exceptional circumstances. There is no limitation on the length of an extension that can be granted. However, the requirement for legal certainty may dictate that this provision will be applied strictly having regard to the need to ensure that a prospective respondent is not prejudiced by a long delay.

Referral of complaints / appeals

There is a standard process now in place for the submission of complaints to the WRC Workplace Relations Customer Service. All claims are initiated using a standard form which can be completed on line. Cases will then be technologically managed and allocated for hearing.

[16] This is not expressly provided for in the Act but the power to make such a referral is inherent in Article 267 of the Treaty

[17] The Act contains a drafting error in that s. 8 of the Unfair Dismissals Act was not amended to substitute 'reasonable cause' for 'exceptional circumstances' as the standard of explanation necessary to ground an application for an extension of time. It is intended to amend the Act to correct that error in the National Minimum Wage (Low Pay Commission) Bill 2015

Practitioners should note that in the case of an appeal it must be made directly to the Labour Court and not to the WRC Workplace Relations Customer Service.

Fees

Section 71 contains an enabling provision which allows the Minister to levy fees for any service provided by the WRC or the Labour Court. The Minister has indicated that he intends to provide only for the charging of a fee in the case of a party appealing to the Labour Court who has not appeared at first instance without good cause. The fee indicated is €300.

Disposal of Complaints / Appeals without a hearing

The Act allows for the disposal of complaints or appeals without a hearing but only in cases where neither party objects to that approach. This provision is likely to be used in limited circumstances where, for example, the information provided on a claim form plainly does not disclose any cause of action or where a claim is clearly out of time. However, the parties must be informed in advance of the proposal to utilise this process and if either party objects it cannot be used.

Enforcement of Decisions / Determination

The jurisdiction for the enforcement an adjudication officer's decision, and determinations of the Labour Court is transferred to the District Court from the Circuit Court. The current requirement to first obtain a determination from the Labour Court or the EAT before proceeding to have a first instance decision enforced through the ordinary courts is abolished.

Conclusion

Finally, I am acutely aware that the Labour Court will inherit a rich body of jurisprudence from the EAT, particularly in relation to unfair dismissal law. That jurisprudence has been developed over the 48 years of the Tribunals existence. I want to pay tribute to the many distinguished chairs and ordinary members of the Tribunal who have contributed to its success in that regard. I radially acknowledge that in assuming the role currently exercised by the Tribunal we will face a difficult challenge. But I am confidently that it is a challenge that my colleagues and those who will come after me will fully meet.