Neutral Citation [2016] IEHC 725

THE HIGH COURT

[2016 No. 29JR]

BETWEEN

CAPITAL FOOD EMPORIUM (HOLDINGS) LIMITED

(FORMERLY CAPITAL FOOD EMPORIUM LIMITED)

APPLICANT

– AND –

JOHN WALSH

FIRST RESPONDENT

– AND –

THE EMPLOYMENT APPEALS TRIBUNAL

SECOND RESPONDENT

– AND –

MAUREEN STEWART

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 15th December, 2016.

I. Key Questions Arising

1. If a party and its representative do not turn up for an official hearing and the presiding officer is satisfied that there has been due notification of the hearing, is it a breach of constitutional or natural justice, or the *audi alteram partem* principle, for the hearing to proceed? If a party participates in proceedings to the extent that it acknowledges and accepts that those proceedings were rightly brought against it, can the party later allege that the proceedings were not so brought? These are key issues arising for resolution in the within application.

II. Background Facts

i. Ms Stewart's Work History.

2. In 1987, Ms Stewart started working at the restaurant in Arnott's department store on Henry Street, in Dublin City Centre. She commenced work as a catering assistant and rose ultimately to become a supervisor/cashier. In May, 2011, the restaurant in Arnott's was taken over and Ms Stewart became an employee of Capital Food Emporium Limited. Difficulties arose in the relationship between employee and employer which Ms Stewart, as will be seen later below, has previously established as having resulted in her constructive dismissal in February, 2012. Following her departure, Ms Stewart invoked the assistance of union officials at SIPTU in a bid to see what could be done about the state of affairs that had arisen between herself and her employer.

ii. The Workplace Relations Complaints Form.

3. With the benefit of SIPTU's advice, on 8th March, 2012, Ms Stewart completed a workplace relations complaints form in which she sought a recommendation under s.8 of the Unfair Dismissals Act 1977 from Mr Walsh, the first respondent, a Rights Commissioner. Among the details provided in the form are the following:

> *"Employment Details….*
>
> *My Work Address: Capital Foods Imporium*
>
> *Address 2: Arnotts PLC*
>
> *Address 3: Henry Street*
>
> *Address 4: DUBLIN 1*
>
> *Contact Name: Mr Michael Andrews….*
>
> *Respondent/Employer's Full Legal Details*
>
> *Name/Company: Mr Michael Andrews, General Manager*
>
> *Trading as..: Clodagh McKenna Restaurants*
>
> *Address 1: Arnotts PLC*
>
> *Address 2: Henry Street*
>
> *Address 3: Dublin 1."*

4. The workplace relations complaints form was submitted under cover letter of 12th March, 2012, from SIPTU to the Rights Commissioner Service. On the same date, SIPTU sent a copy of the form to the following person/address:

Mr Michael Andrews

Capital Food Imporium

t/a Clodagh McKenna Restaurants

Arnotts PLC

Henry Street

Dublin 1.

iii. Initial interactions with the Rights Commissioner Service.

5. On 22nd March, 2012, the Rights Commissioner Service wrote to SIPTU acknowledging receipt of Ms Stewart's complaint. On the same day, the Rights Commissioner wrote to advise the other side that, absent objection (possible under s.7(3)(b) of the Unfair Dismissals (Amendment) Act 1993), it would proceed to an investigation of the complaint made. This letter, headed "Re Clodagh McKenna Restaurants/Maureen Stewart" was sent to the following person/address

Mr Michael Andrews

General Manager

Clodagh McKenna Restaurants

Arnotts PLC

Henry Street

Dublin 1.

6. On 5th April, 2012, an entity, it seems a partnership, known as 'ESA Consultants', whose official notepaper bears the following rubric "*employee relationship management | health and safety, employment law | safety education and training*" wrote to the Rights Commissioner Service. It is not clear to the courts whether ESA is a specialist firm of solicitors or is an entity offering some alternative form of workplace support services. However, under the notably generic heading "*Re: Clodagh McKenna Restaurants/Maureen Stewart*", ESA indicated as follows in its letter of 5th April:

> *"We refer to your letter dated 22nd March 2012 regarding the above matters and we advise that we act on behalf of Capital Food Emporium Ltd.*
>
> *We kindly request that any further correspondence in relation to these matters be issued directly to our offices at the above address. Please find enclosed an acceptance to a Rights Commissioner's Investigation…".*

7. What would any rational person make of such a letter? It appears to the court that any rational person would understand this letter to mean that when it came to Ms Stewart's complaint her employer was satisfied for the Rights Commissioner to proceed with the investigation at hand and that ESA Consultants were dealing with matters for the employer. A professional lawyer who read the letter would doubtless (a) have noted that ESA Consultants expressly stated themselves to be representing Capital Food Emporium Limited and (b) 'put two and two together' and deduced, correctly, that the legal identity of Ms Stewart's employer was Capital Food Emporium Limited. But we are not all lawyers; and such a deductive exercise would not have advanced matters in any event. After all, the party against whom it was sought to make complaint (Ms Stewart's employer) had been notified of the complaint, had appointed ESA to act on its behalf in the complaints process, and had indicated to the Rights Commissioner Service that it had no objection to the matter proceeding to investigation.

8. On 26th June, 2012, it appears that the Rights Commissioner Service wrote to both SIPTU and ESA indicating that the investigation of Ms Stewart's complaint would be heard at 10 a.m. on 2nd August, 2012, at a stated venue. On 2nd August, 2012, Ms Stewart turned up for the hearing, presumably with her SIPTU representative. However, no-one turned up for the other side. This, the court was advised by counsel for Ms Stewart at hearing, is not un-typical, though off-hand it would seem a little un-typical for professional consultants not to appear for a client at a hearing. Be that as it may, however, on 2nd August, 2012, the Rights Commissioner satisfied himself that the standard notification letter had been sent to ESA and had not been returned by the postal authorities. Having so satisfied himself, the Rights Commissioner then proceeded to hear Ms Stewart's complaint. It was suggested before this Court that rather than just relying on the 'paper trail' before him, the Rights Commissioner could and should have rung ESA to ask if they had got the letter of 26th June and enquired whether they were coming. There was and is no obligation of any nature on a Rights Commissioner so to do. The Rights Commissioner was fully entitled to have regard to the paper record, and he was fully entitled to proceed to hearing having satisfied himself, from the paper record, that a suitable letter of notification had been sent to ESA and not returned by the postal authorities.

iv. After the Rights Commissioner's Hearing.

9. After the hearing of 2nd August, 2012, there appear to have been continuing efforts by SIPTU to contact ESA, who proved strangely uncontactable. Eventually, on 15th August, 2012, a SIPTU official wrote the following letter to the Rights Commissioner under a heading that stated the relevant case number:

> *"Dear Mr Walsh*
>
> *Further to the above hearing where neither the employer, nor their Representative showed at the hearing.*
>
> *I have tried on several occasions to contact the Company Representatives ESA Consultants and have repeatedly got no answer from their telephone number [number stated] being told number not in use.*
>
> *I would appreciate if you would issue your recommendation on this matter. The Company is Capital Food Emporium*

Limited T/A Clodagh McKenna Restaurants. The [affected SIPTU] member's name is Ms Maureen Stewart.

Thanking you…"

10. On 6th September, 2012, the Rights Commissioner issued his recommendation. This notes at the outset that "*The Rights Commissioner Service of the Labour Relation Commission advised the employer of the date time and venue of the hearing. Neither the employer nor a representative on their behalf attended the hearing.*" After going through the details of Ms Stewart's complaint, the Rights Commissioner made the following recommendation:

"RECOMMENDATION

Based on the uncontested evidence presented at the hearing, I find that the employer constructively dismissed the claimant. It is clear from the evidence submitted by the claimant that the employer failed to address the claimant's legitimate grievance resulting in causing the claimant stress and isolation in her workplace. The employer also failed to engage with the claimant in a positive manner in relation to her grievances, leaving her no choice but to resign from her employment after 24 years' service.

I recommend that the employer pay to the claimant compensation in the sum of €26,000 for breaches of the Unfair Dismissals Acts 1977-1993.

This sum should be paid within 6 weeks of the date of this recommendation."

11. On 10th September, 2012, ESA, who had, by this time, clearly received the text of the recommendation, wrote to the Rights Commissioner Service and under the notably generic heading "*Re: Maureen Stewart/Clodagh McKenna Restaurants t/a Capital Food Emporium*" sought a fresh hearing of matters. The court cannot but note in passing that there is no confusion in this letter as to what matter the recommendation was concerned with. Sender and recipient each knew exactly what matter was in issue. And the heading does not seek to be legally exact in referring to Capital Food Emporium Limited. The letter states, *inter alia*, as follows:

"We refer to our telephone conversation on Friday 7th September 2012 regarding the above matters and the Rights Commissioner's decision.

We advise that despite the Rights Commissioner Service's records indicating a letter of notification of a hearing date was issued to our offices on 26th June 2012 we confirm that this office and our Client have not received same. We are disappointed with this fact as we have received previous correspondence from the Labour Relations Commissioner notifying us of scheduled or adjourned hearings and we find it unusual that we have not received this letter of the 26th June 2012. We would ask for the Commissioner's understanding and request that another hearing take place."

12. So far as this last request was concerned, this was not possible. The Rights Commissioner Service wrote to ESA on 12th September, 2012, indicating that the letter of 26th June had been sent and that there was no jurisdiction on the part of the Rights Commissioner to convene a new hearing following the issuance of his recommendation. This letter reads, *inter alia*, as follows:

"…The notification of the hearing was issued on 26thJune 2012 (copy enclosed). To date the correspondence to your office has not been returned by An Post.

Please note that once the Rights Commissioner issues his/her findings they do not have the jurisdiction to schedule another hearing in the matter.

If the employer wishes to proceed further, the Recommendation can be appealed to the Employment Appeals Tribunal within 6 weeks of the issue of the Recommendation."

13. The right of appeal to which reference is made arose under the then s.9 of the Unfair Dismissals Act 1997-2007.

v. Capital Food Emporium Limited Commences an Appeal.

14. On 21st September, 2012, ESA wrote to the Employment Appeals Tribunal under the heading "*RE: Ms Maureen Stewart and Capital Food Emporium Limited, Appeal against Rights Commissioner's Recommendation"* indicating that ESA had been instructed by Capital Emporium Limited to appeal the Rights Commissioner's recommendation. Curiously, and perhaps somewhat discourteously, neither Ms Stewart nor SIPTU were copied on this letter. But what is truly notable is that there was clearly no confusion on the part of Capital Emporium Limited that it was the party to whom the recommendation had been directed and that it was the party which enjoyed a consequent right of appeal. Indeed, in the appeal form which accompanied the letter, Capital Emporium Limited stated itself to be the affected employer, Ms Stewart to be the party against whom the appeal was to be brought, and under the hearing "*The Reasons for My Appeal Are*" addressed substantive concerns regarding the actions of the Commissioner that did not in any way touch upon or flag any confusion arising regarding the identity of the parties involved. Thus the form reads:

"THE REASONS FOR MY APPEAL ARE…

[The text that follows is written by hand onto the form]. *In the first instance neither the Employer or their advisers, ESA received notice of the hearing date. Nonetheless, the Commissioner failed to take into consideration the fundamental principles of industrial relations and employment legislation. The Claimant is required to prove that her circumstances of employment were such that it was unsafe, so detrimental to her welfare, that having exercised all her rights to include but not limited to raising her complaints before the Labour Relations Commission under the Industrial Relations Acts and having thereof exhausted all avenues, was left with no alternative but to resign from her position. These are well established principles that have been examined at both common law and civil law and case precedent. It should be noted that the claimant has had union support and representation at all material times. She had left the Company on other occasions and was accepted back. The nature of her complaints as to why she left do not support a claim that her employment and the conditions therein were so grievous and repugnant that she had no alternative but to leave her employment. We shall provide further and better particulars in due course and we are seeking that the Division will set aside the Commissioner's decision".*

15. An appeal to the Employment Appeals Tribunal, such as that which ESA, in its letter, indicated its client to be desirous of now commencing, takes the form of a *de novo* appeal on the merits. Thus the appeal very much represents a 'second bite at the apple' so

far as an appellant is concerned. As in the covering letter, there is no mention in the above-quoted extract from the form that there is any doubt of any nature as to why Capital Food Emporium Limited has been brought into matters. On the contrary, Capital Food Emporium Limited, acting through ESA, knows perfectly well (i) what is going on, (ii) who Ms Stewart is, and (iii) what it is seeking to achieve via its appeal to the Employment Appeals Tribunal.

vi. Ms Stewart Seeks an Implementation Decision.

16. Unaware that an appeal had been brought by Capital Food Emporium Limited, SIPTU wrote on behalf of Ms Stewart to the Employment Appeals Tribunal on 1st November, 2012, (i) noting that (a) Ms Stewart was satisfied to accept the Rights Commissioner's decision, and (b) that the time for an appeal had passed, and (ii) seeking an implementation decision of the Tribunal in respect of the Rights Commissioner's recommendation. Subsequently, Ms Stewart became aware of Capital Food's appeal when, in a letter dated 27th November, 2012 and sent to her by the Employment Appeals Tribunal under the heading "*Appeal of CAPITAL FOOD EMPORIUM LIMITED against the Recommendation of a Rights Commissioner in the case of: MAUREEN STEWART –V- CAPITAL FOOD EMPORIUM LIMITED*", the Employment Appeals Tribunal indicated to Ms Stewart that an appeal was being brought by Capital Food Emporium Limited against the Rights Commissioner's recommendation of 6th September, 2012. By letter of 20th December, 2012, SIPTU wrote to the Employment Appeals Tribunal for Ms Stewart and entered an appearance in the appeal on her behalf. The formal notice of appearance contains in prominent text the following words "*NOTICE OF APPEARANCE by a party against whom a claim has been lodged under the legislation ticked above* [the Unfair Dismissals Acts 1977 to 2007] by CAPITAL FOOD EMPORIUM LIMITED *against MAUREEN STEWART".*

vii. Capital Food Emporium Limited Withdraws Its Appeal.

17. Just over a year after the appeal was lodged by Capital Food Emporium Limited, the Employment Appeals Tribunal, in a letter of 15th November, 2013, wrote to Ms Stewart advising that the said appeal would be heard at a stated venue at 10.30 a.m. on 17th December, 2013. Belatedly, Capital Food Emporium Limited now withdrew its appeal. By letter of 16th December, 2013 from the Employment Appeals Tribunal to ESA (and copied by fax of the same day to SIPTU), the Employment Appeals Tribunal noted receipt of a letter from ESA concerning the withdrawal of the appeal and confirming that, in consequence of the withdrawal of the appeal, the file on the matter had been closed by the Tribunal.

viii. Ms Stewart Seeks an Implementation Decision Again.

18. With the Rights Commissioner's recommendation still extant and the appeal against same now abandoned, SIPTU wrote to the Employment Appeals Tribunal on 19th December, 2013, and made fresh application for an implementation decision in respect of the Rights Commissioner's recommendation. By letter of 2nd April, 2014, the Employment Appeals Tribunal advised the parties that the application would be heard at a stated venue at 2.30 p.m. on 29th April, 2014. By letter of 14th April, 2014, ESA wrote to the Employment Appeals Tribunal indicating that Capital Food Emporium Limited would "*not be in attendance at the hearing or entertain a claim for enforcement of implementation of a Rights Commissioner's recommendation"*.

ix. Capital Food Emporium Limited's Explanation for Its Actions.

19. Why did Capital Food Emporium Limited (i) elect to abandon its appeal against the Rights Commissioner's recommendation back in December, 2013, and (ii) decide not to attend the determination hearing in April, 2014? Surprisingly, despite having (a) raised no objection when matters went to the Rights Commissioner, (b) never mentioned this as a ground of objection when it decided to bring its appeal, (c) been at all times and in every respect satisfied to join battle with Ms Stewart as her employer, and (d) enjoying the possibility of a *de novo* appeal on the merits before the Employment Appeals Tribunal, Capital Food Emporium Limited now indicated a concern as to whether it was affected by the Rights Commissioner's recommendation at all. This is so remarkable a contention at so late a stage in matters that counsel for Ms Stewart, at the hearing of the within application, described Capital Food's behaviour in this regard as a "*stunt*". That is powerful language; yet sometimes powerful language expresses but a powerful truth. ESA's letter of 14th April, 2014, which sought to explain the actions of Capital Food Emporium Limited states as follows:

> *"RE: Appeal of Maureen Stewart for Implementation of the Recommendation of a Rights Commissioner*
>
> *Maureen Stewart –v– Capital Food Emporium Ltd & Clodagh McKenna under Unfair Dismissals Acts, 1997-2007…*
>
> *Dear Sirs…*
>
> [W]e *advise that we act on behalf of Capital Food Emporium Limited.*
>
> *In the first instance our Client will not be in attendance at the hearing or entertain a claim for enforcement of implementation of a Rights Commissioner's recommendation as the recommendation was made against several different parties, none of which is our Client.*
>
> *The Claimant's complaint form submitted by her representative, on 14th March 2012, stated that the complaint was against Mr Michael Andrews, General Manager, t/a Clodagh McKenna. Neither of these are registered as companies nor have they ever employed Ms Stewart. The Rights Commissioner issued a decision against Capital Food Emporium t/a Clodagh McKenna Restaurants, not our Client. There was no application to seek an amendment or change of Respondent's name as set out under the Organisation of Working Time Act, 1997, nor was Capital Food Emporium Limited put on notice of such application. Capital Food Emporium Limited does not consent to any change of Respondent and the matters are out of time.*
>
> *Therefore the Employment Appeals Tribunal does not have jurisdiction to hear or enforce the Rights Commissioner's recommendation.*
>
> *We have instructed our Clients to consider whatever legal remedy* [is] *available to them to protect their company.*
>
> *We trust this clarifies all matters."*

x. A Technical Correction.

20. On 29th April, 2014, Ms Stewart's determination application came on before the Employment Appeals Tribunal. As expected, no-one attended for Capital Food Emporium Limited. As it happened, the hearing did not proceed. Instead Ms Stewart was advised that she should make fresh application in the first instance to the Rights Commissioner for him formally to amend the employer's name in his recommendation. This was done and, on 14th May, 2014, the Rights Commissioner Service wrote to SIPTU to confirm that a correction order had been made, amending the employer's name in the recommendation to Capital Food Emporium Limited. It is important to note that in all the circumstances arising this was but the merest of technical changes. The correct party had been notified of Ms Stewart's complaint and the correct party had participated, as employer, in all the interactions that ensued. In what was an employee-employer dispute, employee and employer had at all times been engaged. In making much a-do as to whether the correct party had been involved and engaged and the subject of an adverse recommendation, Capital Food Emporium Limited was, in all the circumstances arising, making much a-do about nothing. But having embarked on its chosen path of action, Capital Food Emporium Limited now persisted. In a letter of 16th May, 2014, to the Rights Commissioner Service, under the notably generic heading "*RE: Clodagh McKenna Restaurants/Maureen Stewart*", ESA indicated as follows for Capital Food Emporium Limited:

> *"We refer to your letter dated 14th May 2014 and we advise that we act on behalf of Capital Food Emporium Limited.*
>
> *In the first instance the Respondent does not consent to the Correction Order in respect of the Rights Commissioner's Decision of the 6th September 2012 to amend the name of the Respondent to Capital Food Emporium Ltd.*
>
> *The Respondent was put on notice of a Rights Commissioner hearing date and to this effect they were not in attendance on the day of the hearing. The Claimant sought to amend the Respondent's name before the Rights Commissioner after the fact and before the Employment Appeals Tribunal on enforcing the Rights Commissioner's determination.*
>
> *The Claimant then sought to amend the Respondent's name without notice to your Client and here again erred by seeking the amendment to some other entity, not our Client. This process of naming the wrong party and in particular by a person who is learned is inexcusable and not without precedent. We refer to the matter of a Supreme Court case: Sandy Lane Hotel Limited –v– Times Newspaper Limited.*
>
> *Furthermore, in accordance with section 39(3) of the Organisation of Working Time [Act], 1997, the Respondent did not have the opportunity to counter claim the Claimant's complaint under Unfair Dismissals. Therefore the Rights Commissioner does not have consent or jurisdiction to amend the Respondent's name on the Rights Commissioner's decision. In light of this, the Claimant must decide either to have the Unfair Dismissals claim heard before a Rights Commissioner or reject the Correction Order. Should the Claimant refuse, the Respondent will be left with no other alternative but to proceed with civil action for judicial review.*
>
> *We trust this clarifies all matters."*

21. The court turns to the legal arguments raised in the letter later below. Suffice it for now to note that the bringing of a judicial review application by Capital Food Emporium Limited was clearly being contemplated as a possibility, indeed being raised as a threat, as early as 16th May, 2014.

xi. Issuance of the Implementation Decision.

22. Following the issuance of the correction order, there was some to-ing and fro-ing between SIPTU (which, throughout the entire process, appears to have done Trojan work on behalf of Ms Stewart) and the Employment Appeals Tribunal; these interactions concerned the technicalities of seeking an implementation decision and nothing rides on them. The next event of significance was the implementation hearing; this took place on 20th August, 2015. Both Ms Stewart and Capital Food Emporium Limited were represented at this hearing. On 20th October, 2015, the following determination issued from the Employment Appeals Tribunal:

> *"Determination*
>
> *Section 7(4)(a) of the Unfair Dismissals Act, 1977 to 2007, states:*
>
> *'Where a recommendation of a rights commissioner in relation to a claim for redress under this Act has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the recommendation has expired and no such appeal has been brought, the employee concerned may bring the claim before the Tribunal and the Tribunal shall, notwithstanding subsection (5) of this section, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the recommendation.'.*
>
> *The Respondent submitted that it had initially not been on notice of the hearing before the Rights Commissioner. It had not been on notice subsequently of an application for a correction order by the Rights Commissioner in relation to the name of the Respondent either. It had initially lodged an appeal to the E.A.T., but had, on legal advice, withdrawn that appeal. The Respondent submitted, notwithstanding that withdrawal of the appeal, that the E.A.T. had no jurisdiction in the matter.*
>
> *The Tribunal notes that the Respondent was on notice of the correction order of the Rights Commissioner, and had initiated an appeal within time but chose not to pursue that appeal. In the circumstances, the Tribunal is confined to making the order for implementation as sought.*
>
> *Accordingly, the Tribunal makes a determination to the like effect as the Rights Commissioner recommendation, that the respondent pay the appellant the sum of €26,000 for breaches of the Unfair Dismissals Acts 1977 to 2007."*

xii. Judicial Review Application.

23. By notice of motion of 20th January, 2016, Capital Food Emporium (Holdings) Limited (formerly Capital Food Emporium Limited)

commenced the within judicial review proceedings seeking, *inter alia*, the following reliefs: (i) an order of *certiorari* quashing the Rights Commissioner's recommendation of 6th September, 2012, (ii) an order of *certiorari* quashing the Employment Appeals Tribunal's determination of 20th October, 2015, (iii) a declaration that the Rights Commissioner acted *ultra vires* and/or in breach of the requirements of natural or constitutional justice in the manner in which he reached his recommendation of 6th September, 2012, and (iv) a declaration that the Employment Appeals Tribunal acted *ultra vires* and/or in breach of the requirements of natural or constitutional justice in the manner in which it reached its determination of 20th October, 2015.

III. Some Notable Points Arising

24. It appears to the court that a number of notable points arise from the above description of the background events to the within application:

a. The Initial Complaint Form.

(1) In completing the initial complaint form, Ms Stewart may not have stated the full legal details of her employer but there can have been no doubt – none – that she was seeking redress from her former employer.

b. The Conduct of the Rights Commissioner on 2nd August, 2012.

(2) As mentioned above, once the Rights Commissioner had satisfied himself at the hearing of 2nd August, 2012, that correspondence had been sent to ESA advising of the date, time and venue of the hearing of Ms Stewart's complaint, he was fully entitled to proceed to hearing and to issue a recommendation thereafter. Contrary to the complaint made at the hearing of the within application, there was no obligation on the Rights Commissioner to ring ESA (and/or Capital Food Emporium Limited for that matter) and ask what was happening. There is not even the beginning of a breach of the principle of *audi alteram partem*, nor any semblance of a breach of the rules of constitutional or natural justice, in the Rights Commissioner's proceeding as he did. The principle of *audi alteram partem* and the rules of constitutional or natural justice afford one a right to be heard, not a right to hold things up indefinitely until one elects, if one elects, to attend for hearing.

c. Right (and Abandonment) of Appeal.

(3) Insofar as Capital Food Emporium Limited was aggrieved by the decision of the Rights Commissioner, it had remedies galore in the form of a *de novo* appeal on the merits to the Employment Appeals Tribunal pursuant to the Unfair Dismissals Acts, with onwards appeals into the courts system. But Capital Food Emporium Limited, having elected to commence such an appeal, abandoned it on what can only be described as, with every respect, entirely spurious grounds. There was no impediment to its continuing its appeal, it was clearly the party concerned within the meaning of s.9 and had repeatedly acknowledged and accepted this last fact. Its failure to exhaust this right of appeal is a matter which the court would be entitled to take into account in deciding whether to grant the discretionary relief now sought, if the court considered any basis for such relief to arise, and it does not. The court notes that there is not even the beginning of a breach of the principle of *audi alteram partem*, nor any semblance of a breach of the rules of constitutional or natural justice when a party who considers some shortcoming to present in the actions of a body or tribunal of first instance avails properly of a right to a full *de novo* appeal on the merits (and so of the right to have any, if any, error on the part of the body or tribunal corrected) and, having commenced such appeal, later elects of its own free will and for whatever reason, to withdraw from that appeal.

d. Acknowledgement and acceptance that Capital Food was the concerned party.

(4) On 10th September, 2012, ESA wrote, on behalf of Capital Food Emporium Limited to the Rights Commissioner's Service regarding the dispute with Ms Stewart and the Rights Commissioner's recommendation. No issue was taken with the title or name ascribed the employer in that recommendation. ESA sought the "*Commissioner's understanding*" and expressly requested "*that another hearing take place*". In doing so, Capital Food Emporium Limited, acting through its agent, clearly acknowledged and accepted that Capital Food Emporium Limited was the party concerned with the employment dispute which formed the subject-matter of the Rights Commissioner's investigation and recommendation. There was no attempt in this correspondence to reserve the rights of Capital Food Emporium Limited as regards, say, the title ascribed it in the recommendation.

On 21st September, 2012, ESA wrote, on behalf of Capital Food Emporium Limited to the Employment Appeals Tribunal enclosing the requisite form necessary to commence an appeal from the Rights Commissioner's recommendation. In doing so, Capital Food Emporium Limited, acting through its agent, again clearly acknowledged and accepted that Capital Food Emporium Limited was the party concerned with the employment dispute which formed the subject-matter of the Rights Commissioner's investigation and recommendation. There was no attempt in this correspondence to reserve the rights of Capital Food Emporium Limited as regards, say, the title ascribed it in the recommendation.

e. *Quod approbo non reprobo*.

(5) *Quod approbo non reprobo*. ('That which I approve, I cannot disapprove'). In acting as mentioned at point (4) above, i.e. in (a) acknowledging and accepting that Capital Food Emporium Limited was properly the party concerned with the employment dispute which formed the subject-matter of the Rights Commissioner's investigation and recommendation, and then (b) later seeking to disavow that Capital Food Emporium Limited was properly the party joined to the proceedings, Capital Food committed almost the exact same error that was identified by Henchy J., and reported almost forty years

ago, in *Corrigan v. The Irish Land Commission* [1977] I.R. 317. That was a case in which the applicants appeared before a tribunal whose jurisdiction they later challenged when it gave a decision adverse to them, a sequence of actions that led Henchy J. to observe, at 326, that "*That is something the law will not and should not allow. The complainant* [or, in the present case, Capital Food Emporium Limited] *cannot blow hot and cold; he* [it] *cannot approbate and then reprobate; he* [it] *cannot have it both ways"*. By doing as it did in December, 2013, by withdrawing its appeal against the Rights Commissioner's recommendation on the grounds that it was not the party affected by that recommendation, Capital Food Emporium Limited was seeking to deny what by that time, thanks to its own repeated actions, had become, for it, no longer properly, never mind convincingly, undeniable.

f. Section 39 of the Organisation of Working Time Act 1997.

(6) It will be recalled that in its letter of 16th May, 2014, ESA, writing for Capital Food Emporium Limited contended, *inter alia*, that in making the correction order earlier that month, the Rights Commissioner had breached s.39(3) of the Organisation of Working Time Act 1997. This contention, with respect, is wrong. Section 39 of the act of 1997 provides, *inter alia*, as follows:

> *"(1) In this section 'relevant authority' means a rights commissioner…*
>
> *(2) A decision (by whatever name called) of a relevant authority under this Act or an enactment or statutory instrument referred to in the Table to this subsection* [the said Table includes the Unfair Dismissals Acts] *that does not state correctly the name of the employer concerned or any other material particular may, on application being made in that behalf to the authority by any party concerned, be amended by the authority so as to state correctly the name of the employer concerned or the other material particular.*
>
> *(3) The power of a relevant authority under subsection (2) shall not be exercised if it would result in a person who was not given an opportunity to be heard in the proceedings on foot of which the decision concerned was given becoming the subject of any requirement or direction contained in the decision.*
>
> *(4) If an employee wishes to pursue against a person a claim for relief in respect of any matter under an enactment or statutory instrument referred to in subsection (2), or the Table thereto, and has already instituted proceedings under that enactment or statutory instrument in respect of that matter, being proceedings in which the said person has not been given an opportunity to be heard and –*
>
> > *(a) the fact of the said person not having been given an opportunity to be heard in those proceedings was due to the respondent's name in those proceedings or any other particular necessary to identify the respondent having been incorrectly stated in the notice or other process by which the proceedings were instituted, and*
> >
> > *(b) the said statement was due to inadvertence, then the employee may apply to whichever relevant authority would hear such proceeding in the first instance for leave to institute proceedings against the said person ('the proposed respondent') in respect of the matter concerned under the said enactment or statutory instrument and that relevant authority may grant leave to the employee notwithstanding that the time specified under the enactment or statutory instrument within which such proceedings may be instituted has expired:*
>
> *Provided that that relevant authority shall not grant such leave to that employee if it is of opinion that to do so would result in an injustice being done to the proposed respondent.*

A number of points might be made as regards the above-quoted text:

(i) s.39(2) of the Act of 1997 expressly contemplates the doing of that which the Rights Commissioner did in May, 2014, *viz.* the correction of the name of an employer in a previous "*decision*" (here a recommendation) of the Rights Commissioner.

(ii) there are no time limits imposed by s.39 as regards (a) applying for a correction order, or (b) the making of an order consequent upon such application.

(iii) s.39(2) does not require, nor is it a requirement of natural or constitutional justice, or the principle of *audi alterem partem*, that there should be a fresh hearing of a relevant authority into the making of an amendment of the style contemplated by s.39(2).

(iv) s.39(3) is an irrelevance in the circumstances arising; this is because the Rights Commissioner, back at the hearing of 2nd August, 2012, satisfied himself that correspondence had been sent to ESA advising of the date, time and venue of the hearing of Ms Stewart's complaint, i.e. he satisfied himself that Capital Food Emporium Limited had been given an opportunity to be heard in the proceedings on foot of which his recommendation was given (and, for the reasons identified by the court previously above, having so satisfied himself, the Rights Commissioner was entitled in the circumstances arising then to proceed with the hearing).

(v) s.39(4) deals with a situation, irrelevant to the within proceedings, whereby the name of a party was inadvertently mis-stated and, as a consequence, the party that ought to have been pursued was not heard. The within application does not concern a situation in which a party that ought to have been pursued was not given an opportunity to be heard. It concerns a situation in which a party that ought to have been pursued was fully aware of the proceedings, acknowledged and accepted that it was the party concerned, and – so the Rights Commissioner

found on 2nd August, 2012 – was given an opportunity to be heard.

(vi) the making of the correction order must be viewed in the context of Capital Food Emporium Limited having (a) submitted to the jurisdiction of the Rights Commissioner, (b) sought in its letter of 10th September, 2012, the "*understanding*" of the Rights Commissioner for the purpose of seeking a re-hearing of the complaint, and (c) confirmed and acknowledged, when lodging its appeal, on 21st September, 2012, that it was the relevant party concerned with the employment dispute.

g. Limited jurisdiction of Employment Appeals Tribunal at implementation hearing.

(7) Following the making of the correction order, Ms Stewart proceeded with pursuing her right to bring the issue of implementing the Rights Commissioner's recommendation before the Employment Appeals Tribunal. The Tribunal's jurisdiction at an implementation hearing is quite constrained by s.8(4)(a) of the Unfair Dismissals Act 1977, as amended by s.7(4)(a) of the Unfair Dismissals (Amendment) Act 1993. Section 8(4)(a) provides as follows:

> "*Where a recommendation of a rights commissioner in relation to a claim for redress under this Act has not been carried out by the employer concerned in accordance with its terms, the time for bringing an appeal against the recommendation has expired and no such appeal has been brought, the employee concerned may bring the claim before the Tribunal and the Tribunal shall, notwithstanding subsection (5) of this section, without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the recommendation."*

As can be seen, the Employment Appeals Tribunal's jurisdiction pursuant to the above-quoted provision is effectively confined to establishing the objective elements/facts touched upon in the provision, viz. (i) that there is an existing determination of a rights commissioner in favour of a particular person who has brought a claim for redress, (ii) that the recommendation has not been carried out by the employer, (iii) that the time for bringing an appeal against the said recommendation has expired, and (iv) that no appeal has been brought within the time aforesaid. Provided these four elements are satisfied, "*the Tribunal shall*", *i.e.* must as a matter of law, "*without hearing the employer concerned or any evidence (other than in relation to the matters aforesaid), make a determination to the like effect as the recommendation."* It appears to the court that its reading of s.8(4)(a) of the Act of 1977, as amended, finds support in the reading afforded by the Supreme Court, in *Hussein v. The Labour Court* [2015] IESC 58, to the once almost identically worded (though since amended) s.28(8) of the Organisation of Working Time Act 1997. The decision of the Supreme Court in *Hussein* also lends support to the contention that provided the Employment Appeals Tribunal exercises its powers properly and within the parameters defined by the sections in question, there is no basis for setting aside its ensuing implementation order by way of judicial review application. There is no evidence before the court to suggest that, when dealing with Ms Stewart's application pursuant to s.8(4)(a) of the Act of 1977, as amended, the Employment Appeals Tribunal did not exercise its powers properly or stray beyond the parameters defined by that provision.

h. The Decision in *Sandy Lane Hotel* [2011] 3 I.R. 334.

(8) It will be recalled that in its letter of 16th May, 2014, ESA, writing for Capital Food Emporium Limited, contended, *inter alia*, that "*naming the wrong party*" in Ms Stewart's initial application, "*and in particular by a person who is learned is inexcusable and not without precedent. We refer to the matter of a Supreme Court case: Sandy Lane Hotel Limited –v– Times Newspaper Limited."* As touched upon elsewhere above, Capital Food Emporium Limited repeatedly accepted and acknowledged that it was the correct party to Ms Stewart's proceedings, at least until it suited it to contend that it was not. Does the decision of the Supreme Court in *Sandy Lane Hotel* lend any support to the contention that Capital Food Emporium Limited now seeks to make that it was not the subject of the Rights Commissioner's initial recommendation and that this failing effectively taints all that follows in terms of its being a counterparty to Ms Stewart's proceedings?

Sandy Lane Hotel was a case in which two Barbadian companies (Sandy Bay Hotel Limited and Sandy Lane Properties Limited) were owned respectively by two St Lucian companies (Sandy Lane Hotel Limited and Sandy Lane Holdings Limited). In April 1997, Sandy Bay Hotel Limited (one of the Barbadian companies) changed its name to Sandy Lane Hotel Co. Limited. In June 1998, libel proceedings were commenced by Sandy Lane Hotel Limited against, *inter alia*, Times Newspapers Limited. In point of fact, the proceedings ought to have been commenced by Sandy Lane Hotel Co. Limited. Pursuant to an application heard in November 2005, the High Court allowed a substitution of Sandy Lane Hotel Co. Ltd. for Sandy Lane Hotel Limited. The order of substitution was made pursuant to O.63, r.1(15) of the Rules of the Superior Courts which allows for "*the correction of clerical errors*". On appeal, the Supreme Court held that the application made before the High Court did not come within this rule. In his judgment, having characterised a clerical error as an error made in a mechanical process, as distinct from an error arising from *e.g.,* lack of knowledge or wrong information, Hardiman J., for the Supreme Court, observed, *inter alia*, as follows:

> "*It appears to me, from a consideration of* [the company secretary of Sandy Lane Hotel Ltd.]…*that the mistake made in this case is not one which can be described as a clerical error, or anything like it. He* [the company secretary] *frankly admits that the name* 'Sandy Lane Hotel Co. Limited' *was not originally intended to be used in the proceedings. This was because, although he knew of the history of the companies, it was not present to his mind, or to the mind of the lawyers, that the company actually operating the hotel was the* Sandy Lane Hotel Co. Limited. *This in turn was because, as he very frankly says 'at the time of the change of name in 1997 I thought nothing of the inclusion of the word 'Co.' in the title of the plaintiff.'*
>
> *This is not, in my view, a clerical error. The error here arose due to a mistaken belief and a failure to ascribe any significance to the change of name in 1997. This is a misguided state of mind with which one cannot have much sympathy, given that it was made by or on behalf of 'a consortium of businessmen', in the course of a complicated series of arrangements made for tax planning purposes, in which they obviously had the benefit of the best legal and taxation advice.*
>
> *The consortium running the Sandy Lane Hotel were of the view that it was important for corporate or tax planning purposes that the entity operating the hotel should be the* Sandy Lane Hotel Co. Limited. *Nor did this simply involve a change of name: there was another, completely different, company called the* Sandy Lane Hotel Limited. *The operating company was a Barbados Company but the latter Company, which appears as plaintiff at present, is a St Lucia Company. The plaintiff's case would in my opinion have been a stronger one if it had simply failed to get the*

name of the operating company right. But in the events that happened they actually used the name of an entirely different company, which however appears to be the parent company of the operating company. This in my view is not a clerical error or anything similar to a clerical error. It requires, if it is to be remedied, the substitution of a new entity which co-existed the plaintiff at all material times."

It might perhaps be contended that: (a) the Supreme Court's decision in Sandy Lane Hotel is notably harsh, (b) the plaintiff in that case had, to borrow from the wording of Hardiman J. "*simply failed to get the name of the operating company right*" and that the wrong name used just happened to be the name of another company from a different jurisdiction, and (c) if a 'clerical error' is a mistake made in copying or writing out a document, it is difficult to see how writing out the name 'Sandy Lane Hotel Limited' in lieu of 'Sandy Lane Hotel Co. Limited', when it is the latter company to which one means at all times to refer, is anything other than a clerical error. However, (i) it is not for this Court to address any such contention, and (ii) it appears to this Court that the within case is distinguishable in a number of respects from *Sandy Lane Hotel*, *viz*: (A) the appellants in *Sandy Lane Hotel* contended that Sandy Lane Hotel Limited was not the right party to the proceedings whereas in the within proceedings Capital Food Emporium Limited repeatedly acknowledged that it was the correct party to the within proceedings, until it suited it to seek, entirely unconvincingly, to deny this, (B) the Supreme Court, in *Sandy Lane Hotel*, appears to have placed no little emphasis on the fact that the basis for the confusion arising derived from "*a complicated series of arrangements made for tax planning purposes, in which they* [the respondent and those behind it*] obviously had the benefit of the best legal and taxation advice*" whereas in the within proceedings Ms Stewart is a so-called 'ordinary' person who was acting with the benefit of trade union assistance: she is not a sophisticated commercial group acting with the benefit of 'blue chip' legal and tax advice, and (C) the Supreme Court, in *Sandy Lane Hotel*, also seems to have had regard to the fact that the company secretary appears to have been, perhaps, somewhat sanguine in terms of seeking to join the right party whereas Ms Stewart has always sought to bring her claim against the correct party and, again, was repeatedly acknowledged and accepted by that party as having pursued the correct party until it elected, unconvincingly, to deny this.

i. Delay.

(9) Finally, the court notes that with regard to the Rights Commissioner's initial recommendation, the representatives of Capital Food Emporium Limited became aware of the making of that recommendation on 7th September, 2012. A period of in excess of three years and four months elapsed between the making of this initial recommendation and the application for leave to bring the within judicial review proceedings. Having regard, *inter alia*, to the standard timeline contemplated by O.84, r.21 of the Rules of the Superior Courts, the duration of this delay is very considerable, and all the more egregious in the absence, and there is a complete absence, of any convincing explanation or justification. When it comes to the correction order, a period in excess of 20 months lapsed between the making of same and the making of the *ex parte* application for leave to apply for judicial review. This period too is considerably outside the standard timeline contemplated by O.84, r.21, and again no convincing explanation or justification has been offered for this delay. Moreover, as highlighted elsewhere above, the first threat to seek judicial review appears to have been in the letter of 16th May, 2014, yet Capital Food Emporium Limited waited another 20 months or so before moving the application for leave to apply for judicial review. It is trite law that prescribed time limits exist to bring finality and certainty to administrative decisions. Of course, the courts are ever alive to the possibility that in any one case, a particular delay may be capable of being explained and justified and, in consequence, excused, but the within application does not concern such a case.

IV. Conclusion

25. Having regard to all of the foregoing, the court must respectfully decline to grant any of the reliefs sought by Capital Food Emporium (Holdings) Limited (formerly Capital Food Emporium Limited).