

Workplace Relations (Miscellaneous Amendments) Bill 2021

No. 93 of 2021

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30 June 2021

Abstract

The [*Workplace Relations \(Miscellaneous Amendments\) Bill 2021*](#) proposes to make a number of legislative amendments in response to the judgment of the Supreme Court in [*Zalewski v An Adjudication Officer & ors*](#). The amendments primarily relate to the administration of justice in public; and the provision of statutory authority to administer oaths or affirmations in circumstances where there is a material dispute of fact. The Bill also provides for amendments concerning the removal of a WRC adjudication officer; the anonymisation of parties in published decisions; and the independence of the members of the Labour Court.



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This L&RS Bill Digest may be cited as:

Oireachtas Library & Research Service, 2021, *L&RS Bill Digest: Workplace Relations (Miscellaneous Amendments) Bill 2021*

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Introduction

The [*Workplace Relations \(Miscellaneous Amendments\) Bill 2021*](#) (the Bill) proposes to amend a number of Acts¹ in response to the judgment of the Supreme Court in [*Zalewski v An Adjudication Officer & ors*](#).²

In *Zalewski*, the Court upheld the constitutionality of the Workplace Relations Commission's (WRC) adjudication service, but held that [s.41\(13\)](#) of [*Workplace Relations Act 2015*](#) (the 2015 Act) and [s.8\(6\)](#) of [*Unfair Dismissals Act 1977*](#) (the 1977 Act) were incompatible with the Constitution. These sections require relevant WRC proceedings to be conducted in private.

Additionally, it was held that the lack of a legislative provision providing for the administration of oaths or affirmations, or providing for a penalty for giving untruthful evidence, was inconsistent with the Constitution.

The Bill proposes certain legislative amendments to provide:

- that evidence may be given under oath and that a penalty may be enforced for the provision, while under oath, of false information; and
- that matters before the WRC adjudication service will be conducted in public, save in certain circumstances.

In addition to these constitutionally required amendments, it is proposed that the following amendments be made to address further issues raised in the majority judgment of the Supreme Court:

- Amending the 2015 Act to provide for a system for the removal of a WRC adjudication officer. The Minister currently enjoys an unqualified power to revoke the appointment of an adjudication officer and the Court indicated that this might undermine the independence of an adjudication officer in the performance of their functions.
- Amending the *Industrial Relations Acts of 1946 and 1969* to provide an express statement that the Chairperson, the Deputy Chairs, and the Ordinary Members of the Labour Court are independent in the performance of their functions.
- Amending the 2015 Act to strengthen the rights of employers in matters relating to the enforcement of decisions of an adjudication officer in the District Court.

¹ [Workplace Relations Act 2015](#); [Equal Status Act 2000](#); [Employment Equality Act 1998](#); [Protection of Employment \(Employers' Insolvency\) Act 1984](#); [Unfair Dismissals Act 1977](#); and [Redundancy Payments Act 1967](#).

² *Zalewski v An Adjudication Officer & ors* [2021] IESC 24 (06 April 2021). The decision of the majority was delivered by O'Donnell J. Dissenting judgments were delivered by MacMenamin J. (available [here](#)) and Charleton J. (available [here](#)).

Due to the urgent nature of the amendments proposed by the Bill, the decision was made to waive pre-legislative scrutiny.³

WRC's response to the judgment in *Zalewski* and the urgency of the proposed amendments

In response to the judgment of the Supreme Court, the WRC altered the standard procedures followed in matters that involve the administration of justice by adjudication officers.⁴ This included adjourning cases where there was a serious conflict of evidence⁵ pending legislative amendment which will grant an adjudication officer the power to administer an oath or affirmation and to provide for a punishment for the giving of false evidence.

Additionally, the WRC now operates on the basis that all hearings are to be open to the public, other than where the investigation or hearing does not amount to the administration of justice, and published decisions will no longer be anonymised. This procedure will also be followed until the requisite legislative amendments are made.

Table of Provisions

Table 1: Principal provisions of the Bill

Section	Title	Effect
1.	Definitions	Section 1 of the Bill provides for definitions. In this Act "Act of 2015" means the <i>Workplace Relations Act 2015</i> ; "Minister" means the Minister for Enterprise, Trade and Employment.
2.	Amendment of section 7 of Act of 2015	Section 2 of the Bill amends section 7 of Act of 2015 to facilitate a subsequent proposed amendment relating to the offence of perjury under s. 44 of the 2015 Act.
3.	Amendment of section 40 of Act of 2015	Section 3 of the Bill amends s.40 of the 2015 Act, which relates to WRC adjudication officers. This amendment provides for a fair procedure for the revocation of an adjudicator's warrant. Currently, the

³ Joint Committee on Enterprise, Trade and Employment debate - Wednesday, 5 May 2021 - [Workplace Relations \(Miscellaneous Amendments\) Bill 2021: Waiver of Pre-legislative Scrutiny](#)

⁴ [Supreme Court judgment: Impact on WRC Adjudications, the Workplace Relations Act 2015 and related statutes](#), updated 21 May 2021.

⁵ This only applied where the conflict of evidence arose in a matter that involved the administration of justice by an adjudication officer (that is exercising limited functions and powers of a judicial nature within the meaning of Article 37 of the Constitution).

		2015 Act does not specify the circumstances under which the appointment of an adjudication officer may be revoked. Section 3 amends the act to provide for specific circumstances in which an adjudication officer's appointment will cease, and specific grounds on which their appointment may be revoked.
4.	Amendment of section 41 of Act of 2015	<p>Section 4 of the Bill amends s.41 of the 2015 Act, which concerns the presentation of complaints and referral of disputes. Subsection (12) of s.41 provides for the creation of an offence of failure to comply with a notice given by an adjudication officer. It is proposed to add a new subsection (12A) after subsection (12), providing for the giving of evidence on oath or affirmation and the creation of an offence of giving false testimony while legally under oath.</p> <p>It is also proposed to add a new subsection (13), providing for proceedings to be conducted in public, except in special circumstances.</p> <p>Finally, it is proposed to add a new subsection (14), relating to the publication of decisions and the anonymisation of parties in published decisions.</p>
5.	Amendment of section 43 of Act of 2015	Section 5 of the Bill amends s.43 of the 2015 Act, which provides for the enforcement of the decision of adjudication officer. It is proposed to add a new subsection (6), which provides that applications made to the District Court to enforce the decision of an AO shall be made on notice to the employer concerned.
6.	Amendment of <i>Industrial Relations Act 1946</i>	<p>Section 6 of the Bill amends sections 10 and 21 of the <i>Industrial Relations Act 1946</i> to provide for the statutory independence of the chairperson and ordinary members of the Labour Court.</p> <p>Section 21 of the 1946 Act provides for the power of the Labour Court to call witnesses. Section 6 amends the provision to align the offence of perjury to that provided for in the <i>Criminal Justice (Perjury and Related Offences) Bill 2018</i>.</p>
7.	Amendment of section 39 of <i>Redundancy Payments Act 1967</i>	Section 7 of the Bill amends s.39 of the <i>Redundancy Payments Act 1967</i> , which concerns appeals to the Redundancy Appeals Tribunal. The proposed amendment provides for the creation of new subsections (17A) and (17B) after subsection (17) to

		provide for hearings in matters referred to an adjudication officer to be heard in public, except in certain circumstances, the publication of any decisions arising, and for the potential anonymisation of parties to the proceedings.
8.	Amendment of section 4 of Industrial Relations Act 1969	Section 8 amends s.4 of the <i>Industrial Relations Act 1969</i> , which relates to the deputy chairman of the Labour Court. It is proposed to amend s.4 to include a new subsection that states that “A deputy chairman shall be independent in the performance of his or her functions.”
9.	Amendment of section 8 of <i>Unfair Dismissals Act 1977</i>	Section 9 of the Bill amend s.8 of <i>Unfair Dismissals Act 1977</i> , which provides for the determination of claims for unfair dismissal. It is proposed to amend the section to include provisions relating to perjury and hearings taking place in public, except for certain circumstances.
10.	Amendment of section 9 of <i>Protection of Employees (Employers’ Insolvency) Act 1984</i>	Section 10 of the Bill amends s.9 of the <i>Protection of Employees (Employers’ Insolvency) Act 1984</i> , which relates to complaints referred to a WRC adjudication officer. It is proposed to amend the provision to provide for proceedings in public, anonymisation, and the administration of an oath/affirmation, and perjury, in a similar manner to the amendments proposed in earlier sections of the Bill. Further, a regulation-making power has been inserted, empowering the Minister to make provision in relation to any matter relating to the presentation of, the referral of, or the hearing of a complaint under s.9 of the 1984 Act that he or she considers appropriate.
11.	Amendment of section 79 of <i>Employment Equality Act 1998</i>	Section 11 of the Bill amends s.79 of the <i>Employment Equality Act 1998</i> , which relates to investigations by the Director General of the Workplace Relations Commission or the Labour Court. It is proposed to substitute subsection(2) with a new subsection providing that the Director General may require a person giving evidence in an investigation under this section to give such evidence on oath or affirmation, and for a subsequent offence of providing false

		material under oath, in a similar form to the other perjury amendments in this Bill.
12.	Amendment of section 25 of <i>Equal Status Act 2000</i>	Section 12 amends s.25 of the <i>Equal Status Act 2000</i> , which relates to investigation by the Director of the Workplace Relations Commission. It proposes to provide for public hearing and perjury amendments in a similar manner to Section 11 of the Bill.
13.	Review of operation of Act	Section 13 provides that the Minister shall, not later than 12 months after this section comes into operation, commence a review of the operation of the amendments made by the Bill and, not later than 12 months after the commencement of the said review, make a report to each House of the Oireachtas of the findings made on the review and of the conclusions drawn from the findings.
14.	Short title and commencement	<p>Section 14 of the Bill provides that the Act may be cited as the <i>Workplace Relations (Miscellaneous Provisions) Act 2021</i>.</p> <p>This Act shall come into operation on such day or days as the Minister may by order or orders appoint either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.</p>

The Workplace Relations Commission

The *Zalewski* case concerned a challenge to the constitutionality of the [Workplace Relations Act 2015](#) (the 2015 Act). The 2015 Act established the Workplace Relations Commission, which is an independent, statutory body that performs certain functions, including adjudicating on disputes under employment legislation. The WRC assumed the roles and functions previously carried out by the National Employment Rights Authority (NERA), Equality Tribunal (ET), Labour Relations Commission (LRC), Rights Commissioners Service (RCS), and the first-instance (Complaints and Referrals) functions of the Employment Appeals Tribunal (EAT).

The 2015 Act also expanded the appellate functions to the Labour Court, and [s.44](#) of the 2015 Act provides that a party to a complaint may appeal to the Labour Court from a decision of a WRC

adjudication officer.⁶ The enforcement mechanism of the decision is by application to the District Court pursuant to s.43 of the 2015 Act.

The 2015 Act sought to pursue the 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. The WRC is one of a number of tribunals and decision-making bodies, such as the Residential Tenancies Board. In *Zalewski*, O'Donnell J stressed the need to maintain this type of informal decision-making procedure in the field of industrial relations.

⁶ Adjudication Officers of the Workplace Relations Commission (WRC) are statutorily independent in their decision-making duties as they relate to adjudicating on complaints referred to them by the WRC Director General. The Adjudication Officer's role is to hold a hearing where both parties are given an opportunity to be heard by the Adjudication Officer and to present any evidence relevant to the complaint. Hearings of the Workplace Relations Commission will be held in private. However, complaints may, in certain instances, be disposed of by means of written procedure (i.e. without hearing). The Adjudication Officer will not attempt to mediate or conciliate the case. Parties will be free to represent themselves or choose their own representation. [Guide to the Workplace Relations Commission](#), p. 12.

The *Zalewski* case

Short summary

In [*Zalewski v An Adjudication Officer & ors*](#),⁷ the Supreme Court ruled that WRC adjudication officers, when adjudicating upon most employment and equality rights claims, are deemed to be administering justice within the meaning of Article 34 of the Constitution. However, this process was not found to be unconstitutional as it involved “the exercise of limited functions and powers of a judicial nature”, within the meaning of Article 37, which meant that this exercise of power was constitutionally permissible.

The Court thus upheld the constitutionality of the WRC's adjudication service, but held that [s.41\(13\)](#) of the 2015 Act and [s.8\(6\)](#) of the 1977 Act were incompatible with the Constitution. These sections require relevant WRC proceedings to be conducted in private.

Additionally, it was held that the lack of a legislative provision concerning the administration of oaths or affirmations, or providing for a penalty for giving untruthful evidence, was inconsistent with the Constitution.

The Court also commented that the unqualified power of the Minister to revoke the appointment of an adjudication officer might interfere with adjudication officer's independence. However, this was not viewed as constitutionally incompatible and was not a ground that was contested.

The facts

The appellant, Mr. Zalewski, was dismissed from his job as a security guard, and commenced proceedings for unfair dismissal. In advance of the WRC hearing, Mr. Zalewski's solicitor had emailed submissions to the WRC, which included a request that any that any factual evidence should be proved through an appropriate witness rather than documentation. There was a ten minute hearing with the WRC adjudication officer,⁸ which was adjourned at the request of the employer's solicitor as a relevant witness was not present. When Mr. Zalewski attended the WRC on the new assigned hearing date he was informed by the adjudication officer that she had already issued a decision in the matter and that a new date had been assigned in error. The adjudication officer's decision made reference to the contents of documentary materials submitted to the court by the appellant's employer, contrary to the request made by Mr. Zalewski's solicitor, and claimed that certain documents had not been provided by Mr. Zalewski despite the fact that this documentation had in fact been submitted.

⁷ *Zalewski v An Adjudication Officer & ors* [2021] IESC 24 (06 April 2021)

⁸ Adjudication Officers of the Workplace Relations Commission (WRC) are statutorily independent in their decision making duties as they relate to adjudicating on complaints referred to them by the WRC Director General. The Adjudication Officer's role is to hold a hearing where both parties are given an opportunity to be heard by the Adjudication Officer and to present any evidence relevant to the complaint. [Guide to the Workplace Relations Commission](#), p. 12.

Mr Zalewski brought proceedings in the High Court⁹ seeking an order quashing the WRC's decision and a declaration that the 2015 Act was repugnant to the Constitution on the basis that justice should be administered in a Court by a judge. The State conceded the invalidity of the WRC's decision but contested Mr Zalewski's arguments in respect of the constitutionality of the WRC. The matter was appealed to the Supreme Court.

The issues

The Supreme Court proceedings concerned the constitutionality of the adjudicative process established under the 2015 Act. The central issues raised were whether the WRC adjudicative process amounted to the administration of justice, which must be administered in courts, as required under Article 34 of the Constitution¹⁰ and, if this did amount to the administration of justice, whether this came within the scope of Article 37 of the Constitution,¹¹ which protects from invalidity the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, when authorised by law to exercise such functions and powers.

The appellants contended that the following aspects of the 2015 Act were unconstitutional:

- i. proceedings before the adjudication officer cannot be heard in public as s.41(13) provides that "proceedings ... before an adjudication officer shall be conducted otherwise than in public";
- ii. there is no possibility to take evidence on oath, and, consequently, no penalty for false evidence;
- iii. there is no express provision for cross-examination, as s.41(5) provides merely that the adjudication officer shall give to the parties an opportunity to be heard by the adjudication officer and to present evidence relevant to the complaint or dispute; and
- iv. there was no requirement that adjudication officers or members of the Labour Court have any legal qualifications, training, or experience.

⁹ An application for leave to apply for judicial review was made in February, 2017, seeking a wide range of declaratory reliefs, including declarations that the 2015 Act was repugnant to the Constitution, together with an order of certiorari quashing the decision of the adjudication officer. The State respondents conceded that the defects in procedure meant that the decision of the adjudication officer was invalid and offered to consent to the making of an order of certiorari. When the appellant did not agree that this would resolve the matter, the State respondents issued a motion seeking to have the appellant's claim for declarations pursuant to the Constitution and the E.C.H.R. dismissed. The High Court agreed, but the decision was reversed by the Supreme Court (*Zalewski v. Adjudication Officer and The Workplace Relations Commission* [2019] IESC 17, [2019] 2 I.L.R.M. 153). The matter then proceeded to a hearing on the broader issues.

¹⁰ Article 34.1: "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

¹¹ Article 37.1: "Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."

The Court also addressed the question of the independence of adjudication officers, though this point was not contested by the parties.

Relevant findings

Does the WRC “administer justice” and if so, is this constitutionally permissible?

It was held that the WRC and Labour Court do administer justice, within the meaning of Article 34 of the Constitution, which means that it must be administered in court by a judge.

In reaching this conclusion, O'Donnell J found that the adjudicative process satisfied the test set out by the Court in *McDonald v Bord na gCon*.¹² This test set out five features that characterise the administration of justice. In this instance, the contested sections of this test were the fourth and fifth limbs. The fourth limb of the test states:

“4, The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment”¹³

Regarding the fourth limb of the test, the issue arose as to whether the almost automatic enforcement procedure under the 2015 Act had the effect that the WRC adjudicative process was not the administration of justice. The enforcement mechanism of a decision is by application to the District Court pursuant to s.43 of the 2015 Act. The District Court is required to enforce the decision of the WRC or Labour Court and has limited discretion to substitute an award of compensation for an award of reinstatement or re-engagement. It was held that that this did *not* mean that WRC adjudicative process was not the administration of justice.

The fifth limb of the test states:

“5, The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country.”¹⁴

O'Donnell J found that this was satisfied because the form of order made pursuant to the 2015 Act was a final order determining the dispute and awarding redress of a kind known to the courts (namely, reinstatement and re-engagement, which were akin to specific performance, and compensation).¹⁵

While this analysis by the Court showed that the functions of the WRC adjudication officer did amount to the administration of justice for the purposes of Article 34 of the Constitution, Article 37 permits bodies and individuals to exercise “limited functions and powers of a judicial nature”, as

¹² [1965] I.R. 217

¹³ Ibid., pp 230 - 231.

¹⁴ Ibid.

¹⁵ See also Tara Murphy BL, ‘Tomasz Zalewski v Adjudication Officer, WRC & Ors’, *Irish Employment Law Update*, June 2021.

provided for by law. It was held that the powers exercised by the WRC fell within the scope of Article 37, and were thus constitutionally permissible.

Legislative provisions found to be unconstitutional

As the activities of the adjudication officer did amount to the administration of justice, it followed that the power being exercised must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness and fairness, which are understood to be the essence of the administration of justice.¹⁶ The features of the WRC adjudicative process that were found *not* to accord with these principles were:

- That there is no justification for a blanket prohibition on hearings in public before the WRC.
- That the absence of a provision allowing an AO to require that certain evidence must be given on oath, and that providing false information under oath was to be punished, is inconsistent with the Constitution.

It may be noted that the constitutional requirements regarding public hearings and oaths only apply to rights-based claims. They are not relevant to industrial relations cases before the WRC, where recommendations are non-binding and non-justiciable.

In addition, the other two grounds raised by the appellants in their challenge of the Act, namely the lack of a requirement for adjudication officers to be legally qualified and the lack of an express provision for cross-examination, were not held to be constitutionally invalid.

Notably, the core structure of the 2015 Act was not found to be unconstitutional. The features listed above were held to be repugnant to the Constitution but these were not found to be “inevitable, or even central, to the operation of the 2015 Act”,¹⁷ and thus the constitutionality of the Act was upheld. Further, O’Donnell J noted that the Court did not

“criticise in any way the policy underlying the 2015 Act of providing a cheap, relatively informal, and efficient decision-making function, staffed by persons with expertise in the areas of employment law and with practical experience in industrial relations”.¹⁸

¹⁶ However, the standards applicable will vary depending on the circumstances. See the comments of Kelly J. in *Prendiville v Medical Council* [2008] 3 IR 122: “There is no fixed standard of natural justice which is applicable in all circumstances. The standard is elastic. It varies in accordance with the circumstances.... The standard to be applied to a person whose conduct is under investigation therefore varies according to the circumstances”, at p. 156.

¹⁷ *Zalewski*, para. 148, *per* O’Donnell J.

¹⁸ *Ibid.*, para. 137.

Proposed amendments following the *Zalewski* decision

The Bill proposes to make a number of legislative amendments in light of the judgment of the Supreme Court in *Zalewski*. Certain amendments are constitutionally necessary and others are proposed in response to comments made by the Court.

Requirement that matters be heard in public

Finding of the Court in *Zalewski*

Section 41(13) of the *Workplace Relations Act 2015* and s.8(6) of the *Unfair Dismissals Act 1977* require that relevant proceedings before the WRC are to be conducted in private. These sections remove the possibility, in appropriate cases, of a public hearing. The Court considered the constitutionality of these provisions in light of the requirements for open justice under Article 34.1 of the Irish Constitution,¹⁹ which states:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, **shall be administered in public.**” (emphasis added)

The Court cited a number of potential benefits to cases being heard in public, including that the publicity may bring forward further relevant evidence and witnesses, or because it might allow a party to achieve public vindication. It was also suggested that public hearings might have the general public benefit that it allows the public to see justice administered, which might, for example, make it easier for a judgement to be made on the fairness, competence, and efficiency of the decision-maker.

It was noted that the constitutional requirement was not absolute and that the private resolution was permissible in appropriate circumstances. However, O'Donnell J stated that it was difficult to justify the complete ban on public hearings under the circumstances at issue, particularly having regard to the fact that matters can be appealed from the WRC to the Labour Court, which has the power to hold a full *de novo* hearing (allowing a full re-hearing of the matter) in public.

¹⁹ The rationale for this provision was explained by Hogan J. in *Allied Irish Bank Plc v. Tracey (No. 2)* [2013] IEHC 242, para. 22: “The open administration of justice is, of course, a vital safeguard in any free and democratic society. It ensures that the judicial branch is subjected to scrutiny and examination and helps to promote confidence in the fair and even-handed administration of justice. Any system of secret court hearings could pave the way for judicial arrogance, overbearing judicial conduct and abuse.” The essential role of the press in this process was emphasised by Keane J. (as he then was) in *Irish Times v. Ireland* [1998] 1 I.R. 359 at p.409: “Justice must be administered in public, not in order to satisfy the merely prurient or mindlessly inquisitive, but because, if it were not, an essential feature of a truly democratic society would be missing. *Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by press, radio and television.* The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy.” (emphasis added).

Notably, the Court stated that the prohibition on public hearings is to be removed, and proceedings may, but not must, be heard in public. Exceptions to the rule are thus permissible.

Rationale for the initial preference for private hearings

The desirability of either public or private hearings was a contentious issue when the provisions of the 2015 Act were being debated prior to enactment. The Department of Jobs, Enterprise and Innovation engaged in two rounds of public consultation on the reform of workplace relations structures.²⁰ The Department prepared a report for the Oireachtas Committee on Jobs, Enterprise and Innovation in advance of seeking Government approval to draft the Workplace Relations Bill. The report, entitled [Legislating for a World-Class Workplace Relations Service, Submission to Oireachtas Committee on Jobs, Enterprise and Innovation](#), addressed the issue of private versus public hearings in light of the submissions it had received on the subject. The report noted:

“The initial proposal [that] first instance adjudication hearings would be conducted in private provoked a strong reaction particularly (but not exclusively) from commentators from the legal professions, most of whom expressed a preference for public hearings.”²¹

The report made reference to art.6 of the European Convention on Human Rights, which states that “In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing”.²² It was noted however that there are exceptions to this principle, and that as appeals from the WRC to the Labour Court are conducted *de novo*, and that hearings in the Labour Court are conducted in public, this would be sufficient to meet the requirements of art.6(1).²³ However, as noted above, O’Donnell J commented that this disparity between the procedures of the WRC and Labour Court further supported the need for reform of the provision, rather than justifying the exception.

The report did not make reference to the constitutional obligation for hearings to be in public.

²⁰ “[Blueprint to Deliver a World-Class Workplace Relations Service](#)”, April 2012. The Blueprint Consultation Submissions are available [here](#). The submissions from the first consultation procedure are not currently available.

²¹ [Legislating for a World-Class Workplace Relations Service, Submission to Oireachtas Committee on Jobs, Enterprise and Innovation](#), at p. 41. It was noted that one submission took a contrary view and suggested that public hearing of complaints at first instance would introduce ‘an unnecessary additional dynamic into the dispute resolution process at a stage that should be characterised by informality.’

²² The full text of art.6(1) states “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...”

²³ See Council of Europe, [Guide on Article 6 of the Convention–Right to a fair trial \(civil limb\)](#), last updated 31/12/2020, at p. 81.

Proposed reforms

Section 41(13) of the 2015 Act currently provides that “proceedings under this section before an adjudication officer shall be conducted otherwise than in public”. This provision was constitutionally invalid, though the Court stressed that it was not necessary for all hearings to be held in public. The proposed amendments, below, provide that relevant proceedings are to be held in public, but the WRC adjudication officer is given the discretion to hold the hearing otherwise than in public. The adjudication officer may make this decision independently or following a request of a party to the hearing.

Sections 4, 7, 10, 11 and 12 of the Bill propose to make amendments to existing legislation to provide for the hearing of matters in public. The Acts to be amended are

- Section 4 amending s. 41 of the [Workplace Relations Act 2015](#)
- Section 7 amending s. 39 of the [Redundancy Payments Act 1967](#)
- Section 10 amending s. 9 of the [Protection of Employment \(Employers' Insolvency\) Act 1984](#)
- Section 11 amending s. 79 of the [Employment Equality Act 1998](#)
- Section 12 amending s. 25 of the [Equal Status Act 2000](#)

Further, the requirement to administer justice in public has impacted the routine anonymisation of parties under s. 41(14) of the 2015 Act. Section 4 of the Bill proposes to amend s.41 of the 2015 Act to provide the Commission must publish every adjudication officer decision “on the internet in such form and in such manner as it considers appropriate” and that an adjudication officer may determine that, due to the existence of special circumstances, information that would identify the parties should not be made available.

Administration of an oath or affirmation

Finding of the Court in *Zalewski*

The second of two findings of constitutional incompatibility concerned the absence of a provision concerning oaths. The principal functions of an adjudication officer are set out in s.41(5) of the 2015 Act, and the Act does not make any provision for the taking of evidence on oath or affirmation. As previously noted, there is a right of appeal to the Labour Court from the WRC and the Labour Court can take evidence on oath (s.21(b) of the *Industrial Relations Act 1946* (as amended by s.74(a)(ii) of the 2015 Act)). Additionally, as noted above, the WRC assumed the first-instance functions of the EAT, and the EAT also had the power to take evidence on oath.

It was held by the Court that:

“Though there may be few prosecutions for perjury, there seems little doubt that the structure created by the requirement to give evidence on oath, and the possibility of prosecution for false evidence, is an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence. In such circumstances, I consider that the absence of at least a capacity to allow the adjudication officer to require that certain evidence be given on oath is inconsistent with the Constitution.”

The Court stressed that the significance of evidence being given on oath is not because of any particular importance attached to the procedure itself, but because it triggers the power to punish the giving of false evidence and thus provides an incentive to truthful testimony.

Proposed amendments

Sections 4, 9, 10, 11 and 12 of the Bill propose to amend the Acts below to allow for evidence to be taken on oath or affirmation, and for a punishment should a person lie under oath.

It is proposed to create an offence whereby a person who gives false evidence under oath is liable-

“(i) on summary conviction, to a class B fine or to imprisonment for a term not exceeding 12 months, or both, or

(ii) on conviction on indictment, to a fine not exceeding €100,000 or imprisonment for a term not exceeding 10 years, or both.”

This is in line with the penalties under s.12 of the [*Criminal Justice \(Perjury and Related Offences\) Bill 2018*](#).²⁴

The Acts to be amended include:

- Section 4 amending s. 41 of the [*Workplace Relations Act 2015*](#)
- Section 9 amending s. 8 of the [*Unfair Dismissals Act 1977*](#)
- Section 10 amending s. 9 of the [*Protection of Employment \(Employers' Insolvency\) Act 1984*](#)
- Section 11 amending s. 79 of the [*Employment Equality Act 1998*](#)
- Section 12 amending s. 25 of the [*Equal Status Act 2000*](#)

Impartiality and independence

O'Donnell J also chose to address the issue of the independence of adjudication officers, although this point was not itself a separate ground of challenge in the case. It was noted that while s.40(8) of the 2015 Act guaranteed the independence of adjudication officers, this provision was difficult to reconcile with the unqualified powers of the Minister to revoke the appointment of an adjudication officer, under s.40(7). There was no specific set of circumstances in which revocation could occur. The Court stressed that the independence and impartiality of adjudication officers are “fundamental components of the capacity to administer justice”, and described the Minister’s power in this regard as “troubling”, particularly because the adjudication officers are likely to be civil servants in the Minister’s Department and might be required to accept direction in this capacity. While there is no express legislative provision guaranteeing the independence of members of the Labour Court, legislation does provide for appointments for a fixed term and removal for stated reasons.

²⁴ As of 15 June, 2021 the Bill has passed through all stages of the Dáil and Seanad.

O'Donnell J stated that the above concerns regarding independence would require further consideration in light of the Court's conclusion that adjudication officers were performing functions of a judicial nature involving the administration of justice. It was also noted that these requirements were not limited to the provisions of the Constitution, and that guaranteed impartiality and independence are also essential requirements for any adjudication within the scope of European law, or in accordance with Article 6 of the European Court of Human Rights.

Proposed amendments

The Bill proposes the following amendments to address the concerns of the Court regarding independence and impartiality:

Section 3 proposes to provide a specified list of circumstances in which an adjudication officer's appointment will cease, and a separate list of grounds on which the Government may choose to revoke the appointment of an adjudication officer. This will remove the absolute discretion of the Minister to remove an adjudication officer, which had the potential to undermine the adjudication officer's independence.

Sections 6 and 8 propose to include express provisions guaranteeing the independence of the chairman, deputy chairman and ordinary members of the Labour Court in the performance of their functions. The Court had noted that such express provision was lacking.

Impact of the *Zalewski* judgment

Potential negative outcome of the proposed reforms

Public hearings

Some employment law solicitors have indicated that there is a “very real possibility” that the proposed reforms required by the Supreme Court’s decision in *Zalewski* would have a “chilling effect”²⁵ in relation to claims being brought. It has been suggested that neither party involved in a dispute before an adjudication officer would have a favourable view of the publicity that might attend such a case.²⁶ It is also possible that “the employer may be better placed to deal with publicity, and better resourced to engage PR advisors, if necessary [...] employees who would otherwise have brought a claim cloaked by anonymity, will now consider their options more cautiously”.²⁷

The possibility was raised that there may also be increased delays due to the AO spending significantly more time considering their decisions, as the decision will subsequently be open to increased scrutiny.²⁸

It has been suggested that the fact that WRC hearings may become more protracted, formal and will be conducted in public may lead some parties to consider mediation, and a mediation agreement also has the benefit of often carrying a strict level of confidentiality. Parties may also be more inclined to explore direct resolution of complaints in advance of matters proceeding to hearing.²⁹

It has also been noted that if a pattern of increased private settlements and mediation does emerge, and the number of adjudications recede, it would reduce the rate of adjudication decisions being published – the original intent of which was to act, in part, as an educational tool.³⁰

²⁵ Ronnie Neville, employment partner at Mason Hayes & Curran. They added “It would be ironic, if not perverse, if the changes introduced following the *Zalewski* decision in order for the administration of justice to be constitutional, were to have a chilling effect in relation to claims being brought. However, that is a very real possibility”, interviewed in Rosanna Cooney, “Supreme Court ruling could have ‘chilling effect’ on WRC”, *Business Post*, 30 May, 2021.

²⁶ Andy Prendergast, “[Supreme Court’s ‘broad perspective’ saves WRC, but changes afoot](#)”, *Industrial Relations News*, 15/04/2021

²⁷ Rosanna Cooney, “Supreme Court ruling could have ‘chilling effect’ on WRC”, *Business Post*, 30 May, 2021.

²⁸ Julie Galbraith, employment lawyer at Eversheds Sutherland, *Ibid*.

²⁹ [Changes to hearing procedures as a result of the Supreme Court Ruling on the constitutionality of the Workplace Relations Commission](#), ByrneWallace, 30 April 2021.

³⁰ Andy Prendergast, “[Supreme Court’s ‘broad perspective’ saves WRC, but changes afoot](#)”, *Industrial Relations News*, 15/04/2021.

Oaths and affirmations

Additionally, in relation to the proposed reform of the oath or affirmation procedure, it has been suggested that this additional formality of evidence being taken on oath may add to the potential “chilling effect.” This is related to the preceding point about public hearings and increased overall complexity of the adjudication procedure.³¹

“The WRC was designed to allow access to parties without legal representation. With the additional formality of evidence being given under oath, I think more people will want legal representation, which in turn will increase costs. Again, this may be more of an issue for employees than employers.”

A similar point was made by O'Donnell J in *Zalewski*,³²

“I appreciate that one possible contention is that a blanket rule is easier to apply since, if the question of evidence on oath becomes a matter for discretion and only applicable in certain cases, it is an issue which may be raised in many cases, and, if an incorrect decision is made, may lead to the overall decision being quashed. This, in turn, might lead to adjudication officers feeling that the safest route is to concede the procedure even when it is not required, and possibly unhelpful, and leading, inevitably therefore, to greater and unnecessary formality in the proceedings.”

However, the judge concluded that such difficulties were inevitable within systems that are designed to resolve complex disputes.

Impact of the judgment on other decision-making bodies

While the Supreme Court did stress that the form of decision-making exercised by WRC adjudicative officers was constitutional, the Court's opinion regarding the standards of fair procedures that must be met while administering justice may have an impact on a variety of other administrative, adjudicative and regulatory bodies who may exercise quasi-judicial powers determining the rights or entitlements of individuals. This is particularly relevant if those matters are decided in private and/or contested facts are not addressed through evidence given under oath.³³

It has also been suggested that, from a policy perspective, the judgment in *Zalewski* may allow the Oireachtas to delegate other decision-making functions, in specific areas, to new tribunals or decision-making bodies. Examples given include certain intellectual property disputes that could potentially be determined at first instance by an administrative tribunal.³⁴

³¹ Rosanna Cooney, “Supreme Court ruling could have ‘chilling effect’ on WRC”, Business Post, 30 May, 2021.

³² *Zalewski*, para. 144, per O'Donnell J.

³³ [Permanent changes for the WRC and the wider implications of the recent Supreme Court decision in *Zalewski*](#), Arthur Cox, 24 May 2021

³⁴ Eoin Mac Aodha and Paula Shine, [Performance Of Decision-Making Functions By Quasi-Judicial Bodies – Implications Of *Zalewski v An Adjudication Officer, The Workplace Relations Commission And Others \[2021\] IESC 24*](#), Eversheds Sutherland Ireland, 28 May 2021

Principal Provisions

The Bill proposes to make the following amendments to the following Acts, in light of the judgment of the Supreme Court in *Zalewski*:

- [Workplace Relations Act 2015](#);
- [Equal Status Act 2000](#);
- [Employment Equality Act 1998](#);
- [Protection of Employment \(Employers' Insolvency\) Act 1984](#);
- [Unfair Dismissals Act 1977](#); and
- [Redundancy Payments Act 1967](#).

Section 2 proposes to amend s. 7 of the 2015 Act, which provides for offences under the Act. The proposed change is a technical amendment that facilitates a subsequent proposed amendment relating to the offence of perjury under s. 44 of the 2015 Act.

Section 3 proposes to amend s.40 of the 2015 Act. Section 40 relates to WRC adjudication officers. The purpose of this amendment is to provide for a fair procedure for the revocation of an adjudicator's warrant. Under the Act, an adjudication officer is appointed by the Minister. Section 40(7) provides that the Minister may revoke an appointment under the section, but does not specify the circumstances in which such revocation may or may not occur. The Minister is afforded unqualified power of revocation of appointment. It was noted by O'Donnell J in *Zalewski*³⁵ that this was unsatisfactory, though not unconstitutional (see above for further detail on independence of adjudication officers).

It is proposed to amend ss.40(5) and 40(6) to provide that the appointment of an officer, who has been appointed under subsections (1) or (3), will cease if the officer concerned:

- (i) is convicted on indictment of an offence,
- (ii) is convicted of an offence involving fraud or dishonesty,
- (iii) has a declaration made against him or her under section 819 of the Companies Act 2014 or is deemed to be subject to such a declaration by virtue of Chapter 5 of Part 14 of that Act, or
- (iv) is subject to, or is deemed to be subject to, a disqualification order within the meaning of Chapter 4 of Part 14 of the Companies Act 2014 whether by virtue of that Chapter or of any other provision of that Act."

Section 3 also proposes to remove references to the Minister in subsections (5) and (6), relating to revocation, and replace these references with "the Government".

Finally, section 3 proposes to delete s.40(7), which states "The Minister may revoke an appointment under this section", and replace it with the below provision:

³⁵ *Zalewski v Adjudication Office & ors*, para. 147, per O'Donnell J.

“(7) (a) The Government may revoke an appointment under this section if the Government is satisfied that one or more of the grounds specified in paragraph (b) apply to the adjudication officer.

(b) The grounds referred to in paragraph (a) are as follows, namely that an adjudication officer:

- (i) has become incapable through ill-health of performing his or her functions;
- (ii) has engaged in serious misconduct;
- (iii) has failed without reasonable cause, in the opinion of the Government, to perform his or her functions for a continuous period of at least 3 months beginning not earlier than 6 months before the date of the giving of the notice under paragraph (c);
- (iv) has contravened to a material extent a provision of the Ethics in Public Office Acts 1995 and 2001 that, by virtue of a regulation under section 3 of the Ethics in Public Office Act 1995, applies to him or her.

(c) Where the Government proposes to revoke the appointment of an adjudication officer under paragraph (a), they shall give notice in writing to the adjudication officer concerned of the proposal.

(d) A notice under paragraph (c) shall include a statement—

- (i) of the reasons for the proposed revocation of appointment,
- (ii) that the adjudication officer may, within a period of 30 working days from the giving of the notice or such longer period as the Government may, having regard to the requirements of natural justice, specify in the notice, make representations to the Government in such form and manner as may be specified by the Government, as to why the adjudication officer should not have his or her appointment revoked, and
- (iii) that where no representations are received within the period referred to in subparagraph (ii) or the period specified in the notice, as the case may be, the Government shall, without further notice to the adjudication officer, proceed with the revocation of the appointment of the adjudication officer in accordance with this subsection.

(e) In considering whether to revoke the appointment of an adjudication officer under paragraph (a), the Government shall take into account—

- (i) any representations made by the adjudication officer under paragraph (d)(ii) within the period referred to in that paragraph or the period specified in the notice, as the case may be, and
- (ii) any other matter the Government considers relevant for the purpose of their decision.

(f) Where, having taken into account the matters referred to in paragraph (e), the Government decide to revoke the appointment of an adjudication officer, they shall give notice in writing to the adjudication officer of the decision and the reasons for that decision.”

Section 4 proposes to amend s.41 of the 2015 Act, which concerns the presentation of complaints and referral of disputes. Subsection (12) of s.41 provides for the creation of an offence of failure to comply with a notice given by an adjudication officer. It is proposed to add a new subsection (12A) after subsection (12), providing for the giving of evidence on oath or affirmation and the creation of an offence of giving false testimony while legally under oath. As noted above, this is in line with the penalties under s.12 of the *Criminal Justice (Perjury and Related Offences) Bill 2018*.³⁶

“(12A) (a) An adjudication officer may require a person giving evidence in proceedings under this section to give such evidence on oath or affirmation and, for that purpose, cause to be administered an oath or affirmation to such person.

(b) A person who, in or for the purpose of proceedings under this section, gives a statement material in the proceedings while lawfully sworn as a witness that is false and that he or she knows to be false shall be guilty of an offence and shall be liable—

- (i) on summary conviction, to a class B fine or to imprisonment for a term not exceeding 12 months, or both, or
- (ii) on conviction on indictment, to a fine not exceeding €100,000 or imprisonment for a term not exceeding 10 years, or both.”

It is proposed to add a new subsection (13), providing for proceedings to be conducted in public, except in special circumstances:

“(13) Proceedings under this section shall be conducted in public unless the adjudication officer, of his or her own motion or upon the application by or on behalf of a party to the proceedings, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public.”

Finally, it is proposed to add a new subsection (14), relating to the anonymisation of parties in published decisions:

“(14) (a) Subject to paragraph (b), the Commission shall publish on the internet in such form and in such manner as it considers appropriate every decision of an adjudication officer under this section.

³⁶ As of 15 June 2021 the Bill has passed through all stages of the Dáil and Seanad.

(b) In publishing a decision under paragraph (a), 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.”

Section 5 proposes to amend s.43 of the 2015 Act, which provides for the enforcement of the decision of adjudication officer. It is proposed to add a new subsection (6), which provides that applications made to the District Court to enforce the decision of an adjudication officer shall be made on notice to the employer concerned.

Section 6 proposes to amend sections 10 and 21 of the *Industrial Relations Act 1946* to provide for the statutory independence of the chairperson and ordinary members of the Labour Court. Section 10 of the 1946 Act provides for the establishment of the Labour Court. It is proposed to amend s.10 by inserting subsection(13) after subsection(12), which states

“(13) The chairman and the ordinary members shall be independent in the performance of their functions.”

Section 21 of the 1946 Act provides for the power of the Labour Court to call witnesses. It is proposed to amend the provision to align the offence to that provided for in the *Criminal Justice (Perjury and Related Offences) Bill 2018*. The proposed amendment is similar to that provided in section 4 of the Bill.

Section 7 proposes to amend s.39 of the *Redundancy Payments Act 1967*, which concerns appeals to the Redundancy Appeals Tribunal. The proposed amendment provides for the creation of new subsections (17A) and (17B) after subsection (17), in accordance with the Supreme Court judgment, to provide for hearings, in matters that have been referred to an adjudication officer, to be heard in public, except in certain circumstances; for the publication of any decisions arising; and for the potential anonymisation of parties to the proceedings.

Section 8 proposes to amend s.4 of the *Industrial Relations Act 1969*, which relates to the deputy chairman of the Labour Court. It is proposed to amend s.4 to include a new subsection that states that “A deputy chairman shall be independent in the performance of his or her functions.”

Section 9 proposes to amend s. 8 of *Unfair Dismissals Act 1977*, which provides for the determination of claims for unfair dismissal. It is proposed to amend the section to include provisions relating to perjury and hearings taking place in public, except for certain circumstances. The proposed amendment is similar to that proposed by s.4 of the Bill.

Section 10 proposes to amend s.9 of the *Protection of Employees (Employers’ Insolvency) Act 1984*, which relates to complaints referred to a WRC adjudication officer. It is proposed to amend the provision to provide for proceedings in public, anonymisation, and the administration of an oath/affirmation, and perjury, in a similar manner to the amendments proposed in earlier sections of the Bill.

Further, a regulation-making power has been inserted empowering the Minister to make provision in relation to any matter relating to the presentation of, the referral of, or the hearing of a complaint under section 9 of the 1984 Act that he or she considers appropriate.

Section 11 proposes to amend s. 79 of the *Employment Equality Act 1998*, which relates to investigations by the Director General of the Workplace Relations Commission or the Labour Court. It is proposed to substitute subsection(2) with a new subsection providing that the Director General may require a person giving evidence in an investigation under this section to give such evidence on oath or affirmation, and for a subsequent offence of providing false material under oath, in a similar form to the previous perjury related provisions in this Bill.

Section 12 proposes to amend s.25 of the *Equal Status Act 2000*, which relates to investigation by the Director of the Workplace Relations Commission. It proposes to provide for public hearing and perjury amendments in a similar manner to section 11 of the Bill.

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