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The First Thing We Do, Let's Kill All the Lawyers . . . Workplace Discipline and Legal Representation

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Abstract
The Irish Supreme Court's decision in *McKelvey v Iarnród Éireann/ Irish Rail* enters into the ongoing discussion of the 'legalisation' of workplace dispute resolution.

Keywords
Legal representation, disciplinary process, disciplinary hearing

Case: *McKelvey v Iarnród Éireann/ Irish Rail*, [2019] IESC 79 (Irish Supreme Court)

Introduction

The 'legalisation' of workplace disputes has been a topic that has attracted much attention over the past years.[1] The phenomenon has been very visible in the 'voluntarist' systems of the UK and Ireland, where the 'classic' model favoured joint trade union and employer regulation of employment relations, and the relative absence of legal intervention.[2] In Ireland, as elsewhere, the

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1. O'Sullivan, M., et al, 'Is Individual Employment Law Displacing the Role of Trade Unions?', *Industrial Law Journal*, 2015, 44(2), pp. 222–245. The term 'juridification' ('the process of increasing legal intervention in the employment relationship . . . ') features in Heery, E., and Noon, M., *A Dictionary of Human Resource Management (3 rd ed)*, Oxford: OUP, 2017.
2. Kahn-Freund O., *Labour and the Law*, London: Stevens, 1977.

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legalisation of employment disputes takes various forms. First, and partly as a consequence of EU membership, there has been a huge expansion in *individual* employment rights protection (between 1990 and 2010, 28 major labour law Acts were passed in Ireland, dwarfing the number of Acts passed in previous decades).[3] Secondly, declining trade union density and weak legal protections for collective bargaining in Ireland have led to workplace disputes becoming more and more *individualised*, with aggrieved workers either navigating the employment tribunal system alone or, frequently, turning to legal (rather than trade union) *representation*.[4] However, thirdly, and the focus of this note, is the increasing appeal to legal representation, not just in employment tribunals, but in the *workplace itself*, and in the context of workplace disciplinary procedures. A recent decision of the Irish Supreme Court, *McKelvey v Iarnród Éireann/ Irish Rail*,[5] addressed this issue.

A train wreck? *McKelvey*: the facts

Mr. McKelvey worked for Iarnród Éireann, the public company that operates the Irish national rail service. He was initially subject to an investigation concerning the potential misuse of a company fuel purchase card, subsequently suspended (with pay), and the company then proposed to commence disciplinary proceedings alleging, in essence, that Mr. McKelvey had been engaging in the theft of fuel. Mr. McKelvey subsequently sought legal representation at these proceedings, based on the complexity of the allegations, and the lack of information provided to him; this request was refused by the company.

The company argued that no provision for legal representation was set out in the Grievance and Disciplinary Policies and Procedures of Iarnród Éireann; rather, these provide the employee with the right to representation by a fellow employee or trade union representative. Mr. McKelvey issued High Court proceedings to prevent the disciplinary hearing being undertaken without the presence of legal representation, and the High Court ruled in his favour in July 2017. Iarnród Éireann appealed to the Court of Appeal which overturned the High Court decision, and Mr. McKelvey, in turn, appealed to the Supreme Court.

3. Collision avoided? *McKelvey*: the decision

The leading judgment in the Supreme Court was given by Chief Justice Clarke. Clarke CJ affirmed that the law concerning the entitlement to have legal representation in a workplace disciplinary process, such as the one to which Mr. McKelvey was subject, had been set out by the Supreme Court in *Burns v. Governor of Castlerea Prison*.[6] In *Burns* (where a prison officer was the subject of a disciplinary process), the Supreme Court had set out a series of factors which should serve as 'starting off points' from which to approach a request for legal representation in a workplace process:

3. Doherty, M., 'New Morning? Irish Labour Law Post-Austerity', *Dublin University Law Journal*, 2016, 39 (1), pp. 104-125.
4. The *Workplace Relations Commission Annual Report* (2017) notes that the most popular form of representation for both employees and employers (where they do not represent themselves) in employment disputes is legal representation; available at https://www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/ (accessed May 20 2020).
5. [2019] IESC 79.
6. [2009] IESC 33, [2009] 3 I.R. 682. Burns draws on criteria set out by Webster J. in the English case of *R v. Home Secretary ex parte, Tarrant* [1985] 1 Q.B. 251.

1. The seriousness of the charge and of the potential penalty;
2. Whether any points of law are likely to arise;
3. The capacity of a particular prisoner to present his own case;
4. Procedural difficulty;
5. The need for reasonable speed in making the adjudication, that being an important consideration; and
6. The need for fairness as between prisoners and as between prisoners and prison officers.

The Court was clear in stating that, while these criteria are a useful starting point from which to approach the issue, the core question to be answered is whether a disciplinary hearing could be said to be unfair or in breach of the principles of natural and constitutional justice by reason of the fact that the employee does not have legal representation. Clarke CJ explicitly approved the proposition in *Burns* that '[t]he cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be *exceptional*'.[7] Clarke CJ also emphasised that merely because a case may be *better* presented with the forensic skills of an experienced lawyer, does not mean that presence of a lawyer is required for a *fair* process.

Clarke CJ also addressed the question of *when* it is appropriate for courts to intervene in workplace processes; the appropriateness of a court intervening either before or during (as opposed to at the end of) a disciplinary process. Here, he referred to the judgment of the Supreme Court *in Rowland v. An Post*,[8] where the basic principle set out was that courts should be reluctant to intervene while a disciplinary process is *ongoing,* but, rather, should wait until the process has come to an end, and then decide whether the result of that process is sustainable in law. Clarke CJ noted, however, that the judgment in *Rowland* also recognised that there may be cases where court intervention at an earlier point is necessary; where it is clear that the process has 'gone off the rails' to such an extent that there could be no reasonable prospect that any ultimate determination could be sustainable in law.[9]

Ultimately, the Supreme Court concluded that there were no exceptional circumstances necessitating legal representation for Mr. McKelvey. This was especially so as the disciplinary proceedings had not yet commenced at the time legal proceedings were initiated. However, the Court was clear that this did not necessarily bar Mr. McKelvey from asserting an entitlement to legal representation at a later stage due to the manner in which the disciplinary proceedings had evolved.

4. Signal failure? Conclusion and implications

The case raises a number of issues, and questions, of general interest to labour lawyers.

First, the issue of the seriousness of the potential penalty. While the outcome of the disciplinary inquiry could lead to Mr. McKelvey's dismissal (and have a subsequent impact on his future employment prospects and his reputation), the Court placed little weight on the fact that the misconduct alleged (theft) was also a *criminal* offence, as the results of any workplace process would have no bearing on any subsequent criminal trial.

7. *McKelvey* [2019] para. 5.5 (emphasis added).
8. [2017] IESC 20
9. *McKelvey* [2019] para. 4.3.

Secondly, the Court made reference, in some detail, to the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000.[10] Codes of Practice have a slightly unusual status in Irish law in that, while they are admissible in evidence and must be 'taken into account' by courts and tribunals, failure to comply with a Code of Practice does not, in itself, ground an action against any party.[11] Nonetheless, both the Supreme Court and the Court of Appeal in *McKelvey* emphasised that the Code of Practice (on which the company's process in the case had been based) is silent on the question on legal representation. According to Ms Justice Irvine in the Court of Appeal, this is

> perhaps indicative of the view that it should be possible for organisations to carry out inquiries into alleged misconduct on the part of employees on an "in house" basis without the need to involve lawyers. As is observed in many of the authorities, once lawyers become involved, the process is ultimately slowed, becomes more expensive and oftentimes will fracture and irreparably damage relations between employer and employee.[12]

While this is a view to which many (including this author) would be sympathetic, it does raise the problem alluded to above of a workplace where there is *no* employee representation mechanism present (trade union or otherwise), which is the case in the vast majority of private sector workplaces in Ireland. Clarke CJ referred several times in his judgment to the fact that Mr. McKelvey had access to the advice of an experienced trade union official. In Ireland, outside of the public sector, this is an increasingly rare privilege, nor is any other general, permanent and statutory system of employee representation at the workplace prevalent.

A final key issue to highlight is the question of contract. Clarke CJ, in his judgment, felt that the specifics of the case did not require him to address whether it may be possible to exclude by *contract* any entitlement to legal representation in a private law employment dispute. However, the other judgment given, by Charleton J, focused heavily on the contractual relationship between the parties. While coming to the same finding as the Chief Justice, Charleton J noted that 'the place to start, and often to end, is the contract of employment' (at para 10). He concluded that Mr. McKelvey was entitled by contract to have a fellow employee assist him at the disciplinary hearing, or to be represented by a trade union official; 'by contract, no other or outside individual may represent him'.[13] The question, therefore, remains open as to whether a contract could be appropriately drafted, in a situation such as this, so as to *exclude* a right of legal representation *in all circumstances* in a disciplinary process. In the author's view, this would be an undesirable result from a normative standpoint, as it would promote a 'privatisation' of rights in employment law, particularly impacting vulnerable employees, and would undoubtedly lead to challenges both under the Irish Constitution, but also under Article 6 of the European Convention on Human Rights.

10. S.I. NO. 146/2000.
11. *Industrial Relations Act 1990*, section 42 (4-5; as amended). Codes of Practice are designed to give guidance to employers and employees on how to comply with primary employment legislation. They are, ultimately, signed off by the Minister, but are prepared by the Workplace Relations Commission (the State's main body for dealing with employment relations matters), following consultation with the social partners.
12. [2018] IECA 346, para. 85.
13. [2019] IESC 79, para 18.

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