The Supreme Court's decision in Zalewski: *What next for the WRC?*

In the Supreme Court case of *Zalewski v. An Adjudication Officer and Others*, the Workplace Relations Commission (WRC) narrowly survived a constitutional challenge. The Supreme Court, by a majority of 4:3, decided that while the WRC is constitutionally valid, certain aspects of its procedures are not.

These aspects are:

- There is no justification for a blanket prohibition on hearings in public.
- The absence of at least a capacity to require certain evidence on oath is inconsistent with the Constitution.

Background

The WRC was established by the Workplace Relations Act 2015 (the **2015 Act**) to perform certain functions, including adjudicating on disputes under employment legislation. Up until the Supreme Court's recent decision on 6 April 2021, hearings were in private, there was no sworn evidence and parties' names were usually anonymised. The idea behind these measures was so that WRC hearings would be less formal and intimidating. It is worth noting that there are no formal qualifications prescribed for Adjudication Officers of the WRC.

Mr Zalewski was dismissed by his employer in 2016. He brought a claim for unfair dismissal to the WRC. When the parties attended for the hearing it was adjourned due to witness availability. When the parties returned to the WRC on the adjourned date, the Adjudication Officer informed them that she had already made her decision. The decision then issued three days later, dismissing Mr Zalewski's claim.

Mr Zalewski brought proceedings in the High Court seeking an order quashing the WRC's decision and a declaration that the 2015 Act was repugnant to the Constitution on the basis that justice should be administered in a Court by a judge. The State conceded the invalidity of the WRC's decision but contested Mr Zalewski's arguments in respect of the constitutionality of the WRC.

What did the Supreme Court decide?

Following lengthy and detailed consideration, the Supreme Court on appeal has narrowly decided that the WRC does carry out the administration of justice, which means it should be administered in a Court by a judge. However, it found a saver for the WRC in Article 37 of the Constitution, which permits the exercise of some functions and powers by persons and bodies who are neither judges nor Courts under the Constitution.

The exercise of jurisdiction captured by Article 37 is nonetheless an administration of justice. Approached through this lens, the Supreme Court found: (i) that there is no justification for a blanket prohibition on hearings in public before the WRC; and (ii) that the absence of at least a capacity to allow an Adjudication Officer to require that certain evidence must be given on oath is inconsistent with the Constitution. The Supreme Court commented that evidence on oath provides an incentive to truthful testimony.

Mr Justice O'Donnell's comments in relation to the WRC's blanket rule on providing evidence on oath are noteworthy:

"*I appreciate that one possible contention is that a blanket rule is easier to apply since, if the question of evidence on oath becomes a matter for discretion and only applicable in certain cases, it is an issue which may be raised in many cases, and, if an incorrect decision is made, may lead to the overall decision being quashed. This, in turn, might lead to adjudication officers feeling that the safest route is to concede the procedure even when it is not required, and possibly unhelpful, and leading, inevitably therefore, to greater and unnecessary formality in the proceedings. However, this type of problem is inevitable in any form of judicial decision-making and is a reason to have experienced decision-makers. Difficulty of decision-making cannot be designed out of a system intended to decide difficult disputes.*"

Changes to legislation

The Minister for Business, Employment, and Retail wasted no time in announcing that the government will quickly introduce legislative amendments to enable the WRC to continue to function in line with the Constitution. The amendments to the 2015 Act will allow for hearings in public and the administration of evidence on oath in WRC hearings.

What happens now?

The WRC has published a notice outlining that it will now operate on the basis that all hearings under employment rights legislation[1] are open to the public. Hearings are currently being conducted remotely in line with COVID-19 guidance and members of the public or the media may now contact the WRC to request remote access.

Parties who had already submitted complaints to the WRC for adjudication did so on the basis of their hearing being in private, but this no longer applies and the names of parties will no longer be anonymised. This may result in complainants withdrawing, or wishing to enter mediation in respect of their complaints.

The notice also states that where an Adjudication Officer determines that there is a serious and direct conflict of evidence between the parties, they will adjourn the hearing to await the amendment of the 2015 Act. The notice provides that unless a postponement is granted in advance, all hearings will commence in the normal manner, but may be subject to an adjournment if the Adjudication Officer concludes that it is necessary for evidence to be on oath or affirmation. It interestingly states that "*parties may utilise the hearing provided to case-manage the complaint(s) to identify areas of contention and/or agreement which will be of assistance to all parties should the matter require a further hearing.*"

The WRC requests that parties give due consideration to availing of the WRC mediation service. However, this is only an option where both parties are prepared to engage in mediation.

There is no change for any cases heard on or before 6 April 2021. The parties to the decision will still be anonymous, as they would have been before. These changes only apply to cases heard from 7 April 2021 onwards.

Next steps

It is clear there will be adjournments over the coming weeks until the emergency legislation is enacted. The WRC will need to ensure that Adjudication Officers are equipped to decide when evidence on oath is required and be in a position to facilitate and manage this process.

Employers should give due consideration to the fact that hearings are now in public and that parties names will be published. This will also be a valid consideration for claimant employees. This may result in an increase in settlements and mediation.

If an employer has a hearing coming up, it should consider the likelihood of a serious and direct conflict of evidence. It may be worth seeking an adjournment on that basis; or, as the notice suggests, perhaps availing of the scheduled hearing date to try to identify areas of contention and/or agreement, which may be of assistance on an adjourned hearing date. It is important to note that an adjournment may not be granted and that the application to adjourn due to a serious and direct conflict of evidence is not entertained until the hearing. This may result in wasted time and legal costs and it is hoped that the WRC will take a pragmatic approach to any application pending the new legislation.

[1] Not under the Industrial Relations Acts

While the WRC can certainly breathe a sigh of relief, there is still a task ahead in adjusting its procedures to make them fit for purpose and addressing the logistics involved in facilitating public hearings and administering oaths. It's worth remembering, as the Supreme Court stated in its decision, that the individual employer and employee are entitled to no less than a competent resolution in any and every case.

For more information or advice on this topic, please contact Duncan Inverarity, Partner, Triona Sugrue, Knowledge Lawyer or any member of the ALG Employment team.

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