Neutral Citation Number [2006] IEHC 201

THE HIGH COURT

[2005 No. 56 SP]

IN THE MATTER OF THE INDUSTRIAL RELATIONS (AMENDMENT) ACT 2001

BETWEEN

ASHFORD CASTLE LIMITED

PLAINTIFF

AND

SERVICES INDUSTRIAL PROFESSIONAL TECHNICAL UNION

DEFENDANT

Judgment of Mr. Justice Clarke delivered 21st June, 2006.

Introduction

1.1 The defendant ("SIPTU") represents a significant number of employees who work at Cong, Co. Mayo for the plaintiff ("Ashford Castle") in the five star hotel of the same name. Ashford Castle does not negotiate collectively with its employees but instead determines pay on an individual basis by agreement with each member of staff. Over a number of years grievances have been expressed by staff in relation to terms and conditions, which grievances which were ultimately referred to the Labour Court.

1.2 It will be necessary to set out the statutory regime within which the Labour Court considered the matter in due course. However in simple terms the court, in accordance with that statutory regime, made a non-binding recommendation on 22nd July, 2004. That recommendation was followed by a binding determination (No. DIR 051) dated 14th January, 2005. That determination was made under s. 6 of the Industrial Relations (Amendment) Act 2001 ("the Act") and therefore is, by virtue of s. 11 of the Act, open to an appeal to this court by either party "on a point of law".

1.3 The proceedings which I have to decide are, therefore, an appeal on a point of law by Ashford Castle against the determination of the Labour Court. It should also be noted that while the issues which were originally canvassed before the Labour Court related to a range of aspects of the terms and conditions of the employees concerned, the only matter remaining at issue at this stage concerns rates of pay.

2. The Statutory Scheme

2.1 The statutory framework within which the determination of the Labour Court was made is both recent and involves, at least in some respects, a significant new jurisdiction. It, therefore, is appropriate to commence by analysing that statutory scheme.

2.2 The first relevant provision is s. 2 of the Act which governs the circumstances in which the other provisions of the Act arise. Section 2(1) of the Act, as amended by s. 2 of the Industrial Relations (Miscellaneous Provisions) Act 2004 ("the 2004 Act"), provides as follows:-

> "Notwithstanding anything contained in the Industrial Relations Act, 1946 to 1990, at the request of a trade union or expected body, the Court may investigate a trade dispute where the Court is satisfied that –
>
> (a) it is not the practice of the employer to engage in collective bargaining or negotiations in respect of the grade, group or category or workers, who are party to the trade dispute and the internal dispute resolution procedures (if any) normally used by the parties concerned have failed to resolve the dispute,
>
> (b) either,
>
> (i) the employer has failed to observe –
>
> (I) a provision of the Code of Practice on Voluntary Dispute Resolution under section 42 of the Industrial Relations Act 1990 specifying the time for the doing of any thing (or such a provision of any code of practice amending or replacing that code), or
>
> (II) any agreement by the parties extending that period of time,
>
> OR
>
> (ii) the dispute having referred to the Commission for resolution in accordance with the provisions of the such code, no further efforts on the part of the Commission will, in the opinion of the Commission, advance the resolution of the dispute and the Court has received a report from the Commission to that effect,
>
> (c) the trade union or the expected body or the employees, as the case may be, have not acted in a manner which, in the opinion of the Court, has frustrated the employer in observing a provision of such code of practice, and
>
> (d) the trade union or the expected body or the employees, as the case may be, have not had recourse to industrial action after the dispute in question was referred to the Commission in accordance with the provisions of such code of practice."

For the purposes of the Act the "Court" is the Labour Court.

2.3 Thereafter s. 5 of the Act empowers the Labour Court, having investigated a trade dispute under s. 2, to make a recommendation:-

> "… giving its opinion on the matter and, where appropriate, its view as to the action that should be taken having regard to terms and conditions of employment, and to dispute resolution and disciplinary procedures, in the employment concerned".

2.4 Where a recommendation under s. 5 does not resolve the dispute, s. 6 of the Act provides:-

> "(1) Where in the opinion of the Court, a dispute that is the subject of a recommendation under Section 5 has not been

resolved, the Court may, at the request of a trade union or excepted body and following a review of all relevant matters, make a determination.

(2) A determination under subsection (1) may have regard to terms and conditions of employment, and to dispute resolution and disciplinary procedures, in the employment concerned but shall not provide for arrangements for collective bargaining.

(3) A determination under subsection (1) shall be in the same terms as a recommendation under section 5 except where –

(a) the court has agreed a variation with the parties, or

(b) the court has decided that the recommendation concerned or a part of that recommendation was grounded on sound or incomplete information".

2.5 It should also be noted that s. 9 of the Act provides for a review of a determination on the application of either party. Section 9 provides for the vacation of the determination in circumstances where the dispute as originally referred has been resolved or its affirmation where, in the opinion of the court, the dispute has not been resolved.

Section 9(c) provides that the court may:-

"vary the terms of the determination and the order giving effect to the determination where –

(i) the court agrees such variation with the parties, or

(ii) the court is satisfied that the determination or a part of the determination was grounded on unsound or incomplete information".

2.6 Finally s. 10, as amended by s. 4 of the 2004 Act, provides as follows:-

"(1) Where an employer fails to comply with the terms of a determination under section 6 within the period specified in the determination for those terms to be complied with (or, if no such period is so specified, as soon as may be after the determination is communicated to the parties) a trade union or expected body may make an application under this section to the Circuit Court for an order under subsection (2).

(2) On application being made to it in that behalf, the Circuit Court, shall, without hearing the employer or any evidence (other than in relation to the matters referred to in subsection (1) make an order directing the employer to carry out the determination in accordance with its terms."

2.7 It will, therefore, be seen that the section introduces a new and important measure into the industrial relations legislation in this jurisdiction. It provides for a mechanism whereby determinations of the Labour Court as to pay and conditions can, in certain circumstances, become legally enforceable. Therefore, ultimately, the Circuit Court can make an order under s. 10 which has the effect of making it mandatory on the employer concerned to carry out the terms of a determination or review of the Labour Court, made in accordance with the statutory scheme.

2.8 As will also be seen, the essential elements of that statutory scheme are:-

(a) The scheme only applies in circumstances where there is no collective bargaining. The only reasonable inference to draw from that provision is that the intention of the Oireachtas was to confer upon employees who did not have the benefit of collective bargaining, a means of attempting to achieve terms and conditions comparable to those who had the benefit of collective bargaining. It is clear that the statutory scheme does not impose collective bargaining on an employer (s. 6(2) expressly excludes from the competence of the Labour Court an entitlement to include a provision for collective bargaining in a determination). It is, therefore, clear that an employer is entitled to maintain a position of not engaging in collective bargaining. However where an employer does so determine, that employer is exposed to the possibility of industrial disputes arising being determined in a mandatory fashion by the Labour Court, with enforcement of any such determination by the Circuit Court.

(b) The scheme is designed to minimise the risk of industrial action. Section 2(1)(d) excludes from the benefits of the scheme, any employees who have recourse to industrial action after an initial reference of any dispute to the Labour Relations Commission in accordance with the code of practice referred to in s. 2(1)(b). This provision must be seen in the light of the provision noted at (a) above. To give rise to the jurisdiction an employer must decline to engage in collective bargaining and the employees concerned must refrain from industrial action.

(c) The statutory scheme involves at least a two stage process with a non binding recommendation under s. 5(1) being the first stage. If, as a result of such a recommendation, the dispute is not resolved, the Labour Court then has an entitlement to make a determination under s. 6. Thereafter the possibility of a third stage, whereby a review under s. 9 may be engaged in, also arises. It is clear that both in a consideration of whether to issue a determination, or in a review, the Labour Court has a discretion to vary the original recommendation where it is satisfied that the recommendation or a relevant part thereof "was grounded on unsound or incomplete information" (see s. 6(3)(b) in respect of a determination and s. 9(c)(ii) in respect of a review).

2.9 In the context of that statutory scheme it is now necessary to turn to the dispute that arose this case.

3. The Dispute

3.1 The original grievances giving rise to the dispute considered by the Labour Court involved six separate issues namely:-

(a) the operation of service charges,

(b) improvements in basic rates of pay;

(c) improvements in pension schemes;

(d) introduction of a sick pay scheme;

(e) commission for boutique workers; and

(f) clarification of the operation of grievance procedures.

3.2 It will be necessary to specify in some more detail the precise process followed with particular reference to the issue remaining before this court (that is the provision for minimum rates of pay) in due course. While there was, initially, an issue as to whether the necessary prerequisites for the existence of the jurisdiction of the Labour Court existed (i.e. that s. 2 of the Act was satisfied) the Labour Court was satisfied that the relevant conditions were met and no challenge to that decision is now made. I must, therefore, operate on the assumption that each of the requirements set out in s. 2 of the Act was met in this case. It is also important to note that the Labour Court engaged in a consideration of each of the issues referred to it. The Labour Court issued an interim recommendation (LCR 17760) dealing with disciplinary and grievance procedures. Thereafter on 22nd July 2004 the Labour Court made recommendations in respect of each of the other issues including recommendations in respect of rates of pay to which I will return. Thereafter correspondence followed seeking clarification of the recommendation. By letter dated 19th October, 2004 SIPTU requested the court to make a determination under s. 6(1) of the Act. It was accepted that the dispute which had been the subject of the investigation under s. 2 and the recommendation under s. 5, had not been resolved. The Labour Court, having received further submissions from both sides, issued its determination on the 14th January 2005. Some further correspondence concerning interpretation followed.

3.3 While the only issue which remains for consideration by this court is the question of the determination insofar as it relates to rates of pay, it is appropriate to note that separate aspects of the terms and conditions of any employee have, in a general sense, the capacity to affect each other. The overall terms and conditions (including pay) of any employee form a package of arrangements which have, at least to some extent, the capacity to interact with each other. Thus, for example and in particular, those aspects of the terms and conditions which relate to the financial rewards for work done, have a particular capacity to form a single package. A generous pension scheme, for example, can and may well require to be taken into account in assessing rates of pay.

3.4 In that context it is of particular relevance to note that issues relating to tipping/service charges have the capacity to play an important role in the overall financial package which employees in certain sectors may benefit from. While the specific issues which arose in respect of tipping/service charge are no longer, in themselves, part of the dispute so far as this court is concerned, it will be necessary to refer to certain aspects of the issues which arose under that heading insofar as it might reasonably be said to have impacted upon the determination of the Labour Court in relation to basic rates of pay. In that context I now turn to the course of the process before the Labour Court insofar as it related to rates of pay and, for the reasons which I have indicated, matters which might be said to impact upon rates of pay.

4. Rates of Pay

4.1 I will deal with the specific submissions made by the parties to the Labour Court on the pay issue in the context of the grounds of appeal to which I will turn in due course. Before dealing with the recommendation and determination of the Labour Court in regard to pay, some preliminary matters need to be stated. Firstly, as will be apparent, both parties filed detailed submissions and included within their submissions examples of what were contended to be comparable rates of pay in other hotels.

4.2 In considering and analysing the evidence put forward it is necessary to have regard to a number of distinguishing features which are relevant to any such comparison.

4.3 Particular reliance is placed by SIPTU on comparisons with hotels in respect of which collective bargaining arrangements were in place. Having regard to what I have identified as a clear policy in the legislation of seeking to afford additional rights to employees who did not have the benefit of collective bargaining, it does seem to me that it was legitimate for SIPTU to urge that particular weight should be attached by the Labour Court to comparisons with employees' pay rates where the pay rates concerned were in comparable hotels and had been arrived at as a result of a collective bargaining process. The precise weight to be attached to such comparisons (in distinction from other comparisons) was a matter for the Labour Court but it was clearly open to the Labour Court to pay particular attention to comparators which came from hotels of a similar nature where the terms and conditions of employees in those hotels had been fixed by collective bargaining.

4.4 Secondly it is clear from all of the materials and submissions put before the Labour Court that the practice and policy of a hotel in relation to service charges and tipping had the potential to affect the overall financial rewards which employees might obtain. It would appear from those materials that some hotels apply a service charge and some do not. It would also appear to have been contended on behalf of SIPTU (and it would appear to be a logical inference to draw) that the likelihood of customers paying tips above and beyond the amount actually billed would, at least in part, be influenced by whether customers believed that they were already paying a service charge which would be passed on to employees. In the event that customers did not feel that they were paying a service charge then it was likely that tips (whether paid directly to the employee concerned or by an addition to the bill) would be larger than in cases where the customer felt that he or she was already making a contribution to the service staff by means of a service charge.

4.5 For that reason SIPTU placed particular emphasis on the need to have regard to the service charge/tipping policy of a hotel when engaging in a comparison between the pay rates applicable.

4.6 The process before the Labour Court followed the following chronology (which I have taken from the written submissions filed on behalf of SIPTU and which, it seems to me, is fully supported by the evidence).

Chronology of Material Events

7th July 2003	Initiation of claim by Respondents
20th October 2003	Written Submission of Appellant
22nd October 2003	Written Submission of Respondent
22nd October 2003	Preliminary Hearing by Labour Court
19th November 2003	Decision of Labour Court NO. DECP032

18th February 2004	Written Submission of Respondent
18th February 2004	Written Submission of Appellant
18th February 2004	Substantive Hearing by Labour Court
20th February 2004	Additional Written Submission of Appellant
23rd February 2004	Interim Recommendation by Labour Court NO. 17760
14th April 2004	Additional Written Submission of Respondent
7th July 2004	Additional Written Submission of Appellant
7th July 2004	Substantive Hearing by Labour Court
22nd July 2004	Recommendation by Labour Court NO. 17914
August 2004	Request by Appellant for Clarification
19th August 2004	Respondent's submission on Recommendation
1st September 2004	Clarification by Labour Court
19th October 2004	Respondent's request for Determination
14th December 2004	Written Submission of Appellant
14th December 2004	Written Submission of Respondent
14th December	2004 Hearing by Labour Court on Determination
14th January 2005	Determination by Labour Court, NO. DIR051
26th January 2005	Appellant's request for Clarification
16th March 2005	Clarification by Labour Court

4.7 Insofar as relating to pay the original recommendation of the Labour Court of 22nd July 2004 stated the following:-

> "In support of its claim the Union submitted information on rates of pay and conditions of employment in a number of hotels, which were fixed by collective bargaining. The Employer supplied information obtained from a comprehensive survey of pay and conditions of employment in comparable five star hotels. This information was provided to the Court and to the other party to the dispute on a confidential basis and the Court requested that it be used only for the purposes of this investigation …. Having considered all the information with which it was provided the court recommends as follows:
>
> Rates of pay
>
> The rates of pay set out in the schedule to this recommendation should apply to the categories covered by the union's claim and detailed in its submission of 18th February 2004.
>
> All rates are expressed in Euros per 39 hour week and are inclusive of live-in/live-out allowances as stipulated by the Minimum Wage Act 2002. They are also inclusive of the payment derived from one point of the service charge in the case of those categories to which service charge is applicable. The rates are in respect of the basic grade in question and apply to staff who are trained and qualified in the duties of the grade. They are not applicable to trainees or those having extra responsibilities. Where individuals have rates higher than those recommended, the difference should be retained on a personal to holder basis".

There followed a schedule in the following form setting out the rates of pay applicable to each category specified.

Receptionist :	€350 pw.
Day Porter:	€372 pw.
Night Porter:	€411 pw.
Housekeeping Assistant:	€372 pr.
Linen Porter:	€372 pw.
Bartender:	€450 pw.
Still Room Assistant:	€337 pw.
Wash up Assistant:	€337 pw.
Waiter/Waitress:	€450 pw.
Chef:	€450 pw.

4.8 When approaching the issue of pay in the determination of the Labour Court of the 14th January 2005 the court said the following:-

> "In the course of its investigation of this dispute both parties provided the Court with comprehensive information concerning rates of pay and other conditions applicable to comparable grades of staff in similar employment. The court had full and careful regard to all of the information with which it was provided. In formulating its recommendation under s.

> 5 the court considered it appropriate, in the circumstances of the case, to have particular regard to rates of pay and other conditions of employment established by collective bargaining in establishments providing a broadly similar level of service to customers, and apply to staff having levels of skill and experience similar to those expected of the workers associated with the present claims".

4.9 On that basis the Court was not satisfied that its recommendations were based on "unsound or incomplete information" so as to trigger a variation under s. 6(3)(b).

4.10 The court then proceeded to make a determination in accordance with the terms of its earlier recommendation. In order to understand the determination it is necessary to explain the reference to "one point of the service charge". It was common case that the system operated by Ashford Castle gave employees an entitlement to a guaranteed rate of service charge payment. Therefore, irrespective of the amount of service charges actually collected within the hotel as a whole, those employees who were entitled to participate in receiving funds in respect of service charge were given a guarantee of a certain amount of money dependent on the number of points on a scale which the employee concerned had. The recommendation (and ultimately the determination) of the Labour Court had the effect of incorporating the first point on such scale into the minimum pay of the employee. It is clear, therefore, that those employees who were entitled to more than one point on the scale remained entitled to receive, in addition to their minimum pay, a guaranteed service charge payment based on the number of points, less one, which that employee had on the scale.

4.11 It is also relevant to these proceedings to note that, in its submissions to the Labour Court at the determination stage, Ashford Castle produced a financial review, supported by PricewaterhouseCoopers, concerning the effects on Ashford Castle of complying with what was then the recommendation of the Labour Court.

4.12 The position of Ashford Castle on this issue was as follows:-

> "Ashford Castle struggled to break even in 2003. The forecast for 2004 is only slightly better with the profit dependent on one month's trading. Also of concern is the fact that there is no immediate end to this trend, even without the recommended increases being applied …
>
> Ashford Castle has reached a crisis point and does not have a future unless profitability can be restored. This problem is made worse by the lack of resources available to carry out much needed refurbishment of the property. Ashford cannot withstand the imposition of additional labour related costs over and above the terms of the national agreements which Ashford Castle has implemented consistently over the last five years as this would have the effect of wiping out what modest profit is currently being forecast. Ashford must be restored to profitability to protect its very existence."

4.13 In relation to that aspect of the matter the court, in its determination, said the following:-

> "The court has had regard to all relevant circumstances and has decided to make a determination in this case. The court has had particular regard to the cost implications for the employer of the determination which follows. However this consideration must be balanced with the entitlement of the workers associated with this claim to rates of pay and other conditions of employment which are fair and reasonable in all the circumstances. In formulating its recommendation under s. 5, and in this determination, the court has balanced both considerations and has sought to produce a result which is fair and equitable to both the employer and the worker".

4.14 Against that factual background Ashford contends that this court should overturn the determination of the Labour Court in relation to rates of pay on six grounds which are summarised in the written submissions filed on behalf of Ashford Castle. It is suggested that the Labour Court was in error in that it fixed wage rates in the following manner:-

> (a) By reference to broad categories and not by reference to the position of workers actually employed by the Plaintiff notwithstanding that the dispute related to those particular workers.
>
> (b) Failed to take into account the actual guaranteed service charge received by workers within the particular categories in respect of which wages were fixed.
>
> (c) Fixed the wages rates for many of the workers within the categories far in excess of the minimum required by the Determination and at a level which by definition was beyond what was required by the fair and reasonable criterion invoked by the Labour Court.
>
> (d) The Labour Court fixed many (though not all) wage rates at levels higher than those requested by the Defendant.
>
> (e) Did not have regard to the surveys and rates of pay in the hotel sector submitted by the Plaintiff comprising 75 hotels not in just in Dublin but all around the country. It appears to have had regard to pay rates in the Herbert Park Hotel and the Conrad Hotel which are described as non-service charge hotels and an unspecified Holiday Inn which is described as a service charge hotel and to pay rates in Great Southern Hotels and Jurys Hotels cited by SIPTU in its letter to the Labour Court of the 14th April 2002.
>
> (f) Required the Plaintiff to pay rates which, on the undisputed evidence, is it is financially unable to pay.

36. **4.15** Before considering the detail of the case made under each heading it is necessary to deal with the basis upon which this court should consider an appeal from a body such as the Labour Court. There is no significant difference between the parties as to the basis upon which an appeal such as this should be considered.

5. The Basis of Appeal

5.1 An appeal on a point of law from an expert tribunal exists in a number of areas of Irish law. In *Henry Denny & Sons (Ireland) Limited Trading as Kerry Foods v. Minister for Social Welfare* [1998] 1 I.R. 34 at 37 Hamilton C.J. said the following:-

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

5.2 In *Orange v. Director of Telecommunications Regulation and Another (No. 1)* [2002] 4 I.R. 159 at 184 Keane C.J. quoted with approval a passage from the judgment of the Canadian Supreme Court in *Southan v. Director of Investigation and Research* (1997) 1 FCR 748 in the following terms:-

> " … (an) appeal from a decision of an expert tribunal is not exactly like an appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially) to the courts, it is because the tribunal enjoys some advantage that the judges do not. For that reason alone review of the decision of a tribunal should often be of a standard more deferential than correctness …
>
> I conclude that the … standard should be whether the decision of the tribunal is unreasonable. This is to be distinguished from the most deferential standard of review which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it".

5.3 I agree with the recent summary of the authorities set out by Gilligan J. in *Electricity Supply Board v. The Minister for Social Community and Family Affairs and Others* (Unreported, High Court, Gilligan J., 26th February, 2006) where, at p. 30, the following is stated:-

> "I take the view that the approach of this court to an appeal on a point of law is that findings of primary fact are not to be set aside by this court unless there is no evidence whatsoever to support them. Inferences of fact should not be distributed unless they are such that no reasonable tribunal could arrive at the inference drawn and further if the court is satisfied that the conclusion arrived at adopts a wrong view of the law, then this conclusion should be set aside. I take the view that this court has to be mindful that its own view on the particular decision arrived at is irrelevant. The court is not retrying the issue but merely considering the primary findings of fact and as to whether there was a basis for such findings and as to whether it was open to the appeals officer to arrive at the inferences drawn and adopting a reasonable and coherent view, to arrive at her ultimate decision".

5.4 Many other decisions (such as *Faulkner v. The Minister for Industry and Commerce*) (Unreported, High Court, Murphy J., 25th June, 1993) and *Brides v. Minister for Agriculture* [1998] 4 I.R. 250) are to a similar effect. Much of the jurisprudence also draws on the celebrated passage from the judgment of Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] ILRM 421 which, while related to the proper approach to an appeal by way of case stated in revenue matters, has been taken to be equally applicable to an appeal on a point of law from a body such as the Labour Court.

5.5 To those authorities I would merely add one further observation. The tasks which administrative bodies are given under statute vary significantly. The issues which have to be decided can be of very different types. At one end of the spectrum are issues which involve the same sort of mixed questions of law and fact with which the courts are frequently faced. A person may, for example, be entitled to a social welfare benefit provided that a certain set of facts, as specified by statute, are found to exist. The issue at a hearing within the social welfare system may well, therefore, turn on whether, as a matter of fact, the necessary qualifying requirements have been established or disqualifying requirements have been shown to exist. In such cases the findings of fact will be very similar to the facts which will be found by a court should a comparable issue arise in judicial proceedings.

5.6 At the other end of the spectrum, expert bodies may be required to bring to bear upon a situation a great deal of their own expertise in relation to matters which involve the exercise of an expert judgment. Bodies charged with, for example, roles in the planning process are required to exercise a judgment as to what might be the proper planning and development of an area. Obviously in coming to such a view the relevant bodies are required to have regard to the matters which the law specifies (such as, for example, a development plan). However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area.

5.7 Some of the cases use terminology such as "evidence" and "finding of fact" which are borrowed from the approach of the courts. That terminology is entirely apposite where the issue which the statutory body has to decide is towards the end of the spectrum identified above which most closely approximates to the sort of issues which a court has to determine.

5.8 Where applied to decisions towards the other end of the spectrum, language such as "evidence" and "findings of fact" has, in my view, a capacity to mislead and has to be adapted to reflect the different sort of matters which statutory bodies dealing with issues of that type have to consider. It may, in those circumstances, be more appropriate to talk of "materials" rather than "evidence". It may also be more appropriate to speak of "conclusions" rather than "findings of fact".

5.9 Subject to the overriding requirement that any party who may be potentially effected in an adverse way by the result of the process, is entitled to a reasonable opportunity to deal with any factors (to use a neutral term) which may influence the decision, a body may well have an entitlement to place reliance on "materials" which might not be "evidence" in the sense in which that term is used in the courts. This will be particularly the case were the nature of the matter to be determined by the body concerned does not resemble, to any significant extent, a finding of fact (or even a finding of expert fact) in the sense in which the courts use such a term.

5.10 Furthermore such bodies will have to reach conclusions which involve the exercise of their expertise within the statutory framework as a whole. A decision, for example, that a particular project is in accordance with good planning and development is, in my view, better described as a "conclusion" rather than a "finding of fact".

5.11 In those circumstances it seems to me that the Labour Court, when exercising its role under the Act, is very much towards the end of the spectrum where it is required to bring to bear its own expert view on the overall approach to the issues. It, correctly in my view, identified that its decision must be one which is fair and reasonable to both sides. Precisely what is fair and reasonable in the context of terms and conditions of employment is a matter upon which the Labour Court has great expertise and, in my view, the Labour Court is more than entitled to bring its expertise to bear on the sort of issues which arise in this case.

5.12 For those reasons it does seem to me that a very high degree of deference indeed needs to be applied to decisions which involve the exercise by a statutory body, such as the Labour Court, of an expertise which this court does not have. Similarly in

assessing whether a decision could legitimately have been come to by the Labour Court, it is necessary to consider all of the materials which were properly before the court and to identify whether those materials could reasonably have led to the conclusion reached, taking into account the legitimate exercise by the Labour Court of its own expertise in the matter.

5.13 In that context it is necessary to consider the specific manner in which it is alleged that this court should allow the appeal of Ashford Castle against the determination of the Labour Court.

6. The grounds of appeal
6.1 I deal with each of the grounds in turn.

6.2 **Ground (a)**
Under this heading it is contended that the decision of the Labour Court is defective by virtue of the fact that the determination (and, indeed, the recommendation before it) fixed the minimum rates of pay by reference to certain broad categories of employee rather than by reference to the different rates then applied to those actually employed by Ashford Castle. The factual background to this issue stems from the fact that Ashford Castle, in the course of its submissions to the Labour Court at the recommendation stage, supplied details of the basic pay of each employee. It is clear from the relevant materials that a very large number of different rates of pay applied in respect of those employees. This fact may, indeed, have stemmed from the absence of collective bargaining. However, as will be seen from the terms of the schedule to the recommendation referred to above, that recommendation refers only to ten separate categories of employee. Both the recommendation (and the determination which followed it) and the clarifications which were issued, make it clear that each rate is to be applicable to any fully trained person carrying out a job of the relevant description. Therefore, as a matter of fact, it would appear that the Labour Court made a determination which had the effect of fixing a single minimum rate of pay in respect of all of the employees within a category where different rates of pay had, in fact, existed in respect of different members of the same category.

6.3 It is, however, clear that the Labour Court paid particular regard to the rates of pay presented by SIPTU for comparable hotels in respect of which the employers concerned engaged in collective bargaining. The categorisation of employees by Ashford Castle varied significantly from that applied in each of those comparable employments. In my view it was open to the Labour Court to take the view (which, in terms, it did) that it would place a very heavy weight indeed upon rates of pay negotiated as a result of collective bargaining. In those circumstances I can see nothing wrong with the Labour Court having placed particular reliance on the rates of pay produced by SIPTU in support of its case. Having regard to the fact that those rates of pay could not be married, on a one-to-one basis, with the categories applicable in Ashford Castle, it does not seem to me that there was anything inappropriate in the Labour Court deciding on the overall approach which it did. It should be remembered that the Labour Court was fixing minimum rates of pay. Whether any or all persons within any category should receive higher rates is a matter for negotiation between the individual concerned and Ashford Castle as employer. Insofar as the payment of the minimum rate fixed by the Labour Court would give rise to a reduction in the pay of any individual, then that individual's former pay was to be retained for as long as he or she should continue in employment. It does not seem to me that it could be said to be in breach of a "fair and reasonable to all sides" approach to the question of pay that same should be fixed by reference to the categories identified in the recommendation and the determination.

6.4 Furthermore, the recommendation and determination expressly exclude persons within any category who have additional responsibilities. If one excludes such persons from the comparable lists of pay submitted in respect of the Conrad Dublin and the Herbert Park Hotel, (being two of the hotels relied on by SIPTU in its submission to the Labour Court) then it is clear that a relatively small number of comparable categories of pay existed in those hotels. For example, under the heading "accommodation" in respect of the Conrad Dublin there are nine separate categories. However, the first three of those categories involve managers and supervisors who undoubtedly carry extra responsibility. The next four categories all receive the same pay and one of the remaining two categories is a trainee grade (which grades are, again, excluded from the Labour Court determination in this case). Thus it will be seen that in the Conrad Dublin, virtually all employees in the housekeeping area who are neither in a management or supervisory role on the one hand or trainees on the other hand, receive the same basic rate of pay.

6.5 In the light of considerations such as those, I am not satisfied that this ground provides any basis for overturning the determination of the Labour Court.

Ground (b)
6.6 Under this heading it is suggested that the Labour Court failed to take into account the actual guaranteed service charge payment to which I have earlier referred. I can see no basis for this contention. It is manifestly clear that the Labour Court was mindful of the guaranteed service charge payment. Indeed the Labour Court specified in the course of its determination that one point of that service charge payment was to be included in the basic rates of pay. It is clear, therefore, that the Labour Court was well aware of the fact that each employee would be entitled, as a result of the implementation of its determination, to receive his or her basic pay together with the guaranteed service charge payment for all but one of the points applicable to that employee. It is necessary, in respect of some of the other grounds of appeal, to consider whether the accumulation of those two matters gives rise to rates of pay which were outside the scope of what could reasonably have been determined by the Labour Court. I will return to that aspect of the guaranteed service charge under that heading. However, it does not seem to me that there is any basis for the narrow suggestion set out at ground (b) to the effect that the guaranteed service charge (and the benefit to be obtained therefrom by a number of employees) was not taken into account.

Grounds (c), (d) and (e)
6.7 Under each of these grounds complaint is made that the overall level of the minimum pay fixed by the determination was, in substance, excessive. This is put in different ways. It is said that the levels exceeded those required by the fair and reasonable criteria adopted by the Labour Court. It is also said that the rates, in many cases, exceeded those sought by SIPTU. Finally, it is said that no regard was had to the surveys on rates of pay in the hotel sector submitted on behalf of Ashford Castle.

6.8 For the reasons which I have indicated above, it seems to me that the Labour Court acted within its discretion in determining that it should pay particular regard to the rates of pay which had been fixed as a result of a collective bargaining process. There is no evidence to suggest that the Labour Court did not, also, have some regard to the other information concerning rates of pay placed before it by Ashford Castle. Indeed, in its determination it says that it had regard to all of the information. In the circumstances it does not seem to me that this Court should attempt to second guess the judgment of the Labour Court as to which comparators it considered to be appropriate and the weight to be attached to same. The only circumstances in which, in my view, a point of law might arise under that heading (that is to say ground (e)) would have been if I were persuaded that the Labour Court was incorrect, as a matter of law, in placing the weight, which it undoubtedly did, on the collective bargaining comparators. For the reasons which I have already set out I am not satisfied that the Labour Court was wrong in law in approaching the matter in that way.

6.9 In respect of ground (d) it should be noted that, in its original submission to the Labour Court, SIPTU sought an increase in basic

pay of between 25% and 30% across all non-managerial grades. That increase was specified as being necessary to address what was contended to be a disparity between the rates paid in Ashford Castle and those applicable in what were suggested to be appropriate industry comparators. It was also suggested that such a rate of increase in basic pay was necessary because of the fact (which does not appear to be disputed) that Ashford Castle has not, for an appreciable period, applied the terms of national pay understandings, although it was common case that such increases (in accordance with National Pay Agreements) had been paid for two or three years prior to the matter coming before the Labour Court.

6.10 Counsel for Ashford Castle makes the point that the purpose of the statutory scheme is to resolve disputes. It follows, he argues, that a determination cannot go any further than the parameters of the dispute and is, therefore, confined to the competing positions of the employer and employees concerned. That may well be so. However, the position adopted by SIPTU on behalf of the employees was that an increase in basic pay of 25% to 30% was warranted. I will turn, in early course, to the question of whether it was reasonable for the Labour Court to come to the conclusions which it did as to basic pay. However, it does not seem to me that there is any factual basis for the assertion that the determination exceeded the amounts claimed.

6.11 It may well be that Ashford considered (and continues to consider) that granting an increase of 30% on basic pay while continuing to meet the guaranteed service charge payment at the same time, would amount to an unsustainable and excessive rate of pay in many cases. However, that is not the issue which is raised in ground (d). I cannot see any true factual basis for allowing the appeal on the grounds that the Labour Court went beyond the amounts claimed by SIPTU on behalf of the employees.

6.12 That leads to what is one of the central issues in the case. It is contended that there were no materials upon which the Labour Court could reasonably have concluded that the rates of pay recommended were fair and reasonable. In particular it is said that the rates were significantly above any of the comparators put forward. In this context it is necessary to refer to a schedule exhibited on behalf of Ashford Castle by Niall Rochford as exhibit "NR2" to an affidavit of 25th April, 2005. This schedule sets out a range of materials which, it was argued, were derived solely from the materials before the Labour Court and certain mathematical calculations that could have been made in respect of those materials. Objection was taken to the introduction of the exhibit on behalf of SIPTU. Reliance was placed on *Bates –v- Model Bakery* [1993] 1 I.R. 359, for the proposition that this Court can only consider materials which were before the Labour Court. Having regard to the contention on the part of Ashford Castle that the exhibit represented only materials which were otherwise before the Labour Court but presented in a convenient fashion, I accepted that the document should be admitted but subject to the entitlement of counsel for SIPTU to argue that any particular aspect of the schedule should be disregarded if it could not be shown to be directly derived from the materials before the Labour Court.

6.13 The merits of SIPTU's objection to the admission of the exhibit were, in my view, amply demonstrated in the course of the hearing. It was clear that the exhibit contained significantly misleading information. To take but two examples I should refer firstly to the category of junior waiter/ess. As part of an attempt to show that the amounts awarded by the Labour Court in respect of that category of employee exceeded any amounts in respect of which a comparator had been provided by SIPTU, the schedule suggests that the rate applicable to a junior waitress in the Herbert Park Hotel was €339. However, it is clear from the original document produced to the Labour Court on behalf of SIPTU that the rate of €339 is applicable only to waiting staff for the first six months of training. It is therefore abundantly clear that that rate (and indeed the rate of €382.17 attributed in the exhibited schedule to what are described as intermediate waiter/ess) are applicable only to trainees. As was clear from the recommendation and determination of the Labour Court, the rates of pay recommended had no application to trainees. The attempt, therefore, to suggest that there was any comparison between those two rates and the rates recommended in respect of waiter/ess by the Labour Court is wholly unfounded. It has to be said that the inclusion of those matters in the schedule as deposed to on oath by Mr. Rochford is regrettable.

6.14 Furthermore, it could not be said to have been an isolated error. An identical error (although the sums were different) appears in the case of a second example, being bar staff. Similar issues arise in the case of night porters and other categories.

6.15 The exercise also shows the extreme danger of permitting any materials other than those which were before the statutory body in question to be introduced at an appeal. Indeed it provides a strong argument for a return to the procedure advocated by Finlay C.J. in *Bates* which sought to confine the evidence to an affidavit which exhibited only the materials which were before the body in question and the determination of that body and excluded any additional matter. It does not appear to me to be appropriate for affidavits filed either in support of or against appeals of this type to include any additional materials whether by way of argument or background.

6.16 Finally, before leaving the question of the disputed schedule, it is appropriate, again by way of illustration, to have regard to the calculations in respect of non trainee waiter/ess. In that regard the comparable rate for the Herbert Park Hotel was €424.64. The amount of basic pay recommended in respect of that category by the Labour Court for Ashford Castle was €450 to include one point of the guaranteed service charge payment. It was common case that that one point amounted to a payment of €21.25. In those circumstances the basic pay (exclusive of any service charge payment) in respect of the category was €428.75 (a figure almost identical to that paid in respect of the comparable category in the Herbert Park Hotel). Other examples of a similar variety could be quoted. I am afraid I have to describe the argument put forward by Mr. Rochford in his affidavit (which is designed to suggest that the rates of pay determined by the Labour Court were significantly in excess of those in respect of the SIPTU comparator hotels) as highly contrived and of no merit whatsoever.

6.17 Insofar as it is contended that the rates of pay for comparator purposes should have included the guaranteed service charge payable in respect of Ashford Castle employees, it again seems to me that this argument misses the point. The Herbert Park Hotel is, it is common case, a non service charge hotel. For the reasons indicated above there was a more than ample basis for the Labour Court to conclude that employees in such a hotel would achieve significant sums by way of tips or service charge. On that basis it does not seem to me that there was anything inappropriate in the Labour Court coming to a view as to the appropriate basic rates of pay in Ashford Castle (which, of course, included one point of the guaranteed service charge payment) which were comparable to the basic rates payable in other hotels but which did not have regard to the service charge payments or tips which might be earned in addition to basic pay in either case. It may or may not be that the guaranteed service charge payment in Ashford (including the one point included, where applicable, in the basic rates of pay) maybe less than, broadly equal to, or greater than the tips or service charge payments received by employees in a hotel such as the Herbert Park which does not operate a service charge per se. Whatever maybe the case it does not seem to me that it was outside the discretion of the Labour Court, having regard to its own expertise, to conclude that the basic pay of employees in the broad categories defined by it in respect of Ashford Castle should be comparable to the basic pay (exclusive of whatever tips or other payments might be received) in other comparable establishments such as the Conrad Dublin and the Herbert Park Hotel. On the basis of that factual analysis, it seems to me that the contention that rates of pay (on a comparable basis) as determined for Ashford Castle were not supported by reference to those applicable in the Herbert Park Hotel and the Conrad Dublin, was unsustainable.

6.18 I am therefore not satisfied that any of the grounds put forward under these headings would justify allowing an appeal.

Ground (f)
6.19 The final ground relied upon stems from a contention that the amounts recommended and determined were such that Ashford Castle was, on the only available materials, unable to pay them. As will be recalled, subsequent to the recommendation and in the course of the process leading to the determination, Ashford Castle put before the Labour Court certain financial information from which it was suggested that the payment of the rates recommended to all existing staff would amount to an additional labour cost of €300,000 per annum and that this sum (if applied, as an exercise, retrospectively to the previous three years trading) would have led to a reduction in the profits for the year 2002 from a sum in excess of €400,000 to a sum just in excess of €100,000. It would also, it was suggested, have led to the more or less break even situation that obtained in 2003 being converted into a loss of just less than €300,000 and would have had the effect of converting the projected profit for 2004 of just short of €280,000 to a loss of €20,000. It was also suggested that the projections for 2005 were marginally worse than those for 2004.

6.20 It is clear from the relevant passages of the determination of the Labour Court that regard was had to that situation. However the court was of the view that it also should have regard to ensuring that the pay of employees in Ashford Castle was comparable, taking all relevant factors into account, to other similar hotels. For the reasons which I have analysed in some detail above I am satisfied that the Labour Court was more than entitled to come to the conclusion that the rates of pay which it was recommending and determining were so comparable, when proper regard was had to all relevant factors.

6.21 In those circumstances the question arises as to the range of discretion open to the Labour Court in circumstances where it is faced with, on the one hand, an apparent need to increase significantly rates of pay so as to bring same into conformity with other comparable businesses and, on the other hand, a contention on behalf of the employer concerned, that the increased personnel costs which would flow from such an increase would have the effect of making the business unprofitable. It should be noted that the high watermark of Ashford Castle's case under this heading would have demonstrated that profits over the three years under consideration would have been extinguished and replaced by a very marginal loss. The average loss over the four years (if one includes the projections for 2005) if one were to factor in an increase of €300,000 in respect of labour costs in each year would appear to be between €50,000 and €60,000. That figure needs to be seen in the context of a business with an annual total revenue of the order of €9 million, total operating profits of €2 million and an annual payment into a replacement reserve of the order of €450,000. The ability of Ashford Castle to take measures to restore profitability needs to be seen against the background of a business of that size.

6.22 In those circumstances it does not seem to me that it necessarily followed that the only fair and reasonable decision which the Labour Court could have come to would have been to the effect that to award rates of pay which were, for the reasons which I have analysed above, comparable to other similar hotels would place such a burden upon the business as would make it unreasonable to make a determination providing for such rates of pay. Many businesses are faced with difficult choices when confronted with a lack of acceptable profitability. The court was entitled, in my view, to have regard to the fact that other comparable hotels seem to be able to maintain financial viability while paying rates of pay comparable to those which were recommended in respect of Ashford Castle.

6.23 In all the circumstances it does not seem to me that the determination of the Labour Court fails a reasonableness test on this ground either.

7. Conclusions
For the above reasons it does not seem to me that any of the grounds put forward for suggesting that the determination of the Labour Court was unreasonable are sustained. For those reasons I would propose disallowing the appeal.