REPLY

RESTORING MANAGEMENT PREROGATIVE: THE UNFAIR DISMISSALS ACT (1977) IN PRACTICE: COMMENT ON JOYCE AND MURPHY

Frances Meenan*

I consider the views, comments and conclusions reached by the authors are worthy of further discussion and merit a reply:-

The authors state that 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. This is clearly a misapprehension on their part as to the purpose of the Act. The preamble to the Act states that it is "An Act to provide for redress for employees unfairly dismissed from their employment . . .". The Act neither operates to strengthen the position of employees, nor does it operate to prevent an employer from dismissing an employee. The Act does not curb or undermine the authority of the reasonable employer; in fact, the Employment Appeals Tribunal looks to such an employer to provide a standard of acceptable behaviour. Accordingly, it is inaccurate to state that the purpose of the Act was to strengthen the position of employees.

The authors provide an inaccurate summary of the Act, which on reading is self-evident. The redress of compensation is for the loss suffered on account of the dismissal. The authors state that this may be reduced by the "contributory negligence" of the employee. This is inaccurate; contributory negligence involves a lack of reasonable care for one's own safety or for the safety of one's property. A deduction from the total loss may be made (inter alia) due to an action, omission, or conduct by the employee which ultimately leads to dismissal. It should also be noted that this contributory action may also be reflected in the terms of re-engagement.

The intention of the research is unclear for it states that its purpose is to "(a) determine the extent of re-employment in cases of unfair dismissal . . .". The authors define the difference between reinstatement and re-engagement. However, they give no detail as to the true meaning

*The author is a Solicitor with the Federated Union of Employers, Dublin.

IBAR – Journal of Irish Business and Administrative Research, Volume 6, No. 2, October, 1984, pp 113-117.

thereof, and the resultant implications for both parties. I suggest that the first part of the research would be more relevant if they had broken down the pattern of re-employment following an award of reinstatement or re-engagement. Furthermore, I would suggest that this research should have been defined by stating that such research only involved claims or appeals before the Tribunal.

Their first conclusion states that re-employment only takes place in less than 5% of cases involving unfair dismissal. This conclusion is doubtful because: (a) it is only based on a final figure of 28 out of 1355 cases studied, which in effect is only 2% of the total number of cases surveyed; and (b) the study did not include appeals from Rights Commissioners' recommendations to the Tribunal. It might be noted that a considerable number of Rights Commissioners' recommendations are implemented.

The research on claims before the Tribunal covered the period between 1977 and 1981, whilst the research on appeals to Dublin Circuit Court involved a longer period. I would suggest that the same time period should have been used for both surveys. If the same time period had been used there would be more consistency in the research. The authors might have referred to the various Annual Reports of the Tribunal which give a more detailed account of appeals covering practically all counties.

Their second conclusion states that appeals on behalf of employees are more likely to fail before the Circuit Court. It must be noted that the research on such appeals, although stated in the article, was on a general basis only. Therefore, it included appeals where compensation was awarded by the Tribunal. The authors do not give us any commentary on this finding so one immediately queries its relevance. Is it suggesting that the judiciary of the Circuit Court are biased in favour of the employer?

The authors made no reference to proceedings by the Minister for Labour under Section 10 of the Act, where an employer fails to implement a determination in the absence of an appeal. One may conclude that the authors did not acknowledge such Court Orders because of their infrequent occurrence. The conclusion, therefore, is that employers do implement the terms of determinations within the required period. It might be noted that in 1982 only 3 such cases were enforced by the Circuit Court.

In their third conclusion, the authors state that the employer related factors are given more emphasis by the Tribunal when choosing re-

employment as redress. Questionnaires were issued to the members of the Tribunal listing 15 factors as criteria for re-employment should an employee be held to have been unfairly dismissed. It is common practice in an empirical study to have such questionnaires included as an appendix; no such appendix was included. Furthermore, we were given no details as to the weighting of the scored responses.

The analysis of the findings are doubtful as: (a) the conclusion seems to be totally incompatible with the questionnaire where employee preference received the second highest score; (b) company size was the third most important factor (Undoubtedly, this is extremely relevant, but has little bearing when taken in isolation. Such a factor must be taken into account with the job that the claimant performed); and (c) the authors made no reference to the fact that where both parties or the employee are opposed to re-employment the Tribunal would respect such wish.

There is no delineation of the nature of cases studied, for example, an unfair dismissals claim for unfair selection for redundancy where there clearly was a redundancy situation. In such a case if it is held that the employee was unfairly selected, compensation more than likely is the only available redress. Furthermore, it is surprising that the authors make no reference to the fact that the Tribunal is an industrial tribunal. By its very nature a tribunal must take into account the industrial relations aspects of awarding the redress of re-employment. The authors should note that tribunals must administer both a clear set of rules and maintain a high measure of flexibility in their decisions so that justice in individual cases prevails over mere consistency. All claims turn on their own facts and by their very nature each are different. Accordingly, the Tribunal must not pursue consistency in the form of redress awarded at the expense of individual claims. Furthermore, when considering such re-employment the Tribunal clearly has to take into account the long-term aspirations of both parties.

In their fourth conclusion, the authors state that there appears to be stronger relations between chairmen and employer nominees when considering such factors leading to re-employment of the claimant. This may be the case on the basis of the questionnaire as presented and completed by such members. However, they give us absolutely no evidence of majority decisions reached by the Tribunal. From experience, this conclusion has little relevance, when it is often the case in a majority decision that the chairman and the employee member reach a majority decision with the employer member dissenting.

The authors state that the Act has been a failure on the basis of re-employment of employees who have been held to be unfairly dismissed. The success of legislation must be considered in the light of its purpose. As pointed out the purpose of the Act was to provide redress for employees who have been unfairly dismissed. Prior to the Act, the only recourse (apart from industrial action) an employee (who was dismissed) had was to bring a case for wrongful dismissal to the civil courts or to follow industrial relations procedures under the Industrial Relations Acts, 1946 to 1976. The former was a lengthy and expensive process whilst the latter involved the goodwill of both parties. The procedures under the Unfair Dismissals Act, 1977 provide a free and speedy access to justice for employees should they consider themselves to have been unfairly dismissed.

The authors refer to the fact that there is a considerable waiting period before claims can be heard before the Tribunal. This, unfortunately, is true, but the period has shortened considerably over the past year. Therefore, it is surprising that the authors did not refer to such shortened waiting period. It might be further noted that such easy access to the Tribunal results in a high number of frivolous and vexatious claims by employees.

The reference to the impartial obligation of juridical principles is extremely disturbing. The redress of compensation is a "just" solution to such a "dispute". The fact that the Irish Act does not give a preference for reinstatement/re-engagement over the remedy of compensation as compared with the equivalent U.K. legislation would appear to have little bearing. I refer the authors to an article by Dickens *et al.* "*Re-Employment of Unfairly Dismissed Workers: The Lost Remedy*" (ILJ, Volume 10, No. 3). These authors conducted a survey which concluded that between 1972 and 1979, compensation accounted for at least 80% of successful outcomes. Therefore, the implied view in this article that the English legislation is preferable to our own seems to have little substance.

The authors never referred to the basis of the employment relationship, i.e. the contract of employment. They might have referred to the fact that there is a traditional refusal on the part of the courts to order specific performance following a breach of the contract of employment, e.g. wrongful dismissal. The reasoning being that this is in line with the common law exception that such a contract is of a very personal nature. Otto Kahn Freund in "*Uses and Misuses of Comparative Law*" (1974 37 MLR 1) stated that "a contract of employment cannot be specifically enforceable by either side because equity does nothing in vain and also

because an order for specific performance against the worker would savour of compulsory labour and the rule of mutuality demands that if no such order can be made against the employee it cannot be made against the employer either". Accordingly, the authors should have kept this basis of the employer/employee relationship in mind when criticising the legislation and the redress awarded.

Finally, in reply to the authors' contention that "social justice" is not being achieved, I contend that the reference of Bennett and Kelleher quoted in this article is correct in the light of this Act. This is evident from the fact that on a number of occasions the Tribunal has stated "the Unfair Dismissals Act, 1977 establishes for an employee a propriety right to his employment, which, if taken away without there being substantial grounds justifying his dismissal, entitles him to redress for unfair dismissal". The authors do not refer to this propriety right. An employee has something akin to a property right in his job which is not an enforceable claim/right. The legal manisfestation of this rule is that a person who sacrifices an asset should receive a fair amount of compensation. Therefore, compensation is a fair remedy bearing in mind that "specific performance" of a contract of employment may be unfair on both parties. It might be further noted that in line with the fact that the authors are comparing U.K. legislation throughout this article, they should bear in mind that the statutory level of compensation under the Irish legislation is considerably higher.

In summary, it is clear that the Act has achieved what is socially reasonable for the reasons as outlined above. The final contention that the Act re-established the employers' prerogative to dismiss has not been substantiated by the research. The Act never intended to withdraw the right to dismiss from management and equally never intended to "strengthen the position of workers vis-a-vis management".