

THE 38th COUNTESS MARKIEVICZ
MEMORIAL LECTURE

CHANGING LANDSCAPES: THE
JURIDIFICATION OF THE LABOUR COURT?

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I would like to thank the Irish Association for Industrial Relations for inviting me to deliver this year's Countess Markievicz lecture and to say how honoured I am to now be listed amongst those who have previously delivered this lecture such as Charles McCarthy (1978), Paul O'Higgins (1979), Mary Robinson (1985) and Bob Hepple (2010) to name but four.

When I was first invited by Noel Harvey to deliver the 38th lecture in this series, he indicated the broad area of the desired topic, which was "the institutional and legal reform of Irish industrial relations, particularly conflict resolution", which had been promised by the Minister for Jobs, Enterprise and Innovation, Richard Bruton, TD. This is the so-called Workplace Relations Reform Project.

The title which I chose for today's lecture is in two parts - three, if you count the question mark!

Why "Changing Landscapes"? Four years ago, I organised a High Level Conference in UCD to celebrate the 20th anniversary of the enactment of the Industrial Relations Act 1990 (the 1990 Act). The stated purpose of that legislation was to "put in place an improved framework for the conduct of industrial relations and for the resolution of trade disputes". One of the principal features of the 1990 Act was the removal of the conciliation service from the Labour Court and its transfer to the newly established Labour Relations Commission (LRC). The purpose of the 2010 conference was to elicit the views of the institutions (the Labour Court and the LRC), trade unions,

employers and lawyers as to whether the 1990 Act had achieved the objectives envisaged by the Minister for Labour (Bertie Ahern, TD) at the time of its introduction. The papers presented at the conference are published in Kerr ed, *The Industrial Relations Act 1990: 20 Years On* (Thomson Round Hall, 2010).

In his presentation, Kieran Mulvey was firmly of the view that the LRC had been "a significant and successful presence in the landscape of Irish industrial relations" (*ibid* p. 45). Kevin Duffy then contrasted the "industrial relations landscape" as it existed when he was Assistant General Secretary of the Irish Congress of Trade Unions with the reality of current industrial relations practice as experienced by him as Chairman of the Labour Court. Not surprisingly, he concluded that the past 20 years had seen "a profound change in the general industrial relations landscape" (*ibid* p. 67) . Brendan McGinty (IBEC) and Jack O'Connor (SIPTU) both used the word "landscape" in their presentations but in very different contexts. O'Connor argued that the European Court of Human Rights had enabled a number of new features to enter "the landscape around collective bargaining" (*ibid* p. 94). McGinty, however, was of the view that the 1990 Act, more than any other, had provided "the framework from which much of the current landscape of workplace relations in Ireland has evolved" (*ibid* p. 72) .

Put simply, industrial relations is all about management, trade unions and collective bargaining. Workplace relations, however, is a very different concept and one that does not accept the centrality (or even the role) of trade unions in the process. In this context, the title of the legislation currently before the Oireachtas which, when enacted, will dissolve the LRC and further recalibrate the role of the Labour Court is very significant.

When the Workplace Relations Bill 2014 is enacted, the changes it will bring about will have a dramatic impact on the landscape in which trade unions, employers, workers and employment law practitioners will have to operate. It is not my intention to analyse the Bill here in any detail but, in brief and in relevant part, what it will do is to:

- (i) reconstitute the LRC as the Workplace Relations Commission (WRC) which will take over the inspection functions presently carried out by the National Employment Rights Authority (NERA);
- (ii) reconstitute rights commissioners and equality officers as Workplace Relations Adjudicators; and
- (iii) abolish the Employment Appeals Tribunal (EAT) and transfer its first instance functions to those adjudicators and its appellate functions to the Labour Court.

This means that all employment disputes - whether individual or collective, whether of right or of interest, whether brought under the Industrial Relations Acts 1946 or 1969 (other than those referred directly to the Labour Court), the Unfair Dismissals Act 1977 or the Employment Equality Act 1998 - will be channelled into the WRC. The WRC will then endeavour to resolve the dispute whether by conciliation, mediation or, if necessary and appropriate, adjudication. The sole appeal route is to be to an expanded Labour Court but which will retain its jurisdiction under section 20 of the 1969 Act.

The Court will also retain its original jurisdiction under section 21(2) of the Transnational Information and Consultation Act 1996, section 24 of the Organisation of Working Time Act 1997, section 13 of the National Minimum Wage Act 2000, the Schedule to the Protection of Employees (Part-Time Work) Act 2001 and section 6 of the Employees (Provision of Information and Consultation) Act 2006.

This leads me to the second part of the title: "The Juridification of the Labour Court". I first came across the word "juridification" when reading Bob Hepple's contribution to Bain's *Industrial Relations in Britain* (published in 1983). Hepple's contribution was on "Individual Labour Law" and he referred to what he discerned as "the underlying trend towards the juridification of individual disputes" (*ibid* p. 393). Although he does not use the word, Tom Murphy from UCD's Department of Industrial Relations discerned a similar trend in this jurisdiction in 1987.

In an address to the Irish Society for Labour Law on the "The Impact of the Unfair Dismissals Act 1977 on Workplace Industrial Relations" (published in (1987) 6 J.I.S.L.L. 36), Murphy submitted that the Act, and the decisions of the EAT, had made a "major impact on the practices of employers and trade unions at workplace level leading to an improved ability on their parts to resolve dismissal issues without resort to industrial action". He concluded by saying that what had evolved under the Act's implementation was "a very detailed and comprehensive *code of practice* relating not to the dismissal decision alone but to the whole process of personnel administration and disciplinary control". Or, as Hepple put it, the "professionalisation of industrial relations management has

been a direct response to a new demand for an expert grasp of the complexities of legislation and case law" (*ibid* p. 394).

So what is juridification? In what follows, I have drawn heavily on Jon Clark's magisterial review article (published in (1985) 14 *I.L.J* 69) on Professor Spiros Simitis's contribution to a book which, translated from German, was entitled *The Juridification of the Economy, Work and Social Solidarity*. Simitis examined the juridification of industrial relations.

As Clark points out, the concept is awkward in English - "a classic example of latinised English translations from the German which lose the concreteness of the original". In German, the word is "*Verrechtlichung*". *Recht* (or law) is at the heart of the concept with a prefix (*Ver*) and suffix (*lichung*) which make it into an active noun without changing the basic meaning. So, literally, it means "lawification".

Notwithstanding the view of scholars such as Otto Kahn Freund, Simitis argued that juridification was a universal feature of all democratic industrial societies. As Clark puts it:

"In terms of industrial relations, labour ceases to be a commodity subject to the individual agreement of the contracting parties. Instead, it becomes subject to specific and binding legal regulations, which limit the freedom of the contracting parties and 'steer' them in certain directions laid down by the state."

In other words, "juridification", according to Simitis, refers to the use of law to channel social and economic life in a particular direction. It applies to all forms of state intervention (including statute and judicial decisions) which reduce the freedom of action of workers and employers in shaping relations at work and frequently involves a "reduction in the regulatory jurisdiction of the collective bargaining parties".

Simitis identified different stages in the process of the juridification of industrial relations. It begins when the state intervenes to counter extreme consequences of industrialisation: in this jurisdiction, this process could be said to begin in 1743 with the enactment of legislation (17 Geo. II, c.8) which made it an offence for an employer to pay his workers their wages in any manner other than "ready money" and to continue in 1802 with the enactment of the first of the Factories Acts (42 Geo. III, c. 73).

For present purposes, however, our first stage begins in 1946 with the enactment of the Industrial Relations Act (the 1946 Act) and the establishment of the Labour Court. In terms of what I am about to say, it is important to remember that the 1946 Act did more than merely establish the Labour Court. It also provided for the continuation of Trade Boards, established under the Acts of 1909 and 1918, as Joint Labour Committees with the power to make proposals to the Labour Court not just on minimum wages but also on other terms and conditions of employment. The Act also continued the system of registered employment agreements, initially established under section 50 of the

Conditions of Employment Act 1936, but transferred responsibility from the Minister for Industry and Commerce to the Labour Court.

Subsequently, Simitis argued, there is a qualitatively different stage in which the attempt is made to integrate particular and unrelated labour law regulations into longer-term state policy. The state's concern here is not so much to react to specific abuses as to deal with the causes of social conflict or to prevent such conflict. An obvious example is the introduction of unfair dismissal legislation in the UK in 1971 and in this jurisdiction in 1977. When he introduced what became the Unfair Dismissals Act (the 1977 Act) to the Dáil in 1976, the Minister for Labour (Michael O'Leary, TD) expressed the hope that the legislation would lessen the necessity for employees to engage in industrial action over dismissals which had cost the economy over a quarter of a million days lost between 1972 and 1975: 293 *Dáil Debates* Col. 1076. Tom Murphy, in his presentation to the Irish Society for Labour Law in 1987, concluded, by comparing strike data for the seven years before the enactment of the 1977 Act and for the seven years after, that strikes over dismissal had declined by 31%, workdays lost had declined by 24% and the number of workers involved had declined by 41%.

As Clark points out, it is unclear as to whether Hepple was using the word "juridification" in this sense. Hepple's focus was on the fact that rights, such as that not to be unfairly dismissed, were "legal rights" and that they belonged "to individuals rather than collective groups". Hepple thought it significant that only a small minority of complainants were represented by trade union officials with the field being "largely left to barristers and solicitors".

Clark and Wedderburn, writing the same year as Hepple, had defined "juridification" as "the extent to which the behaviour of employers and trade unions in dealing with individual and collective employment issues is determined by reference to legal norms and procedures rather than to voluntarily agreed norms and procedures": see Wedderburn, Lewis and Clark eds, *Labour Law and Industrial Relations: Building on Kahn Freund* (1983) p. 188.

It is this narrower sense of the word that I suggest might be applied to the Labour Court and how it has evolved over the last seven decades.

The Labour Court, which was established on the 23rd September 1946, consisted originally of a full-time Chairman, one part-time Deputy Chairman and two employers' and two workers' members (referred to as the "ordinary members"). These ordinary members were nominated for appointment by "organisations representative of workers' and employers' trade unions". None of the members were required to have any legal qualifications, although the first Deputy Chairman was a Senior Counsel, albeit one with long experience of chairing emergency wages tribunals between 1941 and 1946. Indeed, a suggested amendment in the Dáil that the Chairman be a practising barrister or solicitor of not less than five years standing was comprehensively defeated: 102 *Dáil Debates* Cols 871-879.

The Labour Court was charged, *inter alia*, with the task of promoting harmonious industrial relations. Its most visible function lay in assisting employers and trade unions to settle their disputes in accordance with

procedures laid down in the 1946 Act. It fulfilled this in two ways, namely (i) the provision of a conciliation service and (ii) the investigation of trade disputes and the making of *recommendations* towards their settlement.

In 1949, the Labour Court was judicially described as a "highly responsible board of conciliation charged with the duty of promoting harmony between workers and employers and it investigates a trade dispute with a view to making not an order but a recommendation... The object is to bring about peace by persuasion instead of submission by coercion": *per* Gavan Duffy P. in *McElroy v Mortished* High Court, unreported, 17 June 1949. The late Professor Charles McCarthy put it well when he wrote that a Labour Court recommendation was "essentially a third view" not a judgment and that the Court was established as "a body whose purpose was to promote accommodation...to act as an honest broker, neither to apply law nor to create it": *Elements in a Theory of Industrial Relations* (1984) pp. 37 and 52. More recently Hogan J. has observed that the purpose of the Labour Court, at least when exercising its industrial relations functions, is "to advance a solution to industrial relations disputes" in acting "as a form of industrial relations mediator". Its role is "to resolve disputes and to maintain industrial peace and the criteria which underpin its recommendations are not strictly legal ones": *MacDonncha v Minister for Education and Skills* [2013] IEHC 226.

Because the Labour Court's decisions, at least when exercising its industrial relations functions, did not create legal rights or impose legal obligations, the High Court, in December 1960, refused to grant an order of prohibition preventing the court from investigating an alleged trade dispute at the Stephen's Green Club: *State (Stephen's Green Club) v Labour Court* [1961] I.R. 85.

Senior Counsel for the club, John A. Costello, had submitted that, reading the 1946 Act as a whole, it was clear that the Labour Court was "a judicial tribunal of inferior jurisdiction". The name of, and the procedure adopted by, the court suggested a "judicial investigation" in that the parties present their case; there is an investigation and consideration of the matters involved; and the court publishes its opinion "which in turn carries the sanction of publicity and consequent public opinion". In his submission, a recommendation of the Labour Court could affect the rights of the citizen. Walsh J. disagreed. In his opinion, the 1946 Act did not provide any machinery for enforcing the court's recommendation or of translating the recommendation into findings binding upon the parties and did not provide for the taking of any consequential action by a superior authority. Consequently, the Labour Court, though having the duty to act judicially, could not by its recommendation impose liabilities or affect rights. Accordingly, it was not amenable, when exercising its functions under section 67 of the 1946 Act, to being judicially reviewed.

It must be remembered, however, that the 1946 Act also conferred extensive legal powers, or at least powers with legal consequences, on the Labour Court. Section 21 enables the court to summon witnesses to attend before it, examine them on oath (but not on affirmation) and require the production of documents, all on pain of criminal sanction. Part III of the Act provided for the court's role in registering employment agreements, the effect of which was to apply the terms of the agreement to every worker of the class, type or group to which it was expressed to apply, and to his or her employer, notwithstanding that such worker or employer was not a party to the agreement. Failure to apply the terms of such an agreement was a criminal offence on the part of the employer. Part IV of the Act provided for the court's role in establishing a Joint Labour Committee (JLC) and making Employment Regulation Orders (EROs) on foot

of JLC proposals. Again, the terms and conditions set out in any such Order applied to all workers and employers in the relevant sector on pain of criminal sanction.

There is no question but that the Labour Court could be judicially reviewed by the High Court when exercising its functions under Parts III or IV of the 1946 Act. So, in *National Union of Security Employers v Labour Court*, Flood J. granted a declaration that the purported registration of an agreement for the security industry was invalid and of no effect because the court had not followed fair procedures: see (1994) 10 J.I.S.L.L. 97. Similarly, in *Serco Services Ireland Ltd v Labour Court* [2002] E.L.R. 1, Carroll J. struck down an order made by the court varying the registered employment agreement for the electrical contracting industry because it had acted *ultra vires* in extending the scope of the agreement to workers to whom it had not previously applied.

More recently, employers have not been content with merely challenging the making of individual EROs (as in *Burke v Minister for Labour* [1979] I.R. 354) or the registering of particular employment agreements. Instead, they have successfully challenged the constitutional validity of the relevant provisions of the 1946 Act. So, in *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] 3 I.R. 211, we see the High Court, in June 2011, declaring invalid sections 42, 43 and 45 of the 1946 Act and in *McGowan v Labour Court* [2013] 2 I.L.R.M. 276 we see the Supreme Court, in May 2013, declaring invalid the entirety of Part III of the 1946 Act, namely sections 25 to 33, thus rendering meaningless the amendments made by the Industrial Relations (Amendment) Act 2012.

Additional powers were conferred on the Labour Court by the Industrial Relations Act 1969 (the 1969 Act). This Act had created the office of rights commissioner and had conferred on that office a limited power to investigate trade disputes (other than those concerning pay and hours of work) involving individuals and small groups of workers and to make recommendations for their resolution. Section 13(9) of the 1969 Act, however, provides that a party to a dispute in relation to which a rights commissioner had made a recommendation might appeal to the Labour Court and the parties to the dispute would be "bound" by the court's decision on the appeal. No mechanism, however, was provided for the enforcement of such decisions. The 1969 Act also provides, in section 20, for a fast track procedure in circumstances where the workers concerned (or their trade union), or both parties, undertake in advance "to accept the recommendation of the Court".

A much more fundamental change in the powers and role of the Labour Court took place in 1976 with the coming into operation of the Anti-Discrimination (Pay) Act (the 1974 Act). For the first time, the Labour Court was entrusted with an explicitly legal role; it now had to *adjudicate* on equal pay complaints and make decisions on the parties' legal rights and obligations.

The Minister for Labour (Michael O'Leary, TD) said, in the Dáil, that he had "deliberately selected the Labour Court as the body to be the final arbiter of equal pay cases rather than setting up a separate tribunal". The reason for this was the "high reputation" the Labour Court enjoyed which the Minister hoped would contribute towards "the acceptability of decisions in this area": 270 *Dáil Debates* Col. 2033.

Under the 1974 Act, a person could make a complaint to an officer of the Labour Court, then known as an Equal Pay Officer, with a right of appeal to the court whose determination would be final and legally enforceable, subject only to an appeal on a point of law to the High Court. As Evelyn Owens put it, when delivering the 21st lecture in this series (entitled "The Labour Court: Past, Present and Future"), the Labour Court "was moving into the area of prescribed, rather than agreed, rights".

Given the Labour Court's role in determining disputes under the 1974 Act, it was inevitable that it was then entrusted with jurisdiction under the Employment Equality Act 1977 which prohibited sex and marital status discrimination in relation to, *inter alia*, access to employment and conditions of employment (other than pay). However, instead of a person making a complaint directly to what had become an Equality Officer, he or she had to first refer the complaint to the Labour Court. The court then had to decide whether to endeavour to settle the dispute through one of its industrial relations officers or to refer the dispute to an Equality Officer for investigation and recommendation: see *Aer Lingus Teo v Labour Court* [1990] I.L.R.M. 485, 501-502. Appeals from Equality Officer recommendations lay to the Labour Court whose determinations would be final and legally enforceable, subject only to an appeal on a point of law to the High Court.

As Professor Deirdre Curtin has pointed out (*Irish Employment Equality Law* (1988) p. 300), certain shortcomings had by then been identified in the way in which the Labour Court struggled to resolve the "dichotomous nature" of its

functions under the industrial relations legislation and the equality legislation. She noted that the Department of Labour in its submission to the *Commission of Inquiry on Industrial Relations* said that the Labour Court's appellate function in equality cases "conflicted with the Court's main role as an industrial relations agency". The Department also pointed out that, since none of the members of the Labour Court had legal qualifications, they could be faced with "difficulties of legal interpretation" in the exercise of their functions in such cases.

This was a point often made in the Labour Court *Annual Reports* at that time. So, in 1978, the then Chairman of the Labour Court (Maurice Cosgrave) bemoaned the loss of the "flexibility" which the court enjoyed when dealing with industrial relations cases and then, in 1983 (and repeated in 1984), he commented upon the "increasing complexity in the issues being referred for investigation, many of them involving conflicting legal opinions" concerning the interpretation of the equality legislation. Indeed the suggestion was made that the court's functions in this area be transferred to the EAT, which at that point merely had jurisdiction under the redundancy, minimum notice and unfair dismissals legislation.

The Department's concerns were supported at the time by the Employment Equality Agency who identified difficulties which had arisen when the Labour Court "whose role is generally to conciliate and/or recommend settlements of disputes is the same body whose duties are to adjudicate according to statutory provisions". There was a perceived danger that disputes arising under the equality legislation might be adjudicated upon by reference to industrial relations criteria rather than by strict adherence to the actual statutory provisions. The Agency subsequently, in 1984, reconsidered its position on

transferring jurisdiction to the EAT and recommended that a separate division of the Labour Court be constituted to deal specifically with equality cases with a Chair with a legal qualification permanently assigned to this division. It is worth noting, however, that the Commission of Inquiry said that there was no consensus among members of the Labour Court on that proposal but that the court was opposed to the suggestion that appeals being heard by the EAT should be transferred to an expanded Labour Court with a legal presence.

Further changes to the role of the Labour Court occurred following the enactment of the 1990 Act and the establishment of the LRC. The 1990 Act required that all industrial relations disputes, other than those referred directly to the Labour Court (for example under section 20 of the 1969 Act), would have to go through the LRC's services before being referred on to the Labour Court.

The 1990s saw a wave of individual employment protection legislation being enacted commencing with the Payment of Wages Act 1991. Here we see rights commissioners being conferred with exclusive and mandatory first instance jurisdiction to investigate and determine complaints that an employee's legal rights had been violated. Appeals lay, however, to the EAT. This model is then followed in the Terms of Employment (Information) Act 1994, the Maternity Protection Act 1994, the Adoptive Leave Act 1995, the Protection of Young Persons (Employment) Act 1996 and the Parental Leave Act 1998.

The trend of conferring appellate jurisdiction on the EAT begins to come to an end, however, in May 1997 with the enactment of the Organisation of Working Time Act. In addition to its role under that Act of approving collective

agreements under section 24, the Labour Court was given appellate jurisdiction from decisions of rights commissioners. This model is then followed in the National Minimum Wage Act 2000, the Protection of Employees (Part-Time Work) Act 2001, the Protection of Employees (Fixed-Term Work) Act 2003 and the Protection of Employees (Temporary Agency Work) Act 2012.

For the sake of completeness, I should mention that the Labour Court retained its appellate role in equality cases following the enactment of the Employment Equality Act 1998 and the establishment of the Equality Tribunal. It is also worth mentioning that, until 2004, the Labour Court retained its role, originally conferred by the Employment Equality Act 1977, of hearing at first instance complaints of discriminatory dismissal. Following the enactment of the Equality Act 2004, however, jurisdiction to adjudicate on such complaints was transferred to the Equality Tribunal with a right of appeal to the Labour Court.

As regards the industrial relations dimension of the Labour Court's work, some attention must be devoted to the powers conferred on the court by the Industrial Relations (Amendment) Act 2001 (the 2001 Act); which powers were described by the court itself as being a "far reaching departure from the normal approach to the resolution of industrial disputes": *Bank of Ireland v Irish Bank Officials Association* LCR 17745. These powers provided in effect that the Labour Court might arbitrate in a dispute on the unilateral application of a trade union and in circumstances where the employer might not consent to the process. Given this lecture's title, I may be forgiven for referring to Pat Rabbitte, TD's observations in the Dáil when he described the 2001 Act as being "unlikely to leave any perceptible mark on the industrial relations landscape": 524 *Dáil Debates* Col 822. The decision of the Supreme Court in *Ryanair Ltd v Labour*

Court [2007] 4 I.R. 199 has undoubtedly left an indelible mark on the landscape howsoever described.

There can be no doubt that the 2001 Act, in the words of the Labour Court, provides " a measure of protection to employees in employments where pay and conditions are not freely determined by collective bargaining": *IMPACT v Ryanair Ltd* DECP 1/2005 (reported at [2005] E.L.R. 99).

Unfortunately, the trade unions regard the 2001 Act (even as amended in 2004) as having been emasculated by the Supreme Court. As is well known, the Labour Court's preliminary decision that Ryanair did not engage in "collective bargaining negotiations" was quashed, in judicial review proceedings, by the Supreme Court on the basis, essentially, that the court had also not followed fair procedures in coming to that decision and had also incorrectly interpreted that phrase by assigning to it "the meaning which it would normally bear in an industrial relations context".

It should be noted that the Labour Court, when exercising its appellate functions under, for instance, the Organisation of Working Time Act 1997, can also be judicially reviewed. A very recent example is provided by the decision of Kearns P. on the 13th October 2014 (2014 No. 329 JR) to quash the determination of the Labour Court in *Celina Jakubiak v Lauren Enterprises Ltd* DWT 22/2014 and remit the matter to the court "to be determined in Accordance with law".

The Labour Court *Annual Report* for 2013 reveals that, of the 957 referrals that year, 402 were employment rights cases: the comparable figures for 2012 were 1,181 and 488. In other words, 42% of the referrals in 2013 were made under the various employment rights statutes. There were 207 referrals under the Organisation of Working Time Act 1997 (albeit 100 of these were complaints that rights commissioner decisions had not been implemented), 70 under the Employment Equality Acts, 41 under the Protection of Employees (Fixed-Term Work) Act 2003, 25 under the Protection of Employees (Temporary Agency Work) Act 2003) and 23 under the National Minimum Wage Act 2000. Of the 555 industrial relations cases, 144 were appeals against rights commissioner recommendations under section 13(9) of the 1969 Act and 192 were referred directly under section 20(1) of that Act. Only 166 cases were referred on to the court by the LRC under section 26(1) of the 1990 Act. In other words, just over 60% of the industrial relations cases involved a single worker.

Of the 800 cases that the Labour Court completed in 2013, 308 involved employment rights, but an additional 101 decisions were issued involving appeals from rights commissioner decisions under section 13(9) of the 1969 Act.

The role and functions of the Labour Court have been the subject of a number of official reviews over the last four decades before the announcement in July 2011 of Minister Bruton's Workplace Relations Reform Project.

In their 1981 report, the remaining members of the *Commission of Inquiry on Industrial Relations* were satisfied that the developments that had taken place

since 1946 had created a need for changes in the structures and functions of the industrial relations institutions. In particular, there was a need "to bring about a less diffuse and more coherent distribution of functions between the various official institutions involved in industrial relations". The Commission of Inquiry was doubtful as to whether the Labour Court could discharge successfully the wider range of responsibilities to be demanded of it. In their opinion, it required instead a new body capable of combining legal and industrial relations expertise. Accordingly, the Commission of Inquiry recommended the abolition of the Labour Court and the EAT and their replacement by a Labour Relations Board and a Labour Relations Court, which latter body would assume responsibility for all legal and appellate functions then exercised by the Labour Court and the EAT.

The nucleus of this new Court would consist of a Chairman, a Deputy Chairman and six members all of whom would serve on a full-time basis. Additional Deputy Chairmen and members would serve on a part-time basis. The Chairman and full-time Deputy Chairman should be persons with "considerable expertise in industrial relations". In view of the Court's role in the interpretation of statute law, the Commission of Inquiry considered that all Deputy Chairmen should have a legal background and would preside in all cases involving the implementation of statute law.

None of the recommendations of the Commission of Inquiry were ever implemented, mainly because of the withdrawal of the five trade union nominees in July 1979 over the Government's failure to extend the scope of the Trade Disputes Act 1906 to workers then excluded.

It was not until 2004 that the operation of the various institutions was officially reviewed again. The Review Group on the Functions of the Employment Rights Bodies, which reported in April 2004, recommended that, with the exception of equality complaints, there should be a single first instance body to include conciliation, mediation and investigation. The appellate adjudication body would involve an amalgamation of the services provided by the Labour Court and the EAT. This particular recommendation had been supported by some of those who had made submissions to the Review Group, such as the Incorporated Law Society, but the Department were minded to request Kevin Bonner, its former Secretary General, to further discuss this particular recommendation with the bodies concerned.

Bonner detected a general acceptance that all disputes (other than equality) should go to a rights commissioner in the first instance. On the proposal, as he put it, to "subsume" the EAT into the Labour Court, Bonner concluded that "the general view was that this was not a good idea". He suggested instead that the EAT and its *modus operandi* should be reformed to become less legalistic, that a more full-time tribunal be considered and that recruitment thereto should be by way of open competition.

The suggestion that the EAT be reformed, rather than subsumed into the Labour Court, appeared to have found favour with the Department which then established the Employment Appeals Tribunal Review Group. This group reported in May 2007 and recommended revised procedures for the tribunal.

No action was taken to implement either group's recommendations until the Minister for Jobs, Enterprise and Innovation (Richard Bruton, TD) activated the Workplace Relations Reform Project in July 2011 when he addressed the High Level Conference in UCD on the Resolution of Individual Employment Rights Disputes.

The Minister's proposals, although supported in general by most of the stakeholders, did not meet with the approval of the former Chairman of the Labour Court, John Horgan. He proposed a very different recalibration of the institutions so as to draw a strict distinction between "Disputes of Right" and "Disputes of Interest". The former, in his opinion, should be heard "in a legal context by persons qualified or experienced in law". The latter, however, should be resolved "primarily by the application of fairness and equity" but should be confined to collective disputes. He saw no reason for the State to provide a "free service to employees who have individual grievances with their employers for which there is no legal right". Implicit here is that the former would be a lawyer zone, whereas the latter would be a trade union zone.

Horgan's concerns, as to the dilution of the distinction between disputes of right and disputes of interest, were shared to some extent by Professor Paul Teague and Dr Liam Doherty, of Queen's University Belfast, who were worried that the Minister had placed too much emphasis on the Labour Court resolving rights-based cases. They questioned the merits of locating all appeals within a single structure with the same divisions hearing all cases. In their opinion, this did not give due weight to the very different competencies required to hear complex rights-based cases and complex industrial relations cases.

The Employment Bar Association also submitted that the industrial relations role of the Labour Court should be separate from any adjudicative role in respect of individual rights. As the then Chair of the Association, Tom Mallon BL, put it: "The Labour Court ...must either be a court of law or a court of industrial relations": (2012) 9 *Irish Employment Law Journal* 76 at p. 79.

The concerns expressed by Mallon were addressed by Kevin Duffy, the present Chairman of the Labour Court, in an article published in (2012) 9 *Irish Employment Law Journal* 81. His "short answer" as to whether it was appropriate for the Labour Court to deal with disputes involving legal rights was that the court already had appellate jurisdiction under a number of employment rights statutes, most of which were derived from EU directives. The Labour Court had over 40 years' experience of dealing with such cases and its capacity to do so could not be "seriously questioned". He continued:

"While the Court has exercised this jurisdiction side by side with its industrial relations function, it is demonstrably capable of differentiating between the approach that must be adopted in exercising these different roles."

Duffy was adamant that there was "no reasonable basis upon which it can be asserted that the Court cannot deal with an expanded employment rights jurisdiction with the same competency that it has hitherto demonstrated".

Unlike Teague and Doherty, Duffy did not subscribe to the view that "the skills necessary in order to resolve industrial relations disputes are necessarily incompatible with those required in resolving disputes grounded in the law". Both situations required an understanding of what is reasonable and proportionate "in the context of the workplace".

I would have to agree with the Chairman of the Labour Court when he asserts that, as regards unfair dismissal cases, "the applicable law is well settled and easily understood" and that cases in which novel or complex questions of law arise "are the exception rather than the rule". In contrast, however, an "extensive jurisprudence has developed out of determinations of the Labour Court on the legal issues arising under the various statutes within its jurisdiction". An excellent example is provided by the court's recent determination in *Gorey Community School v Wildes* FTD 19/2014. This case concerned the entitlement of the claimant to a contract of indefinite duration pursuant to section 9(3) of the Protection of Employees (Fixed-Term Work) Act 2003. In coming to its decision that the claimant was so entitled, the Labour Court had to consider and apply three decisions of the Court of Justice - Case C-380/07, *Angelidaki* [2009] E.C.R. 1-3071, Case C-586/10, *Küçük* [2012] I.R.L.R. 697 and Case C-190/13, *Samohano* [2014] I.R.L.R. 459 - and one decision of the High Court - *An Post v Monaghan* [2013] IEHC 404.

It remains to be seen how the Labour Court will structure its responsibilities when the Workplace Relations Bill has been enacted and comes into operation, but it is evident that its industrial relations jurisdiction has for some years become increasingly colonised by lawyers. Leaving aside the cases under the 2001 Act, a very recent example is the dispute between SIPTU and Quality and

Qualifications Ireland (QQI) over its organisation structure, which came before the Labour Court under section 26(1) of the 1990 Act, following the transfer of staff from HETAC (LCR 20854). QQI was represented by Senior Counsel instructed by a firm of solicitors. Jennifer Cowman's recent analysis of unfair dismissal complaints referred to the Labour Court under section 20(1) of the 1969 Act reveals that, in the 21 most recent recommendations (since the 1st January 2013), only two workers were represented by a trade union (LCRs 20459 and 20541) whereas workers were represented in three cases by a solicitor (LCRs 20451, 20528 and 20603) and in one case by solicitor and counsel (LCR 20612): see *Industrial Relations News* 41, 13 November 2014.

Following the perceived emasculatation of the 2001 Act by the Supreme Court in *Ryanair*, it is the case that trade unions have ceased to utilise that legislation and have, instead, reverted to pursuing cases under section 20(1) of the 1969 Act where the invariable practice of the Labour Court is to recommend that the employer should recognise the trade union for collective bargaining purposes: see, most recently, *Cavan and Monaghan Community Area Services v SIPTU* LCR 20838. In a number of those cases, the Labour Court has expressly acknowledged that the outcome of the process in which it is engaged "cannot affect legally enforceable rights or impose legal obligations on any party". Consequently, the Court was of the view that "evidential standards which may be appropriate in mandatory procedures resulting in a legally enforceable outcome need not be replicated by the Court in the exercise of its voluntary industrial relations functions": *Electronic Data Systems v Irish Bank Officials Association* LCR 19306 and *Royal Bank of Scotland v IBOA Members* LCR 19624.

Insofar as the Labour Court may believe that it is immune to challenge by way of judicial review when exercising its industrial relations functions, that belief has to be reconsidered following the recent decision of the High Court in *Grange v Commission for Public Service Appointments* [2014] IEHC 303.

In this case, the applicant had been disappointed in respect of his application for a position within the Civil Service. He lodged a complaint with the Commission for Public Service Appointments (the Commission) that there had been breaches, by the Public Appointments Service, of the *Code of Practice on Appointment to Positions in the Civil Service and Public Service*. The Commission did not consider that any principle in the Code of Practice had been breached and so informed the applicant. After some further communications, the applicant instituted judicial review proceedings seeking the quashing, by way of certiorari, of the Commission's decisions.

The Commission, relying on the decision of Walsh J. in the *Stephen's Green Club* case and the later decision of Kearns J. in *Ryanair Ltd v Flynn* [2000] 3 I.R. 240, contended that judicial review could not lie against it because the purpose of an investigation under the Code of Practice was not to confer a benefit on a complainant but to enable the Commission to make recommendations with a view to addressing any shortcomings in the recruitment process identified during the investigation. The Commission pointed out that it had no power to alter a recruitment decision once it had been made.

Barrett J. noted, however, that there was "anecdotal evidence" before him of instances in which the findings of the Commission had been relied upon by persons, to whom those findings related, to advance their interests successfully with particular government departments. It appeared, therefore, that a decision of the Commission had "the potential" to impact materially on the position of persons to whom its investigation and findings related, at least when those decisions were favourable to such persons. In coming to his decision that judicial review did lie against the Commission, notwithstanding that its decision did not affect legal rights or impose legal obligations, Barrett J. relied upon the observations contained in the 4th edition of Hogan and Morgan's *Administrative Law in Ireland* (2010) at p. 824 that the "modern tendency" was to eschew a rigid classification of whether a determination, *inter alia*, affected the legal rights of the citizen.

One of the applicant's rights was that of "basic fairness of procedures". So, Barrett J. considered that if the Commission followed a "flawed process in the manner in which it discharged its duties then the resultant decisions would appear to be inherently tainted by the breach of [the applicant's] constitutional entitlements in their formulation, not least if the effect of any such flaw was to deny him the fruits of a positive decision".

This suggests that, even when performing its industrial relations functions, the Labour Court may have to adopt a level of formality alien to its traditional ethos.

Much of the criticism that has been levelled against the EAT, particularly by the Irish Congress of Trade Unions, is that it is "overrun by legalism" and is a "cold and unfriendly" place, particularly for trade union officials. More generally, it has been argued by Hepple and others that the growth of statutory rights has imported "excessive formalism" into the dispute resolution process through the use by lawyers of technical legal points and other forms of "gamesmanship". The difficulty here is that legislation has to be interpreted and applied in a legal fashion. As Hepple puts it (*ibid* at p. 413): "statutes are framed by parliamentary draftsmen who expect them to be interpreted by professional judges according to established principles of interpretation known only to lawyers."

A good example of what happens when a quintessentially industrial relations claim conflicts with legal values is provided by a recent rights commissioner decision under the Payment of Wages Act 1991 (the 1991 Act). The Civil and Public Services Union (CPSU) presented complaints to the Rights Commissioner Service on behalf of 141 of its members concerning the non-payment of a Saturday allowance allegedly due to them since the commencement of their employment. The respondent government department submitted that none of the claimants had any contractual right to be paid a Saturday allowance and that most, if not all, of the complaints were outside the time limit as provided for under section 6(4) of the 1991 Act. The CPSU response to this latter submission was that the rights commissioner should take into account the "logistical requirements" of processing 141 claims and that it could not be reasonable or fair to deny those claims on the basis of the delays experienced by the union in ensuring that all claimants had completed their complaint forms properly.

The rights commissioner accepted that, under the 1991 Act, his jurisdiction was limited to investigating the alleged non-payments complained of which occurred in the six months preceding the presentation of the complaints (or in the 12 months preceding if an extension of time were granted). He referred to the decision of David Keane J. in *Moran v Employment Appeals Tribunal* [2014] IEHC 154 where the uncontroverted evidence had established that the claimant in that case did not present a complaint relating to a contravention of the 1991 Act alleged to have occurred on any specific date or dates within six months of the date of presentation of the complaint (17 May 2010). The claimant instead had sought payment of a 5% wage increase with effect from the 14th September 2007.

The rights commissioner was satisfied that all of the complaint forms presented by the CPSU related to a time period of alleged contraventions which was plainly time barred precisely because the complaints related to a time period well beyond the six month period prescribed by section 6(4) of the 1991 Act.

Nor did the rights commissioner feel that there were "exceptional circumstances" warranting an extension of time. He stated that each of the claimants "must take responsibility for filling in and submitting a complaint form". The fact that the union did not have sufficient resources or presence locally to ensure that each claimant filed their complaint form on time did not absolve the claimants from their responsibilities in relation to their complaints. Accordingly, the rights commissioner concluded that he did not have jurisdiction to adjudicate on any of the complaints as they were all time-barred.

To conclude, I have to say, as a lawyer, that I do not consider that the concept of "juridification" as applied to the Labour Court has any pejorative taint. I accept that, given the extent of the employment protection legislation and the jurisprudence generated thereunder, employers and trade unions have no option but to be influenced by legal norms and procedures and that, where collective bargaining does take place, it has to be informed by an awareness of the legal context. The Labour Court is not immune to becoming juridified. Indeed, it could be said that this has already happened, in that the Chairman of the Labour Court is a qualified barrister (albeit never having practised as such), one of the ordinary members was a practising solicitor at the time of his appointment, one of the Deputy Chairmen and one of the ordinary members hold the Professional Diploma in Employment Law and another ordinary member is currently undergoing that programme. This is undoubtedly because of the Court's appreciation of its ever increasing role in individual as opposed to collective disputes.

Thank you for your attention.