An Chúirt Uachtarach

The Supreme Court

Clarke CJ
O'Donnell J
McKechnie J
MacMenamin J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2020:000066
[2020] IESC 000
High Court record number 2017/146 JR
[2020] IEHC 178

Between

Tomasz Zalewski
Applicant/Appellant

- and -

The Workplace Relations Commission, An Adjudication Officer [Y], Ireland and the Attorney General
Respondents

-and-

Buywise Discount Stores Limited
Notice Party

Judgment of Mr Justice Peter Charleton delivered on Tuesday 6th April 2021

1. Following the Unfair Dismissals Act 1977, employees have the right not to be sacked, excepting substantial reasons of competence or qualifications. Up to the Workplace Relations Act 2015, unfair dismissals cases were heard by a tribunal with a right to a complete rehearing in the Circuit Court. This dissenting judgment concerns the constitutionality of the sections of the 2015 Act which abolished rights of appeal to a court, save for the referral of a point of law. Does the adjudication by a State official of unfair dismissal claims constitute an adjudication which Article 34.1 of the Constitution requires to "be administered in courts by judges appointed" as such, or are such adjudications, instead, "the exercise of limited functions and powers of a judicial nature" which are excepted by Article 37.1? Is, further, the issuing of a District Court order for enforcement as required by the 2015 Act consequent on such an adjudication such as to validate the

process within the administration of justice by courts; or, as the Act demands, is a court order premised on a hearing excluding the employer unconstitutional?

Issue for adjudication

2. Correctly deciding what happened to Mr Zalewski to get him sacked from his job in Buywise Discount Stores in Dublin would tax the abilities of a professional judge. This unfair dismissal case does not involve any fine ruling as to points of precedent, law or statutory interpretation; adjudicating his case does require experience of how people behave, patience in listening to two starkly different sets of factual assertions and a determination to come to fair findings that will reflect as far as is possible the actual facts as drawn from a haze of contradictory assertion. Mr Zalewski had a job, but, as and when he applied to the Workplace Relations Commission for redress for unfair dismissal, he had become unemployed through having been summarily sacked for improper conduct, or so his employer claimed. His contract of employment has been repudiated. First at a brief hearing by his employer concluding he should be told to leave and then through that decision being affirmed by the decision maker's father on an internal workplace appeal. Where does this leave Mr Zalewski? Many decisions on fair procedures centre on the constitutionally protected right to enjoy one's reputation; *In re Haughey* [1971] IR 217, 265. To the ordinary working person, of more importance than reputation is being actually able to earn a living. Work bestows dignity. Work is a necessary part of psychic balance. It is work which puts bread on the table. And when that bread is earned through honest labour, it is properly a source of pride for those who have put effort into their livelihood: *Imíonn an tuirse ach fanann an tairbhe*. Those who work hard, who really try, are an asset to any employment for which they are qualified.

3. Having a contract of employment repudiated through dismissal makes the immediate future of the dismissed worker one of real uncertainty. The right to work is put in jeopardy. A new job has to be found. A new employer has to be convinced that the prospective employee will, firstly, knuckle down to the task with the competence or qualifications he or she possesses, be these experience or a formal diploma or natural physical attributes, and, secondly, enhance the workplace through the content of their character. Just as no one would wish to engage an incompetent or a sluggard, nor would any employer knowingly choose to engage a thief.

4. Yet, the reasons given by Buywise Discount Stores for the repudiation of Mr Zalewski's employment involve all those faults. If true, these are almost insurmountable obstacles to a working person's value in the marketplace. A dismissed worker ordinarily will need a reference. References come in various forms, even if not notifying summary dismissal: that a person has left of their own volition and after proper notice; that an employee was made redundant; that the employment terminated by mutual agreement. Each of these carry resonances beyond the skeletal appearance of language. Furthermore, many contemporary references are not in writing but constitute supplying contact details of former employers to prospective employers. Hence, what may follow is the exchange of open-ended information rather than a formal declaration, itself of limited value. This particular dismissed person is in a very bad situation. What is Mr Zalewski to do? He went to the Workplace Relations Commission seeking justice, that a true and fair adjudication be carried out as to the facts leading to his dismissal and as to who was in the right and who was in the wrong and as to whether emotion and supposition supplanted reasonableness in the mind of his employer Buywise Discount Stores. He was as badly let down by that appeal to justice as was possible. Yet, this was the only system from which he could seek

redress, that mandated by the State since 2015 to deal with unfair dismissals, one with no appeal on the facts to any court. *An luibh ná faightear is í a fhóireann.*

Disputed circumstances

5. These are the basic circumstances. Mr Zalewski worked from March 2012 to April 2016 in a general shop trading under the Costcutter brand owned by Buywise Discount Store. The place was plagued by theft: shoplifting and robbery. He was a security guard initially, but attained the rank of supervisor from December 2014. A year later, he was provisionally promoted to assistant manager, but this did not work out. He was reverted to his former role. During this, he was present for robberies in the store: one using a knife and one using a firearm. Most seriously, in October 2014, both pepper spray and a gun were used in robbing the shop, the firearm being actually discharged. Mr Zalewski initiated a personal injuries action against his employer, presumably a negligence claim of an unsafe system or place of work, seeking damages for having been traumatised by being sprayed with a noxious substance and by a gun being discharged.

6. In April 2016, the manager of the shop became emotionally troubled over the presence in the store of a person he believed to be a repeat shoplifter and, apparently, by the fact that Mr Zalewski had not arrested her. He and another employee were subjected to a dressing down involving, it is claimed, the all-too-common use of expletives. Mr Zalewski got upset, went home and sought medical advice. This was regarded by his employer as gross misconduct. Matters seemed to calm and the manager invited Mr Zalewski in for a chat, apologising for the conduct of the meeting over the suspected shoplifter. But, on returning after a few days sick leave, he was called to another meeting. Apparently, he was told this was a continuation of the earlier one and informed of the employer's view that he was not doing his work, that the shop condition was unacceptable, that he was failing to protect the stock, that he was not preventing shoplifting, that he had organised legal and medical advice for other staff over the violent robbery and that this was insubordinate of the company.

7. A lot of this might be emotionally driven, but it would be the job of anyone assessing the case to decide if any of this had a factual basis. Perhaps some comments might have arisen from frustration over repeated criminal actions, a kind of lashing out in frustration perhaps. He was then formally called to a disciplinary meeting. After that, in a letter dated 26 April 2016, his employer claimed that he had not followed the robbery prevention policy and had undermined other staff who were attempting to follow it, had denigrated the work ethic of the store in the context of robberies and, most damagingly had "associated with and used money that had been removed from our tills". In consequence, the letter stated, Mr Zalewski was summarily dismissed for gross misconduct. He appealed. There followed an appeal hearing internally before the manager's father. During this process, Mr Zalewski was told that there was "absolutely nothing" in the dismissal letter stating that the management had "thought that you were ever robbing" and purporting to stress that this was somehow "an accusation made by another member of staff" but "at no time" did management "ever think or say that you were involved in stealing." The dismissal was affirmed.

The task

8. A professional judge dealing with this case would first of all note that under s 6 of the Unfair Dismissals Acts 1977 to 2015 the burden of proving that a reasonable employer

would have regarded there as having been "substantial grounds for dismissal" rested on the employer Buywise Discount Store; s 6(1). There being no issue but that Mr Zalewski had been employed and then was dismissed, as opposed to being an independent contractor or working on a fixed-term contract which had expired, and that a valid termination of his contract of employment could only take place for reasons related to "the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do". If the dismissal was substantially caused, or in the statutory language "resulted wholly or mainly", by the civil litigation claim arising out of the violent robbery or from Mr Zalewski being a likely witness in another employee's claim, it would be automatically unfair; s 6(2)(c).

9. It would be for the employer to prove substantial grounds for dismissal. Thus, a shop owner's frustration over the actions of criminal third parties is not enough to justify sacking an employee. A case has to be made out showing that the employee was not competent in the assigned duties or not capable of carrying out these duties or was lazy. This is not simple. It is not an easy task to go about sifting through even commonplace facts in search of the truth. Was there any connection with the employee and money stolen from the tills; or is that allegation being withdrawn and if so why was it made? What was the anti-robbery policy of the shop and what instructions or training was given to the employee? Was that policy such as to endanger employees so that it might justifiably not always be followed? Was there a policy on suspected shoplifters; were they to be banned or discouraged from the shop? How were they identified and was a list kept? Since under s 4 of the Criminal Justice Act 1984, a civilian, a non-police officer, may only arrest if, as a matter of hard fact and not of reasonable suspicion, an offence carrying a potential penalty of at least 5 years imprisonment had been committed, and reasonable suspicion attached to the person to be arrested, what was the policy on arresting suspected shoplifters? Was the shop left in disarray and if so when and how badly? Was company policy denigrated and if so how and to whom? What, if any, connection did civil litigation over the violent robbery have to the dismissal? If procedures were agreed which were more than the minimal procedure of putting the dismissal allegation to an employee and hearing a reply before making a decision, what were these procedures and were these followed?

10. The consequences for Mr Zalewski should his integrity not be vindicated would be to diminish his ability to find work. But that is only one side of the case. Dismissal litigation has serious ramifications for an employer as well. Any understanding of business must comprehend that it may be impossible for people to work together where trust in a person's competence has broken down. Where that happens, it is not unusual for a voluntary severance package to be offered, rather than risk litigation. In circumstances, however, of tight margins or of businesses being under strain, perhaps due to economic circumstances or loss through theft as can happen in retail, finding the money may be difficult. At the end of every hearing on unfair dismissal before what was the Employment Appeals Tribunal, which was the predecessor of the Workplace Relations Commission, the panel sitting would ask both sides what their preferred remedy was in the event of a finding for the employee whose employment had been terminated; the remedies being compensation for up to two years of salary, reengagement in the same or a similar post, or reinstatement so that whatever salary and benefits had been lost became immediately payable as if the employee had worked throughout. Thus s 7 of the 1977 Act, as amended, was given life in a procedure akin to that where a separate hearing takes place before a convicted person is sentenced. Both the entitlement to redress and the form thereof were concisely addressed by the employer and the employee. In that context, the provisions of the replacement legislation startle.

The Workplace Relations Commission

11. For 38 years, unfair dismissals claims were dealt with by the Employment Appeals Tribunal. That consisted of a barrister or solicitor as chair of each hearing accompanied by, and with equal decision-making power, a person nominated by employer's bodies and by trade unions. Generally, as in all tribunal hearings, strict rules of evidence were not followed but hearings focused on the essence of what led to the dismissal and written rulings followed. A rehearing was possible by appeal to the Circuit Court, which was a rehearing of all the evidence, and a further, and regrettable because it was unnecessary and expensive, appeal by rehearing to the High Court. If the matter had started, as was possible, before a rights commissioner under the 1977 Act, that in turn could be appealed to the Employment Appeals Tribunal, hence the name of the adjudicative tribunal, but both parties had to agree to the rights commissioner first dealing with the claim, otherwise the first instance hearing was before the Employment Appeals Tribunal. Four potential hearings by way of repeated first-instance examinations of evidence tended to favour appeals by the side with more resources, almost invariably the employer, and this system was judicially criticised; *Panisi v JVC Ireland Ltd* [2011] IEHC 179.

12. The Department of Jobs, Enterprise and Innovation in 2012 produced a report entitled, worryingly, "Legislating for a World-Class Workplace Relations Service: Submission to Oireachtas Committee on Jobs, Enterprise and Innovation". Since Ireland is a first-world country, such hyperbolic titles are unnecessary. But, the result was the Workplace Relations Act 2015. This set up the Workplace Relations Commission. Briefly, an employee can make a complaint to the Commission that the employer has contravened any scheduled provision. This schedule includes minimum notice of termination, conditions of employment, payment of wages, holiday pay, equal treatment and unfair dismissals. An employee or employer can also refer a dispute as to the employee's entitlements under other scheduled provisions. The kinds of application dealt with by the Commission are, statistically: pay issues, 28%; discrimination or inequality issues, 14%; unfair dismissals cases, 14%; working time issues, 13%; industrial relations and trade disputes, 9%; and conditions of employment disputes, 8%. While, on being dismissed, Mr Zalewski put in claims for minimum notice of termination and payment of wages, under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Payment of Wages Act 1991 as amended, the substantive case effectively concerns his dismissal.

13. Under s 47 of the 2015 Act, on receipt of a complaint, or referral of a dispute, the Director General of the Commission may inform the parties that it is intended, if there is no objection, to deal with it by written submissions only. Similarly, if there is no objection, a complaint can be referred for mediation. If successful, the agreed result of mediation becomes a binding contract that, if necessary, is litigated in court in the ordinary way. Most disputes are considered, as in this case, by an adjudication officer. Appointment of adjudication officers is by open State competition. A judge in a court requires a legal qualification as a barrister or solicitor and 10 years of practice before appointment to the District Court or Circuit Court, and 12 years in all other courts. Here, the evidence discloses that the Commission takes people who have experience of either personnel management or industrial relations or employment law. No minimum practice in those areas is specified. The job of such adjudication officer, under s 45, is to inquire into the complaint or dispute. Section 42 enables frivolous or vexatious claims to be dismissed straight away. The legislation specifies that the parties, who may be represented, must be given an opportunity to be heard and to present any evidence relevant to the complaint or

dispute. No evidence is given on oath. Powers of compulsion are granted, breach of which is a summary offence, such as giving notice in writing to any person requiring their attendance at a specified time and place to give evidence or produce documents. A decision must be given in writing but mistakes of an administrative or clerical nature may be corrected by notice to the parties. Hearings are in private but all rulings are published, though anonymised. Regulations governing hearings are possible under s 41(17) as to "the presentation of a complaint, referral of a dispute or conduct of proceedings" but no such provisions have been passed. Hence, there is only informal guidance as to how those who have never run a case might conduct a hearing such as that brought by Mr Zalewski.

14. A ruling by an adjudication officer may be appealed by either side to the Labour Court, which is a tribunal not a court. Section 44 provides that the decision of the adjudication officer can be appealed by either party to the Labour Court within 42 days, but the Labour Court can extend time if satisfied that there are exceptional circumstances. Similarly at first instance, under s 47 the Labour Court may inform the parties that it intends, if there is no objection, to deal with the appeal by written submissions only. On this appeal the parties are statutorily entitled to be heard in the same way as at first instance. Proceedings are to be conducted in public unless the Labour Court decides that there are special circumstances. Decisions are given in writing, as at first instance. No appeal to a court, as envisaged by Articles 34, 35, 36 and 37 of the Constitution, is possible. This is in stark contrast to the 1977 Act; see *Panisi*. A point of law may be referred by the Labour Court to the High Court; meaning upon an appellate adjudication by the Labour Court, either party may appeal on a point of law to the High Court; s 46. This is not, however, in any sense an appeal based on the merits, that is, it is not a re-examination or re-adjudication on the facts.

15. Effectively, the order of the adjudication officer, or that of the Labour Court on appeal, has the same status as a court order. Both employer and employee are bound by law to obey such orders. But, there is possible further intervention, which is for an employee, not an employer, to go to the District Court; s 45. If an employer does not carry out the decision of the Labour Court within 42 days, and has not appealed a point of law to the High Court, or has abandoned the appeal, an application may be made to the District Court by the Commission or the employee, or trade union body acting on behalf of the employee only. The employer is entirely shut out. The employer may not be heard by the District Court other than in respect of the question whether the decision has been carried out, that is, has the employer paid compensation as ordered or re-engaged or re-instated the employee. This is merely a basic and uncontentious question of fact. The legislation provides, in flagrant breach of the constitutional principle that a court should hear from each side, or at least provide that opportunity, that the District Court shall not hear any evidence on any other issue, but shall make an order directing the employer to carry out the decision in accordance with its terms. The District Court may order, under s 43(4), the payment of interest on the delayed implementation of the order if in all the circumstances this is considered appropriate, but without hearing from the employer. Apart from inability to pay, under s 51, it is an offence to fail to comply with a District Court order to pay compensation.

16. Section 43(2) provides that if the adjudication officer's decision had required the employer to re-engage or reinstate the employee, the District Court may instead order the employer to pay compensation "of such amount as is just and equitable having regard to all the circumstances". Even though the employer is entirely shut out from addressing the court, unlike the ordinary course of any court hearing where parties are entitled

constitutionally to address the judge as to remedy, the result of a hearing may be altered in the absence of a party. This is not simply notice, there is a legislative requirement that the employer may not make any submissions, yet the employee can. It could be that 6 months has passed since a sacking and re-engagement is ordered by the Labour Court or adjudication officer, but the District Court faced with non-compliance could decide, in the absence of the employer, that instead two years salary as compensation be paid. Average wages now approach €50,000 per annum. Further, the adjudication of compensation has always depended on any contribution to the dismissal made by the employer. An award of €100,000 may cripple a small or medium sized enterprise. More importantly, it may also be unjust. How is a judge of the District Court to know what is the right order to make or whether, for instance, the dismissed employee has made no effort to mitigate unemployment without information from both sides? Even still, the law as set out in the 2015 Act gives the employer no rights. Well, the Constitution does.

Mr Zalewski's experience

17. Mr Zalewski's treatment by the Workplace Relations Commission was nothing short of dreadful. He engaged a solicitor. Both turned up for a hearing on 26 October 2016. The employer was represented but the person who made the decision to dismiss was not there due to a family event. Notwithstanding that, the employer had the burden of proving substantial reasons of competence or qualification to justify the dismissal, something impossible without the person who made the decision to dismiss; the employer's representative started outlining their case without calling any actual evidence. This was objected to on behalf of Mr Zalewski. The matter was adjourned by the adjudication officer who asked Mr Zalewski's representative to bring along certificates of social welfare payments for the next occasion. The new hearing date was notified by post for 13 December 2016. That day, both parties turned up and were represented, expecting a hearing. Instead, the adjudication officer met them in the corridor. It was announced that the decision in the case had already been made. A few days later that decision was received in the post. It stated that findings had been made on the basis of the "evidence and a written submission". There was no evidence of any kind. An order was made dismissing the case. The decision reads:

> On the basis of the evidence and my findings above I declare the respondent conducted the investigation, disciplinary and appeal hearings in accordance with the disciplinary procedures of the company…
>
> The complainant and his legal representative did not advance any argument or evidence at the hearing as to why they considered the dismissal "to be both procedurally and substantially unfair" as stated in the complaint form.
>
> The Complainant stated at the hearing that he was in receipt of jobseekers benefit from the Department of Social Protection since the date of his dismissal. He was requested to provide evidence of this but did not do so.
>
> In accordance with s. 8(1)(c) of that Act I declare the complaint of unfair dismissal is not well founded.

18. How did this happen? Not a single reference to fact is made in this template ruling. There is no reasoning. The document has every appearance of the unthinking use of a template. The chat in the corridor in purported remembrance of the case and stating that

the parties had been called back by mistake indicates that there must have been some kind of deliberation. The State does not explain this. A suggestion during argument of a possible template confusion might be a possibility. It is not for the courts to speculate but it is, in the ordinary way, the normal thing for the State to explain; the relevant authorities are set out in Murphy & Others – The Role and Responsibility of the State in Litigation [2020] 01 IJSJ. Where did this leave the person who had sought justice? What about the allegation over complicity in theft, not preventing robbery, not following shoplifting policy, being insubordinate, walking off the job? No decision on anything was made: no reasons; no vindication of the case made by anyone; no basis for seeking fresh employment with a clean record; no basis for saying the dismissal was correct for some substantial reason related to competence or qualification.

19. By a decision, on consent, of Meenan J in the High Court, on these judicial review proceedings, on 8 February 2018, the adjudication officer's decision was quashed; [2018] IEHC 59. Meenan J also decided in the light of that decision that Mr Zalewski no longer had standing to bring the constitutional challenge with which this judgment is concerned. That decision was reversed by this Court on 18 March 2019; judgment of Finlay Geoghegan J [2019] IESC 17.

Approach to serious adjudications

20. According to Ciarán O'Meara solicitor and Tom Mallon barrister, both lifetime practitioners in employment law, what has just been described might reasonably, but unfortunately, be expected from the qualifications and experience required of those tasked by the Workplace Relations Commission to make important decisions on people's employment and reputation. Here the decision impacted directly on the future working life and on the reputation of Mr Zalewski. Yet, what has been described happened. The evidence from those practitioners is that some called upon to make such important decisions do not understand the more difficult questions that arise in employment law, including rights derived from European law. There is a hostility to representation by the legal profession, they assert. Those adjudication officers with more ability and experience tend to be assigned more serious cases, according to them, but where does that leave ordinary cases: are these to be assigned some less expert form of assessment? Their evidence is of a marked contrast to the professionalism of court adjudication. Furthermore, since the public is not admitted to view the activities of the Workplace Relations Commission, theirs is the only evidence of a disturbing situation that there is likely to be.

21. This evidence could not have come from any other source since the workings of administrators in deciding unfair dismissals, cases of fundamental moment to the reputation and marketability of working people, are closed to both the media and to the public. Of course, few enough members of the public wander into courts, but they are there when they come as of rights and are welcome. Usually, their place is taken by dedicated newspaper and electronic media reporters who have a crucial constitutional role in seeing that justice is administered soundly. As well as that evidence, an academic article indicating profound levels of dissatisfaction with this system under the 2015 Act is cited on behalf of Mr Zalewski; Barry – Surveying the Scene: How Representatives' Views Informed a New Era in Irish Workplace Dispute Resolution [2018] DULJ 41/4. The abstract reads:

> The Workplace Relations Act 2015 introduced a major overhaul of workplace dispute resolution bodies in Ireland, streamlining a complicated system for

> resolving workplace disputes comprising multiple fora into a two-tier structure. The article describes and analyses the results of two surveys undertaken by the author of the views of employment law and industrial relations practitioners and other representatives in Ireland before the reforms in 2011 and after the reforms in 2016. This article describes the purpose, methodology and considers the results of both surveys. The 2011 survey informed the agenda for reforming the Irish workplace dispute resolution system in 2015. The 2016 survey informed the new workplace dispute resolution bodies where improvements could be made. The impact of these surveys will be considered in the context of recent developments in the operation of the new system.

22. While this relates to research from 2016, levels of dissatisfaction are then at 49%. The State's response is that this is inadmissible in evidence. Just that: dismissal out of hand of any criticism of a system that so markedly and in every fundamental respect failed Mr Zalewski. Of course, there are also affidavits about how much training is received, and how seriously matters are taken. But that does not explain this. The Court of Justice of the European Union would take no such attitude in dismissing an important academic contribution and, furthermore, much of what is concerned in the administration of the task of the Workplace Relations Commission is derived from this State's obligations in European law.

23. Evidence has been presented that the Workplace Relations Commission, in the kind of serious employment disputes that would tend to attract the services of practitioners such as Mr O'Meara and Mr Mallon, has a serious problem. The State response has been to point to the lack of specificity in citation and to emphasise a training regime for staff.

24. Success in any enterprise depends on people working hard. That is what an independent country is all about. Success in the administration of the State depends on every public servant approaching their task as a duty to the nation, regarding work as the means whereby this independent country's very existence is justified by the committed nature of what is done in the name of Ireland. All public servants are members of that team and all are required to give their best. While there is a separation of powers, the task of executive, government and judiciary are devoted to the public good and this cannot be achieved save through dedicated work and the unremitting exercise of good sense. It is not for this Court to reach a conclusion on whether the Workplace Relations Commission is a failure. That is not part of the case. The complaints made by practitioners are essentially in the context of competency and consequent effects on fairness of adjudication, especially where legal procedures worked out through experience have met with less than enthusiasm.

25. What can fairly be recorded beyond the example of this case, without ruling, is that there is much evidence of inadequacy. In the context of industries and forms of administration which have an immediate determination to find out the cause of any failure, and to seriously address why accidents or maladministration has occurred on the basis of objective appraisal, matters work better in the long run. Mistakes are corrected, people are expected to tell the truth as to any errors since the emphasis is not on punishment but the wider good of the organisation and those served by it, structures are changed where found inadequate and, above all, there is no carpet under which to sweep the evidence of malfunction. In contrast, where what is involved is a closed society intent on self-protection, a kind of secular priesthood, ranks will be closed, mistakes will be covered up or denied, the truth will be almost beyond reach and in consequence what is bad will

institutionally become worse. This does not serve the Irish people. Matthew Syed in a book-length study contrasts the perpetuation of mistakes within contexts where this happens, as for instance where hospitals react with hostility to accusations of error, which can happen but does not always happen, and where attitudes may have changed, with the airline industry where travel safety is upheld through the objective recording of fact and later objective analysis of accidents, a determination to find causes and a consequent obligation to change for the better; Syed – *Black Box Thinking: Why Most People Never Learn from Their Mistakes--But Some Do* (London, 2015). It is possible, certainly it is to be hoped, that since the initial judicial review of this astonishing set of events that matters may have improved at the Workplace Relations Commission.

Compulsion absent representation

26. There are many instances in law where a citizen is bound by legal regulation which does not first of all give to him or her any right to speak or make representations to the contrary of what the law requires, this despite criminal sanction for disobedience. A prime instance is road traffic legislation as to who may be licenced to drive, what the speed limit is, obedience to signals, direction of travel and condition of vehicles. There, you simply obey and have no choice because there is nothing to argue or make representations about. Another may be public health legislation for the protection of the common good, which may perhaps override individual rights, but subject to exceptions. Yet another may involve deprivations of liberty because of mental illness, but with periodic reviews by independent experts. Those who are mentally ill may indeed speak before being confined to hospital but their representations may not be entirely grounded in reality. A change in planning law may alter the expectations of many and enhance the prospects of others. Central to a democratic society is participation through the free choice of representatives to speak to and thus have a hand in legislating for the entire community. With planning legislation, democratic consultation is added as a further tier as to zoning decisions, which can change tort liability for nuisance, and rights to notice and objection as to any proposed development.

27. Legislation is a function of representation, consideration of the solution to wide questions of policy and the furtherance of social order mandated by the Preamble to the Constitution. In a way, and the point should not be stretched, through democratic participation citizens join in law making or at the least designate the persons trusted or the policies hoped for. Courts are different. This is the forum where the citizens have reposed trust in those qualified for fair judgment, where the law is entitled to the evidence of all, and where all witnesses are bound through democratic obligation to the truth. Courts do not impose liabilities on those coming before the judicial process without notice. At the very least, in civil cases a statement of the case is proven to be served and left unanswered before liability can be established in the absence of a party and in summary criminal cases proof of service of being summonsed on particular charges to court is required before a court may proceed to possible conviction and the imposition of penalties. The more modern procedure, whether constitutionally mandated or not, is to issue a warrant of arrest before any serious conviction is imposed. When there is a conviction, there is a sentence hearing characterised by brief submissions as to the justice of the appropriate penalties.

28. Contrast such foundational principles for the administration of a just system with s 43 of the 2015 Act:

> (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—
> (a) on application to it in that behalf by the employee concerned or the Commission, or
> (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, 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.
> (3) The reference in *subsection (1)* to a decision of an adjudication officer is a reference to such a decision in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought, or if such an appeal has been brought it has been abandoned and the references to the date on which notice in writing of the decision was given to the parties shall, in a case where such an appeal is abandoned, be construed as a reference to the date of such abandonment.
> (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.
> (5) An application under this section to the District Court shall be made to a judge of the District Court assigned to the District Court district in which the employer concerned ordinarily resides or carries on any profession, business or occupation.

29. Hence, interest may be charged upon a statutorily mandated unanswered representations from one side of a legal dispute. Here, however, the issue is limited to the time between the Workplace Relations Commission order and the court hearing. Even still, what if there is culpable delay by or on behalf of the only party entitled to speak to this, the employee or employee representative. Should there not be a chance to at least make that case?

30. More seriously, even, a re-engagement or re-instatement may be altered on hearing only one side to what may be a cripplingly expensive order of compensation for up to 104 weeks of salary. There may only have been absence from work for 25 weeks. There may have been no effort to mitigate the situation. This is hard to credit. The reason both sides are required in a legal dispute is that, as a matter of human nature, some will lie and need to

be corrected by opposing testimony or submissions, but more will take a subjective view of what objective fact may disclose as an exaggeration or a mistake. Some mistakes are culpable, after all, in themselves and all too often mistakes, so called, are made in the direction of those it suits. So, even as a counsel of prudence, efforts should be made to hear both sides of a dispute. Is that not the experience of the human race since the time of the prophet Daniel? Yet here, a statute requires "without hearing the employer or any evidence" that a default of 56 days by the employer, what might merit re-engagement, which does not carry financial loss, may be turned by the District Court on not hearing that employer into damages against a firm or employer amounting to up to two years of salary. That can happen even though that might not be merited. After all, how is the District Court judge to know if limited to hearing only one side of the case? The employee may have immediately moved to a better rewarded engagement or might have just decided to not seek work at all. The 1977 Act makes that relevant: the 2015 Act shuts out the employer from making that case.

31. This is both relevant under the 1977 Act and is relevant too as a matter of ordinary sense. But how does the judge know what to do? The judge is prohibited from hearing evidence from an employer, save as to default in compliance with the order, and is compelled to consider submissions from only one side of the case. Yet, the result may be unjust and may be financially crippling. Furthermore, this approach flies in the face of the principle established by this Court in *The State (Irish Pharmaceutical* Union*) v Employment Appeals Tribunal* [1987] ILRM 36 and see *Galway-Mayo Institute of Technology v Employment Appeals Tribunal* [2007] IEHC 210. Those cases establish a duty on the Employment Appeals Tribunal to ask employers and employees at the end of a hearing into unfair dismissals what remedy they prefer; reengagement, reinstatement or compensation in salary of up to 104 weeks. This is simply normal procedure. If a party chooses a remedy, for instance damages, in an application, a court or tribunal may proceed to award that remedy after finding facts that justify that result. However, if there are variable statutory remedies, the parties must be allowed, even in brief terms, to address why one is to be regarded as appropriate over another. There is also the point from *In Re Haughey*, using the analysis of Ó Dálaigh CJ that "under the Constitution the Courts cannot be used as appendages or auxiliaries to enforce the purported convictions of other tribunals". But the point is even more fundamental: this is a denial of justice.

32. Section 43 offends the Constitution, is incompatible with a fair and impartial hearing and cannot be saved through any construction that does not do violence to the plain words of the legislation. Yet, in the High Court, it was this court's mandate, in reality the use of the courts system as a purported instrument of validation, which was held to save the overall scheme for the administration of unfair dismissal claims from being the administration of justice apart from those appointed as judges within the system of courts set up by the Constitution; Simons J [2020] IEHC 226.

Limitation of judicial powers by appeal

33. The Constitution Committee of 1934 had discussed a draft Article 64 providing that the "judicial power of the" State "shall be exercised and justice administered in the public courts established by the Oireachtas, by judges appointed" as regulated in the text. To that, a recommendation was added:

> We are of opinion that this Article should be regarded as fundamental. We suggest, however, that it should be carefully re-drafted so as to meet the present position

> in which judicial or quasi-judicial functions are necessarily performed by persons who are not judges within the strict terms of the Constitution, e.g. Revenue Commissioners, Land Commissioners, Court Registrars, etc.

34. According to Gerard Hogan, *The Origins of the Irish Constitution*, 1928-1941 (Dublin, Royal Irish Academy, 2017) pages 40-44 and 84, this proviso was to remove doubts as to the powers of such bodies and, in addition to enable the more expeditious and economical administration of justice and transaction of public business, but that criminal trials should be specifically excluded. According to An Taoiseach, addressing Dáil Éireann, on the debates as to the 1937 Constitution, questions had arisen:

> about the Land Commission, as to whether their functions were of a judicial character or not … So as not to get tied in the knot of that judicial powers of functions could only be exercised by the ordinary courts, established here, you have a provision of that type.

35. Consideration as to the efficient dispatch of public business are ever more sharply in focus with the accretion of bodies designated to regulate financial business, to promote equality and to combat such evils as racism and hatred. We remain, nonetheless, with Article 34.1 as it emerged from the analysis as to where judicial power should be distributed in providing simply that: "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution" and generally in public, but that, outside of criminal trial, according to Article 37 this was not to "invalidate the exercise of limited functions and powers of a judicial nature … by any person or body of persons duly authorised by law" to so do "notwithstanding that such person or body of persons" is not a constitutionally appointed judge in a court. The line is a bright one, but difficult at times to draw, the Constitution being both imperative in commanding the separation of justice from administration, stating "Is i gcúirteanna a bhunaitear le dlí agus ag breithiúna … a riarfar ceart", and merely indicative as to what are "feidhmeanna agus cumhachtaí teoranta breithiúnais a oibriú" outside of that territory, which by reason of the second reference becomes less certain. Nor is there anything as to possible interaction as between the two spheres, supposedly administrative or executive but involving judicial-type decisions or orders, and the possible cure of any blurring of the usurpation of judicial power by enabling a corrective appeal to an actual court. What kind of appeal? That would be the question, and how could an appeal validate the trespass on a court function by enabling a court to review that decision as to fact and as to law and to intervene so as to reverse findings of fact or change the form of relief given on hearing both sides: unlike in s 43 of the 2015 Act which has no regard at all to this fundamental.

36. Apparently, the only statutory provision actually declaring that a quasi-judicial function is authorised is s 24 of the Courts and Court Officers Act 1995 in providing for Master of the High Court to be authorised "to exercise limited functions and powers of a judicial nature within the scope of Article 37 of the Constitution." As often declared, the Master has no judicial power; *Permanent TSB v Carr* [2019] IEHC 14. The Master prepares cases for the High Court, depending on the current state of the Rules of the Superior Courts may to make discovery orders, makes some preliminary orders as to trial preparation and can analyse papers and decide that elements of a potential defence are not disclosed whereby judgment may be entered straight away. Everything done in that court, however, is subject to appeal by way of the re-litigation of the order before a judge. In so far, therefore, as some judicial powers are exercised, the boundary there set, the *teorann* set out in Article 37, is that such power is limited because a litigant can immediately have it set to

rights by an unfettered appeal to a judge who will reconsider matters not as an appeal but effectively as if nothing had ever happened; in other words, the decision being considered afresh. Sometimes startling provisions emerge from older statutes whereby it may be inferred that the legislature may have thought that because of the nature of the decision made that some exercise of judicial power may have been involved.

37. There the cure, again, was an unfettered appeal. For example s 33 of the Road Traffic Act 1961 enables learner drivers to be tested for their competence on the Rules of the Road and in practical skills by local authorities. A test may be deferred if the candidate does not show up with the right documentation, a provisional licence, proof of identity and a car properly authorised to be driven in public. But, as regards knowledge of rules and competency at driving, clearly the tester is making an assessment: does this person know what road signs mean, directive or advisory, and can the candidate safely drive a car or motorbike or bus or tractor or lorry? Is that adjudication judicial? Has it anything to do with the administration of justice? Is it such as to require that a court should hear about what happened at a particular junction or the engagement of gears? Apparently, according to s 33(6) which provides that:

> (a) A person aggrieved by a decision under subsection (4) of this section may appeal to a Justice of the District Court having jurisdiction in the place in which such person ordinarily resides, and the Justice may either refuse the appeal or, if satisfied that the test was not properly conducted, direct that the applicant shall be given a further test.
>
> (b) A decision under this subsection of a Justice of the District Court shall be final and not appealable.

38. Ostensibly on the basis of good measure, there can be no other reason, it is also provided that a decision by the examiner as to the propriety of candidate's papers and the authorisation of the vehicle to be on the public road are similarly appealable.

39. What the model does at least posit, if not establish, leaving aside the notion that a driving tester is exercising judicial functions, is that one limitation whereby a power of a judicial nature exercised outside of a court may accord with Article 37 is where, as with the Master, anything done may be rendered as nothing through a judge hearing the same issue again and without regard to any prior decision outside of the court. This is a blind rehearing whereby the judge is obliged to assess the issue with no regard to any prior administrative or quasi-judicial decision through embarking on the cause again and as if no decision, save one enabling the appeal through having been made outside of a court, had happened. But, the question in the first instance must be as to where the definition or adequate description of what is limited may lie. It is there that the boundary is set. The current editors of *Kelly: The Irish Constitution* (5th edition, Dublin, 2018) put the difficulties starkly at 6.4.101 in stating:

> Any statutory power, whether of a judicial or any other nature, is in one sense necessarily 'limited', since it can be exercised only within the four corners of the area, great or small, which the statute marks out and 'delimits'. It is not, however, in this sense that the courts have understood the word in the Article 36 Context, but rather in the senses of 'modest, 'not far reaching', 'confined to special situations'; in other words, in senses which leave much room for subjective judicial appraisal, since there appears to be no objective criterion for any of these notions.

Identifying limited judicial powers and functions

40. The challenge being thus set in Kelly, the case law enables at least three criteria that put matters into the sphere of what are limited functions and powers of a judicial nature to be identified with some security: technical matters; findings which do not have any result other than the public expression of an opinion with no consequent order; and provisional orders and findings subject to immediate appeal which are so limited until confirmed by a court that are of no lasting effect.

41. Technical matters, firstly. Tax is assessed on the basis of income, expenditure or expenses, allowable expenses or statutory allowances, transactions, profit and loss. In essence, while the taxation code can be complex, requiring huge resources of memory to turn acquaintance into expertise, and difficult concepts such as deliberate avoidance for no business purpose arise from time to time, what is involved is a technical calculation. The decision of liability to tax is the well from which the amount to be taken from the taxpayer is calculated. That calculation may be precisely titrated. The reasoning of Barron J in *The State (Calcul International Ltd and Solatrex International Ltd) v Appeal Commissioners* [1986] 12 JIC 1802, whereby the work of the Appeal Commissioners was described as technical, was criticised as being 'very questionable' by the editors of Kelly at 6.4.111-6.4.112. The assigned power was described by the High Court as being limited, even though there was not, nor sensibly could be, any monetary limit, such as that on Circuit Court orders in civil cases, on how much tax the taxpayer could made liable for. As Barron J stated:

> In reality, the decision has no effect on the fortune of the taxpayer, since the Appeal Commissioners do no more than decide the amount for which the taxpayer was always liable. Their decision may well affect the particular taxpayer adversely since he may be found liable to pay a sum for which he believes he was not liable. But this does not have far-reaching effects. The payment of Customs duty or Value-Added Tax is related proportionately to value of the goods concerned, whereas the payment of Income Tax and Corporation Tax is related proportionately to the relevant taxable income. Such payments cannot have far-reaching effects on the fortune of the taxpayer … since in each case the liability is relative, being proportionate either to his income or to his turnover as the case may be.

42. The validity of the reasoning, however, is to be seen in the accuracy of the description of what the essence of taxation is: the Appeal Commissioners cannot go beyond a calculation. What they do is to assess where in the balance liability tips, income or, as in VAT, turnover or in capital gains profit or in gift or inheritance tax degree of relatedness and amount, after taking into account all due allowances and relevant bands. This is not a judicial assessment. There may be an issue as to a fact, but there the burden is on the taxpayer to demonstrate an allowable expenditure or to set out a vouched account of income, since all relevant books must be kept. This is a technical matter. It is not of its essence about the truthfulness of the relating of an event, the assessment of damages so that an amount is arrived at which will compensate for tortious wrongs, or make up for a broken agreement, the motivation for actions or the general standards of conduct applicable within the community. In taxation there is no equity. All liabilities arise from statute and every sum payable is capable of precise calculation from the records that must be maintained. Certainly, as the editors of Kelly state, an incorrect calculation can have the

effect of putting a taxpayer's financial stability into crisis, but the fundamental point is that what deviates from accuracy can be demonstrated as such.

43. A more fundamental point arises here. It is the effects of an order combined with the enforceability of what is ordered, its appealability and its susceptibility to remedy, which are part of the tapestry of description enabling a reading of whether what is done in a quasi-judicial way outside court is an unconstitutional usurpation of judicial function. Calculation is limited. Error in calculation, even if it be the case that appeals are confined to law, and in taxation there is an appeal to recheck facts possible to the Circuit Court under s 942 of the Taxes Consolidation Act 1997 as amended, such a mistake is identifiable and susceptible to judicial review since such a miscalculation will fly in the face of calculable reason; *State (Keegan) v Stardust Tribunal* [1986] 1 IR 642, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *Meadows v Minister for Justice* [2010] 2 IR 701 at 173-174 imposing a proportionality dimension to what is rational in the decisions of non-judicial tribunals. What the remedy is and what it consists of is of its nature a limiting function on any tribunal. In the same way, while Mr Zalewski may have made complaints to the Workplace Relations Commission as to entitlement to holiday pay, minimum notice and the non-payment of wages due, these also are matters requiring assessment and calculation and not the exercise of any judicial consideration.

44. Secondly, there are public tribunals and commissions of inquiry, which can be held in public, where at the end of an examination of facts, often with live evidence, a report will be issued for public discussion. This will attach blame to individuals for such diverse matters as the sinking of a ship, portraying an innocent individual as a child abuser, misusing public funds, the abuse of political influence, failing to regulate money lending or any other controversy which the Oireachtas considers justifies the huge expenditure of time and money that such an inquiry entails. Tribunals of inquiry, set up under the Tribunals of Inquiry Acts 1921 to 2004 are public examinations of matter of great moment. Commissions of inquiry under the Commission of Investigations Act 2004, as amended, tend to be set up at a lesser temperature and generally are conducted in private. None of this legislation, whereby facts may be found by what is usually a judicial figure, or group of individuals chaired by a sitting or former judge, most often retired, have any implications beyond that such facts are declared after a trustworthy process by a trustworthy person. No tribunal can make any final order, beyond an order as to costs at the discretion of the chair, and other orders of compulsion as to attendance and the preservation and production of documents. These while mirroring, and in relation to the Tribunals of Inquiry (Evidence) Act 1921 expressly adopting to the tribunal the powers of the High Court as to necessary pre-trial and compulsion in aid of hearing orders, are limited. All that happens in the end is that an opinion is publicly expressed.

45. Of course, in many ways, and especially in the modern era where criminal law intrudes into European-inspired regulations and into areas of life outside those reserved in the past to behaviour against the community demanding penal sanction, what is to be investigated by a tribunal will easily overlap with liability in tort, as where an oil tanker is destroyed by negligence and people are killed, or the commission of crimes, as where the State is defrauded of public funds in dealing with economic subsidies or where life is lost through what may be very serious negligence. That trespass on the function of a court cannot matter because of the absence of consequence. What a tribunal does not do is make an order that any individual represented before it is liable to pay damages or that some person go to jail or be fined; *Goodman International Ltd v Hamilton (No 1)* [1992] 2 IR 542, [1992] ILRM 145. Hence, the limitation is in not going to where a court must go once a court

makes findings of fact. A court makes an order: a tribunal expresses a view. Similarly, in *M v Medical Council* [1984] IR 485, a finding of misconduct as a doctor, or of unfitness to practice, was only regarded as the publication of an opinion since the final power of sanction through removal from the register of medical practitioners was reserved to the High Court. Admonishment, censure or advice were the limited options which the Medical Council could choose from without invoking the power of a court; similarly for nursing professionals see *K v An Bord Altranais* [1990] 2 IR 396 as to a similar scheme. Opposite to the approach of courts in not dealing with hypothetical situations, because judges pursue the finding of facts in order to make a final order, tribunals and commissions of inquiry find facts and make non-binding recommendations arising therefrom. This is nothing more than an opinion. Furthermore, any suggestions as to, for instance, reforming the police or as to pointing out that public servants of some particular kind are not providing value for the wages paid in attending to duties, are entirely capable of being ignored. In the cynical view, not shared here, inquiries push matters away from public attention, but in reality they push matters into public scrutiny provided they act quickly. Such enquiries have to be pushed on ruthlessly or they are a failure. Even still, a report may be shelved. That is not how courts operate with powers of compulsion up to imprisonment for breach of injunctions, damages enforceable by judgment mortgages over property and persons confined to prison for perhaps decades in condign punishment of misdeeds.

46. Thirdly, what is limited is what does not immediately bite: meaning that the tribunal can reach conclusions but these are of no effect until there is an appeal provided for to a court which each party declines and where the court, if an appeal is taken, causes a judge to re-examine the circumstances and reach an independent decision. Court orders have effect immediately. To that there are exceptions, but these are provided for by the Oireachtas as a matter of policy under the relevant Courts Acts. Hence, criminal convictions under appeal by way of complete rehearing from a District Court to a Circuit Court judge entitles an accused to lodge recognisances and achieve bail. Even still, the judge setting the conditions is acting judicially; recognisances may not be refused on a whim or because the evidence was thought to be overwhelming. Similarly, a civil liability finding by the Circuit Court or District Court may be appealed to, respectively, the High Court or the Circuit Court and it is only if on a complete reconsideration the order is affirmed that practical effect is initiated.

47. In the decisions, this identification of what is of no immediate practical effect is not thus well developed, but the concept is a clear influence on what is to be seen as a limitation which puts a quasi-judicial power on the constitutional side away from any unlawful usurpation of the administration of justice. Thus, in *O'Mahony v Melia* [1989] IR 335, at issue were the residual aspects of the powers of Peace Commissioners. While the order in question was only the remand of a suspect overnight in custody and while the judgment of Keane J referenced the prohibition on outsourcing any criminal business from the courts, the case exemplifies an order which had immediate effect in taking a suspect from his usual abode in consequence of a judicial assessment outside of the sphere of judges in courts and orders that a suspect should be locked up. From that there was no immediate relief; the order bit straightaway. What can be legitimate, but strongly dependant on an overall analysis, and on the historical nature of the power being exercised away from courts, is the exercise of powers which lead to an order but which do not prejudice a court hearing by a judge. The result of a tribunal giving an adjudication on a case is that an opinion is expressed which if not appealed within a statutory timeframe can result in the opinion becoming a binding order. But the parties have an absolute entitlement to seek a re-adjudication by a judge in a court. It might be protested that only one court hearing takes

place and that there ought constitutionally be a further appeal. That is not necessary. There has been a hearing, before the tribunal out of court, and a complete rehearing by a judge. Nothing further is required. That is reflected in the existing court structure of hearings and appeals. Such a judge is "independent in the exercise of their judicial functions and subject only to the Constitution and the law" under Article 35.2 and have taken an oath to uphold that Constitution and those laws and to act "without fear or favour, affection or ill-will towards any" person under article 34.5.1°. There are many powers exercised by the High Court, for instance s 5 of the Illegal Immigrants (Trafficking) Act 2000 or s 50 of the Planning and Development Act 2000, which are subject to no appeal. Essentially, this is because the form of analysis undertaken by the High Court is effectively at second-instance, here a scrutiny of decisions as to status or as to suitability for sustainable development. Medical and solicitors' regulation cases illustrate how a tribunal reaching a conclusion but subject to appeal can sufficiently limit the powers and functions of a judicial nature so as to keep the interaction as one which by retaining the function of the courts passes muster. The former Employment Appeals Tribunal under the 1977 Act prior to amendment was another example: a tribunal makes an adjudication which is binding only if no party appeals, and on appeal there is a judicial hearing in a constitutionally mandated court.

48. The leading cases, *Re Solicitors Act 1954* [1960] IR 239 and *McDonald v Bord na gCon (No 2)* [1965] IR 217, concern the delegation of what were regarded, respectively by the Supreme Court and by the High Court, as decisions, delegated to the Solicitors Disciplinary Committee and to the greyhound body, which would end a career. Kingsmill Moore J considered the Solicitors Act as engaging decisions of "far-reaching effect and importance". If the model followed, however, is one of a tribunal reaching a conclusion but, like a tribunal of inquiry, this being no more than an exercise in opinion, that a solicitor should be struck off or that a doctor's misconduct is so worthy of censure that a erasure from the register is appropriate, and where it is clear that where the final power of review vests in a court, that limitation brings the model onto a constitutionally permissible ground. This is also the analysis of MacMenamin J and, clearly, as he also states, that is dependent on the nature of the appeal. But nowhere in any decision where judicial functions are being exercised do any of the decisions cited by the majority allow judicial review to be a sufficient basis of court limitation of what is an administrator exercising judicial power in a fundamental area to the rights of citizens. It is not. It cannot be and in that regard the majority analysis is at odds with both the decisions and with principle.

Meaningful appeal

49. In this respect, the third criterion enabling a limitation on judicial powers and functions, a distinction must be drawn as between an appeal which has the effect of enabling the judicial function under Article 34 and one which disables it through partialness or which uses a court like a rubber stamp. Analysing the *Calcul International* case from this perspective is perhaps not profitable. While Barron J there held the powers of the Revenue Commissioners to be on the correct side of constitutionality because they had no power to make a final order themselves, in reality to draw a distinction as between an order that cannot be appealed as to amount or as to liability to tax but which is enforceable as a contract debt in court and an order which does not need the initiation of a summons in court to enforce it perhaps misses the essence of the distinction. When the Revenue Commissioners decide that a taxpayer is liable to tax and in a particular amount, that is apart from any appeal enabled by statute. What a court does with a Revenue debt is simply assess that it is due. A court is not analysing the validity of a tax return or engaging in any

underlying assessment of taxability. It is the nature of the calculation and susceptibility to judicial review on reasonableness grounds that would provide a remedy.

50. Similarly, in the modern context, the idea may be unattractive that a grant or refusal of planning permission could be argued to be a judicial function, as Kenny J held in *Central Dublin Development Association v AG* (1975) 109 ILTR 69. What matters about that decision is that the High Court held that powers and functions of a judicial nature, because they affect "the fortunes of citizens in a profound way because of the results of the Minister's decision" are limited because that decision is appealable. Hence, Kenny J held for constitutionality because: "The Minister's decision does not decide finally that a particular development cannot be carried out; it decides only that permission is or is not required." It is not to be doubted that in *Deighan v. Hearne* [1986] 1 IR 603 at 615, Murphy J correctly declined to engage in a tax assessment of the plaintiff in favour of the administrative tribunal established in this regard; 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".

51. The model formerly adopted under the Unfair Dismissals Act 1977, but doubted as to its constitutionality even in that fully appealable format by the current editors of Kelly 6.4.100 citing remarks by McKenzie J in *Government of Canada v Employment Appeals Tribunal* [1992] 2 IR 484, was of vesting powers of a judicial nature in a body consisting of three persons, one legally qualified, with an appeal therefrom to the Circuit Court as an open rehearing unbound by any conclusion of that tribunal. That model is limited in function and is limited in power, and thus in conformity with Article 37, since its decision is of what is, in effect, a statutorily enforced and non-binding arbitration and is one where the judicial function within the court is completely unfettered by any conclusion reached. The model in the Workplace Relations Act 2015 is, on the other hand, to set the Constitution upside down. It is to treat the courts as limited, having only the power to decide such legal issues as may be referred, and as having no function save that which the parties or the Labour Court might choose to ask, with the final decision not in the courts but in the tribunal on receipt of the High Court's ruling as to law. It is to be remembered that the High Court is not entitled in exercising a function of ruling on referred points of law to actually instruct a tribunal as to what decision must be reached. Instead, the High Court decides a point of law and the application of that ruling is for the tribunal; *Barry & Others v Minister for Agriculture & Food* [2015] IESC 63.

52. There are many forms of appeal. This has been the subject of analysis by Clarke J in *FitzGibbon v Law Society* [2014] IESC 48 and it is not necessary to repeat that here. One quite popular one is to subject a tribunal to scrutiny on the basis of the proof by an appellant of a serious error, or a series of factual or legal errors mounting up to a significant error; see *Fitzgibbon* at paragraph 2. Another view is that judicial review is an adequate remedy in itself. That depends. Our form of judicial review is not the same as the kind of reconsideration of administrative decisions such as would be exercised by the Conseil d'État in France. There, a range of decisions from Covid 19 restrictions to austerity financial measures to the practice of euthanising elephants in public zoos are subjected to argument and reanalysis and a fresh decision results which is binding on the authority concerned. Our form of judicial review initiated as to the validity of a record and as to jurisdiction, which came to embrace serious legal errors disabling jurisdiction, developed as to process and through the theory that no administrative or quasi-judicial body has authority to make an unreasonable decision, enabled review of such decisions as flew in

the face of fundamental reason and common sense, and embracing decisions so lacking in proportionality as to meet that criteria. On an order being quashed, the matter is taken up again by the tribunal or lower court or by the administration, applying the correct process to the reconsideration of the decision.

53. A judicial review is a supervisory function under the full and original jurisdiction granted to the High Court under Article 34.3.1° of the Constitution. While the majority judgment characterises current judicial review powers as unrecognisable from those exercised in practice by the High Court in the 1980s, that is not so. There is a continuity and notwithstanding development there continues to be a stark difference. Judicial review could always undermine a decision if it so flagrantly flew in the face of fundamental reason and common sense as to impugn jurisdiction. No tribunal and no body exercising quasi-judicial functions is empowered to come to a bizarre decision or one which turns the facts on its head. That is the continuity. To that is now added a proportionality analysis where appropriate as to what may have been reasonable about the decision. That changes some cases but not cases such as any judicial review of the findings of fact in this case might be. In addition, jurisdiction is now considered in the context of legal error, rather than legal error being considered as being within jurisdiction, it is more likely to demonstrate a trespassing outside the boundaries of jurisdiction. All through, the courts engaged judicial review as to errors of record but these considerations have become less important. What has become more important has been procedure but a truly wrong decision can be reached by excellent procedures. And here is the nub of the problem: the key difference that is absent from the majority judgment. An appeal to a court, such as the Circuit Court under the 1977 Act, will mean a judge will look at the actual evidence again and give a decision. What if, in this case, Mr Zalewski is condemned as a thief? Once there is any evidence to support that, judicial review is out. That could ruin his work prospects. That is not limited, technical or merely adjudicative of statutory rights: it is the very decision that must be made by a judge. That engages the fundamentals of justice and which frightened and apprehensive seekers after justice must surely be entitled to if not at first instance then, as a saver under Article 37.1, through a meaningful factual appeal. What if the employers here were stuck with a lazy person and a thief, surely a decision to that effect also cries out for judicial analysis. In neither case could the technical and procedural manoeuvrings of judicial review, divorced from the fundamentals that a bad decision was made, possibly make up for a factual reappraisal. It is not allowed in judicial review. The majority decision is thus not an enhancement of the fundamental drive of the Constitution. Judicial review cannot be adequate in this context. What is needed is justice. Either a very bad mistake was made by an employer in summarily dismissing Mr Zalewski for dishonesty or that decision was correct. To sort that out needs wisdom and experience applied to fact. This is the administration of justice according to the majority, but also according to the majority, merely looking at whether a decision was utterly unreasonable or weighing the procedure of an administrator in crucial cases of fact suffices to bring adjudication constitutionally outside the ambit of the courts. The only factor which might save such a process is a complete appeal and not the procedural focus of Order 84. Judicial review may be appropriate in some technical types of administrative decisions, such as planning, and the function is also appropriate in such technical analyses in preserving the full and original jurisdiction of the High Court in Article 34.3.1° of the Constitution; *Tormey v. Ireland* [1985] I.R. 289. This function also rightly relieves the courts of the matters touched on in *Deighan v Hearn* and in *Doherty v South Dublin County Council (No. 2)* [2007] 2 IR 696. What judicial review does not do, and cannot ever do, is remove a bad judicial decision and replace it with a fair hearing as to fact leading to a correct factual analysis that vindicates rights and points as to where the truth reposes. That is what Mr Zalewski is entitled to under the

Constitution as is his former employer and that is what neither will get from proposed solution of judicial review. What is needed is at least the prospect of a full rehearing by an actual judge. In the *FitzGibbon* case, Clarke J's concurring judgment treats the forms of appeal which may result from an actual finding by a tribunal as being:

(a) A de novo appeal;
(b) An appeal on the record;
(c) An appeal against error, and
(d) An appeal on a point of law.

Summary

54. Each of these forms of appeal are described in the judgment of Clark J and that classification and analysis is here adopted. Assuming without deciding that what is already in the courts cannot be taken away, a working approach to statutory schemes and the constitutionality of the exercise of limited functions and powers of a judicial nature is to consider, firstly, the breadth of the power, secondly, the availability of an appeal to a judge in court, and thirdly, the extent of that appeal. It must depend upon how deeply the function and power tranches on the constitutional requirement in Article 34 as to how extensive an appeal must be. It must depend also upon the Constitution preserving in the courts the powers and functions which historically belong to the courts and not to the executive. In that regard, s 33 of the Road Traffic Act 1961 may be overdone; but that is within the choice of the legislature. That requires consideration of the nature of unfair dismissal since, in accordance with the interpretation of the *Calcul International* case, all that is involved in the technical award of holiday pay, minimum notice and redundancy payments, apart from that substantive issue of whether a dismissal was justified by substantial grounds related to competence or qualification, is a matter of calculation and not of judicial analysis. But, does unfair dismissal need an adjudication by a judge, even if only after a preliminary but non-binding unless appealed ruling by an administrator or tribunal? As a matter of justice and of close connection to contract law, the answer is yes.

Unfair dismissal and courts

55. For Mr Zalewski, and for those in his position, a finding such as that of the Workplace Relations Commission, later quashed by the High Court, is a potential disaster. It is more than disappointing how little serious effort was put into what is clearly the administration of justice by the Workplace Relations Commission. This is not only a personal fault but a profound structures, training and management issue. That want of application is exacerbated by being in private and thus out of the way of public scrutiny and media analysis as to approach. But it is made a denial of justice, of the right to justice, by leaving no avenue open save the sterile desert of procedure. Procedures can be gotten right but procedure alone solves no one's problem of being blocked from seeking justice in a court.

56. The idea that a worker must be protected in employment and not subject to arbitrary dismissal is not novel and in many respects fits within the historical aspect of litigation. Legal obligations to pursue the security of employment against unfairness in ending the employment contract arose from the International Labour Organisation's work on gaining acceptance of that idea on a convention basis. The first instrument specifically dealing with termination of employment was adopted as a recommendation in 1963, but subsequently, the Termination of Employment Convention was after Ireland had already passed the Unfair Dismissals Act in 1977, that is in 1982, entering into force on 24 November 1985

in circumstances where the State had already fulfilled its international obligations. Further work has been done internationally, including as to reasons which automatically render a termination of employment unfair, such as exercising a right to litigation, making disclosures as to dangerous practices and race relations. This has resulted in Convention No 158, which adopted the Termination of Employment Recommendation, 1982, replacing its predecessor. As of September 2008, there are 34 recommendations.

57. There is a well-developed line of authority that what is in the courts stays in the courts and that if new rights are developed to be decided by a statutory tribunal, it is to those that a rights-seeker must go, with perhaps judicial review being an adequate remedy or whereby a limited right of appeal to courts is enabled by the legislature. An example is equality legislation. This does not trespass on established torts or create a new civil wrong for adjudication in courts but constitutes a new form of entitlement with specifically designed forms of redress; see *Doherty v South Dublin County Council (No. 2).*Nor is this kind of legislation necessarily the provision of safety rights for workers which are enforceable as a species of tort actions under the traditional heading of breach of statutory duty. One goes to a court if injured by a failure to fence a prime mover or to erect compliant scaffolding, to enforce a damages claim based on that tort heading but one goes to a tribunal to obtain redress for novel remedies and statutorily created entitlements. Thus, the case law is far-seeing in embracing the concept of what is within Article 34 as being what, as a matter of history, the courts have dealt with.

58. The test is well traversed in various cases. As Kelly states, it is the application that is difficult; The Irish Constitution 6.1.5-6.1.20. The approach of turning all legal rules into definitions works well with many issues but in others a legal concept may be sufficiently delineated if described but not precisely bordered by precise words. This issue exemplifies that description is possible but, because of the multifaceted nature of decision-making binding citizens becoming increasingly the responsibility of new bodies enforcing new obligations or rights, definition is elusive. The standard five-point test derived from *The State (Shanahan) v Attorney General* [1964] IR 239 and that of Kenny J tentatively approved by this Court in *McDonald v Bord na gCon (No 2)* [1965] IR 217 at 244 succeeds in laying out an approach to predictably differentiate as between what is and what is not the administration of justice. Of the tests, many would be met by statutory tribunals or administrative bodies, most notably the compulsion of witnesses and evidence mentioned in *Shanahan* by Kennedy CJ and, besides, there has to be a practical aspect to this. The courts are not preciously to guard powers of compulsion of evidence simply because as a matter of history, judges exercised such powers almost, but not wholly, exclusively. This is the test:

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.

59. Of the *McDonald* five-part test, unfair dismissal certainly involves a dispute as to the legal right to not loose one's job without substantial reason related to competence or qualification and this is not a merely technical matter or question of calculation based on statutory entitlements. Yet, that right derives from statute and the legislature fulfilled the classic model of moving outside courts with new rights through setting up a tribunal in 1977, but with a full right to appeal to a court. The second aspect of the test repeats that criterion and requires that a court make a determination. But, again, the right and the remedy are statutory. The third criterion is that the determination be final.

60. As a matter of recent history, for close to forty years, final decisions of the Employment Appeals Tribunal were not final because, as a matter of acceptance or rejection by the parties, either could appeal on a *de novo* hearing basis to the Circuit Court. There, and there alone, the later unnecessary appeal *de novo* to the High Court having been abolished after the *JVC* case, the determination became final and was so because the judicial power had intervened and had considered and given a ruling on the rights and wrongs involved. This scheme in the 2015 Act, in contrast, uses the courts as merely a port for the gaining, by no analysis or discretion, of an order that Simons J in the High Court incorrectly thought saved the scheme. It does not. Because nothing judicial happens in the District Court under the 2015 Act. Furthermore, in making a decision in the absence of one of the parties' rights to make submissions and in altering an order without evidence from an employer, a breach of age-old rights is wrongly endorsed and, even worse, mandated by statute. The fourth criterion as to enforcement through the executive power of the State cannot be said to be judicial unless there is a judicial involvement in so deciding. That takes assessment, evidence in some form, a consideration of the options legally open and a balancing of where best that compulsive power ought to be used as part of the functions of the judicial arm of government. The final criterion as to history protects the courts from being denuded of power by unscrupulous government and upholds the bedrock of citizens rights through the executive being checked in its power. Here, on behalf of the State, the Attorney General argued that forty odd years of doing something one way was not the establishment of exclusive jurisdiction under the 1977 Act for the courts; that what was meant by Kenny J was the historical aspects of the administration of justice. That, however, is not all there is to it. A job is a contract. The courts enforce contracts. The 1977 Act added new rights to existing contracts.

61. In analysing where this lies, the peaks of resonance from the spectrum of cases tend to show up the preciousness of the courts being required to guard to themselves under Article 34 life-changing judicial decisions, since these are not of their nature limited. Preserving those areas of law within which as a matter of history the courts have discharged their duties; the maintenance of the sovereign power of the State within a system of separation of powers where the legislative and executive arms of government may not wrestle away from the courts decisions requiring the administration of rights through judicial skills and coercive orders in favour of devolving these onto non judges; and, finally, determining to keep within the courts decisions which require the independence which judges have sworn to uphold and which require the experience and qualifications that enable justice to be done.

62. It is argued by the Attorney General that unfair dismissal is both new and is a limited area of litigation. It might be wondered, however, how new what happened to Mr Zalewski and those in like positions is? Certainly, in the 1977 Act and under the 2015 Act, if an ex-employee opts for a remedy based on a failure to have substantial reasons for dismissal based on competence and qualifications, that is a remedy created by statute, inspired by

the International Labour Organisation. If there is a period of notice appropriate by implication, or expressly set out in the contract of employment, that is justiciable as a matter of contract as wrongful dismissal in a court. Of course, the remedies are different and a choice must be made. But, there is more than an overlap. Mr Zalewski was simply told by his employer to get out, branded it seems as dishonest and given no back pay. That is the repudiation of a contract. It may be correct in terms of contract law or not but it is a matter of law for which injunctive relief is available, which is solely the preserve of the Circuit and High Courts and not of any tribunal. The claim of abuse of contract that he makes is as a matter of history closely tied up to equitable remedies and to the administration of disputes which are historically characteristic of courts. The legislature could have declared, as in consumer cases, an implied term not to be dismissed unfairly or granted injunctive relief as a matter of course in the courts. It is the substance that matters.

63. Dismissal in this manner with no recourse to a final analysis by a court leaves Mr Zalewski bereft of reputation, damaged in the marketplace for work and stripped of the human dignity of labour. This is a judicial controversy.

Under Article 37.1

64. In accordance with the analysis to which that conclusion led, it may be claimed, as counsel for Mr Zalewski sought to argue, and which counsel for the Attorney General persuasively opposed, that it follows that every adjudication official must be a judge. That is not so. Where a *de novo* appeal is possible, it may be argued that the parties have been put to bother for no good reason. That is not so. While failings are highlighted by the evidence, and will no doubt be addressed as real concerns, compulsory arbitration, because with a proper appeal that is what this is, of this kind of dispute is not wrong. Many parties after a first instance decision decide that the decision maker was probably right or that their case was insufficiently strong. For those who do not, however, the judicial power should be available and in unfettered form. That is only possible by a full rehearing appeal. That recourse was sparingly exercised under the 1977 Act and its availability limits, within the meaning of Article 37, the exercise by those other than judges of the powers and functions of a judicial nature which this exercise undoubtedly embraced. This may be considered by some to be akin to the solution in *McNamee v Revenue Commissioners* [2016] IESC 33 whereby an initial hearing of a very informal sort in the first round and with fair procedures in the second review suffices, but it is not. This is about ensuring that any deviation from the exclusive judicial function in Article 34.1 is only that permitted by Article 37.1 and that the function of the courts as an arm of government is protected.

Fair Procedures

65. Sympathy abounds for the proposition that disputes should not be turned into ceremonies akin to a State Trial, that pre-trial procedures should not be used to exhaust patience or finance, that questioning should only be used as an instrument of truth and as a polite exercise rather than as a resort to confusion where a case lacks merit, that unnecessary costs be shunned and that peopling teams with abundant lawyers to do simple cases does not aid the administration of justice. That is what judicial case management, so necessary in larger cases, sets out to counter and counters successfully in jurisdictions which employ that method successfully. Judicial experience in making parties focus on what uncomplex but difficult cases are about is what saves costs.

66. Fair procedures are not the answer to sense where the plain result of a case is that court-like formalities would have changed nothing. As recently as in *Shatter v Guerin* [2019] IESC 9, a consensus was reached that there is a minimum standard, derived from existing judgments of the Court, that examination by a single party with the circulation of a draft conclusion and supporting documentation for comment is possible and that only very rarely are full rights of information, or charge or notice of what is wrong, full relevant papers, representation, rights to cross examine and make submissions necessary. This is not such a case. The fundamental decision is that of Barrington J in *Mooney v An Post* [1998] 4 IR 288 at 298. More recently this was followed by Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233. He there describes a floor of rights where "the minimum" is that a person affected as to their protected rights "is entitled to" some notice of what might be described as "the charge against him" or her. While cross-examination or a public hearing do not come into the question, necessarily, that person must "be given an opportunity to answer it and make submissions." Thus the basic right is fair notice and a chance to comment.

67. Secondly, there is the model where a person is appointed to investigate some issue and goes about by calling in individuals one by one and asking them what they have to offer. These persons, of course, may be ordinary witnesses to some public scandal or to a disaster or they may be those reasonably considered to be responsible. Even still, they are simply asked about their involvement. What then of notice, since cross examination is excluded, and a chance to make submissions? In this, which is the *In re Pergamon Press Ltd* [1971] Ch 388 model, when all evidence has been taken and gathered, such transcripts and documents as cause the enquirer to feel that a particular organisation or individual or people are responsible for something which has gone wrong, these are sent to them with a draft report set of preliminary findings and submissions are invited. On considering those submissions, there is sufficient of audi alteram partem, hearing the party potentially to be blamed, for the report to be finalised and published. This is a valuable model, one which has enabled important enquiries under s 14 of the Companies Act 1990: for instance the report of 30 July 1992 into Chestvale Properties Limited and Hoddle Investments Limited by John Glackin. This is now s 748 of the Companies Act 2014. This is a valuable model, of wide use and should not be unwittingly abolished by this specific analysis.

68. Without this model, those kind of enquiries would become as difficult as those now attending on public tribunals of inquiry. As this second model demonstrates, the kind of elaborate procedures identical to a criminal trial are not necessary to ensure a fair examination of even serious events whereby a public opinion be pronounced and one, at that, which potentially destroys the good name of a citizen.

69. What is emphasised by the will of the legislature in maintaining court appointed inspectors into companies, and by the case law generally upholding the *Pergamum Press* model, and by the establishment in *Atlantean* of sufficiency in notifying and hearing, is that there is no necessity to ensure a fair hearing through cross-examination and the kind of procedures characteristic of a murder trial. Here, the complaint is made that, without trial procedures, the administration of oaths or affirmations to witnesses, and a legally qualified judge, a hearing must be unfair. That is not so. Furthermore, accreting onto models already authorised by law a duty to follow trial procedures would destroy the entire legal basis whereby hearings may be conducted. As to legal qualification, that is desirable for State bodies which are determined to serve the working community by providing a level of expertise which is helpful. In some jurisdictions, notably magistrates in England, judges are chosen for good sense and not for legal qualifications. In others, judges on gaining a

law degree enter a scheme of sitting immediately and without experience as a practitioner. What does perhaps matter is a judicial oath to emphasise and carry with those appointed the seriousness of the role undertaken. But, that again is not a legal requirement. Application to the task in hand and the availability of legal advice suffice. Where there is a conflict, but only in a matter as serious as this, being enabled to ask questions will assist in non-technical matters. The oath or affirmation may aid in the discovery of the truth but may strictly not be necessary.

70. What should not happen is that a clear breach of Article 34.1 not within the exception of Article 37.1 should be made to appear compliant with the Constitution through the accretion of procedures proper to courts. Acting like a court does not make an administrator a court. Good sense should not be overridden by recourse to the fallacy that procedures cure non-application to duty or that the appearance of fairness represents openness of mind and an independent determination to find the truth. Instead of a meaningful appeal, the majority judgment considers that enhanced procedures may cure what is a grim prospect for any litigant, employee or employer, seeking justice within the confines of the meaningful-appeal proof Workplace Relations Commission.

Concise statement of reasons for dissent

71. Firstly, a claim for unfair dismissal involves the administration of justice: the determination of who is right and who is wrong in a matter closely allied to contract law and involving decisions of fact in aid of uncovering truth. Such a decision carries that degree of moment that it is not within the limited range of decisions that could be regarded as technical or administrative. Any such judgment, that a person was unfairly dismissed, on substantial grounds, for incompetence, dishonesty or lack of qualification, is one where the very nature of a person is called into question and determined in what is for working men and women core area of life. Protection of the right to work and of the entitlement of working men and women to their reputation is what should be at the heart of the administration of decisions which may ruin a career or devalue those individuals in the struggle to earn an honest living. Yet, this has been taken away by the Oireachtas from any recourse to the courts. That is constitutionally wrong. In not allowing any judicial determination even by way of an appeal on an unfair dismissal case, the Workplace Relations Act 2015 completely deprives a justiciable controversy of a judicial determination. This reasoning by no means affects all quasi-judicial processes. In a complex modern environment where rights are often created by statute and administered by specialised bodies, it does not infringe the Constitution for these to be considered by non-judicial figures. Where, however, as is the case with unfair dismissal, the rights in question transcend what is limited or technical, but go to the very core of what defines a person in their social standing or conduct, there must be a choice to either the employee or the employer to seek justice in a court by way of a final factual appeal that requires a rehearing. Judicial review as a remedy, suitable for planning, tax, licencing, and other technical matters, is not an answer that makes such cases limited since the subject matter of unfair dismissal so embraces the essence of what courts are set up under the Constitution to do: to administer justice, to determine such fundamental rights as the entitlement of a working man or woman to hold their head high and to seek employment having been vindicated in the most core aspects as to honesty and competency by a judge. Under the majority decision, that constitutional entitlement is completely lost. A full appeal to a court from an administrative body has been abolished by the 2015 Act in favour of private hearings by administrators. Justice is about the truth coming out. Justice under the Constitution is about basing vindication or denial in key matters of human life within the

realm of the courts, or at the very least allowing an appeal to a judge by way of a rehearing if an administrator's verdict is fundamentally disputed. Judicial review, which the majority consider limits this denial of recourse to a constitutionally established court, is about procedure, jurisdiction and reasonableness. Judicial review does not substitute a good judicial decision for an unwise or wrong-headed analysis by an administrator.

72. Secondly, the 2015 Act mechanism for obtaining a court order uses the District Court as a discretion-deprived adjunct to administration. In disabling one side of a case, excluding the employer from being heard, whereby the District Court may cause an order for re-engagement or re-instatement to be changed into an order for damages, being salary of up to two years, the Workplace Relations Act 2015 fundamentally violates the Constitution. The notion that courts would decide radically different remedies, damages by way of salary for up to two years and reengagement and reinstatement into a job are as results to an unfair dismissals case, without hearing from the employer's side involves a statutory model that undermines all the existing principles of fair procedure.

73. Finally, the majority, by requiring a basic level of fairness of procedure, so notably and completely denied by the Workplace Relations Commission to Mr Zalewski, consider that some improvement may come about in what is a sad reflection on application to duty and a denial of what the Constitution contemplates as the path to justice. Curiously, the one place where all of that fairness of procedure is to be found is in a court. Wisdom, experience, independence, application to duty and legal knowledge is what is expected of judges and that is what is therefore to be found in a court. But, that is also the path blocked by this legislation to those who may have a fundamental need to be vindicated as to their honesty and their competence as working people.