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Workplace Dispute Resolution in Ireland at a Crossroads: Challenges and Opportunities

Brian M. Barry Dr
Technological University Dublin, brian.barry@tudublin.ie

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WORKPLACE DISPUTE RESOLUTION IN IRELAND AT A CROSSROADS: CHALLENGES AND OPPORTUNITIES

BRIAN M. BARRY

Abstract: The Workplace Relations Act 2015 fundamentally reformed the workplace dispute resolution system in Ireland–the centrepiece being the Workplace Relations Commission, the new body for first-instance dispute resolution. While the overall system is an improvement on its overly-complex and confusing predecessor, the Supreme Court's decision in *Zalewski v An Adjudication Officer* declaring aspects of adjudication at the WRC unconstitutional, coupled with user representatives' persistent concerns about how adjudication is conducted, present ongoing challenges.

This article describes the results of a survey undertaken in 2019 by the author of over one hundred representatives' views on the system, and contextualises them in light of *Zalewski*. Based on findings from the survey—the third in a series of such surveys since 2011–and the requirement to amend WRC adjudication processes following *Zalewski*, the author suggests that the WRC could reframe how it presents and delivers its dispute resolution services at first instance to help better serve workers and employers in dispute. Specifically, the WRC could enhance its Mediation Service both in terms of how mediation is presented and how it is delivered, so that it is perceived by users and representatives as a mainstay dispute resolution mechanism rather than as a secondary offering to the Adjudication Service. Such a recalibration could help achieve a better balance of informal, flexible dispute resolution through mediation in tandem with constitutionally-compliant adjudication with more robust procedures.

Keywords: workplace dispute resolution – workplace adjudication – workplace mediation – employment law – survey

INTRODUCTION

The year 2015 was a landmark for employment law and industrial relations in Ireland. The Workplace Relations Act 2015 (the "2015 Act") fundamentally reformed the system for resolving workplace disputes, dissolving a convoluted, inefficient and often confusing system comprising several State agencies, sometimes with overlapping jurisdiction, into a streamlined two-tier structure. The 2015 Act established a new first-instance dispute resolution body, the Workplace Relations Commission (WRC), and allocated a substantially increased jurisdiction to the Labour Court to serve as an appellate forum for all statutory employment rights disputes. The background to the reform agenda and the new system introduced by the 2015 Act is well-charted territory, being the subject of extensive commentary from academics and practitioners.[1] Reform was a welcome and necessary step, although the 2015 Act came in for considerable criticism both during its passage through the Oireachtas and after its enactment.[2] One central

[1] A comprehensive synopsis is provided by Anthony Kerr, "The Workplace Relations Reform Project" (2016) 7 *European Labour Law Journal* 126.

[2] Department of Jobs, Enterprise and Innovation, "Blueprint to Deliver A World-Class Workplace Relations Service" (2012) available at *www.workplacerelations.ie/en/publications_forms/blueprint_for_a_world-*

criticism, more often than not levelled by experienced employment law and industrial relations law practitioners, was that the processes within the 2015 Act regulating first-instance adjudication at the WRC Adjudication Service were inconsistent and unpredictable. A subset of these practitioners argued that such processes fell short of procedural safeguards enshrined in the Irish Constitution and the European Convention on Human Rights (ECHR).

These criticisms proved to be prescient. The provisions of the 2015 Act that regulate adjudication before an adjudication officer at the WRC were the subject of a partially successful constitutional challenge in *Zalewski v An Adjudication Officer*.[3] In April 2021, the Supreme Court found, *inter alia* that the effective blanket ban on WRC hearings in public, and the absence of powers for adjudication officers to require that certain evidence be given on oath or affirmation, were inconsistent with the Constitution.

The Supreme Court decision in *Zalewski* has important ramifications for how first-instance adjudication is delivered within the system. It also serves as a punctuation mark–a suitable time to appraise the reform project and the new system introduced by the 2015 Act. This article examines the system's initial successes and failures and offers suggestions for how the system could be improved. To do so, it relies on data from a survey study the author undertook in 2019 of over one hundred professionals who represent clients in the workplace dispute resolution system on their views on aspects of the system.[4] It is the third in a series of survey studies by the author–the first was conducted in 2011 before the reforms were introduced, the second in 2016 in the aftermath of the reforms. The results from the first two surveys and their consequences for the reform agenda are examined in an earlier article which the Supreme Court referred to and relied upon in *Zalewski*.[5] Together, the three surveys from 2011, 2016 and 2019 combine, longitudinally, to capture shifting perspectives on the new system and comparisons with the system that preceded it. The survey data also provides a useful lens through which to reflect on how constitutional frailties at the WRC identified in the *Zalewski* judgment ought to be addressed, and more broadly, to consider ways to improve the system after a number of years in operation.

The article is set out in three parts. Part 1 outlines the Supreme Court judgment in *Zalewski* insofar as it addresses the constitutionality of the 2015 Act's provisions governing the processes of adjudication at the WRC. Although the Supreme Court's decision has broader consequences beyond adjudication procedures at the WRC–both for adjudicative bodies in areas other than in workplace relations and for the nature and boundaries of judicial power in

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class_workplace_relations_service.pdf [Accessed 21 July 2021]; Kevin Duffy, "Blueprint for Reform of Employment Rights Institutions" (2012) 9 *Irish Employment Law Journal* 81; Tom Mallon, "Employment Law Reform" (2012) 9 *Irish Employment Law Journal* 76; Tom Mallon, "A World-Class System? " (2016) 21 *The Bar Review* 71; Marguerite Bolger, "The Workplace Relations Bill: World-Class or Legally Flawed? " (2015) 12 *Irish Employment Law Journal* 21; Brian Barry, "The Workplace Relations Bill 2014: An Important Opportunity for Workplace Relations Reform' (2014) 11 *Irish Employment Law Journal* 106; Brian Barry, "Reforming the Framework for Employment Litigation and Dispute Resolution in Ireland" (Trinity College Dublin, 2013); Kerr (n.1); Anthony Kerr, "Changing Landscapes: The Juridification of the Labour Court? " (2015) 53 *Irish Jurist (n.s.)* 58. The 2015 Act came in for judicial criticism too. In *Bondarenko v Employment Appeals Tribunal*, Binchy J. criticised the manner in which the 2015 Act transferred modes of redress for various employment rights complaints and adjudicative functions from the old dispute resolution bodies to the WRC. He described how what materialised was an "extraordinary labyrinth of legislation", "convoluted", and that it highlighted the "pitfalls of legislation by amendment after amendment" [2019] IEHC 578, paras 63, 66 and 67.

[3] [2021] IESC 24 and 29.

[4] The findings of the study were first presented at the *22nd Annual Irish European Law Forum: Employment Law in a Time of Uncertainty*, UCD Sutherland School of Law, 6 December 2019.

[5] Barry, "Surveying the Scene: How Representatives' Views Informed a New Era in Irish Workplace Dispute Resolution" (2018) 41 *Dublin University Law Journal* 45. The Supreme Court referred to this article at [2021] IESC 24, para.22, per Charleton J. who noted the article was an "important academic contribution", and para.28, per O'Donnell J.

Irish constitutional law—consideration of the *Zalewski* judgment here is confined to the Supreme Court's rulings on the four aspects of the WRC's adjudication process that formed the basis of the applicant's complaints. They are that the 2015 Act breached his rights under Art.40.3 of the Constitution because (i) there was no requirement that adjudication officers or members of the Labour Court have any legal qualifications, training or experience; (ii) there was no provision for an adjudication officer to administer an oath or affirmation and no criminal sanction for a witness who gave false evidence before an adjudication officer; (iii) there was no express provision made for the cross-examination of witnesses during adjudication hearings; and (iv) the proceedings before an adjudication officer were held otherwise than in public.

Part 2 details the 2019 survey of representatives. It describes the background to this survey, putting it in the context of the earlier surveys from 2011 and 2016, and briefly outlines the methodology employed in the survey. It then sets out the results of the 2019 survey, broken down into four main areas that participants were asked to consider: (i) complaints management at the WRC; (ii) adjudication at the WRC; (iii) mediation at the WRC; and (iv) operations at the Labour Court.

Part 3 suggests ways that the delivery of first-instance dispute resolution at the WRC can be improved based on the results of the 2019 survey and accounting for the Supreme Court's decision in *Zalewski*. To briefly preview the main points of this analysis: in light of the necessary levelling-up of procedural safeguards at the Adjudication Service through amending legislation following *Zalewski*—specifically, that adjudication officers will have the power to compel evidence to be given on oath or affirmation, and that adjudication hearings will be held in public at least some, if not most of the time—it seems likely that adjudication at the WRC may develop a more formal character. Consequently, it may be appropriate for the WRC to consider recalibrating how it presents and delivers its various dispute resolution offerings at first-instance, specifically, by allocating more resources to its Mediation Service and presenting it as a mainstay mode of dispute resolution (rather than as a secondary alternative to adjudication). Adjudication ought to be presented as one of two options *alongside* mediation, rather than as the default, go-to mechanism for resolving complaints. Workplace dispute resolution systems in the UK and in New Zealand, where mediation is offered as a mainstay dispute resolution mechanism, rather than as an alternative to adjudication, are briefly considered for comparative context, as is a mediation service that enjoyed success previously in this area of law, the Equality Tribunal's Mediation Service which operated from 2000 to 2015. The results of the survey data broadly suggest representatives' support for such a recalibration at the WRC whereby mediation and adjudication complement each other, and are presented to service users *as equals* in terms of the dispute-resolution offering available at first-instance.

We turn first to the case of *Zalewski v An Adjudication Officer* and its significant consequences for workplace dispute resolution in Ireland.

1. *ZALEWSKI V AN ADJUDICATION OFFICER*

Zalewski v An Adjudication Officer concerned the constitutionality of aspects of adjudication at the WRC Adjudication Service. The Supreme Court found that certain parts of the processes set out in the 2015 Act regulating adjudication were unconstitutional in that they failed to adequately protect the constitutional rights of complainants appearing before the WRC. The decision precipitated amending legislation, the Workplace Relations (Miscellaneous Provisions) Act 2021 (the "2021 Act"), which amended the 2015 Act and other employment legislation to ensure that constitutional frailties at first-instance adjudication are addressed. The 2021 Act is considered further below.

The applicant, Thomas Zalewski, was a security man and later a supervisor at a convenience store in Dublin. Following a serious incident when the store was robbed with the use of pepper spray and a gun which was discharged, the applicant was reprimanded by the store manager for how he handled the incident. After a disciplinary meeting, he was summarily dismissed on the ground of gross misconduct.

The applicant instituted two statutory claims for unfair dismissal and payment in lieu of notice before the WRC. His experience of adjudication at the WRC was, by any measure, unsatisfactory. A hearing before an adjudication officer was scheduled in October 2016 whereupon an adjournment was granted to the applicant's former employer. A further hearing was scheduled for December 2016. The parties attended in December and the adjudication officer informed them that a decision had already issued in respect of the claim and that the hearing date had been scheduled in error. The parties subsequently received a decision a few days later dismissing the applicant's claim, and which appeared to record a full hearing had taken place even though it had not.[6]

The applicant, dissatisfied with this process (and, as the Supreme Court acknowledged, with some justification),[7] undertook judicial review proceedings seeking, inter alia, declarations that the 2015 Act was repugnant to the Constitution insofar as processes established under the 2015 Act for adjudication at the WRC did not protect his constitutional rights under Art.40.3 of the Constitution, together with an order of certiorari quashing the decision of the adjudication officer.

The applicant was unsuccessful before the High Court and was granted leave to appeal directly to the Supreme Court.[8] The two central issues that the court was asked to consider were:

(i) whether adjudication before the WRC amounted to the administration of justice required by Art.34 of the Constitution to be administered in courts and, if so, was such adjudication an exercise of "limited functions and powers of a judicial nature" such that it was a permissible delegation of judicial power to a body other than a court under Art.37; and,

(ii) whether the statutory framework adequately vindicated the rights of a complainant before the WRC under the Constitution and ECHR.

On the first of these issues, the court held that adjudication before the WRC other than cases under the Industrial Relations Act 1969 did indeed amount to the administration of justice as envisaged by Art.34 of the Constitution, thereby reversing the decision of Simons J. in the High Court,[9] and then held by a majority of 4:3 that the jurisdiction of adjudication by the WRC satisfied the requirements of Art.37 in that its functions were "limited".[10]

On the second issue, the applicant complained that the processes for adjudication, set out in Pt 4 of the 2015 Act, inadequately protected his rights under Art.40.3 of the Constitution on four grounds:

(i) *the qualifications of adjudication officers*:

that there was no requirement that adjudication officers or members of the Labour Court have any legal qualifications, training, or experience;

(ii) *administering an oath or affirmation*:

[6] O'Donnell J. outlined that "The decision stated that the adjudication officer had 'enquired into the complaints and [given] the parties an opportunity to be heard … and to present … any evidence relevant to the complaints'". [2021] IESC 24, para.9

[7] For example, Charleton J. described the process as "nothing short of dreadful" [2021] IESC 24, para.17.

[8] [2020] IESCDET 93.

[9] [2020] IEHC 178.

[10] [2021] IESC 24, paras 110–133.

that there was no provision for an adjudication officer to administer an oath or affirmation.[11]

There was no criminal sanction for a witness who gave false evidence before an adjudication officer;

(iii) *cross-examination*:

that there was no express provision made for the cross-examination of witnesses; and

(iv) *public hearings*

that the proceedings before an adjudication officer were held otherwise than in public.[12]

The court agreed with the applicant's complaints on the second ground, the absence of a provision to take evidence under oath or affirmation, and the fourth ground, the default that proceedings were held otherwise than in public.

On the first ground, *the qualifications of adjudication officers*, O'Donnell J. rejected "unhesitatingly" the suggestion that adjudication officers must have the same formal legal training and sufficient legal experience to be appointed judges.[13] Acknowledging that although the range of decisions that the WRC may make can involve very complex areas of law,[14] there was no justification for insisting that a law degree or experience as a practising lawyer ought to be an essential qualification as a requirement of constitutional law. Courts and lawyers, as he put it, "do not have a monopoly on fact-finding, or even the law's application, and cannot claim infallibility in either respect".[15] Nevertheless, tellingly, O'Donnell J. warned that "the standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34".[16]

O'Donnell J. also addressed another argument made by the appellant (although not made as a separate ground of challenge) relating to how adjudication officers are susceptible to be removed from their position by the executive branch. He noted that the unqualified power of the Minister to revoke the appointment of adjudication officers was "troubling, particularly as it is likely that the adjudication officers will be civil servants in the Minister's department with other responsibilities where they will routinely be required to accept direction".[17] Furthermore, O'Donnell J. noted that membership of the Labour Court, regulated by the Industrial Relations Acts 1946 and 1969, did not contain any express statement of the independence of members of the Court. Both these issues, O'Donnell J. suggested, would "at a minimum, require careful scrutiny", in light of the court's findings as to other constitutional flaws in the adjudication process.[18]

On the second ground, *administering an oath or affirmation*, O'Donnell J. set out why compelling evidence to be given under oath or affirmation was important: "it triggers the power to punish for false evidence and thus provides an incentive to truthful testimony", further

[11] It is worth noting that the 2015 Act s.74 provided that the Labour Court has the power to take evidence on oath.

[12] Again, this stood in contrast to the 2015 Act's provisions on proceedings before the Labour Court which "shall be conducted in public unless the Labour Court, upon the application of a party to the appeal, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public", s.44(7).

[13] [2021] IESC 24, para.137.

[14] This includes the power to disapply domestic legislation if considered incompatible with EU law, see the CJEU judgment in *Minister for Justice and Equality v Workplace Relations Commission* [2019] 30 E.L.R. 57.

[15] See fn.14. McKechnie J., while agreeing with O'Donnell J. that a legal qualification was not constitutionally necessary to be appointed as an adjudication officer, was a little more circumspect in his views on the matter, remarking: "As experience has shown, employment disputes can often involve difficult questions of law as well as having to discern fact from non-fact, accuracy from inaccuracy and truth from un-truth. … I fully appreciate why it may not be necessary on all occasions to have qualified lawyers determining such issues . However, the availability of a panel of such persons would in my view be central to the legitimacy of the process… If a lawyer is reasonably required, a lawyer should be appointed", paras 138–139, per McKechnie J.

[16] [2021] IESC 24, para.138.

[17] [2021] IESC 24, para.147. On the matter of independence from the executive branch, see fn.56 below.

[18] See fn.17.

adding that the requirement "is an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence".[19] For these reasons he found that the absence of at least a capacity to allow the adjudication officer to require that certain evidence be given on oath or affirmation was inconsistent with the Constitution.[20]

On the third ground, *cross-examination*, O'Donnell J. ultimately found that the absence of a specific provision in the 2015 Act providing for cross-examination at adjudication was *not* unconstitutional. Although he criticised the absence of such a provision as "unsatisfactory" in circumstances where adjudication is "meant to be capable of being operated by persons without any knowledge of the law, and for decisions to be made by persons without any broader legal experience or training, even though they may have very detailed familiarity with the statutory code in the field of employment law", O'Donnell J. noted that the 2015 Act is presumed to be constitutional, and also that the right to question and cross-examine witnesses was stated in a guidance document on adjudication hearings, the *Guidance Note for a WRC Adjudication Hearing*, suggesting the WRC did not preclude cross-examination where necessary.[21] This was enough to satisfy O'Donnell J. that the absence of an express reference to cross-examination in the 2015 Act itself did not render it unconstitutional.[22]

On the fourth ground, *public hearings*, O'Donnell J. approached this question "through the lens of Article 37", which builds on the administration of justice as set out in Art.34.1, an essential aspect of which is that hearings ought to be in public.[23] Therefore, O'Donnell J. reasoned, he could not "accept that there is a justification for a blanket prohibition on hearings in public before the adjudication officer".[24] He outlined the reasons why public hearings are important. In a narrower and practical sense, publicity may bring forward further relevant evidence and witnesses, and allows a party to achieve public vindication, while in a broader sense, publicity allows for scrutiny of the fairness, competence and efficiency of the decision-maker. O'Donnell J. continued that, historically, public hearings "have been regarded as fundamental to the administration of justice … a principle from which any exception must be justified".[25] He brought home the significance of public justice by quoting Jeremy Bentham: "[w]here there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity."[26]

Notably, however, O'Donnell J. curtailed this principled rhetoric by reflecting on the reality and needs of parties appearing before adjudication officers at the WRC: "there is a justification for calm, quiet, and private resolution of many disputes which may be of particular sensitivity for the participants", he observed.[27] As such, he suggested that public hearings were by no means an absolute requirement and that it may be permissible to have a presumption in favour of private hearings at first instance—it was just the absolute ban on public hearings that meant that the 2015 Act fell foul of constitutional requirements.[28]

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[19] [2021] IESC 24, para.144, per O'Donnell J.
[20] See fn.19. McKechnie J., concurring with O'Donnell J. on this point, expressed this in stronger terms: "the absence of an express power to administer the oath is utterly lacking in constitutional compliance." [2021] IESC 24, para.140, per McKechnie J.
[21] [2021] IESC 24, para.146, per O'Donnell J.
[22] Again, McKechnie J. concurring with O'Donnell J. on this point, was more forthright, finding that while the Oireachtas' failure to expressly make provision for cross-examination in the 2015 Act was not fatal, it was "extremely difficult to understand". [2021] IESC 24, para.141, per McKechnie J.
[23] [2021] IESC 24, para.142, per O'Donnell J.
[24] See fn.23.
[25] See fn.23.
[26] See fn.23.
[27] [2021] IESC 24, para.143, per O'Donnell J.
[28] See fn.27.

These latter remarks are undoubtedly significant, affording wide discretion to legislators on this important question, leaving them open to formulate amending legislation such that all that is required is the *possibility* of public hearing in specific instances.[29] The approach of the Oireachtas on this important matter is addressed below in Part 3.

All told, O'Donnell's J. analysis of these aspects of Pt 4 of the 2015 Act was fairly critical and pointed: the Oireachtas should not have legislated for WRC hearings to be automatically heard in private. They ought to have made provision for evidence to be taken under oath or affirmation, the absence of a specific provision for cross-examination of witnesses was "unsatisfactory", and the Government's powers to remove adjudication officers and Labour Court members or to decide not to renew their warrants of appointment was, at the very least, concerning. The consequences of the Supreme Court's decision are considered further in Part 3.

Part 2 describes the 2019 survey, its background and methodology and, following that, outlines participating representatives' views on the system.

2: THE 2019 SURVEY

The 2019 survey was the third in a series of survey studies investigating representatives' views on state-provided workplace dispute resolution services in Ireland. In 2011, the author conducted the first survey of representatives, shortly before the Minister for Jobs, Enterprise and Innovation, Richard Bruton TD, announced his intention to reform the system, which later culminated in the 2015 Act.[30] The survey obtained the representatives' views on the system in operation then, and gathered their views on, and suggestions for, reform. The results highlighted representatives' widespread dissatisfaction with the complex and convoluted system—one that almost all who partook agreed needed fundamental structural change.

The second 2016 survey was conducted in the aftermath of the reforms realised by the 2015 Act, one year on from the introduction of the two-tier system comprising the WRC and the revised Labour Court. While the results demonstrated some improvement in the perception of the overall structures, representatives nevertheless conveyed relatively high levels of dissatisfaction with aspects of the Adjudication Service.

The third survey conducted in Autumn 2019 investigated representatives' perceptions of the current state of the workplace dispute resolution system in Ireland introduced by the 2015 Act after a period of four years' operation.[31] The attitudes expressed in this 2019 survey, therefore, perhaps paint a truer picture of the overall success or otherwise of the reform project than the 2016 survey did. Views in the 2016 survey were expressed quite soon after the new system's introduction and may have reflected, at least to some extent, the inevitable teething errors after such a fundamental overhaul. A clearer sense emerges from the 2019 survey on whether the reformed system has achieved the Government's stated objective upon their announcement, to provide a "world-class workplace relations service".[32]

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[29] To some extent, although they came to opposite conclusions as to the constitutionality of s.41(13) of the 2015 Act, O'Donnell's J. treatment of this issue squares up with the comments of Simons J. in the High Court that "the general rule that justice must be administered in public should be considered *incrementally* … [t]he choice is not a binary one between (i) a hearing fully in public, or (ii) one completely *in camera*" [2020] IEHC 178, para.206. Simons J. ultimately concluded that the 2015 Act "achieves a compromise between publicity and privacy by ensuring that the decisions must be published, albeit on an anonymised basis" [2020] IEHC 178, para.207.

[30] Duffy (fn.2). Minister Bruton made this announcement at a High Level Conference, *The Workplace Relations Act 2015—One Year On*, UCD Sutherland School of Law, 1 October 2016.

[31] The survey was conducted in compliance with the author's institutional ethical requirements.

[32] Department of Jobs, Enterprise and Innovation (fn.2). Charleton J. described this labelling as "hyperbolic" and "unnecessary" given Ireland "is a first-world country" [2021] IESC 24, para.24.

The methodology employed for the 2019 survey was the same as for the previous two surveys, and targeted the same cohort: professional representatives who regularly represent complainants and respondents in employment law and industrial relations disputes in Ireland and who regularly appear before the relevant workplace dispute resolution bodies. This included solicitors and barristers, trade union representatives and employer organisation representatives. One hundred and four representatives responded to the 2019 survey, comprising 30 barristers, 33 trade union representatives, 31 solicitors (seven of which were working "in house"), seven employer organisation representatives and three others (two of whom described themselves as HR consultants/professionals and one representative from an NGO). Representatives were asked what type of client they generally represented: 34 identified as representing a mix of workers and employers, 35 identified as generally representing workers, and 35 identified as generally representing employers (six for employers mainly from the public sector, 16 for employers mainly from the private sector, and 13 for employers from both the private and public sectors). As such, the sample of representatives who participated in the 2019 survey represented a broad and balanced cohort of the community of professional representatives.[33]

Like the previous two surveys, the 2019 survey was conducted through an online questionnaire on Google Forms, and disseminated by email to members of the Employment Law Association of Ireland, the Employment Bar Association, senior officials at Ibec, the Irish Congress of Trade Unions and major trade unions. Representatives were informed of the purpose of the study and guaranteed anonymity in their responses.[34] Survey questions either used the Likert Scale method to ask representatives' satisfaction or agreement levels with particular statements or were open questions for them to comment in their own words on an issue.

To turn to the results of the survey, in broad terms, the main findings were that while there was something of an overall improvement in how representatives perceived the Irish workplace dispute resolution system relative to the previous survey results, nevertheless representatives reported persistent problems in how claims were processed and heard by the WRC at first-instance—the subject matter of judicial scrutiny in *Zalewski*. At the appellate level, user representatives appeared broadly satisfied with the Labour Court's operations.

Perhaps the most significant result of the 2019 survey was that representatives were more positively disposed towards the system than they had been both in the pre-reform era in 2011 and in the immediate aftermath of reforms in 2016. In 2019, 48 per cent of respondents were either satisfied or very satisfied with the current system, compared to 31 per cent in the 2016 survey, and to just 11 per cent in the 2011 survey. Correspondingly, there was a decrease in dissatisfaction: 34 per cent of respondents were dissatisfied or very dissatisfied with the system in 2019, compared to 49 per cent in 2016 and 68 per cent in 2011. As such, the results pointed to an increasingly positive perception of the overall system.

Breaking the 2019 survey results down by professional cohort, barristers and employer representatives were particularly critical of the overall system. Broadly speaking, this mirrored results from the 2016 survey where trade union representatives were generally more satisfied than legal professional practitioners. Of the 30 responding barristers, 60 per cent were

[33] By comparison, the 2011 survey generated 103 responses, while the 2016 survey generated 139 responses.

[34] As a result, and necessarily, individual representatives' results cannot be individually tracked across the three surveys. The first of these studies was conducted as part of the author's Ph.D. thesis with the School of Law, Trinity College Dublin, Barry, "Reforming the Framework for Employment Litigation and Dispute Resolution in Ireland" (fn.2). The 2016 survey was undertaken by the author and commissioned by the Employment Law Association of Ireland, and the 2019 survey was conducted by the author in his capacity as a Lecturer in Law at the School of Languages, Law and Social Sciences, Technological University Dublin.

dissatisfied, while 23 per cent were satisfied. Of the seven employer organisation representatives, five (or 72 per cent) were dissatisfied. By far the most positively-disposed professional cohort were the 33 responding trade union representatives: 73 per cent satisfied with the system, compared to just 9 per cent dissatisfied. Of the 31 solicitors, 45 per cent were satisfied, 39 per cent were dissatisfied. Compared to the 2016 survey findings, this result was a considerable improvement. In 2016, the 39 responding solicitors were very negatively disposed to the overall system: 82 per cent were dissatisfied, just 10 per cent were satisfied. That more solicitors were satisfied than dissatisfied in 2019 represents a significant change.

Respondents to the 2019 survey were also asked to compare the new system to the old one if they had experience of such. Although there was an overall improvement when compared to the results of an equivalent question in the 2016 survey, nevertheless, negative perceptions remained stubbornly high. In the 2019 survey, 45 per cent of respondents who had experience of both the old and new systems reported that the new system was either slightly or much better, while 40 per cent reported that it was either slightly or much worse. This was a better assessment than responses to the equivalent question in the 2016 survey where 34 per cent thought the new system was slightly or much better, while 66 per cent reported that it was slightly or much worse. Although a better reflection on the new system, nevertheless, that four out of ten representatives felt it had *disimproved* four years on from the introduction of reforms is telling and disappointing.

Breaking these results down into professional cohorts, once more barristers were particularly negatively disposed. Out of 29 responding barristers, 79 per cent thought the new system was either slightly or much worse than the old one, with just 14 per cent responding that they thought the new system was either slightly or much better. On the other hand, 50 per cent of the 30 responding solicitors preferred the new system to the old one, slightly more than the 40 per cent who thought it was worse. Once more, trade union representatives were the most positively disposed, with 55 per cent of the 31 responding trade union representatives reporting that the new system was slightly or much better than the old one, compared to 23 per cent who felt that the new system was slightly or much worse.

We now turn to results from the survey on four discrete areas under consideration: (i) complaints management at the WRC, (ii) adjudication at the WRC, iii) mediation at the WRC and (iv) operations at the Labour Court. Three of these four areas concern the WRC. Results suggest that while user representatives' perception of the competence of adjudication officers has improved, substantial concerns remain, particularly regarding the consistency of approach to hearings, the consistency of adjudication officers' decisions, and how complaints are processed at the pre-hearing stage. These concerns and issues were apparent in 2016 and remained so in 2019.

(i) *Complaints management at the WRC*

Of the representatives, 49 per cent were dissatisfied with the administration, processing and scheduling of complaints by the WRC, while 31 per cent were satisfied. This was a small improvement on results to the same question in 2016 where 60 per cent were dissatisfied and 30 per cent were satisfied. Nevertheless, that seven out of ten responding representatives were not satisfied is an undoubted cause for concern about how the WRC handles complaints at the pre-hearing stage. Asked to comment on the pre-hearing stage, thematically, representatives identified inflexibility and a lack of transparency in adjournments processes and dissatisfaction with notice times for hearings as concerns. Some, for instance, reported that they were refused adjournments when they were double-booked by the WRC. Asked to rate the method by which adjournments are sought and granted by the WRC, 57 per cent said that this was poor or very poor, while 16 per cent said that this was good or very good. This was a disimprovement on

the results to the equivalent question in 2016. Although there were some positive comments about new procedures introduced by the WRC to process adjournments,[35] discontent on this issue remained high, with representatives pointing to a lack of consistency and of clear principles in granting adjournments.

On a more positive note, compared to commentary on the pre-hearing stage before the WRC from the 2016 survey, there was a notable absence of negative comments about the handling and exchange of documents between parties, and to adjudication officers. This was a relatively common cause of complaint in the 2016 survey with many representatives commenting on inconsistencies in how different adjudication officers approached the exchange of documents at the pre-hearing stage.[36] A further positive was an improvement in satisfaction ratings of communication and correspondence by the WRC to users before a hearing. In 2019, 46 per cent said it was good or very good, 18 per cent said it was poor or very poor, and 36 per cent rated it average. This compared to 2016 when 34 per cent said it was good or very good, 38 per cent said it was poor or very poor, and 28 per cent said it was average. Particularly positive, therefore, was that there was an improved perception among representatives of the WRC's communication and correspondence.

(ii) *Hearings at the WRC*

Representatives were asked for their views on the competence of adjudication officers. More representatives were satisfied (47 per cent) than dissatisfied (31 per cent) with the competence of adjudication officers, although not by much more than they had been in 2016 when 40 per cent were satisfied compared to 31 per cent dissatisfied. In the 2019 survey, the majority of representatives who were dissatisfied or very dissatisfied with the competence of adjudication officers were barristers, making up 17 of the 32 barristers who took part in the survey or, in percentage terms, 53 per cent. Among the 30 barristers who responded to this particular question, just 23 per cent were satisfied, while 57 per cent were dissatisfied. This expression of dissatisfaction contrasted with the views of solicitors—of the 31 solicitors who responded, 39 per cent were satisfied, while 26 per cent were dissatisfied. As such, barristers were disproportionately dissatisfied with the competence of adjudication officers compared to other professional cohorts.

Thirty-seven representatives responded with further comments on the general operation of the Adjudication Service. Sixteen specifically commented negatively on the competence of adjudication officers. Recurring themes were a variety and inconsistency in the quality of adjudication officers, the inability of some to understand complex legal matters, and concerns over inconsistencies and improper application in how the rules of evidence are applied during hearings. These comments were mostly made by barristers or solicitors. That barristers were disproportionately more likely to be dissatisfied than others is telling. This finding—reflecting criticisms made by legal practitioners early on in the reform process—may stem from the absence of a requirement to be legally qualified, or to have a minimum level of legal professional practice experience to serve as an adjudication officer.[37] As detailed above, similar arguments were made on the applicant's behalf in *Zalewski*, citing this author's 2016 survey, which pointed to representatives' dissatisfaction with the system as evidence that the absence

[35] The WRC published new guidelines on postponements on 1 July 2021, see *www.workplacerelations.ie/en/complaints_disputes/adjudication/postponement-policy/wrc-postponement-guidelines.pdf* [Accessed 9 August 2021].

[36] Barry, "Surveying the Scene: How Representatives' Views Informed a New Era in Irish Workplace Dispute Resolution" (fn.5) at 60.

[37] Mallon, "Employment Law Reform" (fn.2), 79–80; Bolger (fn.2) at 24.

of a requirement to be legally qualified led to systemic problems.[38] However, as described above, the Supreme Court decided that the absence of such requirements for appointment was not unconstitutional.

As for how representatives rated the quality of adjudication officers' rulings, perceptions in 2019 were just marginally better than those expressed in 2016. In 2019, 38 per cent were satisfied and 38 per cent were dissatisfied, while in 2016, 31 per cent were satisfied and 37 per cent were dissatisfied.

Aside from the issue of competence of individual adjudication officers and the quality of their rulings, representatives expressed strong, predominantly negative views on the consistency of hearings before the WRC. Sixty-eight per cent disagreed that the format of hearings before adjudication officers was consistent from hearing to hearing, while 26 per cent agreed. Rather strikingly, this was a marginally worse result compared to 2016 when 63 per cent disagreed and 26 per cent agreed. Therefore, the results suggest that inconsistencies of approach at hearings cannot be attributable to an initial bedding-in period for the Adjudication Service's operations. That just over two out of three representatives believed adjudication hearings were inconsistent four years on is undoubtedly a concern. Many of the 37 comments on the Adjudication Service referred to inconsistency among adjudication officers and the conduct of hearings, with some flagging differences in approach during hearings as between mediative, inquisitorial and adversarial styles. Others highlighted variability in how rules of evidence were applied. When viewed alongside the result to a separate, but related question—that over half (54 per cent) of representatives are dissatisfied with the consistency of adjudication officers' rulings—the overall picture that these results paint is rather negative. The possible reasons for inconsistencies at adjudication are explored in Part 3.

Overall, negative perceptions persisted regarding many aspects of the critical first-instance Adjudication Service provided by the WRC. The results from the 2019 survey suggested that there is a sizeable cohort of legal professional practitioners, particularly barristers, who remained deeply concerned that adjudication at the Adjudication Service is characterised by unpredictable and inconsistent procedures. Coupled with the finding that more experienced practitioners' perceived the new system as worse than the old one, it is reasonable to deduce that at least some legal professional practitioners remain of the view that a more legal, court-like forum at first instance presided over by legally qualified adjudicators is a preferable mode of adjudication, particularly for the resolution of employment rights claims. These were characteristics of the Employment Appeals Tribunal, where a legally qualified chair (or vice-chair) presided over hearings as part of a tripartite panel. A further finding from the 2019 survey lends weight to this suggestion: 58 per cent of 94 responding representatives (the majority of them solicitors and barristers) expressed the view that adjudication officers were less competent than members of the Employment Appeals Tribunal.[39] Twenty-nine per cent expressed the view that adjudication officers were more competent than their predecessors on the Employment Appeals Tribunal. The next section considers representatives' views on the WRC's Mediation Service.

(iii) *Views on the WRC's Mediation Service*

The WRC's Mediation Service provides mediation in two main formats, telephone and face-to-face mediation, although telephone mediation is used much more often. Measured by case volume alone, adjudication, rather than mediation, remains very much the dominant mode of first-instance dispute resolution at the WRC. Mediation for employment rights issues is

[38] O'Donnell J., [2020] IESC 24, para.18.

[39] It is acknowledged, of course, that this ought to be considered a general impression, particularly given some ordinary members of the EAT transferred to the role of adjudication officer when the WRC was established.

dependent on submitting a claim to the Adjudication Service. The use of mediation and how it is presented to users, and the propensity for disputes to be triaged to adjudication are themes that will be returned to later in Part 3 of this article.

The 2019 survey asked representatives about their satisfaction with the general effectiveness of the Mediation Service to resolve workplace disputes. More representatives were dissatisfied (33 per cent) than were satisfied (26 per cent). Participants' commentary on the quality of the Mediation Service was quite polarised. When asked to provide general additional comments on the Mediation Service, 30 representatives responded. Five remarked that the face-to-face service was more useful than the telephone service. Seven representatives expressed concerns about availability, some recounting instances when mediation was not offered to them even after both parties requested it. Nevertheless, on this issue, there was something of an improvement in representatives' general views as to the availability of mediation services relative to the 2016 survey. In 2019, 33 per cent were satisfied with the availability of the WRC's face-to-face mediation service while 25 per cent were dissatisfied—an improvement on corresponding figures from 2016, when 27 per cent were satisfied and 34 per cent were dissatisfied. Nevertheless, despite the improvement, availability of mediation appeared to remain a significant issue. Finally, two representatives commented that there was not enough flexibility and creativity in terms of the agreements that WRC mediators propose.

The results from the 2019 survey suggest that the WRC Mediation Service is not running optimally, and more could be done to improve both the effectiveness and availability of appropriate mediation in the future. In Part 3, suggestions are made for how bolstering the Mediation Service's service delivery could improve outcomes for parties seeking first-instance dispute resolution at the WRC.

(iv) *Views on the Labour Court*

The 2015 Act increased the Labour Court's jurisdiction considerably. Since its introduction, the Court has appellate jurisdiction over disputes under the full range of employment rights legislation.[40]

Broadly speaking, representatives' satisfaction levels with the Labour Court expressed in the 2019 survey were considerably higher than they were with the WRC. This mirrors a similar trend from the 2016 survey. In the 2019 survey, 70 per cent expressed satisfaction with the administration and processing of claims at the Labour Court. Just 15 per cent were dissatisfied. These figures were broadly similar to those that the Labour Court enjoyed in the 2016 survey. In the 2019 survey, 71 per cent were satisfied with the competence of the Labour Court while 21 per cent were dissatisfied. This compared to 59 per cent satisfied and 13 per cent dissatisfied in the 2016 survey. Representatives in 2019 were generally satisfied with the quality of rulings issued by the Court: 62 per cent satisfied, 22 per cent dissatisfied, compared to 59 per cent satisfied and 12 per cent dissatisfied in 2016.[41] Representatives were also generally satisfied

[40] For discussion on the role of the Labour Court within the system, see Kerr (fn.2); Mallon, "Employment Law Reform" (fn.2) at 77; Duffy (fn.2). Up until the introduction of the 2015 Act the Labour Court served as an appellate forum for complaints made under the Employment Equality Acts 1998–2015, the Organisation of Working Time Act 1997, the National Minimum Wage Act 2000, the Protection of Employees (Part-Time Work) Act 2001, the Protection of Employees (Fixed-Term Work) Act 2003, the Safety, Health and Welfare at Work Act 2005 and the Protection of Employees (Temporary Agency Work) Act 2012.

[41] In 2021, two litigants separately successfully judicially reviewed the decision-making of the Labour Court, on the ground that the Court failed to give reasons for its decisions. In one instance, the Supreme Court found that the Labour Court failed to give reasons for its recommendation under procedures laid down in Chapter 3 of the Industrial Relations (Amendment) Act 2015, see *Naisiunta Leictreacht (NECI) v Labour Court* [2021] IESC 36, while in another instance, the High Court ruled that the Labour Court failed to give adequate reasons for its

with the consistency of the rulings made by the Labour Court: 61 per cent satisfied, 23 per cent dissatisfied, compared to 58 per cent satisfied and 18 per cent dissatisfied in 2016. 70 per cent of representatives agreed to some extent that the Labour Court had adapted well to its new increased role as a full appellate court for employment rights issues, while 22 per cent disagreed. In 2016, 56 per cent agreed while 20 per cent disagreed. It would appear then, that representatives are broadly positive about their experiences of the Labour Court in recent years, and more so than they were in 2016.

However, despite these positive results, 47 representatives provided additional, mostly negative, comments on the Labour Court. Some 18 representatives commented variously on some Labour Court members' hostile, rude, aggressive, intemperate or ill-tempered manner. These comments did not stem from one particular cohort, coming from representatives on both sides of the industrial relations divide and from barristers, solicitors and trade union representatives alike. Five representatives remarked that there was too much emphasis placed on written rather than oral submissions in the decision-making process.

Reflecting on the results of the 2019 survey on the whole, it seems that the bulk of representatives' concerns and criticisms of the new system focus on how disputes are resolved at first-instance at the WRC. Part 3 examines how the survey data can help to reflect on the system's successes and the ongoing challenges it faces, particularly in light of the Supreme Court's decision in *Zalewski*, and how, consequently, the system may be best served by recalibrating its first-instance dispute resolution offering by bolstering mediation, both in terms of how it is presented to users and how it is delivered.

3. REFLECTIONS, ANALYSIS, AND DEVELOPING THE SYSTEM

The three surveys combine to form a longitudinal study over the last decade on representatives' views on workplace dispute resolution services in Ireland at a time of fundamental change in the system. On balance, the survey results suggest that the new system for resolving workplace relations disputes is a significant improvement on the old one. They reflect gradual improvement in some key areas over the first four years of its operations, although considerable challenges remain.

Two successes stand out. First, the new system is undoubtedly far less convoluted and confusing than the old one. The 2015 Act delivered a two-tier adjudication structure for resolving workplace disputes, a structure that enjoyed representatives' widespread support in the 2011 survey before reforms were announced.[42] The system ensures that users and their representatives now have a clearer path for resolving the vast majority of employment law and industrial relations disputes. Confusion over the vast array of entry points for complainants, duplication of claims to multiple agencies arising from the one set of circumstances, and forum shopping that arose under the old system have been eradicated.[43]

Secondly, delays that were pervasive in the old system are no longer common.[44] Although some suggest that delays can sometimes occur at various stages of dispute resolution processes under the new system, and although the COVID-19 emergency caused difficulties in processing

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determination not to block an unfair dismissal claim on procedural grounds, see *The State of Kuwait v Kanj* [2021] IEHC 395.

[42] Eighty-two per cent of representatives supported this model in the 2011 survey. The then-Chairman of the Labour Court, commented in 2012 that, "[i]f there is one thing that every participant in the debate generated by the Minister's proposals for reform of the employment rights adjudicative system appears to agree on, it is the need for reform". Duffy (fn.2) at 81.

[43] This was reflected in evidence from a leading employment law practitioner on behalf of the applicant in *Zalewski* who described the new system as a "tremendous advance" [2021] IESC 24, para.146, per O'Donnell J.

[44] Thirteen representatives in the 2011 commented specifically on delays in the system then. Barry, "Surveying the Scene: How Representatives' Views Informed a New Era in Irish Workplace Dispute Resolution" (fn.5) at 53.

complaints at the WRC, concerns about systemic delays are far fewer in number than they had been previously.

Despite these successes, significant concerns remain among representatives with the delivery of first-instance dispute resolution at the WRC. Most criticisms are directed towards the Adjudication Service, with unpredictability and inconsistency, in how adjudication is conducted, a dominant theme. These concerns overlap with the constitutional frailties identified in *Zalewski*, although the survey results point to wider issues with how first-instance dispute resolution operates.

What are the underlying reasons for representatives' negative views on the Adjudication Service? First, the wording in the 2015 Act that prescribes what an adjudication officer does, s.41(5)(a), is important because it provides context for the criticisms of inconsistency and unpredictability at hearings:

> "An adjudication officer to whom a complaint or dispute is referred under this section shall—
> (i) inquire into the complaint or dispute,
> (ii) give the parties to the complaint or dispute an opportunity to—
> (I) be heard by the adjudication officer, and
> (II) present to the adjudication officer any evidence relevant to the complaint or dispute,
> (iii) make a decision in relation to the complaint or dispute in accordance with the relevant redress provision, and
> (iv) give the parties to the complaint or dispute a copy of that decision in writing."

To summarise then, an adjudication officer's basic duties are to inquire into the matter, hear the parties and allow them to present evidence, make a decision and give it to the parties in writing. The approach taken by the legislators is streamlined—perhaps a deliberate policy decision to diverge from the formalities of traditional court settings governed by extensive court rules of procedure. Layered onto the streamlined legislative framework is the WRC's *Guidance Note for a WRC Adjudication Hearing*, a "general guide for the structure and procedure of a WRC Adjudication Hearing", first published in October 2017.[45] Notably, the *Guidance Note* opens with a statement that emphasises the substantial discretion adjudication officers have when conducting hearings: "[i]t is a matter for the Adjudication Officer to run the hearing/investigation as appropriate for the circumstances of the case and in accordance with fair procedures." As for how oral argument is conducted and how evidence is heard, the *Guidance Note* states at 6.3 that an adjudication officer "will take direct evidence from both parties and all other relevant witnesses, *if required*" [emphasis added], while at 6.4, "[t]he other party, or their representative, will be given the opportunity to question the parties and other witnesses regarding the evidence they have given." The overall tenor of the guidelines seems to facilitate, if not emphasise adjudication officers' considerable discretion in how they run hearings.

Contrast this to equivalent 2015 Guidelines issued by the Employment Appeals Tribunal (EAT), the WRC's predecessor for adjudicating the majority of termination of employment disputes. The EAT guidelines specifically stated that "rules of evidence *are applied* in the taking [sic] the parties' evidence" [emphasis added]. It set out that witnesses give direct evidence to the Tribunal (in general, under oath, for unfair dismissals cases), the other side then

[45] *Guidance Note for a WRC Adjudication Hearing*, *www.workplacerelations.ie/en/Publications_Forms/Guides_Booklets/Guidance_Note_for_a_WRC_Adjudication_Hearing.pdf* [Accessed 9 August 2021].

engages in cross-examination, and if new matters arise, re-examination can take place.[46] The EAT's guidelines were, therefore, considerably more prescriptive than the WRC's.

Some degree of flexibility of approach is desirable because the WRC necessarily has to cater for a very wide range of dispute types with different characteristics and qualities. To illustrate, a worker's complaint of not having received a written contract of employment is not the same, nor nearly as complex, as another worker's complaint of constructive dismissal coupled with an allegation of sexual harassment by a colleague. One senior official from the Department of Enterprise, Trade and Employment, appearing before an Oireachtas committee addressing the need for amending legislation after the *Zalewski* judgment, remarked that the WRC is a "very unique place" that must deal with "very simple matters and very complex matters and what we are trying to do is find the right balance whereby we are ensuring the administration of justice, that fairness is at the heart of it, that it is transparent and of a standard but at the same time it does not become a ten-year process".[47] As O'Donnell J. noted in *Zalewski*, the WRC is trying "… to pursue the desirable objective of having any disputes resolved as speedily, cheaply, and informally as possible, and without the aspects of court proceedings which might be considered unnecessary and, in some cases, intimidating and inhibitory".[48]

However, with flexibility and informality come concerns—among solicitors and barristers, in particular—about inconsistency and unpredictability at adjudication. The potential for such difficulties was flagged before the 2015 Act was passed. As the Workplace Relations Bill 2014 went through the Oireachtas, prominent employment law practitioners criticised its text on aspects of adjudication. Tom Mallon B.L. noted the "total lack of detail" in how hearings were to be conducted,[49] while Marguerite Bolger S.C. flagged that there seemed to be an emphasis on adjudication possessing an inquisitorial, rather than an adversarial quality.[50] Bolger argued that, while an inquisitorial approach may be suitable for resolving industrial relations disputes, it "may not be so effective in dealing with the blatant conflicts of fact which can and do arise in employment law disputes".[51] These comments were prescient, given the views expressed in both the 2016 and the 2019 surveys about inconsistencies and unpredictability in the adjudication process. In a similar vein, Bolger's criticism that the 2015 Act's provision for adjudication may be in breach of constitutional and ECHR rights also proved prophetic in light of the Supreme Court's decision in *Zalewski*.[52]

Aside from the broadly-framed wording of the 2015 Act and the *WRC Guidelines* that followed, another reason for inconsistency and unpredictability at adjudication may be adjudication officers relying on previous experiences and modes of adjudicating at the old dispute resolution bodies in which they served. In 2015, adjudicators from each of the old

[46] Employment Appeals Tribunal, *Guidelines for Employees, Employers, and Practitioners appearing before the Employment Appeals Tribunal*, October 2015. Such guidelines appear to have been based on legislative requirements for the conduct of certain proceedings under the Tribunal's remit. See regs.10–13, Redundancy (Redundancy Appeals Tribunal) Regulations 1968 (S.I. No. 24 of 1968) that provided, inter alia, that Tribunal hearings shall take place in public, and provided for procedures including calling witnesses and cross-examination.
[47] Tara Coogan, Oireachtas Joint Committee on Enterprise, Trade and Employment debate on the Workplace Relations (Miscellaneous Amendments) Bill 2021: Waiver of Pre-legislative Scrutiny, 5 May 2021.
[48] [2021] IESC 24, para.138, per O'Donnell J.
[49] Commenting on the Bill, Tom Mallon noted "a total lack of detail as to how the hearings will be conducted". Mallon, "Employment Law Reform" (fn.2) at 77.
[50] Marguerite Bolger noted that the wording in the Bill that described the adjudication officer's function at a hearing—to "inquire into the complaint or dispute"—suggested an inquisitorial rather than an adversarial approach. Bolger (fn.2) at 23.
[51] See fn.50 at 24.
[52] That said, it is worth noting that the vast majority of participants in the 2019 survey did not specifically allude to constitutional concerns. The more pressing and commonly-expressed misgivings among representatives related to inconsistency in the adjudication process, and unpredictability in how hearings play out.

dispute resolution bodies—each with its own practices and procedures, and culture of dispute resolution—transitioned to their new role as adjudication officers at the WRC. Commenting on the WRC's operations one year after its commencement in 2016, the then Director General of the WRC, Oonagh Buckley, remarked that the experiences and skills adjudication officers had acquired in the adjudicative bodies in which they had previously served "naturally inform how they go about their day to day work in the independent performance of their duties. We must respect that independence".[53] Notwithstanding that, she agreed that the WRC ought to work with adjudication officers towards "a consistent and predictable approach to the management of hearings."[54] Despite these commitments, survey responses taken three years later in 2019 suggest that such efforts have not worked—all the more surprising, perhaps, given an influx of newly-appointed adjudication officers between 2016 and 2019, and the expectation that procedures and practices at adjudication would have homogenised to a greater extent.

Where to next for the WRC and how can it improve its services to users? Critically, how can the WRC safeguard constitutional justice, while affording users a flexible and cost-effective means of resolving their dispute? O'Donnell J. captured the inherent tension in what the WRC is trying to achieve: "[I]f the policy of informality and the rejection of expensive and potentially cumbersome legal procedures becomes a rejection of the law and those features of procedure necessary for a fair determination, then there is an unavoidable, and fatal, clash."[55] The *Zalewski* decision presents an opportunity for the WRC to evolve and to improve its dispute resolution offering. The first, and most pressing, milestone, of course, is amending legislation to address the constitutional frailties identified in *Zalewski*, the Workplace Relations (Miscellaneous Provisions) Act 2021.

The Workplace Relations (Miscellaneous Provisions) Act 2021 ("the 2021 Act") was first published on 24 June 2021, proceeded through the legislative stages at a fast pace, and was signed into law by the President on 22 July. It directly addresses the constitutional shortcomings of adjudication at the WRC identified in *Zalewski*. It grants adjudication officers the power to provide for the administration of oaths or affirmations and for adjudication hearings to be heard in public by default, subject to exceptions. The 2021 Act also sets parameters on the Government's powers to appoint and revoke the appointment of adjudication officers,[56] for the anonymisation of parties in published decisions of adjudication officers in certain circumstances, and provides that applications to the District Court in relation to the enforcement of decisions of adjudication officers shall be made on notice.[57]

To focus on those provisions that directly address the declarations of unconstitutionality in *Zalewski*, the 2021 Act's provisions for oaths or affirmations are straightforward. Section 4 of the 2021 Act amends the 2015 Act at s.41(12A) by providing that an adjudication officer may require a person giving evidence in adjudication proceedings "to give such evidence on oath or affirmation and, for that purpose, cause to be administered an oath or affirmation to

[53] Oonagh Buckley, "Presentation of the Director General of the WRC" at a High Level Conference, *The Workplace Relations Act 2015—One Year On*, UCD Sutherland School of Law, 1 October 2016.
[54] See fn.53.
[55] [2021] IESC 24, para.138.
[56] The question arises whether such parameters comply with the requirements of art.6 of the ECHR, specifically the entitlement to a hearing by an "independent and impartial tribunal established by law". See further on this matter, *Smith v Secretary of State for Trade and Industry* [2000] I.R.L.R. 6.
[57] While this had already been provided for through Ord.40C in Sch.2 of the District Court (Civil Procedure) Rules 2014, S.I. No. 17 of 2014, the purpose of the section in the 2021 Act, as described in the Explanatory Memorandum accompanying it, is to "strengthen the rights of employers in matters relating to the enforcement of decisions of an adjudication officer in the District Court".

such person".[58] It further provides for substantial criminal penalties for persons making statements material in the proceedings that are, and that they know to be, false.[59]

As regards the provision for adjudication hearings to be conducted in public, s.4 of the 2021 Act replaces s.41(13) of the 2015 Act that the Supreme Court in *Zalewski* declared unconstitutional insofar as it provided that hearings were to be conducted otherwise than in public. It amends s.41(13) of the 2015 Act such that it prescribes that adjudication hearings shall be heard in public, subject to a broadly framed qualification that an adjudication officer may determine, upon a motion or application by a party, that "due to the existence of special circumstances" all or part of the proceedings "should be conducted otherwise than in public". Section 4 of the 2021 Act also provides equivalent criteria regarding the publication of decisions and the identification of parties involved. By default, every decision shall be published on the internet subject to the adjudication officer's discretion to anonymise parties in published decisions by inserting the following wording into the 2015 Act at s.41(14): "an adjudication officer may determine that, due to the existence of special circumstances, information that would identify the parties in relation to whom the decision was made should not be published by the Commission".[60]

The provision regarding hearings in public or private mirrors the provision for the conduct of hearings in the Labour Court in public by default, subject to the same exception. Although the legislative approach taken is like-for-like, it should be noted that the WRC and Labour Court operate in very different contexts. Firstly, the vast majority of complaints begin and end at the WRC, rather than proceed to appeal before the Labour Court. The issue of whether hearings ought to be heard in public or in private will therefore undoubtedly arise far more often at the WRC than it will at the Labour Court. Every party who wishes to engage with state-provided adjudication will weigh up the prospect of public scrutiny of their matter, not just those who seek to appeal a decision to the Labour Court.

Secondly, the Labour Court operates as a tripartite panel, and as such its three members can—at least in theory, if not in practice—make the call together on whether there are special circumstances to host the hearing in private. An adjudication officer, on the other hand, must make such a call alone on what amounts to "special circumstances" for the hearing to be conducted otherwise than in public.

Thirdly, then, what amounts to "special" circumstances, both in the context of deciding to host hearings in private and in the context of anonymising parties' involvements in any decision that is published? It is worth noting that the legislators did not choose "exceptional" or "extraordinary" circumstances as the requisite threshold. Perhaps by setting the threshold to "special" circumstances rather than to a higher threshold, this envisages private hearings becoming relatively common case—indeed, as previously noted above, O'Donnell J. observed that it may even be permissible to have a presumption in favour of private hearings. However, during a Dáil debate on this subsection, Minister of State, Damien English T.D., gave some indication as to what was envisaged by "special circumstances", suggesting that they would

[58] The 2021 Act also makes equivalent amendments to the Redundancy Payments Act 1967 s.39 and the Unfair Dismissals Act 1977 s.8.

[59] The penalties on summary conviction are a class B fine (€4,000) or to imprisonment for a term not exceeding 12 months, or both, or, on conviction on indictment, a fine not exceeding €100,000 or imprisonment for a term not exceeding 10 years, or both.

[60] The 2021 Act also makes equivalent amendments to s.39 Redundancy Payments Act 1967 and s.9 Protection of Employees (Employers' Insolvency) Act 1984. On granting anonymity, interestingly, while the 2021 Act provides for anonymising parties, it does not provide for anonymising witnesses. It is also worth considering, in this context, the Court of Justice of the European Union's approach to this issue, which is based on reconciling the principle of open courts and public information with the protection of personal data of "natural persons", per Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018. **[final sentence deleted – duplicate of 2nd sentence in this note]**

arise in instances "such as cases involving a minor, a sensitive health or other social matter, sexual harassment or protected disclosures".[61] It seems, then, that a complainant would not meet the threshold simply by expressing concern that, if their name is in the public domain as having taken a complaint to the WRC, this could potentially damage their future employment prospects. The Minister of State rejected an amendment tabled by four Sinn Féin senators to require the WRC not to publish parties' names where it would detrimentally impact on their securing employment in the future. He dismissed such concerns: public hearings at the WRC "would not deter employees bringing cases forward" and "[a]ny decent employer will not hold it against a potential employee who took a case to the WRC to vindicate his or her rights under our employment law", he contended.[62] At the very least, it remains to be seen whether this is an overly optimistic view. At worst, some workers may well decide that "going public" to have their employment rights vindicated is simply not worth the risk of possibly damaging their career prospects. Or vice versa, an employer facing a spurious complaint from an unjustifiably disgruntled worker may decide to cut their losses and reach a settlement to avoid any reputational damage occasioned by a public hearing.

Whatever the case, where one party seeks a private hearing and the other contests this, there are, at present, no criteria other than "special circumstances" for an adjudication officer on which to base their decision. The 2021 Act appears to have been left deliberately open-ended. The Minister of State emphasised the importance of adjudication officers' discretion in this regard, in response to concerns from both T.D.s and Senators.[63] He said that more detail and guidance will follow in the form of regulations and WRC guidelines.[64] Regulations, at a minimum, will be necessary. If prescribing factors for determining what amounts to "special circumstances" is left to guidelines alone, this approach would arguably be tantamount to the approach O'Donnell J. highlighted as "unsatisfactory" in his judgment in *Zalewski*, albeit in a separate context—that cross-examination was not expressly provided for in the 2015 Act itself and, instead, was left to be provided for through guidelines.[65]

The circumstances in which hearings will be heard in public or private, and whether parties will be publicly identified, are issues that are probably as significant as cross-examination. Adjudication officers will inevitably be asked, time and again, to make these important and contentious calls that may often make the difference between parties deciding to pursue or defend a claim or leave it be. From the legislation, there is little to go on. Further clarity on what factors an adjudication officer ought to consider in determining whether "special circumstances" exist will undoubtedly be necessary, to ensure that such decisions will be made robustly and consistently, and that inconsistencies and unpredictability do not arise. Otherwise, as one Dáil Deputy suggested, "[w]e would cause a bigger problem than we are trying to fix".[66] It remains to be seen whether problems may arise, depending on the approach taken when the 2021 Act comes into operation.

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[61] Dáil debate on the Workplace Relations (Miscellaneous Provisions) Bill 2021, 7 July 2021.
[62] See fn.61.
[63] Seanad Debate on the Workplace Relations (Miscellaneous Provisions) Bill 2021, 15 July 2021.
[64] See fn.63, the Minister for State stating that the intention is to "make sure we have all the i's dotted and the t's crossed in order that when we publish the regulations and guidelines, the adjudicator is given very clear guidance as to what we expect in these situations."
[65] [2021] IESC 24, para.146, per O'Donnell J. McKechnie J. was more forthright in his criticism: the failure to explicitly provide for such in the parent legislation was "extremely difficult to understand" [2021] IESC 24, para.141, per McKechnie J.
It is worth noting that the Workplace Relations (Miscellaneous Provisions) Act 2021 does not include an express provision for cross-examination.
[66] Louise O'Reilly T.D., Dáil Debate on the Workplace Relations (Miscellaneous Provisions) Bill 2021, 2 July 2021.

Reframing dispute resolution at the WRC

Aside from addressing the immediate constitutional frailties identified in *Zalewski* through the Workplace Relations (Miscellaneous Provisions) Act 2021, the broader question is how the overall system for resolving workplace disputes can be improved. The longitudinal data presented by the three surveys are useful in this regard. As detailed above, debate and criticism around the new system have to date predominantly focused on how WRC adjudication hearings are conducted, and the inconsistency and unpredictability that has arisen. The problem may be an over-reliance on adjudication, and the key to improving how disputes are resolved at first instance by the WRC may be to widen the lens, to investigate how the WRC can better harness the potential of its full suite of dispute resolution mechanisms beyond merely the Adjudication Service. Those tasked with reforming the system and drafting the 2015 Act were doubtless aware of the potential that other dispute resolution mechanisms had for resolving workplace disputes, alongside adjudication. However, it seems that rather than harnessing the 2015 Act's "omnibus procedures which apply to a whole spectrum of decision-making" (as Simons J. put it in his High Court judgment in *Zalewski*) to the fullest extent, many disputes may end up at the Adjudication Service too readily, rather than being triaged elsewhere, or at least without due consideration being given to other modes of dispute resolution.[67]

The unique characteristics of the WRC's workload, the full gamut of dispute types it must deal with, and the entirely laudable aim of providing flexibility to service users and informal channels for resolving their disputes, all point to the benefits of not only providing, but *fully resourcing* a multi-faceted, and multi-service dispute resolution offering to parties who come to the WRC. The 2015 Act provides for such a structure, but whether by accident or design or owing to the legacy of pre-existing fora for resolving workplace disputes, service users and their representatives predominantly converge on adjudication.

Breaking down the number of complaints before the WRC that are triaged to the different dispute resolution services is revealing. Adjudication is still very much the order of the day, bearing the burden of users' demands for a service to resolve their dispute. In 2019, the number of adjudications heard (5,009) amounted to about five times that of disputes that proceeded to full mediation (1,024). Of those 1,024 mediation processes, just 240 were face-to-face mediations, proportionately about 5 per cent of the total number of adjudication hearings in the same year. Equivalent figures for 2020 were highly skewed owing to the COVID-19 pandemic, with a hugely reduced number of adjudication hearings taking place, 1,899, owing to the forced postponement of hearing dates at various points during the year; 582 complaints proceeded to full mediation, 14 per cent of which were held face-to-face (circa 74 complaints), 85 per cent via telephone and the remainder (a handful it would seem) conducted virtually. A table detailing the number of face-to-face mediations from the calendar years 2016 to 2020 is set out below.

2016	2017	2018	2019	2020
69	197	603 (This figure includes 363 identical cases with a single employer).[68]	240	74[69]

[67] [2020] IEHC 178, para.30.

[68] In real terms, then, excluding this class mediation, 241 different face-to-face mediations took place in 2018.

[69] This number is based on the following calculation: in 2020 there were 582 complaints that went to mediation. This number was multiplied by 14 per cent, the percentage of these complaints that proceeded to face-to-face mediation. It is important to note that restrictions as a consequence of the COVID-19 pandemic presented unique challenges to the WRC's operations, undoubtedly making organising face-to-face mediation more difficult.

In his decision in *Zalewski*, O'Donnell J. spoke of how many parties presenting before the WRC seek "calm, quiet, and private resolution" of their dispute.[70] Perhaps the best place for calm, quiet and private resolution is very often at the Mediation Service, rather than at the Adjudication Service. As such, solutions may come from within the WRC and within the already established parameters of the 2015 Act. It may be a matter of emphasis and resourcing, while preserving the general structure of the 2015 Act and the WRC's dispute resolution offerings.

Before considering this further, it is important to acknowledge that mediation is not a panacea for all disputes and that adjudication is a necessary and fundamental part of the system. For many disputing parties—whether out of intransigence, a complete breakdown in a work relationship, or owing to the legal complexity of their claim—adjudication may be the only feasible option for resolving the dispute. However, representatives' criticisms in the 2019 survey, in particular, of inconsistency and unpredictability at adjudication may partly be a by-product of adjudication officers' efforts to provide for flexibility and informality in a forum that is over-relied upon, one that is unnecessarily perceived as the "go-to" option for users and their representatives in many instances. Indeed, some representatives, lamenting inconsistency at adjudication hearings, pointed to some adjudication officers' mediative style.

Flexible and informal dispute resolution can be provided for by the WRC elsewhere, through a fully-resourced, properly presented Mediation Service, while ensuring that adjudication remains available but is used appropriately.

The data on case throughput at the WRC highlight the propensity for complaints to go to adjudication. Mediation is a relatively uncommon avenue, and where it does occur, the vast majority of mediation is conducted through the telephone service. On the numbers alone, it may well be argued that the Mediation Service is underused, and perhaps, as some have suggested, under-resourced.[71] The WRC ought to consider ways to bolster its Mediation Service to make it a mainstay mechanism for resolving disputes for more users of the WRC. This involves a detailed consideration of how it is presented to potential users, and the substance and modes of delivering mediation and the concomitant increase in resources that may be required.

Encouragingly, this appears to be on the agenda. The WRC proposes to undertake a consultation process with its stakeholders to establish what informs parties' decisions to make use of mediation and what changes the WRC might introduce to increase usage of the service.[72]

Some brief comparisons with other jurisdictions are worth considering. In Britain disputing parties must contact the Advisory, Conciliation and Arbitration Service (Acas) before an Employment Tribunal claim (the British equivalent of the WRC Adjudication Service) can be lodged. Acas has a statutory duty to offer the services of a Conciliator to explain and offer Early Conciliation to the parties for an initial period of up to one calendar month. The Conciliator has the discretion to extend that by two weeks if both parties agree that extra time may help resolution.

In New Zealand, the Employment Relations Authority (the equivalent of the WRC there) must first consider whether mediation has been used by disputing parties. By default, the

[70] [2021] IESC 24, para.143

[71] On this, both Louise O'Reilly T.D. and Paul Murphy T.D. expressed the view that the WRC was under-resourced in a Dáil debate on the Workplace Relations (Miscellaneous Amendments) Bill 2021, 2 July 2021. As described above, the 2019 survey data point to a sizable number of representatives expressing concern about the availability of mediation.

[72] Workplace Relations Commission, "Workplace Relations Commission 2020 Annual Report" available at *www.workplacerelations.ie/en/publications_forms/corporate_matters/annual_reports_reviews/annual-report-2020.pdf* [Accessed 9 August 2021], p.11.

Authority must direct the parties to the Authority's mediation service, unless the Authority considers that mediation will not contribute constructively to resolving the matter, or will not be in the public interest, or will undermine the urgent or interim nature of the proceedings, or will be otherwise impractical or inappropriate in the circumstances. There is also a legal obligation on parties to comply with a direction to mediation and attempt in good faith to reach an agreed settlement of their differences.

In both jurisdictions, then, mediation is not prescribed as an alternative to adjudication, but rather, adjudication is prescribed as an alternative to mediation. The default dispute resolution mode is the reverse. By contrast, mediation for employment rights issues at the WRC is, as they describe in their own words, "dependent on submitting a claim to the Adjudication Service".[73]

What lessons can be learned from these jurisdictions? Both the British and New Zealand systems are designed to funnel claims into mediation as a first step, with adjudication the next step to be considered afterwards. Recalibrating the WRC such that parties *are mandated* to go to mediation may not be viable under the terms of the 2015 Act, and could conceivably be viewed as a barrier to parties' constitutional right of access to justice (recall that the Supreme Court decided in *Zalewski* that the Adjudication Service administers justice under a combination of Arts 34 and 37).[74] Moreover, mandatory mediation may not be desirable: mediation experts often view voluntary participation as integral to its viability and success.[75]

However, to turn to how mediation is presented: first, the WRC could recalibrate how it frames its two primary dispute resolution services—mediation and adjudication—to service users. They ought to be perceived by users and representatives as being of equal standing with each other, with one no more a default dispute resolution mechanism than the other. Although one cannot be entirely definitive about this, mediation at the WRC may currently be viewed by some users and representatives as something of a "boxed-off" category of dispute resolution, a secondary option, one that is couched as an "*alternative* dispute resolution" in the literal sense of the word and nothing more, rather than a mainstay dispute resolution mechanism in the way that adjudication is. Indeed, that access to mediation for employment rights disputes is contingent on filing a complaint to the Adjudication Service in the first place *renders* it an alternative, rather than as a standalone dispute resolution offering.

Aside from consulting with stakeholders, the WRC could draw from literature on the behavioural sciences, particularly nudge theory, pioneered by Richard Thaler and Cass Sunstein, to investigate behavioural reasons why users and their representatives may be inclined to opt for adjudication rather than mediation and to design behavioural interventions to present the Mediation Service as more than a mere secondary alternative to adjudication.[76] Concepts from this field may help to explore why parties, and their influential representatives, may over-rely on adjudication rather than on mediation. For instance, one might hypothesise that *status quo bias* (the propensity to stick to default options—adjudication seemingly the default dispute resolution option at the WRC), *overconfidence bias* (being unrealistically optimistic about predicting one's prospects, say, one's chances of success at adjudication) and *salience bias* (making decisions based on what is familiar and visible—the WRC Adjudication

[73] WRC, *Mediation: A Users Guide*, p.1.

[74] See *Macauley v Minister for Posts and Telegraphs* [1966] I.R. 345 where Kenny J. recognised the right to access to justice as being a necessary inference of the administration of justice set out in Art.34.

[75] See Gary Smith, "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not" (1998) 36 *Osgoode Hall Law Journal* 847; Paul Venus, "Court Directed Compulsory Mediation—Attendance or Participation?" (2004) 15 *Australasian Dispute Resolution Journal* 29. Although, for alternative perspectives, see Melissa Hanks, "Perspectives on Mandatory Mediation" (2012) 35 *University of New South Wales Law Journal* 929.

[76] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Penguin 2009).

Service is the salient, touchstone forum for resolving workplace disputes in Ireland), may all have a bearing on users' and their representatives' choices.[77] Consequently, many may opt for adjudication rather than pursue mediation even when adjudication may not be the most useful and cost-effective choice for them.

Aside from how the WRC presents its mediation offering, it ought to consider the substance of its mediation offering and to explore ways to improve the Service's dynamism and attractiveness to users and their representatives. When mediation is made available (and it is worth noting that some respondents to the 2016 and 2019 surveys remarked that they were not offered mediation, even when both parties asked for it), as noted above, respondents seemed to view face-to-face mediation more favourably than the telephone mediation service. The apparent reliance on telephone mediation over face-to-face mediation is, therefore, striking, as is the almost entire absence of employing online video conferencing technology, an avenue that at the very least ought to be considered further, particularly in light of its normalisation during the COVID-19 pandemic. Some mediators suggest virtual mediation, and some of the features available through online video conferencing platforms, have advantages over in-person mediation. For example, the breakout rooms function on online video conferencing platforms can be useful for shuttle diplomacy.[78] Further resources in terms of budget, ICT, personnel, or otherwise would become necessary. But it would be a cost worth bearing.

Mediation is, by its nature, a more malleable dispute resolution technique for workplace disputes than adjudication.[79] Mediators can adapt their strategic approach to mediation to cater for the dispute at hand.[80] Certainly, mediators can operate with more flexibility and discretion than adjudicators can, given the nature of mediation and given the constitutionally necessary constraints on how adjudication officers ought to conduct hearings following the Supreme Court's decision in *Zalewski*. Mediators can on the one hand be more evaluative and forthright in their assessment of the dispute where necessary, or facilitative on the other, eliciting resolutions to the dispute from the parties themselves, perhaps working towards creative resolutions that preserve or even improve workplace relationships. Through in-depth, comprehensive mediation sessions and processes, users may feel that their case has been properly oxygenated and that their rights and duties as workers and employers alike have been considered in a nuanced, and meaningful way. Mediation can also lead to bespoke resolutions that may not be available through adjudication.

Indeed, mediation has been employed in the context of resolving employment rights disputes in Ireland before, and according to users, very successfully. The Mediation Service that operated at the Equality Tribunal operated on a face-to-face basis from 2000 until the introduction of the new system. A survey of its users in 2009 demonstrated overwhelming endorsement for the Service with over 90 per cent of users rating the Mediation Officer's

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[77] See further on how these behavioural effects can affect choosing mediation as a dispute resolution option, Charmaine Yun Ning Yap, "What's in a Nudge? How Choice Architecture Surrounding Dispute Resolution Options can Increase Uptake of Mediation" (2019) 4 *Contemporary Issues in Mediation* 13.

[78] See, for example, Giuseppe Leonne, founder of Virtual Mediation Lab's demonstration of break-out rooms in the online video conferencing platform Zoom as a tool for shuttle diplmacy in online mediation, *How Shuttle Diplomacy Works in Online Mediation via Zoom*, available at *www.youtube.com/watch?v=9_kx-MiPcwQ* [Accessed 9 August 2021].

[79] On the nature of workplace mediation, and the competencies, skills and behaviours of effective workplace mediators, see Brian Barry and others, "Shaping the Agenda 1: Exploring the Competencies, Skills and Behaviours of Effective Workplace Mediators" [2016] Kennedy Institute Workplace Mediation Research Group.

[80] Elsewhere, the author presents a framework for mediators to determine mediation strategy in workplace disputes depending on the nature of the dispute (the type of dispute, the relationship between the parties, the outcome agenda of the dispute all being factors). See Brian Barry, "A Strategy Model for Workplace Mediation Success" (2021) 6 *Mediation Theory and Practice* (forthcoming).

fairness to both sides, the clarity of mediation guidelines, and their overall satisfaction with the Service as either "good" or "very good".[81]

For a bolstered role to be given to the WRC's Mediation Service, and for it to enjoy wider success, would, of course, demand the confidence and buy-in from representatives from different professional backgrounds, legal practitioners or otherwise. Clear policies and guidelines to representatives on how mediation sessions will be conducted ought to be provided. Again, messaging and presentation are key. It is worth noting that representatives who responded to the 2011 survey, before the reforms were introduced, were well disposed towards the introduction of mediation or other alternative dispute resolution service as a *mainstream* means of first-instance dispute resolution: 69 per cent agreed or strongly agreed with the proposal, 15 per cent disagreed, while 16 per cent expressed no opinion. As the 2019 survey indicated, however, representatives' views on the Mediation Service in its current guise are mixed.

If the WRC were to bolster how it presents its Mediation Service and its modes of delivery, this may help to ensure that informality and flexibility are embedded within the system as a viable mainstream option, while at the same time, the necessary and appropriately rigorous standards of constitutional justice could be provided for through adjudication.

Notwithstanding all of the above, and to reemphasise, the Adjudication Service should of course necessarily remain fully available to those who will need it. A granular approach where a complaint gives rise to more than one issue can be taken. Complaints comprising multiple issues can be bifurcated between the two services.[82]

The Adjudication Service should continue to serve as a cornerstone of the WRC's dispute resolution offering, and although it need not mimic an ordinary court, the "standard of justice" administered by it and now confirmed as falling under Art.37, cannot, as O'Donnell J. stated, "be lower or less demanding than the justice administered in [ordinary] courts under Article 34".[83] The *standard* of processes that an adjudication officer is required to uphold, therefore, must not dip below that which would be expected in any ordinary court. With that requirement comes, perhaps, a necessary degree of rigour in terms of procedure, and a concomitant degree of formality, not to mention public scrutiny given that the default will be that hearings will be conducted in public. This more rigorous procedural approach will likely afford prospective users of adjudication some degree of certainty. In his judgment, MacMenamin J. put it simply: "[P]arties are entitled to know, in advance, the rules of procedure to be applied prior to embarking on a hearing."[84]

Consequently, the Mediation Service, through better presentation and bolstered resources, including more reliance on face-to-face mediations and more use of online video-conferencing technology rather than on telephone mediation, could serve as a more meaningful counterpart and foil to adjudication than it has done to date (and vice versa), thereby ensuring that it provides the flexible and informal dispute resolution avenue that many users may seek when they come to the WRC, while, between them, mediation and adjudication can properly cater for the full gamut of disputes.

What is suggested here does not require any overhaul to the legislative framework set out in the 2015 Act, nor is the proposal geared towards purposefully funnelling users away from

[81] Annual Report of the Equality Tribunal 2009, p.27. Experts spoke of the Service in 2008 "as a viable and appropriate avenue of redress" for claims of unlawful discrimination". Paul Teague and Damian Thomas, *Employment Dispute Resolution & Standard-setting* (Cork: Oak Tree Press, 2008), p.112.

[82] It is worth noting, also, that some complaints can be dealt with by written submissions by an adjudication officer under the processes set out under s.47(1) of the 2015 Act. This would seem to be more suited to more straightforward disputes that hinge entirely on documentary evidence— for instance, where a worker alleges their employer failed to provide them with a written statement of terms of employment.

[83] [2021] IESC 24, para.138.

[84] [2021] IESC 24, para.139, per MacMenamin J.

getting a ruling from the Adjudication Service when they need it. Rather, it is to better harness the true potential of its Mediation Service which, to date, the survey data would suggest, has perhaps not fully met expectations. The inconsistency and unpredictability at adjudication, and the procedural problems that the Supreme Court in *Zalewski* identified, are perhaps indicators that adjudication is too often relied upon. More parties, instead, ought to benefit from mediation and the informality, flexibility and sometimes creativity that comes with resolving disputes through it. This will, by extension, facilitate adjudication officers to deal with the proportion of complaints that demand more formality owing to their factual or legal complexity or otherwise in a more predictable and consistent manner. The range and differing nature of workplace disputes that present to the WRC lend themselves to this dual offering. Finally, as workplace dispute resolution in Ireland evolves, the insights of the community of legal practitioners and other professional representatives, as the survey data has demonstrated over the years, offer unique and valuable perspectives into operations on the ground. They ought to continue to have a say on the system's ongoing development.

Dr Brian Barry is a Lecturer in Law, Technological University Dublin.