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Recent Supreme Court case considers unfair dismissal

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The Supreme Court recently had the opportunity to consider the Unfair Dismissal Act 1977 (as amended, the '**1977 Act**') in the long-running case of **An Bord Banistíochta, Gaelscoil Moshíológ v the Labour Court** [2024] IESC 38 (the '**O'Súird case**').

While there was a broad array of issues in controversy, for present purposes the issues crucially, included the principles to be considered by the Workplace Relations Commission ("**WRC'**), Labour Court or High Court when directing reinstatement or reengagement of an employee under the 1977 Act. In its decision, the Supreme Court has reasserted the exceptionality of those remedies, and criticised aspects of the decision-making by the WRC and Labour Court in a manner which might be expected to give rise to an increased level of scrutiny becoming evident in the written decisions from those bodies.

Background

This highly-contentious dispute related to the conduct of Mr O'Súird while principal of the respondent school in respect of the management of enrolment in the school dating back to 2009-2010. Mr O'Súird was initially placed on administrative leave in January 2012 arising from complaints that he had lost his temper with a pupil. During that leave, teachers in the school raised a number of concerns about overstatement of numbers enrolled in annual returns to the Department of Education (the '**Department**'), which may have affected the funding received by the school. This was, eventually, the subject of an investigation by the school's Board of Management regarding whether matters had been fraudulently misrepresented to the Department. During that investigation, Mr O'Suird, as principal with statutory responsibility for the day-to-day management of the school, was suspended on pay from May 2013. The essential response of Mr O'Súird in the investigation was to argue that deliberately including pupils in the roll who would not attend the school in that academic year was a grey area, that other schools adopted similar practices and that members of the school's Board were complicit in, and aware of, this practice.

Following a prolonged disciplinary hearing, Mr O'Súird was dismissed with effect from November 2015 on the grounds of serious misconduct, with this dismissal later upheld by a disciplinary appeal panel. While the Board indicated that it had regard to mitigating factors including the enormous contribution of the principal to the school and the fact he was not motivated by personal gain, it reluctantly concluded that his misconduct had so undermined its trust and confidence in him as to make his position untenable. In July 2016, an existing teacher at the school was appointed as principal of the school.

Previous decisions in the case

The WRC, noting that the Board was complicit in the practice, upheld Mr O'Súird's complaint of unfair dismissal and, deciding that compensation was an inadequate remedy insofar as it was capped at 104 weeks' remuneration and Mr O'Súird's prospects of securing future employment were 'very slim', ordered he be re-engaged as principal on the same terms as prior to his dismissal, with effect from January 2018.

On appeal to the Labour Court, Mr O'Súird was again found to have been unfairly dismissed, with the court critical of the delay in the school's process, and finding in the facts evidence of '*a determined intention on the part of the respondent to find a basis for removing the complainant from his employment*'. Noting that a sanction of dismissal from an education post could amount to a '*kiss of death*' to one's career as an educational professional, with such a sanction '*in a case such as the instant one [being] manifestly more far-reaching*' than in other settings, the Court concluded that the dismissal was disproportionate and not within the band of reasonable responses open to a reasonable employer in the circumstances. Arising from the fact the complainant '*was not acting without the support & encouragement of the Board*', his re-engagement was directed with effect from four months earlier than that directed by the WRC.

This decision was, in turn, appealed to the High Court, where an order for his reengagement as principal was made by Cregan J, with all arrears of pay from his date of dismissal to be paid to him. The effect of that decision was to require the school, with effect from August 2023, to accept the respondent as principal in a role he had not fulfilled for more than a decade, and where there was a principal in place for more than seven years. This was also despite an asserted loss of trust and confidence in him in that role, and notwithstanding that there had been a bitter dispute between him and the school in the course of which a number of teachers gave evidence against him.

Appeal on a point of law

The Supreme Court emphasised the limitations applicable to an appellate court's jurisdiction in an appeal on a point of law, as applied to the High Court in this case. In particular, it noted the principle that the facts as found by the Labour Court would bind the High Court where they are supported by credible evidence and the High Court should be slow to disregard the inferences drawn by the Labour Court unless wholly unwarranted on the findings made. The High Court's own view of any particular decision of the Labour Court is irrelevant as the appeal on a point of law is not a rehearing, with the High Court hearing no evidence. O'Donnell CJ stated that this division of function was easily stated in principle but could be difficult to apply, although he emphasised that the division must be respected and that an appellate court '*should be alert to avoid being drawn wholesale into the details of the dispute*' as the court is not '*a surrogate Labour Court*'. Nevertheless, he held that proceedings in the High Court had '*slipped their moorings and travelled well beyond the limits of an appeal on a point of law', at times "mutatling into a form of rehearing on the merits*'.

The unfair dismissal decision

In the course of his judgment, O'Donnell CJ appears to hint that no question of law arises regarding the appropriate tests so much as the application of those tests on the facts. While noting that the 1977 Act is not elegantly or clearly drafted, he stated that the fundamental issue is whether a dismissal is fair, with the onus on the employer, and the reasonableness of its approach being a key issue. The test is whether

the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned.

O'Donnell CJ stated that while perhaps *'too much heat'* had been generated in the case, the decisions of the WRC & Labour Court were *'certainly not clearly or adequately expressed'* as to whether the dismissal decision was within the range of responses open to a reasonable employer in the circumstances. Referring to the court's judgment in **Zalewski v An Adjudication Officer** [2022] 1 IR 421 which held that the WRC & Labour Court discharge a limited judicial function, the court stated that the position of such bodies as primary fact finder '*carries with it the duty of identifying the issues in controversy considered to be relevant to the decision; the evidence adduced; the findings of the tribunal; and the reasoning leading to the conclusion*'.

O'Donnell CJ noted that the accusations against the principal were a serious matter which could '*certainly*' be considered serious misconduct; he criticised the WRC & Labour Court for failing to engage with the facts that '*might tend against the decision to which they have come*', of which there were some here. However, notwithstanding unsatisfactory elements of the assessment, the decision that the dismissal was unfair was one to which the Labour Court was entitled to come, albeit O'Donnell CJ clearly stated that there was evidence upon which a '*sterner view*' could have been taken (and the fact that the Board and appeal panel both took that view only supported that the conclusion was within a range of reasonable responses).

The remedy: the exceptionality of reengagement and reinstatement

The Supreme Court also noted that the statutory distinction between reinstatement and reengagement had been blurred in this case, as the appellant was ordered to be reengaged as principal with effect from a point in the past, so as to give rise to an obligation to pay arrears of salary. Reengagement, the more flexible remedy, does not typically entitle an employee to recover pay for the period between dismissal and reengagement and may be more appropriate where, for instance, an employee can be restored to employment in a different role or where s/he may not be required to work closely with former colleagues. Reinstatement is significantly more burdensome and intrusive, often involving a significant element of public vindication appropriate where an employer's conduct is regarded as particularly outrageous and where there is little or no contribution by the employee to the dismissal. It is an exceptional remedy, the effect of which is to require the employer to take the person back in the same job, without any break in service or loss of pay, and notwithstanding any breakdown in the relationship, and as such, the Supreme Court opined that it would be applicable only in 'clear-cut cases', where any other remedy is not sufficient vindication of the employee. Reinstatement, the court indicated, imposing as it does a personal contractual relationship on an unwilling party, can only properly be granted where the court or tribunal has '*assessed the interests of both parties to the arrangement and where, having done so, it provides clear and coherent reasons for the appropriateness of the remedy in the particular case*'.

The WRC & Labour Court in their remedies had fixed the point of reengagement at a point significantly after the date of dismissal to reflect that the principal had been guilty of wrongdoing which merited some sanction. However, the order of the High Court came from its own view of the evidence and was such that the Supreme Court commented '*the Principal [made] the transition from serious wrongdoer but whose*

dismissal was disproportionate in the Labour Court, to innocent victim in the High Court'. There was no basis on which the High Court could properly have substituted its own remedy of '*effective reinstatement*' and that decision was, accordingly, set aside.

Factors to be considered when ordering reengagement and reinstatement

In ordering the exceptional remedy of reinstatement, the Supreme Court insisted that the WRC &/ or Labour Court must give careful consideration to all factors, whereas very little consideration, if any, appears to have been given in this case, in which the determinations focused solely on the interests of the principal. The court indicated that it was '*troubling*' if reengagement was seen as appropriate in order to provide greater compensation than that otherwise available under the 1977 Act and in any case the inadequacy of financial compensation was only one factor, and of limited significance where the remedy is otherwise inappropriate or impracticable. The Court commented that the delay in this case was in fact a strong reason against ordering reengagement and no assessment had been made of the practicability of such an order having regard to the fraught relationships involved, or of the principal's capacity to perform a role after so long out of the school environment. All of these considerations tended against the remedies of reinstatement or, as ordered by the High Court, effective reinstatement, with the Supreme Court commenting that the displacement of the new principal appointed in 2016 being a '*very significant factor*'. The Court noted that that appointment had followed consultation with the Department and was made a year after the dismissal was upheld on appeal (and as such could not be characterised as an attempt to frustrate the legal process). The Court commented that it was not reasonable to expect that businesses would remain in limbo pending the outcome of protracted legal proceedings; life must go on, in particular in a case involving such delay.

'At the risk of stating the obvious, the grant of an exceptional remedy requires a clear and balanced explanation detailing precisely why a relief which is out of the ordinary is being granted in a particular case. This would be so in any case but was particularly required here because of... the employer's asserted lack of trust in an employee whom they have unfairly dismissed and the appointment of a new principal in the school on a permanent basis'.

In this case, the Board asserted a loss of trust and confidence in the principal and the Supreme Court noted that there may be factions of parents, teachers and others opposed to the principal's return. The practicability of an order for reinstatement required some assessment of how it was anticipated the school would work. The Court indicated that while normally the decision of the High Court on the remedy would be set aside and remitted to the Labour Court, it reluctantly decided against doing so here given that these proceedings had been in being for an inordinate and unconscionable amount of time. The effect is that the principal remains reengaged with effect from 1 September 2017.

Concluding remarks

The judgment in the O'Súird case demonstrates the difficulties of appropriately confining an appeal on a point of law. However, the restatement of the principle that the High Court is not at large to substitute its own findings for that of the Labour Court will be welcomed by employers.

While the ultimate decision (that the dismissal of Mr O'Súird was unfair) was not disturbed by the Supreme Court, the Court clearly considered that a contrary conclusion could have been sustained. The comments made by O'Donnell CJ might presage a closer scrutiny of the evidence by the WRC/Labour Court in cases of unfair dismissal, especially evidence that tends against the tribunal's decision.

Employers will derive comfort from the comments emphasising that orders for reinstatement will be warranted only in '*clear-cut cases*' following an assessment of *both* parties' interests, including on the practicability of the order, and subject to the giving of '*clear and coherent*' reasons. While an employer's opposition to an order on the basis of an asserted loss of trust & confidence can sometimes be treated skeptically, the Supreme Court has indicated that this, together with the appointment of a replacement, are weighty factors in the analysis.

O'Donnell CJ criticised the lapse of time involved in the case as '*disturbing & unacceptable*' particularly given that the remedies of reinstatement and reengagement required to be seriously considered. '*If the WRC & Labour Court are to fulfil the promise of the 1977 Act of providing relatively informal speedy & experienced determination of dismissals, then they must adopt procedures that promote the speedy resolution of unfair dismissal claims*'. Those comments might be taken as mandating changes to the scheduling of unfair dismissal hearings. It is understood that the practice of the WRC is now to expedite hearings alleging penalisation under the Protected Disclosures Act 2014. While there is the possibility of interim relief being obtained in such cases, the lack of availability of that relief in cases under the 1977 Act, in which delay can have a significant effect on the potential remedy, supports these cases being scheduled in an efficient and timely manner.