

**IHRC and Law Society Conference**  
**Economic, Social and Cultural Rights: Making States Accountable**  
**Saturday 21 November 2009**  
**By Eilis Barry, BL.**  
**Parallel Session on Employment Rights**  
**National Mechanisms for Protecting Employment Rights**

**Introduction**

The briefing note for speakers asks that I outline the national mechanisms for protecting employment rights, to discuss key cases of the Court of Justice that have advanced employment protection and the impact on Ireland, the potential of the Lisbon Treaty. It also asks to consider which avenue may be more advantageous from a human rights litigant by reference to accessibility (including costs), timeliness, etc, to illustrate how the EAT, Equality Tribunal protect employment rights by reference to their jurisprudence. These are complex, important and quite detailed issues and within the 20 minutes available it will not be possible to give a comprehensive analysis. What follows is more of a rather superficial note of some of the main features occurring under each heading. I have also been asked to include a gender perspective. I do not intend to deal with trade disputes (that are dealt with under the Industrial Relations Acts) but will focus more on employment protective legislation that affords a personal right and a means of enforcing it by way of lodging a claim before a quasi judicial body.

There are three striking and notable features in relation to the mechanisms for the protection of employment rights. The first two features are of a practical nature and while they concern form and process, they go to the heart of accessibility and are foundational in relation to the potential of employment protective statutes from a whole range of perspectives, including enforcement, non discrimination and human rights. These features almost make discussions about concepts like equality and human rights a theoretical exercise even though anti discrimination and human rights concepts have a significant relevance to process and procedures. The first feature is the number and range of employment protective statutes and statutory instruments. The second feature is the number and range of fora or quasi judicial bodies that are designated to adjudicate upon and/or enforce employment rights.

The third feature of national employment mechanisms is the significant impact of the EU on employment protection and the extent to which Ireland and other EU members have been required to implement and/or update national employment protective legislation. It is striking how much of our national legislation is now required by EU Directives and correspondingly how little of our employment protective legislation is 'home-grown' or has a domestic origin or caters to specific domestic needs. The Unfair Dismissals Acts and the Minimum Wages Act are the major striking exceptions.

*'Given the multiplicity of fora for the resolution of employment rights disputes and the disparate provisions of the relevant legislation, it is not possible to provide a consistent*

*guide to practice and procedure in Employment. Depending on the nature of the claim, the forum may vary, the procedure may differ and the appeal process may diverge.’*<sup>1</sup>

There are at least 20 significant employment protective statutes.<sup>2</sup> These are (the corresponding Directive is included):

- a) Redundancy Payments Acts 1967-2007;(Council Directive 98/59/EC)
- b) Industrial Relations Acts 1969-2004;
- c) Unfair Dismissals Acts 1977-2007;
- d) Protection of Employees (Employers’ Insolvency) Act 1984; ( Council Directive 2008/94/EC)
- e) Payment of Wages Act 1991;
- f) Minimum Notice and Terms of Employment (Information) Acts 1994-2001; (Council Directive 91/533/EEC on an employer’s obligation to inform employees on the conditions applicable to the contract or employment)
- g) Maternity Protection Acts1994 and 2004; (Council Directive 92/85/EC)
- h) Adoptive Leave Acts 1995 and 2005;
- i) Protection of Young Persons (Employment) Act 1996; (Council Directive 94/33/EC)
- j) Organisation of Working time Act 1997; (Council Directive 2003/88/EC)
- k) Parental Leave Acts1998 and 2006; (Council Directive 96/34/EC}
- l) Employment Equality Acts, 1998-2008; ( Article 141 of the Treaty, Recast Council Directive 2006/54; Framework Employment Directive 2006/54/EC; the Race Directive, 2000/43/EC)
- m) National Minimum Wage Act 2000
- n) Carer’s leave Act 2001;
- o) Protection of Employees(Part-Time Work) Act, 2001; (Council Directive 97/81/EC)
- p) Protection of Employees(Fixed-term Work)Act2003; (Council Directive 99/70/EC
- q) EC (Protection Of Employees on Transfer of Undertaking) Regulations 2003;(Council Directive 2001/23/EC)
- r) Safety, Health and Welfare at Work Act 2005;
- s) Employees(Provision of Information and Consultation)Act 2006;and
- t) Employment Permits Act 2006;

There are at least 70 statutory instruments.

In relation to these statutes, 7 quasi judicial or judicial bodies can be identified as having different roles to play, depending on the Act, and/or the section of the Act. These adjudicative/enforcement bodies are, the Equality Tribunal, the Rights Commissioners, the Employment Appeals Tribunal , the

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<sup>1</sup> Chapter 22,Practice and Procedure in Employment Law, by Anthony Kerr and Cathal McGreal, in Employment Law, General Editor, Maeve Regan

<sup>2</sup> This figure does not take into account amendments.

Labour Court, the District Court and the Circuit Court.<sup>3</sup> Institutions like the National Employment Rights Authority, the Health and Safety Authority, the Pensions Board and the Equality Authority are all part of the landscape. There are a large number of EU Directives which require national employment protective legislation.

There are a number of ways of classifying the Acts for example equality/ non discrimination and family friendly could form one group, working conditions could form another. There are problems with classifying the acts under various headings as the factual experience of the individual does not necessarily fit comfortably under one heading for example there could well be a dismissal that is both discriminatory and unfair. Also the procedures under any classification that you can pick will invariably vary. Claims under the maternity legislation will be heard before a Rights Commissioner, while claims under the Employment Equality Acts will be heard before the Equality Tribunal. An employment gender discrimination claim may be brought in the Circuit Court. It is possible that arising out of the one employment factual situation, a sexual harassment claim under the Employment Equality Acts could be lodged in the Circuit Court, an Unfair Dismissal claim could be lodged in the Employment Appeals Tribunal, and a claim in relation payment of wages could be lodged before a Rights Commissioner. While this scenario is unlikely, it is not unusual for a number of different claims to be lodged at the one time. While this may be necessary to protect statutory interests, it is not a good use of resources.

### **Rights Commissioners**

They operate out of the Labour Relations Commission and deal with a large number of different types of claims, that are too numerous to list, that can broadly and somewhat inaccurately be divided into claims under the Unfair Dismissals Act and claims under the employment rights and other employment legislation. (They also have jurisdiction to hear claims under the Industrial Relations Acts) Essentially since around 1991, the Rights Commissioners have been given jurisdiction to deal with all new employment claims except for claims under the Employment Equality Acts 1998 to 2008. The Equality Tribunal has jurisdiction in relation to these claims. Gender employment claims may be heard in the Circuit Court. (Before 2004, the Labour Court had originating jurisdiction but only in relation to discriminatory dismissals). Rights Commissioners hearings are held in private (except for claims under the Payment of Wages Act 1991 which requires hearings to be in public (unless the Commissioner decides otherwise)). The recommendations of the Rights Commissioners are not made available to the public. This is problematic in a number of respects. Where an adjudication of statutory rights is involved as opposed to conciliation or mediation, then the determination should be public knowledge. It also presents difficulties in knowing how the law is applied in practice. This cannot be in the public interest.

A good example of the inconsistency in the statutes is that a Rights Commissioner may extend the time for initiating a claim 'where there are 'exceptional circumstances' under the Payment of Wages Act (and a number of other Acts) but time may be extended 'for reasonable cause' under the Organisation of Working Time Acts (and a number of other Acts). The Parental Leave Act 1998 allows

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<sup>3</sup> This figure does not include the High Court, which would hear appeals on a point of law or the Court of Justice which would adjudicate on a preliminary reference.

for an extension of time where it is reasonable to do so. The National Minimum Wage Act simply allows the commissioner to extend time.

Some claims may be appealed from the Rights Commissioners to the EAT other claims are appealable to the Labour Court.

### **Employment Appeals Tribunal**

The EAT has originating jurisdiction in redundancy and minimum notice claims. It has appeal jurisdiction in relation to maternity, adoptive leave, parental leave, carer's leave, terms of employment, payment of wages, and young person's claims. In claims under the Unfair Dismissals Acts it can either have original or appellate jurisdiction.

### **The Equality Tribunal**

This hears claims under the Employment Equality Acts, Part VII of the Pensions Acts 1990 as amended.<sup>4</sup> The ET is inquisitorial in that the equality officer is obliged to investigate hear and decide claims. The secretariat of the tribunal appears to play a role in deciding whether a claim is admissible. This is problematic. Admissibility matters should be dealt with by the quasi judicial body responsible. In unfair dismissals claims the onus is firstly put on the claimant to show that the claim is admissible. Detailed written submissions are usually sought by the Equality Tribunal. This can be quite onerous on both parties and may tend to add to the delay. Is it appropriate in all cases. While the Acts allow for procedural rules to be made by the minister, this has not been done.

### **The Labour Courts**

Apart from its function of investigating trade disputes, the Court hears appeals from decisions of Rights Commissioners under a large number of acts. It also hears appeals from decisions of the Equality Tribunal under the Employment Equality Acts. The Labour Court and the EAT have a chairperson and a representative from the employers and from the unions. The chairperson of the EAT is legally qualified.

### **The Circuit Court**

This has an originating jurisdiction in relation to gender employment discrimination claims. It has an appellate jurisdiction in relation to unfair dismissal claims from the EAT. It also has an enforcement role in relation to a number of statutes. There is a vast difference between hearings before the ET and the Circuit Court in terms of formality, rules of evidence, the function of the deciding body, privacy and anonymity, costs, discovery etc.

### **The District Court**

This has an enforcement role.

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<sup>4</sup> It also has jurisdiction under the Equal Status Acts, 2000

## Forum Consolidation

The Department of Enterprise Trade and Employment a number of years ago sought submissions from interested parties on the issue of forum consolidation. I googled to see what was the outcome. All I could find was an excellent submission from FLAC on the issue.

## Procedures

Some regulations have been made prescribing the procedures to be adopted in particular claims, however for the most part the quasi judicial bodies have been left to devise their own procedures. The result is that there is a major divergence in the procedures and in the hearings in the various fora. For example the Equality Tribunal (and the Labour Court on appeal) requires written submissions as a matter of course whereas the other fora do not. Written submissions are read out as part of the hearing in the Labour Court and this does not happen in the other fora. The Redundancy (Redundancy Appeals Tribunal) Regulations 1968 govern the proceedings in the EAT. These provide that a party may make an opening statement, call witnesses, cross examine any witnesses called by any other party, give evidence on his or her own behalf, and address the Tribunal at the close of evidence. The Equality Tribunal the Rights Commissioners do not explicitly allow cross examination though rigorous questioning may well occur throughout the course of the hearing.

The recommendations of the Rights commissioners are not available to the public. The EAT and Labour Court tend to issue short determinations. The determinations of the Equality Tribunal are comparatively longer and much more detailed

If there is an EU matter at issue then the bodies are required by Community Law principles of equivalence and effectiveness to apply directly effective provisions of a relevant Directive even though they have not been given express jurisdiction to do so under the provisions of domestic law transposing the Directive.<sup>5</sup> The ECJ recognises that statutory employment tribunals are 'national courts' for the purposes of the Community law and may therefore in the first instance interpret it and in the second instance must enforce it. The Court went further on the question of forum to say that the enforcement of community law entitlements must not be complicated or made difficult by an unwieldy system of separate fora or tribunals. The Labour Court and the Equality Tribunal regularly refer to the EU principles set down in the gender case law of the Court of Justice and reflected in later anti discrimination directives that remedies must be *effective proportionate and dissuasive*. This has meant that awards in relation to pregnancy dismissal may be higher in claims under the equality legislation than under the unfair dismissals legislation.

## Delays

The length of time it takes for hearing go come on is an issue in all the fora (except perhaps for the District and Circuit Courts). There is a wait of at least six months in claims before the EAT. The delays in the Equality Tribunal are well known with far longer delays than any other fora. Delays act as a deterrent to some claimants and a wait of a number of years to have a claim heard and decided is very undesirable for all concerned. The delays also mean that the remedy of reinstatement is unlikely to be ever awarded. The High Court found that a delay of three years before the Equality Tribunal while undesirable was not unreasonable in relation to a claim under the Equal Status Act.

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<sup>5</sup> Case C 268/08 Impact v Minister for Agriculture and Food(2008) 2 CMLR 1256.(This was not applied in the Boyle case)

The particular claim did not fall within the remit of an EU Directive and so EU case law on remedies did not feature. There may have been a different outcome in an employment anti-discrimination claim.

## Remedies

The EAT and the ET may award up to two years compensation. On a number of occasions the Equality officers have indicated that they would have liked to award higher amounts. The Circuit Court has unlimited jurisdiction in relation to awards in gender employment discrimination claims, but this is underutilised. In claims under the Employment equality acts an order can be made directing a specified course of action

## The Employment Compliance Bill 2008

Part of the Ten Year Framework Social Partnership Agreement 2006-2016 contains a commitment to securing better compliance with legal requirements, underpinned by adequate enforcement.

The main provisions of this Bill are<sup>6</sup>—

- to establish a new statutory office of the Director of the National Employment Rights Authority (within the Department of Enterprise, Trade and Employment), dedicated to employment rights compliance, and with a tripartite Advisory Board;
- to strengthen inspection and enforcement powers and make other necessary provisions to secure compliance with employment legislation (including protection against penalisation of employees who claim their entitlements or redress where they are denied, or who *bona fide* report breaches of employment legislation to the Director, etc) in line with “state-of-the-art” provisions in Revenue, Social Welfare, Consumer Protection, etc., legislation;
- to specify the statutory employment records to be kept by employers for all employees and the high penalties for failure to do so or for other breaches of employment legislation;
- to foster increased co-operation at workplace level so as to safeguard employment rights;
- to support and enhance monitoring and inspection activity in relation to compliance with the Registered Employment Agreement in the electrical contracting industry;
- to provide for exchanges of information between statutory enforcement authorities so as to facilitate Joint Investigations of employments suspected of contravening the law;
- to strengthen the powers of the Minister for Enterprise, Trade and Employment to initiate investigations and publish the outcomes in cases of public interest;
- to provide for involvement of labour inspectors, for the first time, in the enforcement of provisions of the Employment Permits Acts 2003 and 2006 and to strengthen those Acts as regards records and other obligations of employers.

## Notices to be Displayed

Section 32 provides:

*“Subject to subsection (3), every employer shall display in a prominent position in or at the place of work concerned, being a place to which employees have access and in such a position that it may be easily read by employees, one or more than one notice in a form, manner and, as appropriate, language or more than one language that is reasonably*

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<sup>6</sup> as stated in the explanatory memo

*likely to be understood by the employees concerned containing the information prescribed under subsection (2)."*

The information to be contained in the notice shall include:

- (a) entitlements under employment legislation, either generally or by reference to particular enactments or a particular class or particular classes of enactments or to employees of one or more than one particular class or description, as may be specified in the notice concerned,*
- (b) complaints procedures concerning entitlements under employment legislation, and*
- (c) the contact details of the office of the Director for the purposes of –*
  - (i) making general enquiries regarding entitlements under, and the application and enforcement of, employment legislation, and*
  - (ii) communicating information to the Director pursuant to section 50.*

Failure to comply is a criminal offence. The scope of the bill is large but is not comprehensive. It does not include the Employment Equality Acts, the Maternity Protection Acts, the Adoptive leave Acts, the Parental leave acts and the Pension Acts. It is not clear whether this omission is deliberate or an oversight. The included legislation all comes within the remit of the Department of Enterprise trade and Employment while the acts that are excluded come within a remit of a different department.

### **Case Law of the Court of Justice**

There has been extensive case law of the court of justice which had a major impact on national jurisprudence but has also been influential in the drafting of subsequent EU Directives. There has been case law on indirect discrimination, which has provided significant protection to for example part-time employees and job sharers. There have been significant case law on equal pay, pregnancy, remedies, and positive actions. The case law of the ECJ transforms into provisions in later directives thus making EU law very dynamic. (In Ireland successful case law on occasion may be followed by legislative amendments which seek to negate the benefit of the successful case). Employment protective judgments are not confined to the realm of anti discrimination. For example the Court of Justice in the *Deutsche Post* case<sup>7</sup> stated that the social objectives of the EU are primary and that the economic objectives are secondary to these social aims. In the *Viking* case, the ECJ declared the right to take collective action is a fundamental right.

However the quality of the judgments may depend on the quality and content of the legislative provisions. It is not always possible to predict the outcome of a case before the ECJ. The judgements on the age provisions in the Framework Directive which are problematic in themselves, give considerable latitude to the state.

### **Lisbon Treaty**

There are a number of interesting provisions. Article 2 provides that the

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<sup>7</sup> (C-270/97)

*'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights including the rights of persons belonging to minorities'*

Article 3(3) (ex Art 2 TEU) provides that

*'the union shall provide an internal market. It shall work for the sustainable development of Europe, based on balanced economic growth and price stability, a highly competitive social market economy aiming at full employment and social progress.'*

Article 8 provides that in all its activities, the union shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 9 provides that in defining its policies and activities, the union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education and training.

Article 10 provides that in defining and implementing its policies and activities, the union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability age or sexual orientation.

What impact will these provisions have? These articles provide the basis for a new initiative to mainstream equality and social inclusion in all policy making by the European Institutions. Mainstreaming equality and social inclusion is a formal process of impact assessment on all new policies. It tests the capacity of any policy to contribute to equality and inclusion and if necessary, redesign the policy. Mainstreaming of equality and social inclusion is underdeveloped at EU level. The focus on mainstreaming is strengthened and will be facilitated by the provisions in Article 11 that the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. While it reflects current practice of the Commission and Parliament, it will afford a right for organisations that represent people experiencing inequality to a voice at the European policy table.

The current climate suggests that there is very little appetite for new EU legislative provisions at the moment. The Lisbon Treaty is unlikely to change this lethargy for the time being. The EU Equal treatment Goods and Services Directive on grounds other than gender has been stalled. If there is going to be new legislation, it is likely to be in the area of Maternity/parental leave rights rather than for example legislation requiring the introduction of a positive duty to promote equality equivalent to the Statutory duty in Northern Ireland and the UK. Any initiatives are likely to be of the soft law variety.

The treaty also provides at Article 6 for the 'recognition of the rights and freedoms and principles set out in the Charter of Fundamental Rights, which shall have the same legal values as the treaty'

The Union provides for the accession to the European Convention for the protection of Human Rights and Fundamental Freedoms. (Article 6(2)). However the recognition of the Charter and the accession to the convention are expressly stated to not extend the competence of the Union as defined in the treaties.

What are the implications of recognition of the Charter? It is arguable that the rights contained in the Charter are not to be infringed in the drafting of EU legislation. The provisions of the Charter will serve as an aid to interpretation, for example if there are two competing interpretations of EU

legislation available, then the interpretation that does not infringe the provisions of the charter should be preferred. It has been suggested that the incorporation of the Charter will result in a collision of rights and remedies.<sup>8</sup> Will the incorporation displace the Constitution and the human rights legislation when a government agency is implementing Union law? Another question arises. Will Union law now be adopting principles of the Strasbourg Court? There is a degree of legal uncertainty arising out of accession and incorporation of the charter and the convention

There are three groups of worker who fall within the cracks and could benefit from better protection, older workers, workers who have acquired illegal status, and people employed in sheltered workshops.

## **Recommendations**

These recommendations are made from the perspective of accessibility and enforcement.

There is a strong case to be made for the need to consolidate the existing employment protective statutes into one consolidation Act with specific chapters on different issues and a common chapter on remedies and procedures.

There should be uniformity in relation to the statutory provisions on forms, time limits, procedures, mediation, and the extent and in what circumstances costs will be awarded, in what circumstances a case will be heard *in camera*, in what circumstances the identity of the parties will be anonymised. There should be no general requirement for written submissions unless there is a complex point of law involved. There needs to be provision for preliminary hearings, applications to be made to hear urgent cases and /or some form of interim relief. The listing system should be transparent with regular call over of cases. A written decision should issue in relation to every decision. The same provisions should apply in relation to time limits for appeals and enforcement. The Redundancy Appeals Tribunal regulations are a useful model in relation to the procedures at hearing.

The issue of forum consolidation should be considered again. There is a strong case to be made that all initial complaints could be made to the same forum with a common right of appeal to one other forum and an appeal on a point of law to the High Court. The UK model of the industrial tribunal with an appeal to the Employment Appeals Tribunal( with a judge and representatives from the unions and the employers) is a good model though it may pose constitutional problems Having representatives from employers and unions works very well .The forum needs to independent and perceived to be independent.

The issue of legal aid particularly for complex cases in non unionised employment needs to be addressed.

Trade unions and non -governmental organisation should be able to institute proceedings in their own name on behalf of member. Consideration should be given to allowing class actions and *amicus curiae* applications by trade unions and NGOs.

The level of financial awards needs to be examined as financial awards that simply reflect loss of earnings may not constitute an effective, proportionate and dissuasive remedy, particularly for low paid part- time workers.

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<sup>8</sup> See an excellent analysis by Dr Angela Ward in 'Fundamental Rights Protection Post Lisbon: the Impact of Incorporation of the EU Charter of Fundamental Rights' The Royal Irish Academy 11 May 2009.

Statutory time-limits should not run until efforts to sort things out have failed.

There should be a statutory right to apply for Family friendly arrangements,

Victimisation provisions are important and need to be defined to include victimisation by others including unions

The Employment Compliance Bill needs to be amended to ensure coherence across the employment protective landscape in relation to enforcement. Employment legislation in the Bill needs to be defined to include the Employment Equality Acts. The relationship between NERA and the employee who has rights needs to be clarified.

The protection of workers who may have acquired Illegal status through no fault of their own needs to be addressed.