APPROVED **[2020] IEHC 178**

THE HIGH COURT
JUDICIAL REVIEW

2017 No. 146 J.R.

BETWEEN

TOMASZ ZALEWSKI

APPLICANT

AND

THE WORKPLACE RELATIONS COMMISSION
AN ADJUDICATION OFFICER
(ROSALEEN GLACKIN)
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

BUYWISE DISCOUNT STORES LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 April 2020

INTRODUCTION

1. The principal issue for determination in these proceedings is whether the procedural mechanisms for the resolution of employment disputes, which have been established under the Workplace Relations Act 2015, involve the administration of justice within the meaning of Article 34 of the Constitution. It is the Applicant's case that the determination of (i) a claim of "unfair dismissal", and (ii) a claim for payment in lieu of notice, are matters which are properly reserved to judges appointed in accordance with the Constitution. The Workplace Relations Act 2015 is said to be invalid in circumstances where it has purported to confer these decision-making functions upon a

non-judicial body, namely adjudication officers appointed by the Minister for Jobs, Enterprise and Innovation. The alleged invalidity is said to extend equally to the body designated to hear appeals from the adjudication officers, namely, the Labour Court.

2. This challenge to the validity of the legislation has been strongly contested on behalf of the State respondents. The grounds of opposition will be considered in detail presently. For introductory purposes, however, it may be helpful to highlight the following two arguments made on behalf of the State respondents. First, it is said that a decision of an adjudication officer lacks the character of a binding determination. If a claimant-employee wishes to enforce the decision, it is necessary to apply to the District Court to do so. The necessity to have recourse to the judicial power to enforce a decision is, it is said, fatal to the argument that the adjudication officers are themselves carrying on the administration of justice. Secondly, it is said that employment disputes have not traditionally been regarded as justiciable. Put otherwise, employment disputes have not traditionally fallen within the purview of the courts.

3. In addition to his principal contention that the Workplace Relations Act 2015 is invalid by reference to Article 34 of the Constitution, the Applicant makes an argument, *in the alternative*, to the effect that the procedures prescribed under the Act are deficient. In particular, complaint is made that there is no provision for the taking of evidence on oath or affirmation; no express provision for the cross-examination of witnesses; and the hearings before the adjudication officers take place in private. Complaint is also made that there is no requirement for adjudication officers to hold a legal qualification.

STRUCTURE OF JUDGMENT

4. This judgment is divided into four parts as follows. Part I sets out the factual background, the procedural history and provides an overview of the relevant legislative provisions.

Part II addresses the Applicant's principal argument, namely that the decision-making under the Workplace Relations Act 2015 represents the administration of justice for the purposes of Article 34 of the Constitution. Part III addresses the Applicant's alternative argument, namely that the procedures under the Workplace Relations Act 2015 are deficient, and in breach of the Applicant's personal rights under Article 40.1 of the Constitution. A related argument, made by reference to the European Convention on Human Rights, is also addressed under this Part. Finally, Part IV of the judgment will set out a summary of the conclusions.

ABBREVIATIONS AND SHORTHAND

5. Where convenient, the following abbreviations will be used in this judgment.

Workplace Relations Act 2015	WRA 2015
Unfair Dismissals Act 1977	UDA 1977

6. Unless expressly stated, any references in this judgment to the functions and powers of an adjudication officer should be understood as being equally applicable to the functions and powers of the Labour Court. Distinctions between the two tiers of decision-making will, however, be relevant to the discussion of certain issues, such as the power to take evidence on oath and the requirement for a public hearing. These distinctions will be explained in the context of the more detailed discussion.

PART I

FACTUAL BACKGROUND

7. The within challenge to the constitutional validity of the Workplace Relations Act 2015 has its genesis in the purported dismissal of the Applicant by his former employer, Buywise Discount Store Ltd. ("***the employer***"). By letter dated 26 April 2016, the employer had purported to dismiss the Applicant from his employment as a supervisor of a convenience store. The Applicant instituted (i) a claim for unfair dismissal pursuant to the Unfair Dismissals Act 1977, and (ii) a claim for payment in lieu of notice pursuant to the Payment of Wages Act 1991. These claims were presented to the Director General of the Workplace Relations Commission, and were duly referred to an adjudication officer (Ms Rosaleen Glackin) pursuant to section 41 of the WRA 2015 and section 8 of the UDA 1977. The adjudication officer issued a purported decision on 16 December 2016, dismissing the claims. (The circumstances leading up to the making of that purported decision are discussed below). Following on from that decision, the Applicant instituted these judicial review proceedings.

8. This judgment is not concerned with the underlying merits of the claims for unfair dismissal and for payment in lieu of notice. Rather, the principal dispute between the parties to these judicial review proceedings is as to the appropriate procedure by which these claims should be heard and determined. The Applicant maintains that an adjudication upon the claims involves the administration of justice, and, as such, is reserved to a court of law. Conversely, the State respondents contend that the resolution of such disputes has properly been entrusted, under the Workplace Relations Act 2015, to adjudication officers, in the first instance, with a right of appeal thereafter to the Labour Court.

9. Given that the underlying merits of the claim for unfair dismissal and for payment in lieu of notice are not before this court, it is not necessary—nor, indeed, appropriate—to

discuss the claim in any detail. There are, however, three aspects of the claim which are potentially relevant to the constitutional issues the subject-matter of these proceedings, as follows.

10. First and foremost, the Applicant is aggrieved by the manner in which his claim had been dealt with by the adjudication officer to whom it had initially been referred. The sequence of events in this regard is said to be indicative of a systemic or structural failing in the operation of the adjudication process provided for under the Workplace Relations Act 2015.

11. The evidence before this court indicates that the sequence of events was as follows. The Applicant's claim had been referred by the Director General of the Workplace Relations Commission to an adjudication officer, Ms Rosaleen Glackin. A hearing had been scheduled for 26 October 2016. The hearing commenced on that date, and the adjudication officer received written submissions and other documentation from the parties. An application for an adjournment was then made on behalf of the employer. The parties are in disagreement as to the precise purpose of this adjournment application. On the one hand, it is suggested on behalf of the State respondents that the hearing was adjourned to allow a witness on behalf of the employer to attend and to be cross-examined at the resumed hearing. On the other hand, the Applicant submits that the adjournment was simply to allow the witness to attend, and that no decision had yet been made as to whether he would be subject to cross-examination. The significance of this disagreement will become clearer in the context of the discussion of the right to cross-examine in Part III of this judgment. (See paragraphs 183 *et seq.*). One of the criticisms made of proceedings under the WRA 2015 is that adjudication officers are often reluctant to allow the cross-examination of witnesses. The Applicant denies that the adjudication officer had made a ruling in his favour to allow cross-examination.

12. The parties are, however, agreed that the hearing on 26 October 2016 only lasted a matter of minutes, and that a further hearing date was to be scheduled. It seems that the adjudication officer was not in a position to assign a date there and then, but she indicated to the parties that they would be notified in due course of the rescheduled hearing date. The hearing was ultimately rescheduled for 13 December 2016.

13. Events then took what can only be described as a bizarre turn. The parties had duly attended at the Workplace Relations Commission's premises on 13 December 2016. On that occasion, they were informed that a decision had *already issued* in respect of the claim, and that the hearing date had been scheduled in error. This was so notwithstanding that a full hearing of the claim had never taken place. It seems that the parties actually spoke to the adjudication officer herself on 13 December 2016, and she informed them that the decision had issued. Thereafter, a five page decision was issued by the adjudication officer which reads as if a full hearing had, in fact, taken place. This decision bears the date 16 December 2016, i.e. a number of days *subsequent* to the events of 13 December 2016. It would seem from this chronology that the adjudication officer went ahead and issued her decision notwithstanding that she had been on notice of the fact that no proper hearing had taken place.

14. The Applicant is highly critical of this sequence of events, and suggests that the only credible explanation for the adjudication officer having issued a detailed decision without having had a proper hearing is that adjudication is routinely issued in such a formulaic manner after a consideration of written documentation, rather than a consideration of oral evidence proffered during an oral hearing. (See, in particular, page 6 of the written submissions).

15. The State respondents have conceded that the decision of 16 December 2016 is invalid, and have indicated that they will consent to an order of *certiorari* setting aside the decision.

16. The potential significance of the events of December 2016 to these judicial review proceedings is, as noted earlier, that the Applicant relies on same as indicative of a systemic or structural failing in the operation of the adjudication process.

17. The second aspect of the claim which is relevant to the constitutional challenge is as follows. The Applicant maintains that the claim for unfair dismissal gives rise to certain factual disputes, and that cross-examination will be necessary in order to properly resolve these disputes. The Workplace Relations Act 2015 is said to be deficient in that it does not expressly provide for a right of cross-examination. This issue is discussed further in Part III of this judgment, at paragraphs 183 *et seq.*

18. The third aspect is as follows. The Applicant maintains that the nature of the grounds originally relied upon by the employer to justify the dismissal are such as to impact on his constitutional right to a good name. More specifically, it is said that the employer made unfounded allegations of dishonesty against the Applicant. The Applicant wishes to vindicate his good name, and it is for this reason that he seeks a public hearing of his claim.

PROCEDURAL HISTORY

19. The within proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 20 February 2017. The proceedings seek a series of declaratory reliefs, and an order of *certiorari* quashing the decision of the adjudication officer dated 16 December 2016.

20. The State respondents have conceded that the decision of the adjudication officer is invalid, and have offered to consent to the making of an order of *certiorari*. It had initially been suggested in correspondence that the granting of this relief would be sufficient to dispose of the judicial review proceedings. When the Applicant did not agree to this suggested course of action, the State respondents issued a motion seeking to have the Applicant's claim for declarations pursuant to the Constitution and the European Convention on Human Rights Act 2003 dismissed. This application to dismiss had been successful before the High Court, but was ultimately refused by the Supreme Court: see *Zalewski v. Adjudication Officer and Workplace Relations Commission* [2019] IESC 17.

21. The procedural history is very helpfully set out in the judgment of the Supreme Court, and I respectfully adopt that summary. I do not propose to add to the length of this judgment unnecessarily by repeating same here.

22. At the hearing before me, there was some disagreement between the parties as to the precise consequences of the Supreme Court judgment. The disagreement centres on the question of whether the Applicant is entitled to rely on decision-making carried out by adjudication officers pursuant to legislation *other than* the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991. To assist the reader in understanding this disagreement, it is necessary to sketch the interaction between the impugned provisions of the Workplace Relations Act 2015, and other pieces of legislation in the context of employment rights. In brief, Part 4 of the Workplace Relations Act 2015 has sought to put in place a mechanism whereby claims and disputes under various pieces of legislation will be adjudicated, in the first instance, by adjudication officers, with a right of appeal thereafter to the Labour Court. This streamlined system replaces a legislative regime whereby there had been a large number of different decision-making bodies involved, including, for example, rights commissioners, the Employment Appeals Tribunal

("*EAT*"), the Equality Tribunal, the Labour Court, and the National Employments Rights Agency ("*NERA*").

23. In somewhat oversimplified terms, the relevant provisions of Part 4 of the Workplace Relations Act 2015 might be regarded as setting out the *procedure*, with the *substantive rights* to be found under other pieces of legislation. On the facts of the present case, for example, the principal claim advanced by the Applicant is for unfair dismissal pursuant to the Unfair Dismissals Act 1977. The substantive jurisdiction to hear and determine such claims has now been transferred to the adjudication officers and the Labour Court; and the relevant procedures to be followed—in terms of, for example, whether the hearings are to be held in public or private—are to be found primarily under the WRA 2015.

24. This procedural/substantive dichotomy, with the substantive rights being found under the parent legislation and the procedure prescribed under the Workplace Relations Act 2015, is not always observed. For example, in some instances aspects of the procedure will also be regulated by the parent legislation, subject to the amendment that the adjudication officers have been substituted for the original decision-maker. Thus, in the case of a claim for unfair dismissal, a power on the part of an adjudication officer to compel the attendance of witnesses appears to be provided for under the UDA 1977 itself (section 8(13)), rather than under the WRA 2015 (section 41).

25. For the purposes of presenting his constitutional challenge, the Applicant seeks to rely on the nature and extent of the substantive jurisdiction which has been conferred upon the adjudication officers and the Labour Court under other legislation *in addition to* that conferred under the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991. During the course of the hearing before me, reference was made on a number of occasions to the fact that these decision-makers now exercise functions under more than fifty pieces

of legislation. The argument has been made that almost the entire of employment law has been "consigned" to these decision-makers. The point has been made rhetorically that if this can be done in one significant area of the law, i.e. employment law, then, in principle, it can be done in relation to other areas such as, say, family law or commercial law. The sheer breadth of jurisdiction conferred upon the adjudication officers and the Labour Court is said to be relevant to arguments such as, for example, whether the exercise of this statutory jurisdiction involves the administration of justice under Article 34 of the Constitution, or the exercise of limited functions and powers of a judicial nature within the meaning of Article 37 of the Constitution.

26. In pointing up the extent of the monetary jurisdiction conferred upon an adjudication officer, the example has been given of the Protected Disclosures Act 2014, where compensation equivalent to five years' salary can be awarded. The potential scale of an award under this legislation might well exceed the general monetary jurisdiction of the Circuit Court (€75,000).

27. The State respondents object to these lines of argument. It is submitted that the Applicant is confined to the facts of his case. More specifically it is said that the Applicant can only legitimately refer to the legislative provisions pursuant to which his claim is made, namely the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991. Counsel on behalf of the State respondents draws attention to the following two passages from the judgment of the Supreme Court: *Zalewski v. Adjudication Officer and the Workplace Relations Commission* [2019] IESC 17, [20] and [49].

> "20. The core submission of the appellant is that, as a person who has made a claim that he has been unfairly dismissed within the meaning of the 1977 Act and to the remedies provided by that Act and to unpaid wages in lieu of notice under the 1991 Act, that he has *locus standi* to challenge the constitutionality of provisions of the 1977 Act and the 2015 Act which require those claims to be determined by an adjudication officer of the WRC and on appeal by the Labour Court. He submits that as a person who is about to have his claims for redress

> and compensation for his alleged unfair dismissal and unpaid wages determined in accordance with a statutory scheme which he contends is inconsistent with the Constitution, he is in real and imminent danger of being adversely affected by the operation of the relevant provisions of the 2015 Act and the 1977 Act, as amended."
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> […]
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> "49. It is important to make clear that this decision does not determine the arguments which the appellant is entitled to pursue in his constitutional challenge relevant to the grounds upon which he has been granted leave. I make this observation by reason of the distinction made, in my view correctly, by McCarthy J. in his dissenting judgment in *Norris v. The Attorney General* [1984] I.R. 36 at p. 90 that *locus standi* '… means the status or qualification, as it were, to maintain the action, *and not the right to advance arguments of a particular kind, unrelated to the facts of the case, in support of the challenge made to the statute*…'.* I respectfully agree with this observation. If there is objection made to any of the arguments sought to be advanced on behalf of the appellant who has *locus standi* to pursue the constitutional challenge, that would be initially a matter for the High Court and may involve different considerations."
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> *Emphasis (italics) added.

28. The submissions on behalf of the State respondents are well made. The Applicant is not at large as to the arguments which he is entitled to advance in support of his constitutional challenge. The arguments must be rooted in the two pieces of legislation pursuant to which the substantive relief in his claim for redress is sought. One of the objectives of a *locus standi* requirement is that a constitutional challenge to legislation should have the force and urgency of reality. See *Cahill v. Sutton* [1980] I.R. 269 (at 283).

> "While a cogent theoretical argument might be made for allowing any citizen, regardless of personal interest or injury, to bring proceedings to have a particular statutory provision declared unconstitutional, there are countervailing considerations which make such an approach generally undesirable and not in the public interest. To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented."

29. The importance of this requirement for concrete personal circumstances can be illustrated by the following hypothesis. Suppose the Applicant's claim in the present case had been confined to one under the Payment of Wages Act 1991 for payment in lieu of notice, and did not include a claim for unfair dismissal. The monetary value of such a hypothetical claim would, obviously, be much less, and might be confined to a number of weeks' wages rather than two years' salary. The monetary value of the claim could, potentially, be relevant to the outcome of the proceedings. For example, the modest monetary value of the claim might be seen as significant in the context of the arguments advanced in respect of Article 37 of the Constitution. The argument for saying that a claim which is measured in hundreds, rather than in thousands, of euros represents the exercise of "limited functions and powers" of a judicial nature would be stronger than in the case of a claim for unfair dismissal. It would not be an answer to this for the Applicant to say "well, although my claim is relatively modest, the procedures prescribed under the WRA 2015 also apply to different types of claims, under different pieces of legislation, which may well have a greater monetary value". To allow this line of argument would be to permit the Applicant to present and argue what is essentially another person's case. The constitutional challenge must, instead, be assessed by reference to the substantive employment law jurisdiction which had actually been invoked by the litigant (on this hypothesis, a modest claim for the payment of wages in lieu of notice).

30. To put the matter another way, the WRA 2015 has put in place a set of omnibus procedures which apply to a whole spectrum of decision-making. There is nothing inherently objectionable in prescribing a procedure which allows an administrative decision-maker to make certain types of determinations on the basis of an informal hearing conducted in private. In some instances, such a procedure will be constitutionally valid. In others, it may not be. An assessment of whether those procedures are

constitutionally valid cannot be carried out in the abstract, without reference to the substance of the decision-making at issue. This is because the assessment of issues such as, for example, whether a particular decision-making function involves the administration of justice, or whether there is a constitutional right to cross-examination, will depend largely on the precise nature and extent of the rights and liabilities affected by the decision-making.

31. The Applicant in the present case is certainly entitled to make arguments by reference to matters such as the jurisdiction of the adjudication officers and the Labour Court to award statutory compensation equivalent to two years' salary under the UDA 1977. The Applicant is equally entitled to argue that his claim engages his constitutional rights to earn a livelihood and to a good name. The Applicant can make the general point that the adjudication officers and the Labour Court exercise jurisdiction under a great number of pieces of legislation. The Applicant cannot, however, go further and rely on specific features of those other pieces of legislation. He cannot for example, rely on the fact that under the Protected Disclosures Act 2014 compensation equivalent to five years' salary can be awarded. The Applicant has not brought such a claim.

32. As it happens, any limitations arising from the *locus standi* requirement would appear to have had very little practical effect on the presentation of the constitutional challenge in this case. This is because a claim under the Unfair Dismissals Act 1977 is one of the more significant type of claims which comes within the jurisdiction of the adjudication officers and the Labour Court. Moreover, the legislative history of the UDA 1977 is directly relevant to one of the issues arising in the judicial review proceedings, namely whether the decision-making function now exercised by adjudication officers under the WRA 2015 is of a type which has traditionally or historically been performed by the courts. (This is the fifth characteristic of the administration of justice per *McDonald v.*

Bord na gCon [1965] I.R. 217. This issue is discussed in detail at paragraphs 106 *et seq*. below).

33. It is not at all obvious that the Applicant's arguments would have been strengthened by reference to other legislation, such as the Protected Disclosures Act 2014. The facts of the present case amply illustrate the breadth of the jurisdiction which can be exercised by adjudication officers and the Labour Court, and allow the constitutional issues to be teased out fully. Put shortly, this case is probably as good a "test case" as any by reference to which the constitutional validity of the procedures under Part 4 of the Workplace Relations Act 2015 might be assessed.

OVERVIEW OF UNFAIR DISMISSALS ACT 1977

34. The following aspects of the Unfair Dismissals Act 1977 ("***the UDA 1977***") are relevant to the constitutional issues in these proceedings. (This overview commences with the UDA 1977 as initially enacted; any material amendments will then be discussed).

35. First, a determination by the Employment Appeals Tribunal could not be directly enforced. Rather, in the event that an employer failed to comply with a determination, the remedy was for the Minister for Labour to apply to the Circuit Court for an order that the employer make the appropriate redress to the employee. An express right to make such an application has since been conferred upon an *employee* by the Unfair Dismissals (Amendment) Act 1993.

36. Secondly, there had been a statutory right of appeal from a decision of the Employment Appeals Tribunal to the Circuit Court. This appeal took the form of a rehearing, on oral evidence. Indeed, it appears that there was then a further right of appeal to the High Court in accordance with the Courts of Justice Act 1936. See *JVC Europe Ltd v. Panisi* [2011] IEHC 279.

37. Thirdly, the UDA 1977 had preserved the right of an employee to recover damages at common law for wrongful dismissal (section 15). An employee was, however, required to elect between the remedies: the initiation of one form of claim operated to exclude the other. Once an employee gave notice in writing of a claim under the UDA 1977, they were not thereafter entitled to recover damages at common law for wrongful dismissal. Similarly, once proceedings for damages at common law for wrongful dismissal had been initiated by or on behalf of an employee, the employee was not thereafter entitled to redress under the UDA 1977.

38. The forms of redress available under the UDA 1977 (as amended by the Workplace Relations Act 2015) are as follows.

> (a) re-instatement by the employer of the employee in the position which he held immediately before his dismissal on the terms and conditions on which he was employed immediately before his dismissal together with a term that the re-instatement shall be deemed to have commenced on the day of the dismissal, or
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> (b) re-engagement by the employer of the employee either in the position which he held immediately before his dismissal or in a different position which would be reasonably suitable for him on such terms and conditions as are reasonable having regard to all the circumstances, or
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> (c) (i) if the employee incurred any financial loss attributable to the dismissal, payment to him by the employer of such compensation in respect of the loss (not exceeding in amount 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with regulations under section 17 of this Act) as is just and equitable having regard to all the circumstances, or
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> (ii) if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding in amount 4 weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances.

Unfair Dismissals (Amendment) Act 1993

39. The procedural aspects of the UDA 1977 identified above had been subject to minor modifications by the Unfair Dismissals (Amendment) Act 1993. First, and as already noted, the right to apply to enforce a determination of the Employment Appeals Tribunal has been extended to an employee.

40. Secondly, the manner in which parallel claims for (i) wrongful dismissal, and (ii) unfair dismissal are regulated had also been amended. Parallel claims could be pursued until such time as the *hearing* before either the Employment Appeals Tribunal or the court had *commenced*. Once a hearing had commenced, the employee was, in effect, confined to that remedy, and was not entitled to a remedy in the parallel proceedings. More specifically, the employee, having elected for the other remedy, could not thereafter recover damages at common law for wrongful dismissal or redress under the UDA 1977, as the case may be.

Workplace Relations Act 2015

41. The Workplace Relations Act 2015 has made a number of significant amendments to the statutory scheme under the UDA 1977. First, the jurisdiction previously exercised by the rights commissioners and the Employment Appeals Tribunal has now been transferred, in effect, to the adjudication officers and the Labour Court. Secondly, the right of appeal to the Circuit Court has been removed. There is a right of appeal against a decision of the Labour Court to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive. (This is subject to the possibility of petitioning the Supreme Court for leave to appeal: *Pepper Finance Corporation v. Cannon* [2020] IESC 2).

42. Thirdly, the interaction between a claim for unfair dismissal and a claim for wrongful dismissal has been modified. There is now a slight disconnect between the two remedies,

in that the cut-off events are different, namely the making of a decision in one instance, and the commencement of the hearing in the other. More specifically, a claimant-employee is precluded from pursuing a claim for wrongful dismissal once a decision has been made by an adjudication officer in respect of a claim for redress under the UDA 1977. A claimant-employee is precluded from pursuing a claim for unfair dismissal once a hearing by a court of proceedings for damages at common law for wrongful dismissal has commenced.

43. Finally, the procedure for the enforcement of the decision is now by way of an application to the District Court. This procedure is discussed in more detail at paragraph 74 below.

OVERVIEW OF THE PAYMENT OF WAGES ACT 1991

44. The essence of the Applicant's claim under the Payment of Wages Act 1991 is that the employer is now required to pay a sum in lieu of the appropriate prior notice of the termination of employment. (The employer had purported to dismiss the Applicant summarily). Any sum recoverable will be modest in circumstances where the Applicant's weekly wages were in the order of four hundred euros.

45. As originally enacted, the Payment of Wages Act 1991 provided for the making of a complaint to a rights commissioner, with a right of appeal thereafter to the Employment Appeals Tribunal.

46. The procedure for determining complaints under the Payment of Wages Act 1991 is now governed by the WRA 2015. This has been achieved by the making of amendments to the Payment of Wages Act 1991 itself, so as to transfer the substantive jurisdiction to adjudication officers, and then applying the relevant procedures under Part 4 of the WRA 2015. Thus, a claim is now made in the first instance to an adjudication officer, with a right of appeal thereafter to the Labour Court.

47. Finally, it should be noted that under the Payment of Wages Act 1991, as originally enacted, a decision of a rights commissioner or a determination of the Employment Appeal Tribunal could be enforced as if it were an order of the Circuit Court made in civil proceedings. Put shortly, a decision or determination could be enforced directly as if it was a court order. By contrast, a decision of an adjudication officer or the Labour Court has a lesser status under the WRA 2015. Such a decision cannot be enforced directly. Rather, it is necessary to apply to the District Court for an order directing the employer to carry out the decision in accordance with its terms. As discussed presently, the requirement for an application to the District Court is relied upon by the State respondents in support of their argument that decision-making under the WRA 2015 does not involve the administration of justice.

OVERVIEW OF THE WORKPLACE RELATIONS ACT 2015

48. The relevant provisions of the WRA 2015 will be addressed in detail, in context, as part of the discussion of each of the specific complaints made by the Applicant. For the present, it is proposed simply to provide an overview of the procedure under the Act.

49. An employee who wishes to advance a claim for, *inter alia*, unfair dismissal or the payment of wages in lieu of notice is required to present the claim to the Director General of the Workplace Relations Commission. The Director General will then refer the claim for adjudication to an adjudication officer. (In the case of a claim for unfair dismissal, the claim is referred to the adjudication officer pursuant to section 8 of the UDA 1977; in the case of a claim for payment of wages in lieu of notice, the referral is made pursuant to section 41 of the WRA 2015).

50. The adjudication officers are appointed by the Minister for Jobs, Enterprise and Innovation pursuant to section 40 of the WRA 2015. There are no formal qualifications

prescribed for adjudication officers under the Act. However, in the case of new appointments, section 40(2) of the WRA 2015 provides that a person shall not be appointed to be an adjudication officer unless that person has been selected for the purpose of his or her being the subject of such an appointment following a competition conducted for that purpose. The State respondents have explained on affidavit that in practice this is achieved as follows. See first affidavit of Tara Coogan sworn on 19 July 2019.

> "36. With the exception of those persons who were previously appointed as Rights Commissioners or Equality Officers, Adjudication Officers are appointed through an open and transparent system managed by the Public Appointments Service. In order to be considered for appointment, candidates are requested to demonstrate significant relevant experience in at least one of the following specialisms: Human Resource Management, Industrial Relations, or Employment Law. In this regard, I beg to refer to a copy of a Candidates Information Booklet prepared by the Public Appointments Service for a recent competition for the appointment of the Adjudicating Officers […]. As a consequence, the WRC is able to draw on a diverse panel of Adjudication Officers who have extensive experience in employment law, equality law, industrial relations and trade disputes. At present persons holding an appointment as an Adjudication Officer include experienced industrial relations and HR practitioners, employment lawyers and civil servants."

51. The affidavit goes on to explain that, in advance of taking up an appointment, an Adjudication Officer is required to undertake bespoke training on a range of relevant topics, including relevant legal issues. The training programme is managed in conjunction with the National College of Ireland.

52. The principal functions of an adjudication officer are set out as follows at section 41(5) of the WRA 2015.

> (5) (a) An adjudication officer to whom a complaint or dispute is referred under this section shall—
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> (i) inquire into the complaint or dispute,
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> (ii) give the parties to the complaint or dispute an opportunity to—

(I) be heard by the adjudication officer, and

(II) present to the adjudication officer any evidence relevant to the complaint or dispute,

(iii) make a decision in relation to the complaint or dispute in accordance with the relevant redress provision, and

(iv) give the parties to the complaint or dispute a copy of that decision in writing.

53. An adjudication officer has a power to compel the attendance of witnesses, but does not have an express power to administer an oath or affirmation.

54. (Functions and powers in almost identical terms to those above apply to an adjudication officer when adjudicating upon a claim for unfair dismissal. See section 8 of the UDA 1977).

55. There is a right of appeal against the decision of an adjudication officer to the Labour Court. (Section 44 of the WRA 2015, as applied to a claim for unfair dismissal by section 8A of the UDA 1977). The procedures before the Labour Court are more formal in that the court can taken oath on evidence. (See section 21 of the Industrial Relations Act 1946 (as amended)). Proceedings before the Labour Court shall be conducted in public unless the Labour Court, upon the application of a party to the appeal, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public (section 44(7) of the WRA 2015).

56. The Labour Court may refer a question of law arising in proceedings before it to the High Court for determination by the High Court (section 44(6) of the WRA 2015).

57. Finally, it is necessary to refer to the procedures governing the enforcement of a decision of an adjudication officer or the Labour Court. These decisions are not self-executing. Rather, if the employee wishes to enforce the decision, it is necessary to make an

application to the District Court for an enforcement order. Section 43 of the WRA 2015 provides as follows.

> 43.(1) If an employer in proceedings in relation to a complaint or dispute referred to an adjudication officer under section 41 fails to carry out the decision of the adjudication officer under that section in relation to the complaint or dispute in accordance with its terms before the expiration of 56 days from the date on which the notice in writing of the decision was given to the parties, the District Court shall—
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> (a) on application to it in that behalf by the employee concerned or the Commission, or
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> (b) on application to it in that behalf, with the consent of the employee, by any trade union or excepted body of which the employee is a member,
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> without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms.
>
> (2) Upon the hearing of an application under this section in relation to a decision of an adjudication officer requiring an employer to reinstate or reengage an employee, the District Court may, instead of making an order directing the employer to carry out the decision in accordance with its terms, make an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all the circumstances but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Act of 1977.
>
> […]
>
> (4) The District Court may, in an order under this section, if in all the circumstances it considers it appropriate to do so, where the order relates to the payment of compensation, direct the employer concerned to pay to the employee concerned interest on the compensation at the rate referred to in section 22 of the Act of 1981, in respect of the whole or any part of the period beginning 42 days after the date on which the decision of the adjudication officer is given to the parties and ending on the date of the order.

58. (Section 43 of the WRA 2015 is applied to a decision of an adjudication officer on a claim for unfair dismissal by section 8A of the UDA 1977).

59. An equivalent provision applies to decisions of the Labour Court under section 45 of the WRA 2015.

60. As appears, the District Court may make an order directing the employer to pay compensation to the employee in lieu of re-instatement or re-engagement. The District Court also has power to direct an employer to pay statutory interest on the compensation, which is a power not enjoyed by an adjudication officer or the Labour Court.

61. It is a criminal offence not to comply with an order of the District Court. See section 51 of the WRA 2015, as follows.

> 51.(1) It shall be an offence for a person to fail to comply with an order under section 43 or 45 directing an employer to pay compensation to an employee.
>
> (2) It shall be a defence to proceedings for an offence under this section for the defendant to prove on the balance of probabilities that he or she was unable to comply with the order due to his or her financial circumstances.
>
> (3) A person guilty of an offence under this section shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both.

62. Crucially, it is not an offence for an employer to fail to comply with the decision of an adjudication officer or the Labour Court: the offence is the failure to comply with the order of the District Court.

PART II

ADMINISTRATION OF JUSTICE

63. Article 34.1 of the Constitution provides as follows.

> 1 Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

64. The principal issued to be addressed in this judgment is whether an adjudication of a claim for unfair dismissal and for the payment of wages in lieu of notice involves the administration of justice. It may be useful to identify, from the outset, what issues are not in dispute between the parties. The parties are agreed that the correct starting point for the analysis of whether an adjudication involves the administration of justice should be the five-point test propounded by the High Court (Kenny J.) in *McDonald v. Bord na gCon* [1965] I.R. 217. (The Supreme Court, on appeal, approved of the formulation of this test, but overturned the High Court on the application of the test to the particular facts of the case). This test has recently been applied by the Supreme Court in *O'Connell v. The Turf Club* [2015] IESC 57; [2017] 2 I.R. 43.

65. The five characteristic features are enumerated as follows.

> "It seems to me that the administration of justice has these characteristic features:
>
> 1, A dispute or controversy as to the existence of legal rights or a violation of the law;
>
> 2, The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
>
> 3, The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
>
> 4, The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;
>
> 5, The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."

66. It has been accepted on behalf of the State respondents, for the purpose of these proceedings, that the determination of the two relevant claims exhibit the first, second and third of these characteristics. (DAR, Day 5, 12.55). The dispute between the parties centres instead on whether the fourth and fifth characteristics are fulfilled. I address each of these characteristics under separate headings below.

(A). ENFORCEMENT / IMPOSITION OF PENALTY

67. The ability of a decision-maker to enforce its decisions is one of the essential characteristics of the administration of justice. This has been described as follows in *Lynam v. Butler (No. 2)* [1933] I.R. 74 (at 99/100).

> "[…] In relation to justiciable controversies of the civil class, the Judicial Power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens and the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in asserting or resisting claims alleged or denied. It follows from its nature as I have described it that the exercise of the Judicial Power, which is coercive and must frequently act against the will of one of the parties to enforce its decision adverse to that party, requires of necessity that the Judicial Department of Government have compulsive authority over persons as, for instance, it must have authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property. So much towards a definition of the term—'Judicial Power.'"

68. This characteristic has been formulated as follows in *McDonald v. Bord na gCon*.

> "4, The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;"

69. As appears, it is not necessary that the decision-maker must be able to enforce its decisions itself. Rather, it is consistent with the exercise of judicial power for the

decision-maker to call in aid the executive power of the State to enforce its decisions. This is illustrated by reference to the manner in which court orders are given effect to by, for example, An Garda Síochána (an order for attachment and committal) or by the Sheriff or County Registrar (an order for the recovery of the possession of land).

70. The application of this limb of the test in *McDonald v. Bord na gCon* can be difficult to apply in practice. Indeed, on the facts of *McDonald v. Bord na gCon* itself, the High Court and the Supreme Court had been at odds on the question of whether the decision at issue in that case met the test. The decision at issue was the making of an "exclusion order" under section 47 of the Greyhound Industry Act 1958. The effect of an "exclusion order" was to prohibit a person from (a) being on any licensed greyhound race track; (b) being at any authorised coursing meeting; and (c) being at any public sale of greyhounds. The Act purported to authorise any person acting under the direction of the licensee of a greyhound race track to remove an excluded person from the track, and to use such force as may be reasonably necessary for this purpose.

71. Counsel for the Attorney General had argued that an "exclusion order" has no direct effect, and that its only result is to give the licensee of a greyhound race track an additional remedy which he may exercise should he wish to do so. A person against whom an "exclusion order" has been made may continue to go to greyhound race meetings, but takes the risk of being removed. It had been further argued that an "exclusion order" is not an order of the same nature as an injunction because an injunction is enforced by the executive authority of the State, while an exclusion order can be enforced only by the licensee of a greyhound racing track or those acting under his authority.

72. The High Court (Kenny J.) held that a body or tribunal which may lawfully execute its orders by physical force or authorise others to do so does not differ from a court. The

Supreme Court overturned this aspect of the High Court judgment, holding that an exclusion order is not directly enforceable. The Supreme Court placed particular emphasis on the fact that the body making the "exclusion order", namely Bord na gCon or the Irish Coursing Club, would not have the right to obtain an injunction to enforce an "exclusion order" itself. Rather, an application for an injunction could only be made by the licensee of a greyhound racing track or some other authorised person. An "exclusion order" was thus only effectively enforceable at the will of such a person. The fourth of the characteristics identified by the High Court (Kenny J.) had not therefore been met.

73. A similar approach has been adopted more recently by the Supreme Court in *O'Connell v. The Turf Club*. O'Donnell J. held at [94] that the decisions of the Turf Club did not satisfy the fourth criteria. O'Donnell J. noted that a decision by the Turf Club to impose financial penalties is not enforceable as a judgment, and that there is no process for converting such a decision into a judgment. The decision cannot be enforced of its own right, and instead the Turf Club must seek to recover any such fine in litigation.

74. Turning now to apply these principles to the facts of the present case, the legislative history of the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991 indicates that the Oireachtas has deployed a range of legislative devices to give effect to determinations made by statutory bodies in respect of employment disputes. At one end of the range, it is expressly provided that a determination may be enforced as if it were an order of the Circuit Court made in civil proceedings. This is the approach which had been taken under the Payment of Wages Act 1991 as originally enacted. At the other end of the range, it is necessary to apply to the Circuit Court to enforce a determination, and the Circuit Court has full jurisdiction to consider the merits of the underlying claim. This is the approach which had been taken under the Unfair Dismissals Act 1977 as originally enacted. The approach had been amended subsequently under the Unfair Dismissals

(Amendment) Act 1993. Under this amended version of the legislation, the Circuit Court's jurisdiction appears to have been reoriented towards a consideration of the precise form of relief to be granted (as opposed to a reconsideration of the merits of the underlying claim). More specifically, the Circuit Court had discretion to modify the form of redress from that ordered by the Employment Appeals Tribunal, by making an order directing the employer to pay compensation in lieu of re-instating or re-engaging the employee. (This legislative history is discussed in more detail at paragraphs 34 *et seq*. above).

75. The approach since taken under the Workplace Relations Act 2015 lies somewhere between these two extremes. Determinations made by an adjudication officer or the Labour Court cannot be directly enforced as if they were court orders made in civil proceedings. Rather, in each instance it is necessary to have recourse to the judicial power to translate those administrative decisions into a court order. This involves the making of an application to the District Court. Crucially, the offence created under section 51 of the WRA 2015 is failure to comply with the District Court order (and not the earlier determination of the adjudication officer or the Labour Court).

76. The striking feature of the enforcement procedure prescribed under the WRA 2015 is that the application is made on an *ex parte* basis, i.e. without hearing the employer. The procedure thus falls far short of the full rehearing seemingly envisaged under the Unfair Dismissals Act 1977 as originally enacted.

77. With some hesitation, I have concluded that the necessity of having to make an application to the District Court to enforce a decision of an adjudication officer or the Labour Court deprives such determinations of one of the essential characteristics of the administration of justice. Whereas the function to be exercised by the District Court is a narrow one, it cannot be dismissed as a mere rubber-stamping of the earlier

determination. The District Court's discretion to modify the form of redress represents a significant curtailment of the decision-making powers of the adjudication officers and the Labour Court. The District Court can, in effect, overrule their decision to direct that the employee be re-instated or re-engaged.

78. In this regard, it is worth recalling the provisions of section 43 of the WRA 2015, as follows. (The relevant provisions have been set out in full at paragraphs 57 *et seq*. above).

> (2) Upon the hearing of an application under this section in relation to a decision of an adjudication officer requiring an employer to reinstate or reengage an employee, the District Court may, instead of making an order directing the employer to carry out the decision in accordance with its terms, make an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all the circumstances but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Act of 1977.

79. As appears, the District Court may make an order directing the employer to pay compensation to the employee in lieu of re-instatement or re-engagement. The District Court also has power to direct an employer to pay statutory interest on the compensation, which is a power not enjoyed by an adjudication officer or the Labour Court.

80. A decision-maker who is not only reliant on the parties invoking the *judicial power* to enforce its decisions, but whose decisions as to the form of relief are then vulnerable to being overruled as part of that process, cannot be said to be carrying out the administration of justice.

81. The only reason I have expressed any hesitation in reaching this conclusion is because of a concern as to the limitations of the procedure before the District Court. The application to the District Court is made without hearing the employer, and is also made without hearing any evidence (other than evidence in relation to the determination to be enforced). These limitations have the potential to reduce the likelihood of the District Court exercising its discretion to direct the payment of compensation in lieu of re-

instatement or re-engagement. This is because the party most likely to want such a change in the form of redress, i.e. the employer, is excluded from the process.

82. Notwithstanding this concern, I am satisfied, on balance, that determinations made by adjudication officers and the Labour Court do not fulfil the fourth limb of the test in *McDonald v. Bord na gCon*. The very fact that the District Court can, in effect, overrule the adjudication officer's or the Labour Court's decision as to the form of relief is irreconcilable with a finding that the two statutory bodies are carrying out the administration of justice. This is so even though the WRA 2015 appears to envisage that the District Court's power to direct the payment of compensation in lieu of re-instatement or re-engagement must be exercised by the District Court on its own initiative, and cannot be requested by the employer directly.

(B). ORDER CHARACTERISTIC OF COURTS

83. Leading counsel on behalf of the State respondents, Ms Nuala Butler, SC, made an attractive argument that, historically, employment disputes have not been justiciable. Put otherwise, it is said that employment disputes have not traditionally fallen within the purview of the courts.

84. Counsel commenced her submission by tracing the evolution of employment rights under national law. Over the past five decades, a large number of statutory provisions have been enacted, all of which gave employees statutory rights enforceable against employers. In the case of dispute, such disputes are to be adjudicated upon through statutory mechanisms provided for under the legislation.

85. This process is said to have begun with the enactment of the Redundancy Payments Act 1967. Counsel points out that an entitlement to a redundancy payment is entirely statutory in nature. There is no common law right, still less a constitutional right, to such

a payment. Crucially, any claims for redundancy payments were to be determined by the adjudicative process provided for under the 1967 Act itself. This had involved a first-instance decision by a "deciding officer", with a right of appeal thereafter to a Redundancy Appeals Tribunal. The role of the courts was largely confined to an appeal on a point of law to the High Court. (There was also a procedure whereby a reference could be made to the High Court).

86. Counsel submits that there has been a consistent, long-term legislative policy evident since the enactment of the Redundancy Payments Act 1967. There are two aspects to this policy. First, to enhance the protection afforded to employees, i.e. through the creation of statutory rights; and, secondly, to provide adjudicative mechanisms for the resolution of disputes outside the court structure.

87. Counsel submits that the enactment of the Workplace Relations Act 2015 was not transformative, in the sense of *removing* from the courts a jurisdiction which they had been exercising. Rather, the Act brought about a streamlining of multiple adjudication mechanisms which had previously been exercised by a diverse range of statutory decision-makers, including rights commissioners, the Employment Appeals Tribunal ("*EAT*"), the Equality Tribunal, the Labour Court, and the National Employment Rights Agency ("*NERA*").

88. The WRA 2015 has now consolidated these various strands of decision-making into a single adjudicative machinery. The decision-making process now commences with the decision of an adjudication officer at first instance; there is then a full right of appeal to the Labour Court; and, thereafter, an appeal on a point of law to the High Court.

89. This streamlining of the decision-making process is said to have resolved a number of practical difficulties that had arisen with the procedures in existence prior to 2015. An employee may have had to make multiple complaints to different decision-makers arising

out of what was, in effect, a single employment dispute. In some instances, the complaints would be subject to different time-limits, and, might even be mutually exclusive. The streamlined procedure introduced by the WRA 2015 was thus said to be of benefit to employees.

90. Turning to the specific claims made in the present case, counsel notes that the remedy for an "unfair dismissal", created under the Unfair Dismissals Act 1977 ("***the UDA 1977***"), is entirely statutory in nature, and differs from the common law remedy for breach of a contract of employment. In particular, the burden of proof is reversed in that the UDA 1977 takes as its starting point that a dismissal is "deemed" to be an "unfair dismissal" unless there were substantial grounds justifying the dismissal. The remedies available under the UDA 1977, in particular, re-instatement and re-engagement, are not analogous to common law remedies. An order for the specific performance of a contract of employment is said to remain exceptional. In particular, counsel cites *Earley v. Health Service Executive (No. 2)* [2017] IECA 207, and *Wallace v. Irish Aviation Authority* [2012] 2 I.L.R.M. 345, as authority for the proposition that where there has been an actual termination of employment (as opposed to a suspension), it is extremely difficult to obtain specific performance. The shortcomings of the common law are precisely the reason for which the Oireachtas introduced the statutory remedies, i.e. to ensure that appropriate redress was available.

91. Counsel cites the judgment of the High Court (Charleton J.) in *Doherty v. South Dublin County Council (No. 2)* [2007] IEHC 4; [2007] 2 I.R. 696 in support of the proposition that the statutory dispute resolution mechanisms created in the area of employment law are intended to be exclusive. The applicants in *Doherty* were travellers, and they sought to challenge what they alleged was a failure on the part of the local housing authority to provide them with suitable accommodation. Part of their claim sought to invoke the

equal status legislation. A preliminary issue arose as to whether the court had jurisdiction to grant declaratory relief under the equal status legislation. More specifically, the respondents had argued that, in adjudicating upon the application for judicial review, the High Court was not entitled to have any regard to the provisions of the Equal Status Act 2000 and the Equality Act 2004. The rights and obligations therein created, it had been argued, belong only within the scheme created by those Acts and administered within the mechanisms set up by them.

92. The High Court held that the equality legislation had created its own legislative and administrative scheme, with only limited right of access to the courts. See paragraph [16] of the judgment as follows.

> "[…] Here, a specific legal obligation is created for the first time by statute, a mode of enforcement is set up through an agency which was thereby created and limited rights of access to the courts are created. In my judgment this amounts to the creation of a separate legislative and administrative scheme which does not create a series of private rights which are either enforceable in damages, or outside the context of that scheme."

93. The rationale for this conclusion is set out, in particular, at paragraphs [12] and [14] of the judgment as follows.

> "12. In my judgment, the Equal Status Acts 2000 to 2004 do not create new legal norms which are justiciable outside the framework of compliance established by those Acts. Prior to the Local Government (Planning and Development) Act 1963 one could lawfully turn one's house from being a family home into a block of apartments. Subject to tort laws relating to nuisance, one could establish a factory or workshop in one's back garden. Many activities which involved the development of land would also have required one to obtain a licence, for instance to run a slaughter house, but these were incidental to one's general right to develop one's property as one wished. Prior to the Unfair Dismissals Act 1977, the only right that an employee would have in respect of his or her employer was for a period of notice to be given of dismissal, as specified in the contract of employment, or such as were implied by law where the contract was silent. There was no recognition that an employee had a right to work or had any *quasi*-proprietary interest in their job; see Redmond, *Dismissal Law in Ireland* (Butterworths, Dublin, 1999) at para. 3-27. The Unfair Dismissals Act 1977 established such rights and, like the

> Equal Status Acts 2000 to 2004, set them up within a framework providing for a specific tribunal enforcing new legal norms and with particular rights of appeal to specified courts in particular circumstances. The difference between the unfair dismissals legislation and the Equal Status Acts 2000 to 2004 is that under the Unfair Dismissals Act 1977, a person must opt to choose between a claim for wrongful dismissal pursuant to his employment contract, or for unfair dismissal under the Act. Wrongful dismissal would involve litigation in the ordinary courts, which historically have dealt with all the questions related to contract, whereas by claiming unfair dismissal one would come under the special tribunal established by that Act."

94. As appears, Charleton J. expressly cites the example of a claim for "unfair dismissal" under the UDA 1977 as part of his analysis of the interaction between statutory tribunals and the courts.

95. Having cited the judgment of the Supreme Court in *Tormey v. Ireland* [1985] I.R. 289, Charleton J. continued as follows (at paragraph [14] of his judgment).

> "14. Earlier, Henchy J. referred to the wording of Article 34.3.1 as giving jurisdiction to the High Court to determine 'all matters and questions' as being required to be read 'all justiciable matters and questions'. Many of the rights and obligations created by modern statute were never justiciable until they were created by the passage of legislation. Some legislation consolidates existing rights in a code form while others interfered with the general freedom of contract by establishing, for instance, that particular terms of contracts in particular circumstances may be unfair. These Acts tag onto the existing law, by way of amendment or tidying up, and divert the law in a particular direction. Such legislation contemplates that the courts are to be used for the settling of controversies. Where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust the jurisdiction of the High Court but, instead, to establish new means for the disposal of controversies connected with those legal norms. In such an instance, administrative norms, and not judicial ones are set: the means of disposal is also administrative and not within the judicial sphere unless it is invoked under the legislative scheme. In the case of the Planning Acts, in employment rights matters and, I would hold, under the Equal Status Acts 2000 to 2004, these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense. In some instances, the High Court has declined

> jurisdiction on the basis that a forum established by law, over which it exercises supervisory jurisdiction, as above, is a more appropriate forum. In *Deighan v. Hearne* [1986] I.R. 603 at p. 615, Murphy J. declined to engage in a tax assessment of the plaintiff in favour of the administrative tribunal established in this regard. He felt the jurisdiction of the High Court would only come into play in the most exceptional circumstances because legislation provided a constitutional procedure 'competently staffed and efficiently operated to carry out that unpopular but very necessary task'. *In my judgment it is no function of the High Court, at first instance, to adjudicate on planning matters, to assess income tax, to decide on unfair dismissal or to decide whether there has been unequal treatment*."*
>
> *Emphasis (italics) added.

96. Counsel in the case before me characterised the judgment in *Doherty* as finding that the High Court did not have jurisdiction to grant declaratory relief because the right to equal treatment, provided for under the Equal Status Acts, was entirely a creature of statute. A right to equal treatment was not something which had had a prior existence under the common law. Rather the Equal Status Acts had created that right, and, crucially, had also put in place adjudicative mechanisms to resolve claims of discrimination. As of the date of the High Court judgment in *Doherty* in January 2007, the procedure prescribed for seeking redress for alleged discrimination involved the making of a complaint to the Director of the Equality Tribunal (with a full right of appeal thereafter to the Circuit Court). The applicants in *Doherty* were not entitled to by-pass the prescribed procedures, by seeking to invoke the full original jurisdiction of the High Court in preference to bringing a complaint before the Director of the Equality Tribunal.

97. (It is to be noted that even now, subsequent to the amendments introduced to the procedures under the Equal Status Acts by the Workplace Relations Act 2015, there continues to be a full right of appeal to the Circuit Court in respect of a claim of discrimination).

98. Counsel submits that the principles identified in *Doherty* are directly applicable to a claim for unfair dismissal and for the payment of wages in lieu of notice. Such claims seek to assert statutorily created rights, and are subject to the adjudicative mechanisms expressly provided for under the legislation. There has been no transference of jurisdiction from the courts.

99. Counsel also relies on two judgments, each delivered in the context of a ruling on an interlocutory injunction application in an employment law context, namely *Maha Lingam v. Health Service Executive* [2005] IESC 89; [2006] 17 E.L.R. 137, and *O'Domhnaill v. Health Service Executive* [2011] IEHC 421. These judgments are said to confirm, albeit not on the basis of a full hearing, that where employment legislation provides its own statutory scheme of enforcement, it is not intended to confer independent rights at common law or to modify in general the terms of contracts of employment to be enforced by the common law courts.

100. In response, leading counsel on behalf of the Applicant, Mr Peter Ward, SC, challenges the State's characterisation of his client's claims for unfair dismissal, and for the payment of wages in lieu of notice, as "industrial relations" disputes which fall outside the purview of the courts. The notion of "industrial relations" is said to be an "outdated concept" in this context. Collective bargaining and union membership are no longer the main source of protection for employees. Instead, employees are protected by the conferment of statutory rights. An allegation that there has been a breach of these statutory rights is justiciable: it requires a legal adjudication by a court of law.

101. The hearing and determination of employment disputes, and the making of orders thereon, is something which is characteristic of the business of the courts. This is evident from the fact that for almost forty years prior to the enactment of the WRA 2015, the Circuit Court had heard and determined claims under the UDA 1977, whether by way of

a full appeal or by way of an application to enforce a determination of the Employment Appeals Tribunal. The WRA 2015 is said to have carved the Circuit Court out of the process.

102. Even prior to the UDA 1977, the courts had heard and determined contractual disputes arising out of contracts of employment. Indeed, this continues to be the position today. The courts' jurisdiction in this regard is acknowledged by section 15 of the UDA 1977, which recognises the right of a person to recover damages at common law for wrongful dismissal. Counsel observes that both parties accept that employment legislation generally operates by implying statutory terms into contracts of employment, thus emphasising the contractual nature of the relationship. Counsel refutes the suggestion that an order for specific performance would not normally be granted in respect of a contract of employment, and that the statutory remedies of re-instatement or re-engagement thus have no equivalent at common law.

103. Counsel helpfully took me through the relevant case law on the so-called "*Johnson* exclusion area", named for the judgment in *Johnson v. Unisys* [2001] UKHL 13; [2003] 1 A.C. 518. (I will return to discuss this further at paragraphs 132 *et seq*. below).

104. Finally, counsel submits that the fifth limb of the test in *McDonald v. Bord na gCon* cannot have been intended to "freeze", at a particular point in time, the categories of decision-making which comprises the administration of justice. To hold otherwise would have the consequence that the adjudication upon any new legal norm would never comprise the administration of justice. This could result in an entire set of rights being impermissibly put beyond the reach of the courts.

105. Properly understood, the fifth limb looks to whether the decision at issue is one which is characteristic of a court, in the sense of being similar to the *type* of orders which a court

makes, rather than asking whether this specific type of order is one which the courts have made historically.

Findings of the court

106. It is important to recall the precise issue which falls for determination under this heading. The State respondents seek to refute the argument that the adjudication upon a claim for unfair dismissal, or upon a claim for the payment of wages in lieu of notice, involves an administration of justice, by saying that the fifth characteristic identified in *McDonald v. Bord na gCon* is not fulfilled. The fifth characteristic is as follows.

> "5, The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."

107. This limb of the test requires consideration of whether the claims for redress which the Applicant has made arising out of his dismissal are of a type which historically or traditionally have been determined by a court. This is a different question from that which has been considered in the case law, such as *Doherty v. South Dublin County Council*, relied upon by the State respondents. In those cases, what had been at issue was whether, as a matter of statutory interpretation, the relevant legislation had the effect of creating an *exclusive* dispute resolution mechanism, with only very limited recourse to the courts. I will return to this distinction in more detail presently (at paragraph 117 *et seq*. below).

108. The necessary starting point for an analysis of the argument is to consider how the fifth characteristic has been interpreted in the case law. Two examples of cases where the historical jurisdiction of the courts had been an important consideration in concluding that the decision-making at issue represented the administration of justice are as follows.

109. First, in *In re Solicitors Act, 1954* [1960] I.R. 239, emphasis was placed on the fact that the power to strike a solicitor's name from the Roll of Solicitors had traditionally been

exercised by the Chief Justice. The Solicitors Act 1954 had purported to confer this function instead on a newly established Disciplinary Committee.

110. The second example is provided by the judgment of the High Court in *Cowan v. Attorney General* [1961] I.R. 411. There, the High Court, in concluding that the exercise of powers by the commissioner of an electoral court represented the administration of justice, had regard to the fact that, historically, the jurisdiction to deal with election petitions in municipal elections lay exclusively in the High Court. This jurisdiction was expressly taken away from the High Court by the legislation being challenged in the proceedings, namely the Municipal Corporations Act 1882, and the Municipal Elections (Corrupt and Illegal Practices) Act 1884 (as subsequently applied to Ireland).

111. Examples of cases falling on the other side of the line, i.e. where a particular decision-making function had traditionally been carried out by a non-judicial body, include the following. The first example is provided by *Keady v. Commissioner of An Garda Síochána* [1992] 2 I.R. 197. There, the fact that discipline over An Garda Síochána had traditionally been exercised by the Commissioner appears to have informed the conclusion that the dismissal of a member from the force did not involve the administration of justice. Having referred to the judgment in *In re Solicitors Act, 1954*, O'Flaherty J. then stated as follows (at page 211).

> "It seems clear, therefore, that the case of solicitors must be regarded as exceptional and, perhaps, anomalous and owes a great deal to the historic fact that judges always were responsible for the decision to strike solicitors off the roll.
>
> In contrast, the Garda Síochána is a force which consists of members each of whom on appointment undertakes the duty of preserving the peace and preventing crime. The members comprise a disciplined force who are subject to the authority of the Commissioner in whom the general direction and control of the force is vested […]."

112. The second example is provided by the more recent judgment of the Supreme Court in *O'Connell v. The Turf Club* [2015] IESC 57; [2017] 2 I.R. 43. In concluding that the

disciplining of a jockey and a trainer by the Turf Club did not amount to an impermissible administration of justice, the Supreme Court had regard to the historical role of the Turf Club. The matter is put as follows by O'Donnell J. at paragraph [94].

> "[…] Furthermore, the making of such disciplinary orders up to and including the warning of a person from a racecourse, have not only not been characteristic of the courts as a matter of history, they have as a matter of history been the exclusive function of a body such as the respondent."

113. It seems from this case law that the fifth characteristic in *McDonald v. Bord na gCon* will only assume importance in a small category of cases where there is a long established tradition of a particular type of decision-making either falling within or outwith the courts' jurisdiction. It must be doubtful whether it was intended to have the consequence that disputes in respect of any *newly* created statutory right can be put beyond the courts' reach by the Oireachtas without infringing Article 34.1. It is, happily, not necessary to resolve this difficult question for the purposes of disposing of the proceedings before me. This is because the determination of claims for unfair dismissal is something which has been characteristic of the business of the courts for almost forty years. More specifically, the UDA 1977 conferred jurisdiction on the Circuit Court to determine the merits of a claim for unfair dismissal. The matter could come before the Circuit Court either by way of an appeal from the Employment Appeals Tribunal, or by way of an application to enforce a determination made by the Employment Appeals Tribunal. Crucially, in each instance, the Circuit Court had full jurisdiction to hear and determine the underlying merits of the dispute. This jurisdiction has now been taken away by the Workplace Relations Act 2015.

114. It is correct, of course, to say that the Circuit Court's jurisdiction only arose subsequent to a first-instance determination of the Employment Appeals Tribunal. The fact that a court of law is only involved at *second-instance* might well be relevant in the context of

an argument as to whether the decision-making process, when examined in its entirety, might be compliant with Article 34.1 of the Constitution. (This is discussed further at paragraph 122 *et seq*. below). The *timing* of the involvement of the Circuit Court is, however, largely irrelevant to the separate question of whether the fifth of the *McDonald v. Bord na gCon* criteria has been fulfilled. The argument advanced by the State respondents is to the effect that the determination of what they characterise as "industrial relations" disputes is not something with which the courts have traditionally been involved. This argument is undone by the legislative history of the UDA 1977. It is irrefutable that, as a matter of fact, the Circuit Court had heard and determined claims for unfair dismissal on their merits for a period of almost forty years, i.e. since the commencement of the UDA 1977 in May 1977 until the commencement of the WRA 2015. Put shortly, such claims had been treated as justiciable as a matter of history.

115. Moreover, and in any event, disputes arising out of the termination of employment have always, in principle, been capable of being litigated before the courts. It is open to an employee to bring a claim for wrongful dismissal based on a breach of his or her contract of employment. This is expressly recognised under the UDA 1977. Whereas it may well be that in most instances the rights of an employee under the contract would be limited, there continues to be circumstances where certain senior employees will have been afforded very generous rights under their contract of employment. For this reason, such employees may well elect to pursue a claim for breach of contract before the courts. There is no question but that such disputes are justiciable.

116. It may be that certain other statutory rights in the employment sphere are novel and have no equivalent under the common law, e.g. a right to equal pay. However, as the State respondents have correctly pointed out as part of their submissions on *locus standi*, these proceedings must be determined by reference to the claims actually advanced by the

Applicant, namely the claims for unfair dismissal and for the payment of wages in lieu of notice. (See paragraph 27 *et seq*. above). Both parties accept that employment legislation generally operates by implying statutory terms into contracts of employment, thus emphasising the contractual nature of the relationship. Against this background, whereas it is correct to say that the claims made by the Applicant are statutory in nature, the issues which fall for adjudication are not dissimilar to those which would arise in proceedings for breach of contract.

117. The State respondents have placed great emphasis on the judgment of the High Court (Charleton J.) in *Doherty v. South Dublin County Council*. The judgment is cited as authority for the proposition that where a person seeks to assert statutorily created rights, they are subject to the adjudicative mechanisms expressly provided for under the relevant legislation. In the case of a claim for unfair dismissal and for the payment of wages in lieu of notice, a claim for redress has always been initiated outside the court system. Originally, such claims were made to a rights commissioner or the Employment Appeals Tribunal; since the enactment of the WRA 2015, a claim must now be presented to the Director General of the Workplace Relations Commission, who will refer it onwards to an adjudication officer for adjudication.

118. With respect, the submissions tend to overlook the fact that the judgment in *Doherty v. South Dublin County Council* is addressed to a different issue. The issue in that case had been whether an applicant could by-pass the statutory procedures prescribed under the Equal Status Acts by invoking the High Court's original jurisdiction. Charleton J. held that the equal status legislation had created its own legislative and administrative scheme, with only limited rights of access to the courts. One consequence of this is that it is not the function of the High Court, at first instance, to decide whether there has been unequal treatment. Charleton J. emphasised that the purpose of creating a new mechanism for

the enforcement of the statutory rights under the Equal Status Acts was not to oust the jurisdiction of the High Court. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness, and enjoy outcomes that do not fly in the face of fundamental reason and common sense. ([2007] 2 I.R. 696 (at 706)).

119. The judgment in *Doherty v. South Dublin County Council* is concerned primarily with identifying the limits of the jurisdiction of the High Court under the Equal Status Acts. The judgment is not authority for the proposition that a claim for redress for discrimination in breach of the right to equal treatment is not justiciable before *any* court. The Equal Status Acts provide for a full right of appeal to the Circuit Court in respect of a claim of discrimination. This continues to be the position even after the amendments introduced to the Equal Status Acts by the Workplace Relations Act 2015. The business of the Circuit Court thus includes the hearing and determination of claims of discrimination. Put otherwise, these matters are justiciable.

120. As of the date of the judgment in *Doherty* in January 2007, the same logic had applied to claims for unfair dismissal. It is only since the enactment of the WRA 2015 that the Circuit Court's jurisdiction to hear and determine such claims has been abolished.

121. In conclusion, therefore, the hearing and determination of a claim for unfair dismissal and for the payment of wages in lieu of notice fulfil the fifth limb of the test in *McDonald v. Bord na gCon*. The making of orders determining such claims is characteristic of the business of the courts as carried out pursuant to the UDA 1977 (prior to its amendment under the WRA 2015); and, more generally, is characteristic of the type of orders made pursuant to the courts' common law jurisdiction in respect of claims for wrongful dismissal.

RELEVANCE, IF ANY, OF ACCESS TO COURT OF LAW

122. The Unfair Dismissals Act 1977, as originally enacted, had allowed for access to the courts by two routes. First, the right of a person to recover damages at common law for wrongful dismissal had been expressly preserved. An employee was, however, required to elect between the remedies: the initiation of one form of claim operated to exclude the other.

123. Secondly, there was a right of appeal against a decision of the Employment Appeals Tribunal to the Circuit Court. The appeal had been by way of rehearing, on oral evidence. This latter route has been closed off by the WRA 2015, and recourse may now only be had to the courts by way of an appeal on a point of law to the High Court.

124. One issue which does not appear to have been fully teased out in the existing case law is the relevance, if any, of the existence of a right of access to a court of law. More specifically, in assessing whether a decision-maker is carrying out the administration of justice, should any weight be attached to either (i) the existence of a right of appeal against the decision to a court of law, or (ii) the existence of a parallel right of access to the courts. Put otherwise, does it make any difference that a scheme of statutory decision-making is not exclusive and does not oust the right of access to the courts.

125. The orthodox position appears to be that set out by the Supreme Court in *Re Solicitors Act, 1954* [1960] I.R. 239 (at 275). Kingsmill Moore J. held that the existence of an appeal to the courts cannot restore constitutionality to a tribunal whose decisions, if unappealed, amount to an administration of justice.

> "It seems to the Court that the power to strike a solicitor off the roll is, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen is a matter which calls for the exercise of the judicial power of the State and because to entrust such a power to persons other than judges is to interfere with the necessities of the proper administration of justice.

> It is urged that the existence of an appeal to the Chief Justice is sufficient to answer these objections. The Chief Justice in his judgment took the view that, notwithstanding his own opinion as to the merits, he was not at liberty to act as if he were engaged on an untrammelled re-hearing and he must not interfere with the decisions of the Committee unless he was clear that the decision was wrong, nor interfere with the punishment unless he was convinced that it was out of proportion to the misconduct. If this view be correct the appeal is but an indifferent protection, but, even if it be not correct, *the existence of an appeal to the Courts cannot restore constitutionality to a tribunal whose decisions, if unappealed, amount to an administration of justice*."*
>
> *Emphasis (italics) added.

126. It appears that a more pragmatic approach had been adopted in *Lynham v. Butler (No. 2)* [1933] I.R. 74. The judgment concerned the status of the lay commissioners of the Land Commission. The decision of the lay commissioners in respect of an objection to inclusion of particular lands on the list of lands to be acquired was subject to appeal to the Judicial Commissioner. Under the then legislation, the Judicial Commissioner was a nominated High Court judge.

> "The Land Commissioners (other than the Judicial Commissioner) are, then, an administrative body of civil servants who are not Judges within the meaning of the Constitution and do not constitute a Court of Justice strictly so-called but who, in the performance of some of their duties, must act judicially and who are always subject, in respect of any justiciable controversy arising in the course of their business, to the exercise of the Judicial Power of the State for the determination of such controversy by one of the Judges of the High Court of the State assigned to act as Judicial Commissioner for the purpose."

127. The judgment emphasises that the objectives of the Land Commission involved, of necessity, administrative work on an immense scale, including administrative decisions and rulings from day to day quite outside the functions and beyond the capacity of a small judiciary if required to rule upon them individually.

128. Properly analysed, *Lynham v. Butler* appears to be concerned with the division between administrative and judicial functions. It seems to be suggested that the functions of the lay commissioners would only become justiciable in certain circumstances. This appears

to be quite different from what is intended under the Workplace Relations Act 2015, where all issues in dispute fall to be determined by an adjudication officer and the Labour Court.

129. It is not, strictly speaking, necessary to resolve the question of whether the existence of a full right of appeal to a court of law might negate what would otherwise be a finding that a decision-maker of first instance had been carrying out the administration of justice. This is because, as a result of the changes wrought by the Workplace Relations Act 2015, there is no longer a full right of appeal to the Circuit Court. The only right of appeal now allowed is confined to an appeal to the High Court on a point of law. I simply observe that it is, perhaps, anomalous that the requirement for the intervention of the District Court, albeit on a limited basis, to *enforce* a determination of the Labour Court is sufficient to deprive such a determination of one of the characteristics of the administration of justice, yet the existence of a full right of appeal against the determination to the Circuit Court on the merits would not. Of course, the explanation for this distinction may be that recourse to the judicial power is always necessary to obtain an enforcement order, whereas unless the appellate jurisdiction is invoked, a first-instance decision becomes final and conclusive.

130. The related question of whether the preservation of a right of access to the courts to pursue a parallel action negates what would otherwise be a finding that a decision-maker had been carrying out the administration of justice is more immediately relevant. It has certainly been a feature of other schemes for statutory compensation that the underlying legislation expressly provides that the scheme is an *alternative* to legal proceedings, and does not displace a right of action. It is only if a claimant chooses to pursue the statutory route that they will then be precluded from pursuing legal proceedings thereafter. See, for example, the CervicalCheck Tribunal Act 2019 (sections 13 and 28).

131. It might be argued that a statutory scheme for compensation, which sits in parallel with a right of action before the courts, does not involve the administration of justice. There is no compulsion to have recourse to the statutory scheme, and a claimant could instead insist on their right of access to the courts. It might be said that coercive jurisdiction is one of the characteristics of the administration of justice.

132. I turn now to consider the possible application of these (tentative) propositions to the Unfair Dismissals Act 1977 (as amended by the WRA 2015). The UDA 1977 does not oust the jurisdiction of the courts to entertain claims arising out of the termination of employment. Rather, the statutory right to make a claim for unfair dismissal sits in parallel with the common law right of action for wrongful dismissal. (As explained at paragraph 42 above, a claimant must ultimately elect between the two remedies). In principle, therefore, it could be argued that the adjudication officers and the Labour Court are exercising a *consensual* jurisdiction only, and that parties retain a full right of access to the courts. The difficulty with this line of argument is, however, that the very existence of the parallel jurisdiction under the UDA 1977 has had an inhibiting effect on the development of the common law. Put otherwise, the existence of the parallel jurisdiction is not a neutral factor, but it has actually diminished the potential of the courts' jurisdiction.

133. This phenomenon is sometimes referred to as the "*Johnson* exclusion area", named for the judgment in *Johnson v. Unisys* [2001] UKHL 13; [2003] 1 A.C. 518. In that case, the judicial committee of the House of Lords had declined to develop the common law to give a parallel remedy to that provided for under the Employment Rights Act 1996. It held that for the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of

Parliament that there should be such a remedy, but that it should be limited in application and extent.

> "The remedy adopted by Parliament was not to build upon the common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies."

134. The specific concern in *Johnson* had been that the claim for compensation for distress, humiliation, damage to reputation in the community or to family life being advanced was far in excess of the statutory limit of STG£11,000. The House of Lords was not prepared to develop the common law to give a parallel remedy which was not subject to any such monetary limit.

135. The decisions in *Johnson*, and in *Eastwood v. Magnox Electric plc* [2004] UKHL 35; [2005] 1 A.C. 503, were applied by the High Court (Laffoy J.) in *Nolan v. Emo Oil Services Ltd.* [2009] 20 E.L.R. 122.

> "[…] There may be situations in which, on the reasoning of Lord Nicholls in [*Eastwood v. Magnox Electric plc*], a dismissed employee is entitled to maintain an action at common law, for example, where he has suffered financial loss from psychiatric or other illness as a result of pre-dismissal unfair treatment which would give rise to an action for damages. That scenario was signposted by Lord Steyn in the *Johnson* case and recognised in the *Eastwood* case. The plaintiff's situation here is entirely different. In effect, he is inviting the court to develop its common law jurisdiction by reference to the statutory concepts of redundancy and unfair dismissal. Specifically, the court was invited by counsel for the plaintiff to have regard to the statutory definition of 'redundancy' in s.7 of the Redundancy Payments Act 1967, as amended. The Oireachtas in enacting the Unfair Dismissal Acts 1977 to 2007 and in introducing the concept of unfair dismissal provided for specific remedies for unfair dismissal and specific procedures for obtaining such remedies in specific forums, before a Rights Commissioner or the Employment Appeals Tribunal. For the courts to expand its common law jurisdiction in parallel to the statutory code in relation to unfair dismissal and redundancy would, to adopt Lord Nicholls's terminology, end up supplanting part of the code."

136. In summary, therefore, it seems that the existence of the parallel jurisdiction under employment legislation such as, relevantly, the UDA 1977, has had an inhibiting effect on the development of the common law. It seems that the so-called "*Johnson* exclusion area" has been extended, and it precludes the bringing before the courts of any employment disputes which seek to expand the common law in areas covered by statutory rights. (This is so even if the amounts sought to be recovered in such actions fall within the monetary limits applicable to the statutory scheme). It would seem to follow that, even if the preservation of a parallel right of action before the courts might, in principle, be an answer to an allegation that a statutory decision-maker—such as, for example, the CervicalCheck Tribunal—is carrying out the administration of justice, this could not apply to employment legislation.

ARTICLE 37 OF THE CONSTITUTION

137. In light of the finding that the determination of a claim for unfair dismissal and for the payment of wages in lieu of notice does not involve the administration of justice within the meaning of Article 34 of the Constitution, it is unnecessary to consider the arguments under Article 37. Those arguments had been advanced in the alternative only. By definition, decision-making which does not involve the administration of justice does not need to rely on the exception for the exercise of limited functions and powers of a judicial nature provided for under Article 37 of the Constitution.

PART III

ALLEGED BREACH OF ARTICLE 40.3 OF CONSTITUTION

138. The Applicant makes a series of arguments in the alternative. More specifically, it is submitted that, even if the High Court were to resolve the issues under Article 34 and 37 *against* the Applicant, there are separate grounds for saying that the procedures under the WRA 2015 are invalid as being in violation of the Applicant's rights under Article 40.3 of the Constitution. Four complaints are made as follows.

(i). There is no requirement that adjudication officers or members of the Labour Court have any legal qualifications, training or experience.

(ii). There is no provision for an adjudication officer to administer an oath or affirmation. There is no criminal sanction for a witness who gives false evidence at a hearing before an adjudication officer. (By contrast, the Labour Court can take evidence on oath).

(iii). There is no *express* provision made for the cross-examination of witnesses.

(iv). The proceedings before an adjudication officer are held otherwise than in public. (There is a requirement to publish the decisions, albeit on an anonymised basis).

(I). LEGAL QUALIFICATIONS

139. There are two strands to the Applicant's complaint that the WRA 2015 should stipulate that adjudication officers and members of the Labour Court hold a legal qualification. First, that as a matter of principle, the decision-makers should be required to hold a legal qualification. Secondly, that as a matter of practice, hearings which are conducted by non-legally qualified decision-makers are deficient. These two strands are addressed, in turn, below.

140. The principled objection to the absence of a requirement for a legal qualification is predicated largely on an analogy with the qualifications prescribed under statute for

judicial office. It is pointed out, correctly, that under the current legislation to be appointed to judicial office a person must have been a practising lawyer for a minimum period of time. For example, in order to be eligible for appointment to the High Court, Court of Appeal or Supreme Court, a person must be a practising barrister or practising solicitor of not less than 12 years standing. (Different rules apply where a sitting judge is to be appointed to a higher court).

141. With respect, there is an element of begging the question in this line of argument. It takes as its starting point an *assumption* that the role of an adjudication officer is equivalent to that of a judge. This assumption cannot be relied upon for the purposes of the present argument. By definition, the arguments advanced on behalf of the Applicant in this part of his case are made in the *alternative* only, i.e. these arguments only ever arise for consideration in the event that the court has already found against him on the principal plank of his case, namely the arguments in respect of Articles 34 and 37 of the Constitution. It is a given, therefore, that the arguments under Part III of this judgment fall to be assessed against a finding that the decision-making under the WRA 2015 does <u>not</u> involve the administration of justice. Any analogy with the eligibility criteria for judicial office is, therefore, inappropriate. Put shortly, there is no logical basis for saying that the holder of a non-judicial office should be subject to eligibility criteria equivalent to those for judicial office.

142. The Applicant has also sought to draw an analogy with the eligibility criteria prescribed for decision-makers under other pieces of legislation. In particular, reference is made to the Mental Health Tribunal; the Adoption Authority; the International Protection Appeals Tribunal; the Irish Financial Services Appeals Tribunal; and the Appeal Board established under the Censorship of Publications Act 1946.

143. More relevantly, the Applicant points to the fact that the Employment Appeals Tribunal (whose appellate function is now exercised by the Labour Court) had required that a legally qualified person sit on each division of the tribunal.

144. The essence of the Applicant's argument is that it is impermissible, *as a matter of constitutional law*, for the Oireachtas to authorise non-legally qualified individuals to adjudicate on claims for unfair dismissal or for the payment of wages in lieu of notice. The fact that in different legislative contexts, the Oireachtas has chosen to include a legal qualification as part of the eligibility criteria cannot be determinative of this question of constitutional law.

145. The Applicant is unable to identify any express provision of the Constitution which would impose an obligation for legal qualifications. Even in the case of judicial office, the Constitution itself does not expressly require that a judge hold a professional legal qualification. Rather, the eligibility criteria are prescribed by statute. In some jurisdictions, leading academics, for example, are eligible for appointment to the bench.

146. Even if one assumes for the sake of argument that it is *implicit* in the Constitution that, in addition to the obvious requirements for independence and integrity, a professional legal qualification is a prerequisite to appointment to judicial office, it is difficult to infer from that an obligation that other decision-makers must similarly hold a legal qualification. Article 34 of the Constitution represents the bulwark against an encroachment on the judicial function. Where decision-making falls outwith the administration of justice, then the choice as to the eligibility criteria for appointment as a decision-maker under any particular statutory scheme is quintessentially a matter for the Oireachtas. The courts will be respectful of the margin of appreciation properly afforded to the Oireachtas.

147. In examining eligibility criteria, the nature of the decision-making at issue would have to be considered in the round. Relevant factors would include, for example, (i) the potential impact of the decision-making on the rights and liabilities of affected persons; (ii) the nature of the decision-making and, in particular, whether it is closer to the policy end of the spectrum than to the determination of rights and liabilities; (iii) whether the decision-making calls for particular expertise, such as, for example, in relation to planning and environmental matters; (iv) the independence of the decision-maker; and (v) the extent to which guidance, by way of judgments, will be available from the courts.

148. The breadth and extent of modern legislation is such that many decision-makers will have to make decisions against a complex legislative background. Notwithstanding that such decision-makers must, of course, comply with and properly apply their governing legislation, it is nevertheless legitimate for the Oireachtas to afford priority to subject-matter expertise rather than to legal qualifications. An obvious example is provided by An Bord Pleanála. The legislation governing planning and environmental decision-making is very complex. Indeed, a recent study of the case load of the Supreme Court indicates that a significant portion of appeals are concerned with planning and environmental matters. There is no requirement, however, that any member of An Bord Pleanála hold a legal qualification. Rather, the procedure for the appointment of board members involves the nomination of candidates by various panels which represent relevant stakeholders such as, for example, persons whose professions or occupations relate to physical planning, engineering and architecture. Relevantly, this represents a change from the legal position when An Bord Pleanála was first established under the Local Government (Planning & Development) Act 1976. At that time, to be eligible for appointment as chairperson of An Bord Pleanála, a person had to be a sitting or retired High Court judge.

149. A similar movement away from legal qualification to subject-matter expertise is evident in the context of employment disputes. In both instances, it represents a legitimate legislative choice.

150. It is important to reiterate that this judgment is confined to the two instances of decision-making relevant to the Applicant's claims. These arise under the UDA 1977 and the Payment of Wages Act 1991. The adjudication upon such disputes does, of course, require the decision-maker to properly apply the law. For example, in some instances a dispute may arise as to whether the claimant qualifies as an "employee" or, alternatively, whether he or she had been engaged under a contract for services. This will require the decision-maker to consider and apply the relevant case law. The decision-making under these two Acts is unlikely, however, to give rise to the difficult or complex issues of EU law cited in the Applicant's written legal submissions.

151. In most instances, the dispute between the parties will turn largely on the factual circumstances of the case. A decision-maker with relevant experience in, for example, human resources or industrial relations, is competent to resolve such factual disputes.

152. In assessing the alleged invalidity of the legislative choice as to eligibility criteria for appointment, it is necessary to have regard to the extent to which guidance, by way of judgments, will be available to the decision-makers. The WRA 2015 makes express provision for the Labour Court to refer a question of law arising in proceedings before it to the High Court for determination, and for the parties to bring an appeal on a point of law to the High Court. These procedures ensure that where a claim gives rise to a novel or difficult point of law, then recourse to the courts is possible. The judgment delivered by the High Court will provide guidance for the resolution of future disputes giving rise to similar issues of law.

153. I turn next to the second strand of the argument, namely that the absence of legal qualifications has given rise to difficulties in practice. The evidence before the court does not demonstrate this. The State respondents have put before the court detailed evidence as to the type of qualifications which candidates must have in order to be eligible for appointment. The evidence also indicates that extensive training has been provided on an ongoing basis to adjudication officers and members of the Labour Court. None of this has been contradicted by the Applicant's side.

154. Instead, the Applicant seeks to rely on two independent experts, Mr Tom Mallon, BL and Mr Ciaran O'Mara, Solicitor. (I accept the submission made on behalf of the State respondents that a third deponent, Mr Eamonn O'Hanrahan, cannot properly be regarded as an independent expert in circumstances where he is the solicitor representing the Applicant in these proceedings. This is, obviously, no reflection on Mr O'Hanrahan's acknowledged expertise or integrity).

155. Without in any way wishing to diminish the acknowledged expertise of these two practitioners, the affidavit evidence filed falls far short of establishing the type of systemic failure contended for. The content of the two affidavits is in the most general terms, and both deponents acknowledge that they have deliberately avoided singling out individual failures.

156. For example, Mr Mallon states as follows.

> "[…] Whilst I accept that a number of the Adjudication Officers are properly qualified and have appropriate qualifications and experience, that is certainly not the case in respect of all of Adjudication Officers. A number of Adjudication Officers are practising solicitors or barristers. I acknowledge that some of the Adjudication Officers who are not qualified in the law have – by reason of their experience and general knowledge of such matters – competency to conduct a hearing but many lack competency to adjudicate issues of law which may be complex. I have to say however that a not insignificant proportion of the Adjudication Officers before whom I have appeared lacked sufficient qualifications or experience and, in some cases, they are not, in my

> view, capable of exercising the full range of powers under the 2015 Act and lack even the basic skill and ability to conduct a fair hearing. My concerns about the qualifications and experience of many Adjudication Officers apply equally to a number of the ordinary members of the Labour Court."

157. Insofar as the practice in respect of allowing cross-examination is concerned, Mr Mallon states as follows.

> "In brief reply to paragraph 43, whilst I accept that the facility to cross examine witnesses is more common it is not yet granted in every single case. I do however believe that there has been a change from the situation which was adopted in the early days of the Workplace Relations Commission when in my view there was a policy to deny cross examination and to reduce the time available for cases to a minimum. In this regard there continue to be serious issues in relation to the administration of hearings, including the assignment of limited time and difficulties in getting second and subsequent hearing dates, however I believe and am advised that those matters may be outside the scope of the proceedings."

158. Mr O'Mara states as follows.

> "[…] It has been my experience that a number of Adjudication Officers simply do not understand some of the more difficult questions that arise. Whilst it would not be appropriate for me to refer to any specific case I say that I have appeared before Adjudication Officers in cases where I firmly believe that the Adjudication Officer involved quite simply did not have sufficient understanding to deal with the important matters before them."

159. The vagueness of the affidavit evidence is such that it is not possible for the court to determine, as a matter of fact, that the absence of a statutory requirement that an adjudication officer hold a legal qualification has resulted in a systemic failure in the hearing and adjudication of claims. The court has been provided with no practical examples of alleged incompetence on the part of an adjudication officer; no details of the qualifications held by the adjudication officers said to have been incompetent; nor any details of the percentage of the overall number of claims processed by the Workplace Relations Commission of which Mr Mallon and Mr O'Meara have direct experience.

160. In this regard, the evidence from the State respondents indicates that the Workplace Relations Commission hears and determines a very significant number of claims each year, running into the thousands. There is no indication from the affidavits filed by the two independent experts as to what number of cases they have personal experience of.

161. Moreover, the point made on behalf of the State respondents to the effect that, almost by definition, practitioners of this level of expertise will only have been involved in the more difficult cases is well made. Accordingly, the lens through which these experts are looking at the process is likely to overlook the vast majority of cases.

162. Finally, for the sake of completeness I do not think that any inference of systemic failure can be drawn from the particular circumstances in which the Applicant's claim came to be dealt with during the period October to December 2016. Whereas it is regrettable that a situation came about whereby an adjourned hearing resulted in what purported to be a final conclusive determination of the proceedings, there is no statistically sound basis for seeking to draw wider inferences from what is, literally, one instance in a case load of thousands.

163. A detailed affidavit has been sworn in response to those of Mr O'Mara and Mr Mallon by Mr David Small, who is the Director of Adjudication in the Workplace Relations Commission. Mr Small reiterates certain points previously made by Ms Tara Coogan in an earlier affidavit sworn on behalf of the State respondents. Mr Small explains that as of the date of the swearing of his affidavit in January 2020, there were 51 adjudication officers holding warrants of appointment under the Workplace Relations Act 2015. A breakdown of their qualifications and experience is then set out as follows.

> "[…] Of these, 9 of those in the role of Adjudication Officer are civil servants who hold the grade of Assistant Principal Officer and are former Equality Officers who served in the Equality Tribunal previously. There are five former Rights Commissioners. The remainder are persons who have been appointed by the Public Appointments Service in the manner described in Ms Coogan's

> Affidavit. Adjudication Officers hold a variety of educational and professional qualifications and come from a variety of professional backgrounds, however as explained in her affidavit of July 2019, in order to be eligible for appointment by the Public Appointments Service, candidates are required to have experience in at least one of Employment Law, Human Resources Management and Industrial Relations and will generally have had experience as members of or appearing before tribunals, committees and other decision-making bodies in the employment rights, equality rights and industrial relations arenas. Of the persons external to the Civil Service who hold the position of Adjudication Officer (i.e. those appointed by the Public Appointments Service) I am aware that 13 are qualified as either barristers or solicitors while other adjudication officers hold law degrees or qualifications in employment law."

164. Mr Small then goes on to explain that all adjudication officers appointed by the Public Appointments Service are required to complete and graduate from the Workplace Adjudication Programme currently administered and delivered by the National College of Ireland. This is said to be a Level 8 qualification for the purposes of the National Framework of Qualifications. It is further explained that the Workplace Relations Commission hold ongoing continuous professional development meetings for adjudication officers and provides them with appropriate administrative and research support.

(II). NO REQUIREMENT FOR OATH OR AFFIRMATION

165. Counsel on behalf of the Applicant, Mr Cian Ferriter, SC, submits that it is a fundamental principle of the common law that, for the purpose of trials in either criminal or civil cases, *viva voce* evidence must be given on oath or affirmation. The judgment of the Supreme Court in *Mapp (A Minor) v. Gilhooley* [1991] 2 I.R. 253 is cited in support of this proposition. Counsel is critical of the suggestion made on behalf of the State respondents that the finding in *Mapp (A Minor) v. Gilhooley*, to the effect that the evidence of an eight year old child could not be received because it was unsworn, is "somewhat

anachronistic", pointing out that the judgment dates from 1991, and not from the nineteenth century.

166. The common law principle is said to extend to non-judicial decision-making bodies. Counsel submits that, in the case of any significant statutory tribunal, there is always legislative provision made for sworn evidence, precisely because that is the common law requirement. The relevant provisions of the Medical Practitioners Act 2007 are cited by way of example. In particular, reference is made to there being "a full right to cross-examine witnesses" under section 65 thereof, and to the Fitness to Practise Committee being authorised to administer oaths for the purpose of an inquiry. Reference is also made to the Part 6 of the Residential Tenancies Act 2004. It is said that it is hard to find a tribunal which does not have the power to administer an oath. The requirement for an oath or affirmation carries with it the sanction of perjury.

167. Where there are going to be contested facts, the common law requires that the resolution of same be done on sworn evidence. The requirement for an oath or affirmation is said to add to the weight and gravity of the process of giving evidence on pain of sanction. The evidence giver is going to be careful that their evidence is correct. The requirement for an oath or affirmation is not a Victorian trapping, but an engine to ensure the accuracy of evidence.

168. The desire for informality in a decision-making process cannot trump legal rights, nor can it trump the fundamental requirement of the common law. The burden shifting provisions of the UDA 1977, which "deem" a dismissal to have been unfair unless there were substantial grounds justifying the dismissal, do not displace or excuse the necessity for contested facts to be resolved on sworn testimony. The absence of a criminal sanction for a witness who gives false evidence before an adjudication officer is said to render that part of the legislation invalid.

169. In response, counsel for the State respondents, Ms Nuala Butler, SC, contends that no authority has been cited for the proposition that there is a constitutional requirement that evidence must always be given on oath or affirmation. It does not follow as a corollary from the fact that there is a *general practice* that evidence should be on oath or affirmation that this is a constitutional requirement.

170. The judgment in *Mapp (A Minor) v. Gilhooley* is described as "somewhat anachronistic". The context is said to be changing all the time. We have now moved to a position where the profession of religious faith is a much more private matter, and individuals are protected from religious discrimination by legislation.

171. The parliamentary history leading up to the enactment of the Workplace Relations Act 2015 indicates that there had been a deliberate legislative choice not to provide for evidence on oath. Counsel cites what she describes as the *travaux préparatoires*, namely the submission presented by the Minister to the Oireachtas Committee on Jobs, Enterprise and Innovation in July 2012, which indicates (at page 41) that the original proposal had been that evidence would be taken on oath.

172. This is said to have been a choice which was legitimately open to the Oireachtas: the procedure under the WRA 2015 is intended to be informal, more accessible, and less expensive. There would have to be a constitutional right to cross-examination before the legislation could be challenged on this basis. No such constitutional right exists. The circumstances underlying the judgment in *In re Haughey* [1971] I.R. 217 are distinguishable. Here, there is a statutory procedure whereby once dismissal has been asserted, then the burden of proof shifts to the employer to justify the dismissal. This is a very different situation from one where, as in *In re Haughey*, an allegation has been made against an individual which that person has to defend. In such a scenario, there is a right to confront your accuser.

Findings of the court

173. There does not appear to be any authority directly on point on the question of whether there is a constitutional requirement that evidence be given on oath or affirmation, subject to penal sanction in the case of perjury. It seems unlikely that there is a blanket entitlement in this regard. Rather, the case law indicates that whereas a person impacted by decision-making which affects their rights or liabilities is entitled to constitutional justice, the precise nature and extent of the fair procedures required in any particular case will depend on the context. There is a spectrum of decision-making, with criminal proceedings lying at one extreme. A criminal trial attracts the full panoply of fair procedures. These include the requirement that evidence be on oath or affirmation; rights to cross-examine one's accusers; a right to legal representation by solicitor and counsel; and a right to legal aid to pay for that legal representation (subject to a financial means test). Disciplinary proceedings against professionals such as, for example, solicitors, doctors and nurses, lie close to this end of the spectrum of decision-making. The final decision to strike off such a professional is reserved to the High Court, and shares many of the procedural safeguards of a criminal trial.

174. The challenge for the court in the present case is as to where to locate a claim for unfair dismissal within the spectrum of decision-making. The case law does appear to suggest that employment as a *professional* has a special status, and that a decision to strike-off a professional has significant reputational effects. The heightened safeguards identified for professionals, in cases such as *Law Society of Ireland v. Coleman* [2018] IESC 80, cannot necessarily be read across to other employment contexts. Nevertheless, for a person to be unfairly dismissed from non-professional employment also has potentially significant consequences. It may, for example, represent a breach of their contractual rights (including any rights implied by statute). Contractual rights are, in principle,

capable of being characterised as property rights under the Constitution. The unfair dismissal may also adversely affect their constitutional right to earn a livelihood and their constitutional right to good name. An individual who has been dismissed may have difficulty in obtaining new employment.

175. It is also relevant to consider the nature of the controversies which are likely to arise in contested employment law cases. Such disputes are likely to turn on the credibility of witnesses, with an employer and employee offering different versions of the same events. Put otherwise, the disputes are likely to turn on *issues of fact* rather than of opinion or expertise. This is to be contrasted with, for example, a hearing before an expert decision-maker such as An Bord Pleanála.

176. It would seem, therefore, that there is an argument to be made that the hearing of evidence on oath or affirmation would be appropriate in the context of a claim for unfair dismissal. To say that it might be appropriate, however, falls far short of finding that this is a constitutional requirement. There is much to be said for the submission made on behalf of the State respondents to the effect that the informality of hearings before an adjudication officer confers a benefit to claimant-employees in terms of speed and expedition. These are legitimate objectives for the Oireachtas to consider.

177. Although not pressed by the parties, it occurs to me that the existence of a right of appeal to the Labour Court is significant in assessing the constitutional validity of the decision-making scheme. The two-tier structure ensures that the more informal hearing at first instance is counterbalanced by the right of appeal to the Labour Court. Crucially, the Labour Court is empowered to take evidence on oath. This is provided for under section 21 of the Industrial Relations Act 1946 (as amended), as follows.

> 21(1). The [Labour Court] may, for the purposes of any proceedings before it under this Act, the Unfair Dismissals Act 1977 or Part 4 of the Workplace Relations Act 2015, or any investigation under the

> Industrial Relations (Amendment) Act 2001, do all or any of the following things—
>
> (a) summon witnesses to attend before it,
>
> (b) take evidence on oath and, for that purpose, cause to be administered oaths to persons attending as witnesses before it,
>
> (c) require any such witness to produce to the Court any document in his power or control.
>
> (2) A witness before the Court shall be entitled to the same immunities and privileges as if he were a witness before the High Court.
>
> (3) If any person—
>
> (a) on being duly summoned as a witness before the Court makes default in attending, or
>
> (b) being in attendance as a witness refuses to take an oath legally required by the Court to be taken, or to produce any document in his power or control legally required by the Court to be produced by him, or to answer any question to which the Court may legally require an answer,
>
> he shall be guilty of an offence under this section and shall be liable on summary conviction thereof to a fine not exceeding ten pounds.

178. In analysing the decision-making, it is appropriate to look to the full range of procedures open to a party. The judgment of the Supreme Court in *Crayden Fishing Company v. Sea Fisheries Protection Authority* [2017] IESC 74; [2017] 3 I.R. 785, [33] provides very helpful guidance in this regard.

> "Returning then to the facts of this case, I consider it is necessary to analyse the entirety of the process here. While an appeal in any administrative procedure is not a requirement of natural justice, nevertheless the existence of a full appeal is always relevant in considering the overall fairness of a process. Again, if there is a full hearing at what might be termed first instance, then it may be unobjectionable if an appeal proceeds on a more limited basis. Indeed, in the case of an appeal from the High Court to the Court of Appeal or Supreme Court, this is precisely what occurs. The same may be said in reverse: a full fair hearing before an adverse decision may mean that the initial process may proceed on a more limited basis. However, it would be wrong to extrapolate from any decision endorsing a particular procedure some general principle that that

> procedure is always unobjectionable in a different legal and factual context. Something which takes place in a lengthy process involving review and appeal may be insufficient if it is part of a single hearing and process."

179. It is true, of course, that the scheme of the WRA 2015 does not provide for a "unitary" decision-making process, in that the decision of an adjudication officer is a stand-alone decision, and is final unless it is appealed to the Labour Court. Put otherwise, it is not an interim or preliminary decision, which requires to be affirmed by the Labour Court in order to become legally effective. A party who wishes to avail of evidence on oath or affirmation is put to the trouble of having to bring an appeal to the Labour Court. Nevertheless, it seems to me that the existence of the safeguard of an appeal is an important factor in assessing the Applicant's arguments.

180. Again, it seems to me that a useful analogy can be drawn with the planning legislation. The Planning and Development Act 2000 ("***PDA 2000***") provides for a two-tier decision-making process in respect of (conventional) planning applications. The "fair procedure" rights available at first instance, before the planning authority, are notably less generous than those at the second stage, by way of appeal to An Bord Pleanála. For example, there is no provision for an oral hearing at first instance. Yet, when considered in the round, the decision-making process fulfils the requirements of constitutional justice.

181. Having regard to the foregoing considerations, I have concluded that there is no constitutional requirement that decision-making of the type arising in a claim for unfair dismissal, or for the payment of wages in lieu of notice, must be performed on the basis of sworn evidence, i.e. evidence on oath or affirmation subject to a penal sanction in case of perjury. First, the nature and extent of the rights at issue falls further along the spectrum of decision-making than either criminal proceedings or disciplinary proceedings against a professional. The procedural requirements are therefore less stringent. Moreover, there are countervailing factors in the context of employment

disputes which also indicate that a more informal and expeditious process is a legitimate legislative choice. In many instances, the monetary value of the claim will be modest, and the imposition of complex procedures involving potentially lengthy and costly hearings is something which may legitimately be taken into account by the Oireachtas. It is unnecessary, therefore, that there must be sworn evidence (at least not at first-instance).

182. Secondly, and in any event, even if there were a constitutional requirement for sworn evidence, this can legitimately be achieved by providing for sworn evidence on appeal. More specifically, when looked at in the round, the two-tier decision-making under the WRA 2015 ensures fair procedures by allowing for sworn evidence on appeal before the Labour Court.

(III). NO *EXPRESS* PROVISION FOR CROSS-EXAMINATION

183. On behalf of the Applicant, Mr Ferriter, SC, submits that where there are material conflicts of fact, and fundamental rights are involved, then there must be cross-examination. The gravity of the rights engaged in employment disputes—which include the right to a good name and the right to a livelihood—are such that there should be a constitutional right to full cross-examination. The relevant provisions of the Medical Practitioners Act 2007 are, again, cited by way of example: that legislation expressly prescribes "a full right to cross-examine witnesses".

184. Counsel submits that there are limits to the presumptions identified in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at 341). In particular, a statutory provision which is clear and unambiguous cannot be given an opposite meaning. It is further submitted that the presumption runs into the ground on the facts of the present case, where the Applicant has adduced expert evidence to the effect that

there are systemic problems in respect of the cross-examination of witnesses. These problems are said to arise because of a structural flaw in the WRA 2015, i.e. the failure to provide for a full right of cross-examination.

185. The Applicant is seeking a declaration, similar to that granted in *Maguire v. Ardagh* [2002] IESC 21; [2002] 1 I.R. 385.

186. In response, Ms Butler, SC, began her submission by confirming that the State accepts that if natural justice in a particular context requires that there be a right to cross-examine, then it must be afforded. If it is not afforded, then judicial review would lie. There is nothing in the statutory framework under the WRA 2015 which excludes a right to cross-examine, and the effect of the presumption in *East Donegal Co-Operative* is that proceedings before an adjudication officer will be conducted in accordance with constitutional justice. Evidence has been put before the court, by way of exhibits, of the guidance which is provided to adjudication officers.

187. A document entitled "Procedures in the Investigation and Adjudication of Employment and Equality Complaints" (October 2015) states as follows (at pages 6/7).

> "The adjudication officer can ask questions of each party and of any witnesses attending. He or she will give each party the opportunity to give evidence, to call witnesses, to question the other party and any witnesses, to respond and to address legal points. Witnesses may be allowed to remain or may be asked to come in only for their own evidence. The adjudication officer will decide what is appropriate, taking into account fair procedures, arrangements which will best support the effective and accurate giving of evidence and the orderly conduct of the hearing."

188. The "Guidance Notes for a WRC Adjudication Hearing" (September 2016) provide that a party or their representative will be given the opportunity to question the other parties and the other witnesses regarding the evidence which they have given.

189. Counsel cites the following passage from *Kiely v. Minister for Social Welfare* [1977] I.R. 267 (at 281).

> "[…] This Court has held, in cases such as *In re Haughey*, that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally—to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like—but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently-cited dictum of Tucker L.J. in *Russell v. Duke of Norfolk*, 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'".

190. The WRA 2015 is said to allow for the possibility of cross-examination where required, and the guidance issued to the adjudication officers envisages it. It would be contrary to the presumption in *East Donegal Co-Operative* for the court to assume that cross-examination will not be allowed where required.

Findings of the court

191. The Applicant's complaint that the WRA 2015 does not expressly provide for a right to cross-examine witnesses shares some ground with its earlier complaint that there is no provision for the taking of evidence on oath or affirmation. In each instance, the Applicant's argument places emphasis on the importance of cross-examination in allowing a decision-maker to resolve factual disputes. The difference between the two complaints, however, is that whereas an adjudication officer is not empowered to administer an oath or affirmation, they do have an implicit power to allow cross-examination. Put otherwise, the complaint in respect of cross-examination reduces itself to one predicated on the absence of an *express* power or duty to allow cross-examination.

192. A power to allow cross-examination arises, by necessary implication, from the provisions of section 41 of the WRA 2015 (and the equivalent provisions to be found under section 8 of the UDA 1977). An adjudication officer is required to give the parties to the complaint

or dispute an opportunity (i) to be heard, and (ii) to present any evidence relevant to the complaint or dispute. It is inherent in these statutory provisions that an adjudication officer must allow the parties to test the evidence of the other side, by way of cross-examination. A party cannot be said to have been afforded a right to be heard if there is no opportunity to test the other side's evidence.

193. The height of the Applicant's argument is that there should be an express requirement to allow cross-examination in all cases. This argument cannot, however, be reconciled with the presumption applicable to administrative proceedings, as identified in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 at 341 ("***East Donegal Co-operative***").

194. The following passage from that celebrated judgment bears repeating.

> "[…] At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."

195. It is to be presumed, therefore, that an adjudication officer, when adjudicating on a complaint or dispute, will conduct the proceedings in accordance with the principles of constitutional justice. Not every claim will require the cross-examination of witnesses. In some instances, for example, the claim may turn on threshold issues, such as whether the claimant has been employed for the requisite period of time, or whether they meet the definition of an "employee" at all. In other instances, the facts will not be in issue, but there may be a dispute as to whether, on the agreed facts, the dismissal was justified.

196. In those cases where cross-examination is required, then the adjudication officer is to be presumed to allow for same. If he or she fails to allow cross-examination, then this

would, in principle, represent a good ground for judicial review. (The claimant might instead elect for an appeal to the Labour Court).

197. It would be inconsistent with the presumption identified in *East Donegal Co-Operative* to condemn the WRA 2015 on the basis that it does not prescribe the procedure for determining claims in detail.

(IV). RIGHT TO A HEARING IN PUBLIC

198. The Applicant objects that the proceedings before an adjudication officer are held otherwise than in public. There are three strands to this objection; (i) it is said to represent a breach of an individual's personal rights under Article 40.3 of the Constitution; (ii) a public hearing is required by analogy with Articles 34 and 37 of the Constitution; and (iii) a public hearing is required under Article 6 of the European Convention on Human Rights.

199. Before turning to consider each of these strands in turn, it is necessary first to consider the publication requirements which apply to decision-making under the WRA 2015.

200. The proceedings before an adjudication officer are addressed as follows under section 41(13) and (14) of the WRA 2015 (as applied to the UDA 1977, by section 8 thereof).

> (13) Proceedings under this section before an adjudication officer shall be conducted otherwise than in public.
>
> (14) The Commission shall publish on the internet in such form and in such manner as it considers appropriate every decision (other than information that would identify the parties in relation to whom the decision was made) of an adjudication officer under [subsection (1) of section 8 of the Act of 1977].

201. As appears, although the proceedings themselves are conducted in private, there is an express obligation to publish every decision on what might be described as an "anonymised" basis.

202. The obligations of the Labour Court are addressed as follows at section 44 of the WRA 2015.

> (7) Proceedings under this section shall be conducted in public unless the Labour Court, upon the application of a party to the appeal, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public.

203. Returning to the Applicant's arguments, it may be convenient to address the first and second arguments together. The Applicant seeks to rely variously on Articles 34.1, 37 and 40.3 of the Constitution to conjure up a constitutional right to a public hearing before a statutory decision-maker. No authority is cited in support of the asserted constitutional right. Instead, the implication seems to be that the values which are protected by the requirement that justice shall be administered in public (save in such special and limited cases as may be prescribed by law) extend, by analogy, to statutory decision-making. The Applicant cites a number of cases which illustrate the values underlying Article 34.1, namely that justice must not only be done, but be seen to be done, in order to ensure respect for the rule of law and to maintain public confidence in the administration of justice. The requirement of a hearing in public has been described as a check upon the power which can be exercised by judges. Reliance is placed, in particular, on *In Re R Ltd* [1989] I.R. 126; *Irish Times Ltd v. Ireland* [1998] 1 I.R. 359; and *Gilchrist v. Sunday Newspapers Ltd* [2017] IESC 18; [2017] 2 I.R. 284.

204. It is not immediately apparent that the values protected by the constitutional requirement that justice be administered in public can be "read across" to decision-making by non-judicial bodies. The judicial power is one of the three branches of government, and there is an obvious importance in ensuring that the power is, generally, exercised in public. This rationale applies with less force to statutory decision-makers who, by definition, are exercising much more limited powers.

205. Even in the case of the judicial power, there are exceptions to the requirement that justice be administered in public. In some instances, a requirement for a public hearing might deter individuals from having recourse to the courts, on the basis that the price to be paid in terms of the loss of privacy is too high. It is for this reason that family law proceedings are normally heard *in camera*. The rationale for this has been explained as follows by O'Donnell J. in *Gilchrist v. Sunday Newspapers Ltd* [2017] IESC 18; [2017] 2 I.R. 284, [42].

> "[…] A couple should not have to go to the lengths of contemplating withdrawing an application for a divorce, separation, or for custody of children, to secure a hearing in private of personal matters. It is true that the interest of administration of justice between the parties is engaged in such a case, but so too is the importance of protecting family life and of avoiding the insult to the dignity of the individual by requiring that intimate matters be aired in a public hearing, with a risk of wider publicity. Conversely, one party to a relationship ought not to be able to bring pressure to bear on the other and perhaps more sensitive partner by demanding a hearing in public as a constitutional entitlement. In a case where justice cannot be done or cannot be done without damage to important constitutional values, it is appropriate to provide for the possibility of a hearing other than in public, albeit that it is a matter for the court to decide whether any departure from the standard of a full trial in public is required and if so what measures are the minimum necessary."

206. The judgment in *Gilchrist* is also instructive in that it emphasises that any departure from the general rule that justice must be administered in public should be considered *incrementally*, by asking whether there are any lesser steps which would meet any legitimate interests involved. The choice is not a binary one between (i) a hearing fully in public, or (ii) one completely *in camera*.

207. Even if one assumes for the purposes of argument that a presumption in favour of a public hearing—analogous to that applicable to the administration of justice under Article 34.1—arises in the context of a claim for unfair dismissal, the statutory requirements of the WRA 2015 strike a proper balance. More specifically, the desirability of a public hearing must be balanced against the risk that publicity might

deter some employees from pursuing a claim. An employee might be concerned that the public record might have implications for their future employment. An employee who is successful in a claim for unfair dismissal might, unfairly, be seen by prospective employers as a "troublemaker". The legislation achieves a compromise between publicity and privacy by ensuring that the decisions must be published, albeit on an anonymised basis. The reasoning of the decision-maker is thus publicly available, and this ensures a check on arbitrary decision-making. At the same time, the fact that the parties are not identified ensures privacy.

208. Even if this analysis is incorrect, and there should be a public hearing, this is, in any event, achieved by the provisions governing the Labour Court. For reasons similar to those discussed at 178 above, it is appropriate to have regard to the decision-making process in the round. It is necessary, therefore, to consider not only the first instance decision of an adjudication officer, but also the appellate stage before the Labour Court. As noted earlier, section 44(7) of the WRA 2015 provides that proceedings before the Labour Court shall be conducted in public unless the Labour Court determines otherwise.

209. In summary, therefore, my findings on this issue are as follows. First, it is doubtful whether the values protected by the constitutional requirement that justice be administered in public can be "read across" to decision-making by non-judicial bodies. Secondly, even if one assumes for the purposes of argument that a presumption in favour of a public hearing, analogous to that applicable to the administration of justice under Article 34.1, arises in the context of a claim for unfair dismissal, the legislative requirement for a public decision but a private hearing represents a legitimate legislative choice. Thirdly, any requirement for a public hearing, is, in any event, achieved by the provisions governing the appeal to the Labour Court.

European Convention on Human Rights (Article 6(1))

210. Article 6(1) of the European Convention on Human Rights ("***ECHR***") provides as follows.

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

211. The ECHR is not directly applicable in the domestic legal order, but rather is given effect to through the provisions of the European Convention on Human Rights Act 2003. In particular, there is an obligation to interpret and apply domestic law, in so far as is possible, in a manner compatible with the State's obligations under the provisions of the ECHR. (This is subject to the rules of law relating to such interpretation and application).

212. It is not, strictly speaking, necessary for the purposes of this judgment to decide whether a decision on his claim for unfair dismissal or for a minimum notice period represents the "determination" of the Applicant's "civil rights and obligations" within the meaning of Article 6(1). This is because the State's response to this aspect of the judicial review proceedings is to say that any requirement for a "public hearing" is met by a public hearing at the appeal stage, i.e. before the Labour Court.

213. Counsel for the State respondents, Mr Mark Dunne, SC, helpfully took the court through a number of judgments of the ECtHR including *Malhous v. The Czech Republic* [GC], no. 33071/96, 12 July 2001; *Buterlevičiūtė v. Lithuania*, no. 42139/08, 12 January 2016; and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, 6 November 2018.

214. The principles are summarised as follows in the last of these three judgments.

> "192. The Court has previously examined the question whether the lack of a public hearing at the level below may be remedied by a public hearing at the appeal stage. In a number of cases it has found that the fact that proceedings before an appellate court are held in public cannot remedy the lack of a public hearing at the lower levels of jurisdiction where the scope of the appeal proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of the facts and an assessment as to whether the penalty was proportionate to the misconduct (see, for example, in a disciplinary context, *Le Compte, Van Leuven and De Meyere*, cited above, § 60; *Albert and Le Compte*, cited above, § 36; *Diennet*, cited above, § 34; and *Gautrin and Others v. France*, 20 May 1998, § 42, Reports 1998-III).
>
> If, however, the appellate court has full jurisdiction, the lack of a hearing before a lower level of jurisdiction may be remedied before that court (see, for example, *Malhous*, cited above, § 62, and, in a disciplinary context, *A. v. Finland* (dec.), no. 44998/98, 8 January 2004, and *Buterlevičiūtė v. Lithuania*, no. 42139/08, §§ 52-54, 12 January 2016)."

215. As appears, the ECtHR confirmed that a public hearing before an appellate court may remedy what would otherwise be a breach of Article 6(1) at a lower level of jurisdiction. This is subject to the requirement that the appellate court have "full jurisdiction".

216. These principles apply to the determination of the two claims brought by the Applicant. Whereas there is no provision for a public hearing before an adjudication officer, at first-instance, an appeal before the Labour Court shall be conducted in public, save in special circumstances. The appeal is by way of full *de novo* hearing, and thus the requirement that the appellate court have "full jurisdiction" is fulfilled.

PART IV

CONCLUSIONS AND FORM OF ORDER

217. The powers exercised by adjudication officers and the Labour Court under Part 4 of the Workplace Relations Act 2015 ("***the WRA 2015***") exhibit many of the characteristics of the administration of justice. Those two statutory bodies have been empowered to determine employment law disputes, and do so by way of an *inter partes* hearing between the claimant-employee and their employer. In the case of a claim for unfair dismissal, the remedies which can be awarded are significant, and, in some instances, would exceed the general monetary jurisdiction of the Circuit Court. More specifically, a determination may direct re-instatement or re-engagement of the employee, or the payment of a sum equivalent to two years' salary.

218. Crucially, however, the decision-making under the WRA 2015 lacks one of the essential characteristics of the administration of justice, namely the ability of a decision-maker to enforce its decisions. The necessity of having to make an application to the District Court to enforce a decision of an adjudication officer or the Labour Court deprives such determinations of one of the essential characteristics of the administration of justice. Whereas the function to be exercised by the District Court is a narrow one, it cannot be dismissed as a mere rubber-stamping of the earlier determination. The District Court's discretion to modify the form of redress represents a significant curtailment of the decision-making powers of the adjudication officers and the Labour Court. The District Court can, in effect, overrule their decision to direct that the employee be re-instated or re-engaged.

219. A decision-maker who is not only reliant on the parties invoking the *judicial power* to enforce its decisions, but whose decisions as to the form of relief are then vulnerable to being overruled as part of that process, cannot be said to be carrying out the administration of justice.

220. It follows, therefore, that the Applicant's contention that the determination of (i) a claim of "unfair dismissal", and (ii) a claim for payment in lieu of notice, are matters which are properly reserved to judges appointed in accordance with the Constitution is not made out.

221. The Applicant's alternative argument to the effect that the procedures prescribed under the Workplace Relations Act 2015 are deficient is also not well founded.

222. The constitutional challenge to the validity of the Workplace Relations Act 2015 is, therefore, dismissed.

223. The State respondents have already conceded that the decision made on 16 December 2016 should be set aside by an order of *certiorari*. I propose to make an order to that effect, and to remit the claims pursuant to the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991 to the Director General of the Workplace Relations Commission to be referred to another adjudication officer for rehearing.

224. A stay will be placed on these orders for twenty-eight days pending the making of an appeal to the Court of Appeal or the making of an application for leave to appeal to the Supreme Court. The stay will continue pending the determination of any appeal made.

225. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

226. The parties are requested to correspond with each other on the question of the appropriate costs order. In default of agreement between the parties on the issue, short written submissions should be filed in the Central Office within fourteen days of today's date.

Appearances

Peter Ward, SC and Cian Ferriter, SC (with them Darach MacNamara and Nóra Ní Loinsigh) for the Applicant instructed by Eamonn O'Hanrahan Solicitor

Nuala Butler, SC and Mark Dunne, SC (with them Aoife Carroll) for the Respondents instructed by the Chief State Solicitor