THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 321 J.R.]

BETWEEN

NURENDALE LIMITED TRADING AS

PANDA WASTE

APPLICANT

AND

THE LABOUR COURT

RESPONDENT

AND

ROBERT BURKE

NOTICE PARTY

JUDGMENT of Ms. Justice Faherty delivered on the 12th day of December, 2017

1. The applicant is an unlimited company which is engaged in the waste collection and disposal business.

2. The notice party is a former employee of the applicant.

3. The notice party was dismissed by the applicant on 21st July, 2014. The applicant alleged that the notice party had been guilty of gross misconduct. The notice party lodged a claim pursuant to the Unfair Dismissal Act 1977 ("the 1977 Act") in respect of his dismissal on or about the 25th August, 2014. The complaint was the subject of a hearing before a Rights Commissioner on 21st July, 2015. Arising from that hearing, the Rights Commissioner made a recommendation dismissing the notice party's unfair dismissal claim on 17th September, 2015.

4. On 1st October, 2015, the Minister for Jobs, Enterprise and Innovation promulgated the Workplace Relations Act 2015 (Commencement) No. 2 Order 2015 [Statutory Instrument No. 41 of 2015] ("the Commencement Order"). The Commencement Order commenced a number of sections of the Workplace Relations Act 2015 ("the 2015 Act"), including those sections dealing with the fora in which various employment disputes were to be ventilated following upon the coming into force of the 2015 Act.

5. On or about 2nd October, 2015, the notice party's solicitor submitted an appeal from the recommendation of the Rights Commissioner to both the Employment Appeals Tribunal ("hereinafter the Tribunal") and the respondent (hereinafter "the Labour Court"). According to the notice party's statement of opposition in the within proceedings, this was so as to ensure that no difficulty would arise in respect of the appropriate forum for the determination of the notice party's appeal. This was obviously done out of an abundance of caution on the part of the notice party's legal representative, given the changed employment law landscape which the coming into force of the 2015 Act had heralded. In these proceedings, it is the applicant's contention that it is not an insignificant factor that the notice party's solicitor believed that the appeal of the Rights Commissioner's rejection of the unfair dismissal claim might lie with the Tribunal.

6. By letter dated 8th October, 2015, the Tribunal informed the notice party's solicitor that it could not hear the notice party's appeal as it was lodged subsequent to the commencement of the 2015 Act. The letter stated as follows:

> "On 1st October 2015 the Workplace Relations Commission (WRC) commenced. From that date the WRC carries out the work of the Labour Relations Commission (including the Rights Commissioner Service) Equality Tribunal, Employment Appeals Tribunal and National Employment Rights Authority. The Labour Court is now the appellate body to determine, among other matters, appeals against decisions of the WRC Adjudication Officers. This means that the Employment Appeals Tribunal can no longer accept appeals of Rights Commissioners decisions lodged on or after 1st October, 2015. As your letter of appeal/claim form was received on 08th October, 2015 I have forwarded same to the Labour Court who will contact you directly in the near future."

7. On 13th October, 2015, the Labour Court acknowledged receipt of the notice party's appeal and it retained *seisin* of the matter from that point onwards.

8. The "Guidance Notes for Completion of Appeal Form" which attached to the appeal form utilised by the notice party for his appeal provided, *inter alia*, that the form should be used "when making an appeal/s to the Labour Court in relation to…

a Decision of a Workplace Relations Commission Adjudication Officer or other employment rights adjudication body or officer…".

It was advised that the form "should NOT be used" when*, inter alia*, "making an appeal in relation to a determination of the Employment Appeals Tribunal on a complaint presented under the Unfair Dismissals Act 1977 to 2007 before 1st October (such appeals to be made to the Circuit Court.)"

9. The applicant's solicitor, Mr. Michael Shanley, received notice of the notice party's appeal on or about 15th October, 2015.

10. In his affidavit grounding the within application, Mr. Michael Shanley avers that from the contents of the Guidance Notes which attached to the notice party's appeal form, it appeared to him that the correct forum for hearing the appeal was the Labour Court "since what was involved was the Notice Party's appeal from a decision of a rights commissioner which was an 'employment rights adjudication officer' and further that the Circuit Court was not the appropriate venue since [the] Notice Party was not appealing a determination of the Employment Appeals Tribunal made before the 1st October 2015."

11. Written submissions were furnished by both the applicant and the notice party to the Labour Court, in respect of the issuance of witness summonses. On 18th December, 2015, both parties were legally represented before the Labour Court in a case management hearing. At the direction of the Labour Court, further legal submissions were exchanged between the parties in January, 2016. Ultimately, on 21st March, 2016, the notice party's appeal was heard by the Labour Court. Both parties were legally represented at the hearing which was a *de novo* appeal with a full oral hearing, at which the applicant's solicitor cross-examined the notice party and witnesses were called to give evidence on behalf of the applicant.

12. Having heard oral evidence from both parties, and considered the parties' written legal submissions, by decision dated 30th March, 2016, the Labour Court duly determined that the notice party had been unfairly dismissed by the applicant and it awarded him a sum of €35,000 by way of compensation. This is the decision which is impugned in the present proceedings.

13. Mr. Shanley avers that, after receipt of the Labour Court's decision, and following the advices of counsel and a review of s. 80 and s. 53(1) of the 2015 Act, he wrote on 15th April, 2016 informing the Labour Court of the applicant's concerns regarding the jurisdiction of the Labour Court to determine the notice party's appeal.

14. The letter reads, in part, as follows:

> "The issue in question concerns the Labour Court's jurisdiction to hear appeals from recommendations of a Rights Commissioners in unfair dismissal cases which, although commenced before the coming into operation of the Workplace Relations Act 2015, are appealed under that new regime to the Labour Court. As you are aware, the old regime would have involved those appeals being made to the Employment Appeals Tribunal. In our case, the appeal of the Rights Commissioner's recommendation of the 17th September, 2015 was filed by the claimant's solicitors on the [2nd] October 2015, that is, after the coming into operation of the 2015 Act.
>
> Our advice is that all such unfair dismissal appeals should be made to the Tribunal rather than the Labour Court. For whatever reason, this is not what transpired in our case. Against that, it is conceded that no jurisdictional issue was raised by either party or the Court during the appeal process."

15. After setting out the provisions of sections 8 and 9 of the 1977 Act, Mr. Shanley went on to state:

> "Thus…as you are well aware, under the old regime, the appeal would have been from the Rights Commissioner's recommendation to the Tribunal.
>
> Under the old regime, a claim for unfair dismissal under the 1977 Act was commenced either before the Rights Commissioner or the Tribunal and if it was the former, the appeal lay to the Tribunal. From the 1st October 2015 onwards, the new regime applies with such complaints being made to the Workplace Relations Commission and, if necessary, being heard by an Adjudication Officer with a right of appeal to the Labour Court.
>
> As regards the transitional period between the old and new regime, the legislature introduced section 53(1) of the 2015 Act… [as inserted by s. 20 of the National Minimum Wage (Low Pay Commission) Act 2015]…"

16. Mr Shanley went on to make the case that despite the enactment of s. 53(1) of the 2015 Act which, in respect of certain employment enactments, made provision for the Labour Court to hear appeals of Rights Commissioners' decisions or recommendations made before the commencement of the 2015 Act, (and which would otherwise have been heard "through the old channels"), s. 53(1) was not applicable to the notice party's appeal since the schedule of enactments to which s. 53(1) referred did not contain the 1977 Act. It was further pointed out that, albeit that s. 80(1)(i) of the 2015 Act deleted s. 9(1) of the 1977 Act (which provided for the right of appeal to the Tribunal from a recommendation of a Rights Commissioner in unfair dismissal cases), s. 80(2) of the 2015 Act "disapplies that deletion as regards any claims for redress brought under the 1977 Act before the 1st October 2015." Mr. Shanley advised that all of that meant "that the Tribunal, as opposed to the Labour Court, was the forum that had jurisdiction to hear the appeal from [the Rights Commissioner's] recommendation. The Labour Court was requested to relist the matter "for the purposes of dealing with this very important jurisdictional issue".

17. The Labour Court replied to Mr. Shanley's letter on 19th April, 2016, noting the issues raised and stating that having delivered its determination it was "*Functus Officio* and therefore has no jurisdiction to reopen the matter."

18. On 30th May, 2016, by order of Humphreys J., the applicant was granted leave to seek judicial review by way, *inter alia*, of an order of *certiorari* quashing the decision of the Labour Court of 30th March, 2016.

19. The Labour Court, through the Office of the Chief State Solicitor, indicated its intention not to participate in the within proceedings.

20. In his replying affidavit in the within proceedings, Mr. Richard Grogan, the notice party's solicitor, avers*, inter alia*, as follows:

> "14. I say that, at no point, either at the case management hearing, or in written submissions or at the oral hearing of the Notice Party's appeal, did the applicant ever raise the issue of the jurisdiction of the Labour Court to hear the Notice Party's appeal. I say that the Applicant had the benefit of legal advice throughout the appeals process from a Solicitor with a practicing certificate, and had sufficient time to research and prepare two detailed legal submissions in respect of the case. The Applicant, and its legal representatives, had a period of some six months to satisfy themselves as to the jurisdiction of the Labour Court and gave no indication, at any stage, that they believed that the Labour Court lacked jurisdiction to hear the appeal. I say that the Notice Party herein entered into the appeal in good faith, and participated in the appeal at all material times on the understanding that the Applicant accepted the jurisdiction of the Labour Court to determine the matter.
>
> 15. I say, believe and am advised that the Labour Court did in fact at all material times have the jurisdiction to hear and determine the notice Party's appeal, and that it acted at all material times *intra vires* its powers in determining the appeal. I further say and believe that the Applicant has acquiesced in the hearing of the appeal, and has waived any right to contest the jurisdiction of the Labour Court, by fully participating in the appeal hearing, without ever raising an objection in respect of jurisdiction.
>
> 16. I further say and believe that the Applicant herein has unfairly dismissed the Notice Party, and was found to have done so by way of an oral hearing before the Labour Court, at which hearing the Applicant was afforded the benefits of

fair procedures, and of natural and constitutional justice. I say that, were this Honourable Court to quash the determination of the Labour Court, the earlier recommendation of the Rights Commissioner would continue in force. As the time provided by statute for an appeal to the Employment Appeals Tribunal has now expired, the Notice party would lose his entitlement to an appeal of the decision of the Rights Commissioner, and his cause of action against the Applicant would be extinguished."

21. From the written submissions furnished by the applicant and the notice party, and following upon the oral submissions made in the within proceedings, the following issues arise for determination:

(a) Which statutory body had jurisdiction to hear the notice party's appeal of the Rights Commissioner's recommendation?

(b) If it is found that the Labour Court had no jurisdiction to hear the appeal, what is the effect of it having made a determination outside of its statutory jurisdiction?

(c) What is the effect of the applicant's failure to raise the jurisdictional issue at the hearing before the Labour Court?

(d) Will the notice party be left without a remedy if the decision of the Labour Court is quashed?

Which statutory body had jurisdiction to hear the appeal of the rights commissioner's recommendation?

22. Essentially, the applicant challenges the decision on the basis that the Labour Court had no jurisdiction to hear the notice party's appeal. The applicant's central thesis is that the appeal should have been heard by the Tribunal which, the applicant submits, was the statutory body charged at the material time with hearing the notice party's appeal of the recommendation of the rights commissioner dismissing his unfair dismissal claim.

23. Counsel for the applicant contends that the provisions of the 2015 Act do not make provision for the Labour Court to hear appeals of recommendations of rights commissioners in respect of unfair dismissal claims initiated prior to 1st October, 2015, and that the provisions of s. 80(2) of the 2015 Act specifically reserves such appeals to the Tribunal.

24. It is submitted that while it is clear from s. 80(1)(i) of the 2015 Act that s. 9 of the 1977 Act was deleted, an exception however is made in s. 80(2) in respect of any claims for redress brought under the 1977 Act which had been brought before the commencement of s. 80 on 1st October, 2015. It is thus submitted that the effect of s. 80(2) of the 2015 Act is that appeals such as that of the notice party must be pursued before the Tribunal and not the Labour Court. It is the applicant's case that since the notice party's claim for redress was brought to the Rights Commissioner on 21st July, 2014, and that since s. 80 was commenced on 1st October, 2015, i.e. after the date upon which the notice party's claim was brought, s. 80(2) of the 2015 Act applies. It is submitted that the net effect of s. 80(2) on the notice party's claim is to retain his claim within the "old" Tribunal system. Effectively, for the purposes of the notice party's claim, s. 9 of the 1977 Act is not deleted by s. 80(1)(i) of the 2015 Act.

25. Contrary to the applicant's position, which is, as a matter of law, that the 2015 Act does not allow for an unfair dismissal claim initiated prior to 1st October, 2015 and where an appeal of the first instance determination is lodged after 1st October, 2015, to go to the Labour Court, counsel for the notice party contends that the effect of amendments to the 1977 Act following the commencement of relevant provisions of the 2015 Act, is that the Labour Court is empowered to hear the notice party's appeal. In large part, counsel for the notice party relies on the provisions of s. 53(1) of the 2015 Act, as substituted by s. 20 of the National Minimum Wage (Low Pay Commission) Act 2015, as the basis for the Labour Court's jurisdiction. It is submitted that while an appeal from the Rights Commissioner's recommendation might also have been heard by the Tribunal under the provisions of the 2015 Act, this does not serve to deprive the Labour Court of jurisdiction to hear the notice party's appeal.

26. In addressing whether the Labour Court or the Tribunal had jurisdiction to hear the notice party's appeal of his unfair dismissal claim, it is important to set out the legal landscape which governed the hearing of statutory unfair dismissal claims pre-1st October, 2015. Prior to the coming into force of the 2015 Act, s. 8(1) of the 1977 Act provided that unfair dismissal claims could be heard by a Rights Commissioner or the Tribunal. That provision, prior to its amendment by the 2015 Act, reads as follows:

"(1) A claim by an employee against an employer for redress under this Act for unfair dismissal may be brought by the employee before a rights commissioner or the Tribunal and the commissioner or Tribunal shall hear the parties and any evidence relevant to the claim tendered by them and, in the case of a rights commissioner, shall make a recommendation in relation to the claim, and, in the case of the Tribunal, shall make a determination in relation to the claim."

27. Section 9(1) of the 1977 Act provides as follows:

"(1) A party concerned may appeal to the Tribunal from a recommendation of a rights commissioner in relation to a claim for redress under this Act and the Tribunal shall hear the parties and any evidence relevant to the appeal tendered by them and shall make a determination in relation to the appeal."

28. The coming into force of the 2015 Act changed the landscape for the adjudication of, *inter alia*, unfair dismissal claims. Pursuant to s. 41 of the 2015 Act, the claim of the aggrieved party is now heard at first instance by an adjudication officer. Section 40(3)(a) of the 2015 Act provides any person who was a Rights Commissioner immediately prior to the commencement of the section shall, upon the date of commencement, be appointed an adjudication officer.

29. Section 44(1) of the 2015 Act confers power on the Labour Court to hear appeals from adjudication officers in respect of a number of employment statutes, including the 1977 Act. Section 44(1) provides as follows:

" (a) A party to proceedings under section 41 may appeal a decision of an adjudication officer given in those proceedings to the Labour Court and, where the party does so, the Labour Court shall—

(i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal,

(ii) make a decision in relation to the appeal in accordance with the relevant redress provision, and

(iii) give the parties to the appeal a copy of that decision in writing.

(b) In this subsection "relevant redress provision" means—

(i) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under that section of a contravention of a provision of an enactment specified in Part 1 or 2 of Schedule 5 , the provision of that enactment specified in Part 2 of Schedule 6 ,

(ii) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a dispute as to the entitlements of an employee under an enactment specified in Part 3 of Schedule 5 , the provision of that enactment specified in Part 2 of Schedule 6 and

(iii) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under subsection (3) of that section, paragraph 2 of Schedule 2 to the Act of 2012."

30. The provisions of s. 44 of the 2015 Act are applied to claims in respect of unfair dismissal by amendments made to the 1977 Act. These amendments are set out in s. 80(1) of the 2015 Act. Pursuant to s. 80 (b),(c),(d),(e),(f),(g),and (l), for example, relevant provisions of the 1977 Act are amended by the substitution of "the adjudication officer or the Labour Court" for "the rights commissioner, the Tribunal or the Circuit Court". Section 80(k) provides, *inter alia*, for the 1977 Act to be amended by the provision of an appeal to the High Court on a point of law against the decision of the Labour Court.

31. Under the old regime, a claim for unfair dismissal could be initiated before a Rights Commissioner if no objection was made by the employer (which was the position in the present case) and an appeal lay to the Tribunal. Thereafter, irrespective of whether the determination of the Tribunal followed upon an appeal from the Rights Commissioner's recommendation, or whether the unfair dismissal claim originated in the Tribunal, a full appeal lay to the Circuit Court. The provisions of the 1977 Act were also such that a full appeal lay to the High Court of the Circuit Court's decision.

32. It is common case that, post 1st October, 2015, a more streamlined approach was adopted in respect of numerous employment law statutes, including the 1977 Act. As already referred to, in the 2015 Act, provision is made for the bringing of a claim for unfair dismissal to an adjudication officer with a right of full appeal to the Labour Court and thereafter an appeal on a point of law to the High Court.

33. Section 80(1)(h) of the 2015 Act specifically inserts a number of new sections into the 1977 Act, one of the effects of which is that adjudication officers assume the role previously performed by Rights Commissioners in hearing claims for Unfair Dismissal under the 1977 Act.

34. Section 80(1)(i) of the 2015 Act deleted s. 9 of the 1977 Act. The net effect of this amendment is that all appeals from unfair dismissal claims brought to the Workplace Relations Commission after 1st October, 2015 and adjudicated on by adjudication officers go to the Labour Court. However, s. 80(2) of the 2015 Act provides as follows:

"The amendments to the Act of 1977 effected by this section shall not apply in relation to a claim for a redress under that Act brought before the commencement of this section."

35. Notwithstanding the provisions of s. 80(2) of the 2015 Act, counsel for the notice party's principal contention in these proceedings is that the effect of s. 53(1) of the 2015 Act is that recommendations of a Rights Commissioner made under certain enactments as listed in column 3 of Part 1 of Schedule 2 to the 2015 Act are appealable to the Labour Court.

36. Section 53(1) of the 2015 Act reads as follows:

"Where a decision or recommendation in relation to a complaint or dispute to which subsection (2) or (4) of section 8 applies was made by a rights commissioner before the commencement of this Part and no appeal was brought from the decision or recommendation before such commencement, the decision or recommendation shall be appealable to the Labour Court under section 44 as if the decision or recommendation were a decision of an adjudication officer under s. 41."

37. Given that the relevant commencement date was 1st October, 2015, counsel for the notice party contends that the effect of s. 53(1) is that the Labour Court shall have jurisdiction to hear appeals in respect of certain decisions or recommendations of a Rights Commissioner, where such decisions or recommendations were delivered prior to 1st October, 2015, and where no appeal was brought from the decision or recommendation before 1st October, 2015.

38. Section 53 of the 2015 Act has been described in the within proceedings as a transitional provision dealing with certain statutory employment law claims which were already commenced at the time of the commencement of the 2015 Act. Column (3) of Part 1 of Schedule 2 to the 2015 Act lists, inter alia, the enactments in question. Accordingly, where a decision was made by a Rights Commissioner in relation to a claim brought under one of the listed enactments in column (3) before 1st October, 2015, and where no appeal was lodged by that date, s. 53(1) of the 2015 Act mandates the Labour Court as the forum for the hearing of an appeal lodged after that date.

39. The reference in s. 53(1) of the 2015 Act to subsections (2) and (4) of s.8 of the 2015 Act requires to be put in context by reference to s. 8(1) of the 2015 Act. Section 8(1) provides:

"The enactments specified in column 3 of Part 1 of Schedule 2 are repealed to the extent specified in column 4 of that Part.".

40. Section 8(2) of the 2015 Act provides as follows:

"The repeals effected by subsection (1) shall not apply in respect of complaints or disputes made, presented or referred to a rights commissioner under an enactment specified in column (3) of Part 1 of Schedule 2 before the commencement of Part 4."

41. Section 8(4) provides:

"The revocations effected by subsection (3) shall not apply in respect of complaints or disputes made, presented or referred to a rights commissioner under an enactment specified in column (3) of Part 2 of Schedule 2 before the

commencement of Part 4”

42. Counsel for the applicant and counsel for the respondent both agree that s. 8(4) of the 2015 Act, dealing as it does with Statutory Instruments, as listed in column (3) of Part 2 of Schedule 2, has no applicability to the present proceedings.

43. Neither s. 8(1) nor s. 8(2) of the 2015 Act list the enactments, or parts thereof, which are, respectively, to be repealed (pursuant to s. 8(1)), or in respect of which s. 8(1) is not to be applied as far as complaints or disputes which were referred to a Rights Commissioner before 1st October, 2015 are concerned (pursuant to s. 8(2)). The relevant enactments are set out in column (3) of the Part 1 of Schedule 2 of the 2015 Act. They number thirty two in total. They are, in the order in which they appear in column (3):

- Industrial Relations Act 1946
- Industrial Relations Act 1969
- Minimum Notice and Terms of Employment Act 1973
- Payment of Wages Act 1991
- Unfair Dismissals (Amendment) Act 1993
- Terms of Employment (Information) Act 1994
- Maternity Protection Act 1994
- Adoptive Leave Act 1995
- Protection of Young Persons (Employment) Act 1996
- Organisation of Working Time Act 1997
- Parental Leave Act 1998
- National Minimum Wage Act 2000
- Carer’s Leave Act 2001
- Prevention of Corruption (Amendment) Act 2001
- Protection of Employees (Part-Time Work) Act 2001
- Competition Act 2002
- Protection of Employees (Fixed-Term Work) Act 2003
- Industrial Relations (Miscellaneous Provisions) Act 2004
- Health Act 2004
- Safety Health and Welfare at Work Act 2005
- Employees (Provision of Information and Consultation) Act 2006
- Employment Permits Act 2006
- Consumer Protection Act 2007
- Chemicals Act 2008
- National Asset Management Agency Act 2009
- Inland Fisheries Act 2010
- Criminal Justice Act 2011
- Property Services (Regulation) Act 2011
- Protection of Employees (Temporary Agency Work) Act 2012
- Further Education and Training Act 2013
- Central Bank (Supervision and Enforcement) Act 2013
- Protected Disclosures Act 2014

44. It is clear from s. 53(1) that for the Labour Court to have jurisdiction under s. 44 of the 2015 Act to hear and determine an appeal from a decision or recommendation of a Rights Commissioner made before 1st October, 2015, the decision or recommendation must have been made in respect of a complaint or dispute under an enactment which is specified in column (3) of Part 1 of Schedule 2 to the 2015 Act.

45. Counsel for the notice party’s stance, in respect of the application of s. 53(1) to the notice party’s circumstances, is as follows:

while the 1977 Act is not expressly specified in column (3) of Part 1 of Schedule 2 to the 2015 Act, the Unfair Dismissals (Amendment) Act 1993 ("the 1993 Act") is a specified Act in this Schedule. It is essentially the notice party's contention that the inclusion of the 1993 Act in column (3) of Part 1 of Schedule 2 to the 2015 Act mandates the Labour Court to hear the appeal by the notice party of the Rights Commissioner's decision.

46. It is submitted on the notice party's behalf the 1993 Act is primarily an amending statute to the 1977 Act which makes significant alterations to the statutory scheme for the resolution of unfair dismissals disputes set out in the 1977 Act. It is submitted that the two Acts are clearly in *pari materia*, and must be read together as one Act. The notice party also maintains that the Oireachtas' intention that the Unfair Dismissals Acts 1977 to 1993 are to be included as an "enactment" for the purpose of ss. 8(2) and 53(1) of the 2015 Act is further evidenced by a consideration of 1993 Act itself, in particular of s. 17 which reads as follows:

> "(1) This Act may be cited as the Unfair Dismissals (Amendment) Act, 1993.
>
> (2) The Unfair Dismissals Acts, 1977 and 1991, and this Act may be cited together as the Unfair Dismissals Acts, 1977 to 1993.
>
> (3) The Unfair Dismissals Acts, 1977 and 1991, and this Act shall be construed together as one.
>
> (4) This Act shall come into operation on the 1st day of October, 1993.
>
> (5) This Act shall have effect as respects dismissals occurring after the commencement of this Act."

47. It is submitted that the reference to the 1993 Act in s. 8(2) and s. 53(1) of the 2015 Act would therefore be entirely superfluous if the reference to the 1993 Act in s.53(1) is to be read disjunctively to the remainder of the unfair dismissal legislative scheme, which, counsel submits, should not be the case given that the 1977 Act and the 1993 Act are clearly in pari materia.

48. The effect of Acts being in *pari materia* was considered by the Privy Council in *Canada Southern Railway Co v. International Bridge Co* (1883) 8 App Cas 723, where Selbourne LC stated, at p. 727:

> *"It is to be observed that these two Acts are to be read together by the express provision of the 7th and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."*

49. Reliance is also placed by counsel for the notice party on *The People (Attorney General) v. Boggan* [1958] I.R. 67, where Daly J. found "*the Courts of Justice Acts, 1924 and 1936, are in pari materia and they are therefore as was said in Palmer's case … to be taken together as forming one system, and as interpreting and enforcing each other*."

50. Counsel also contends that in providing that an appeal to the Labour Court in respect of complaints or disputes arising from enactments set out in column (3) of Part 1 of Schedule 2 of the 2015 Act where the Rights Commissioner's decision or recommendation issued before 1st October, 2015, but the appeal was not lodged until after that date, the Oireachtas clearly envisaged that an unfair dismissal complaint could in fact be made to a Rights Commissioner under the 1993 Act. It is submitted that by including a reference to the 1993 Act in column (3), and therefore bringing that Act within the scope and operation of s. 53(1) of the 2015 Act, the Oireachtas must be taken to have intended that an appeal would lie from a recommendation of a Rights Commissioner arising from a claim made under the 1977 Act. It is contended that the Court is thus required to consider the reference to the 1993 Act in column (3) to be a reference to the Unfair Dismissals Acts 1977 to 2007, and the system of dispute resolution set out therein. Counsel points to s. 17 of 1993 Act which, it is submitted, expressly refers to the construal of all of the Unfair Dismissals Acts as one for precisely this purpose.

51. Accordingly, the notice party's position is that s. 53(1) of the 2015 Act gives the Labour Court jurisdiction to hear appeals in respect of unfair dismissal claims which were already commenced and determined at first instance at the time of the commencement of the 2015 Act.

52. The submission advanced on behalf of the applicant is that s. 53(1) has no application to the notice party's situation since the decisions or recommendations covered by that provision does not include an appeal of a rights commissioner's recommendation under the 1977 Act. The 1977 Act is not one of the enactments specified in column (3) of Part 1 of Schedule 2 to the 2015 Act. It is submitted that the applicant's position is copper fastened by the fact that s. 80(2) of the 2015 Act specifically provides for the "old" machinery to operate in relation to unfair dismissal claims that were commenced before 1st October, 2015.

53. The applicant's position is that the notice party's submissions as to the applicability of s.53(1) of the 2015 Act are misconceived, and that such submissions do not stand up to scrutiny when read in conjunction with s. 80(2) of the 2015 Act. Counsel contends that insofar as the notice party suggests that column (3) of Part 1 of Schedule 2 to the 2015 Act incorporates the 1977 Act by dint of the reference to the 1993 Act, this is not correct. In this regard, counsel for the applicant points to s. 2 of the 2015 Act which defines the "Act of 1977" as meaning the Unfair Dismissals Act 1977. It is submitted that it must be assumed that, had the Legislature intended to include the Act of 1977, so defined, in column (3), it would have expressly referred in column 3 to the 1977 Act, as defined in s.2 of the 2015 Act.

54. It is the applicant's further contention that the 1993 Act is not mentioned in its entirety. Only ss. 11 and 12 of that Act form part of column (3), as is clear from the Schedule. Section 11 deals with appeals from the Tribunal to the Circuit Court. Section 12 deals with the failure to attend before or furnish documents to the Tribunal. It is submitted that since ss. 11 and 12 of the 1993 Act do not deal with the institution of claims, their inclusion in column (3) can be of no assistance to the notice party. Furthermore, insofar as the notice party contends that the 1977 Act and the 1993 Act should be "construed together as one", this means only that the two Acts form part of the same statutory scheme and that in order to understand the entire unfair dismissals legislation, regard must be had to both. It is also contended that s. 17(5) of 1993 Act does not assist the notice party's argument. That provision merely states that the 1993 Act "shall have effect as respects dismissals occurring after the commencement of [the 1993] Act", and thus provides only that the Act has prospective as opposed to retrospective effect, and is therefore an uncontroversial provision. Counsel for the applicant also points to s. 8(6) of the 2015 Act which provides as follows:

> "The repeal of sections 11 and 12 of the Unfair Dismissals (Amendment) Act 1993 effected by subsection (1) shall not apply in relation to a claim for redress under the Act of 1977 brought before the commencement of Part 4."

55. It is thus submitted that despite the appearance of ss. 11 and 12 of 1993 Act in column (3), s. 8(6) of the 2015 Act sets at nought any support the notice party might glean from such inclusion by virtue of the clear statement in s. 8(6) that the repeal of ss. 11 and 12 of the 1993 Act is not to apply in relation to a claim for redress under the 1977 Act brought before the commencement of Part 4 of the 2015 Act. In this regard, counsel for the applicant refers to Kerr in his commentary in relation to s. 11 of the 1993 Act. Kerr states as follows:

> "This section, which sets out the procedure for appealing and enforcing determinations of the Employment Appeals Tribunal was repealed by s. 8 of the Workplace Relations Act 2015. Given that the Circuit Court will continue to exercise jurisdiction over appeals from determinations of the Employment Appeals Tribunal in complaints lodged before October 1, 2015, neither this section nor the relevant Circuit Court Rules … have been deleted".

56. Having regard to the submissions of the parties, as summarised above, it seems to the Court that the provisions of s.80 of the 2015 Act must be the obvious point of departure for the purpose of determining which body, Labour Court or Tribunal, had jurisdiction to determine the notice party's appeal of the Rights Commissioner's recommendation on his unfair dismissal claim. I am satisfied that the clear import of s. 80(2) of the 2015 Act, in providing that the amendments made to the 1977 Act by s. 80(1) of the 2015 "shall not apply" in relation to a claim for redress under the 1977 Act brought before the commencement of the 2015 Act is to preserve, *inter alia*, the appeal structure provided for in s.9 of the 1977 Act in respect of redress claims under the 1977 Act that were brought before 1st October, 2015. Section 9 of the 1977 Act relates solely to an appeal from a recommendation of a Rights Commissioner to the Tribunal. Thus, pursuant to s. 80(2), this mechanism is retained in respect to an unfair dismissal claim brought before 1st October, 2015. I do not see how s. 80(2) of the 2015 Act can admit of any other interpretation.

57. That being said, the Court must now address the argument canvassed by the notice party which is, effectively, that the Labour Court had concurrent jurisdiction to hear and determine the appeal pursuant to s. 53(1) of the 2015 Act. The provisions of s. 53(1) have been set out above. It is common case that the import of s. 53(1) is to confer jurisdiction on the Labour Court to hear and determine appeals in respect of complaints or disputes under certain employment law enactments which were as of 1st October, 2015, the subject of a first instance decision or recommendation of a Rights Commissioner. Section 53(1) is a transitional provision. It provides that appeals which would otherwise have been addressed by the "old" regime "shall be appealable to the Labour Court under section 44 as if the decision were a decision of an adjudication officer under section 41". The scope of the Labour Court's jurisdiction under the "old" regime (for the purpose of the within application) is to be determined by reference to s. 8(2) of the 2015 Act and column (3) of Part 1 of Schedule 2 of the 2015 Act.

58. The question for the Court is whether the inclusion of the 1993 Act in column (3) of Part I of Schedule 2 to the 2015 Act is sufficient to displace the clear import of s. 80(2) of the 2015 Act and give the Labour Court a concurrent jurisdiction in respect of an appeal of an unfair dismissal recommendation of a Rights Commissioner which issued prior to 1st October, 2015. To my mind, it is not. While counsel for the notice party urges on the Court that the reference to the 1993 Act in column (3) must be taken to include a reference to the 1977 Act (and relies in this regard*, inter alia*, on s.17 of the 1993 Act), I am not persuaded that the manner in which the 1993 Act is cited in column (3) is sufficient to convince the Court that its inclusion in column (3) is determinative of the jurisdiction question in the notice party's favour.

59. In so finding, the Court has regard, in particular, to s. 2 of the 2015 Act, which defines "the Act of 1977" as "the Unfair Dismissals Act 1977" and to s. 80 of the 2015 Act which, in respect of the amendments which are made by s. 80(1) by*, inter alia*, the substitution of "the rights commissioner", "the Tribunal" and "the Circuit Court" for "adjudication officer" and "the Labour Court", refers at all times to "the Act of 1977". This, to my mind, is not insignificant. Nor, as I have said, is it insignificant (indeed it is indisputable) that s. 80(2) of the 2015 Act provides that s. 80(1), which provides*, inter alia*, via s. 80(1)(i), for the deletion of the right of appeal to the Tribunal pursuant to s. 9(1) of the 1977 Act, "shall not apply" to a claim for redress under the 1977 Act brought before the commencement of the 2015 Act.

60. It is also of note that s. 8(1) of the 2015 Act is entirely concerned with the repeal of certain provisions of the employment-related enactments listed in column (3) of Part 1 of Schedule 2 to the 2015 Act. Not all of these enactments have as their object or subject substantive employment rights or refer to redress mechanisms, whether at first instance or on appeal, for the pursuit of employment claims. Of course, many of the enactments listed in column (3) are in fact concerned with substantive employment law rights and the redress mechanisms which were in operation for the pursuit of such rights prior to the commencement of the 2015 Act. (See for example Payment of Wages Act 1991, Terms of Employment (Information) Act 1994 and Organisation of Working Time Act 1997). Indeed, s. 8(2) provides that the repeals to be effected by s. 8(1) by reference to column (4) of Part 1 of Schedule 2 to the 2015 Act, shall not apply in respect of complaints or disputes referred to a Rights Commissioner under the enactments specified in column (3) before the commencement of the 2015 Act.

61. It is certainly the case that the 1993 Act has as its subject and object rights in relation to unfair dismissal and the redress mechanisms for the pursuit of unfair dismissal claims and appeals. In this regard, the 1993 Act extended the scope of "the Principal Act", (defined in the 1993 Act as the "Unfair Dismissals Act 1977) to agency workers. It is however primarily an amending statute which effected amendments to various provisions of "the Principal Act". Indeed, many of the amendments effected by the 1993 Act relate to the redress and appeal structures set out in the 1977 Act, including a minor amendment to s.9 of the 1977 Act. That notwithstanding, I cannot find, having regard to s. 80(2) of the 2015 Act, that s. 53(1), via its reference to s. 8(2) of the 2015 Act, which itself must be read in conjunction with column (3) of Part 1 of Schedule 2 to the 2015 Act, is sufficient to oust the clear intention of the legislature, as expressed in s. 80(2), that unfair dismissal claims (including the appeal of a first instance recommendation of a rights commissioner by virtue of the retention of s. 9(1) of the 1977 Act) which were brought before the commencement of the 2015 Act are to be addressed via the redress mechanisms provided for by the 1977 Act.

62. In all of the circumstances of this case, I am satisfied that the body which has jurisdiction to hear and determine the notice party's appeal is the Tribunal and that the Labour Court did not have jurisdiction to hear and determine the said appeal.

The consequences of the Labour Court having made a determination outside of its statutory jurisdiction

63. It is the applicant's contention that jurisdiction is a condition precedent to the embarking by the Labour Court on the notice party's appeal. It is submitted that where a "vital precondition to jurisdiction" is missing, then the Labour Court's purported determination must be quashed, as was the position in *Ryanair v. Labour Court* [2007] 4 I.R. 199. In aid of her submissions, counsel for the applicant also cites *Bank of Scotland (Ireland) v. Employment Appeals Tribunal* [2002] IEHC 119, where the making of a claim within a six month period was found to have been a condition precedent to the holding of a hearing by the Tribunal. In that case, O Caoimh J. stated as follows:

> *"It is clear that the respondent does not have jurisdiction to determine a claim unless the claim is brought within the period prescribed by statute and this is the period of six months provided for in s. 8 of the Unfair Dismissals Act, 1977*

(as amended) or if the claim is not brought within the period of 12 months provided the tribunal is satisfied that exceptional circumstances prevented the giving of the notice within the period of six months. It is clear that the responded did not seek to address the alternative basis of jurisdiction referred to in s.8 (2) (b) of the Act. Accordingly, I am satisfied that unless it determines the matter as coming within this sub-section that the respondent does not have jurisdiction to determine the claim of the notice party unless it was brought within the relevant six month period.

…

I am satisfied that the cases referred to by counsel for the notice party are not a sufficient authority to refuse the relief sought as it is clear that the applicant should not be faced with having to defend a claim before the respondent unless the respondent establishes that it has jurisdiction. I am satisfied that on the undisputed facts of this case that it does not have jurisdiction under s. 8 (2) (a) of the Unfair Dismissals Act, 1977 and that accordingly it should not proceed with the claim of the notice party unless satisfied that the requirements of s.8 (2) (b) of the Act have been satisfied. If the applicant is correct then the further proceedings before the respondent will not have been commenced within jurisdiction at all as a condition precedent to the respondent having jurisdiction will not have been satisfied. … I am not satisfied that an appeal is a more appropriate remedy in the instant case and I accordingly believe that in my discretion the applicant is entitled to the relief sought herein."

64. It is well established that anything done by a statutory body without jurisdiction cannot have legal effect. This was the position in *Kennedy v. Hearne* [1988] I.R. 481 where the Supreme Court found that a notice issued by the Revenue Commissioners without valid activation of their powers as provided for by statute, was a nullity.

65. I am satisfied that as the Labour Court never had jurisdiction to hear the notice party's appeal, what occurred was more than an error of law made within jurisdiction and thus it comes within the second of the categories identified by Keane J. in *Killeen v. Director of Public Prosecutions* [1998] 1 I.LR.M. 1:

> *"It may be that an error of law committed by a tribunal acting within its jurisdiction is not capable of being set aside on certiorari: see The State (Davidson) v. Farrell [1960] I.R. 438. It is otherwise where the error of law has as its consequence the making of an order which the tribunal had no jurisdiction to make." (at p.227)*

66. In the circumstances of this case, it seems to the Court that given that the Labour Court had no jurisdiction to embark upon the notice party's appeal its decision is amenable to an order of certiorari. The question which arises is whether the applicant's failure to raise the jurisdictional issue at the hearing before the Labour Court should debar the applicant from relief in this case, as contended for by the notice party, or whether there is any other basis upon which the applicant should be denied relief.

What is the effect of the applicant's failure to raise the jurisdictional issue before the Labour Court

67. It is common case that neither at the time of the receipt of the notice party's appeal to the Labour Court, nor during the hearing before that body, was objection raised to the Labour Court's jurisdiction to entertain the appeal. The Labour Court was obviously content to receive and hear the appeal and indeed, as now known, the said appeal had separately been forwarded to the Labour Court by the Tribunal's Secretariat.

68. As averred to in Mr. Shanley's affidavit, the applicant concedes that it misdirected itself as to the correct forum for the notice party's appeal. Mr. Shanley accounts for this on the basis of what was contained in the Guidance Notes which attached to the notice party's appeal, and which had issued from the Labour Court. Thus, the applicant's position is that there can be no suggestion of acquiescence on its part to the Labour Court's purported jurisdiction since Mr. Shanley believed the Labour Court had jurisdiction on the basis of what was contained in the Guidance Notes: on this basis, Mr. Shanley cannot be held to have knowledge of the invalidity. It is submitted that Mr. Shanley only became aware of the jurisdiction question on receipt of counsel's advices, post the Labour Court's decision.

69. The question is whether, as contended for by the notice party in the statement of opposition, and indeed in the written and oral submissions before the Court, the applicant is estopped from challenging the *vires* of the Labour Court's decision on account of its participation and/or acquiescence in the hearing before the Labour Court.

70. The applicant contends that this question must be answered in the negative. It is submitted that waiver or acquiescence by participation in a hearing before a statutory body that did not have jurisdiction to hear an appeal cannot cure such a jurisdictional defect. I am satisfied that counsel's submission is correct. As a creature of statute, the Labour Court cannot acquire jurisdiction to determine a claim or appeal in respect of which it never had a jurisdiction. Any claim determined by the Labour Court without jurisdiction has no effect in law, even if it can be said there was acquiescence on the part of the party now seeking to impugn the decision for want of jurisdiction. Hogan and Morgan, Administrative Law in Ireland (4th Ed., Roundhall, 2010), addresses this issue in the following terms:

> "The fundamental rule is that waiver and consent cannot confer jurisdiction. The rule is grounded in the fundamental public policy that a jurisdiction laid down by statute with the good of the community cannot be altered. It thus applies irrespective of whether the waiver emanates from the public body or the private individual affected."

71. In *State (Byrne) v. Frawley* [1978] I.R. 326, O'Higgins J. opined as follows:

> *"Acquiescence depends on knowledge; if the person convicted did not know of the suggested invalidity, he cannot be said to have acquiesced. In any event acquiescence cannot confer validity, just as consent cannot confer jurisdiction". (at p.342)*

72. In De Blacam, Judicial Review, (3rd Ed., Bloomsbury Professional, 2016), the position is put in the following terms:

> "Outside the criminal law of context, the criterion, generally, seems to rest on whether the court or Tribunal ever had jurisdiction to enter on the subject-matter at its inquiry; if the Tribunal never had jurisdiction to enter on the inquiry, there can be no waiver or acquiescence and no consent can supply the want of jurisdiction; but if it did have jurisdiction, any defects arising during the course of that inquiry may be waived."

73. Accordingly, the Labour Court could not cure its lack of jurisdiction by embarking on the hearing of the appeal. As stated by Henchy J. in *Corrigan v. Irish Land Commission* [1977] I.R. 317:

> *"There is no question of the waiver relied on in the present case creating a new jurisdiction. The lay commissioners plainly had jurisdiction to hear the appeal. The question was whether the two particular lay commissioners were debarred from exercising that jurisdiction by reason of their prior dealing with the case. However, this point was knowingly waived by counsel for the appellant when they elected to accept the tribunal as they found it composed on the day of the hearing." (at pp.325-326)*

74. The present is clearly distinguishable from what occurred in Corrigan. In that case, it was clear that the Appeals Tribunal of the Land Commission had jurisdiction to hear appeal. Here, the Labour Court had no jurisdiction whether or not the parties could be said to have accepted that it had. The fact of the matter is that the notice party's appeal was lodged to the wrong forum and wrongly accepted by that forum.

75. What occurred in the present case was not a routine mishap that might befall any trial, as was distinguished by the Supreme Court in *Sweeney v. Judge Brophy* [1993] 2 I.R. 202. The present case is also not comparable to what occurred in *Hussein v. the Labour Court* [2015] IESC 58 where the High Court was overturned for having granted judicial review of two decisions of the Labour Court. Those decisions were respectively determinations that the employer pay sums which had been found by a Rights Commissioner to be due and owing to the employee pursuant to the Organisation of Working Term Act 1997 and the National Minimum Wage Act 2000, respectively. What was sought to be impugned in the judicial review proceedings were the decisions of the Labour Court, and not the underlying adjudications of the Rights Commissioner. The basic premise of the employer's case for the setting aside of the two Labour Court decisions in *Hussein* was that the earlier decision of the Rights Commissioner was tainted by illegality in making an award on foot of an employer/employee relationship which was unlawful.

76. The ratio for the decision of the Supreme Court was expressed by Murray J. as follows:

> *"42. The terms of the determination of the Rights Commissioner are cited at paragraph 14 above. It is, in its terms and on its face, a determination under the relevant statutes in favour of the notice party. Once the objective fact of the existence of that decision is established for the purposes of the particular sections under which the Labour Court is acting and that the employer has failed to comply with it, the Labour Court has no option but to make the decisions which they did. The applicant has not, in my view, established any grounds from which it could be argued that the applicant was entitled to some form of order ex debito justitiae. The decision of the Rights Commissioner was simply not the subject of a judicial review before the High Court or before this Court. This Court is, as explained, only concerned with the manner in which the Labour Court exercised its statutory powers. Counsel for the applicant relied on The State (Vozza) v. District Justice O'Floinn (cited above) for supporting a proposition that one could in some way go behind the decisions of the Labour Court in this case and rely on an alleged frailty of the earlier Rights Commissioner's decision for impugning them. There are a number of elements of that case which distinguish it from the circumstances of this case, but the most fundamental one is that in that case certiorari was sought against both the decision of the District Court and the decision of the Circuit Court. Thus, unlike this case (apart from the fact that that case was concerned with the validity of a criminal conviction) both orders in issue were the subject matter of the certiorari proceedings.*
>
> *43. Accordingly, the Labour Court, in exercising powers under the relevant sections, is not and cannot be concerned with whether the evidence before the Rights Commissioner supported the decision or whether it was the correct decision. It is only concerned as to whether a decision has been made. This is underscored by the fact that each of the sections make it a precondition for the exercise of this particular jurisdiction that no appeal had been brought. Moreover, each section provides that the Labour Court should make this decision without hearing the employer concerned, and adding "other than in relation to the matters aforesaid", referring to the objective facts that (a) a decision has been made and (b) it has not been carried out by the employer.*
>
> *44. The express provision that the decision may be made without hearing the employer, except on those particular matters, is manifestly because there is no other issue of either fact or law before the Labour Court concerning the merits or otherwise of the decision of the Rights Commissioner.*
>
> *45. Thus, once the Labour Court had objective evidence of a decision and Determination, as quoted above at paragraph 14, and evidence that the employer had not paid the amount of the award in each case, it was bound to make the decisions which it did pursuant to s. 28(8) of the Act of 1997 and s. 31(1) of the Act of 2003. It is not permitted to act otherwise under these sections.*
>
> *46. This is what the Labour Court decided. In my view, it clearly acted pursuant to and in accordance with its jurisdiction.*
>
> *47. Since the Labour Court exercised its powers properly and within the parameters defined by the sections in question, there is no basis, in my view, for setting aside its two decisions by way of judicial review."*

77. In this case, unlike the position in Hussein, the Labour Court has not satisfied the pre-condition for jurisdiction as it did not have jurisdiction to determine the notice party's appeal.

78. On behalf of the notice party, counsel agrees that if a Tribunal or body does not have jurisdiction, then acquiescence cannot cure that want of jurisdiction. However, it is submitted that there is authority for the proposition that participation in a hearing (albeit one without jurisdiction) may be sufficient for the Court to deny the remedy of *certiorari*. In this regard counsel relies on *R. (County Council of Kildare) v. Commissioner of Valuation* [1901] 2 I.R. 215.

79. In R. (County Council of Kildare) the prosecutor council sought to review a decision of the respondent to value a portion of the Great Southern and Western Railway Company Railway Line. The council had originally appealed the decision of the respondent to the County Court and had not raised an objection to the jurisdiction of the respondent at that time. When that appeal was unsuccessful, it sought to judicially review the respondent on the ground that the respondent did not have jurisdiction to enter into a revaluation of the railway line, in the absence of certain lists being delivered to the respondent. The Court of Appeal held that the council was estopped by its conduct in seeking *certiorar*i, notwithstanding the fact that the respondent did not have jurisdiction under the relevant legislation to enter upon the revaluation which the council sought to challenge. At pp. 230-231, Holmes L.J. set out the Court's reasoning as follows:

> *"The County Council before taking the appeal was aware of the point now relied on; but by excluding it from the notice of appeal, it prevented it from being adjudicated on by the Court of Quarter Sessions. Had it been properly raised before that Tribunal it might have been ruled in favour of the appellant; and if it had been decided otherwise the County Council*

might have called on the Court to state a case for the Queen's Bench Division, or might have sought a remedy by writ of certiorari. Instead of this the County Council took the chance of increasing the valuation beyond what it had stood at originally, and it was only when it failed in this that it raised the objection to revision founded on want of jurisdiction.

I concur with the Chief Baron in holding that where the right of an individual is prejudiced by an adjudication of an inferior Tribunal, the writ of certiorari is not a matter of discretion but of right; but I also agree with him when he says that the right to question such an adjudication can be lost by the conduct of the party. I cannot conceive a stronger case of estopppel by conduct than the present. The appeal that was taken, so far from raising the point now relied on, asked for relief that could only be granted on the assumption that there was jurisdiction to revise the valuation; and the appellant now seeks to quash the order of the Court whose assistance he invoked, because, although it was to a certain extent in his favour, it was not so favourable as he expected, or desired. Upon this ground I am of opinion that the appeal ought to be allowed, and the order for the issue of the writ of certiorari discharged."

80. While in that case it was the appellant who relied on the lack of the jurisdiction, unlike the present case where it is the respondent who has raised the issue, counsel for the notice party urges the Court to adopt the approach taken by the appeal court in *R. (Kildare County Council v. Commission of Valuation*).

81. The notice party also relies on the decision of the Supreme Court in Corrigan, citing Henchy J.:

"I consider it to be settled law that, whatever may be the effect of the complaining party's conduct after the impugned decision has been given, if, with full knowledge of the facts alleged to constitute disqualification of a member of the tribunal, he expressly or by implication acquiesces at the time in that member taking part in the hearing and in the decision, he will be held to have waived the objection on the ground of disqualification which he might otherwise have had." (at p.324)

82. It is also submitted that ignorance of the law, such as that averred to by the applicant's solicitor in this case, is clearly not sufficient to prevent the applicant from acquiescence in the process before the Labour Court. This is especially so given that the applicant had the benefit of full legal representations at all stages. Counsel contends that had the applicant in *Corrigan* argued that he was not in possession of the relevant information because his counsel were unaware of the principle against objective bias, it is not hard to envisage that such an argument would have been given short shrift by the Supreme Court.

83. In *Corrigan*, Henchy J. set out the basis upon which estoppel by conduct arises:

"The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways." (at p.326)

84. Counsel for the notice party also cites *Galvin v. Commissioner of An Garda Síochána* [2011] IEHC 486 in aid of his submission that acquiescence is a bar to relief. In *Galvin*, the applicant had been charged with a number of disciplinary offences pursuant to the Garda Síochána Act 2005. Some of these offences had occurred prior to the commencement of the Act and accordingly the applicant argued that there was therefore no jurisdiction under that Act to make findings against her in respect of those offences. In refusing the quash the impugned decision Hedigan J. found that the applicant had acquiesced in the disciplinary process which was in and of itself a sufficient reason to refuse relief by way of judicial review. Hedigan J. stated:

"Active participation in a hearing has long been held to be sufficient to deprive an applicant of the right to complain about it subsequently.

…

Having accepted and engaged with the process it is difficult to see how the applicant can now turn around and seek to object to it. In my view the applicant acquiesced in the procedure and cannot now challenge the result."

85. Reliance is also placed by the notice party on *Capital Food Emporium (Holdings) Limited v. Walsh* [2016] IEHC 725. There, the applicant sought judicial review of a decision of the Rights Commissioner, and of the Tribunal on appeal which awarded compensation to the employee notice party for unfair dismissal. The applicant's agent had received notice of the unfair dismissal claim and requested that all future correspondence be addressed to them. The applicant failed to appear at the first instance hearing before the Rights Commissioner. Following the Rights Commissioner's recommendation, the applicant appealed to the Tribunal but subsequently withdrew its appeal. A hearing was then scheduled before the Tribunal to implement the Rights Commissioner's recommendation. The applicant objected in correspondence to the Tribunal's jurisdiction to hold an implementation hearing on the basis that the notice party employee's original claim form had made a claim against an entity which was not a limited liability company and on the basis that the Rights Commissioner had subsequently made a recommendation against a natural person "trading as *Capital Foods Emporium*" and not against the applicant. The notice party subsequently applied to the Rights Commissioner to have his recommendation changed to the correct legal name of the applicant. The applicant objected in writing to this application, and to the correction order made on foot thereof, on the basis that it had not been heard originally before the Rights Commissioner and accordingly the applicant did not consent the correction order being made. In the High Court, Barrett J. rejected these arguments and held that the applicant clearly acquiesced in the proceedings by accepting in correspondence that it was the appropriate body concerned with the employment dispute. Barrett J. stated as follows at pp. 23 – 24:

"(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."

86. Counsel for the notice party submits that on the basis of the above authorities, the Court should refuse the relief sought by the applicant on the basis of its acquiescence in the procedure before the Labour Court. It is further submitted that the applicant's position is not comparable to *Bank of Ireland v. Employment Appeals Tribunal*, as in that case the issue of the time period for lodging the claim was raised before the Tribunal itself and therefore no acquiescence was found to arise. The notice party also argues that it is not insignificant that the applicant at all times was represented before the Labour Court. It is submitted that even if it is found that the applicant did not acquiesce in the Labour Court appeal such as to disentitle it to relief, the Court should still refuse to grant the reliefs sought by the applicant, which are within the discretion of the Court. In this regard counsel cites Hedigan J. in *Galvin*:

"Judicial review is a discretionary remedy. In Judicial Review, (2nd ed) at p. 421 De Blacam speaking about certiorari notes that:-

'The Courts sometimes refuse relief where they conclude that the applicant has suffered no injustice as a result of the impugned order or decision. In these cases the Court does not necessarily stand over the impugned order. If there is no injustice, then, it is reasoned why grant relief by way of certiorari?'"

87. In response to the notice party's submissions, counsel for the applicant emphasises that in as much as criticism cannot be levelled at the notice party's solicitor, given that he lodged an appeal both with the Tribunal and the Labour Court, similarly, no criticism should attach to the applicant's solicitor given what was set out in the Guidance Notes which issued from the Labour Court, which, it is submitted, informed the applicant's solicitor's actual knowledge. Counsel further relies on the fact, as made known to the applicant upon receipt of the statement of opposition, that the Tribunal forwarded the appeal to the Labour Court.

88. In all of the circumstances of this case, I am not persuaded that the applicant's conduct is such that it could be said to be aware of or acquiesced in the Labour Court's jurisdictional defect to the extent that would warrant the Court refusing the relief sought. I so find in circumstances where the Labour Court's own appeal form contributed to the applicant's misunderstanding. The applicant cannot be faulted for the reliance placed on the active role of the Labour Court in saying to the applicant, via the Guidance Notes attached to the appeal form, that it had jurisdiction. This is not, to my mind, a case where it can be said that there was approbation and reprobation on the part of the applicant of such a nature as to warrant refusal of relief on that basis. I am also not persuaded by the notice party's reliance on *Capital Foods (Holdings) Limited* as authority for the proposition that relief should be refused in this case. On the facts in *Capital Foods (Holdings) Limited*, there was more than sufficient basis for Barrett J. to refuse the reliefs sought in that case.

89. I accept the applicant's submission that the notice party overly relies on *R. (Kildare County Council) v. Commissioner of Valuation* and *Corrigan*. In both of those instances (and indeed in respect of the other cases cited above), the body whose decision was sought to be impugned had jurisdiction to process the claim before it, subject to that jurisdiction being validly exercised. This is not the position in the present case. I am also of the view that the notice party's reliance on *Galvin* is not of particular assistance to the Court.

90. There is no doubt, as argued on the notice party's behalf, that the applicant has had the benefit of two hearings. It had every opportunity to call evidence in its favour, and to cross-examine the notice party. There is no suggestion that the applicant did not have the benefit of fair procedures or of natural and constitutional justice. Counsel for the notice party submits that in those circumstances the Court should not grant the relief claimed in this case. It is further submitted that the Court is entitled to exercise its discretion to refuse relief by way of judicial review where to remit the matter for re-hearing would inevitably lead to the same result. As regards the latter argument, the Court is not concerned with the merits of the matter but rather with the process by which the impugned decision was arrived at. In any event, there can be no question of remitting the matter to the Labour Court given the basis upon which its decision has been impugned. As to the fair procedures argument, I am not persuaded that the fact that there was adherence to fair procedures is sufficient to debar relief, particularly in circumstances where the Labour Court acted without jurisdiction. In all the circumstances of this case, I have not been persuaded, to paraphrase Holmes L.J. in *R (Kildare County Council) v. Commissioner of Valuation*, that the applicant has lost the right to question the adjudication of the Labour Court.

91. I am also satisfied there was no question, in the instant case, that the applicant should have appealed the Labour Court's decision on a point of law to the High Court pursuant to the statutory appeal mechanism set out in the 2015 Act. As the Labour Court's purported decision was made *ultra vires* that Act, it seems to me that the only remedy lay in judicial review.

Will the notice party be left without a remedy if the decision of the Labour Court is quashed?
92. In paras. 20-25 of the notice of opposition the notice party pleads, inter alia, as follows:

"[I]n the event that the determination of the Labour Court is quashed by way of an order of *certiorari*, the effect of this will be to deprive the Notice Party both of the award which was made by the Labour Court in respect of his unfair dismissal. In the premises, the discretion of this Honourable Court to grant an order of certiorari in respect of the impugned decision of the Labour Court should not be exercised. If this Honourable Court is to grant an order of *certiorari* the Notice Party's appeal to the Tribunal would still be in existence but the right of the Notice Party to a fair and speedy resolution would have been impugned when the Applicant could have raised this issue of jurisdiction as a preliminary matter.

…

Further, or in the alternative, the Applicant herein participated at all material times in the appeal process before the Labour Court. As a result, the Notice Party proceeded with his appeal before the Labour Court, which was extant when the time limited to appeal to the [Tribunal] from a decision of a Rights Commissioner expired. As a result of the behaviour of the Applicant in this regard, the Notice Party is now precluded, in the event that the determination of the Labour Court is quashed for want of jurisdiction, from pursuing an appeal before the [Tribunal].

…

In the alternative to the foregoing, and contingent on this Honourable Court granting the reliefs sought by the Applicant, damages are sought by the Notice Party against the Respondent, the Notice Party having relied on the decisions of the

Respondent and the [Tribunal] as to which forum was the appropriate one for the determination of his appeal."

93. While not conceding the point, counsel for the applicant submits that the notice party "may" have an appeal extant with the Tribunal. This is in circumstances where it is acknowledged by the applicant that the notice party lodged a timely appeal with the Tribunal on 2nd October, 2015. In her written submissions to the Court, counsel for the applicant points out that the Tribunal had no jurisdiction to transfer the appeal to the Labour Court. It is thus contended that despite what is argued in the statement of opposition, the Notice Party may still be left with the opportunity to prosecute his appeal before the Tribunal and that in that event, both parties will still also have the option to appeal any such determination of the Tribunal to the Circuit Court.

94. At this juncture it is not for the Court to speculate as to what will transpire upon the quashing of the Labour Court's decision, save to note that the appeal route to the Tribunal provided by the 1977 Act, as preserved by s. 80(2) of the 2015 Act, was exercised by the notice party in a timely fashion, a fact conceded by the applicant in the course of these proceedings. The Court would observe that in as much as the applicant has been found by the Court to have reasonably relied on the Labour Court's Guidance Notes in believing that it was the correct forum for the appeal, the notice party is in a position where not only did his legal representative lodge an appeal with the Labour Court, but in tandem with that, he lodged an appeal with the Tribunal, only for the Tribunal to direct the notice party to the Labour Court. However, it is not for this Court to pronounce upon the actions of the Tribunal as it is not a party to the within application for judicial review.

95. In summary, in circumstances where there is a statutory appeal mechanism to the Tribunal available to the notice party (and which has been invoked), the Court is satisfied that the notice party will not suffer undue prejudice by the granting of relief in this case. Accordingly, relief by way of an order of *certiorari* will be granted. I will hear from the parties as to what, if any, further order should follow consequent on the grant of an order of *certiorari.*