Neutral Citation Number: [2007] IEHC 406

THE HIGH COURT

RECORD No. 550 JR/2005

BETWEEN

IARNROD ÉIREANN

APPLICANT

AND
SOCIAL WELFARE TRIBUNAL

RESPONDENT

AND
AMALGAMATED TRANSPORT AND GENERAL WORKERS UNION

NOTICE PARTY

Judgment of Mr. Justice Roderick Murphy dated the 30th day of November, 2007

1. Issue

1.1 By order of the 30th of May, 2007 McKechnie J. granted leave to the applicant, Iarnrod Éireann, to seek an order of *certiorari* quashing the adjudication of the Social Welfare Tribunal dated the 8th of December, 2004. That review and decision upheld an earlier adjudication of the 22nd of September, 2004. The earlier decision was that over a hundred specified employees of Iarnród Éireann, the applicant, were entitled to unemployment benefit or unemployment assistance while they were not at work for the period 19th of June, 2000 to the 1st of August 2000 or such date as they returned to work prior to the 10th of August 2000, provided that all other conditions for the receipt of the said benefit or assistance were satisfied.

1.2 The applicant also sought a declaration that the decision of the 8th of December was wrong in law and/or that the respondent tribunal had acted outside its jurisdiction and, moreover, that there was an error in the face of the record and that the respondent tribunal had failed to give reasons for its decision.

1.3 The grounds upon which the relief was claimed arose out of industrial relations dispute involving train driver employees who were, at that time, members of the Irish Locomotive Drivers Association (ILDA) which had since been subsumed into the Amalgamated Transport and General Workers Union, the notice party.

1.4 A deciding officer had earlier decided that they were disqualified under s. 47 (1) and/or s. 125 (3) of the Social Welfare (Consolidation Act) Act, 1993 from receiving unemployment benefit or unemployment assistance.

At s. 47 (1) provides as follows:

> (1) A person who has lost unemployment by reason of a stoppage of work which was due to a trade dispute at the factory, workshop, farm or other premises or place at which he was employed shall be disqualified for receiving unemployment benefit as long as the stoppage of the work continues, except in a case where he has, during the stoppage of work, become "*bona fide*" employed elsewhere in the occupation which usually follows or has become regularly engaged in some other occupation:
>
> > provided that the for ingoing provisions of this section shall not apply to a person who is not participating in or directly interested in the trade dispute which caused the stoppage of work.

1.5 At s. 125 (3) provides similarly for disqualification for receiving unemployment assistance.

1.6 Iarnrod Éireann applied for a review of the respondent's decision under s. 274 of the 1993 Act as amended by s. 33 of the Social Welfare Act, 1996. That amendment substitutes "a deciding officer or an appeals officer" for a deciding officer and appeals officer.

1.7 Accordingly, s. 274, as amended, provides as follows:

> 274. - where, in relation to a stoppage of work or a trade dispute, a deciding officer or appeals officer have decided that a person is disqualified under s. 47 (1) from receiving unemployment benefit or under s. 125 (3) for receiving unemployment assistance, that person may, not withstanding any other provision of this Act, apply to the Social Welfare Tribunal (in this chapter referred to as "The Tribunal") for an adjudication under this chapter.

1.8 Iarnrod Éireann says that it is clear from the evidence that specified employees were absent from work due to a considered decision exercised on an individual and collective basis to refuse to work in accordance with their terms and conditions of employment.

1.9 Section 275 in relation to adjudication provides at (C) that:

> 275. - (C) a decision of the tribunal on an application for adjudication should be final and conclusive, but an appeal shall lie to the High Court on a question of law:
>
> > provided at that person interested (including the Minister) may apply to the Tribunal for a review of its decision and, if the Tribunal is satisfied that a material change has occurred in the circumstances of the stoppage of work or of the trade dispute which causes stoppage of work, although there is new evidence or new facts which in the opinion of the Tribunal could have affected its decision, it may review its decision and such a review should be treated as an adjudication under the section.

1.10 The applicant submitted that evidence presented to the Tribunal by them on the date of review was presented for the first time and it was new evidence. In addition, evidence from the public record was indisputable and constituted factual evidence that had not been presented previously. It was incorrect to state as the Tribunal did in its written submission of the 8th of December, 2204, that "… no new facts have been brought" to its attention. At a meeting to review its decision of the 22nd of September, Iarnrod Éireann submitted to the Tribunal that the employees had made a clear choice to voluntarily make themselves unavailable for work in a very precise context of the implementation of new and enhanced terms and conditions of employment which had resulted from a lengthy negotiation process facilitated by the Labour Relations Commission. The implementation of the resulting agreement occurred on the 19th of June, 2000 at which point the employees choose not to work in accordance with the new agreement. A subsequent examination and report by the Labour Court and the Labour Relations Commission confirmed the legitimacy of the implementation of

the new agreement.

1.11 The Tribunal was informed that a number of the employees of Iarnrod Éireann choose to return to work and were readily facilitated in so doing. Access to work was not denied to the employees at the time. In addition, the ultimate return to work on the 28th of August, 2000 was similarly facilitated without impediment, demonstrating that work was readily available to all who chose to work. A claimant for social welfare cannot voluntarily make himself unavailable for work. They had chosen to do so in order to maximise the impact of their refusal to work the new agreement by engaging in disruptive action. It was submitted to the Tribunal that a decision to award benefits to employees would, in effect, create the precedent for the granting of an illegal subsidy in instances of unofficial or illegal industrial action.

1.12 The nub of the submission of Iarnrod Éireann appeared to be that the Tribunal's decision of the 13th of December, 2004 to uphold its adjudication of the 22nd of November, 2004 wrongfully allowed employees engaging in disruptive action affecting services contained in the newly implemented timetable, to receive unemployment benefit or assistance.

1.13 The Tribunal had failed to give its reasons for deciding that the employees had been denied access to work notwithstanding a letter dated 20th of December, 2004 when Iarnrod Éireann asked the Tribunal to confirm the necessary criteria on which the adjudication was based.

2. Evidence and Affidavit
2.1 John Keenan, Director, Strategy and Business Development, of Iarnród Éireann referred to the claim for unemployment benefit or unemployment assistance arising from the industrial action involving Mr Brian Dunphy and more than a hundred other employees of Iarnrod Éireann who, as locomotive drivers, were engaged in an industrial dispute during the period of the 19th of June, 2000 to the 28th of August, 2000. Mr Keenan also referred to the review by the Tribunal of its adjudication.

2.2 Mr Keenan said that the position of Iarnrod Éireann at all times was and remains that he claimant employees collectively organised themselves for, and engaged in a refusal to work during the period of their claim. As the participants engaged in organised action under the banner of the "Irish Locomotive Drivers' Association" (ILDA), an unlicensed registered trade union which subsequently was subsumed into the notice party, the action taken was unofficial and, indeed, illegal. Mr Keenan said that new and very pertinent information had been given to the Tribunal in the application for review of its adjudication.

2.3 Iarnrod Éireann informed the Tribunal that the industrial action taken was resulted in wilful disruption, which caused very great inconvenience to the travelling public and impacted with devastating effect on rail freight services. The action was one of the most damaging instances of organised industrial action in the public sector ever experienced in Ireland. It also acknowledged as one of the most significant instances of a "recognition dispute" in Irish industrial relations history.

2.4 The implementation of new pay and conditions of employment for locomotive drivers on the 19th of June, 2000, Mr. Keenan explained, had been painstakingly negotiated between Iarnrod Éireann and the locomotive driver representatives and their trade union officials who represented the two unions recognised for collecting bargaining on behalf of the drivers that is SIPTU and NBRU. ILDA responded to the formal notice of implementation of the new arrangements by indicating its collective intention to refuse to work the new rosters on that date. From that date members of ILDA refused to work up to the 28th of August, 2000. Each driver had the opportunity to report for work in the 19th of June, and throughout the period of the ILDA action. Iarnrod Éireann drew to the Tribunal's attention in correspondence dated 11th of October, 2004 of the numerous references by the ILDA Secretary and strike leader to the industrial action as "a Strike".

2.5 The Labour Court and the Labour Relations Commission, having intervened jointly on the 11th of August, 2000, reported in December, 2000 made it clear that there had been no "lockout" and that a collective agreement had been properly entered into and implemented with the support of the properly accredited and recognised trade unions.

2.6 The Secretary of ILDA, Mr Brendan Ogle, in a book published in late 2003, is quoted as referring to the industrial dispute of June to August 2000 as an organised, collective work stoppage. Dan Mallen's Off The Rails, stated that:-

> "As the only real Union in Ireland without a negotiating license, ILDA found itself in a unique position. We could not legally ballot our members for a strike. We could not place pickets on our workplaces… our protest at our treatment would come, of necessity, be just that – a protest, a withdrawal of labour. We were walking a legal and industrial relations tightrope."

Mr Keenan said that he informed the Tribunal of his view that Mr Ogle's words had not other meaning than that a decision to withdraw labour was taken and implemented with devastating effect. The claimants had made a conscious and deliberate choice to make themselves unavailable for work in respect of which access had not been denied at any time by Iarnrod Éireann.

2.7 Mr. Keenan said that he had written to the Tribunal on the 20th of December, 2004 and received a reply on the 28th of January, 2005 from the Secretary of the Tribunal saying that the Chairman of the Tribunal "regrets that the Social Welfare Tribunal cannot take any further action".

2.8 Subsequently "The Evening Echo" newspaper of the 11th of February, 2005 reported, as did several other media, that "Irish Rail strikers win ----- in Tribunal" because of the unfair treatment by Iarnrod Éireann, "after an investigation found their employer behaved unreasonably by locking them out".

2.9 Iarnrod Éireann has, without success, tried to obtain clarifications and information from the Tribunal concerning its adjudication but the latter had failed to give reasons on which the decision was based. This necessitated the within proceedings.

3. Submission of Iarnrod Éireann
3.1 By written application to the Tribunal dated 18th of November, 2004 in relation to the Tribunal's adjudication of the 22nd of September, 2004, Iarnrod Éireann strongly contended that the position it put to the Tribunal at the hearing in question was not accurately reflected the adjudication subsequently raised and that, in particular that the adjudication finding that "the employer did not wish to dispute anything in the submission presented by the applicants" was inaccurate. And, in fact, contradictory of a previous statement which recorded the company's challenge to the applicants submission that there had been a lockout. The information on and definition of the circumstances in which the claimants gauged the action concerned apparently was not available to the Tribunal at its hearing of 22nd of September, 2004.

3.2 Iarnrod Éireann had made a submission to the Tribunal in writing on the 20th of February, 2001 in response to a letter from the Tribunal of the 15th of January which was not referred to at the hearing of the 2nd of September, 2004. The Tribunal did not ask any

question or challenged that submission nor were the applicant or their representative asked to respond or to make any observation or comment on the submission.

3.3 The number of locomotive drivers who refused to work on the first day of the action, 19th of June, 2000 was 134. However the number of applicants to the Social Welfare deciding officer was 104. ILDA claimed that their members were locked out by the company as displayed on pickets carried by their members during the action. The circumstances involved did not constitute a lockout. It was the implementation of new pay and conditions of employment for locomotive drivers on the 19th of June, 2000 which was cited as the reason for the co-ordinated ILDA refusal to work on and from that date. Those changes were painstakingly negotiated with locomotive driver representative and their full time trade union officials, SIPTU and NBRU resulted in the "new deal for locomotive drivers". The negotiations had commenced in April 1997 and were facilitated throughout by a senior industrial relations officer from the Labour Relations Commission. The agreed changes were widely communicated. Formal notice of implementation was issued. ILDA responded by clearly indicating their collective intention to refuse to work the new rosters on the 19th of June, 2000 and during the period of stoppage up to the 28th of August, 2000 by engaging in a variety of public protests, marches, pickets and disruptive action including blocking railway lines and occupation of the CIE board room at Heuston Station.

3.4 The Labour Court and the Labour Relations Commission commented on the implementation of the new deal agreement as follows:

> In the circumstances in which the company and the unions found themselves and having regard to the overriding operational and economic requirement to implement the measures provided for in the agreement, the course of action adopted was fully justified. Whatever the position at the time of the ballot, the fact that the majority of the employees accepted and have continued to work the agreement indicated that it now commands majority support.

3.5 The Tribunal was asked to consider information not previously put to them which supported Iarnrod Éireann's assertions made in correspondence of the 11th of October, 2004 by referring to recorded statements of the Secretary of ILDA exemplified by the quotation in The Star newspaper of the 4th of August, 2000 where the Secretary was quoted as saying that "We have no slush fund in operation to pay our members every week during the strike".

3.6 On the 27th of August, 2000, the day before the organised return to work, The Sunday Tribune newspaper quoted the Secretary of ILDA:

> He went on to say that the ILDA is united and determined despite the collapse of the strike. "That ILDA has lost nothing" he added. "As a result of the Strike, the Labour Court and the Labour Relations Commission have issued a joint initiative on rail safety, which was our primary concern. We have been on strike for ten weeks and we cannot carry the burden any longer. It is time to pass responsibility to the Labour Court".

3.7 The Labour Court and the Labour Relations Commission (LRC) had jointly intervened on August the 8th, 2000 and reported in December 2000 making it clear that there was no lockout and that collective agreement had been properly entered into and implemented with the support of the properly accredited and recognised Trade Unions.

3.8 The submission had referred to Don Mullan's "Off the Rails" referring to "recollections on the strike of 2000" at page 152 and 153 in relation to the planned implementation of the "new deal agreement" there was reference to the dispersed depots where ILDA members would report for duty on the day of implementation and the discussion of tactics for dealing with the reality of planned implementation. Iarnrod Éireann "isn't like a shop, office or factory where all the protesting workers could assemble at the same time and simply not work or mount a picket".

3.9 There followed a quotation referred to above that ILDA was the only real Union in Ireland without a negotiating license and the walking of illegal and industrial relations tightrope.

3.10 The thinking of the ILDA leadership was to characterise the action as a protest and more particularly as a lockout as similar to a work stoppage in July 1999, a "strike, without striking, so to speak".

3.11 Iarnrod Éireann has submitted that there was no lockout, no unilateral action by the company but rather a wilful disruptive and damaging work stoppage and asked the Tribunal for a decision to reverse the adjudication of the 22nd of September.

4. Tribunal Decision of the 22nd of September, 2004

4.1 In outlining the "Background to the Application", the Tribunal stated that on the 19th of June, 2000 the applicants, members of ILDA, reported for duty to find that their means of reporting for duty, "signing on book", had been removed by management. They were confronted by a foreman and a Senior Manager and were in turn refused the opportunity to sign on. Each one was, for the first time asked to agree to radical changes in work practises which had not been negotiated in advance. None of the members of ILDA or their representatives had been consulted about these changes nor had they been given the opportunity to vote on the changes. The applicant members of ILDA responded by informing their foreman and Senior Manager that they were prepared to work under the existing terms and conditions of employment and were prepared to discuss the changes while continuing to work their work agreements. They also advised that they were eager to use the State conciliation services, The Labour Relations Commission (LRC) to deal with the issues and urge their employer to do likewise.

The applicants were advised that no work was available for them under these terms and their means of signing on was withheld from them. They were prevented from working the terms and conditions of employment which had been consulted and agreed upon.

4.2 The above represents not the findings of the Tribunal but, as seems more likely, represents the applicant's case, as the three paragraphs are repeated under the heading of the "Applicants' case" and expanded to deal with the intervention of the LRC on the 15th of June, 2000 where it was stated that the employer declined to accept the invitation to a conciliation hearing. It was stated that the employer did not request intervention and that intervention did not occur until eight weeks had elapsed despite repeated requests on the employee's side.

4.3 It was stated that on the 10th of August the LRC and the Labour Court intervened. The company accepted the initiative. The employees did not co-operate until the 28th of August for reasons of rail safety. The employees were stated to have accepted that benefits can be denied to them for the periods the 10th of August, 2000 until the 28th of August, 2000 on the grounds of their failure to accept the invitation to talks for that period.

4.4 The applicant's case was that the dispute was started by the employer on the 19th of June, 2000 in order to break or eliminate the chosen representative body of the claimants. There was no strike. There was no strike notice or strike ballot. There were no

pickets either official of unofficial. The claimants did not receive any strike pay. There was a lockout started by the employer.

4.5 Under the heading "Employers position" the Tribunal recited that the company had bona fide arrangements in place with SIPTU and the NRB how costs savings could be achieved by the company. Discussions on these issues have been conducted between the company and the two recognised unions. The LRC was involved in these discussions. There was no lockout as the new working arrangements had been agreed with the two unions.

4.6 The Tribunal then refers to what it believes to be the position of the employer:

> The employer did not wish to dispute anything in this submission presented by the applicants.
>
> The employees who were not allowed to sign on the 19th of June were not suspended. Some left the workplace and other remained at work.
>
> There were senior operators of the employer on site to prevent disturbances to the new working arrangements.
>
> The employer did not agree with the term lockout.
>
> The employer did not ask the employees to discuss the new work arrangements as there was a clear understanding by all employees on the issued concerned.
>
> The employer rejects any suggestion of not exercising their duty of care for the employees and contends that the employers position on the new work arrangements was widely know.
>
> It would not have been possible to administer a practise whereby the old and new rosters could be operated simultaneously.

4.7 It was, accordingly, adjudicated that based on the circumstances in this particular case that the employees are entitled to unemployment benefit/assistance for the period 19th of June, 2000 to the 10th of August, 2000 or such date as they returned to work prior to the 10th of August, 2000 and, accordingly, the Tribunal have founded that the applicants were entitled to receive benefit or assistance for that period provided that all other conditions for the receipt of the said benefit or assistance were satisfied.

4.8 The position of Iarnrod Éireann in the review of the adjudication before the Tribunal was that they did dispute the allegations of lockout by the applicants and, indeed, this is so recited that "the employer did not agree with the term lockout". A review and adjudication was sought under s. 275(c) of the 1993 Act.

5. Review of Adjudication of the 8th of December, 2004

5.1 The hearing for the purpose of reviewing the adjudication was held on the 18th of November, 2004. The decision of that review summarised the adjudication and referred to subsequent correspondence.

5.2 In its application for a review of the adjudication Mr Keenan of Iarnrod Éireann, asserted that the position of the company in the dispute of 2000 was not accurately reflected in the adjudication report nor effectively communicated to the Tribunal. The applicant's case was that the staff at Iarnrod Éireann voluntarily absented themselves from work on the 19th of June, 2000 in a preplanned and deliberate action. This action was not in accordance with the collective agreement entered into by the company and the unions legitimately entitled to do so. The review recited that the applicant had stated, in answer to why those contentions were not brought to the attention of the Tribunal on the date of the original hearing on the 2nd of September, 2004, the applicant stated that it would be defined as complacency by the employer.

5.3 The Tribunal recited the employee's position as contending that the employees were denied their employment in a lockout situation by the employer. Mr Ogle, on behalf of the employees refuted the contention that the employees voluntarily absented themselves from employment whilst the new work arrangements were negotiated following inclusive negotiations.

5.4 The Tribunal then found as follows:

> (7) Having carefully considered the evidence brought before it from both sides the Tribunal is satisfied that no few facts have been brought to its attention that they were not previously aware of.
>
> (8) The Tribunal notes that at the conclusion of the hearing both sides expressed the wish to move forward from any ill will generated at the time of these events.

Adjudication

> (9) The Tribunal upholds the adjudication of the 22nd of September, 2004.
>
> (10) When reaching its decision the Tribunal is hereby not vindicating the actions of any of the parties involved.

6. Statement of Opposition

6.1 The dated statement of opposition the notice party, ATGWU, denied that the Tribunal had acted unlawfully, without jurisdiction or in an *ultra vires* manner or made any or the alleged errors in coming to its decision. The applicant was disentitled to relief by reason of not having a sufficient interest in the matter within the meaning of O. 84, R. 20 (4) and was not a person to whom s. 274 or 275 (C) of the 1993 Act applied.

6.2 The applicant was disentitled to the reliefs claimed by reason of delay. The decision of the Tribunal on an application for an adjudication should, in accordance with the provisions of s. 275 (C) be final and conclusive. The appeal on a question of law is properly brought before the court pursuant to O. 3, R. 21 judicial review is precluded by the statutory scheme.

6.3 No point of law had been raised by the applicant.

6.4 It was denied that the respondent Tribunal heard, in stating that no new facts had been brought to its attention that they were not previously aware of. The notice party accepted that some new evidence of an indirect secondary nature, primarily newspaper reports and a book, were brought to the attention of the Tribunal but was denied that any new facts of a material nature were contained therein.

6.5 Section. 275 (C) of the 1993 Act provided that a person interested, including the Minister, may apply to the Tribunal for a review of its decisions and, if the Tribunal is satisfied that a material change has occurred in the circumstances of the stoppage of work or of the trade dispute which caused the stoppage of work, or that there is new evidence or new facts which in the opinion of the Tribunal could have affected its decision, it may review its decision and such a review should be treated as an adjudication under this Section. The ATGWU contended that any new evidence provided to the Tribunal was not such as could have or should have affected its decision and that no new substantial facts were provided to the Tribunal. The lengthy submission comprised of matters "not brought to the attention of the Tribunal on the date of the original hearing 2nd of September, 2004". The union contends that it is solely and only a question of fact for the Tribunal as to whether members "clearly chose to be unavailable for work" which question affect improperly determined by the Tribunal.

6.6 It was denied that statements referred to amount of defects "which in the opinion of the Tribunal could have affected its decisions". Due weight and consideration was given to such statements by the Tribunal.

6.7 The union denied that the Tribunal had failed to give reasons for its decision within the meaning of s. 275 (C). The precise reason required by statute is specifically whether the Tribunal was "satisfied that a material change had occurred in the circumstances of the stoppage of work or the trade union dispute which caused the stoppage of work, or that there is new evidence or new facts which in the opinion of the Tribunal could have affected its decision". The Tribunal had given us its reason for not changing its decision that "no new facts had been brought to its attention that they were not previously aware of". The Tribunal was not obliged to give further reasons. The decision of the Tribunal on review is final and conclusive.

6.8 The applicant was not entitled to any reasons or to the reasons given when it was not the claimant/applicant before the Tribunal and incurred no loss, financial or otherwise as a result of the decision of the Tribunal.

6.9 In the circumstances the applicant was not entitled to the relief claimed or any relief.

7. Affidavits of Brian Dunphy and Mick O'Reilly
7.1 Brian Dunphy's short affidavit avers that he is a member of the ATGWU and responds to Mr Keenan's affidavit of the 27th of May. He was treasurer or ILDA and refers to the work stoppage at which he was present and the adjudication of his claim as a test case. He says that he was prepared to work on the 19th of June, 2000 in accordance with the terms and conditions he had agreed with the company. He was not allowed to work in accordance with those terms and conditions. This was the central point in the submissions of the 2nd of September, 2004 made by him and Mr Ogle. He was of the view that the work stoppage was as a result of the unreasonable behaviour of his employer which was usually referred to by all of the ILDA members as a lockout. However he would not be prepared to state that no member of ILDA ever referred to it as a strike and indeed the media constantly referred to it as the rail strike. He did not accept that the colloquial references had any significance. The photograph in what he refers to as Mr Brendan Ogle's book, "Off the Rails" showed a picture of a placard asking the public to "support the locked out train drivers".

7.2 The lengthier affidavit of Mick O'Reilly did not accept any of the arguments or assertions made by Mr Keenan. He was advised that it would be inappropriate to treat the application as an appeal of the decision of the Tribunal.

He said that the union had been placed in a difficult position of having to stand over the impugned decision of the Tribunal which would not interfere or be represented when its decision was challenged rather in the High Court by way of judicial review. Mr O'Reilly's concern was that not all of the 118 (sic) individuals who received their social welfare entitlements following the decision were in fact represented by the court as not all individuals concerned were members of the ATGWU. Mr Dunphy's claims was an agreed test case. Any order quashing the decision of the Tribunal might ultimately involve the other individuals being obliged to repay monies to which they believe they are entitled having been so informed by the Tribunal.

7.3 He said that he had attended both hearings before the Tribunal. He referred to s. 275 (C) of the 1993 Act. He was advised that the crux of the application for judicial review related to the "new and very pertinent" information but was surprised that the applicant had not exhibited the original submissions made on the 2nd of September, 2004 which did not differ particularly from the second set of submissions of the 18th of November, 2004. He did not recollect that any significantly different oral submissions were made. The new evidence was primarily second hand newspaper reports which were available at the first hearing. The applicant did not seek to bring this information forward. The Tribunal referred to Mr Keenan on behalf of the applicant, stating that it "would be defined as complacency by the employer". Mr Keenan was not present at the original hearing and did not appear to be aware of what his colleague did or did not communicate to the Tribunal.

7.4 Mr O'Reilly stated that the hearing related to individual taxpayers' claims for their social welfare entitlements from the State. The employer, Iarnrod Éireann, had no financial stake in the matter nor did the relevant legislation make any provision for an employer to appear before or make application to, the deciding officer in relation to those welfare payments.

8. Decision
8.1 The function of the court in a judicial review is limited to an examination of process. It is not an appeal. The Tribunal made a finding that there were no new facts that were not already before it at the adjudication hearing.

The submissions of the notice party that the former members of ILDA had not been allowed to sign on, was uncontroverted. This would appear to have been a decisive basis for the decision of adjudication which was affirmed on review. Iarnród Éireann had referred to in its original submission on adjudication which were not repeated at the review hearing due, it seems, to "the complacency of the employer". However these submissions did not deny that on the 19th of June, the members of ILDA were not allowed to sign on. While there is no finding of whether or not there was a lockout the Tribunal has confirmed its decision on adjudication that there was no new information that it had not already considered and that the members were entitled to assistance and benefit.

8.2 If new evidence is to be construed as "fresh evidence" then such a reference in an enactment imports the usual legal meaning of this phrase as evidence which is not merely additional to that adduced on the former occasion but could not be reasonably have been expected to be produced then. (See Bennion on Statutory Interpretation, 2nd Ed., 262 and *Smith v. Tunney* [1996] 1 I.L.R.M. at 219.

The court accepts that the burden is on the applicant, the primary facts will not be set aside by the court unless there is no

evidence whatsoever to support them.

In *Henry Denny & Sons (Ireland) Limited* [1998] 1 I.R. 34, Hamilton C.J. stated that:

> "The courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based on an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise, it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or a judicial review."

The court considers that the argument in relation to whether judicial review is appropriate or whether an application should be made alternatively, does not alter the position. The applicant did not incur any loss, financial or otherwise as a result of a decision of the respondent Tribunal.

The notice party had asserted Iarnrod Éireann, as the employer was not affected financially in relation to the decision of the Tribunal which concerned the taxpayers' claim for social welfare entitlements. Of course, it is accepted that it had led to a lengthy disruption of work. The question arises whether, in such circumstances, an employer has sufficient interest in the matter to be granted a review of the decision of whether, indeed, it has *locus standi* in the matter. Section 275 (C) which provides that a decision of the Tribunal on an application for an adjudication shall be final and conclusive but allows for an appeal to the High Court on a question of law for the person interested it is dissatisfied that a material change has occurred in the circumstance of the stoppage of work. The phrase "a person interested" is not defined. It clearly covers the employee's availability for work but who is most deprived of the employment through some act or omission on the part of an employer concerned. The Tribunal must take into account the question whether the applicant is or was prevented by the employer from attending for work at his place of employment or whether the action of the employer amounted to a worsening of the terms or conditions of employment of the applicant and whether adequate consultation with their notice to the applicant was made.

It is clear that the employer is indeed a person interested in respect of these issues and, ordinary, the court cannot accept the submissions made by the notice party in this regard.

However it is clear that the Tribunal, without making a clear find of fact did take into account the circumstances of the stoppage of work. The uncontroverted evidence of Mr Dunphy at p. 3 of his affidavit, was that he was not allowed to work on the 19th of June, 2000 in accordance with the terms and conditions he had agreed with the company. It is not for this Court to decide on the legality or otherwise of such action or the withdrawal of labour by the employee. This is an application by way of judicial review.

Mr O'Reilly refers to Mr McKenna's assertion that the joint report of the Labour Relations Commission and the Labour Court issued in December 2000, which was not exhibited by Mr McKenna, did not make it clear that there had been no lockout. Mr O'Reilly's recollection was that the report dealt with rail safety and with industrial relations matters concerning terms and conditions of employment. He did not accept that the report made any findings as to the cause of the work stoppage.

Mr. O'Reilly exhibited the report (see appendix). He believes that the Iarnród Éireann was still worried about the public relations exercise in relation to a dispute that had been over for many years and in relation to which his members had been given large amounts of money. There were no new facts which, in the opinion of the Tribunal, should have caused it to change its decision nor was the material before it ignored.

The decision of the Tribunal should be final and conclusive other than respect to the point of law, that this point of law can be dealt with by way of judicial review. The court does not believe that a point of law arises: the decision refers to a factual issue.

The court is of the view that the applicant is not entitled to the reliefs sought.

Approved: Murphy J.

9. Appendix

9.1 The report of the investigation into the issues arising in the dispute between Iarnród Éireann and the Irish Locomotive Drivers Association dated the 11th of December, 2000 which was referred to but not exhibited by Mr Keenan and exhibited by Mr O'Reilly is a thirty three page document with a ninety eight page independent safety assessment of the new deal for locomotives drivers annexed to it. The report, by way of background, said that ILDA regarded the stoppage as a lockout while the company regarded it as an orchestrated refusal by ILDA numbers to work the new arrangements, amounting to unofficial industrial action. The report comments that this conceptual distinction highlighted one of the fundamental differences between the parties, arising as it did from the central question of whether or not the numbers of ILDA were bound by the terms of the "new deal" agreement.

The company entered negotiations and concluded the "new deal" agreements with SIPTU and NBRU as the recognised unions representing all locomotive drivers. The agreement introduced far-reaching changes in conditions of employment and work practices for that grade. Both unions and the company regarded the agreement as binding on all locomotive drivers. In the company's view, the refusal by some drivers to work the new agreement constituted a concerted refusal to fulfil their conditions of employment, amounting to an unofficial strike.

The members of ILDA did not consider themselves bound by the new agreement. They believed that their conditions of employment were unchanged. They regarded the refusal by the company to allow them to continue working under their original conditions as a lock-out.

The report notes that the actual background to the dispute was more complex and could be traced to the conclusion of an earlier productivity agreement in 1994 where some of those who subsequently formed the ILDA were dissatisfied with the way in which the agreement was negotiated and endorsed by their union. Central to their grievances was the decision of the unions to submit the proposal to an aggregate ballot of all members of the company, as had been recommended by the Labour Court. By the time the complaints came before the appropriate body of the Irish Congress of Trade Unions the complainants had resigned their union membership and, in consequence, their grievances could not then be dealt with under the rules of Congress.

The ballot on the agreement overseen by the LRC at the request of the two unions in the company concluded, *inter alia*, that the arguments made by ILDA raised serious questions on how employers and trade unions should respond to a situation in which a group of employees effectively withdraw from the decision-making process on industrial relations matters. These questions went to the

heart of the integrity and effectiveness of the collective bargaining process itself which necessarily involved the adoption of agreed structures within which the process would be concluded. When final processes, formulated by the negotiators, are endorsed by the respective parties through their own internal decision-making procedures the agreement binds all employees to whom it is expressed to relate, regardless of whether they voted or how they voted in the ballot.

That process was long established within Iarnród Éireann and its predecessors. It clearly commanded the support of the vast majority of employees. It was the accepted mechanism by which conditions of employment could be established and periodically altered and was incorporated as such into the individual contracts of employment of all employees.

The validity of the process is derived from the degree of support which it commands amongst the employees affected by its outcome. It was a matter for the representative unions and the employer to maintain a sufficient level of support to ensure the credibility of the process. Had the company and the recognised unions aborted the ballot because a minority of drivers refused to participate, this would have amounted to an abandonment of the process of collective decision making which was supported by the majority, at the behest of a minority breakaway group.

Originally the parties envisaged a phased implementation of the new agreement up to September, 2001. The agreement provided for significant lump sum payments to drivers to compensate for loss of overtime earnings arising from the introduction of restructured pay and attendance arrangements. A collateral agreement, not put to ballot but without any dissent, provided a guarantee to maintain fully the company's operational requirements in the period leading up to the commissioning of new drivers. ILDA had taken issue with the decision to conclude this collateral agreement on a number of grounds.

The report concluded that the requirement for transitional changes was not unusual. The impetus had come from the drivers themselves. There was nothing furtive in the manner in which the collective agreement was concluded nor any evidence of discontent by members of SIPTU or NRBU nor, was there anything to suggest that ILDA would have participated if such a ballot had been conducted.

The code of practice on grievance and disciplinary procedures had originally provided that an employee could be represented by a work colleague or an authorised trade union. This was then changed to a registered trade union.

ILDA was formed in September, 1998 with a membership of 104 locomotive drivers from Iarnród Éireann. In July, 1999 train services were disrupted in Athlone and in Cork. The company instituted proceedings for damages against eleven named employees who were members of the Executive Council of ILDA. ILDA, subsequently joined as a defendant, counterclaimed for a declaration that it was an exempted body within the meaning of the Trade Union Act, 1941 and was entitled to be recognised as a representative body for the purpose of negotiating changes in pay and conditions of employment of the company's employees. O'Neill J. dismissed the company's claim against the defendants and ILDA's claim for the declaratory relief sought in an unreported decision of 14th April, 2000. (*Iarnród Éireann/Irish Rail v. Christopher Holbrooke & Ors.,* High Court, Unreported, 14th April, 2000).

The Labour Court/IRC report concluded that the use of legal proceedings against employees arising from alleged misconduct had to be regarded as an extreme step. Normally all matters would be dealt with by an employer through the agreed company disciplinary procedures. The court and the Commission were not aware of any previous case in which the company pursued to trial and action in damages against its employees for taken unofficial disruptive action. The report also concluded that there was no evidence to support ILDA's allegation that the disciplinary procedures were used selectively against its members.

The report referred to the future and the rebuilding of relationships. No finding had been made in relation to whether there had been a lock-out or otherwise. Accordingly, it does not appear that this comprehensive report substantiates the submissions of either the applicant or the notice party.

In relation to the applicant's interest and *locus standi*, the issue of the applicant's credibility "on a wide and very damaging scale", as referred to by Mr. Keenan in the letter dated 23rd December, 2004 to the Tribunal is not, of course, relevant. Indeed, the decisions in relation to the entitlement to social welfare are inherently administrative within the statutory provisions. It would appear that no legal rights of the applicant are being affected by the decision of the Tribunal. In *Ryanair Limited v. Flynn* [2000] 3 I.R. 240 at 255 Kearns J. referred to the applicant's claim that its rights were infringed by adverse findings of a statutory report commissioned by the Minister under s. 38(2) of the Industrial Relations Act, 1990, to a strike at Dublin Airport. The rights allegedly infringed included the credibility of the applicant and its public reputation and the threat of industrial action which might follow from the report if certain errors were not rectified. The court held that it was not necessary that such rights be legally enforceable because, as pointed out by Diplock J. in *R. v. Criminal Injury Compensation Board* that the determination of a tribunal may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights and liabilities of a person to whom it relates.

However, in relation to the prejudice alleged to have been suffered by the applicant in that case the court held at 262:

> "I am satisfied in the instant case that the matter raised before this Court is not justiciable because there is no decision susceptible of being quashed in the sense that no legal rights of the applicant are affected by what is a mere fact finding report.
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> …
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> … Two other requirements must be fulfilled before the court can intervene by way of judicial review, namely, that there must be a decision, act or determination and must affect some legally enforceable act of the applicant. If the right is not a 'legally enforceable right', it must be a right so close to it as to be a probable, if not inevitable, next step that some legal right will, in fact, be infringed."

In relation to new facts or new evidence, it would appear that the proper construction of s. 275(c) such new evidence or new facts have to be, in the opinion of the Tribunal, ones that would have affected its decision.