Neutral Citation Number [2007] IEHC 210

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 602 J.R.]

BETWEEN

GALWAY-MAYO INSTITUTE OF TECHNOLOGY

APPLICANT

AND

EMPLOYMENT APPEALS TRIBUNAL

RESPONDENT

AND

HELENA PIDGEON AND HELEN THORNTON

NOTICE PARTIES

Judgment of Mr. Justice Charleton delivered on the 20th June, 2007.

1. This case concerns the right to be heard. In this application for judicial review, the applicant claims that it did not get a fair hearing from the respondent in deciding on redundancy payments claims brought by two of its former employees, who are the notice parties.

2. Fundamental to the correct dispensation of justice is the right of each party to communicate their case. If one party is deprived of that entitlement they will legitimately have a sense of grievance if a judicial decision goes against them. If one party is given an unfair advantage over the other in the way in which a judicial tribunal conducts its business, the same fundamental right in the due process of justice may be infringed. The touchstone for the administration of justice by any judicial body is that both sides be heard. This is done by giving them, as far as practicable, an opportunity to fairly present their case.

3. The ultimate powers of discovery of documents, examination and cross-examination by each side, the presentation of submissions, followed by the consideration of, and then delivery of, a reasoned judgment need not apply to the conduct of all forms of judicial, or quasi-judicial, tribunal. Some forms of fair procedure may require only that a party should be given notice of what the nature of the problem is and then given an opportunity to present a reply. Other forms of decision are so far reaching as to require what is, in effect, the adoption by the tribunal of all of the measures inherent in a plenary hearing or a criminal trial. Fundamental to any procedure, however, is the duty of the tribunal to identify the issue which it is tasked with deciding and to make available to the parties the means, which can be variable, whereby they may address that issue.

Facts

4. There are two notice parties to this case, Helena Pidgeon and Helen Thornton. Since their cases are the same, I am giving one judgment in respect of both. Both were employed in the Galway-Mayo Institute of Technology from 1993, in the case of Helena Pidgeon, and 1994 in the case of Helen Thornton, until their employment was terminated, in both cases, on the 31st August, 2003. I am not concerned in deciding the controversy relating to their redundancy payments. I understand that their issues with the applicant as to their redundancy payments have been disposed of to the satisfaction of all sides prior to this application being made to the court. Nonetheless, I need to refer to some of the issues which arose on the termination of their employment.

5. Both third parties were employed as lecturers in German studies. Their contracts of employment seem to imply that their position, which was part-time, and paid on an hourly basis, would allow them to work at least nine hours a week. However, the documents indicate that over the course of their nine or so years of employment the hours varied and that they were paid on a pro-rata basis depending on the hours they worked. These hours went up or down depending upon the number of students who wished to take the option of studying the German language. Unfortunately, numbers have been in decline in recent years. In the academic year 2001 to 2002, both the notice parties would have worked eleven hours per week. Then the number of students taking German declined so that only five hours tuition a week was required. Then the demand decreased even further until there was no need to have part-time lecturers in German at all.

6. Having been made redundant on the 31st August, 2003, both the notice parties brought a claim before the Employment Appeals Tribunal under the Redundancy Payments Acts 1967 - 2001. Helena Pidgeon, in setting out her reasons for the application for redress to the respondent stated, on the appropriate application form, as follows:-

> "[The] HR manager at GMIT, made no offer of redundancy payment prior to being contacted by the Employment Appeals Tribunal at the end of November, following an application by Helen Thornton, my colleague. Neither Helen nor myself have accepted a subsequent identical offer to us on 2nd December, (five months after receiving letters of notice) because the amount was not representative of our earnings over the nine years we both worked at GMIT. [The HR manager] agreed at our meeting that we should go to a Tribunal in the Spring and urged me to forward my application. He said there is no precedent for a redundancy claim such as ours, although during our meeting he did confer with his counterpart at DIT about redundancy payments made there over the summer. Helen and I appealed to the Tribunal to deal fairly and swiftly on matters our employer has failed [to address]."

7. The remedy sought on the form, therefore, was a payment which would reflect the earnings of the third parties and their service to the college over nine and ten years respectively. In essence, what was being said was that since they were working eleven hours per week in the year before they were made redundant, that to offer them a redundancy payment based upon five hours of work per week, based on the year they were made redundant, was unfair and contrary to the relevant Acts. As it happened, the respondent decided that issue in their favour; but not by interpreting the legislation that both parties had addressed before it.

8. The third schedule to the Redundancy Payments Act 1967, as amended, sets out the calculation of the lump sum that is payable upon redundancy. The right to a redundancy payment arises upon losing your job by reason of the disappearance of your employment; as where a firm closes down or needs to reduce its workforce. Sometimes people can negotiate for a voluntary redundancy package and sometimes the lump sum payment to which an entitlement arises on a statutory basis may be the subject of collective negotiations: therefore, it can be seen as a floor of rights. Even that can disappear if a firm is wound up on insolvency, in which case the workers look to the State.

9. Schedule 3, in calculating a redundancy payment, provides:-

> "1. The amount of the lump sum shall be equivalent to the aggregate of the following –

(a) the product of the employee's normal weekly remuneration and the number of years of continuous employment from the date on which the employee attains the age of 16 years with the employer by whom the employee was employed on the date of dismissal or by whom the employee was employed when the employee gave notice of intention to claim under s. 12, and

(b) a sum equivalent to the employee's normal weekly remuneration.

2. In calculating the amount of the lump sum the amount per annum to be taken into account shall be that obtaining under s. 4(2) on the Redundancy Payment Act, 1979 at the time the employee was declared redundant."

The hearing

10. Form T1-A issued by the Employment Appeals Tribunal is an elegant document. It allows claimants to tick boxes in respect of the statutory relief they are seeking; it requires them to give relevant dates; it takes the particulars of their employment; it gives them a space in which to indicate what the nature of their case was; and it gives them space in which they can write out the nature of their case. I have quoted this latter section already. When the case came on for hearing it was, very unusually, agreed by both sides that the right way to approach it was for the Employment Appeals Tribunal to take no evidence or oral submissions, but, instead, to decide the matter on the basis of written legal submissions. The core issue, as between an entitlement to a redundancy based upon the pay appropriate for five hours of employment or eleven hours of employment, seemed readily capable of being joined through written legal arguments only. This is what happened. These submissions, which were date stamped by the Employment Appeals Tribunal on the 15th November, 2004, are a full discussion of the law. Both parties centred their submissions on the interpretation of the Redundancy Payments Acts 1967 – 2003. Nobody mentions any other statutory entitlement as, I infer, it did not seem to anybody that any other statutory entitlement could possibly be relevant to this claim. At the end of the day, it all looked rather complicated and it is not surprising, therefore, that the solicitors on behalf of the applicant, who were the employers for the purpose of the issue before the Employment Appeals Tribunal, wrote on the 8th November, 2004 and requested an oral hearing. They said:-

"By way of general and overall comment we should make it absolutely clear that it is both our view and that of our clients that this dispute cannot be determined on the basis of witness submissions alone by reason of the fact [that] the dispute before the Tribunal to be determined is a mixture of both fact and law. It is submitted that the Tribunal will not be in a position to determine the true nature of the claimant's employment with the respondent and by extension determine what their normal weekly remuneration truly should have been without hearing evidence on the matter from the claimant and respondent."

11. The request was not acceded to. Instead, on the 20th April, 2005, the Employment Appeals Tribunal issued its decision. The determination was to this effect: that since December, 2001, the employment of the notice parties with the applicant had become subject to the Protection of Employees (Part-Time Work) Act 2001, any condition whereby the hours of work of the notice parties could go up as well as down must be regarded as a void since that condition was not mirrored in a similar provision for full-time workers. Full-time workers might, I infer, have a right to earn overtime but they were entitled to be paid on the basis of a standard number of hours worked per week, whether there was a demand for their services, or not. The determination stated:-

"It follows that the clause in the appellant's contract whereby her hours could go up as well as down, became void insofar as it could cause her to suffer a reduction in pay since there was no similar clause in the contract of her comparable full-time counterpart which could reduce the latter's pay. This clause became void on the 20th December, 2001, as a discrimination between the part-time worker and her comparable counterpart."

12. It is correct that s. 14 of the Protection of Employees (Part-Time Work) Act 2001, renders void any provision in an agreement which is inconsistent with any provision of that Act. I am not interpreting that Act now. I merely note that under s. 9 a part-time employee cannot be treated in a less favourable manner than a comparable full-time employee. However, s. 9(2) states that such a difference can be valid if it is "justified on objective grounds". In order to decide whether any such difference between the conditions of employment of a part-time and full-time worker might be justified on objective grounds the tribunal deciding that issue would need to either hear evidence or accept a written explanation from both sides. Inherent, therefore, in s. 14 of the Act is the notion that a provision can be void if the condition in the Act as to objective justification between different conditions of employment is not met. That is different to a provision being automatically void.

13. The point of contention here is that nobody either averted to the Protection of Employees (Part-Time Work) Act, 2001, in their written submissions and that neither side thought it was applicable, or even that it might be applicable, until the Employment Appeals Tribunal decided that it governed the entire basis for its decision of the issue under the Redundancy Payments Acts 1967 – 2003.

Fundamental duty

14. Every judge, and every judicial or quasi-judicial tribunal, takes on two fundamental tasks in hearing a case. They are, firstly, to attempt to find out what the true situation is as between the allegations and counter allegations of the parties. Sometimes that fundamental duty may be diverted by the necessity for parties to abide by written pleadings in furtherance of the right to have notice of a claim or a defence; but even there, such procedural rules exist for the purpose of assisting in finding out where the truth lies. Where one party to a hearing is not legally represented, the court or tribunal may find themselves drawn in to the process of examination and cross-examination where otherwise it may be wise to remain silent and simply listen to the evidence. Where a decision-making body is drawn into the process of attempting to find out the facts, then it does so in fulfilling the fundamental principle that justice requires to know the truth before it can decide on the remedy. Secondly, a judge applies the rule of law to his or her decisions and a tribunal is no different from that. Certainty of legal principle is the opposite end of the spectrum to the arbitrary decision making that characterises a totalitarian society. A judge, tribunal, or quasi-judicial tribunal, cannot divert from its duty to discover the law and then to apply it. The law can not be made up. It must be applied whether it is attractive or unattractive; subject only to the power of the Superior Courts to declare a law unconstitutional as a last resort if the principles of constitutional interpretation cannot otherwise be applied to save it and so to respect the will of the people as expressed in the Oireachtas.

15. Save by accident, no one who did not witness an event or who did not have reliable testimony about it, could come to know the truth in relation to the facts of disputed event. Knowing about a case personally is something which is not allowed to a judge. The declaration of the law is, however, a much easier proposition since every lawyer is trained to find it and to state it accurately. The central point of defence in this judicial review is stated at paras. 3, 10 and 12 of the statement of opposition.

"3. The respondent as a statutory body charged with determining disputes as between employers and employees pursuant

to, inter alia, the Redundancy Payments Acts is obliged to take account of all relevant statutory provisions in determining any issue before it and is not limited to the legal arguments advanced by or on behalf of the parties appearing before it.

10. It is denied that the respondent considers the protection of Employees (Part-Time Work) Act 2001 in a manner which exposed the applicant to civil or criminal consequences and it is pleaded by the respondent that the respondent as a quasi-judicial body was entitled to, and indeed obliged, to have regard to the provisions of the Act of 2001 and the underlying European Community Directive.

12. It is denied that the respondent acted in breach of natural or constitutional justice as alleged or at all. The Tribunal considered the facts, and only the facts and no other facts, other than those brought before it and admitted by the parties in their submissions to the Tribunal. Insofar as the parties and in particular the applicants failed to address the law or adduce the relevant law to the Tribunal, the Tribunal was obliged and indeed had a duty to apply the law in force in making its determination between the parties."

Fair procedures

16. In his judgment in *Joseph Murphy v. The Minister for the Marine, Ireland and the Attorney General* [1977] IEHC 62, Shanley J. at p. 3405-3406 summarised the circumstances which would cause the High Court on judicial review to interfere with a discretionary decision. In that case, the decision concerned a refusal to grant a sea fisheries licence in respect of a fishing vessel which, to be granted, had to replace the tonnage lost to the national fishery fleet by reason of the taking out of service of another vessel. I note the decision by Shanley J. as to the fairness of the procedures adopted by the respondent in accepting submissions from the application. He makes wider remarks as to the powers of the court on judicial review, which though directed towards the review of discretionary administrative decisions, I find helpful in this context. Shanley J. stated:-

> "While the power is discretionary, it may be reviewed by a court and set aside as unlawful in certain circumstances. There is no exhaustive list of those factors or circumstances upon which a court will or will not act to set aside the exercise of a discretionary power. The following may be said to be the principal factors. The court will set aside a decision where it is shown that the decision:
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> (a) was made without regard to matters which the statute required the decision taker to have regard to in arriving at his decision,
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> (b) was made having regard to matters which were not relevant or germane to the decision to be taken,
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> (c) was not made in good faith,
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> (d) was made on wholly unreasonable grounds,
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> (e) was based on a mistaken view of the law,
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> (f) was taken on foot of a rule or policy which had to the effect of negating the discretionary power,
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> (g) was taken without hearing what the applicant had to say or without otherwise adhering to the principles of natural justice.

Keane J. summed up the applicable principles in *Carrigaline Community Television Broadcasting Company Limited trading as South Coast Community Television Broadcasting Service and Gabriel Hurley v. The Minister for Transport and Energy and Communications and Others*, (Unreported, 10th November, 1995) at p. 178 et seq. when he stated:-

> 'The court can and must set aside a decision where it is shown to be unlawful because the manner in which the decision was made, whether because the competent authority failed to consider the matter in a fair and impartial manner or because it took into account the factors which it should have excluded.'"

17. It is well settled that before a factual decision can be made by a judicial or quasi-judicial tribunal which has the effect of altering the rights and obligations under the law of those whom it affects, each party is entitled to be heard. There are many examples of which *Ingle v. O'Brien* (1974) Vol. C1X I.L.T.R. 6 is instructive. The applicant was a taxi driver who had been convicted of offences of forgery in connection with cash dockets given to him by a passenger. He had two previous convictions for similar offences. The procedure adopted to take away his taxi licence in those days was that he was handed a notice of revocation by a sergeant in the Carriage Department of An Garda Síochána; which function would now be fulfilled by the Taxi Regulator. He was not given any opportunity to plead a case, orally or in writing, in mitigation of the wrong that he had done or otherwise to make any relevant submission. It was, however, obvious that having regard to the convictions entered against the applicant that the Commissioner of An Garda Síochána, in whose name the decision was made, would have been well entitled to come to the conclusion that the applicant was no longer a fit and proper person to hold a taxi drivers' licence. Nonetheless, he was entitled to be heard as to the removal of his livelihood and the existence of an appeal from an administrative decision to a court did not cure the original wrong. It is worth quoting from the conclusions of Pringle J. as to this point at p. 10 and 11 of the report:

> "In the case of *The State (Crowley) v. the Irish Land Commission* 85 I.L.T.R. 26; [1951] I.R. 250, the well established test of what is a judicial act, that is to say an act of a competent authority which imposes liability or affects rights was accepted (see page 265), and the act of revoking the applicant's licence was clearly an act which affected his rights to earn his living by operating his taxi. Mr. Gogarty also contended that it was necessary in the interest of the public that the Commissioner should have power to make an immediate decision to revoke a licence to drive a taxi, where, for instance, the holder had suffered a stroke or a fit or became an alcoholic and that the holder's rights to object to the revocation were sufficiently protected by the right of appeal to the District court. While there might seem to be some force in this suggestion, it is significant that, as pointed out by Mr. Conolly, in the case of an ordinary driving licence the legislature apparently did not consider that an immediate revocation should be provided for, as section 28 of the Road Traffic Act, 1961, provided that, before such a licence could be revoked an application to and hearing before the District Court is necessary.
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> As regards the present case, I have already pointed out that the notice of revocation was not given to the applicant for two months after it had been made, so that apparently the matter was not regarded as one of any urgency.

> As regards the submission that the licence holder is sufficiently protected by the right of appeal under which the principles of natural justice would be complied with, I cannot accede to this submission. The revocation of a licence to drive public service vehicles, even for a short period pending an appeal, may seriously damage the holder's livelihood. I must say I am impressed by the judgment of Megarry J. in the case of *Leary v. National Union of Vehicle Builders* [1971] 1 Ch. 34, in which he held that, whilst a complete rehearing by an original tribunal, or by some other body competent to decide an issue, might satisfy the requirements of natural justice, a plaintiff, where there was right of appeal from an original decision, was entitled to natural justice both before the original tribunal and the appellate tribunal . At page 49 the learned Judge said:" If a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had? I very much doubt the existence of any such doctrine' and again on the same page he said: "As a general rule at all events, I hold that a failure of natural justice in the trial body cannot be cured by sufficiency of natural justice in an appellate body." I agree with this statement of the law. I am satisfied that the decision of the Superintendent O'Brien in this case is null and void for the reason that the applicant was given no opportunity to be heard as to why such a decision should not be made. It does not necessarily follow however that the conditional order of certiorari should be made absolute, as such an order is discretionary. It might be suggest, for instance, that the applicant could have appealed, but for the reasons stated above, I consider that the fact that he did not do so is not a reasonable ground on which to refuse the order. Again it might be suggested that the fact that the licence in question would, in the ordinary case, have expired on the 10th day of March of this year makes an order now ineffective. But, having regard to the serious affect on the applicant and his livelihood of a revocation order, and particularly to the fact that if such an order was valid he could not apply for a renewal for his licence for twelve months, disposes in my opinion of this suggestion.
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> I am satisfied that I should exercise the discretion vested in me by making the conditional order of certiorari absolute on the second ground set out in the said order and that I should disallow the cause shown by the respondents."

18. As an instance of the constitutional right to be heard, *Ingle v. O'Brien* is perhaps an obvious example of the circumstances in which it should be applied. There, the applicant had no hearing at all in respect of a matter which fundamentally affected his right to earn his livelihood. There have been other cases, however, where the hearing granted was regarded as insufficient by reason of a judicial, or quasi-judicial tribunal failing to hear evidence on a point which would have the result of a particular form of order being made, notwithstanding that on the main point of deciding the facts the tribunal had behaved correctly. In *The State (Holland) v. Kennedy* [1977] 1 I.R. 193 the respondent District Judge sentenced a sixteen year old boy to imprisonment in Mountjoy jail, pursuant to an exception as to character set out in s. 102(3) of the Children Act 1908, rather than making the usual order required in the case of a young person, as so defined, which was to send him to a young offenders' institution. This was done because the learned respondent regarded him as a young person who was of so unruly a character that he could not be detained in such a place of detention: the definition of the statutory exception. Her reasoning, in that regard, however, was not based on any evidence beyond the facts of the circumstances of the assault for which he was convicted. Following a hearing which was entirely proper, her view of the details grounding the conviction made her of the view that the statutory exception applied. This order was overturned by the Supreme Court. At page 201 of the report Henchy J. stated:-

> "The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a court or a tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decision liable to be quashed on certiorari. For instance, it may fall into an unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction.
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> The statute conferred jurisdiction to impose a sentence of imprisonment only when the court certifies that the young person is of so unruly a character that he cannot be detained in the provided place of detention. It was necessarily the statutory intention that a legally supportable certificate to that effect is to be a condition precedent to the exercise of the jurisdiction to impose a sentence of imprisonment. Otherwise the sentencing limitation imposed by the statute could be nullified by disregarding what the law regards as essential for the making of the certificate. In the present case the certificate, having been made without evidence is as devoid of legal validity as if it had been made in disregard of uncontroverted evidence showing that the young person is not what he was certified to be. Therefore, the consequent sentence of imprisonment was imposed without jurisdiction and the order embodying it was correctly quashed in the High Court."

19. Sometimes the courts have gone so far as to hold that if a person wishes to make submissions as to a fact which is important for an administrative decision, then that requested opportunity should not be refused. An example of this is *Frenchurch Properties Limited v. Wexford County Council* [1992] 2 I.R. 268.

20. The requirement that a party should have notice as to what might happen in consequence of a judicial or quasi-judicial decision is exemplified in extreme form by the decision of the Supreme Court in the *State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal*, [1987] I.L.R.M. 36. The written form, on which that tribunal now proceeds, as I understand it, includes a series of boxes whereby the employee indicates a preferred choice of the remedy that he or she is seeking should it be held that their employment was unfairly terminated. These remedies include re-instatement, re-engagement and damages. Experience also indicates that since that particular Supreme Court decision, it has been the practice of every division of the Employment Appeals Tribunal at the end of an unfair dismissals hearing, or at some stage during it, to ask the applicant what remedy he or she is seeking and to give an opportunity to the respondent employer to comment on that preference, if they wish. In that case, an unfair dismissal hearing was held which had the result of the Tribunal finding that the employee had been unfairly dismissed. Their decision was that the most appropriate remedy, having regard to all the circumstances of the case, was that the employee should be re-engaged. The entirety of the hearing had been confined to the circumstances of the dismissal; what had been uppermost in the minds of the parties seems to have been the financial loss arising therefrom. None of the applicants, on either side, had raised any question as to whether there should be a re-instatement or a re-engagement. The Employment Appeals Tribunal, however, did not award damages but made an order that renewed the employment relationship. The decision of the Employment Appeals Tribunal was quashed in the High Court and this decision was affirmed by the Supreme Court. It is noteworthy, in relation to this decision, that s. 7 of the Unfair Dismissals Act, 1977 expressly provided that where a finding of unfair dismissal had been made then the Employment Appeals Tribunal, or on appeal the Circuit Court, would grant one of the alternative reliefs of re-instatement, re-engagement or damages not exceeding an amount equal to 104 weeks of the employee's remuneration. It might, therefore, be argued that once a decision had been made by the Employment Appeals Tribunal that an employee had been unfairly dismissed, that the employer should necessarily have, as a matter of law, regarded himself as being liable to be the subject of any of the three orders that the Tribunal might make. However, correct procedures dictated that not only the issue of fairness or unfairness in dismissal should be addressed by the parties, but also the

remedy. At page 40-41 of the report, McCarthy J., on behalf of the Supreme Court, stated:-

> "Whether it be identified as a principle of natural justice derived from the common law and known as *audi alteram partem* or, preferably, as the right to fair procedures under the Constitution in all judicial or quasi-judicial proceedings, it is a fundamental requirement of justice that persons or property should not be at risk without the party charged been given an adequate opportunity of meeting the claim as identified and pursued. If the proceedings derive from statute, then, in the absence of any set of fixed procedures, the relevant authority must create and carry out the necessary procedures; if the set or fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice, for which proposition there is a wealth of authority: *O'Brien v. Bord na Mona* [1983] I.R. 255; *Loftus v. The Attorney General* [1979] I.R. 221;
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> *East Donegal Cooperatives Livestock Marts Ltd. v. Attorney General* [1970] I.R. 317. In the instant appeal it was argued for the Tribunal and the employee that the employer and its legal advisors where aware of the powers of the Tribunal in s. 7 of the Act; consequently they had adequate and ample opportunity to call such evidence and to make such representations as they saw fit on the appropriate redress, if and when the question arose. Such an argument might be sustainable if the redress sought were not specified other than being under the Act and the "run" of the hearing had been at large. Such was not the case. The hearing was directed towards two substantial issues, the dismissal and a remedy by way of compensation. That part of the determination by the Tribunal, albeit within the terms of s. 7, which prescribed re-engagement as the appropriate redress, there was one made without affording the other party, the employer, any adequate or real opportunity of meeting the case. Consequently, it was in breach of that fundamental principle which the employer calls in aid."

This decision

21. This decision was flawed on the basis of two principles derived from the relevant law. Firstly, I am not entitled to decide and do not now decide, whether it was possible that an objective justification might have existed for the difference in treatment of the notice parties in this case, as part-time employees, that was made by the Galway-Mayo Institution of Technology in comparison with the treatment of their full-time staff. I do not know the answer to that question because I have not heard evidence on it. From the point of view of the respondent Employment Appeals Tribunal, they were entitled to choose a procedure which might best dispose of that issue; oral evidence being the safest option but written submissions and agreed statements being also a possible option. Once evidence is required on any issue, it seems impossible to argue, on the authorities, that a tribunal which has made a determination in the absence of that evidence can have acted correctly.

22. Secondly, the parties before the Employment Appeals Tribunal were entitled to know that an issue had arisen pursuant to a statutory entitlement that may arguably have existed under the Protection of Employees (Part-Time Work) Act, 2001. This was not one of the Acts listed in the helpful claim form supplied to employees by the Employment Appeals Tribunal; it was not something which was adverted to by either side in their written submissions; and it is now submitted that it could never have been part of the determination of the Employment Appeals Tribunal at all. Counsel on behalf of the Applicant has argued that the various wrongs giving rise to remedies in employment law are referable, for their enforcement, to a range of bodies including the Labour Court, a Rights Commissioner and the Employment Appeals Tribunal. Section 1(4) of the Protection of Employees (Part-Time Work) Act, 2001 states that insofar as that Act relates to redundancy payments it should be construed together as one and may be citied with the Redundancy Payments Act, 1967 to 2001 (as it then was). As a matter of fact the Protection of Employees (Part-Time Work) Act, 2001, creates rights on behalf of employees and makes the declaration of those rights, and their enforcement, the task of a Rights Commissioner under s. 16 of the Act and allows an appeal to the Labour Court under s. 17. Enforcement of such declarations calls in aid the Circuit Court under s. 18(3). Therefore, under the Act, this issue as to whether there was discrimination as to variable hours between part-time and full-time employees by the Galway-Mayo Institution of Technology could never, it is submitted, have come before the Employment Appeals Tribunal.

23. I am not in a position to decide whether this submission is correct. It is not an issue which is before me. Neither, however, was it a submission that was before the Employment Appeals Tribunal as no one had ever adverted to the Act and neither of the parties therefore could have raised an objection to the decision eventually made by arguing before the Employment Appeals Tribunal that it was not within their powers to reach the determination which they eventually arrived at.

Issues of Law

24. It follows from the foregoing that a judicial or quasi-judicial tribunal is not entitled to invoke a statutory remedy which no one has sought and in respect of which no one is on notice. For the purpose of fulfilling the requirements of natural justice, however, I would have thought that if any such tribunal does have jurisdiction to give a remedy under a particular Act, then if this remedy is sought in an originating document, for instance by ticking a box giving a choice of remedies, or if it is orally sought to in the course of the hearing, such a tribunal is entitled to make a choice in favour of it. If that happens, parties have to be taken as being aware that in the event that a decision goes a particular way the tribunal may look to a remedy claimed. In that regard, I would regard a written claim or an oral assertion seeking a particular remedy as being sufficient for the due administration of constitutional justice provided the tribunal has jurisdiction in respect of it. If remedies are complex, and a tribunal has rules as to notice in the form of simple originating documents, then it should abide by its own procedures or consider the grant of an adjournment to a genuinely surprised party.

25. In *R. v. Immigration Appeals Tribunal*, ex-parte Suen, [1997] Imm. A.R. 355, Collins J. made some helpful comments as to what should happen when a court or tribunal discovers a new piece of law that was relevant to an issue before the parties. He felt it best that a tribunal should re-convene and point out the legal material to the parties to enable them to make legal submissions. Is that necessary?

26. At a judicial or quasi-judicial hearing it is important to try to give the parties an adequate opportunity to refer to all aspects of the law which they consider to be important. It is for the parties to discover the issues, from the pleadings or other originating documents, or the correspondence and documents exchanged between them, and to address them. Therefore, any question as to whether a particular issue has or has not been addressed might arise only very rarely. If the judge feels an issue of law is important then I feel, as a matter of manners at least, that it is up to him or her to indicate to the parties that one particular issue may be of significance and that it should not be overlooked but that submissions on it would be welcome. If this involves re-convening a hearing then it is better to go for that option.

27. Issues often give rise to legal submissions. Text books, statutes or case law may be referred to. The judge or the tribunal may then retire and, in considering those submissions, find passages in reports or text books, or in the folders of authorities handed in by

the parties, that seem to be as germane, or more important, than those referred to in oral argument or written submission. The court or tribunal may, in pursuing its duty to declare the law correctly, make its own exploration to see whether other relevant authorities may be discovered. In my view, in those circumstances neither courtesy nor law requires that a hearing should reconvene for the purpose of ploughing through the same field of law that has already been traversed by the parties to their satisfaction. Natural justice requires that they be given an opportunity to be heard as to the fact in issue, as to the remedies and as to the law. It does not necessarily require that there should be re-convening of a hearing merely for the purpose of considering a different passage of law to those cited when, as can happen, an advocate may take an over-optimistic or over-inventive view as to the law. I would say that re-convening a hearing should be considered if the judge or tribunal discovers a completely new issue, to which no one has adverted.

Result

28. In this instance, the Employment Appeals Tribunal went about the task of determining the appropriate redundancy payments to the employee third parties, as against the applicant, with great diligence. Unfortunately, in basing its decision on a remedy created by an Act to which no one had referred, and in respect of which the Employment Appeals Tribunal may not ever have had jurisdiction to determine, and in failing to hear evidence on a point of determination as to objective justification on which the parties would have been entitled to call evidence, it fell into error. Accordingly I am going to quash the decisions of the respondent dated the 20th April, 2005 in the proceedings entitled *Pidgeon v. Galway-Mayo Institute of Technology* case no. RP31/2004 and in the proceedings entitled *Thornton v. Galway, Mayo Institute of Technology* case no. RP666/2003 on claims pursuant to the Redundancy Payments Act, 1967 - 2003. No further order is required because the applicant and the notice parties, who were its employees, have separately settled the issue of an appropriate redundancy payment.

No in camera issues were raised.