TALK TO EMPLOYMENT LAWYERS GROUP

The Rt Hon Sir Declan Morgan
Inn of Court, RCJ, Belfast

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Ladies and gentlemen it is a real pleasure to be here with you today. I am very grateful to the Employment Lawyers Group for inviting me to speak. I am particularly pleased to deliver this talk as it gives me the opportunity to recognise publicly the important work which employment lawyers do in a legally complex and fast changing environment.

Reporting in 1968, the Royal Commission on Trade Unions and Employers Association said that the purpose of Industrial Tribunals was to be that of providing for employers and workers "an easily accessible, speedy, informal and inexpensive procedure for the settlement of disputes".

Industrial Tribunals were designed to enable a non-lawyer, whether as a party or as a representative, to appear before them and to take a full part in their proceedings. In practice, the tribunal system generally involves many people with little or no legal experience even though the problems they are asked to resolve may be as complex as any that face other courts of law. In our more complex society tribunals have become the preferred method for regulating the allocation of scarce public resources, the protection of the vulnerable and the resolution of social problems in the widest sense. They are generally presided over by lawyers which I think is healthy because the training of lawyers ensures that fairness lies at the heart of the process. The danger is that the lawyers import the formalities and procedural complexities of traditional court litigation.

I am sure you will agree that the highly legalistic and complex environment in which you work in the tribunals makes it difficult to contribute to the achievement of the aspiration expressed by the Donovan Commission. I do not wish in any way to dumb down the legal input to this environment. Indeed I recognise that it would now be impossible to do so having regard to the extensive jurisprudence that has developed and the continuing developments particularly in discrimination and EU law. What I do want to explore, however, is whether from a judicial perspective there are steps that we and in particular the employment judges can take and are taking that are consistent with some of the underlying thinking of the Donovan Commission.

Delay etc

Tribunals in Northern Ireland and elsewhere have been the subject of growing criticism with regard to matters such as delay, cost and formality. Notwithstanding the involvement of non-legal members, and the philosophy

underscoring the tribunal system, it has been suggested that tribunals have become too legalistic in their approach and can consequently be an intimidating environment for users.

As Lord Justice Girvan said in Peifer v Castlederg High School and Western Education and Library Board [2008] NICA 49:

> "Industrial tribunals were originally intended to provide an expeditious and relatively informal and cheap means of resolving disputes arising in the workplace. Proceedings were intended to dispense with the formality of court proceedings and to avoid the legalism and formalism that marked ordinary litigation, features which contributed to the perception of unnecessary cost and delay in ordinary litigation. With the increasing complexity of modern legislation in the field of employment and discrimination law the industrial tribunal has itself become increasingly costly and litigation in the tribunals is characterised by increasing length of proceedings, delays and lengthy breaks in the course of hearings. This court has on occasions had to warn against the readiness of tribunals to determine apparently preliminary points in such proceedings which turn out at the end of the day not to be shortcuts to a resolution of a dispute but in fact add to delay and increase the length of the proceedings. The problems caused by delay and unnecessary length of proceedings in the tribunals are self-evident. Unnecessary length substantially increases the overall costs of proceedings; ties up tribunal chairman and members unduly; delays other cases coming on for hearing; and often requires the attendance of witnesses for undue length of time thus affecting their capacity to do their own jobs or run their own businesses."

Case Management

In Rogan v Southern Education Health and Social Care Trust [2009] NICA 47 we set out the approach which should be followed by tribunals.

That case was an appeal by way of case stated by the Southern Eastern Health and Social Care Trust against the decision of an Industrial Tribunal whereby the Tribunal held that the Trust had unfairly dismissed Mr Rogan. In that case the Tribunal heard evidence from nine witnesses for the first 9½ days who apparently

had no relevant evidence whatsoever to give in relation to the issue which the Tribunal was being asked to determine. The case was a classic example of the need for active case management by the tribunal.

You might at times feel that you are being case-managed to death but clearly that is not the case as all of you here appear to be in remarkably good spirits! What we stressed in Rogan was that tribunals needed to exercise control over litigation robustly and fairly. It is worth reminding ourselves again of what the Court of Appeal said in Rogan in relation to the approach which should be followed in the conduct of proceedings. The Court of Appeal referred to the words of Lord Justice Girvan in the Peifer case I have referred to in relation to the overriding objective in Regulation 3 of the Industrial Tribunals (Constitutional Rules of Procedure) Regulations (Northern Ireland) 2005.

> "[3] Regulation 3 ... is based on the provisions of Order 1 Rule 1A of the Rules of the Supreme Court. The provisions of Order 1 Rule 1A and Regulation 3 were intended to be exactly what they are described as being, namely *overriding* objectives. The full implications of those rules identifying the overriding objectives have not been fully appreciated by courts, tribunals or practitioners. These overriding objectives should inform the court and the tribunals in the proper conduct of proceedings. Dealing with cases justly involves dealing with cases in ways which are proportionate to the complexity and importance of the issues ensuring that the case is dealt with expeditiously and fairly and with the saving of expense. Parties and practitioners are bound to conduct themselves in a way which furthers those overriding objectives. Having regard to the imperative nature of the overriding objectives tribunals should strive to avoid time wasting and repetition. Parties should be required to concentrate on relevant issues and the pursuit of irrelevant issues and questions should be strongly discouraged. Our system of justice properly regards cross examination as a valuable tool in the pursuit of justice but that tool must not be abused. Tribunals must ensure proper focus on the relevant issues and ensure that time taken in cross examination is usefully spent. The overriding objectives, which are, of course, always intended to ensure that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. Tribunals can expect the appellate and supervisory courts to give proper and due weight to the tribunals' decisions made in the fulfilment of their duty to ensure the overriding objectives. Tribunals should not be discouraged from exercising proper control of proceedings to secure those objectives through

> fear of being criticised by a higher court which must itself give proper respect to the tribunal's margin of appreciation in the exercise of its powers in relation to the proper management of the proceedings to ensure justice, expedition and the saving of cost. Tribunals should be encouraged to use their increased costs powers set out in Regulations 38 et seq of the Rules of Procedure to penalise time wasting or the pursuit of cases in a way which unduly and unfairly increases the costs falling on opponents. Tribunals should feel encouraged to set time limits and time tables to keep the proceedings within a sensible time frame.
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> [4] When parties before the tribunal appear in person without the benefit of legal representation the lack of legal experience on the part of the unrepresented party may lead to the pursuit of irrelevancies and unnecessary length of proceedings. While tribunals must give some latitude to personal litigants who may be struggling in a complex field they must also be aware that the other parties will suffer from delay, incur increased costs and be exposed to unstructured and at times irrelevant cross examination. While one must have sympathy for a tribunal faced with such a situation the tribunal remains under the same duty to ensure that the overriding objectives in Regulation 3 are pursued."

I want to stress that the exhortations in relation to case management in pursuit of the overriding objective apply just as much to what I call traditional courts as they do to tribunals. The legal world has changed. In civil cases increased reliance on written material can substantially reduce time and costs and assist in identifying the real issues. Time limited cross examination is commonplace. Professional litigators have to develop different skills. The same is true for judges. The days of sitting back and adjudicating on whatever the parties put in front of you have long gone. The modern judge is expected to expeditiously identify the parameters of the dispute and ensure that the parties are focussed on those parameters only in the course of the hearing. Anyone who wants to start a cross examination by going back to the story of Adam and Eve should not be allowed to reach the bit about the serpent before they are stopped!!

Employment Appeal Tribunal

I am aware that the Employment Lawyers Group responded to the DOJ consultation on the structure of tribunals in Northern Ireland in April 2013 and that the Group believes that the issue of the establishment of an Employment Appeals Tribunal in Northern Ireland is an important issue that should be explored. I note

that critically the group believes that the establishment of an EAT would help ensure the development of a Northern Ireland Employment Law jurisprudence and that such an appellate body would in addition provide guidance to the tribunals and help ensure consistency. Matters of policy are properly for the elected institutions and as many of you will know from my attendance at the Assembly Committee, I have stressed that the judiciary should not comment on matters of policy other than to offer advice on the practical implications of implementation. In considering the Group's submissions to the consultation however I thought it is instructive to look at what is actually happening in relation to the cases coming to the Court of Appeal.

Since the beginning of 2012 the Court of Appeal disposed of approximately 36 appeals from decisions of the Industrial Tribunals.

Out of the 36 appeals, 24 were taken by the employee and 12 were taken by the employer. 4 were appeals by way of case stated and 1 was an unsuccessful application to compel the Tribunal to state a case.

Out of the 36 appeals, around 10 were remitted to an alternative or the same Tribunal for reconsideration of all or some of the points raised in the appeal. Out of the remainder, 2 were allowed, 21 were dismissed, and 3 were withdrawn or struck out.

In 20 of those cases, one of the parties was a personal litigant. Of these 20, the person litigant was the employer in 4 cases. Of those personal litigants who were employees all were appellants, a total of 16 cases. In the 4 cases where personal litigants represented themselves as employers only one was an appellant. There were, therefore, a total over the period of 17 cases in which personal litigants were appellants in ITFET cases. In 14 of those cases the appeal was dismissed. It follows, therefore, that in the 19 cases where the appellant was legally represented only 7 were dismissed. That suggests a strike rate of over 60% for represented appellants but less than 20 % for unrepresented appellants. The numbers are small but the outcome is not altogether surprising.

Overall, employment appeals have represented just under 20% of the civil appeals in this jurisdiction over the last few years. To put that in context the body of criminal appeals is about the same again and the Court of Appeal judges also deal with Divisional Court cases which comprise about half the number of civil or criminal cases. In short, therefore, employment appeals at present make up about 8% of the work of the Court of Appeal judges. I think it likely that even if an EAT were in place many of the personal litigant cases would make their way through the system in any event. I also anticipate that the EAT itself would promote a body of cases for the Court of Appeal. Those would probably be easier to manage with the benefit of an EAT judgment but it does not seem to me that an EAT will appreciably affect the workload of the Court of Aappeal one way or the other.

A recurring theme of the cases is the adequacy of the findings of the tribunal.

The recurring theme of adequate reasoning was mostly recently emphasised by Lord Justice Coghlin delivering the judgment of the court in Martin Sheil v Stena Line Irish Sea Ferries Ltd [2014] NICA 66.

That was an appeal from an Industrial Tribunal which determined that Martin Sheil had been unfairly dismissed and that he had also been subjected to unlawful harassment on the grounds of sexual orientation.

Lord Justice Coghlin said that Industrial Tribunals are often referred to as "industrial juries" and it was important to remember the extent to which their decisions benefit from the contribution of the lay members of the panel with their extensive knowledge and practical experience of both sides of industry. In those circumstances he said the Court of Appeal should not be over-prescriptive in terms of the degree of analysis that it applies to the reasoning and fact-finding of the tribunal.

However, he went on to say that both reasoning and fact-finding have a significant role to play in the construction and formulation of tribunal decisions.

Lord Justice Coghlin said the statutory obligation contained in Rule 30 of the IT Rules of Procedure simply clarifies the general duty to provide adequate reasons for judicial decisions since, if it is not apparent for the parties why one has won and the other has lost, justice will not have been done. He referred to Lord Phillips observations in English v Emery Reimbold and Strick Ltd [2002] EWCA Civ. 605:

> "The essential requirement is that the terms of the judgment should enable the parties and an Appellate Tribunal readily to analyse the reasoning that was essential to the judge's decision."

Similar observations were made in Ferris and Gould v Regency Carpet Manufacturing Ltd [2013] NICA 26 and in Antrim Borough Council v McCann [2013] NICA 7. In the latter case Lord Justice Girvan said:

> ""[3] In its decision dated 29 June 2012 the Tribunal purports to set out what it called 'findings of fact' in [4]-[51]. As not infrequently happens in such decisions the recorded 'findings of fact' are not limited to the conclusions reached by the Tribunal on the evidence adduced but interspersed with a resume of disputed evidence. This does not assist an appellate court which on occasions is left with a record of what a witness is reported to have claimed or said in the course of the hearing without the Tribunal making clear what conclusion it has reached on the relevant evidential material. In formulating its decision a Tribunal should

> follow the course of succinctly recording the relevant evidential material and set out its analysis of the evidence where this is necessary and set out its conclusions from its analysis of the evidence. It can then set out its findings of fact. Such findings will emerge from the conclusions arising from undisputed evidence or from the Tribunal's conclusion reached after analysis of disputed evidence."

In the Martin Shiel case, Lord Justice Coghlin said there were a number of matters which caused concern about the reasoning and fact-finding of the tribunal. In the view of the Court of Appeal conclusions reached by the tribunal were not adequately supported by relevant facts or reasoning. The appeal was allowed and the matter remitted for consideration by an alternative tribunal.

It has been my invariable experience that judges at all levels are assisted by the input of legal professionals where they are instructed. Can I suggest that when making closing submissions to a tribunal that considerable thought is given to what each party contends are the factual conclusions that the tribunal should reach and the reasons for that. That is both to bring clarity to the submission and to assist the tribunal in its job of writing the decision.

Personal Litigants

I know that the members of the Group feel that the existing procedures present a very real access to justice issue, since it is the experience of your members that the costs risk of proceedings in the Court of Appeal is typically prohibitive for both sides but in particular for claimants.

Access to justice for all is central to the rule of law. Parties in employment appeal cases who do not qualify for civil legal aid and are not members of trade unions may abandon cases where better resourced employers can appeal or threaten to appeal.

The reduction of publicly funded legal aid is an issue for us all and has resulted in a substantial increase in litigants whose access to law is unaided by lawyers. The result may be no access to justice for some and compromise of the access to justice for others. The figures I have mentioned in relation to personal litigants in employment cases in the Court of Appeal is reflected to some extent throughout the justice system. Our civil justice system has of course had many users who represent themselves over the years and this is what the Tribunal system was designed for. Unfortunately the complexity of the law being dealt with in the Industrial Tribunals and the Fair Employment Tribunal gives rise to a number of challenges which we all have to address.

As Lord Wolff said in the Access to Justice Interim Report June 1995:

> "All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists."

Most recently Lord Justice Gillen described the nature of the problem in a JSB seminar on litigants in person:

> "Most litigators and judges will have faced the tribulations involved in facing a personal litigant opponent. Inappropriate orders are sought, papers are not served, court dates are not met and applications to set aside orders in judgments are commonly made out of time - sometimes well after the represented clients have long thought the cases were concluded. As someone who comparatively recently presided over a 48 day clinical negligence case brought by an unrepresented widow who sued three hospitals and five consultants and who assembled witnesses from as far away as Boston and Amsterdam I am fully familiar with the problems that can surface. Unexamined assumptions, blinkered certainty, emotive accusatory fervour, imponderable evidence with layered meanings, empty questions that would do justice to a Castro address, detailed examination of matters that served the issues only in the most glancing of terms and a relentlessly visceral quality to submissions all took their place in an unsuccessful action that at times threatened to make snailing chaos out of the process and ultimately cost the health service hundreds of thousands of pounds."

Whilst not of course confined to cases involving personal litigants, the tribunal has power to impose deposit orders pursuant to Rules 18 and 20 of the 2005 Regulations. Those provisions were recently considered by the Court of Appeal in Dr Stadnik-Borowiec v Southern Health and Social Care Trust, Health and Social Care Board & Others [2014] NICA 53]. That was an appeal from decisions of two separate chairpersons of the Industrial Tribunal to impose deposit orders of £500 and £3,000 on the appellant as a condition of her being permitted to pursue claims of discrimination on grounds of race and sex.

In quashing both deposit orders and substituting one order to pay a deposit of £200, Lord Justice Coghlin, giving the judgment of the court noted that the deposit of £3,000 was six times the amount of the maximum deposit payable in respect of "a matter" in accordance with Rule 20(1).

In remitting the cases to a new tribunal for the purpose of case management Lord Justice Coghlin suggested that consideration might be given to a strike out application in accordance with Order 18. In doing so, he said the tribunal might wish to take into account the need to stand back and focus on the issue of discrimination taking account of the relevant factual matrix relied upon by the appellant, including any evidence relating to relevant comparators and the reason for any differential treatment. He suggested that if the tribunal determined that the Order 18 threshold had been passed, the question of a fair and appropriate deposit order in accordance with Order 20 may arise. In making the suggestions Lord Justice Coghlin stressed that it was for the Tribunal to give consideration to the most practically effective means of dealing with the cases consistent with the interests of justice and having regard to the overriding objectives contained in Regulation 3 of the 2005 Regulations.

Whilst we all have a part to play in meeting the challenges in this changing pattern of self-represented litigants, that does not mean that steps should not be taken to identify the vexatious litigant. Courts and tribunals need to be vigilant about litigants who habitually and persistently issue claims without reasonable grounds and where such a practice amounts to an abuse of the court process.

Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms secures to everyone the right to have any claim relating to a civil right and obligation brought before a court or tribunal and accordingly embodies the "right to a court" at which the right of access, that is the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, the right to a court is not absolute. Limitations, including financial ones, may be placed on a party's access to a court or tribunal as long as the limitations pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved. That right is therefore subject to the rights of the other party to be protected against being put to irrecoverable expense by an impecunious and irresponsible litigant. Article 6 of the Convention therefore does not confer upon a litigant, represented or otherwise, an unfettered choice of forum in which to pursue or defend his rights.

Conclusion

As can be seen from the cases coming to the Court of Appeal, there are no new novel legal issues being raised. In straightened economic times one would have imagined that there would be more challenges to, for example, the design and implementation of redundancy schemes. The fact that we are not getting cases in this jurisdiction is perhaps reflective of the expertise of people in this room in designing practices and advising clients to keep matters out of court.

I would be interested in hearing your views as to why more interesting legal challenges are not being brought.