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WRC

An Coimisiún um Chaidreamh san Áit Oibre
Workplace Relations Commission

# Workplace Relations Commission Report

## Summary of Key Judgments of the Irish Courts and the Court of Justice of the European Union from 2015 to 2022 Relating to Decisions of the Workplace Relations Commission

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# ***Introduction:***

This is the first volume of what we hope will be a regular publication of a "*Summary of Key Judgments of the Irish Courts and the Court of Justice of the European Relating to Decisions of the Workplace Relations Commission*".

WRC Adjudication Officers ("***AO***"s) are provided with summaries of relevant judgments of the Irish Courts, the Court of Justice of the European Union and the European Court of Human Rights on a regular basis, so that lessons from those judgments can be applied to enhance the quality of the WRC's decision-making and to inform internal training sessions.

The WRC hopes that that this publication and the trends it maps will be useful to legal practitioners and those interested in the work of the WRC.

# ***Constitutionality of the Workplace Relations Act 2015:***

## Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General [2021] IESC 24:

### Introduction:

In *Zalewski v. Adjudication Officer & Ors* [2021] IESC 24, the Supreme Court scrutinised the procedural fairness afforded by the WRC pursuant to its founding legislation Workplace Relations Act 2015 ("***WRA 2015***"). While the benefits of "*providing a cheap, relatively informal and efficient decision-making function*"[1] were noted, it was held that they cannot come at the expense of "*the law and those procedures necessary for a fair determination*".[2] The Supreme Court identified the legislation governing certain WRC procedures as being inconsistent with the Constitution, namely: the absence of a provision for an AO to administer an oath or affirmation; the absence of a possibility of punishment for giving false evidence; and the conduct of hearings in private. The Workplace Relations (Miscellaneous Provisions) Act 2021 was subsequently introduced and the WRC duly amended its procedures.

### Background:

Mr. Zalewski was employed by Buywise Discount Store Limited as a security guard and supervisor. When dismissed from his job for allegedly failing to follow company procedures, he brought unfair dismissal and non-payment of notice claims before the WRC. The parties attended a hearing and the AO accepted written submissions and documentation. The matter was adjourned and another date was scheduled. However, when the parties attended, they were told that a decision had been rendered in favour of the Respondent, based upon the written submissions. This resulted in an appeal to the Labour Court; and the institution of judicial review proceeding before the High Court – seeking *inter alia* to quash the AO's decision and challenge the constitutionality of the WRC's adjudicative process, as established under the WRA 2015. The High Court essentially upheld the constitutionality of the WRC's adjudicative process and the matter was appealed to the Supreme Court.

The Supreme Court appeal encompassed four complaints under Article 40.3 of the Constitution: (i) there was no requirement that AOs or members of the Labour Court have any legal qualifications, training, or experience; (ii) there was no provision for an AO to administer an oath or affirmation and there was no criminal sanction for a witness who gave false evidence before an AO; (iii.) there was no express provision made for the cross-examination of witnesses; and (iv.) the proceedings before an AO were held otherwise than in public.

### Findings:

The Supreme Court's majority judgment was delivered by O'Donnell J.:

[1] Judgment, para.137.

[2] Judgment, para.139.

Firstly, he noted that while the administration of justice is a function which is usually reserved for the courts under Article 34 of the Constitution, bodies such as the WRC are permitted to do so "*in a context that is non-criminal and limited*"[3] under Article 37. O'Donnell J. held that in exercising such functions, the WRC must act in accordance with the "*fundamental components of independence, impartiality, dispassionate application of the law, openness, and, above all, fairness*" and that *"[t]he standard of justice administered … cannot be lower or less demanding than the justice administered in courts*".[4]

O'Donnell J. found that it was not unconstitutional that AOs were not required to hold legal qualifications. However, he emphasised that "*it is not possible to have claims fairly determined in accordance with law in the absence of law and fair procedures*."[5]

O'Donnell J. found that the absence of a provision for the administration of an oath or any possibility of punishment for giving false evidence is inconsistent with the Constitution. He noted that "*the requirement to give evidence on oath, and the possibility of prosecution for false evidence, is an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence*."[6]

O'Donnell J. emphasised the benefits of cross-examination as a core part of fair procedures. He held that while it was unsatisfactory that there was no express provision for cross-examination in the WRA 2015, it was not unconstitutional. He also noted that the 2015 Guidance Note for a WRC Adjudication Hearing provides for cross-examination and, in any event, if it is wrongly refused, a remedy would be available.

O'Donnell J. did not accept that a blanket prohibition on public hearings could be justified. He noted that public hearings may bring forward further relevant evidence and witnesses; allow a party to achieve public vindication; and allow the public to see justice administered. He noted that "*from time immemorial* [the requirement for a public hearing has] *been regarded as fundamental to the administration of justice*".[7]

Finally, O'Donnell J. noted that the independence of decision-makers was touched upon in argument but did not constitute a specific challenge. He further noted that *"[i]ndependence and impartiality are fundamental components of the capacity to administer justice*."[8] As such, he found that the power of revocation over the AO's appointment could not be exercised in a manner which interfered with, or detracted from, their independence.

[3] Judgment, para.138.
[4] Judgment, para.138.
[5] Judgment, para.139.
[6] Judgment, para.144. [7]
Judgment, para.142. [8]
Judgment, para.147.

## ***Appropriate Use of Judicial Review Proceedings:***

**Ammi Burke (Applicant) v. An Adjudication Officer and the Workplace Relations Commission (Respondents) and Arthur Cox LLP (Notice Party) [2021] IEHC 667:**

**Introduction:**

This judicial review matter concerned a challenge to the handling of an unfair dismissal claim by the WRC. Simons J. dismissed the Applicant's challenges in their entirety and in his judgment made salient and more widely applicable findings regarding the application of the Supreme Court judgment in *Zalewski v. An Adjudication Officer & Ors* [2021] IESC 24; the administration of justice; and the appropriate use of judicial review proceedings.

**Background:**

On 31 January 2020 the Applicant brought an unfair dismissal claim against the Respondent before the WRC. The claim had had been part heard, but not yet determined, when the *Zalewski* judgment was handed down on 6 April 2021. The Zalewski judgment identified legislative shortcomings governing certain WRC procedures, one of which concerned the absence from the Unfair Dismissals Act 1977 of any provision for the administration of an oath or affirmation. The legislation was subsequently amended in July 2021 by the Workplace Relations (Miscellaneous Provisions) Act 2021.

Having heard submissions from the parties on 12 May 2021, the AO wrote to the parties on 26 May 2021, outlining her decision to recuse herself from the case so that it could be heard afresh before a different AO who would administer the oath or affirmation. She noted "*I am firmly of the view that, in light of the* [Zalewski] *Supreme Court judgment, this is the safest and most prudent course of action*".[7] On 19 July 2021, the Applicant brought judicial review proceedings essentially challenging this decision. The Applicant sought an order directing the AO to resume the hearing of the unfair dismissal claim. The Applicant also sought an order compelling the AO to direct the disclosure of certain documentation.

**Findings:**

[7] Judgment, para.20.

Simons J. dismissed the logic of the Applicant's argument that the AO should determine the unfair dismissal claim by reference to the unamended and (now) unconstitutional legislation. Simons J. found that the Applicant would not be at a disadvantage as the procedural safeguards upheld by the *Zalewski* judgment are for the benefit of all parties. Moreover, he found no support for the proposition that that the *Zalewski* judgment did not apply as the unconstitutionality finding concerned a legislative omission. Finally, relying on *Wily v. Revenue Commissioners* [1994] 2 I.R 160, Simons J. noted that the Applicant "*cannot be said to have any legitimate expectation that her claim for unfair dismissal would be completed under the unamended, invalid version of the legislation*."[8]

Simons J. emphasised from the outset that "*it would be most unusual for this court, in the exercise of its judicial review jurisdiction, to intervene in the proceedings of any tribunal exercising a judicial function prior to the conclusion of those proceedings*."[9] In any event he found it highly apparent that there were significant conflicts of fact. Simons J. found that these conflicts could only be addressed properly and fairly by requiring the evidence to be given under oath and submitted to crossexamination. As a result, he found that "*there can be no doubt but that the decision to discontinue the hearings, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer is legally correct*."[10] Simons J. noted: "*It was eminently sensible for the (original) adjudication officer to take the precaution of ensuring that the fresh hearing be before a different adjudication officer who had not had any prior involvement*."[11]

Simons J. accepted that hearing the unfair dismissal claim afresh will result in some delay. However, he found that any concerns about delay were outweighed by the elimination of any possible perception of predetermination, relying on the Court of Appeal findings in Commissioner *of An Garda Síochána v. Penfield Enterprises Ltd* [2016] IECA 141.[12]

Simons J. found that there was no basis whatsoever for the Applicant's personal criticisms of the AO and noted that the Applicant subsequently withdrew the allegations of bias on the part of the AO or the WRC at the hearing.

Simons J. rejected in full the arguments that the WRC's published notices were an incorrect interpretation of the *Zalewski* judgment and a "whitewash" of the AO's decision. He found no evidential basis for these allegations and was satisfied that the policy revised on 30 July 2021 correctly interpreted and applied the *Zalewksi* judgment.

Simons J. noted the gravity of the Applicant's disclosure request which would result in the High Court intervening in a part-heard claim for unfair dismissal and making a significant decision as to how it should be conducted. He referred to s.8(13)(a) of the Unfair Dismissals Act 1977, stating that the production of documents was solely a matter within the statutory discretion of the AO. He refused to order the disclosure on a number of grounds, namely, the matter would be heard afresh and so any complaint regarding the disclosure of documents was moot; the AO had not made any final decision concerning the disclosure of documents and it would therefore be premature to grant judicial review (see *Huntstown Air Park Ltd v. An Bord Pleanála* [1999] 1 I.L.R.M. 281); and in this case, there was also a full right of appeal to the Labour Court once the decision-making at first instance concluded.

[8] Judgment, para.57.
[9] Judgment, para.62.
[10] Judgment, para.69.
[11] Judgment, para.72.
[12] Judgment, para.74.

Finally, Simons J. made some general observations regarding the appropriateness of seeking judicial review of interim procedural rulings made in the context of an unfair dismissal claim. He noted that judicial review is a discretionary remedy and relief will be refused where the application is premature or where there is an adequate alternative remedy. He stressed that it was not for the High Court to micromanage proceedings before an AO. He stated that a judicial review concerns the legality of a decision and that the High Court would have to be "*satisfied that the ruling was manifestly unfair, unreasonable or otherwise made without jurisdiction before it could set aside an interim procedural ruling*."[13]

Simons J. handed down a separate detailed judgment in February 2022 awarding costs in favour of the WRC to reflect the extent of its participation in the litigation[14].

## ***Statutory Appeal before Labour Court is an Adequate Alternative Remedy:***

**Erdogan v. The Workplace Relations Commission [2021] IEHC 348:**

**Introduction:**

This case concerned an application for leave for judicial review The underlying challenge concerned an AO's decision to dismiss a complaint under the Employment Equality Act 1998-2015 ("***EEA***") because it was made outside of the prescribed 6-month time limit.

**Background:**

The Applicant brought a discrimination claim under the EEA, alleging that he was discriminated against during his employment and dismissed by acts of discrimination and victimisation. The Respondent argued that the complaint was made outside of the 6-month time limit –the employment terminated on the 14 February 2017 and the complaint was filed on 24 May 2018.

The 6-month time limit may be extended where the delay is due to a misrepresentation by the respondent under s.77(6) of the EEA. The Applicant contended that certain information only came to his attention on 15 January 2018, at a separate hearing before the WRC in respect of an unfair dismissal claim which was later withdrawn. He argued that minutes of meetings produced at this hearing were '*false*' and '*forged*', and that witnesses lied during the hearing. The AO concluded that the Applicant failed to provide evidence of misrepresentation and so the complaint was out of time.

**Findings:**

Simons J. identified the principal issue as being whether the statutory appeal before the Labour Court is an adequate alternative remedy. He applied the *McGoldrick v. An Bord Pleanála*[15] approach:

[13] Judgment, para.115.

[14] *Burke v An Adjudication Officer, the WRC and Arthur Cox (Notice Party)* [2022] IEHC 45

[15] [1997] 1 I.R. 497 (at 509).

*"The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his mind."*

He cited the six relevant factors listed *in O'Donnell v. Tipperary (South Riding) County Council*[16] and in particular looked to the fourth factor which states:

*"The essence of the issue raised relates to evidence as to the allegedly fraudulent actions of the applicant and this may be dealt with fully by an appeal before the EAT, rather than as a review of procedure. It is manifestly a matter for an appeal process rather than a review of procedure."*

Simons J. emphasised that judicial review is not the appropriate procedure to address allegations of fraud. He then looked at the following aspects of the decision-making structures under the Workplace Relations Act 2015:

- The appeal before the Labour Court is a *de novo* appeal.
- The procedure before the Labour Court is more formal than in the WRC and entails procedural safeguards which are not statutorily required before an AO, in particular the jurisdiction to hear evidence on oath (this case was decided before the Supreme Court decision in *Zalewski* was handed down).
- There is a right of appeal against the determination of the Labour Court to the High Court on a point of law.[17]

Simons J. then addressed the Applicant's three judicial review grounds, in light of the above principles:

1. Requirement to Hear the Other Side:

Simons J. found that the allegation that the AO's decision goes beyond the time-limit point, is not something which justifies a judicial review. He noted that it is not possible to treat the underlying merits of the claim as hermetically sealed from the time-limit point.[18]

2. The AO's Decision was Unreasonable:

Simons J. found the Labour Court to be much better positioned to resolve this allegation, as this issue goes to the factual dispute between the parties.[19]

3. Allegation of Bias:

Simons J. noted that bias must be external to the decision-making process. Relying on *O'Callaghan v. Mahon*,[20] Simons J. held that normal interventions, including debate and argument, and even the

[16] [2005] IESC 18; [2005] 2 I.R. 483.
[17] Judgment, para.22.
[18] Judgment, para.24.
[19] Judgment, para.23.
[20] [2007] IESC 17; [2008] 2 I.R. 514.

expression of strong views on the subject-matter, will not normally justify a finding of bias.[21] Simon J. found that an AO is entitled to ask parties to confine themselves to relevant issues, and to put questions to the parties.[22]

Simons J. concluded that the proper forum for the resolution of this factual dispute was the Labour Court and dismissed the application.

## ***Non-Attendance at a Hearing:***

**Jennifer Morgan v. The Workplace Relations Commission, High Court, No. 514/2019:**

Ms Morgan was refused a postponement of her adjudication claim and did not attend the hearing. The AO issued their decision and dismissed the case. Ms Morgan applied by way of judicial review for an order of *certiorari* to quash the decision of the AO and she also sought an injunction on the matter proceeding in either the WRC or to the Labour Court until certain findings were made by the DPC. The matter was defended and a Motion to Dismiss was heard in March 2021. The case was struck out in April 2021.

[21] Judgment, para.27.

[22] Judgment, para.28.

## ***Refusal to Postpone:***

**Kenneth Smullen v. The Workplace Relations Commission & Joe Mallon Motors, High Court, No. 561/2020:**

The Applicant sought to prevent a part-heard adjudication hearing going ahead after a refusal to postpone it and lodged a judicial review application. There were related civil and criminal proceedings in the background. A few days later the hearing was in any event postponed due to Covid-19. The Applicant continued to move their judicial review application, which subsequently became moot. At a contested costs hearing in March 2021, the WRC was awarded its costs by Hyland J.

## ***Isaac Wunder Orders and Strike Out of Frivolous or Vexatious Complaints:***

**Morgan v Labour Court & Others [2022] IEHC 361**

**Introduction:**

While the WRC has the power to strike out complaints before it as frivolous or vexatious, it has no jurisdiction to restrain a complainant from submitting repeated complaints in respect of the same matter, even if previous complaints were found to be without merit. In *Morgan v Labour Court & Ors,*[23] the High Court considered applications for orders to prevent a serial complainant whose claims had been repeatedly rejected before the WRC from lodging any further complaints in respect of the same matters. The issue of whether such "*Issac Wunder* orders" could be made in respect of proceedings before statutory tribunals such as the WRC had not previously been considered in this jurisdiction.

**Findings:**

Ferriter J. noted that the basis of the court's jurisdiction to make such an order is "*to protect the integrity of the administration of justice by providing a filter to weed out the issue and prosecution of proceedings where such proceedings would amount to an abuse of process."*[24]He described this as an exceptional step which "*should not be seen as some form of ancillary order that follows routinely or by default from the dismissal of a party's claim… The court must in every case ask itself whether, absent such an order, further litigation is likely to ensue that would clearly be an abuse of process."*[25]

Ferriter J. then considered a number of UK decisions addressing the specific question of whether such orders could be made in relation to a tribunal established by statute. In *Nursing &Midwifery Council and Another v Harrold,*[26] it was stated that *"[i]t is entirely consistent with the High Court's jurisdiction in matters of contempt for it to be able to make orders to protect the inferior courts in such circumstances".*[27] In *Law Society of England and Wales v Sheikh,*[28] following *Harrold,* Jay J stated that *"…the court has an inherent jurisdiction in this sort of case to impose its coercive or injunctive powers on a vexatious litigant if she persists, without reasonable cause, in litigating in inferior tribunals."*[29]

On this reasoning (and *a fortiori* in light of the Irish High Court's role under Articles 34 and 37 of the Constitution as elaborated upon in *Zalewski v An Adjudication Officer* above[32]*),* Ferriter J. stated, the High Court had jurisdiction to make *Issac Wunder* orders preventing the institution of proceedings before statutory tribunals which administer justice (like the WRC) as long as the previously established criteria for making such an order are present. In the instant case, it was appropriate to make the order due to the claimant's 'habitual and persistent' institution of proceedings despite binding and final

[23] [2022] IEHC 362

[24] Judgment, para. 121

[25] *Irish Aviation Authority & Anor v Monks & Anor* [2019] IECA 309, judgment of Collins J, at para [7].

[26] [2015] EWHC 2254 (QB); [2016] IRLR 30.

[27] [2015] EWHC 2254 (QB) at para [20].

[28] [2018] EWHC 1644 (QB)

[29] [2018] EWHC 1644 (QB) at para [17]. [32]

[2021] IESC 24

decisions already being made regarding the relevant matters and her clearly stated intention to continue to do so.

Ferriter J. also had to consider an application to strike out the multiple sets of proceedings already lodged before the WRC. Although an Adjudication Officer may strike out a complaint as frivolous or

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vexatious, that decision may be appealed to the Labour Court; similarly, while the Director General of the WRC may dismiss a claim for being in bad faith, frivolous, vexatious, misconceived, or trivial, this is also subject to appeal to the Labour Court. However, these powers were of limited use in circumstances where one set of complaints had been decided upon by an Adjudication Officer but the claimant had appealed them to the High Court and another set, while they had not yet been heard and thus could be dismissed by an Adjudication Officer or the Director General, would in his view inevitably be appealed by the claimant as well.

Ferriter J. therefore concluded that the circumstances were "sufficiently exceptional" to justify exercising the High Court's inherent jurisdiction to strike out these proceedings.

## ***Fair Procedures, Access to Justice and Adjudication Officers' Discretion:***

### County Louth Vocational Educational Committee v. The Equality Tribunal [2016] IESC 40:

**Background:**

Between 1981 and 2007, Mr Brannigan was employed as a teacher in a number of institutions under the control of County Louth Vocational Educational Committee ("***VEC***"). Mr Brannigan alleged discrimination and harassment on the sexual orientation ground under the EEA. County Louth VEC objected to evidence that was introduced which dealt with matters going back over a number of years. The EO decided to firstly hear the entirety of the evidence, and then rule on the jurisdictional objection. This decision led directly to the institution of judicial review proceedings. The High Court dismissed the application, holding that a complaint could be expanded upon provided the general complaint remained the same. County Louth VEC appealed to the Supreme Court.

**Findings:**

The Supreme Court broadly concurred with the High Court judgment in that it confirmed that EOs could allow evidence on matters and then decide on its probative value. The Supreme Court also noted that "*there is nothing sacrosanct about the use of an EE1 Form to activate*" the WRC's jurisdiction.[30]

McKechnie J. held: "*I would be quite satisfied that, subject to overall fair procedures, an equality officer has a sizeable degree of latitude in deciding how the hearing before her should be conducted. This conclusion is supported also by the decision in the case of Aer Lingus Teoranta v. Labour Court [1990] I.L.R.M. 485 where it was held, albeit in the context of the Labour Court, that such a body could decide whether the complaints were made within time or not, either by way of a preliminary inquiry or as part of a unitary hearing involving also the merits of the case*."[31]

He went on to state: *"……. in accordance with long established principle, there is a presumption that both the process of making the decision and the decision itself will have due regard to natural and constitutional justice and, furthermore, will be made in accordance with law and therefore within the jurisdiction conferred on her under the 1998 Act. Accordingly, there could be no basis for this Court to intervene and in some way anticipate or infer that she will act unlawfully*."[32]

McMenamin J. held "[i]*t is well established that the purpose of a deciding body or tribunal, such as the respondent Tribunal, is to provide speedy and effective redress in cases of alleged discrimination. It is not in dispute the procedures employed may be both informal and flexible. It is true, as Mr. Gerard Durcan, S.C., counsel for the Tribunal, submits, that the range of claimants before such a Tribunal do not fit into any one category. They may or may not be legally represented and, therefore, flexibility is both warranted and necessary*."[33]

[30] Judgment, para.32.
[31] Judgment, para.43.
[32] Judgment, para.51.
[33] Judgment, para.47.

**Bisi Adigun v. The Equality Tribunal [2015] IESC 91:**

**Background:**

A dispute arose between the Applicant, Mr Adigun, and the Abbey Theatre relating to a production of "*The Playboy of the Western World*". The Applicant brought a complaint alleging discrimination under the EEA. The EO held a preliminary hearing on whether the Applicant was an employee. The EO found that the Applicant was not an employee and, therefore, the EO lacked jurisdiction to hear the substantive complaint. The High Court subsequently dismissed the Applicant's judicial review claim concerning the EO's decision. The Applicant then appealed to the Supreme Court.

The Applicant argued it was contrary to fair procedures, guaranteed by the Constitution, and incompatible with Article 6 of the ECHR to hold a preliminary hearing, in his circumstances, "*when the substance of the case related to victimisation and discrimination*".[34]

**Findings:**

Charleton J., delivering the Supreme Court judgment, stated "[w]*hile it is correct to argue that a unitary trial is the normal and most satisfactory method of proceeding with a case in court, there are also many circumstances where the trial of a preliminary issue may resolve the substance of a legal dispute. Even apart from the subsection quoted above, it is within the scope of fair procedures before any judicial or quasi-judicial body for an issue to be isolated and tried in advance of the main hearing provided that can be done fairly. […] Hence, even apart from legislative provisions, it would make sense that once the issue was raised, it should be determined in advance of what was likely to be a substantial hearing. The resources of courts and tribunals are limited. It is a pointless exercise to engage in a trial of fact over several days when whether or not the resolution of such facts may yield any redress to the claimant looms is clearly the first hurdle that he or she must cross*."[35]

The Applicant appealed to the European Court of Human Rights pleading breaches of Articles 6, 13 and 14 European Convention of Human Rights but the complaint was deemed inadmissible in 2017[36].

[34] Judgment, para.13.

[35] Judgment, para.15.

[36] *Adigun v Ireland*, App. No. 19673/16

**Sam Dennigan and Company v. O'Connell and The Workplace Relations Commission [2016] IEHC 665*:***

**Background:**

The underlying WRC complaint concerned unpaid annual leave and payment under the Organisation of Working Time Act 1957. In this matter, the Claimant sought leave to apply for judicial review of the AO's case management decision. The AO had re-scheduled a case for hearing after he became aware that the Complainant was not on notice of the hearing date. No decision had been made on the substantive issue at that stage.

**Findings:**

Humphries J. refused leave, referring to the informal and relatively flexible procedures allowed to a quasi-judicial body although again re-iterating the importance of fair procedures. He held that "[t]*he notice party has due process rights, which would be simply extinguished by the extreme and unacceptable legal doctrine being advanced by the applicant*."[37] He went on to state that the discretion of an AO to relist a matter was reasonable and fair in the circumstances – "[n]*ot only was the decision not irrational but it was a perfectly reasonable and indeed humane, sympathetic and fair response to the situation and completely in accordance with the stated policy of the respondents to permit matters to be re-listed if an explanation for non-attendance was provided before the formal dismissal of the claim*."[38]

[37] Judgment, para.34.

[38] Judgment, para.46.

## ***Awarding Costs under the Equal Status Acts 2000:***

**Heather Rosen (Appellant) v. The Director of Equality Investigations and The Equality Tribunal, The Minister for Justice and the Department of Justice Equality and Law Reform, Ireland and the Attorney General (Respondents); and Members of Certain Traveller Families and Clare County Council and the County Manager (Notice Parties) [2019] IESC 22:**

**Introduction:**

This appeal concerned the High Court refusal to grant leave to the Appellant to seek judicial review. The underlying matter concerned the Equality Tribunal decisions regarding complaints brought against Clare County Council ("***Council***") pursuant to the Equal Status Acts 2000 – 2004 ("***ESA***"). In essence, the Appellant sought to quash orders which brought some complaints to an end and made her personally liable for some of the Council's expenses. The Appellant also sought declaratory and mandatory relief in respect of the procedures adopted in, and the lack of available legal assistance for the Notice Parties at, the hearings.

**Background:**

From 2003 to 2006, the Appellant, acting as a lay advocate, assisted travellers in making approximately 1,000 discrimination complaints against the Council. The Equality Officer ("***EO***") assigned to the complaints, grouped the complaints by family and instituted a "callover" procedure. The EO dismissed complaints if family members were not present at the callover. The Appellant frequently applied for adjournments and sought the abandonment of the callover procedure. She also refused to provide complainant families' contact details to the Equality Tribunal.

The Appellant argued that the EO dismissed some cases where the individuals were absent for good reason or were late to arrive. The EO found the Appellant's behaviour to be obstructive. When

complaints were dismissed, the EO frequently made an expenses award against the Appellant pursuant to the ESA. The Council subsequently obtained summary judgment from the County Registrar for this total expense award amount of €7,400 plus costs.

The Appellant unsuccessfully appealed the County Registrar's order to the Circuit Court. The Appellant then appealed to the High Court. She also unsuccessfully sought to be named as a Notice Party, and heard, in separate judicial review proceedings between the Council and the Equality Tribunal.

**Findings:**

It was noted that the expenses orders were not, when made, directly enforceable. However, it was the subsequent court orders that enabled the Council to take coercive steps to recover the amount ordered (and related costs). The Circuit Court heard and determined the Appellant's appeal from the County Registrar, and the High Court heard and determined her appeal from the Circuit Court. The order made in that last appeal was the legal basis for the debt collection steps taken by the Council.

The Supreme Court found that it was not possible to embark upon alternative proceedings with the objective of establishing, through the judicial review process, that the money was not due because the expenses orders should not have been made. The Supreme Court held that the issue between the parties had, as a matter of law, been finally disposed of by the High Court. The Supreme Court stressed that this was not a matter of the timing of proceedings.

The Supreme Court found that the Appellant had no *locus standi* to seek orders of *certiorari* and declaratory relief in respect of the decisions of the EO in concluding the complaints, and *mandamus* and declaratory relief in respect of the procedures adopted by the Equality Tribunal and the lack of legal aid for complainants. The Appellant's appeal was dismissed in its entirety.

# ***Court of Justice of the European Union:***

# ***Disapplication of National Provisions Contrary to EU Law:***

**Minister for Justice and Equality and The Commissioner of An Garda Síochána v. The Workplace Relations Commission and Ronald Boyle and Others (Notice Parties), Case C-378/17:**

**Introduction:**

This matter came before the Court of Justice of the European Union ("***CJEU***") by way of a Supreme Court reference for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. The net issue concerned the jurisdiction of the former Equality Tribunal to conclude that a provision of domestic law is incompatible with European law in circumstances in which questions concerning the validity of laws is reserved to the High Court, the Court of Appeal and the Supreme Court.

**Background:**

Mr Boyle took a complaint to the Equality Tribunal in which he claimed to have been discriminated against on age grounds in being excluded from consideration for admission to An Garda Síochána. Regulation 5(1)(c) of the Garda Síochána (Admissions and Appointments) Regulations 1988, provided that a person could only be admitted if they were at least 18 and under 35 years of age when the vacancy advertisement was first published. At the relevant time Mr Boyle was over the age of 35. Directive 2000/78, upon which the EEA is based, prohibits, *inter alia*, discrimination on grounds of age in access to employment.

The EO accepted jurisdiction and indicated that it may be necessary to consider if the Garda Regulations were compatible with Directive 2000/78. The Respondent initiated judicial review proceedings in the High Court seeking an order prohibiting the Equality Tribunal from proceeding with the case. The High Court granted the order sought and, in so doing, held that only the High Court could have jurisdiction to entertain a complaint that a provision of domestic law was invalid. The High Court further held that when a person seeks to advance a claim in reliance on European law that is unsustainable by application of a domestic law provision, he or she should first obtain a declaration from the High Court that the said domestic law provision is incompatible with European law and therefore invalid. The order and judgment of the High Court was appealed to the Supreme Court. Both on appeal and at first instance the WRC, which had then become the successor of the Equality Tribunal, argued that under the Doctrine of Supremacy of European law, every court or tribunal of a Member State is obliged to apply the law of the European Union in preference to any contrary provision of domestic law.

The Supreme Court stayed the appeal and referred the following questions to the CJEU: -

"*Where*

*(a) A national body is established by law and has a general jurisdiction conferred on it to inter alia ensure enforcement of Union law in a particular area; and*

*(b) National law would require that such body not have jurisdiction in a limited category of case where an effective remedy would require the disapplication of national legislation on the basis of national or European law; and*

*(c) Appropriate national courts would have a jurisdiction to make any appropriate order disapplying national legislation which was required to ensure compliance with the measure of European law in question, would have jurisdiction to entertain cases in which such a remedy was necessary, would have jurisdiction in such cases to provide any remedy mandated by Union law and where the remedy provided in the courts has been assessed, in accordance with the jurisprudence of the Court of Justice, as complying with the principles of equivalence and effectiveness*

*Must the statutory body concerned nonetheless be taken to have a jurisdiction to entertain a complaint that national legislation was in breach of relevant Union law and, if upholding that complaint, disapply that legislation notwithstanding that national law would confer the jurisdiction in all cases, involving challenges to the validity of legislation on any ground or requiring the disapplication of legislation, on a court established under the Constitution rather than the body in question?"*

**Findings:**

The CJEU first observed that, under Irish law as interpreted by the Supreme Court, there is a division of jurisdiction between the courts designated as such by national law and the WRC. On the one hand, according to the Supreme Court, the WRC has jurisdiction to rule on complaints against measures or decisions allegedly incompatible with Directive 2000/78 and the Equality Acts and, on the other, the High Court has jurisdiction where the upholding of such a complaint would require a national provision contrary to EU law to be disapplied or struck down.

The CJEU further observed that a distinction must be drawn between the power to disapply a provision of domestic law, in a particular case, which is contrary to Union law, and a power to strike down such a provision, which has the broader effect that the provision is no longer valid for any purpose. The CJEU made it clear that what was in issue in the instant case was a "disapplication" of a provision of Irish law rather than a declaration concerning its validity.

The CJEU then turned to its established jurisprudence on the doctrine of the primacy of EU law. It referred to the seminal case of *Simmenthal* (C-106/77) of 9 March 1978. In that case the CJEU had held that the doctrine of supremacy means that any national court or tribunal called upon, in the exercise of its jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary, by refusing to apply any conflicting provision of national law. It was further held in *Simmenthal* that national courts and tribunals must do so without requesting or awaiting the prior setting aside of the conflicting provision by legislative or constitutional means.

The CJEU pointed out that the prohibition of discrimination on, *inter alia*, grounds of age is derived from Directive 2000/78. That directive obligates Member States to put in place judicial processes to ensure that those who are discriminated against contrary to the directive can obtain redress. In Ireland, the WRC is the body established for that purpose. It follows, according to the CJEU, that the WRC must be able to apply the provisions of the directive fully. That may involve disapplying any provision of domestic law that impede the effectiveness of EU law.

Accordingly, the CJEU answered the questions referred by the Supreme Court as follows: -

"*EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law*."