

RESTORING MANAGEMENT PREROGATIVE: THE UNFAIR DISMISSALS ACT, (1977) IN PRACTICE

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The Unfair Dismissals Act, 1977, was intended to strengthen the position of workers vis-a-vis management in cases involving the ultimate disciplinary sanction, dismissal. It is ironic that this protection of workers should have been instituted at a time when it was apparent that workers had already achieved a considerably strengthened position and had, through their more effective organisation at workplace level, greater self-confidence and heightened wants and expectations, acquired the ability to compel management to negotiate and bargain on practically any issue. The Act was necessary, however, since the capacity of workers to defend themselves against arbitrary and summary acts of management was not uniform throughout employment and besides many workers were not unionised.¹ The Act was also intended to provide an alternative process for the resolution of disputes over dismissal and thereby remove such disputes from the basically confrontational process of collective bargaining wherein strike action was so often the result.² The Commission of Inquiry on Industrial Relations (1981) adopted the view that since a procedure now existed under the Act to enable aggrieved persons to pursue their case to finality, "such persons should not be entitled to attempt to by-pass these procedures or to overturn decisions lawfully taken by having recourse to industrial action" (para. 703). The Commission recommended, therefore, that the statutory definition of a trade dispute should exclude disputes concerning dismissal. This article considers the Commission's view that with the introduction of the Act the dismissal issue is now justiciable and examines the assumptions upon which this view is based. In addition, we present empirical evidence on re-employment as a remedy in unfair dismissal cases and consider its significance.

Disputes and the Juridical Process

A school of thought has been developing in Ireland in recent years which asserts that certain dispute issues, because they possess less inherent

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conflict than other issues, lend themselves to settlement through the juridical process. We will refer to this school as the juridical school since its practice is to describe such disputes as justiciable.³ Disputes which arise within collective bargaining are said to involve two basic types of issues, interest issues and rights issues. The former involve fundamental conflicts of interest between the parties, such as those which typically occur in the course of the negotiation of basic terms and conditions of employment. These are not regarded as justiciable since the conflict of interests which exists precludes the achievement of consensus between the parties on the principles which would form the basis of any adjudicated settlement decision. Disputes of right, on the other hand, typically involve the interpretation and application of an agreement during the period of its operation and as such are viewed as justiciable. By "justiciable" is meant that a *just* solution to the dispute is possible because the principles and conditions previously agreed between the parties lend themselves to *impartial* interpretation, free from the wills of the parties. The distinction between interest and rights disputes is, therefore, crucially important to the juridical school of thought.

The belief that a boundary can be constructed in practice between interest and rights issues in industrial relations and that the adoption of principles somehow makes an issue less conflictual is, however, both unrealistic and naive. It ignores the great number of motives and goals which often lie behind the outward manifestations of industrial strife. This relationship between the latent and manifest contexts of industrial disputes makes it extremely difficult to classify conflicts in any satisfactory way [Lockwood, (1955) p. 338]. Walton and McKersie (1965) provide a more concrete insight into issues and the underlying conflicts of interest they may represent. Conflict is seen to stem from a dissimilarity between the value systems of the parties and their preferences among outcomes. Whatever the objectives being pursued, whether they concern economic, rights and obligations, or relationship patterns between the parties, basic conflict may exist. This is not to say that whenever these items are the subject of negotiation there is necessarily an underlying conflict of interests. On the contrary, the existence or the extent of inherent conflict is an empirical question, in each case to be examined on its merits. And while the extent of conflict will depend on the particular issue, it will also depend on the particular ideological perspectives with which the parties view each other. The choice which an issue may create between the value systems of the parties and the fact that one party's preferences are opposed to those of the other party may be sufficient therefore to create an issue of basic conflict. Rights and obligations issues are obviously not precluded from such

situations. Among such issues is that which pits employee job rights against management prerogatives and flexibility, values which are often involved in the nature of provisions covering discipline and dismissal [Walton and McKersie, *op. cit.* pp. 17-19].

Since fundamental conflict of interests may, therefore, arise over "rights issues" it follows that an "inherently justiciable issue" can be a sheer fiction. Of course, parties in their dealings do sometimes adopt arrangements which on the surface have all the 'trappings' of a juridical process, such as, principles and procedures, statements of commitment and impartial adjudication. It would be erroneous, however, to infer from the existence of such arrangements that inherent conflict had been eliminated and the goals and motives nullified on both sides in the interest of peace and order. That such arrangements do exist in industrial relations is obviously the case, but they are limited to special circumstances where there is a perceived calculable advantage in their use; that is, that they accord with the bargaining calculus applied by the parties to collective bargaining. It is not on the basis of their impartiality alone, therefore that such arrangements gain legitimacy. They cannot lessen the fundamental conflict which may exist between the parties.

The significance of the argument will be clear to those who would see dismissal in Ireland as an issue now rendered wholly justiciable by the introduction of the Unfair Dismissals Act, 1977. Principles have been statutorially established and a juridical process provided. However, dismissal as an issue is still capable of the most fundamental conflict between the parties. Adjudicators in such circumstances invariably come up against the difficulty of identifying notions of fairness on which consensus exists between the parties. The subjection of dismissal disputes to juridical processes of settlement must, therefore, be viewed as problematical.

Summary of the Act

The Act does not apply to employees with less than one year's continuous service, most public servants, employees who are employed by relations, those on fixed term contracts and some others. The onus of responsibility rests with the employer to show that there were substantial grounds justifying the dismissal. To be fair, the dismissal must result wholly or mainly from (a) the capability, competence or qualifications of the employee, (b) the conduct of the employee, or (c) the redundancy of the employee. There are a number of grounds specified in the Act which would render a dismissal unfair; these include membership of or engaging in activities on behalf of a trade union, religious

beliefs or political opinions of the employee, race, colour and others. Three forms of redress for unfairly dismissed employees are specified in the Act: (a) re-instatement in the position held immediately before dismissal and with effect from the date of dismissal, or (b) re-engagement in the same position or in a “reasonably suitable” alternative position on such terms and conditions as are reasonable, or (c) compensation (not exceeding two years remuneration) in respect of any financial loss incurred by the employee and attributable to the dismissal. The term re-employment as used in this article covers both reinstatement and re-engagement under (a) and (b) above. In calculating compensation the Act requires that regard be had to contributory negligence on the part of the employee and failure on his/her part to mitigate the financial loss incurred. Claims for redress under the Act may be brought before a Rights Commissioner or the Employment Appeals Tribunal. Rights Commissioners provide a mediational form of service and were instituted under the Industrial Relations Act, 1969. Providing no objection is made by either of the parties a Rights Commissioner may hear a claim for redress under the Unfair Dismissals Act and issue a recommendation. This recommendation may be appealed to the Employment Appeals Tribunal or an appeal made to the Tribunal in the first instance and a determination made by it.

The Tribunal consists of a chairman and vice-chairmen who are legally qualified, and a panel of members made up of equal numbers of nominees of the Irish Congress of Trade Unions and of employer organisations. The Tribunal ordinarily acts by division, each division consisting of either the chairman or a vice-chairman and two members, one drawn from the employer side of the panel and one from the trade union side. A determination of the Tribunal may be appealed to the Circuit Court by either party and if an employer fails to implement a determination of the Tribunal the Minister for Labour may institute and carry on proceedings in the Circuit Court for redress under the Act. Finally, the Act does not specify a primary redress among the three forms of redress permitted; neither does it specify any criteria or guidelines in choosing between remedies. The decision is left to the discretion of the Rights Commissioner, the Tribunal or the Circuit Court, as the case may be, and what they consider appropriate having regard to all the circumstances.

Research

The research was intended to (a) determine the extent of re-employment in cases of unfair dismissal and (b) establish the criteria adopted by Tribunal members in choosing the re-employment remedy.

Extent of Re-employment: An examination of 1,355 appeals to the

Tribunal between 1977 and 1981 showed a failure rate of 55% i.e., 55% of appeals against dismissal were found not to be unfair. Of the 45% found to be unfair by the Tribunal 40% resulted in awards of compensation and the remaining 5% resulted in re-employment orders by the Tribunal. Seventy cases of re-employment involving 61 companies were identified and examined. Information was obtained on 28 cases (40%); in the other cases the managements refused to provide information. In 10 of the 28 cases (36%) the workers actually returned to their employments. In the remaining 18 cases (64%), however, re-employment did not take place. Table 1 summarises the outcomes of appeals on a percent basis from the lodgement of appeal stage to final implementation. The following reasons were given by the managements concerned explaining the non-implementation of re-employment orders:

(a) Appealed to Circuit Court and	
(i) decision of Tribunal reversed/varied:	8 cases
(ii) settlement reached outside Court:	8 cases
	—
Total cases involving Circuit Court:	16 cases
(b) Terms of Re-engagement not accepted by employee	1 case
(c) Reason not given:	1 case
	—
	18 cases

Because of the extent of the involvement of the Circuit Court in the re-employment cases examined it was decided to examine more generally the outcomes of appeals to the Circuit Court. Time permitted an examination of cases for the Dublin area only, involving a total of 130 cases. A total of 74 of these were settled out of court, withdrawn or adjourned. A breakdown of the Circuit Court decisions in the remaining

Table 1: *Percentage Distribution of Outcomes of Appeals to Tribunal (from lodgement through implementation)*

All Appeals	100%		
<i>Decision:</i>			<i>Decision:</i>
Dismissal unfair	45%	55%	Dismissal <i>not</i> unfair
Re-employment ordered	5%	40%	Compensation ordered
Re-employment implemented	2%	3%	Re-employment <i>not</i> implemented

Source: based on an examination of 1,355 appeals to the Tribunal between 1977 and 1981 and on subsequent outcomes in 28 of the 70 cases involving re-employment orders.

56 cases is shown in table 2. This shows that appeals on behalf of employees are very much more likely to fail before the Circuit Court than appeals made on behalf of employers, 79% as against 14%.

Table 2: *Results of Appeals to Dublin Circuit Court between January 1978 and June 1983*

Appeals on behalf of:	Favourable		Varied		Unfavourable	
	No.	(%)	No.	(%)	No.	(%)
Employers:	17	(61%)	7	(25%)	4	(14%)
Employees:	4	(14%)	2	(7%)	22	(79%)

$$\chi^2 = 24.6 \text{ with d.f.} = 2, p \leq 0.05$$

Source: Examination of results of all appeals to Circuit Court in Dublin Area. A verdict was not given in 74 cases which were settled out of court, withdrawn, or adjourned.

Criteria for Re-employment: No criteria are set down in the Act for determining redress in cases of unfair dismissal. Neither is priority given to any one of the remedies provided for in the Act, i.e. re-instatement, re-engagement or compensation. (This is in contrast to the UK where the achievement of re-employment is emphasised as the primary remedy). The Tribunal, therefore, has discretion in determining redress in each case. The research, through a questionnaire survey of Tribunal members sought to establish the significance of a number of factors in relation to the Tribunal's decision whether or not to order re-employment. Fifteen factors were listed in the questionnaire and members were asked to indicate in each case whether they considered the factor *significant, fairly important or not relevant*.⁴ Questionnaires were forwarded to each of the six Chairman/Vice-Chairmen, and the thirty members of the employer/trade union panel of nominees. Sixteen completed questionnaires were returned – four in respect of Chairman/Vice Chairmen, and twelve in respect of the panel members, six employer and six trade union nominees. Table 3 shows the fifteen factors ranked in order of importance based on the scored responses of the Tribunal members as well as a breakdown of the scored responses for each of the three membership groupings. We examine below each of the factors as they fall within each quartile of the score for all members.

First Quartile

Reason for dismissal is the only factor which falls into this quartile and has the single greatest impact according to Tribunal members on the decision to re-employ. Emphasis on this particular factor is dif-

Table 3: *Re-employment Criteria: Ranking of Factors based on Scored Responses of Tribunal Members*

Factors	Total Score All Members	Average Member/Group Score		
		Chairman/ Vice Chairmen	Employer Nominees	Trade Union Nominees
		(A)	(B)	(C)
1. Reason for Dismissal	43	2.75	2.83	2.50
2. Employee Preference	40	2.75	2.00	2.83
3. Company Size	40	3.00	2.50	2.17
4. Relationship with Mgt.	38	2.75	2.50	2.00
5. Quality of Service	37	3.00	2.00	2.17
6. In Alternative Employment	36	2.00	2.33	2.33
7. Length of Service	35	2.75	2.17	1.83
8. Contributory Negligence	34	2.75	2.17	1.67
9. Employer Preference	32	2.00	2.00	2.00
10. Employee replaced	31	2.50	2.33	1.17
11. Elapsed time since Dismissal	31	2.50	2.00	1.50
12. Alternative Employment Opportunities	29	2.00	1.50	2.00
13. Age of Employee	29	2.25	1.50	1.83
14. Occupation of Employee	28	1.50	1.83	1.83
15. Marital Status of Employee	19	1.50	1.00	1.17
Mean Scores	33.5	2.40	2.04	1.93
Spearman Correlations: A - B = .62; A - C = .41; B - C = .40				

Note: Based on responses of 4 Chairman/Vice-Chairmen, 6 Employer and 6 Trade Union nominees.

difficult to explain. While it may not have been on the basis of the 'reason' that the Tribunal determined the dismissal unfair in the first instance (the employer may not have acted reasonably in complying with due procedure) it seems the 'reason' might make it unreasonable to expect the employer take back the employee into employment. An analysis of the 'reasons' for dismissal in 65 cases involving re-employment determinations shows more than half (56%) to have been due to the employees' conduct. (26% was accounted for by absenteeism alone). In a study by Gaffney (1981, table 4.3.2) of a sample of all appeals to the Tribunal between 1978 and 1980, 43% of dismissals were due to the employee's conduct.

Second Quartile

Seven factors fall into this quartile. *Preference of employee* has a very significant bearing on the Tribunal decision. In virtually all of the cases examined the employee had requested re-employment. In the UK the Tribunal is obliged to ask employees their choice of remedy and should

they opt for re-employment the Tribunal must state their reasons if it fails to determine accordingly.⁵ Within the Tribunal the employer nominees are very much less influenced by this factor than either trade union nominees or Chairman/Vice-Chairmen. *Company size* has a very significant bearing on Tribunal decisions. This is consistent with a comparison (Table 4) between Gaffney's data and the 61 companies studied here involving re-employment determinations (Gaffney, *op. cit.* Table 4.2.2.).

Table 4: *Company Size: Comparison between "Gaffney" sample of 200 Appeals to Tribunal and 61 Companies involved in Re-employment Determinations*

Employees	"Gaffney" – Sample of all appeals	UCD – Cases involving Re-employment
Under 50	60%	30%
50 and over	40%	70%

There was a tendency for larger companies to be proportionately more involved in *actual* re-employment cases. *Relationship with Management* and '*Quality of Service*' each has a very significant influence on the Tribunal and appear to carry most weight with the Chairman/Vice Chairmen; the employer group places greater emphasis on *Relationship with Management* and less emphasis on *Quality of Service* than the employee group of nominees. *In Alternative Employment* carries considerably less weight among the Chairman/Vice-Chairmen group than both other groups. *Length of Service* receives considerable emphasis. Again this is consistent with a comparison between the "Gaffney" study and the results of an analysis of 49 of the re-employment determination cases studied, which shows 48% and 62% respectively, with in excess of four years service. There is a wide divergence of views between membership groups concerning *Contributory Negligence*, with Chairman/Vice-Chairmen very much influenced by it, followed by employer and trade union nominees, in that order.

Third Quartile

Preference of Employer has quite a considerable influence on the Tribunal with Chairman/Vice-Chairmen placing least emphasis among the three groups. *Employee since Replaced* is quite an important influence although there is a great divergence within the Tribunal with the trade union nominees hardly recognising it as having any bearing what-

soever on the decision. It is interesting to note that under UK legislation this factor may not be taken into account by the Tribunal. In the cases of re-employment examined here approximately half were cases where the employees had already been replaced by employers. *Elapsed Time since Dismissal* shows a wide divergence between membership groupings with trade union nominees very much less influenced by it. The average time which had elapsed between dismissal and the Tribunal hearing in the re-employment cases examined was 6.9 months. Research conducted in the UK (Lewis, 1981) shows that the employees' choice of remedy may undergo considerable change while awaiting the Tribunal hearing: those opting for re-employment fell from 72% immediately after dismissal to 21% at the hearing, and those opting for compensation rose from 28% to 79%. The remaining three factors in the third quartile, in order of emphasis given by the Tribunal are, *Alternative Employment Opportunities*, *Age of Employee* and *Occupation*.

Fourth Quartile

The sole factor in this lowest quartile, *Marital Status of Employee*, receives least emphasis among all membership groups.

Criteria and Employer/Employee Interests

The factors, ranked in terms of their significance to the Tribunal in relation to the decision whether to re-employ or compensate, provide the basis for determining the extent to which Tribunal decisions reflect the respective interests of employer and employee interests. In addition, the breakdown of the data by membership grouping enables us to determine the extent to which the responses of each group reflect employer/employee interests. Efforts in this regard, however, are impeded by the apparent ambiguity of so many of the factors in terms of their particular meaning to Tribunal members. We dealt with the problem by constructing a coherent scenario based on empirical inference and to a lesser extent, conjecture, and depicting the most typical circumstances surrounding Tribunal decisions of the kind we are concerned with here. Each factor could then be matched-off against the respective employer/employee positions in the scenario and that of best-fit taken to be the particular interests reflected by that factor.

Scenario

The Tribunal has established that the employee has been *unfairly* dismissed. The dismissal has been implemented by management pending the outcome of the appeal. Management has a strong preference that the employee should not return to employment and enlists in their support such arguments as the damage caused to the management/worker relationship, the time which has elapsed since the issue first

arose (worker may even have been replaced) and the size of the company (most workplaces in Ireland are small, with less than fifty workers). The employee for his part is uncertain about his preference between returning to the employment from which he was unfairly dismissed and compensation for losses suffered. The negative attitudes of the employer towards his re-employment as well as the time spent waiting for the appeal hearing (particularly where no alternative work has been found) prejudices his choice of lump-sum compensation. He must, however, consider his investment of past service, opportunities for alternative work and family responsibilities.

In thirteen of the fifteen cases it was possible in this way to determine the particular interest most decisively represented by the factor. In this way two groups of factors were compiled, one of employer-related factors and the other of employee-related factors. The results in table 5 indicate that employer-related factors are considerably more emphasised by the Tribunal in choosing the remedy than employee-related factors. The same emphasis is shown by both the Chairman/Vice-Chairmen and

Table 5: *Employer/Employee Related Factors and Scored Responses by Tribunal Membership Grouping*

	Total Score All Members	Average Member/Group Score		
		Chairman/ Vice-Chairmen	Employer Nominees	Trade Union Nominees
<i>Employer-Related Factors</i>		(A)	(B)	(C)
1. Reason	43	2.75	2.83	2.50
2. Company Size	40	3.00	2.50	2.17
3. Relationship with Management	38	2.75	2.50	2.00
4. Employer Preference	32	2.00	2.00	2.00
5. Employee Since Replaced	31	2.50	2.33	1.17
6. Elapsed Time	31	2.50	2.00	1.50
Mean Scores	35.8	2.67	2.36	1.89
Spearman Correlations: A – B = .83; A – C = .63; B – C = .73				
<i>Employee-Related Factors</i>				
1. Employee Preference	40	2.75	2.00	2.83
2. Quality of Service	37	3.00	2.00	2.17
3. Length of Service	35	2.75	2.17	1.83
4. Alternative Opportunities	29	2.00	1.50	2.00
5. Age	28	1.50	1.83	1.83
6. Occupation	29	2.25	1.50	1.83
7. Marital Status	19	1.50	1.00	1.17
Mean Scores	31	2.25	1.71	1.95
Spearman Correlations: A – B = .76; A – C = .60; B – C = .54				

Note: Factors taken to be ambiguous are – *Contributory Negligence* and *Alternative Employment undertaken*.

employer groups. The trade union nominees show only a slight emphasis towards employee-related factors. Finally, a stronger association was found to exist between the Chairman/Vice-Chairmen responses and those of employer nominees, than between either Chairman/Vice-Chairmen and trade union nominees or employer and trade union nominees. These results are not significantly affected when the marginal factor *Marital Status* is removed from the group of employee-related factors.

Conclusions

The principal research findings may be summarised as follows:

1. Re-employment in cases of unfair dismissal is a comparatively rare event. In less than 5% of cases involving *unfair* dismissal does re-employment take place.
2. The Circuit Court appears to be involved in a comparatively high proportion of cases in which the Tribunal determination has favoured re-employment. Appeals on behalf of employees are very much more likely to fail before the Circuit Court than appeals on behalf of employers.
3. Employer-related factors are given more emphasis by the Tribunal when choosing redress in cases of unfair dismissal than employee-related factors. Similar emphasis is shown by both Chairman/Vice-Chairmen and employer groups. Trade union nominees show only a slightly greater emphasis towards employee-related factors.
4. A stronger association exists between the Chairman/Vice-Chairmen responses and those of employer nominees, than between either Chairman/Vice-Chairmen and trade union nominees or employer and trade union nominees.

Judged on the basis of its achievements in protecting workers against loss of employment through unfair dismissal, the Unfair Dismissals Act, 1977, has been immensely disappointing and indeed a failure. An estimated 95% of workers found to have been unfairly dismissed by the Tribunal have failed to recover their jobs. Those of the juridical school who assert that issues of dismissal are justiciable and that "just" solutions are possible based on the impartial application of juridical principles will find little in the empirical data presented to support their views. To us the process examined bears a closer resemblance to *bar-gaining*, with power unobtrusively influencing outcomes. For example, the time-scale inevitably involved in processing a case is a particular area of relative disadvantage to the employee.

Finally, the evidence of this brief study has some modest implications

for ideas on the socialisation of law in our society. Those who hold the view that socialisation of law has occurred might assert that the man without property is coming to be significantly less disadvantaged as against the man with property; that *actual* equalisation and *actual* 'social justice' are being achieved through accumulation of 'social' legislation (see Bennett and Kelleher, 1976, pp. 22, 24). The empirical evidence presented here does little to support such views. In terms of the Unfair Dismissals Act, 1977, we must ask whether it has achieved what is socially reasonable or merely provided management a means of re-establishing their former prerogative to dismiss.

NOTES

1. In 1975 45% of workers in Ireland did not belong to trade unions.
2. Between 1970 and 1976 strikes over dismissals had averaged 32 per annum. This represented an increase of 75% over the previous decade (Source: Department of Industrial Relations, UCD).
3. For a statement of these views see Professor Charles McCarthy, *Problems in the Field of Dispute Resolution*, Third Countess Markievicz Memorial Lecture, 1978, published by the Irish Association for Industrial Relations.
4. A sixteenth factor, *sex*, was listed in the questionnaire but is omitted since it was found to have no relevance and since in any event employment discrimination on grounds of sex is prohibited under Irish equality legislation.
5. The Tribunals in the U.K. are required to take into account whether the applicant wants it; whether it is "practicable"; if there is "contributory fault", whether it would be "just". For a full treatment of this topic see Lewis, Paul, *Interpretation of "Practicable" and "Just" in Unfair Dismissal Cases*, *Modern Law Review*, July 1982.

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