Neutral Citation [2016] IEHC 665

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 688 J.R.]

BETWEEN

SAM DENNIGAN AND COMPANY

APPLICANT

AND

RIGHTS COMMISSIONER JIM O'CONNELL AND

WORKPLACE RELATIONS COMMISSION

RESPONDENTS

AND

RONAN HARRINGTON

NOTICE PARTY

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of April, 2016

1. The chain of events which led to this leave application being made begins for present purposes with an apparently unrelated event on 9th March, 2015, the decision to appoint Mr. Alan Haugh, B.L., as deputy chairman of the Labour Court.

2. On 29th April, 2015 a claim for unpaid annual leave and payment under the Organisation of Working Time Act 1997 (No. 155728-wt-15) was submitted by the notice party, the employee in this case, against the applicant employer. The claim listed the worker's legal representative as Mr. Haugh with an address at Merchant's Quay Chambers. It would appear that no solicitor was involved in the claim and therefore that papers or notices to be served in the matter would be served on Mr. Haugh directly. Mr. Alan J. Crann, B.L., who appeared for the respondents, informed me that this sort of practice, whereby barristers deal with applications of this kind before rights commissioners without any involvement by solicitors, is "*not unusual*". The appropriateness or otherwise of such a practice does not arise on this application, but either way it clearly has at least some disadvantages, as will shortly become apparent.

3. On 5th May, 2015 the Labour Relations Commission (later to be renamed the Workplace Relations Commission) notified the applicant of the claim.

4. On 3rd June, 2015 the applicant was notified that a hearing would take place on the 1st of July, 2015. Adjournments were said to be granted only in exceptional circumstances. However the notice party requested an adjournment, and on 15th June, 2015 the applicant was notified that the hearing would take place on a date to be fixed.

5. On 4th August, 2015 the applicant was notified of a hearing date on 10th September, 2015. The letter stated that the hearing would be postponed only in exceptional circumstances and that a request for postponement must be supported in writing with relevant documents in advance.

6. While Mr. Haugh's appointment as deputy chairman was decided upon in March, 2015, he did not take up the position immediately, and I am now told that he in fact took up the position in September, 2015. That presumably explains why Mr. Haugh continued to act in labour relations litigation in the intervening period.

7. What then appears to have happened, based on what the notice party stated, as set out in the exhibited correspondence, is that on formally taking up the rôle, Mr. Haugh had to cease acting in labour law disputes. However based on what the applicant states, it would appear that he did not notify the applicant of the date for the hearing, which had been communicated to him as legal representative rather than to the applicant directly, or to any solicitor (because there was none). Of course I have not heard from Mr. Haugh but in terms of the material before me there is nothing to contradict the applicant's version of events as so set out.

8. On 10th September, 2015, the appointed hearing date, Mr. Jamie McAuliffe solicitor for the applicant says that at 11a.m. the applicant's representatives entered the conference room at the appointed venue, the Silver Springs Hotel in Cork. The first named respondent, the rights commissioner, was present. At 11.10a.m., the first named respondent indicated he would begin without the notice party, who had not appeared at that point. Mr. McAuliffe states that the rights commissioner stated that he would dismiss the application for failure to prosecute, and that a written decision would issue in due course. As it happens no written decision was ever issued. His evidence in this regard is reinforced by affidavits from the other representatives of the applicant, Ita McDonagh and Aiden Hand.

9. By contrast, Mr. O'Connell, the rights commissioner, states (affidavit of 28th January, 2016, para. 12) that he informed the representatives of the applicant that unless he heard from the notice party he would issue a decision based on the notice party's failure to prosecute the application within 6 to 8 weeks.

10. I will deal separately below with the question of this conflict of evidence.

11. On 11th September, 2015, the notice party sent two emails timed at 12.51 and 13.00 notifying the respondents that Mr. Haugh had taken up his role as deputy chairman of the Labour Court and could no longer represent the notice party. He stated that further correspondence should be sent to him, and that Mr. Haugh had failed to notify him of the date for the hearing.

12. On 14th September, 2015 Mr. O'Connell made a note on an "attendance docket" that "*claimant not informed - changed solicitor*" (*sic*) (para. 17 of his affidavit). He accepted this reason and decided to adjourn the hearing (para. 18).

13. On 1st October, 2015, the Labour Relations Commission was reconstituted as the Workplace Relations Commission.

14. On 12th November, 2015, the matter was listed by the Workplace Relations Commission for 16th December, 2015.

15. On 7th December, 2015 the present *ex parte* application for leave to seek judicial review was commenced. I directed that the leave application should be made on notice.

16. On 9th December, 2015, the Workplace Relation Commission wrote to the applicants indicating that the practice is that where a party does not appear the rights commissioner can issue a determination "*dismissing the case for want of prosecution*" unless the absent party is heard from within a reasonable time.

17. The respondent agreed not to substantively process the matter further pending my determination of the leave application.

18. On 21st December, 2015 the applicant furnished an amended statement of grounds, without seeking leave to do so.

19. The essential point made by the applicant is that as Mr. Nathan Reilly B.L. for the applicant put it in his very able submission, "*even if the Rights Commissioner intended something else, what he said was unequivocal*" and the notice party's claim has already been dismissed. The rights commissioner is therefore *functus officio* and cannot purport to adjourn and further consider the claim.

What approach should be taken for leave purposes to the alleged conflict of evidence regarding what was said at the hearing?

20. Not all of the evidence relating to the issue of "dismissal" versus "adjournment in contemplation of dismissal unless explained" is in fact in conflict. The rights commissioner has given evidence which clearly indicates that his intention was not to dismiss the application there and then. He has also given evidence regarding his general practice where there is a non-appearance, which is along the lines on which he states that he proceeded in this case. Furthermore I have been given evidence that a note was placed on the file stating that the matter had been adjourned. These matters have not been contradicted either adequately or at all.

21. In replying submissions (para. 3.3), the applicant says that "*dismiss[al of] the case for want of prosecution … is standard procedure when a party doesn't turn up*". Unfortunately this submission is simply incorrect in the light of the evidence. The standard procedure before Rights Commissioner O'Connell is that the matter is adjourned in contemplation of dismissal unless an explanation for non-attendance is furnished. That has been clearly established and is uncontradicted.

22. Insofar as the conflict of evidence as to what exactly was said at the hearing is concerned, Mr. Reilly suggests that I should determine arguability on the assumption that the applicant's averments are correct (*Gordon v. D.P.P.,* Unreported, Supreme Court, Fennelly J., 7th June 2002). Mr. Crann however submits that the court should have regard to the answers of the respondent in accordance with *Joel v. D.P.P.* [2012] IEHC 295 (9th July, 2012) per Charleton J. at para.13: "*[a]nything can be argued, that is the reality but the courts have said that, where other parties are on notice of the application, the court is also entitled to look at any answers that are given to any points that are made and to assess on that basis as to whether arguable grounds have been made out*"). In *Gilligan v. Governor of Portlaoise Prison* [2001] 4 JIC 1201 (12th April, 2001), McKechnie J. commented that the court could "*take into account those parts of the respondent's evidence which [the court could] confidently accept as being accurate*" (para. 11). The approach of taking all the evidence into account appears to me to be the correct one. Arguability must be assessed on the totality of the evidence and indeed submissions rather than by artificially disregarding the respondent's material.

23. In this regard I emphasise first of all that the evidence that a note to the effect that the matter had been adjourned was placed on the file is uncontradicted, albeit perhaps that that fact alone is not hugely central. Much more importantly, Mr. O'Connell's evidence as to his general practice and his intention is completely uncontradicted.

24. The most that the applicant's representatives can aver to is what they say Mr. O'Connell said. They cannot give direct evidence as to what he intended to say, or what he intended to do. Mr. O'Connell's position on this is in effect uncontradicted. The most the applicant can say, assuming the applicant's evidence were to be accepted, is that the words actually used on the day did not fully reflect that intention.

25. However, I think it is extremely unlikely that the applicant's evidence as to what Mr. O'Connell said would be accepted. It has been shown on innumerable occasions that human psychology is such that people acting in complete good faith still manage to hear what they want to hear and what it suits them to hear. What the applicant's representatives remember from Mr. O'Connell's statement just happens to suit their particular case. That is not an indication of any failure in absolute good faith on their part but it is almost certainly not a coincidence either. Mr. O'Connell on the other hand is a quasi-judicial figure and entirely independent of the parties, the case and the outcome. His own evidence as to what he said is overwhelmingly more likely to be accepted, even bearing in mind the unanimity of recollection as between the three representatives of the applicant.

26. However for reasons stated later in this judgment, it is not in fact necessary to rest the decision solely on that basis.

The alleged lack of "evidential basis" for the notice party's version of events

27. The argument is made that the decision to re-list the proceedings was "*made without any evidential basis and is consequently irrational and/or unreasonable".*

28. Inherent in this argument is the contention that the respondents required some positive evidence of the notice party's version of events above and beyond his letter. The suggestion is that there was no such evidence either before the respondents or therefore the court. This approach misunderstands the fundamental point that tribunals are bound by fairness but not by the rules of evidence. The applicant cannot dictate the procedures to be adopted by the respondents. If the respondents want to act on a letter and accept its contents as true, that is a matter for them, subject of course to the right of any other party to present contrary material when informed of the matter. No such contrary material was presented. The respondents did not need an "*evidential basis*" to accept the notice party's letter. The notice party's account, that his barrister had ceased to act and had not passed on details of the date of the hearing, was thus simply accepted by the respondents. Implicitly would have been without prejudice to an entitlement on the part of the applicant to show that this was not accurate, but they did not do so. It thus constitutes in effect a step akin to a finding by the respondents which does not require further positive evidence for the purposes of judicial review, and indeed which is not challenged as factually unsustainable in these proceedings. Instead, the (misconceived) legalistic point is made that there was a lack of "*evidential basis*". By passing up the opportunity to challenge this act akin to a finding on the facts before the rights commissioner and in this judicial review in particular, the applicant cannot do so at a future point when the matter returns to the rights commissioner, pursuant to *Henderson v. Henderson* (1843) 3 Hare 100 (see also my judgment in *O'Neill v Kerry County Council* [2015] IEHC 827), which precludes the raising at a future stage of any points which could have been raised in these proceedings.

29. A decision to re-list the matter did not require an "*evidential basis*" in any formal legal sense. It is based on material furnished by

the notice party. That is sufficient.

The test for leave in G. v. D.P.P.
30. In *G. v. D.P.P.* [1994] 1 I.R. 374 at 377 to 378, Finlay C.J. (Blayney and Denham JJ. concurring) set out the criteria for the grant of an ex parte application for leave. As developed by subsequent changes to the rules of court, and subsequent caselaw, the criteria can be summarised as follows:

> (i) That the applicant "*has a sufficient interest in the matter to which the application relates*" (p. 377);
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> (ii) That "*an arguable case in law can be made that the applicant is entitled to the relief which he seeks*" (p. 378) on the basis of facts averred to, albeit that the court can also have regard at least to uncontradicted evidence adduced by a respondent who has been put on notice of the application. Of course in particular circumstances a higher threshold applies, such as where legislation requires substantial grounds, or where the grant of leave would itself be likely to determine the event (*Agrama v. Minister for Justice and Equality* [2016] IECA 72 *per* Birmingham J. at para. 32);
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> (iii) That the application has been made within the appropriate time limit or that the Court is satisfied that it should extend the time limit in accordance with the applicable rules of court or legislation;
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> (iv) That *"the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure"* (p. 378).
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> (v) That there are no other grounds to warrant refusal of leave. "*These conditions or proofs are not intended to be exclusive and the court has a general discretion, since judicial review in many instances is an entirely discretionary remedy which may well include, amongst other things, consideration of whether the matter concerned is one of importance or of triviality and also as to whether the applicant has shown good faith in the making of an ex parte application."* (p. 378).

31. It is now therefore necessary to assess the present application under a number of these headings, in particular arguability, alternative remedies, and discretionary factors including benefit to the applicant.

Is the applicant's case arguable?
32. A claim is not arguable if it is clearly wrong; for example if it is "*based on a fundamental misconception" (Agrama v. Minister for Justice and Equality* [2016] IECA 72 *per* Birmingham J. at para. 33, see also para. 36). Furthermore it is not arguable if the point involved has already been decided in another case adversely to the position now being argued for, and the applicant does not demonstrate any clear basis as to why the previous decision ought to be departed from. Otherwise there would simply be no end to the litigation of stale points. Of course the door is open to an applicant to show that the law should move on since any earlier decision but a demonstrable basis to do so must be shown.

33. A claim is not arguable merely because its consideration requires an amount, even a considerable amount, of debate and consideration by the court: by way of example see the very detailed judgments of Peart J. refusing leave in *Duffy v. Clare County Council* [2013] IEHC 51 [2013] 2 JIC 0803; *Kelly v. Flanagan* [2014] IEHC 378 [2014] 6 JIC 2604. An applicant does not establish substantial or even arguable grounds merely by weight of papers or number of grounds pleaded, or merely by virtue of the quantity of submissions, affidavits and time required to deal with the matter: *O'Mahony Developments v. An Bord Pleanala* [2015] IEHC 757 at para. 50; *R. v Local Government Commission for England ex p. North Yorkshire County Council* (unreported, High Court (Queen's Bench Division), 11th March, 1994) (Laws J.); *R. v. London Docklands Development Corporation ex p. Frost* [1997] 73 P. & C.R. 199, *per* Keene J. at 204: "*The approach of 'never mind the quality, feel the width' has no application in these proceedings*".

34. While I do not in fact consider that there is any reasonable likelihood that the disinterested evidence of Rights Commissioner O'Connell will be rejected if this matter went to a full hearing, if I am wrong about that, and if assuming in favour of the applicant that what the rights commissioner said did not reflect what he intended, I would in any event completely reject the notion that a verbal slip by a quasi-judicial decision maker is sufficient to completely derail the process and permanently extinguish the right of the notice party to furnish an explanation for non-attendance. The notice party has due process rights, which would be simply extinguished by the extreme and unacceptable legal doctrine being advanced by the applicant.

35. Those due process rights include his right to the effective remedy which has been prescribed by law (pursuant to Art. 40.3 of the Constitution, art. 13 of the ECHR and art. 47 of the EU Charter of Fundamental Rights (applicable here because the 1997 Act is based on Directive 2003/88/EC), which specifically guarantees the possibility of "*being advised, defended and represented"*. For good measure, a right to an effective remedy for breach of fundamental rights granted by national constitutions or law is also guaranteed in art. 8 of the UN Universal Declaration of Human Rights of 10th December, 1948, not of course part of Irish law in any direct sense but of persuasive authority in interpreting human rights instruments.

36. There is unchallenged evidence as to the rights commissioner's practice, and as to his intention, and as to the note in the file indicating that the matter had been adjourned. Even if, which I do not accept, it is arguable that he did not fully articulate the caveat that an opportunity would be given to the notice party to explain non-attendance, any such failure could not even arguably have the effect of running the entire process into a brick wall.

37. Mr. Reilly's very learned submission that there exist other statutory procedures which allow a decision to be reopened (e.g., s. 122 of the Residential Tenancies Act 2004) is interesting but not in any way determinative. The present case is not one where the decision-maker ever intended to make a final decision in the first place (irrespective of whether the words used to express that intention were in fact mangled in some way, whether as alleged or at all). Reliance on the doctrine that an administrative decision is generally final once made because the decision-maker is *res judicata* (see Hogan and Morgan, *Administrative Law* 4th ed. (2010) at paras. 19 to 132 as approved in *Noel Recruitment (Ireland) Ltd. v. Personal Injuries Assessment Board* [2015] IEHC 20 (23rd January, 2015, per Kearns P.) at para. 24) is therefore misplaced because of the absence of an intention to make a final decision.

38. The same problem applies to the reliance on *In re War Damage Act 1943: Re 56 Denton Rd.* [1952] All E.R. 799, *In Aparau v. Iceland Frozen Foods plc* [2000] 1 All E.R. 228 and *R. (B.) v. Nursing and Midwifery Council* [2012] EWHC 1264 (Admin), which were also cases where a definite decision was made.

39. The superficially similar case of *Akewushola v. Immigration Office (Heathrow)* [2000] 1 W.L.R. 2295 was one where a hearing date was fixed on the day the applicant was due to give birth. She had of course applied for an adjournment, but due to an error, the

Immigration Appeal Tribunal was not made aware of the request for an adjournment, and so the hearing then went ahead. The decision which she was appealing against was upheld despite the absence of the appellant. It was held by the Court of Appeal that there was no inherent power to rescind a decision once given. While I appreciate that a quotation from that decision was referred to approvingly by Kearns P. in *Noel Recruitment* (at para. 26, the only Irish decision to do so), the actual outcome of the case strikes one as far from acceptable. However one does not have to agree that the *Akewushola* case was wrong in order to find it clearly distinguishable, the distinction being the crucial one that here, there is uncontested evidence that the rights commissioner did not intend to make a final decision. To say as the applicant does that it wants to cross-examine the rights commissioner is not really an answer here. Cross-examination in judicial review requires established conflict, and there is no conflict on the rights commissioner's general policy, his note and his intention.

40. The respondents placed some emphasis on the necessity to give the decision in writing under s. 27(2) of the 1997 Act, which was not done, suggesting that in the absence of a written decision there was no decision at all for the purposes of the law relating to a decision-maker who is *functus officio*. Such a rule might have attractions, given situations such as those in *Akewushola* or *Spring Grove Service Group plc v. Hickinbottom* [1990] ICR 111 where the discovery of a crucial authority after an oral decision was held not to provide any entitlement to re-open the oral decision. On the other hand, a doctrine that a mere failure to record the decision would mean that there was no decision could itself create injustice, as appears from *Jowett v. Earl of Bradford* [1977] ICR 342 where that doctrine was rejected in a context where the decision maker died after an oral decision and a new decision-maker produced an opposite decision by way of re-hearing. It is not necessary to resolve that issue in view of the fact that there is no basis on the applicant's evidence to displace the first respondent's evidence as to his intention not to make a final decision there and then.

Are the other grounds advanced arguable?
41. The basic claim made, as stated above, was the lack of an entitlement on the part of the rights commissioner to re-list the matter meant that the re-listing was *ultra vires* or had no legal effect.

42. A number of other points were made, which are essentially subsidiary, and by and large the reasons for rejecting the main submission set out elsewhere in this judgment also apply to these as well. I would only comment further as follows.

43. The argument that the applicant was entitled to a written version of the "*determination of 10th September 2015*" is predicated upon the incorrect contention that there was a determination by the rights commissioner in September 2015.

44. The argument that the decision to re-list the proceedings was made without reference to the applicant and without affording the applicant fair procedures or by taking into account irrelevant considerations is nonsensical. Fair procedures do not require that a party be given advance notice of a decision to give that party advance notice of a hearing.

45. This was not a case where the applicant was being deprived of a hearing. If it had wanted to it could have, on the adjourned date, made a submission to the rights commissioner not to proceed further. That satisfies any fair procedure requirements. Instead it has sought to invoke the High Court. The result of that is that its opportunity to make the same submission to the rights commissioner no longer exists as the present decision determines that issue between the parties.

46. Furthermore the suggestion that the decision to relist the matter is irrational in the sense that it flies in the face of reason and common sense, is overstatement. Not only was the decision not irrational but it was a perfectly reasonable and indeed humane, sympathetic and fair response to the situation and completely in accordance with the stated policy of the respondents to permit matters to be re-listed if an explanation for non-attendance was provided before the formal dismissal of the claim.

47. The argument is made that "*the clear and unambiguous representation of the first respondent made on 10th September 2015 that the proceedings were being dismissed and that it had no case to answer…created a legitimate expectation*". There was no such representation, but even if there was, a representation of this kind could not even arguably create a legitimate expectation. The applicant has not even arguably acted upon it to its detriment. It is too bad for the applicant that it prematurely celebrated victory and now has to deal with a complaint that it thought had been dismissed, but that is not even remotely in the ball park of the kind of circumstance that would create a legitimate expectation. The presumably modest costs of having travelled to the Silver Springs Hotel may perhaps have been wasted but the rights commissioner has no power to award costs anyway so parties to the relatively (compared to court) informal procedures provided by the 1997 Act must simply take such costs on the chin. It is not arguable that the applicant was in some way "*entitled to rely on*" this (in any event non-existent) representation. In what way it relied on it to its detriment is unspecified in the pleadings.

48. The argument is also made that the respondent's letter of 4th August 2015 created an "*express policy*" regarding adjournments, and that the purported decision to re-list the matter was made "*in defiance of [that] express policy*", contrary to the applicant's legitimate expectations. The phrase "*legitimate expectations*" is not a magic formula that can simply be sprinkled on the case to create a cause of action where none exists. The applicant does not have a legal entitlement to dictate the procedures of the rights commissioner (see by analogy *The State (Casey) v. Labour Court* (Unreported, High Court, O'Hanlon J., 15th May, 1984); *G.E. v. Refugee Appeals Tribunal* [2006] 2 I.R. 11). Even if the applicant's version of events were to be accepted, this comes nowhere near a situation that would create a legitimate expectation, because it would not be "*unjust to permit the public authority to resile from it" (Glencar Explorations plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at 163 *per* Fennelly J.; Keane C.J., Denham, Murray, McGuinness JJ. concurring). In the absence of injustice there can be no legitimate expectation. In any event, the applicant misunderstands the nature of the representation made. The respondent's letter being relied on does not purport to deal with or restrict the entitlement of the rights commissioner to adjourn the hearing. It only specifies that adjournments *in advance* will be granted in limited circumstances.

Is there a more appropriate alternative remedy?
49. Where the legal system provides an established mechanism to vindicate the rights of an applicant, such as the criminal process, or a quasi-judicial or judicial civil process, or indeed an administrative or judicial appeal process, such a procedure is normally to be regarded as a more appropriate alternative remedy than seeking judicial review.

50. For some of the many authorities supporting the exhaustion of remedies, see *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 384 *per* O'Higgins C.J. at p. 393; *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203 (*per* Denham J.; McGuinness and Hardiman JJ. concurring); *Tomlinson v. Criminal Injuries Compensation Tribunal* [2004] 3 JIC 0302 (3rd March, 2004, *per* Kelly J.); *Sheahan v. Minister for Social and Family Affairs* [2010] IEHC 4 (14th January, 2010, *per* MacMenamin J., refusing relief where there was a failure to appeal before seeking judicial review)); *McCarthy v. Brady* [2007] IEHC 261 (30th July, 2007, *per* de Valera J., refusing relief where there was a failure to avail of an appeal against an order of the District Court; *Nova Colour Graphic Supplies Ltd v. Employment Appeals Tribunal* [1987] I.R. 426 (*per* Barron J., where the possibility of a rehearing on appeal from the tribunal was held to be a satisfactory alternative warranting refusal of relief by way of judicial review); *Memorex*

World Trade Corporation v. Employment Appeals Tribunal [1990] 2 I.R. 184 (*per* Carroll J, holding at p. 188 that the appeal by way of rehearing to the Circuit Court rendered certiorari of the tribunal inappropriate); *Koczam v. Financial Services Ombudsman* [2010] IEHC 407 (1st November, 2010, *per* Hogan J.); *Temida v. Private Residential Tenancies Board* [2014] IEHC 604 (11th December, 2014, *per* Baker J.); *O'Connor v. Kerry County Council* [1989] I.L.R.M. 660 (*per* Costello J.); *R. v. Inland Revenue Commissioners* ex parte *Preston* [1985] A.C. 835 at 862 *per* Lord Templeman.

51. There are of course exceptions to this approach. The Supreme Court has definitively set out the position in *E.M.I. Records (Ireland) Limited v. Data Protection Commissioner* [2014] 1 I.L.R.M. 225[2013] 7 JIC 0301. In that case, Clarke J. (Fennelly and O'Donnell JJ. concurring) said at para. 4.8 that *"[t]he default position is that a party should pursue a statutory appeal rather than initiate judicial review proceedings. The reason for this approach is, as pointed out by Hogan J. in Koczan, that it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned".*

52. He went on to say at para. 4.9 that *"there will be cases, exceptional to the general rule, where the justice of the case will not be met by confining a person to the statutory appeal and excluding judicial review. The set of such circumstances is not necessarily closed. However, the principal areas of exception have been identified. In some cases an appeal will not permit the person aggrieved to adequately ventilate the basis of their complaint against the initial decision. … Likewise, there may be cases where, in all the circumstances, the allegation of the aggrieved party is that they were deprived of the reality of a proper consideration of the issues such that confining them to an appeal would be in truth depriving them of their entitlement to two hearings."*

53. Of course in this case, depriving both the notice party and itself of an entitlement to two hearings is, curiously (and in principle undesirably), the object of the judicial review, rather than an adverse outcome it seeks to prevent. In the circumstances I do not see any compelling reasons to depart from what Clarke J. calls the "*default position*" that an appeal to the Labour Court (which exists in this case under s. 28 of the 1997 Act) is a remedy that the applicant can avail of if it loses before the rights commissioner. Admittedly the Labour Court will not be able to deal with the precise legal point being argued – that the rights commissioner should not have purported to reconvene the hearing – but one would have to ask "so what?" The applicant has to face the Labour Court anyway and in any event, an inability of the appeal process to deal with the precise legal point argued is not, to my mind, an automatic reason to favour judicial review over appeal. One must look at the overall reasonableness of the situation. In some cases, admittedly not here, the legal point can be preserved to be used as a challenge to the appeal decision, even if the appellate body does not have jurisdiction to deal with it as such. It may simply be more practical and appropriate to require the appeal process to run to its conclusion before judicial review.

54. This approach is not that far removed from that of Costello J. in *Donegal Fuel and Supply Company Ltd v. Londonderry Harbour Commissioners* [1994] 1 I.R. 24 (per Costello J.), where he said at p. 40 as to the question of judicially reviewing allegedly ultra vires bye-laws before the conclusion of the statutory process: "*Even if it was shown that the draft bye-laws were ultra vires the Minister's powers or unreasonable, the court cannot assume that they would be adopted by the Minister. I think that an objector to draft bye-laws is required to exhaust his statutory remedies before seeking the aid of the court in relation to them. If notwithstanding his objections the Minister approved bye-laws which legally he could not approve then the courts would quash the bye-laws".* In effect, an applicant should go through even a process which is *ultra vires* and without jurisdiction on his or her submission, because even such a process could provide relief and if it does not then *certiorari* will lie at the end of the process if there is any real injustice. Again, admittedly, the precise technical point now being argued cannot form part of any such future *certiorari* application because it will be subsumed and rendered moot by the Labour Court rehearing (*Department of Foreign Affairs v. Cullen* EDA 6/2011). But that is not in itself and without more a reason to bring judicial review now, not least because a subsuming of the claim into Labour Court proceedings is effectively going to happen anyway.

55. The applicant makes the point that the rights commissioner has made a determination that the matter is to proceed notwithstanding the applicant's objection, and therefore a remittal to the rights commissioner gives rise to "*apparent bias*" (relying on Tomlinson *v. Criminal Injuries Compensation Tribunal* [2004] 3 JIC 302). This is a misunderstanding of the process on a number of fronts. First of all, not accepting a party's submission is not a matter of bias. A decision-maker is not biased merely because he or she has rejected a submission or application, or a series of submissions or applications, made by a party. Secondly, if the matter proceeds before the rights commissioner, it is not proceeding on the basis that the rights commissioner will now determine whether to continue to re-list the matter. It will proceed on the merits on the basis that the matter is being re-listed. The applicant had the opportunity, if it had wished to do so, to challenge the notice party's version of events giving rise to his non-attendance. Not only did they not do that, they did not argue in the present application that the rights commissioner's acceptance of that version of events was unreasonable. Having failed to do either, they cannot now do so if the matter proceeds further before the rights commissioner. It will proceed on the merits, whatever they may be.

56. If this matter is re-entered and processed, and the applicant remains dissatisfied with the result, it has a full right of appeal to remedy the ultimate outcome. It thus has an alternative remedy which is cheaper and more appropriate than judicial review, which is therefore not a route that I would permit it to go down in this case.

Are there discretionary or other reasons to decline to grant leave?

57. It is not possible to provide a closed list of the grounds on which leave could be refused under this heading but I will identify two substantive grounds of relevance in this case: the interests of justice and the lack of benefit to the applicant.

Should the application be refused because the proceedings could produce injustice?

58. Examples of cases where factors relevant to the balance of justice, including the conduct of the applicant, have been identified as a reason for refusal of leave in the exercise of the court's discretion include *Arnold v. Windle* (Unreported, Supreme Court, Murphy J., 4th March, 1999), affirming the reasoning of Kelly J on that point (albeit differing as to the result); *Talbot v. An Bord Pleanala* [2005] IEHC 215.

59. Judicial review is a discretionary remedy (*G. v. D.P.P.*, at p. 378; *Stefan v. Minister for Justice*). The right to be heard is a core dimension of our notion of justice. What happened in the present case was that the rights commissioner re-listed the matter on the basis that the notice party was deprived of that right through no fault of his own, but rather because notice of the hearing was delivered to his barrister alone, who was not at that point able to act, and notification of the hearing fell through the cracks. The applicant submits that because of what is essentially an alleged verbal slip by Rights Commissioner O'Connell (which I do not in any event accept occurred), nothing can now be done to rectify this. Such an argument would simply bring about an injustice or at an absolute minimum the appearance of injustice, and even more so if applied generally across the field of administrative decision-making bodies.

60. It is easy to follow to a *reductio ad absurdum* the (to my mind artificial) outrage of the applicant at being asked to now deal with this claim. Supposing the notice party, representing himself, was knocked down by a car on the way to the hearing, and only discovered that his claim had been purportedly dismissed after he came around. Or was hospitalised when the notice of hearing was issued, and simply was not in a position to respond meaningfully to it, still less to appear. The posture struck by the applicant would rule out any possibility of the rights commissioner adopting an approach similar to that proposed here.

61. Where a genuine mistake occurs on one side of a dispute, the other side should hesitate before exploiting the ostensibly and temporarily stronger position that they might thus be placed in. Efforts to do so can have a disturbing tendency to backfire on the party seeking to take such advantage. I might be forgiven for thinking that it is curious that the applicant is making such an express point about its right to a good name, given that it seems to me that the main threat to the applicant's good name comes from the applicant, by its conduct in seeking to exploit what the respondents considered to have been a simple mistake on the side of the notice party. Of course it would not matter if it was an employee trying to exploit a mistake by an employer or vice versa. This entire application is an attempt to obtain a windfall first-round victory as a result of what the rights commissioner in effect took to be a difficult situation that descended on the notice party through no real or established fault of his own. To use law in a manner that would create injustice is to abuse it. The present application is an attempt to create a situation which would be substantively unjust, at least as judged on the materials before the decision-maker at the time the decision was made, and therefore independently of any of the foregoing reasons I would exercise my discretion against permitting the matter to proceed further.

62. The authorities relied on by the applicant in support of the proposition that discretion should not be exercised in this way (*O'Keeffe v. Connellan* [2009] 3 I.R. 643 (*per* Hardiman J.; Fennelly and Finnegan JJ. concurring) and *De Róiste v. Minister for Defence* [2001] 1 I.R. 190 *per* Fennelly J. at 220) discuss very different situations (such as criminal convictions without jurisdiction) and are irrelevant. The applicant is not entitled to relief *ex debito justitiae*. It is not entitled to relief at all.

63. Leaving aside the rhetoric about good name and property rights, the applicant's claim of "prejudice" amounting to countervailing injustice against it basically amounts to a claim that it will incur further costs before the rights commissioner. That is unfortunate perhaps but it is liable to incur those costs as a result of a claim having been made against it which has not been finally determined. The incurring of those costs is not injustice. In any event, the solicitous and touching concern for the costs of the rights commissioner hearing must be put in the context of the applicant's voluntary decision to invoke the much more significantly expensive option of involving the High Court in this matter. Refusal of this application does not visit an injustice on the applicant.

Is the application trivial or lacking in benefit to the applicant?
64. It is well established that "*if an order will confer no practical benefit on an applicant relief would be refused*" (*per* Costello P. in *Ryan v. Compensation Tribunal* [1997] 1 I.L.R.M. 194; see also *Barry v. Fitzpatrick* [1996] 1 I.L.R.M. 512 (*per* Denham J.)). The consequences for the applicant were also identified as a relevant factor in *Stefan*. There is a full right of appeal to the Labour Court from a decision of the Rights Commissioner. The time for appealing to a Labour Court only commences with the issue of the written determination, which has not happened in this case. Even if the applicant were to obtain leave and ultimately win this action (which of course I do not accept it is entitled to do), the net effect of that would be that the rights commissioner would be held not to be entitled to re-enter this matter. He would then have to formally issue a written determination dismissing the notice party's claim. That would then trigger a right for the notice party to appeal to the Labour Court, where the matter would be fully reheard.

65. The applicant argues that if it succeeds in the present judicial review it will have the benefit of a decision dismissing the notice party's case, which has implications for its constitutional rights including its property rights and its right to a good name. That is all well and good but for the fact that the full right of appeal will be triggered rendering these benefits purely temporary. The applicant says that the notice party might not appeal; I should not assume he will; and they could then in effect keep their windfall gain. This is not a realistic basis on which I should regard this application as conferring a benefit on the applicant. The notice party has brought a claim and never indicated an intention not to pursue it. He sought to continue it after the events at the aborted hearing. He also expressly said that he did not wish to add to the respondents submissions, which included the submission that the fact that he would have the facility of an appeal to the Labour Court was a reason to refuse leave. He also has an unfair dismissal claim against the applicant which continues to be listed and is not subject to the judicial review. He also diligently attended before me on 29th February, 2016 and 15th March, 2016, travelling from West Cork to do so. These are not the actions of a man who is bent on dropping his claim. It is reasonable to infer, and I therefore do infer, that he will continue to pursue his claim in the appropriate forum (which, if the applicant succeeds, would be the Labour Court) in the absence of material to the contrary. Possibly scraping the barrel in this regard, the applicant makes a point that the notice party did not put in an affidavit in the present application and inferentially it can be taken that the applicant may not pursue the matter. The notice party did attend the proceedings and told me that his solicitor had advised him of the costs of preparing an affidavit and he did not wish to do so. All one can infer from the lack of an affidavit is that the notice party does not want to be in the High Court. He wants to be back in the industrial relations machinery established by statute, and indeed he can and will be whether the applicant wins or loses the present application.

66. One would need a microscope to see the benefit to the applicant in rushing to the High Court to achieve such a futile result. On the other hand there is no difficulty in seeing the downside. The full rehearing would be conducted without the benefit of a full hearing at first instance, which could clarify many issues and perhaps resolve matters (a first instance hearing which will be afforded if this judicial review is dismissed but not if it succeeds). In addition there is not simply the cost and expense visited upon the respondent arising from litigating this matter in the High Court, but the "*lamentable waste of precious judicial resources*" (to use a phrase of Tallman J. (dissenting) in *Frost v. Gilbert* (Application number 11-35114, US Court of Appeals for the 9th Circuit, 21st March 2016, p. 33) involved in devoting time to this trivial and pointless complaint when there are so many other litigants needing the time of the court to resolve disputes where there is something tangible at stake.

67. Coming to the same conclusion from another point of view, *G. v. D.P.P.* also permits a court hearing leave applications to refuse leave on the grounds of the "*triviality*" of the matter (at p. 378). I am not aware of any previous examples where a judicial review leave application has been refused on grounds of triviality but clearly there is a first time for everything.

Position in relation to the proposed amended statement of grounds
68. During the leave application, the applicant submitted a revised version of its Statement of Grounds. As I am not of the view that the proposed amendments, relating to legitimate expectation and the like, are ones that the applicant should be permitted to make on the *G. v. D.P.P.* criteria, I would decline to permit the applicant to file the amended statement of grounds, even if it had expressly sought leave to amend. Because the proposed amendments are not a basis for a grant of leave for the reasons stated in this judgment they therefore fail to meet one of the threshold considerations necessary to allow an amendment (see my decision in *S.O. v. Refugee Appeals Tribunal* [2015] IEHC 821 (21st December, 2015)). The filed copy dated 7th December, 2015 appears to be the first version. The amended statement does not appear to have been filed. Even if due to some mistake akin to that said to have affected the rights commissioner, the applicant had the impression that it had permission from me to file amended grounds or had applied to do so (and one does not have to accept any of his other conceptions to consider that experience since Karl Marx's

aphorism of 1852 has done much to bear out the view that history repeats itself, first as tragedy, then as farce), no such steps in the course of a leave application could involve a representation, or create a legitimate expectation, that leave would be granted if the amendment was made. To advance a doctrine that would inadvertently predetermine the leave application as a result of successfully asking to amend papers would amount to allowing or encouraging the court to fall into a jurisprudential elephant trap. Leave to amend given in the course of a leave hearing is always without prejudice to the question of whether leave will in fact be granted, or not. In any event I am not of the view that the applicant did in fact properly apply for liberty to amend but even assuming in its favour that it did so, I would not be prepared to accede to any such application for the reasons given.

Order

69. There are a number of separate reasons for rejecting the application for leave. I consider it is not arguable. The remedy is ultimately futile, or alternatively the real benefit to the applicant is trivial. The applicant has an alternative remedy. And in any event I would refuse the application on discretionary grounds. For the foregoing reasons, which are independent of each other, and despite Mr. Reilly's very skilful advocacy on behalf of the applicant, I will order:

(a) that the application for leave be dismissed; and

(b) that the respondents be discharged from their undertaking not to process the claim further, with effect from the oral pronouncement of this judgment.

Postscript

70. Following delivery of the unapproved judgment, Mr. Michael Lynn S.C. applied to me on behalf of Mr. Alan Haugh B.L. requesting that the unapproved judgment be amended to record certain matters of concern to his client. As there did not seem to be any particular objection to this from any of the parties to the proceedings I entertained the application, and now record the matters so raised by Mr. Haugh in correspondence with those parties.

71. Firstly Mr. Haugh states that there is no connection between his appointment to the Labour Court and the postponement granted to the Notice Party of the claim. I do not think that the judgment suggests any improper connection. Mr. Haugh's unavailability to act for the applicant appears related to his change of status arising from his appointment; nothing more than that is suggested. Mr. Haugh did not advance any other reason for not wanting to act for the applicant.

72. Secondly he states that he was listed on the complaint form as legal representative without his knowledge or consent. Mr. Lynn says he did not receive either of the two notifications issued in June 2015 regarding the hearing. He says he received the August notification and promptly notified the notice party by telephone "*that he was not in a position to act for him*".

73. Thirdly he states that having received a copy of the notice of hearing he *"assumed that the notice party had been separately informed of the hearing" and "was unaware that the practice of the Labour Relations Commission was to inform only the named representative of hearing dates".*

74. Fourthly he is concerned about the fact that para. 7 of the judgment states that I had not heard from Mr. Haugh. That statement was intended to be in ease of Mr. Haugh and not in any way critical, and I do not think it can or should be read as critical. Indeed overall I did not see any element of the judgment as critical of Mr. Haugh and I had intended it to be read accordingly.

75. Finally, in reply to the suggestion that the notice party stated that Mr. Haugh failed to notify him of the date of hearing, Mr. Haugh says that the responsibility of informing the Commission of the fact that Mr. Haugh was not acting for the notice party lay on the notice party. Mr. Haugh did not in fact deny in correspondence that he had not notified the notice party of the date of the hearing.

76. In an attempt to be as fair as possible to Mr. Haugh I am recording the position in relation to his concerns, but I do not consider that the additional information he has provided changes fundamentally, or at all, the rationale set out for finding that leave is not appropriate in this particular case.