

Institutional Challenge: Tribunals, Industrial Relations and the Law

This article considers the impact on the Employment Appeals Tribunal and the Labour Court of recent developments in the distinct, but overlapping, spheres of industrial relations and the legal regulation of employment. It suggests a reform of the tribunal system and a bolstering of collective rights as means of better ensuring the vindication of employment rights for workers.

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I. Introduction

“There is no need of legislation so long as things work well without it, but, when such good customs break down, legislation forthwith becomes necessary” (Machiavelli)

“I decided law was the exact opposite of sex; even when it was good, it was lousy” (Zuckerman)

The relationship between the distinct, but overlapping, spheres of law and industrial relations (IR) has been complicated in the context of regulating employment relations. This regulation derives from a number of sources (formal and informal) and the balance between these various sources is continuously changing.¹ This, of course, reflects the reality that the employer-employee relationship itself is one that is constantly developing. Adding to the complexity is the fact that, in addition to the regular courts, there are a variety of specific institutions and tribunals that deal with claims relating to employment disputes. This article looks at some significant recent developments in both IR and the legal regulation of employment, and assesses how these have impacted, and might further impact, on the workings of two of the key employment tribunals, the Employment Appeals Tribunal and the Labour Court.²

¹ Regan, “Sources and Institutions” in *Employment Law* (Regan ed, Tottel, Dublin, 2009), p 3.

² We do not consider directly here some of the other significant institutions that deal with claims relating to employment disputes, such as the Rights Commissioner Service, the Equality Tribunal, the Labour Relations Commission, and so on. However, some of the general points made pertain to the institutional framework generally.

II. Voluntarism, the Law and Partnership

The Irish system of IR, derived as it is from that of the UK, has traditionally been classified as “voluntarist”, meaning that there has been a preference for joint trade union and employer regulation of employment relations and the relative absence of legal intervention.³ Voluntarism is premised on freedom of contract, what Kahn-Freund referred to as the great “indispensable figment of the legal mind”,⁴ and freedom of association, whereby the employment relationship is essentially regulated by free collective bargaining between worker and employer representative groups. In such a model, there is no *rejection* of public intervention or labour law but the role of the State is seen to be primarily to provide a supportive framework for collective bargaining and the “principal purpose of labour law is to regulate, support and restrain the power of management and organised labour”.⁵

However, recent years have seen much comment, both in Ireland and the UK, on the decline of the voluntarist model.⁶ Principally, this is because trade union density has dropped considerably in Ireland over the course of the last twenty

³ The Irish “Anglo-Saxon” model can be contrasted, for example, with the “Roman-Germanic” model of France and Germany, where the state, through its labour laws, has an active and central role in labour market organisation; see Teague, “Deliberative Governance and EU Social Policy” (2001) 7(1) *European Journal of Industrial Relations* 26.

⁴ Kahn-Freund, *Labour and the Law* (Stevens, London, 1977), p 18.

⁵ *Ibid*, p 4.

⁶ See, for example, Teague, “New Developments in Employment Dispute Resolution” (2005) 4 *LRC Rev* 5; Redmond, “The Future of Labour Law” (2004) 1 *IELJ* 3; Colling, “What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights” (2006) 35(2) *Ind Law J* 140; Brown et al, “The Employment Contract: From Collective Procedures to Individual Rights” (2000) 38(4) *British Journal of Industrial Relations* 611. However, it should be noted that the “decline of voluntarism” (like that of the virtue of the young) has been decried at various times over a long period; see (the illustratively titled) Hawkins, “The Decline of Voluntarism” (1971) 2(3) *Industrial Relations Journal* 24.

years and now stands at approximately 35 per cent (in the private sector, the figure is approximately 20 per cent).⁷ Many organisations (particularly in the service industries) do not engage in collective bargaining and do not recognise trade unions. Efforts by the trade union movement to persuade the legislature to introduce a mandatory recognition scheme along the lines of that in the UK have failed.⁸ The decline in trade union density and presence in the workplace has been accompanied by a corresponding decline in industrial action, prompting some to identify a new “individualism” amongst workers, which encompasses an ideological rejection of collective organisation and action.⁹

At the same time, there are increasingly attempts by employers to individualise the employment relationship through the implementation of various Human Resource Management (HRM) techniques, which often seek to bypass trade unions and foster employee commitment to the enterprise.¹⁰ Growing antipathy, in some cases bordering on oppression, towards unions by some major employers has also been documented.¹¹ In certain cases, employer attention has shifted to the establishment of *non-union* structures for employee representation at work and, indeed, a number of obligations exist on employers in non-union

⁷ Sheehan, “Union Density Drops 10% in a Decade” (2005) 35 *IRN* 12.

⁸ Doherty, “Union Sundown? The Future of Collective Representation Rights in Irish Law” (2007) 4 *IELJ* 96.

⁹ Beck, *The Brave New World of Work* (Polity, Cambridge, 2000); cf. Kelly, *Rethinking Industrial Relations: Mobilisation, Collectivism and Long Waves*. (Routledge, London, 1998).

¹⁰ D’Art and Turner, (eds), *Irish Employment Relations in the New Economy* (Blackhall, Dublin, 2002).

¹¹ D’Art and Turner, “Union Recognition and Partnership at Work: A New Legitimacy for Irish Trade Unions?” (2005) 36(2) *Industrial Relations Journal* 121; O’Sullivan and Gunnigle, “Bearing All the Hallmarks of Oppression; Union Avoidance in Europe’s Largest Low-cost Airline” (2009) 34(2) *Labor Studies Journal* 252.

settings to inform, and consult with, their workers. These derive, primarily, from requirements of EU law and include various duties to inform, consult and, in some cases, negotiate with employee representatives under the Employees (Provision of Information and Consultation) Act 2006; the Transnational Information and Consultation of Employees Act 1996; the Protection of Employment Act 1977 (as amended by the Protection of Employment Order 1996);¹² the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007; the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003;¹³ and the Safety, Health and Welfare at Work Act 2005.¹⁴

However, while trade union presence and influence at the workplace level has been on the wane, the union movement has found for itself a new and crucial role in socio-economic governance at national level. Since 1987 a series of tripartite social pacts have been concluded between the social partners (the State, unions, employers and some other representative interest groups) beginning with *The Programme for National Recovery* (PNR, 1987-1990) and encompassing most recently *Towards 2016* (agreed in 2006; reviewed in 2008). The agreements focus mainly on issues of pay (particularly in the public sector),

¹² SI No. 370 of 1996.

¹³ SI No 131 of 2003.

¹⁴ With the exception of the 2006 Act, the obligations on employers are issue specific; this contrasts with the more general obligations under the 2006 Act, but particularly with traditional collective bargaining, which tends to encompass a variety of workplace concerns; see Doherty, "It's Good to Talk...Isn't It? Legislating for Information and Consultation in the Irish Workplace" (2008) 15 *DULJ* 120.

tax reform and a range of other socio-economic issues.¹⁵ For our purposes, what is significant is that, through partnership, a number of legislative measures have been agreed, which are then progressed through the normal legislative process; these include legislation on trade union bargaining rights, collective redundancies, the national minimum wage and employment rights compliance.¹⁶

The result of these changes (or, depending on one's perspective, a contributor to them) has been an explosion in the volume of employment legislation over the last 20 years or so.¹⁷ This has had, and will continue to have, significant implications for the workings of the employment tribunals and for those- employers, employees, trade unions and lawyers- that frequent them. This article looks at the implications of the changing context of Irish IR, in particular the "juridification" of employment relations,¹⁸ for the operation of two of the key employment tribunals; the Employment Appeals Tribunal, established to deal primarily with individual claims, and the Labour Court, set up to deal primarily with collective matters. We look, in turn, at each institution in detail, before considering some of the key developments and challenges facing each.

¹⁵ See Roche, "Social Partnership in Ireland and New Social Pacts" (2007) 46(3) *Industrial Relations* 395.

¹⁶ Respectively the Industrial Relations (Amendment) Acts 2001-2004, the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007, the National Minimum Wage Act 2000 and the Employment Law Compliance Bill 2008. At the time of writing the latter has not yet been passed into law.

¹⁷ Teague and Thomas, for example, point to 16 major pieces of employment legislation enacted in the period 1990-2006 alone; Teague and Thomas, *Employment Dispute Resolution and Standard Setting in the Republic of Ireland* (LRC, Dublin, 2008), pp 14-15. This list is by no means exhaustive, as the authors do not include hugely important legislation like the Safety, Health and Welfare at Work Act 2005.

¹⁸ Browne, *The Juridification of the Employment Relationship* (Avebury, Aldershot, 1994).

III. The Employment Appeals Tribunal

The Tribunal was established under s 39 of the Redundancy Payments Act 1967 and, up to 1977, was known as the Redundancy Appeals Tribunal. In 1977, under s 18 of the Unfair Dismissals Act 1977, the name of the Tribunal was changed to the Employment Appeals Tribunal (EAT). The Tribunal was originally set up to adjudicate on disputes about redundancy between employees and employers and between employees or employers and the Minister for Labour (now the Minister for Enterprise, Trade and Employment) or a Deciding Officer. The scope of the Tribunal was extended over the years and now it deals with disputes under a range of Acts.¹⁹

The Tribunal is composed of a Chairman and 36 Vice-Chairmen and a panel of 80 other members, 40 nominated by “an organisation representative of trade unions of workers” (the Irish Congress of Trade Unions-ICTU) and 40 by “a body or bodies” representative of employers.²⁰ The Tribunal acts in Divisions, each consisting of either the Chairman or a Vice-Chairman and two other members, one drawn from the employers’ side of the panel and one from the trade union side.

In some areas, the EAT has first instance jurisdiction. These include claims arising from the termination of the employment relationship under legislation

¹⁹ Regan, *op. cit*, p 16.

²⁰ Redundancy Payments Act 1967, s 39(4).

relating to unfair dismissal,²¹ redundancy²² and minimum notice.²³ The Tribunal is, however, also an appellate body, adjudicating on appeals from the recommendations or decisions of rights commissioners under various pieces of employment rights legislation.²⁴ Unusually, claims for unfair dismissal can be made in the first instance *either* to the Tribunal²⁵ *or* to a rights commissioner and in the latter case an appeal lies from the recommendation of a rights commissioner to the Tribunal.²⁶

In 2008, over 5,000 cases were referred to the Tribunal.²⁷ The EAT's annual report shows that the bulk of the Tribunal's work continues to be (in descending order) complaints under the Unfair Dismissals legislation,²⁸ claims under the Minimum Notice and Terms of Employment Acts, and claims under the Redundancy Payments Acts.

The essential purpose of the EAT is to offer a speedy, inexpensive and relatively informal means for the adjudication of employment rights disputes under the various pieces of legislation that come within the Tribunal's scope. As a result, procedures before the EAT are not as formal as would be the case before a

²¹ Unfair Dismissals Act 1977, s 8(2).

²² Redundancy Payments Act 1967, s 39(15).

²³ Minimum Notice and Terms of Employment Act 1973, s 11(1).

²⁴ See, for example, Payment of Wages Act 1991, s 7(1); Maternity Protection Act 1994, s 33(1) and Protection of Young Persons (Employment) Act 1996, a 19(2).. See, generally, Kerr, *Employment Rights Legislation* (2nd ed, Round Hall, Dublin, 2006).

²⁵ Unfair Dismissals Act 1977, s 8(2).

²⁶ Unfair Dismissals Act 1977, s 9(1).

²⁷ EAT Annual Report, 2008 available at <http://www.eatribunal.ie>. This represents an increase of 72 per cent on 2007.

²⁸ The EAT estimates that 95 percent of its total workload in terms of actual "time spent on cases" at hearings relates to unfair dismissal claims; Teague and Thomas, *op. cit.* p 145.

regular court.²⁹ A party to an application may “appear and be heard in person or be represented by counsel or solicitor or by a representative of a trade union or by an employers’ association or, with the leave of the Tribunal, by any other person”.³⁰ Any party to a case may have one or more representative(s) acting on his/her behalf. At the hearing, a party to an application may be invited to make an opening statement, call witnesses, cross-examine any witnesses called by any other party, give evidence on his/her own behalf and address the Tribunal at the close of the evidence.³¹ The Tribunal has power to take evidence on oath and may administer oaths to persons attending as witnesses.³² Penalties are prescribed by law for wilful and corrupt perjury by any person convicted in a court of law of wilfully giving false evidence or wilfully and corruptly swearing anything, which is false, at a hearing of the Tribunal.³³

Written determinations of the Tribunal are final and conclusive subject only to the appropriate avenue of legal appeal. So, for example, a determination of the Tribunal on any question referred to it under the Redundancy Payments Acts,³⁴ or the Minimum Notice legislation³⁵ may be appealed by a dissatisfied party to the High Court on a point of law. A determination of the Tribunal under the Unfair Dismissals Acts may be appealed to the Circuit Court by a party within six weeks

²⁹ See, generally, Kerr and McGreal, “Practice and Procedure in Employment Law” in *Employment Law* (Regan ed, Tottel, Dublin, 2009),

³⁰ Redundancy (Redundancy Appeals Tribunal) Regulations 1968 (SI No. 24 of 1968).

³¹ *ibid.*

³² Redundancy Payments Act 1967, s 39(17)(a).

³³ Redundancy Payments Act 1967, s 39(17)(b).

³⁴ Redundancy Payments Act 1967, s 39(14).

³⁵ Minimum Notice and Terms of Employment Act 1973, s 11(2).

from the date of service of the determination.³⁶ Appeals to the Circuit Court are held *de novo* (that is, by way of a full re-hearing of the case). The Tribunal may not award costs against any party to an application except that where, in its opinion, a party has acted frivolously or vexatiously.³⁷ Legal aid, under s 28(8) of the Civil Legal Aid Act 1995 may only be granted in relation to *court* proceedings and, therefore, not before tribunals like the EAT.

The EAT, therefore, has always dealt in the adjudication of claims involving individual workers, where it has had to make legally binding decisions that clearly impact on the rights and interests of both employers and workers. Nevertheless, the EAT is not a court of law. In 2007, an EAT Procedures Revision Working Group was established to consider best practice in improving the service the Tribunal provides to its client base. The Review Group reported in 2007 and identified a range of areas where improvements could be made to the Tribunal's services.³⁸ Key amongst its proposals is a recommendation that a preliminary process be introduced prior to the substantive hearing, which will streamline the process and allow maximum opportunity for settlement. This would take the form of a pre-examination of each case by a member of the Tribunal. It further recommended that the objective of the procedures should be to ensure that they are speedy, inexpensive, fair and, as far as possible, informal. Other recommendations include that the Tribunal be given power to issue "Consent

³⁶ Unfair Dismissals (Amendment) Act 1993, s 11(1).

³⁷ Regulation 19(2) Redundancy (Redundancy Appeals Tribunal) Regulations 1968 (SI No. 24 of 1968).

³⁸ The report is available at: <http://www.entemp.ie>.

Determinations”, i.e. to embody settlement agreements in a Tribunal determination thus rendering them enforceable in like manner to regular determinations of the Tribunal and that time-limits be harmonised across all the pieces of legislation providing for the reference of disputes to the EAT.

A major criticism of the EAT, however, relates to it having become overly legalistic.³⁹ Teague and Thomas reported that approximately two-thirds of those appearing before the Tribunal in 2006 had legal representation.⁴⁰ This is an ongoing issue as an excessive focus on legalistic procedures inevitably impedes the mission of the EAT to provide a speedy, fair, inexpensive and informal means for individuals to seek remedies for alleged infringements of their statutory rights.

The Report of the EAT review group⁴¹ sums up the problem as follows:

“the Tribunal has moved very substantially from the more informal inquisitorial model to a more long drawn out, over legalistic, adversarial, costly and, especially from the perspective of employees and unions, intimidating environment...it was never envisaged when the Tribunal was established that participation in what was supposed to be a relatively informal tribunal would frequently involve delays and adjournments and legal representation (counsel and solicitor) on both sides with court-like procedures (evidence on oath, examination, cross examination, re-examination and the adoption of rules of evidence) becoming the norm...it puts employees, especially those without union representation, and smaller firms which cannot afford legal representation, at a distinct disadvantage. The frequent delays in hearings and the cost of legal representation mean that the redress options of reinstatement or reengagement become less practicable and the maximum permissible award of two years’ salary (subject to mitigation of loss) is eaten up in legal fees. It is a concern that over 70 per cent of successful claimants, according to EAT Annual Report data, feel the need to have legal

³⁹ See Browne, *The Juridification of the Employment Relationship* (Avebury, Aldershot, 1994).

⁴⁰ Teague and Thomas, *op. cit.* p140.

⁴¹ *Op. cit.*, p 3.

representation, the cost of which they must pay for from their own resources...”

However, the report goes on to note that:⁴²

“the Tribunal is not bound to fully adopt court procedures or to strictly follow the rules of evidence in all cases... While the Tribunal has no mediation role under its procedures, it does encourage settlement between the parties where it sees that it might be achieved...”

It is interesting to compare, in light of the EAT Review Group report, an innovation under the equality legislation, which allows the Director of the Equality Tribunal, at any stage, with the consent of both parties, to appoint an equality mediation officer, if the Director feels the case might be resolved in this way.⁴³ This provision represents an attempt to encourage the wider usage of alternative dispute resolution (ADR) systems and procedures that can result in a speedier and less expensive resolution of the issues and puts the parties themselves (rather than an adjudicator) in control of the outcome. Importantly, since 2004, the Director has opted to assign all cases to mediation (in the absence of an express objection from either party) making mediation the “default option” in relation to claims under the equality legislation.⁴⁴ Interestingly, Teague and Thomas note that, while parties have been increasingly represented by lawyers in the mediation process, this has not led to the process becoming over-legalistic

⁴² *ibid.* p 4.

⁴³ Employment Equality Act 1998, s 78 (as amended by ss 34 and 46 Equality Act 2004).

⁴⁴ Teague and Thomas, *op. cit.* p111.

as “to date the Tribunal has encountered no problems resulting from the involvement of the legal community in the mediation process”.⁴⁵

The nature of the disputes with which the EAT must deal often involves the protection and vindication of important rights (particularly in cases of dismissal) and so it may not be surprising that the growth in employment legislation, the decline in trade union density and a more rights-based approach to the employment relationship has led to the growth of legalism at the Tribunal. However, the EAT must ensure that it does not become a “cold house” for litigants (on both sides) by approximating too closely a court of law. If it be otherwise, the very existence and continuing usefulness of such a tribunal must be called into question. We will explore these concerns further below.

IV. The Labour Court

While the EAT was set up primarily to deal with statutory claims by individuals in relation to redundancy and, later, unfair dismissals, the Labour Court was established for a very different purpose. The Labour Court was established under s 10 of the Industrial Relations Act 1946 for the purposes of dealing with industrial relations disputes, predominantly of a collective nature. The Labour Court is not a court of law, but operates primarily as an industrial relations tribunal hearing both sides in a case and then issuing a non-binding

⁴⁵ *ibid.* p 129. A number of other groups, including trade unions, employer representative bodies, citizen advice centres and advocacy groups, has also participated in the process on behalf of claimants and respondents.

recommendation setting out its opinion on the dispute and the terms on which it should be settled. The Court, however, has acquired many extra functions in recent years as a result of specific roles being assigned to it under various pieces of employment legislation, under which it can make legally binding determinations.

The Labour Court consists of nine full-time members; a chairman, two deputy chairmen and six ordinary members, three of whom are employers' members, nominated by a "designated trade union of employers" (in practice the Irish Business and Employers' Confederation-IBEC) and three of whom are workers' members, nominated by "an organisation representative of trade unions of workers" (in practice the ICTU).⁴⁶ The Court usually operates in divisions, made up of the chairman or a deputy chairman, an employers' member and a workers' member.⁴⁷ According to its mission statement the role of the Labour Court is to "find a basis for real and substantial agreement through the provision of fast, fair, informal and inexpensive arrangements for the adjudication and resolution of trade disputes".⁴⁸

Importantly for this article, the Court's primary role was traditionally seen to be in the industrial relations arena. The court has a role to investigate trade disputes under the Industrial Relations Acts 1946-2004. This includes the power to investigate a dispute referred by the Labour Relations Commission (LRC) at the

⁴⁶ Industrial Relations Act 1946, s 10(4) and Industrial Relations Act 1969, s 2.

⁴⁷ Industrial Relations Act 1969, s 3.

⁴⁸ www.labourcourt.ie.

request of the parties to the dispute.⁴⁹ The Court may be requested by the Minister for Enterprise, Trade and Employment to investigate trade disputes affecting the public interest, or to conduct an enquiry into a trade dispute of special importance and report on its findings.⁵⁰ The Court also functions as an appellate forum in relation to rights commissioners' recommendations under the Industrial Relations Acts.⁵¹ The Court can establish Joint Labour Committees and decide on questions concerning their operation,⁵² register Joint Industrial Councils,⁵³ register, vary and interpret employment agreements and investigate complaints of breaches of registered employment agreements.⁵⁴ In relation to codes of practice, the Court can investigate complaints of breaches and give its opinion as to the interpretation of a code of practice made under the Industrial Relations Act 1990.⁵⁵

The Court has the power to investigate disputes and, significantly, issue legally binding determination under the Industrial Relations (Amendment) Acts 2001-2004. This legislation represents a recent attempt to deal with disputes in workplaces where no collective bargaining mechanisms are present and where trade unions are not recognized for negotiating purposes. Under the Acts, an employer may be compelled to grant trade union representatives the right to represent members on workplace issues relating to pay, and terms and

⁴⁹ Industrial Relations Act 1990, s 46.

⁵⁰ Industrial Relations Act 1946, s 24 and Industrial Relations Act 1990, s 38.. See also Kerr, *The Trade Union and Industrial Relations Acts* (3rd ed, Round Hall, Dublin, 2007) p 219.

⁵¹ Industrial Relations Act 1969, s 13(9).

⁵² Industrial Relations Act 1946, s 35.

⁵³ Industrial Relations Act 1946, s 61.

⁵⁴ Part III Industrial Relations Act 1946.

⁵⁵ Industrial Relations Act 1990, s 43.

conditions of employment. The Labour Court can make a binding determination with regard to these matters, and to dispute resolution and disciplinary procedures, in the employment concerned but cannot provide for arrangements for collective bargaining.⁵⁶

Outside of its traditional sphere of collective employment relations, the Court now hears appeals of decisions and recommendations from equality officers under a variety of legislation including the Employment Equality Acts 1998-2008⁵⁷ and the Pensions Act 1990;⁵⁸ and from rights commissioners' decisions under, for example, s 17 of the Protection of Employees (Part-Time Work) Act 2001, s 15 of the Protection of Employees (Fixed-Term Work) Act 2003 and s 29 of the Safety, Health and Welfare at Work Act 2005. In these cases, appeals are by way of re-hearing the entire case and the Labour Court can issue legally binding determinations.⁵⁹

We can see, therefore, that the Court increasingly has a significant role in relation to individual employment law disputes (although it is IR disputes that continue to make up the bulk of the Court's workload).⁶⁰ However, the fact that the Court must increasingly grapple with complex employment rights legislation and the fact that its decisions in many areas are now legally binding mean that,

⁵⁶ Industrial Relations (Amendment) Act 2001, section 6(2).

⁵⁷ Employment Equality Act 1998, s 83.

⁵⁸ Pensions Act 1990, s 77.

⁵⁹ For a comprehensive list of the Court's legislative functions see Regan, *op. cit.* pp 14-15.

⁶⁰ 890 out of 1179 referrals in 2008 related to IR disputes-see Labour Court Annual Report 2008 available at <http://www.labourcourt.ie>.

similar to the EAT, concerns exist that the court will become overly legalistic.⁶¹ Traditionally, while the Court has the power to take evidence on oath and require the production before it of persons or documents,⁶² hearings are generally held in an atmosphere of informality and the procedure is inquisitorial rather than adversarial. However, this informality has been thrown into some doubt by the decision in *Ryanair v The Labour Court*.⁶³

This case centred around a dispute involving the company and pilots represented by the Irish Airline Pilots Association (IALPA, a branch of the Irish Municipal Public and Civil Trade Union, IMPACT), under the Industrial Relations (Amendment) Acts 2001-2004. The Supreme Court was quite critical of the informal procedures adopted by the Labour Court when hearing the case, in particular, the fact that neither a single pilot nor any other employee of Ryanair was called by the union to give evidence. The Supreme Court held that the Labour Court did not adopt fair procedures, first, by permitting complete non-disclosure of the identity of the persons on whose behalf the union was purporting to be acting and, secondly, by disbelieving the oral evidence of two senior management figures in Ryanair in the absence of hearing evidence from at least one relevant pilot who was an employee of Ryanair. The Labour Court

⁶¹ The Labour Court, for example, has in recent years needed to make quite sophisticated referrals to the ECJ in relation to issues arising from Community law. Note that in Case C-268/06 *Impact v Minister of Agriculture* [2008] 2 CMLR 1265 the ECJ held that national courts or tribunals (in this case, the Labour Court) were required to apply directly effective provisions of Community law even if they had not been given express jurisdiction to do so under domestic law.

⁶² Kerr and McGreal, *op. cit.* p 848.

⁶³ [2007] 4 IR 199. See Connolly, "Industrial Relations (Miscellaneous Provisions) Act 2004- Implications for Industrial Relations Law and Practice of the Supreme Court Decision in *Ryanair v Labour Court and IMPACT*" (2007) 4 *IELJ* 37; Doherty, 2007, *op. cit.*

had decided the issue against Ryanair to a large extent on foot of omissions in Ryanair documentation and on foot of a view put forward by the union that the company did not engage in collective bargaining; this, according to the Supreme Court, did not amount to sufficient evidence to justify the finding. Moreover, the Supreme Court was critical of what it referred to as the Labour Court's "mindset", which favoured the way particular expressions are used and particular activities are carried out by trade unions.⁶⁴

This aspect of the Supreme Court's judgment is somewhat surprising. The Superior Courts have traditionally been quite deferential to the Labour Court's expertise in relation to industrial affairs, as seen in another judgment dealing with the 2001-2004 Acts, *Ashford Castle v SIPTU*.⁶⁵ There Clarke J. noted that the Labour Court was an administrative body which was required, when exercising its role under industrial relations legislation, to bring to bear its own expert view on the approach to take to the issues. He held that "a very high degree of deference indeed needs to be applied to decisions which involve the exercise by a statutory body, such as the Labour Court, of an expertise which this (High) Court does not have".⁶⁶ The Supreme Court's criticism of the procedures adopted by the Labour Court will likely have the effect of encouraging a greater formality in respect of Labour Court hearings and encourage a further juridification of the

⁶⁴ [2007] 4 IR 199 at 215 *per* Geoghegan J.

⁶⁵ [2007] 4 IR 70.

⁶⁶ *ibid.* at 85. See also the decision in *Calor Teoranta v Mc Carthy* [2009] IEHC 139, where Clarke J noted that, while the High Court can scrutinise the extent to which the Labour Court considered all necessary matters and excluded from its consideration any matters that were not appropriate, it should not interfere with a legitimate and sustainable judgment of the facts based on a proper consideration of all relevant materials.

process. The Labour Court has already drawn up a list of the key issues that arise out of the judgment and has laid down a set of guidelines that it will follow in future hearings, stressing the need for a “best evidence” rule.⁶⁷ As Kerr and McGreal point out, although the decision dealt with the Labour Court’s jurisdiction under the 2001-2004 Acts, there seems to be nothing to suggest that the Supreme Court’s comments would not apply equally to other employment tribunals and to the Labour Court when exercising other jurisdictions.⁶⁸

V. Where to Now?

We have looked above at the changing context of industrial relations in Ireland (in particular, the weakening of voluntarism, the spread of the legal regulation of employment relations and the emergence of social partnership). We have also looked at the role and functions of two of the key employment tribunals and noted some of the challenges facing them and concerns expressed about their operation. In this section, we will attempt to draw together these themes in order to draw attention to some implications for, and make some tentative suggestions as to the future direction of, the EAT and the Labour Court.

Complexity Now

The defining feature of the Irish system of employment dispute resolution at present is complexity. The well-known example of a potential claim for unfair

⁶⁷ Sheehan, “Labour Court’s Guidelines for 2001-2004 Cases in Wake of ‘Ryanair’ Judgment” (2007) 14 *IRN*.

⁶⁸ Kerr and McGreal, *op. cit.* p 828.

dismissal illustrates this. Under s 15 of the Unfair Dismissal Act 1977 (as amended), a claimant must choose between pursuing a claim for wrongful dismissal at common law or a statutory claim under the Act (“procedural election”).⁶⁹ However, this is not the only decision to be made. While a statutory claim for dismissal, depending on the circumstances, can also be made under a number of other acts, relief can only be granted pursuant to one piece of legislation; see the Protection of Employees (Fixed-Term Work) Act 2003;⁷⁰ the Protection of Employees (Part-Time) Work Act 2001;⁷¹ the Employees (Provision of Information and Consultation) Act 2006;⁷² and the Employment Equality Act 1998.⁷³ Obviously, in a termination situation, the optimum route to choose is a hugely important tactical question. The employee will need to consider a range of factors including the existence of preconditions for taking a claim (particularly service periods); the potential remedies available; the cost and likely duration of taking the claim a particular tribunal; the burden of proving the claim; different procedural requirements of the tribunals (time-limits, evidential requirements); and so on.⁷⁴

⁶⁹ We have already seen that a claim under the 1977 Act can be made at first instance to either the rights commissioners or the EAT.

⁷⁰ Section 18(1).

⁷¹ Section 15(3). Note also that an individual who is both a part-time employee under the 2001 Act and a fixed-term employee under the 2003 Act cannot claim relief under both acts for penalisation resulting in dismissal that arises from the same set of circumstances; however it seems this does not prevent two separate claims from being *processed*; Ryan, “Fixed-Term Workers” in *Employment Law* (Regan ed, Tottel, Dublin, 2009), p 334.

⁷² Section 13(7).

⁷³ Section 101(4). One important innovation in relation to claims of discriminatory dismissal under the equality legislation, introduced by the Equality Act 2004, is that the Director of the Equality Tribunal can recommend (after an investigation is complete) that the case proceed under the unfair dismissals legislation; this may occur where the Director feels that the claimant was unfairly dismissed but not discriminated against; Employment Equality Act 1998, s 101(2)(b) (as amended by Equality Act 2004, s 42(a)).

⁷⁴ See Stewart and Dunleavy, *Compensation on Dismissal* (FirstLaw, Dublin, 2007), ch 9.

Thus, there is a real need to simplify a system which potentially allows a multiplicity of fora (which have different aims and purposes, approaches, histories, institutional competences, routes of appeal and are staffed by personnel with different backgrounds) to hear claims arising from the same set of circumstances, in the same workplace, involving the same parties. We will return to this below. However, a clear implication of such a complex system is that it is unlikely to be navigated successfully other than by (relatively experienced) lawyers.

The First Thing We Do...Lets Kill All the Lawyers

We have noted above in the context of the EAT and the Labour Court some of the concerns expressed in light of the further juridification of the employment tribunal system (in terms of both individual and collective grievances). These primarily relate to the adoption of court-like rules and procedures and the related cost and delay engendered by legal involvement in what was envisaged originally as a relatively informal, party-driven and party-controlled dispute resolution system. The difficult balance between the vindication of rights on the one hand, and speedy and inexpensive resolution of grievances on the other is by no means new, nor is it unique to the employment sphere. Nevertheless, it does have a distinct relevance there in the light of a statutory regime that established a very particular method of grievance resolution, which envisaged a lesser reliance on legal professionals than would be the case in other areas of legal regulation.

There is an amount of research in the employment sphere (given the typical situation of a fundamental inequality of arms between the parties) to suggest that greater legal involvement in the process results in many aggrieved workers being discouraged from processing claims at all. In the UK, it has been argued that “vast swathes of disputes go entirely without adjudication” and “estimates suggest that only 15–25 per cent of potential cases are pursued formally”.⁷⁵ Moreover, research in both Ireland and the UK has shown that claimants tend to reflect the core, rather than the vulnerable “peripheral” workforce; in the UK three-fifths of applicants are men, 90 per cent are white, nearly all applications (95 per cent) are brought by permanent employees, and the median length of service is over six years.⁷⁶ The average employee involved in a case before the Irish EAT is more likely to be male (65 per cent of claimants) and Irish (88 per cent) with the average length of service being six years.⁷⁷

Hann and Teague report that the decline of the voluntarist system of employment relations means more and more people are turning to the statutory route to resolve alleged breaches of employment rights:

⁷⁵ Colling, *op. cit.*, p 144. See also Pollert, “The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights” (2005) 34(3) *Ind Law J* 217.

⁷⁶ Colling, *op. cit.*, p 144.

⁷⁷ Hann and Teague (2008) *The Employment Appeal Tribunal* (Internal Report for the Irish Labour Relations Commission). The authors also found that Irish nationals are disproportionately likely to appoint a solicitor while non-Irish nationals are more likely to be represented by a trade union official. Moreover, when an employee elects to be represented by a solicitor the response of the employer invariably is also to employ legal representation.

“As a result, an increasing range of employment relations problems are being resolved by or with reference to employment law. People are interacting with employment relations issues as legal subjects and not as members of a collective institution such as a trade union”.⁷⁸

The growth in references to the EAT is a development that is running parallel to the decline in trade union density and industrial action; thus it appears that conflict at work has certainly not gone away but has become increasingly individualised. The individualised nature of such an approach, however, can be problematic. The decline of the workplace presence of trade unions and the failure of any robust, non-union structures to emerge has, arguably, left a “representation” gap in relation to the processing of employment grievances. While the merits or otherwise of unionisation can be debated, one of the primary functions of trade unions has traditionally been to diffuse *individual* rights across memberships; the outcome of a dispute does not end with one individual, but rather unions can be “an instrument in translating statute and case law into changed employment practice”.⁷⁹ Otherwise, in the absence of a class-action type procedure, even where cases are brought and won, the impact of the law is often confined to the individual.

A final point to note relates to the involvement of lawyers in “pure industrial relations matters”. As Mallon has pointed out, if lawyers increasingly appear before the Labour Court in relation to collective disputes (as the *Ryanair* decision suggests is likely), there is an increased likelihood that lawyers will become more

⁷⁸ *Ibid.*, p 104.

⁷⁹ Dickens, “Individual Statutory Employment Rights Since 1997: Constrained Expansion” (2002) 24(6) *Employee Relations* 619, p 633.

active in industrial relations matters more generally. This might result, for example, in legal involvement in the drafting and negotiating of collective agreements and subsequent arguments as to the legal enforceability of such agreements; a further juridification of employment relations and a seismic shift away from the traditional voluntarist, collective bargaining model.⁸⁰

Partnership, the Labour Court and the Law

There are two final issues to be noted in relation to the role and remit of the employment tribunals and the changing context of employment regulation. The first relates to the role of social partnership. Although the future of the social partnership system as it has developed since 1987 is in doubt at the time of writing, following the refusal of the state and many (if not all) employers to honour the pay terms of the *Towards 2016 Transitional Agreement* agreed in late 2008, the process has had an important impact on the regulation of employment relations over the last two decades. First, the role of the Labour Court has, in some areas, been eclipsed by partnership institutions. This is, perhaps, most starkly the case in relation to the role of the National Implementation Body (NIB). The NIB is a highly unusual body, which is made up of high-level representatives of the social partners (in this case of the IBEC, the Construction Industry Federation and the ICTU) and which meets on an ad hoc basis to ensure the

⁸⁰ Tom Mallon, BL, speaking at the 5th Annual Thomson Round Hall Employment Law Conference, Dublin, May 24, 2008. The status of collective agreements in Irish law has not been definitely clarified by the courts. There is a presumption that collective agreements between trade unions and employers are not legally enforceable (given that many have an aspirational tone) but it seems this presumption may be rebutted; *O'Rourke v Talbot (Irl) Ltd* [1984] ILRM 587.

delivery of the industrial stability and peace provisions of the partnership agreements. In recent years, the NIB has intervened in high-profile industrial disputes in relation to nurses, electricians, and airport workers (to name but a few).⁸¹ The concern that this somewhat ephemeral body was being seen by employers and unions as a sort of “court of last resort” and was resulting in the usurpation of the statutory functions of the Labour Court was reflected in clause 1.19 of the *Towards 2016 Transitional Agreement* which stated that a protocol on the operation of the NIB should be devised to avoid the role of the Labour Court (and the LRC) being undermined. Nevertheless, the mere presence of such a clause indicates the extent to which the original role of the Labour Court in the “promoting of harmonious relations” between employers and workers and the “settlement of trade disputes” has been increasingly compromised.

However, the social partnership process has impacted on the Labour Court in other ways too. The *Ryanair* judgment, where the Supreme Court indicated significant discomfort with the scope of the 2001-2004 Acts, drew attention to the difficulties that can arise for the Court in operating legislation that derives from the partnership process. The right to bargain legislation arose as a compromise position arrived at during social partnership talks, where the social partners, in deciding not to go down the route of statutory trade union recognition, but at the same time moving away from a purely voluntarist approach, agreed on a half-

⁸¹ The NIB issues “Statements” in respect of disputes in which it intervenes; these can be accessed at <http://www.taoiseach.gov.ie>.

way house solution, which was ultimately shown to be highly problematic.⁸²

Similarly, the Labour Court, with its role as the promoter and defender of collective agreements, including national partnership agreements, now finds itself in the unenviable position of adjudicating on claims where trade unions are seeking to implement terms of the *Towards 2016 Transitional Agreement* from which the State and employer representative bodies have resiled. Whether or not the present system of partnership continues, then, will have important implications for the future remit of the Labour Court.

A second issue relates to the composition of the employment tribunals. At present, as we have seen, the practice is for the State, the ICTU and the main employer representative bodies (primarily the IBEC) to appoint the members of the EAT and the Labour Court. This system is likely to come under pressure on a number of fronts. First, if court-like rules and procedures (and, in the case of the Labour Court, statutory issues *per se*) are increasingly before the tribunals, the appropriateness of appointing non-lawyers to the tribunals is likely to be questioned. Secondly, the extent to which the existing social partners are, in fact, representative of their supposed constituencies is likely to become more of an issue. Most obviously, with trade union density at the low levels outlined above, whether the ICTU can really be said to be representative of “workers” is open to challenge. However, it is the status accorded the traditional employer representative bodies that has become a major source of recent controversy.

⁸² For a comprehensive analysis of the impact of the legislation and the Labour Court’s interpretation of it, see Doherty, “Labour and the Law...Uneasy Bedfellows Still” (2010) *NILQ* (forthcoming).

This can be seen in relation to recent challenges (which at the time of writing are awaiting High Court hearings) to the catering Joint Labour Committee, by the Quick Service Food Alliance, a new grouping of major fast food suppliers and a challenge to the electrical contracting Registered Employment Agreement by a non-aligned group of electrical contractors.⁸³ In both cases, certain employers are objecting to terms and conditions imposed on them as a result of agreements or decisions made by the established employer representative groups. A failure to renew the social partnership process (which itself has been criticised for being non-representative)⁸⁴ might lend further momentum to calls for an overhaul of the system of appointments to the employment tribunals.

Conclusion

The objectives behind setting up specialist employment tribunals were to provide a flexible, speedy and relatively informal means of resolving workplace disputes. What we have seen is that these objectives have become increasingly difficult to achieve. The increasing incidence of legal representation and the greater tendency towards the use of court-like practices and procedures seem difficult to avoid given the volume and increasing complexity of employment legislation. This point is amplified by evidence that shows significantly more successful outcomes for claimants that attend the EAT with the benefit legal

⁸³ See “Catering JLCs Face High Court Challenge, National Terms to be Proposed” (2009) 6 *IRN*; the Labour Court’s decision in *An Employer and A Worker* REP091/2009 and “Electrical Contractors Seek Judicial Review of Labour Court REA Decision” (2009) 19 *IRN*.

⁸⁴ O’ Cinneide, “Democracy and the Constitution” (2008) 46(4) *Administration* 41.

representation.⁸⁵ Specialist tribunals now have a heavy burden of responsibility to resolve claims by reference to relevant legislation and case law, both domestic and European.⁸⁶ Nevertheless, it is undoubtedly the case that the system for resolution of employment grievances could be rationalised in order to make it more navigable for lawyers and non-lawyers alike. This might be achieved, for example, by the establishment of a single “Employment Court”, with uniform procedural rules and routes of appeal. Greater use of ADR mechanisms (as in the case of mediation in equality case) might be considered, as well as provision for some sort of financial assistance for impecunious claimants (funded, at least in part, by the social partners).⁸⁷

However, it seems to this author, a more fundamental change might be canvassed. This would involve an attempt to restore or revive the collectivist ethos of the system for employment dispute resolution. The role given to the Labour Court to support collective bargaining and to uphold and enforce collective agreements (including national partnership agreements) was underpinned by the view that such agreements are worthy of support precisely because they are agreed by the parties themselves. The voluntarist system was supported because it allowed the labour market actors to agree appropriate rules

⁸⁵ See Browne, *op. cit.*; Hann and Teague, *op. cit.*

⁸⁶ Including obligations arising not only under EU law but also under the requirements of the European Convention on Human Rights Act 2003.

⁸⁷ Ironically, at the time of writing, such a rationalisation has been proposed, for very different reasons, by the *Special Group on Public Service Numbers and Expenditure*, established in order to identify areas where public sector spending cuts could be made. The Group’s report (available at www.finance.gov.ie) recommends that the “complex structure” for industrial relations institutions be “simplified and streamlined”; one suggestion made is the merging of the Labour Court, the LRC and the Equality Tribunal into one body (p 85).

and procedures for the orderly resolution of disputes (that could be tailored to individual sectors or workplaces) and allowed a flexibility to respond to changing circumstances it was felt could not be matched by legislation.⁸⁸ These features could be extremely attractive to all sides in times of economic difficulty.

To achieve such an end would require, first, an institutional structure within which collective bargaining could take place and some form of State support for, and commitment to, such arrangements and, secondly, an acceptance by employers of an obligation to comply with the terms of a collective agreement (be it negotiated at establishment, sectoral or national level).⁸⁹ This would surely require a reform of the laws relating to trade union bargaining rights and/or a more robust legislative framework for non-union workplace representative structures than is implicit in the *Ryanair* judgment (which veers towards a Constitutional stamp of approval for what are effectively “company unions” operated and controlled by the employer)⁹⁰ or explicit in the weak implementation of the Information and Consultation Directive.⁹¹ This may, on the face of it, seem unpalatable to employers and unlikely in the context of an economic downturn, but the many positive achievements of a partnership approach in the 20 years to 2007,⁹² the need for orderly restructuring of business (preferably without an upsurge in industrial action, the first signs of which are recently beginning to

⁸⁸ Kahn-Freund, *op. cit.*

⁸⁹ See Ewing, “The Functions of Trade Unions” (2005) 34(1) *Ind Law J* 1.

⁹⁰ D’Art and Turner, “Ireland in Breach of ILO Conventions on Freedom of Association, Claim Academics” (2006) 11 *IRN*; Doherty, 2007, *op. cit.*, pp 101-102.

⁹¹ Doherty, 2008, *op. cit.*

⁹² See, for example, Hastings et al, *Saving the Future: How Social Partnership Shaped Ireland’s Economic Success* (Blackhall, Dublin, 2007); Teague and Donaghey, “Why Has Irish Partnership Survived?” (2009) 47(1) *British Journal Of Industrial Relations* 55.

emerge)⁹³ and the potential benefits suggested by the literature of employee involvement and “voice” at work⁹⁴ all suggest deeper consideration of this proposal might be well-advised.

⁹³ Recent months have seen a national strike by electricians, work stoppages at a range of different private sector companies, including multi-nationals like Coca-cola and even sit-ins and occupations by workers of business premises (for example, at Waterford Crystal and Thomas Cook). See www.irn.ie for detailed accounts of various actions.

⁹⁴ See, for example, Storey (ed), *Adding Value Through Information and Consultation* (Palgrave, Basingstoke, 2005); Roche and Geary, *Partnership at Work: The Quest for Radical Organisational Change* (Routledge, London, 2006).