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Surveying the Scene: how Representatives' Views Informed a New Era in Irish Workplace Dispute Resolution

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Surveying the scene: how representatives' views informed a new era in Irish workplace dispute resolution

Dr Brian Barry*

Abstract

The Workplace Relations Act 2015 introduced a major overhaul of workplace dispute resolution bodies in Ireland, streamlining a complicated system for resolving workplace disputes comprising multiple fora into a two-tier structure. The article describes and analyses the results of two surveys undertaken by the author of the views of employment law and industrial relations practitioners and other representatives in Ireland before the reforms in 2011 and after the reforms in 2016. This article describes the purpose, methodology and considers the results of both surveys. The 2011 survey informed the agenda for reforming the Irish workplace dispute resolution system in 2015. The 2016 survey informed the new workplace dispute resolution bodies where improvements could be made. The impact of these surveys will be considered in the context of recent developments in the operation of the new system.

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Introduction

On 1 October 2015 the Workplace Relations Act 2015 (the “Act”) transformed the system for resolving workplace disputes in Ireland.¹ Before that date the Irish workplace dispute resolution system comprised a “multiplicity of adjudicating fora” and was regarded by many, including the government department responsible for the system, the Department of Jobs, Enterprise and Innovation, as being complex and onerous.² A new two-tier structure was introduced by the Act consisting of two bodies for adjudicating employment rights and industrial relations disputes: an Adjudication Service at the newly-established Workplace Relations Commission (the “WRC”) to resolve disputes at first instance and an expanded Labour Court with a revised jurisdiction to hear all appeals from decisions of Adjudication Officers at the WRC.

Over this period of reform the author conducted two surveys in 2011 and 2016 of representatives - that is professionals who regularly represent complainants and respondents in employment law and industrial relations disputes including solicitors and barristers, trade union representatives and employer representatives - in Ireland who appear before the relevant workplace dispute resolution bodies. The aim of both surveys was to ascertain the views and levels of satisfaction of representatives with the system, with the individual workplace dispute resolution bodies operating within the system at that time, and to seek their views on how the system could be improved.

The first survey was conducted in 2011 on the old system that existed before the changes introduced by the Act. Its focus was on identifying what representatives thought of that system, on ascertaining levels of support for specific proposals for reform and to seek representatives’ own commentary on both of these issues.

¹ See generally, Anthony Kerr, ‘The Workplace Relations Reform Project’ (2016) 7(1) *European Labour Law Journal* 126.

² Judge Mary Laffoy referred to the “multiplicity of adjudicating fora” in her foreword to Neville Cox, Val Corbett and Des Ryan, *Employment Law in Ireland* (1st ed., Clarus Press, 2009), at vii. See, Richard Bruton, ‘Address by Richard Bruton, TD, Minister for Jobs, Enterprise and Innovation’ (High Level Conference on the Resolution of Individual Employment Rights Disputes at the School of Law, University College Dublin, 2011) <https://www.workplacelaw.ie/en/Publications_Forms/Minister_Bruton_s_Address_at_School_of_Law_U_CD_1st_July_2011.pdf> accessed 25 October 2018, Brian Barry, ‘The Workplace Relations Bill 2014: An Important Opportunity for Workplace Relations Reform’ (2014) 11(4) *Irish Employment Law Journal*, 106, Tom Mallon, ‘A world-class system?’ (2016) 21(2) *The Bar Review* 71, Tom Mallon, ‘Employment Law Reform’ (2012) 9(3) *Irish Employment Law Journal*, 76, Marguerite Bolger ‘The Workplace Relations Bill: World-class or Legally Flawed?’ (2015) 12(1) *Irish Employment Law Journal* 21.

The second survey was conducted in 2016 to seek representatives' views of the first year of operations of the new system after the Act. Its focus was on identifying what representatives thought of the new system and the two bodies operating within that system, and to seek their views and commentary on how it could be improved.

The remainder of this article will briefly describe how the Irish workplace dispute resolution system has changed, describe the reasons for surveying representatives in this context, describe the methodologies and analyse the findings of both surveys, compare key results from 2011 to 2016, and describe how the surveys influenced and shaped the reform project in Ireland and the development of the new system after the reforms. The 2011 survey demonstrated representatives' considerable dissatisfaction with the system then, emphasising its inefficiency and their preference for a simpler structure. The 2016 survey showed a modest improvement in levels of satisfaction with the overall system but representatives remained unsatisfied in many respects, particularly with the operations of the newly established WRC.

Streamlining the system: how the Workplace Relations Act 2015 changed the Irish workplace dispute resolution landscape

By operation of the Act, four workplace relations bodies operating in Ireland (the Labour Relations Commission including the Rights Commissioner Service, the National Employment Rights Authority, the Equality Tribunal, and the Employment Appeals Tribunal) were abolished (the latter dissolving upon completion of its existing case load). Their functions were subsumed into a two-tier model: the newly-established WRC and an expanded version of the Labour Court.

Before the introduction of the Act it had been generally accepted that there was a need for major reform of workplace relations structures, particularly of the convoluted, confusing system for resolving complaints made by workers about alleged breaches of their statutory employment rights. The system comprised a "multiplicity of adjudicating fora" including: the Rights Commissioners Service which hosted private hearings to investigate employment rights claims under a host of Acts and Statutory Instruments: the Employment Appeals Tribunal which presided over disputes pertaining

to termination of employment, including claims for unfair dismissal, redundancy and minimum notice and acted as an appellate body from the recommendations or decisions of Rights Commissioners under certain legislation; the Labour Court which adjudicated on industrial relations disputes and dealt with certain appeals arising under employment equality, organisation of working time, national minimum wage, part-time work, fixed-term work and safety, health and welfare at work legislation; and the Equality Tribunal which investigated and mediated complaints of unlawful discrimination under the Employment Equality Acts 1998-2015, the Equal Status Acts 2000-2008, and the Pensions Acts 1990-2008.³ The ad-hoc development of this system was to some degree due to legislation in this field that has vastly expanded in the last 30 years. This “legislative explosion”⁴ largely derived from the “raft of Irish employment legislation which has been transposed in compliance with EU directives.”⁵ Often the functions and jurisdictions of these fora overlapped and litigants were required to make a complex choice on where to take their initial complaint or complaints, an issue highlighted and criticised by Charleton J in *JVC Europe Ltd v Ponisi*.⁶ For instance, a worker before the introduction of the Act who felt he or she has been dismissed without good reason, and possibly owing to discrimination on one of the nine grounds of discrimination under the Employment Equality Acts 1998-2015, could potentially have taken a claim for unfair dismissal to either the Rights Commissioner Service or the Employment Appeals Tribunal pursuant to section 7 of the Unfair Dismissals Act 1977-2015, a claim for discriminatory dismissal before the Equality Tribunal pursuant to the Employment Equality Acts 1998-2015, or a claim before the civil courts under the common law remedy of wrongful dismissal. With so many avenues, the system was perceived by many, including

³ For a full explanation of the roles of each of these bodies, see Chapter 1 of Brian Barry ‘Reforming the Framework for Employment Litigation and Dispute Resolution in Ireland’ (PhD thesis, University of Dublin, Trinity College Dublin, 2013) <<http://www.tara.tcd.ie/handle/2262/77859>> accessed 1 October 2018.

⁴ *Ibid.*

⁵ Anthony Fay “An Overview of the European Union's Influence on Employees' Rights and Industrial Relations within Ireland” (2004) 22 *Irish Law Times* 282. Fay points to the Maternity Protection Act 1994, the Organisation of Working Time Act 1997, the Employment Equality Acts 1998-2015, the Parental Leave Act 1998 and the Carer's Leave Act 2001 as examples of this.

⁶ [2012] 23 ELR 70, at paras 11-12.

the relevant department of government, as being “costly, confusing and complicated,” “ad-hoc,” and “less than optimal.”⁷

Kerr describes these problems succinctly:

A worker, when seeking to vindicate his or her statutory employment rights, was faced with a bewildering maze of overlapping points of entry and bifurcated routes of appeal. ... even experienced practitioners found it difficult to successfully navigate their clients' way through the system.⁸

Aside from the difficulties complainants faced, employer stakeholders, politicians and the LRC Chief Executive adverted to the related problem of “forum shopping” by complainants.⁹

The Act was the legislative response to these criticisms. On October 1, 2015, the dispute resolution framework was streamlined to a single point of entry at the WRC, with a single route of appeal to the Labour Court. The Irish Government’s stated aim was to establish a “world class” workplace relations service “in line with the government’s policy and fiscal constraints for reforming

⁷ Department of Enterprise, Trade and Employment, *Report of the Review Group on the Functions of the Employment Rights Bodies*, (2004).

⁸ Kerr, n.1 above, 126.

⁹ The Irish Hotels Federation spoke in stark terms about abuses within the system:

the opportunity of redress for minor transgressions has fuelled an industry, led by elements of the legal profession, intent on bringing multiple claims arising out of a single set of facts to secure significant damages. This practice is deliberately designed to force a settlement even where the employer believes he or she has no case to answer, but with the knowledge that the time spent defending the claims renders the submission of a defence financially unviable for the employer.

The Irish Hotels Federation, Submission to the Consultation on the Reform of the State’s Employment Rights and Industrial Relations Structures and Procedures, 2011 <http://www.workplacerelations.ie/en/Publications_Forms/Consultation_Responses_2011/Irish-Hotels-Federation.pdf>, (accessed 21 March 2018), at 4.

Minister of State for Labour Affairs Dara Calleary, speaking in 2010 said that “[t]he agencies tell me there is an issue there with people shopping around or lodging claims with no basis. It’s small enough, given the huge surge of genuine claims, but it’s still there” while Labour Relations Commission Chief Executive Kieran Mulvey said that “[t]here are spurious claims, there’s no doubt about that.” ‘Agencies warn of ‘dispute shopping’ *The Irish Times*, (Dublin, 15 January 2010).

the system,” particularly in the context of austerity and the government’s public sector reform policy to reduce the number of state agencies, commissions and bodies.¹⁰

Adjudication before one Adjudication Officer at the WRC is the main first-instance dispute resolution service. The WRC also provides a mediation service. Section 39(1)(a) of the Workplace Relations Act 2015 provides that the Director General of the WRC “may, where he or she is of the opinion that a complaint or dispute is capable of being resolved without being referred to an adjudication officer ..., refer the complaint or dispute for resolution to a mediation officer.” Under s39(1)(b) of the Act a complaint or dispute will not be referred “if either of the parties to the complaint or dispute objects to its being so referred.”

Under the old system, the Labour Relations Commission or the Labour Court presided over the resolution of industrial relations collective disputes. Since the introduction of the Act, the WRC or the Labour Court presides over the resolution of industrial relations collective disputes. Structurally, therefore, the system for resolving industrial relations collective disputes remains largely the same. As such, the main change brought about by the new system was to fundamentally reform the mechanisms for resolving individuals’ statutory employment rights disputes by subsuming the roles of the multiple fora for resolving employment rights disputes into one forum, the WRC. As the Government saw it, the stated aim of introducing the WRC was to provide a “simple, independent, effective, impartial, cost effective and workable means of redress, within a reasonable period of time.”¹¹

The surveys described below scrutinise the systems, individual bodies, and dispute resolution processes, in operation both before and after the introduction of the Act. The surveys can be viewed as a detailed account of the reasons and need for reform through and offer insights into whether the reforms have been as effective and successful as the Government’s stated aims.

Why survey representatives?

Representatives in a particular area of law are well-placed to critically analyse the mechanisms for resolving disputes in that field. Surveying specialist practitioners is a recognised and often-used

¹⁰ Department of Jobs, Enterprise and Innovation, *Blueprint to Deliver A World-Class Workplace Relations Service* (2012) 3, 36, Special Group on Public Service Numbers and Expenditure Programmes, *Report of the Special Group on Public Service Numbers and Expenditure Programmes Volume 1* (2009) 63.

¹¹ Department of Jobs, Enterprise and Innovation, n.10, at 3.

methodology to analyse dispute resolution systems both within and beyond the sphere of workplace relations and employment law.¹²

Legal practitioners, industrial relations representatives and other representatives who represent workers and employers in dispute experience at first-hand how workplace dispute resolution bodies operate and perform.¹³ Representatives engage with dispute resolution services throughout the dispute resolution process from start to finish, from lodging or responding to the complaint through to receiving the decision. Because representatives engage with the same services repeatedly, representatives can compare consistency within and across the services from initial case-management, to important pre-hearing issues, to how adjudication hearings are run and to the quality and consistency of the rulings of a workplace dispute resolution body. In particular, on the issue of rulings, representatives' knowledge of the law in the area allows for a deeper, more insightful analysis on the quality and consistency of rulings.

Representatives perhaps also offer a more balanced perspective of a system than that of an individual user: a representative's perceptions of the system will be less inclined to be biased by a one-off or a limited number of experiences of the dispute resolution system and rather will be the product of many experiences and interactions. Latreille, Latreille and Knight comment on practitioners' typically greater experience of dispute resolution services than that of those they represent.¹⁴ That being said, the views of users (as distinct from representatives) on their direct experience of workplace dispute resolution services are of course important. Three surveys have since been undertaken in 2017 and 2018 seeking users' views on the Adjudication Service at the WRC.

¹² Paul L. Latreille, Julie A. Latreille and K. G. (Ben) Knight, 'Employment Tribunals and Acas: evidence from a survey of representatives' (2007) 38(2) *Industrial Relations Journal* 136, Paul L. Latreille, Julie A. Latreille and K. G. (Ben) Knight, 'Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives', (2005) 34(4) *Industrial Law Journal* 308, Roselle L. Wissler, 'Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences' 26(2) *Ohio State Journal on Dispute Resolution* 271, Melissa Burkland, Marah deMeule, Tim Driscoll and Douglas Murch, Assessment of the Services of the United States District Court for the District of North Dakota (2005) 81(2) *North Dakota Law Review*, 235, Stephen J. Choi, Mitu Gulati and Eric A. Posner, 'Judicial Evaluations and Information Forcing: Ranking State High Courts and their Judges' (2009) 58(7) *Duke Law Journal* 1313.

¹³ Data on levels of legal representation and the correlation between success at adjudication and legal representation is limited. The author conducted a research study funded by the Labour Relations Commission of a sample of 292 claims made to the Rights Commissioner Service in 2011. 64% of employees were represented, 55% of employers were represented. See Barry, n.3, at 96.

¹⁴ Latreille, Latreille and Knight (2007) n.12 above, 138.

These surveys, two undertaken by the Chartered Institute of Personnel and Development and Industrial Relations News and one commissioned by the WRC are briefly considered below.

Different cohorts of legal practitioners and other representatives can offer different perspectives on a dispute resolution system. In the workplace relations sphere, representatives often generally appear for and represent particular user groups, either workers or employers. Workers, as complainants, have specific needs from a dispute resolution system. Similarly, employer respondents have specific needs from the system. Trade union representatives may offer very different perspectives on a workplace dispute resolution system than employer organisation representatives. Similarly, different professional groups who represent users (barristers, solicitors, trade union representatives and employer organisation representatives) have different perspectives on how disputes should be resolved. As such, the perspectives of how dispute resolution services are operating for the needs of these specific user groups can and should be deduced from the data and will be disaggregated accordingly in the analysis to follow.

By surveying representatives anonymously on specific aspects of the system, individual representatives' experiences are collated in an objective and quantifiable way. The author was invited to present the results of the survey, which was part of his doctoral thesis at the School of Law, Trinity College Dublin, directly to Minister for Jobs, Enterprise and Innovation, Richard Bruton TD and Minister of State for Small Business, John Perry TD, and other officials in the Department of Enterprise, Trade and Innovation (as it then was) and separately to the head of the workplace dispute resolution reform project, Ger Deering. The survey results identified for them the strengths and weaknesses within the system, where particular problems lay, and where improvements could be made.

The 2011 Survey

Against the background of a flawed and confusing workplace relations system the author undertook the first comprehensive survey of employment law practitioners and representatives in 2011 on their

views on workplace dispute resolution structures in Ireland.¹⁵ The survey was conducted over the period 9 May to 2 June 2011. The aim of the survey was to seek the views of employment law and industrial relations practitioners and other representatives on the following issues:

- 1) Satisfaction levels with the then-existing workplace dispute resolution bodies and structures for resolving workplace disputes in Ireland,
- 2) To ascertain levels of support for specific proposals for reform of workplace dispute resolution in Ireland, and
- 3) To seek representatives' own specific comments on both of the above issues.

Survey questions took two main formats: closed questions using the Likert Scale method asking for participants' satisfaction levels and agreement levels with particular statements, and open questions, asking participants to comment freely on employment dispute resolution structures in operation, and to glean their suggestions for reforms. The survey was drafted and disseminated online through Google Forms. The author disseminated the survey to the members of specialist employment law associations in Ireland, to trade union representatives and to representatives from business federations. In total, the author sent an email with a link to the online survey to 350 legal practitioners and other representatives in the field; to members of the Employment Law Association of Ireland, the Employment Bar Association and among senior officials at Ibec, the Irish Congress of Trade Unions and major trades unions. This survey population was designed to give a broad, representative sample of representatives who appeared regularly before the workplace relations bodies operating across the full spectrum of workplace relations. Survey participants were asked to confirm that they regularly represented users before the workplace relations bodies. Participation was voluntary and confidential.¹⁶ The total number of responding participants was 103. Respondents were asked to self-identify their profession or role. The breakdown of the professions or roles of these participants was as follows: 54 solicitors, 31 barristers, 8 employer organisation representatives, 8 trade union representatives and 2 'others' who described themselves as non-legally qualified consultants who

¹⁵ The survey was part of the author's doctoral thesis. See Barry, n.3.

¹⁶ In compliance with institutional requirements for research surveys as part of the author's doctoral thesis at the School of Law, Trinity College Dublin, information on the purpose of the study was provided. Participants were guaranteed anonymity, therefore completion and return of the questionnaire itself implied consent and no consent form was required in accordance with institutional research ethics rules.

represented users before the workplace dispute resolution bodies on a regular basis. It must be acknowledged, therefore, that a large majority of respondents to the survey were lawyers.

Representatives were asked for their satisfaction levels with the overall system, the performance of individual fora, and whether they supported specific proposals for reform devised by the author. These specific proposals were based on the author's doctoral research of the Irish system and on comparative analyses of other jurisdictions including England and Wales, New Zealand and Ontario, Canada. With regard to the performance of the individual fora, representatives were asked to consider the competence of adjudicators, the quality of the rulings from each service and the consistency of their rulings. These results will be explored later in the article as a means of directly comparing specific levels of satisfaction of the old fora with satisfaction levels from the 2016 survey with the new fora, the WRC and the revised Labour Court.¹⁷

Representatives generally expressed dissatisfaction with the overall framework of fora for resolving workplace disputes in Ireland. 68% of representatives were either dissatisfied or very dissatisfied with the framework, while 11% were satisfied. The remaining 21% were neutral in this regard. The survey asked representatives whether they perceived the system to have improved, declined or remained the same in the preceding three to five years. 56% of representatives felt that the system had declined over that period. 35% said the system had remained the same while 5% said that the system had improved over the period. The remaining 4% had no comment to make in this regard.

Representatives were asked if they wished to comment further on the current dispute resolution system. These comments provided specific insights on why the system was perceived negatively, and to be in decline. A prevalent complaint concerned delays in the system, specifically in the allocation of hearing dates, which in the years preceding the survey had worsened considerably.¹⁸ 13 representatives commented specifically on delays in the system, which may have accounted for the perceived demise in the system over the preceding years: the system was described as "too slow,"

¹⁷ See below the section "Comparing the findings between the 2011 and 2016 surveys."

¹⁸ Delays in allocating hearing times, particularly in the Employment Appeals Tribunal and the Equality Tribunal, had worsened in the years preceding 2011 when the survey was conducted. For instance, the average waiting period for a hearing before the Employment Appeals Tribunal had jumped from 31 weeks in 2008 to 77 weeks in 2011. See *Employment Appeals Tribunal Annual Report 2011*, <https://www.workplacerelations.ie/en/Publications_Forms/EAT_44th_Annual_Report_English_.pdf> accessed 23 March 2018.

delay was a “paramount” concern and others complained of “very long waiting times” making it “very difficult to manage clients’ expectations.” Aside from delays, 15 representatives complained about the system’s ad hoc and complicated structure, for instance referring to “the core problem” as being “too many fora,” there being “absolutely no necessity for retaining four separate fora,” the system being “unnecessarily complicated” with “no joined up thinking,” and variously describing the system as “dysfunctional,” “erratic” and a “shambles,” to name a few. These (sometimes strongly expressed) comments illustrate the reasons behind representatives’ general levels of dissatisfaction with the overall system as it operated then. Representatives also commented negatively on adjudicators, their decision making, their qualifications and the processes by which they were appointed. 13 representatives commented negatively on the quality of adjudicators’ decisions and decision making, for instance, alluding to poor reasoning: “the majority of decisions from Rights Commissioners and the EAT are of no help to practitioners in terms of understanding the underlying reasoning,” to bias: “Rights Commissioners in particular, but also on considerable occasions the EAT and Equality Tribunal, seem to forget that they are there to make an unbiased decision on the facts,” and to the credentials of adjudicators: “the lack of legal qualifications of some of the adjudicators affects the quality of decisions.” Some questioned the consistency of decisions: “there is a problem with consistency with decisions in all fora” and “more transparency and consistency needed.” Others expressed specific concerns with the way adjudicators were appointed, for instance: “the present arrangements are overly influenced ... by the partnership model” and “the appointment of Rights Commissioners and members of the Tribunal (other than the chair) completely lacks transparency.” These comments, on the whole, reflect the dissatisfaction representatives expressed with adjudicators at the fora.

Together, these comments - almost entirely negative - offer specific and illuminating insights into why representatives perceived the system at the time so negatively. Complaints regarding the ad-hoc dispute resolution structure, delays, inconsistent adjudication and a lack of transparency in adjudicator appointments among other things all pointed to a system that was understood and accepted to be dysfunctional at the time and badly in need of a reform.

The Government mooted reforms around the time the survey was disseminated. Representatives were asked to agree or disagree with specific reforms suggested by the author. One such reform was to introduce a two-tier adjudication structure for resolving employment rights dispute. 82% of representatives supported this idea. 14% did not support this idea. The remaining 4% had no opinion in this regard. Of those who disagreed with this proposal, some suggested that the current bodies could be maintained but that their roles could be rearranged to improve their efficiency. One representative suggested that the main issue with the system was not the bodies and the overall structure, but rather the “appointment, competence, impartiality and experience of the personnel.” Representatives expressed support for the introduction of a state-provided alternative dispute resolution service as a mainstream means of first-instance resolution of employment rights disputes. 69% of representatives favoured the introduction of such a service. 15% disapproved of this suggestion. 16% had no opinion in this regard. Those who disapproved of this suggestion expressed, for example, concern that such a service “would make things slower rather than quicker and would only add another layer of bureaucracy;” another suggesting that “adding this as a formal step would only add to an unduly lengthy process.”

Representatives were asked for their views on the manner in which adjudicators were appointed to the various workplace dispute resolution bodies. At the time of the 2011 survey, Rights Commissioners were appointed pursuant to section 34 of the Industrial Relations Act 1990. Chairs and vice-chairs of the Employment Appeals Tribunal were appointed pursuant to section 39 of the Redundancy Payments Act 1967. The Labour Court chair and deputy-chairs of the Labour Court were appointed pursuant to section 10 of the Industrial Relations Act 1946 and section 4(1) of the Industrial Relations Act 1969 respectively. Equality Officers at the Equality Tribunal were appointed pursuant to section 75 of the Employment Equality Act 1998. None of these statutory provisions required appointments to these four main adjudicating bodies to be made through open, public competition, nor did they provide formal qualifying criteria (save for the requirement for appointees to the position of chair of the Employment Appeals Tribunal to be a practising barrister or solicitor of seven years’ standing at least pursuant to s39(2)(a) of the Redundancy Payments Act 1967). Representatives were asked “[g]enerally, do you think that the manner in which adjudicators are appointed to the various

employment rights bodies is fair and transparent?” 66% disagreed. 10% agreed. The remaining 24% had no opinion in this regard. This rather emphatic expression of dissatisfaction with appointments processes for adjudicators is not quite as strongly reflected in the levels of dissatisfaction with the competence of the adjudicators at individual fora, although they were still relatively high. 44% were dissatisfied with the competence of Rights Commissioner, 60% were dissatisfied with Equality Officers of the Equality Tribunal, 35% were dissatisfied with members of the Employment Appeals Tribunal and 25% were dissatisfied with the members of the Labour Court. In a similar vein, these levels of dissatisfaction with the competence of the various adjudicators, while relatively high (particularly for Rights Commissioners and Equality Officers), were not as high as representatives’ dissatisfaction with the overall framework of fora for resolving workplace disputes in Ireland at 68%. Putting these results into context it appears that representatives’ most pressing concerns were with the overall framework for resolving disputes, mainly favouring a streamlining of the system down to two fora, and with how particular fora operated (most prominently Rights Commissioners and Equality Officers).

The impact of the 2011 survey and moves towards reform

The results of the 2011 survey were presented at a High Level Conference on the Resolution of Individual Employment Rights Disputes, at the School of Law, University College Dublin, on 1 July 2011, and separately to government stakeholders in the reform project, as described above. Through these speaking engagements, the results of the 2011 survey were assimilated directly by those who introduced the subsequent reforms.¹⁹

Many of the suggestions for reform which were supported by representatives in the 2011 survey were realised to a broad extent in the Act. Specifically, and perhaps most fundamentally, the strongly-supported suggestion that a two-tier structure should replace the complex array of bodies materialised. A new body, the WRC, was established as the forum of first instance with a revised Labour Court with expanded jurisdiction designated as the appellate court. While in principle the introduction of a two-tier structure reflected the overwhelming preference of representatives who took part in the 2011

¹⁹ The results of the 2011 survey are discussed throughout the author’s doctoral thesis, see Barry, n.3. Also some of the results from the 2011 were explored in the context of an article commenting on the impending reforms in 2014. See Barry, n.2.

survey, the decision to transform the Labour Court into the ‘go-to’ appellate forum for all workplace issues, including statutory employment rights issues, ran contrary to the views of representatives. The 2011 survey asked representatives to consider the role of the Labour Court and suggested the following reform: “[r]emove the Labour Court’s current jurisdiction as an appeals body for certain statutory employment rights issues and leave it to only adjudicate on industrial relations issues.” A remarkably high number of representatives, 80%, agreed or strongly agreed with this suggestion, 16% disagreed or strongly disagreed and 4% had no opinion on the matter. This clearly indicated that representatives viewed the Labour Court’s expertise as being in industrial relations matters and preferred the Labour Court’s jurisdiction to be confined to such, rather than in statutory employment rights matters. However, the reform settled upon by the Act went the other direction, broadening the Labour Court’s remit to hear appeals on the full panoply of workplace disputes to include industrial relations matters and employment rights governed by legislation. Arguably, the decision to transform the Labour Court in this manner has proven to be the correct choice in that respondents to the 2016 survey indicated a higher level of satisfaction with the Labour Court’s competence after the Act was introduced. Representatives’ views on the Labour Court and its role are more fully explored below.²⁰

On the issue of alternative dispute resolution, the results of the 2011 survey highlighted the appetite among representatives for alternative dispute resolution services to be introduced as a mainstream means of resolving workplace disputes. This suggestion materialised with the establishment of the Mediation Service at the WRC under the Act. This service is “provided by a cross-divisional team of trained professional mediation officers.”²¹ Mediators transferred from the Equality Tribunal and the Labour Relations Commission to the WRC.²² However, it appears that the means by which mediation at the WRC’s Mediation Service is delivered, compared to that at the

²⁰ See section ‘Representatives’ views on the Labour Court from 2011 to 2016’.

²¹ WRC, *Mediation Introduction*, <https://www.workplacelrelations.ie/en/Workplace_Relations_Services/Mediation_Services/> accessed 1 October 2018.

²² Brian O’Byrne, “Consultation on the Reform of State’s Employment Rights and Industrial Relations Structures and Procedures. Interim Proposal to Utilise Existing Mediation Expertise,” <https://www.workplacelrelations.ie/en/Publications_Forms/Consultation_Responses_2011/Brian-O-Byrne-1.pdf> accessed 1 October 2018. For further information, the Kennedy Institute Workplace Mediation Research Group are currently undertaking a comprehensive study of the WRC Mediation Service and comparatively analysing this service with equivalents in New Zealand. This study, to be published in 2019, will include interviews with key personnel at the WRC regarding the provision of mediation since the introduction of the Mediation Service. See www.kiwmrg.ie for further updates.

Equality Tribunal, for instance, has changed. In particular, mediation by telephone has become the primary means of delivery, as distinct from face-to-face mediation.²³ While the introduction of a unified mediation service at the WRC may have reflected the preference of representatives, the implementation of this service was criticised by representatives in the 2016 survey in terms of the competence of WRC Mediation Officers and the availability of the Service. Representatives' views on the new Mediation Service are discussed more fully below.

With regard to the adjudicators themselves, Rights Commissioners and Equality Officers transferred to the role of Adjudication Officer at the WRC. Labour Court members retained their position on the Labour Court in its revised guise. When this transfer of adjudicative function was announced, concerns were expressed by this author and leading employment law practitioners that the competence of adjudicators would not improve under the new system, particularly given the increased complexity of WRC Adjudication Officers' expanded remit.²⁴ Concerns were also expressed about the impartiality and independence of Labour Court members.²⁵ These concerns will be returned to below in the analysis of the results from the 2016 survey.

Aside from transferring adjudicators in bodies under the old system to adjudicative functions in the new system, the mechanisms for making prospective appointments to these roles changed following the introduction of the Act. The Act responded to concerns expressed by representatives in the 2011 survey about the opaque manner in which adjudicators were appointed. Going forward, the Chairman and Deputy Chairmen of the Labour Court are appointed by the Minister for Jobs, Enterprise and Innovation through open competition by the Public Appointments Service by operation of sections 75(1)(a) and s79(a) of the Act, amending section 10 of the Industrial Relations Act 1946 and section 4(1) of the Industrial Relations Act 1969 respectively. This is a more transparent process than under the old system. A panel of Adjudication Officers was appointed through open competition held by the Public Appointments Service in 2015. A subsequent round of appointments of Adjudication Officers took place in 2018. However, despite the more transparent modes of

²³ In 2017, the WRC Mediation Service delivered services in 376 telephone mediations compared to 197 face-to-face mediations (the latter representing a 185% increase over 2016). See WRC Annual Report 2017, at 18.

²⁴ See Barry, n.2, at 109, Mallon, (2012), n.2, at 79-80, and Marguerite Bolger, n.2, at 24.

²⁵ Mallon, (2012), n.2 at 79-80, Bolger, n.2, at 24.

appointment, there remains a residual concern, particularly among legal practitioners, about the qualifications required for appointment; specifically that new appointees do not have to be legally qualified.²⁶ Indeed, this concern was one aspect of a recent constitutional challenge to the Act. In *Zalewski v Adjudication Officer (Rosaleen Glackin) & ors* the applicant submitted, *inter alia*, that the Act was constitutionally flawed in that, “there is no requirement that the adjudication officer, who has to determine disputes of fact and/or law, must have any legal qualification or experience.”²⁷ However, judicial scrutiny as to the constitutionality of the Act on this or other grounds was not necessary as the claim was rejected on *locus standi* grounds. We will return to the implications of the *Zalewski* judgment later in this article.

The 2016 Survey

While the 2011 survey looked at the system in place at that time and toward the prospect of fundamental reforms of the system, the 2016 survey looked back at the first year of the reformed system introduced by the Act on 1 October 2015. Despite the difference in emphasis in the 2016 survey, central components of it were designed to reflect the 2011 survey to offer a comparison of the old with the new. As described, the 2011 survey collected satisfaction levels with the workplace relations bodies operating at that time (the Rights Commissioner Service, the Employment Appeals Tribunal, the Equality Tribunal and the Labour Court). The 2016 survey asked for equivalent satisfaction ratings for the bodies within the new two-tier structure, the WRC and the revised Labour Court with expanded jurisdiction. A comparison can therefore be drawn between the fora in 2011 and the fora in 2016. This comparison offers a substantive reflection on the central question of whether the new system introduced by the Act is perceived by representatives as an improvement on the old one. These comparisons are described and analysed more fully below.²⁸

The 2016 survey followed the same methodology as the 2011 survey. Survey questions took the same two formats: closed questions using the Likert Scale method asking for participant’s attitudes on, satisfaction and agreement levels with particular statements, and open questions, asking participants to comment freely on how they felt the system and specific fora within the new system

²⁶ Mallon, (2012), n.2 at 79-80, Bolger, n.2, at 24.

²⁷ *Zalewski v Adjudication Officer (Rosaleen Glackin) & ors* [2018] IEHC 59, at 10.

²⁸ See below ‘Satisfaction with first-instance adjudication’.

were operating. The survey adopted the same methodology as the 2011 in terms of drafting and dissemination. The author made particular efforts to encourage trade union representatives to complete the survey owing to the relatively low response return rate from trade union representatives in the 2011 survey. The breakdown of 139 respondents to the survey was as follows: 43 barristers, 38 trade union representatives, 36 solicitors, 13 employer organisation representatives, 6 'others' and 3 solicitors working in-house. Owing to the requirements and benefits of anonymous participation, it was not possible to establish which participants in the 2016 survey had also participated in the 2011 survey.

Perhaps the key result from the survey, and the one from which all other discussion flows, was the stubbornly high level of dissatisfaction with the new two-tier system. 49% of representatives said that they were either dissatisfied or very dissatisfied with the new two-tier system, while just 31% said that they were either satisfied or very satisfied. 20% of representatives said that they were neutral in this regard. Although a high level of dissatisfaction, it is still something of an improvement on overall satisfaction with the system that preceded it. A comparison between the results of the 2011 and 2016 survey follows below and will parse this out in more detail. Leaving comparisons with the old system aside, two enquiries flow from the key finding of dissatisfaction with the new two-tier system: first, who specifically was satisfied and dissatisfied with the new system, and second, what were the causes of dissatisfaction.

On the first enquiry, interestingly, dissatisfaction was considerably more prevalent among representatives who identified as generally representing employers than those who identified as generally representing workers. Of the 42 representatives who identified as generally representing employers 61% were dissatisfied with the new system. 23% were satisfied and 16% were neutral in this regard. In contrast, of the 52 representatives who identified as generally representing workers only 25% were dissatisfied with the new system, 54% were satisfied and 21% were neutral in this regard. Numerically, this difference can in large part be explained by notably higher level of satisfaction among trade union representatives. Just two of 38 trade union representatives expressed dissatisfaction with the new two-tier system, 26 expressed satisfaction and 12 neutral in this regard. In contrast, much of the dissatisfaction was expressed by solicitors and barristers, particularly those who

identified as representing a mix of workers and employers, and generally employers. Tentatively, this divergence between trade union officials and legal practitioners may hinge on the latter cohort's preference for more formal, legally-styled adjudication hearings, a theme that will be returned to later in the article once the reasons for dissatisfaction with the new system, more generally, are explored.

The survey asked representatives' views on specific aspects of the new system from pre-hearing processes, the Mediation Service, adjudication at the WRC through to the Labour Court's operations. On these topics open comment questions provided representatives with an opportunity to comment on specific aspects of the new system. This commentary highlights the reasons why representatives did not, on the whole, perceive the new system in a positive light. Representatives' perceptions of the WRC will now be explored in detail under the following three main categories:

- pre-hearing processes at the WRC,
- the Mediation Service, and,
- how hearings are conducted at the WRC Adjudication Service.

Pre-hearing processes at the WRC

Representatives expressed a number of concerns about pre-hearing processes at the WRC. 60% of representatives were dissatisfied with the administration, processing and scheduling of complaints by the WRC. Only 28% were satisfied.

Representatives were asked to comment on pre-hearing processes.²⁹ Some themes emerged from this commentary. One theme was that of short notice being given to parties of hearing dates. Twelve representatives commented that they thought that the notice given by the WRC of hearing dates was too short. Some representatives who generally represented employers commented that this can give rise to scheduling difficulties for their clients, arranging for managing personnel and human resources personnel of an organisation to attend the hearing. Conversely, some representatives who generally represented workers complained about delays in processing hearings. Another theme was a

²⁹ Questions included:

Have you any comments about the administration, processing and scheduling of complaints by the WRC?

Have you any comments or suggestions about the WRC Complaint Form?

Have you any comments or suggestions about your experience of adjournments of hearings (or postponements on the day of hearing) at the WRC?

Have you any comments or suggestions about communication and correspondence by the WRC to users?

lack of co-ordination in scheduling cases. Eleven representatives complained of having been ‘double-booked’ for multiple hearings at the same time, two representatives complained of opposing parties having received different hearing dates and times and three representatives complained that an adjudicator failed to show at a scheduled hearing without notice. A final theme that emerged was a variety of complaints about submissions in advance of the hearing. Responding to a question asking for “comments about the operation of the WRC Adjudication Service generally” sixteen representatives complained about inconsistent approaches from one adjudication to another regarding what documentation was required to be submitted in advance of hearing. Six representatives complained of adjudicators not having been given, or not having read, submissions of the parties in advance of the hearing.

A closed question asking representatives to rate the method by which adjournments are sought and granted by the WRC indicated that 51% of representatives rated this as poor or very poor while 25% said it was good or very good. 24% said it was average. Representatives were also asked if they had any comment to make on this issue. A remarkably high number of 76 of the 139 respondents specifically commented about this issue, pointing to inconsistent procedures in the seeking and granting of adjournments and poor communication to parties once an adjournment or postponement had been granted.

On the whole, the responses - particularly from legal practitioners - pointed to a high level of discontent with pre-hearing processes at the WRC in its first year of operations.

Mediation Service

Representatives were asked to rate the WRC Mediation Service under two categories: availability and competence of Mediation Officers. 34% of representatives expressed dissatisfaction with availability at the WRC Mediation Service. 27% of representatives expressed satisfaction with this. 39% of representatives were neutral in this regard. With regard to the competence of Mediation Officers, 32% expressed satisfaction, 29% expressed dissatisfaction and 39% were neutral in this regard. Representatives were asked for their comments on the Service. Responses tended to focus on the lack of availability of mediation. Fifteen representatives made specific open comments about Mediation

Officers not being made available in circumstances where the parties had elected to use the Service. It is not altogether clear whether this was an administrative issue or a resource issue at the time that the survey was disseminated. Interestingly, however, results from an Annual Customer Survey, undertaken by the WRC on its services, published in April 2018, noted that “engagement with the face-to-face mediation service amongst stakeholders was relatively limited” and stakeholders interviewed “felt there was a need to improve the process by which potential participants were informed about whether or not mediation will be offered or will take place.”³⁰ This suggests that the Mediation Service remains a relatively under-used service, perhaps reflecting representative’s dissatisfaction with the Service as expressed in the survey.

Conduct of WRC adjudication hearings

63% of representatives thought that the format of hearings before WRC Adjudication Officers was not consistent from hearing to hearing. 26% of representatives thought that they were. 11% of representatives had no opinion in this regard. This is perhaps one of the most significant findings of the 2016 survey. Eleven representatives specifically commented on inconsistencies in the format of adjudication hearings, describing this variously as “a huge issue” and “a big problem.” More specifically, eight representatives specifically criticised on the basis that some adjudicators did not permit cross-examination of witnesses at adjudication hearings.

One barrister commented in some detail on inconsistency:

There is no consistency on how witnesses give evidence so that sometimes this is allowed and other times it is not. There is no appreciation of the importance to both sides of requiring a witness to give evidence and be cross-examined in order to allow the issues in the case be properly tested. This means the hearings are often run very unfairly.

³⁰ WRC, *Workplace Relations Commission Stakeholder and Service User Research*, <http://www.workplacelrelations.ie/en/Publications_Forms/WRC_first_annual_Customer_Survey.pdf> accessed 1 May 2018, at 5.

Another barrister commented that this can lead to difficulties in advising clients: “[i]t is very unsatisfactory to advise a client that you have no idea what procedures to expect at a hearing.” This inconsistency of approach gives rise to a constitutional concern regarding the right to fair procedures, a matter which has arisen in the *Zalewski* case, discussed further below.³¹ Eight representatives also commented on inordinate delays in the issuing of decisions by Adjudication Officers.

These general findings, apart from the positive perception of representatives who generally represent workers on the new system, point to a generally negative perception among representatives of the new two-tier system, with dissatisfaction generally directed to operations at the WRC. However, although still disappointing, the perception is at least generally more positive than that expressed in the 2011 survey.

Comparing the findings between the 2011 and 2016 surveys

Both the 2011 and 2016 surveys asked representatives if they were satisfied with the overall dispute resolution system. Representatives were more satisfied with the system overall introduced by the Act than the old system surveyed in 2011. There was an increase from 11% in 2011 to 31% in 2016 in terms of representatives’ overall satisfaction with the system and a decrease in dissatisfaction from 68% in 2011 to 49% in 2016. Although results from the 2016 survey on the overall system point to a marked improvement, it is fair to say that levels of dissatisfaction in the 2016 survey remained disappointingly high, particularly among representatives who generally represent employers. Of representatives who identified as generally representing employers in both surveys, there was an increase from 5% in 2011 to 23% in 2016 in those satisfied with the system and a decrease in those dissatisfied from 82% in 2011 to 61% in 2016. Of representatives who identified as generally representing workers in both surveys, there was a sizeable increase in those who were satisfied from 17% in 2011 to 54% in 2016, and a sizeable decrease in those dissatisfied from 57% in 2011 to 25% in 2016.

³¹ *Zalewski v Adjudication Officer (Rosaleen Glackin) & ors* [2018] IEHC 59.

In terms of overall dissatisfaction with the new system, we have already reflected on some of the reasons why dissatisfaction may be high, particularly the specific problems identified by representatives with the operations of the WRC. In addition, it is reasonable to assume that some of the dissatisfaction is due to teething problems in the first year of operation. Six representatives specifically acknowledged and referred to “teething problems” as a factor.

As part of the 2016 survey representatives were asked to directly compare the new two-tier dispute resolution system introduced by the Act to the old system that preceded it. The answer is unfortunately a gauge for just quite how little confidence the surveyed representatives had in the new system nearly one year after its operations commenced. The result to this question contradicts the improvements suggested by the general overall satisfaction ratings: 48% of representatives said that the new two-tier system was worse than the system that existed before the reforms introduced by the Act (although it is important to note that this question did not ask representatives to compare the system in 2011 to that in 2016). 34% of representatives said that the system had improved while 18% said that the new system was neither better nor worse. To provide context for comparing satisfaction levels with overall systems in 2011 and 2016, it makes sense to compare, insofar as is possible, like-for-like dispute resolution bodies in the old system as against the new system to identify where precisely improvements and dis-improvements have occurred.

Comparing satisfaction with first-instance adjudication between 2011 and 2016

Both the 2011 and 2016 surveys asked representatives for their views on specific aspects of the various first-instance dispute resolution services in operation at the time. In 2011 the first-instance adjudication services surveyed were the Rights Commissioner Service, the Employment Appeals Tribunal and the Equality Tribunal. Their roles and remit are detailed above.³²

As mentioned above the specific aspects of these services that were surveyed in 2011 were the competence of adjudicators, the quality of the rulings from each service and the consistency of their rulings. In the 2016 survey these same metrics were surveyed with respect to the WRC’s Adjudication

³² For a full explanation of the roles of each of these bodies, see Chapter 1 of Brian Barry, n. 3.

Service, which replaced these services. It is important to bear in mind that while the metrics are the same, the comparison between the old bodies at the WRC come with three important caveats. First, the three old bodies (the Rights Commissioner Service, the Employment Appeals Tribunal and the Equality Tribunal) each had discrete roles to play in the system, each with their limited jurisdiction as described above. In particular, the Equality Tribunal had a highly specialised role. The WRC, on the other hand, was set up to amalgamate these roles and, as such, has a far broader remit. Therefore, comparing the old with the new is not entirely like-for-like. Second, the WRC was less than a year in operation when the survey was undertaken. Some accommodations must be made to allow for a ‘bedding down’ period for the establishment of an organisation at this scale. Third, owing to the opaque manner in which adjudicators at the WRC are assigned to cases, and also owing to the complexities of how different complaints were heard by the different old bodies (and some complaints were heard by more than one body), it is not possible to disaggregate levels of satisfaction with aspects of the WRC Adjudication Service to correspond to the equivalent aspects in the corresponding old bodies.

However, once these caveats are borne in mind, basic comparisons can still be made to the extent that each of three old bodies’ jurisdiction to adjudicate on certain types of employment rights disputes transferred directly to the WRC Adjudication Service after the Act passed. Below are the tables of results in percentage terms of satisfaction ratings among representatives on these metrics.

Table 1:

Competence of Adjudicator				
Workplace relations body	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
WRC (2016)	40	31	29	131
Rights Commissioners (2011)	38	44	18	99
Employment Appeals Tribunal (2011)	39	36	25	98

Equality Tribunal (2011)	33	37	30	97
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Table 2:

Quality of rulings				
Workplace relations body	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
WRC (2016)	31	37	32	130
Rights Commissioners (2011)	25	54	21	99
Employment Appeals Tribunal (2011)	37	40	23	98
Equality Tribunal (2011)	37	20	43	97

Table 3:

Consistency of rulings				
Workplace relations body	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
WRC (2016)	18	51	31	130
Rights Commissioner (2011)	17	56	27	99
Employment Appeals Tribunal (2011)	23	45	32	97
Equality Tribunal (2011)	30	38	32	96

Comparing satisfaction levels from 2011 to 2016 across these metrics does not indicate uniform improvement. Representatives' perception of the WRC's overall performance, compared to its three

predecessors, is underwhelming. On the perceived competence of adjudicators the WRC scored a little higher against all three of its predecessors, but not by much. More representatives were dissatisfied with the competence of WRC Adjudication Officers than were satisfied. However, a little bit more positively, fewer were dissatisfied with them relative to adjudicators in the three old bodies. It is maybe not surprising that perceptions of the competence of WRC Adjudication Officers and equivalent adjudication roles in the three old bodies are largely similar. A little less than one year had passed and a great deal of the cohort of adjudicators at the old bodies simply transferred over to the role of WRC Adjudication Officers upon the WRC's establishment. However, some new Adjudication Officers had been appointed in the interim. The result may broadly be viewed as a disappointment in that there was not a more enthusiastic reaction from representatives.

On the quality of rulings and on the consistency of the rulings issued by the various bodies, again, the performance of the WRC Adjudication Service is mediocre. While representatives rated both the quality and consistency of WRC Adjudication Officers' rulings as being better than rulings of the Rights Commissioner Service, WRC Adjudication Officers fared worse than the Employment Appeals Tribunal and the Equality Tribunal. Again, these results are disappointing for the WRC. The source of most dissatisfaction on rulings in the old system was the Rights Commissioner Service and while rulings at the WRC are perceived more positively than that body, it fails to meet the satisfaction levels of the Employment Appeals Tribunal and Equality Tribunal. Although it is hard to precisely identify the specific reasons for this, perhaps the rulings of the Employment Appeals Tribunal in terms of both quality and consistency were perceived more highly than WRC rulings owing to the fact that three adjudicators, rather than one, were involved in handing down a decision, and the chair of that tripartite panel was legally qualified (a theme solicitors and barristers have often identified as being an important aspect of the robust delivery of an adjudication service throughout the reform process). Some comments from representatives bear this out. One barrister who generally represents workers commented "I think that it is very unfortunate that the EAT is being abandoned." Another

barrister commented “The EAT system worked well, with 3 members of the Tribunal, all with legal knowledge adjudicating the merits on the case.”³³

With regard to why representatives perceived the quality and consistency of WRC Adjudication Officers’ rulings to be worse than those of the Equality Tribunal, one factor may be that the Equality Tribunal had a track record as a specialist forum in a discrete area of law. This may have put Equality Officers at an advantage over WRC Adjudication Officers, and the residual negativity that attached to the Rights Commissioner Service may have filtered through to representatives’ perceptions of first-instance adjudication at the WRC. One solicitor who generally represented employers remarked that a “lack of legal background is a big issue for [Adjudication Officers] - at least Equality Officers were experts by virtue of [the] volume of equality claims [and] EAT members had [a] legal chair.” Another solicitor who generally represents workers remarked that “[t]he specialisation attached to equality complaints is not recognised within the [new] system” and thought it important that “the specialism built up by the former Equality Tribunal is not lost.”

Overall, in terms of the general question of whether first-instance adjudication has improved following the establishment of the WRC’s Adjudication Service, there is a marginally better perception of the competence of WRC Adjudication Officers when compared to their predecessors. However, dissatisfaction remains high, and satisfaction levels are disappointingly low. As for comparing the quality and consistency of rulings between the WRC and its predecessors, while WRC decisions are perceived better than the decisions of Rights Commissioners, they do not match the satisfaction levels that decisions of the Employment Appeals Tribunal and Equality Tribunal enjoyed.

Again, it is important to bear in mind the context in which the 2016 survey took place, a major period of transition, described by the Director General of the WRC, Oonagh Buckley as a “baptism of

³³ It is important to note that only the Chairperson was required to have experience of legal practice, namely that he / she “shall be a practising barrister or solicitor of 7 years’ standing at least,” s39(2)(a) of the Redundancy Payments Act 1967. In practice, however, only lawyers were appointed as Vice-Chairs. EAT, *50 Years of the Employment Appeals Tribunal 1967 - 2017*, <https://www.workplacelrelations.ie/en/Publications_Forms/EAT-50th-Booklet-FINAL.pdf> accessed 1 October 2018, at 9. S 9 of the Redundancy Payment Act 2003 proposed to introduce an eligibility requirement of 5 years’ experience as a practising barrister or practising solicitor for appointment as a Vice-Chair but this section was never commenced.

fire.”³⁴ Inevitably a period of ‘bedding in’ is required for a new service such as the WRC, particularly given that the functions of many workplace relations bodies were subsumed into the one entity.

Representatives’ views on the Labour Court from 2011 to 2016

The Labour Court’s role, both before and after the introduction of the Act, can broadly be divided into two strands: its role as an arbiter of industrial relations disputes and its role as an appellate forum for employment rights disputes pursuant to employment law statutes. The latter function expanded dramatically under the Act to include appellate jurisdiction over disputes under the full range of employment law statutes.³⁵ As we have already seen from the results of the 2011 survey the vast majority (80%) of representatives thought the Labour Court’s jurisdiction should be confined exclusively to industrial relations disputes. Despite representatives’ reservations, the Department of Jobs, Enterprise and Innovation pressed ahead, pointing out the Court’s experience of handling different aspects of these two distinct jurisdictions for over forty years, highlighting how it had “demonstrated a capacity to interpret and apply this body of law in its decisions ... [issuing] detailed and reasoned written decisions.”³⁶ The Department also noted that “very few of the Court’s decisions are appealed and fewer still are overturned on appeal.”³⁷ While the move to expand the Labour Court’s jurisdiction could be viewed as being something of a gamble at the time, the results of the 2016 survey concerning the Labour Court’s operations are generally positive. The Labour Court’s performance is arguably the main success story of the reforms brought about by the Act.

Reflecting on the 2011 survey once again, the Labour Court scored higher than the other adjudication bodies. Representatives provided little in the way of open commentary to explain the

³⁴ Oonagh Buckley, Presentation to the *High Level Conference, ‘The Workplace Relations Act 2015 – One Year On’ at the Sutherland School of Law*, University College Dublin, 1 October 2016, at 5.

³⁵ For discussion on the role of the Labour Court within the system, see See Mallon, 2012, n.2, at 77, Anthony Kerr, ‘Changing Landscapes: The Juridification of the Labour Court?’ (2015) 53(1) *The Irish Jurist* 58, Kevin Duffy, ‘Blueprint for Reform of Employment Rights Institutions’ (2012) 9(3) *Irish Employment Law Journal* 81.

Up until the introduction of the Workplace Relations Act 2015 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.

³⁶ Department of Jobs, Enterprise and Innovation, n.10, at 29.

³⁷ *Ibid*, at 30.

perceived strengths of the Labour Court although what little was said aligned to the Department's rationale for expanding its remit. One representative, for instance, suggested that members of the Labour Court were "the real experts on working time, equality" and that they deal with "complicated legal issues" and that they are not judicially reviewed very often.

In both the 2011 and the 2016 surveys representatives were asked to rate their satisfaction with four aspects of the Labour Court in line with the metrics used to survey the other workplace relations bodies: the competence of the Labour Court, the quality of written rulings, the consistency of the rulings and the administration / claims processing functions of the Labour Court.

The results are presented in the following tables. As can be seen, the results show that in 2016 the Labour Court scored higher than in 2011 across all metrics.

Table 4:

Competence of the Labour Court				
Year	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
2011	44	24	32	98
2016	59	13	28	128

Table 5:

Quality of the rulings of the Labour Court				
Year	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
2011	47	16	37	98
2016	59	12	29	126

Table 6:

Consistency of the rulings of the Labour Court				
Year	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
2011	39	22	39	98
2016	58	18	24	127

Table 7:

Administration / claims processing function of the Labour Court³⁸				
Year	Satisfied (%)	Dissatisfied (%)	Neutral (%)	Total number of responses
2011	37	26	37	99
2016	55	10	35	128

These results indicate that representatives were more satisfied with the Labour Court than with the other workplace relations bodies, both in 2011 and 2016. The results also indicate that representatives' perceptions of the Labour Court have improved from 2011 to 2016 across all four metrics, with a particular improvement in the satisfaction ratings for the administration / claims processing function of the Labour Court. It is also interesting to note that there was a close correlation between the relatively high satisfaction levels with the competence of Labour Court members and the quality and consistency of rulings that they issue. Perhaps these results are reflective of a perception that the Labour Court is a more legally-expert Court, and one that representatives (particularly legal practitioners) trust more. For instance, isolating solicitors and barristers' satisfaction levels in 2016 with the competence of Labour Court members, satisfaction levels were relatively high: 44% were satisfied, and just 14% were dissatisfied, with 42% neutral in this regard.

As for its place within the new system, 74% of representatives agreed that the Labour Court had adapted well to its new increased role as a full appellate court for employment rights issues. 26% disagreed with this contention. Of those who disagreed, negative comments about the Court's performance were relatively limited, referring to inconsistencies in how hearings are conducted and residual concerns that the Labour Court should only have jurisdiction over industrial relations issues. The generally positive perceptions of the Court are perhaps the most impressive results in either survey, highlighting representatives' general confidence in the Court's performance.

However, somewhat counter-intuitively, a substantial number of representatives still appear to have anxieties about the role of the Court. 63% of representatives felt that its role as a forum for

³⁸ "Administration / claims processing function" here refers to pre-hearing processes generally at the Labour Court for all disputes it hears.

resolving industrial relations disputes had been compromised by its increased role as an appellate forum for employment rights issues. 37% disagreed. This result is perhaps surprising given general satisfaction with the Court's performance. It appears minds have not easily been changed from the time that reforms were mooted when "many parties" submitted to the Department "that the industrial relations role of the Labour Court should be separate from any adjudicative role in respect of individual rights."³⁹ It is hard to draw completely clear-cut conclusions on how representatives perceive the Labour Court after the reforms. It may simply be the case that representatives viewed the Labour Court as an odd fit for the role of appellate forum but, despite this concern, it has grown reasonably well into that role since the introduction of the Act.

Learning from representatives' views: improvements and developments at the WRC

The 2016 survey played an important role in informing the development of operations at the WRC. As we have seen representatives offered incisive, issue-specific commentary on a number of aspects of the dispute resolution services at the WRC. In particular, as we have seen, representatives expressed concerns with a) how complaints were administered and scheduled, b) problems with the availability of mediators at the WRC Mediation Service, and c) inconsistencies with the format and procedures at adjudication hearings.

The survey results were disseminated to the Department of Jobs, Enterprise and Innovation and to management within the WRC, including the Director General of the WRC, Oonagh Buckley, in September 2016. The results were presented by the author at a High Level Conference, 'The Workplace Relations Act 2015 – One Year On' at the Sutherland School of Law, University College Dublin on 1 October 2016 and were widely reported in the media.⁴⁰ At this conference the Director

³⁹ See Mallon, (2012), n.2, at 77, and Department of Trade, Enterprise and Employment, *Summary and Analysis of Responses to the Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures* (2011), at 18.

⁴⁰ Colm Keena, 'Half of practitioners dissatisfied with workings of WRC – survey' *The Irish Times* (Dublin, 30 September 2016), Colleen Cleary, 'Workplace Relations Commission is just not working' *The Irish Examiner* (Cork, 30 September 2016), interview with author, RTE, *The Week in Politics*, (Dublin, 2 October 2016), interview with author, Newstalk, *Newstalk Breakfast*, 30 September 2016, Andy Prendergast, 'Lawyers less satisfied with WRC than unions, survey finds, *Industrial Relations News*, (Dublin, 6 October 2016).

General of the WRC presented a paper on the first year of the WRC's operations.⁴¹ In that paper the Director General referred and responded directly to many of the central findings of the 2016 survey (circulated in advance to the WRC) regarding problems and teething issues at the WRC in its first year of operations. She also described measures that had already, or would soon be implemented by the WRC to rectify them.

On the issue of scheduling and case management, the Director General promised to work with Adjudication Officers "to put in place a consistent and predictable approach to the management of hearings."⁴² The Director General referred to rectifying the causes of incidents of representatives being 'double-booked' and of adjudicators not attending hearings and gave assurances that "the underlying causes (mainly new systems, new processes, insufficient clarity around the complaint form, glitches in software) have been or are being resolved through a combination of better systems, better training and learning from our mistakes."⁴³

Commenting on the issues relating to the seeking and granting of adjournments the Director General commented "...we got a strong sense that parties were very concerned about the number of pre-hearing postponements. I agree that there have been too many. ...While we seek evidence of the need for such postponements and, to date, have not looked behind them, there are some underlying structural changes we will make to improve matters."⁴⁴ She commented that the WRC would examine "procedures which will require parties seeking a postponement to notify the other parties" and that the WRC's preference is that "late postponements will not be granted other than in very exceptional and unforeseen circumstances."⁴⁵ On scheduling of hearings more generally, the Director General gave assurances that a new computerised scheduling system had recently been introduced "so that parties are now being notified 6 weeks in advance of the hearing date."⁴⁶ The Director General explained the benefits of these measures: "[t]aken together, I believe that these amendments will mean that parties' diaries are likely to be free for a hearing, will afford parties more time to prepare for a hearing (such

⁴¹ Buckley, n. 34 above.

⁴² *Ibid*, at 7.

⁴³ *Ibid*, at 7.

⁴⁴ *Ibid*, at 8.

⁴⁵ *Ibid*, at 8.

⁴⁶ *Ibid*, at 8.

as calling witnesses etc.) and will result in less postponed hearings which are a source of frustration for the parties and the Adjudicators themselves....”⁴⁷ The Director General also referred to the average time from hearing to decision as being eight weeks and promised to “shorten the time ... over the coming months.”⁴⁸ The WRC Annual Report for 2016 indicated marginal improvement with decisions issued, on average between six and eight weeks of the hearing date.⁴⁹ No directly equivalent figures are mentioned in the WRC Annual Report for 2017, although 90% of decisions issued in 2017 were issued within six months of the receipt of the original complaint.⁵⁰

Perhaps the most important aspect of the Director General’s reaction to the 2016 survey was her comments on representatives’ concerns with how adjudication hearings are conducted at the WRC:

I know from the results of the survey ... that many of you have concerns around consistency of hearing procedures It is critical that all users of the Service have full confidence in the hearing process, and crucially, know what to expect when the hearing gets underway.”⁵¹

In this respect the Director General committed to putting “in place procedures for hearings that are commonly applied and notified to all.”⁵² While she acknowledged that consistency was important she also emphasised that procedures should be “fair but not rigid” because the Adjudication Service is “not a court of law” and that procedures should allow “for an individual Adjudicator’s personality and the identity of the parties before him or her....”⁵³ Since then, the WRC, in its most recent report for 2017, notes that it has “continued to engage extensively with major stakeholder bodies” with discussions centring on, *inter alia*, “consistency of hearings, consistency of decision style.”⁵⁴

⁴⁷ *Ibid*, at 8.

⁴⁸ *Ibid*, at 7.

⁴⁹ WRC Annual Report 2016, at 21.

⁵⁰ WRC Annual Report 2017, at 26.

⁵¹ Buckley, n. 34, at 7.

⁵² *Ibid*, at 7.

⁵³ *Ibid*, at 7.

⁵⁴ WRC Annual Report for 2017, at 27.

That the WRC is not a court of law is of course true, but these comments go to the crux of the debate on how workplace disputes should be resolved under the new system. This is where opinion diverges, and where dissatisfaction with the WRC - primarily, it would appear, among legal practitioners - lies.

Where statutorily prescribed employment rights are at issue, consistency of approach is imperative. An initial WRC document from 2015 on ‘Procedures in the Investigation and Adjudication of Employment and Equality Complaints’ states that Adjudication Officers “will decide what is appropriate, taking into account fair procedures, arrangements which will best support the effective and accurate giving of evidence and the orderly conduct of the hearing.”⁵⁵ This level of discretion, regarding the format and structure that the hearing will take, is arguably too broad for complaints regarding rights. A later WRC document from 2017, a ‘Guidance Note for a WRC Adjudication Hearing’ suggests a slightly more rigid format to the hearing. However, it appears Adjudication Officers retain a wide level of discretion. For instance, the Guidance Note describes how “[t]he Adjudicator will direct evidence from both parties and all other relevant witnesses, *if required* [emphasis added].”⁵⁶ The phrase “if required” implies discretion regarding a fundamental aspect of an adversarial hearing. It is submitted that a fair hearing for both workers and employers on a matter of legal rights must comprise a consistent structure by which evidence is heard, guaranteeing certain tenets of procedural fairness, such as the right to give evidence.

The procedures at WRC adjudication hearings that had been heavily criticised by representatives in the 2016 survey were the subject of a constitutional challenge in *Zalewski v Adjudication Officer (Rosaleen Glackin) & ors.*⁵⁷ The case arose out of events at the WRC in October 2016 three weeks after the Director General’s remarks reacting to the survey. The respondent, a WRC Adjudication Officer, was assigned to hear the applicant’s complaint for unfair dismissal before the WRC. An initial hearing was adjourned on consent between the parties as a witness could not

⁵⁵ WRC, *WRC Procedures in the Investigation and Adjudication of Employment and Equality Complaints* <https://www.workplacerelations.ie/en/Publications_Forms/Procedures_Employment_and_Equality_Complaints.pdf> accessed 1 October 2018.

⁵⁶ WRC *Guidance Note for a WRC Adjudication Hearing* <https://www.workplacerelations.ie/en/Publications_Forms/Guides_Booklets/Guidance_Note_for_a_WRC_Adjudication_Hearing.pdf> accessed 1 October 2018.

⁵⁷ [2018] IEHC 59.

appear for family reasons. On the date of the next scheduled hearing in December 2016 the applicant's solicitor was informed that the Adjudication Officer had already issued her decision and that the hearing that day had been scheduled in error. A decision was subsequently issued without the applicant being given the opportunity to present evidence.

The applicant challenged the constitutional validity of the sections of the Act that prescribe how WRC adjudication hearings on the grounds that:

- (i) there is no requirement that the adjudication officer, who has to determine disputes of fact and/or law, must have any legal qualification or experience;
- (ii) evidence is not heard on oath;
- (iii) there is no penalty for any person who gives false evidence; and
- (iv) hearings are held in private.⁵⁸

The challenge was rejected on the grounds of *locus standi* but Meenan J made a number of important *obiter* remarks on the operations of the WRC Adjudication Service. He described how Adjudication Officers are charged with hearing claims that “can have profound consequences, both personally and financially, for people involved.”⁵⁹ Meenan J described the manner in which the complaint was dealt with by the WRC Adjudication Officer in this instance as “unacceptable,” that it gave “rise to very serious concerns,” that there were “fundamental errors of fact in the written decision,” and that there had been “a complete failure on the part of the Adjudication Officer to follow fair procedures.”⁶⁰ While these remarks were confined to how one WRC adjudication was conducted, Meenan J also noted the applicant's solicitor's evidence of experiences he “had in dealing with other cases before the WRC which would tend to suggest that the case of the applicant was not an isolated incident.”⁶¹ Furthermore, Meenan J did not entirely discard the possibility that the Act may have constitutional flaws, suggesting that “[i]t could be that the decision of December 2016 [of the WRC Adjudication

⁵⁸ [2018] IEHC 59, at 10.

⁵⁹ [2018] IEHC 59, at 8.

⁶⁰ [2018] IEHC 59, at 3, 5 and 7 respectively.

⁶¹ [2018] IEHC 59, at 12.

Officer] may have been as a result of some of the alleged constitutional infirmities in the Act of 2015.”⁶²

Although the ruling in the High Court did not directly impact on the validity of the WRC’s operations, Meenan’s J highly critical remarks may serve as a warning to the WRC to ensure that procedures and processes meet constitutional scrutiny, perhaps suggesting that more clarity and consistency of approach to hearings may be required. A barrister writing about *Zalewski* (but before the ruling was issued) suggested “there are cracks in the foundations of the WRC.”⁶³ In July 2018, the Supreme Court granted leave to appeal the matter to that Court pursuant to Article 34.5.4° of the Constitution.⁶⁴ It remains to be seen, therefore, whether aspects of the Act pertaining to its adjudicative function, and by extension aspects of the WRC’s adjudicative operations, will withstand constitutional scrutiny either in this appeal or subsequent cases. Further scrutiny of the WRC’s adjudicative operations arose in the CJEU case of *Minister for Justice v The Workplace Relations Commission* in December 2018.⁶⁵ In his Opinion, Advocate General Hahl noted that, as is the case at the WRC, ‘it is increasingly common that ... conflicts in the workplace ... are ‘out-sourced’ from courts to specialised bodies’ with adjudicators who ‘do not necessarily have a legal qualification’.⁶⁶ He remarked that ‘not all disputes, in particular those raising important questions of principle with broader legal implications, are best dealt with by such bodies’.⁶⁷ This again raises the question of whether a legal qualification and practitioner experience should be a prerequisite for appointment as an Adjudication Officer.

On a more positive note, three further surveys of users of the WRC have shown higher levels of satisfaction with the WRC Adjudication Service than the results of the 2016 survey of representatives. CIPD Ireland and Industrial Relations News conducted two surveys in 2017 and 2018 of

⁶² [2018] IEHC 59, at 11.

⁶³ Donall O’Riordan, Cracks in the Foundations? Constitutional Challenge to Workplace Relations Commission, 2017, 35(7) *Irish Law Times* 86, at 87.

⁶⁴ [2018] IESCDET 94.

⁶⁵ Case C–378/17, ECLI:EU:C:2018:979.

⁶⁶ *ibid* para 87.

⁶⁷ *ibid* para 88.

predominantly large-scale employer companies who have used the WRC Adjudication Service.⁶⁸ 42% in 2017 and 40% in 2018 of users were satisfied with the Service and 18% in both 2017 and 2018 were dissatisfied with the Service. A separate survey of users commissioned by the WRC and published in April 2018 pointed to a 56% satisfaction rating with the overall experience of the Adjudication Service.⁶⁹ On the whole, users' perceptions of the WRC Adjudication Service are better than those expressed by representatives surveyed in the 2016 survey, but the results are not overwhelmingly positive either on this important metric. The WRC acknowledges that their operations are a "continuous improvement process" and that there are "areas where we need to press ahead and improve service delivery further."⁷⁰

Conclusions

The two surveys undertaken by the author and described in this article played an important role in bringing representatives' views on the Irish workplace dispute resolution system to the table of those who were tasked with reforming and operating the services. The first survey in 2011 offered the Department of Enterprise, Trade and Innovation (as it then was) a snapshot of how representatives viewed the system then. The survey highlighted high levels of dissatisfaction with the system, and indicated the necessity for reforming a broken system. The 2011 survey also demonstrated high levels of support for particular reform proposals, including support for a two-tier adjudication system and for a non-adversarial alternative dispute resolution service to be used as a first-instance dispute resolution service. Both of these suggestions were realised by the Act through the introduction of the WRC (subject to the caveat that representatives responding to the 2011 survey did not indicate support for the Labour Court to act as an appellate court).

⁶⁸ CIPD-IRN private sector pay survey 2017, <https://www.cipd.ie/Images/CIPD-IRN-Private-Sector-Pay-Survey-2017_tcm21-21562.pdf>, accessed 2 May 2018, and CIPD-IRN private sector pay survey 2018, <https://www.cipd.ie/Images/mary-connaughton-presentation_tcm21-39332.pdf>, accessed 2 May 2018.

⁶⁹ Workplace Relations Commission Stakeholder and Service User Research, April 2018, <http://workplacelrelations.ie/en/Publications_Forms/WRC_first_annual_Customer_Survey.pdf>, accessed 2 May 2018.

⁷⁰ Workplace Relations Commission, Press Release, Workplace Relations Commission (WRC) Customer Survey, May 2018, <http://workplacelrelations.ie/en/news-media/Workplace_Relations_Notices/WRC_publishes_first_annual_Customer_Survey.html>, accessed 2 May 2018.

In a similar vein, the 2016 survey played an important role, this time in capturing representatives' views on how the new two-tier system had been operating within its first year. A comparison of the two surveys demonstrates that some positive progress has been made. Satisfaction levels among representatives were generally higher in 2016 than in 2011.

The 2016 survey identified specific problems such as issues pertaining to the Mediation Service, pre-hearing processes and, perhaps most prominently, inconsistencies and concerns with how hearings were conducted by WRC Adjudication Officers. The Director General responded directly to the results of the 2016 survey and the concerns expressed therein by committing to improving aspects of the WRC's operations including how cases are managed, the mechanisms for how adjournments are sought and granted, and shortening the time-frame for issuing decisions. However, there is still much work to be done, particularly on how adjudication hearings are conducted. The results do not indicate that the system has achieved the Government's initial aim to establish a "world class" workplace dispute resolution system in this respect.⁷¹ Representatives in the 2016 survey identified that first-instance adjudication at the WRC has considerable flaws. This criticism has, to some extent, been borne out in the judicial criticisms of Meenan J in *Zalewski* case. However, it must be acknowledged that various teething problems and issues may well have had a bearing on how the adjudication service operated in the first year of the new system's operations. Both the survey and the events giving rise to the challenge in *Zalewski* occurred in 2016. Three subsequent surveys of users indicate more positive feedback on the WRC Adjudication Service, although the results are still not excellent. Another survey of representatives in the near future would perhaps be merited to explore if improvements have been made.

Excellence within the system, and representatives' confidence in it, flows from continuously striving to improve procedures and operations. In this regard, it is imperative that the dispute resolution service providers continue to communicate with representatives so that the new system can work more effectively and fairly for all users.

Finally, on a broader note, the 2011 and 2016 surveys demonstrate how a dispute resolution system can be improved with the expert input of representatives in a field. It is hoped that the survey

⁷¹ Department of Jobs, Enterprise and Innovation, n.10.

model and methodologies described in this article may benefit other researchers and stakeholders who may wish to improve the effectiveness, fairness and efficiency of dispute resolution systems elsewhere.

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