Sharp end experience and lawyers' tricks: A conversation with Kevin Duffy and Alan Neal

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> **At the 'Workplace Relations Act – One Year On' conference last weekend in Dublin, former Labour Court chairman Kevin Duffy and professor of law at the University of Warwick Alan Neal engaged in a candid discussion on several pressing themes in employment tribunals, drawing from their own extensive experience and taking some modern trends to task.**

Messrs Duffy and Neal delivered insights on pressing matters in adjudication, such as legal qualifications of adjudicators, fees, public or private hearings, lay litigants (unrepresented parties) and trends they have witnessed over the course of several decades they have been involved in third-party adjudication in Ireland and the UK respectively.

The talk, anchored by Bill Roche (UCD), drew some fascinating observations from the two seasoned characters at the conference, organised by Anthony Kerr BL.

> *"Why should they be legally qualified ... it's not rocket science"*

Professor Neal, who is also a part-time employment judge in the UK, finds the employment dispute system has become increasingly legalistic (or "juridified"), pointing to "that great bane of modern society, the lawyer", and they have "managed to get in on the act in the UK."

Asked whether adjudicators should have legal qualifications – something which legal commentators have bemoaned as a problem area for many years – Mr Duffy said simply: "some of them are, some of them aren't – that's the reality."

"We have a different tradition in this country than in the UK. With the exception of the EAT, we have no requirement for legal qualifications."

He quipped that when some equality officers, in the former Equality Tribunal, got legal qualifications "they were promptly moved out of it."

"By and large the Equality Tribunal consisted of people who were trained in employment equality law and knew employment equality law very well but they didn't have a degree from a law school; and it worked very well."

Neither did Rights Commissioners require legal qualification – they were "a mixed bag", he said, but they did the job very well.

"There was no requirement in the Labour Court to be legally qualified, and they've done very well."

Mr Duffy flips the question around: "The question: 'should they be legally qualified?' Why? I ask the question: Why?"

"What people have to do is understand the legal principles – and it's not rocket science – and they understand the legal principles and they understand how to rule a case. And by and large they do."

“Obviously I can understand why lawyers say that, just as if you want to build a wall you should be a bricklayer.

“It’s really a question of whether you’re able to do it or not and by and large people who come from the employer background or who are trade union officials have demonstrated a capacity to deliver in this area for donkeys years, and deliver very well.”

DECENT COMMON SENSE

Mr Neal offered: “My sense is when you have issues that turn on the fact finding and the application of relatively straightforward principles of law – something like unfair dismissal – you need experience as well as the ability to organise a hearing with the skill set that a lawyer may bring.

“It doesn’t mean that the lawyer is uniquely able to do that, it just means he or she is expected to have as a matter of course as a skillset.”

“You don’t need PhDs in law or legal theory or a three or four year period in Florence at the EUI to do that. You could have decent common sense and a bit of sharp end experience – and what we’re missing now in the UK is sharp end experience.”

The UK, he said, has increasing use of a “stipendiary” magistrate (a single one) who is a lawyer: the lawyer brings “a narrower, darker frame of vision to the problems in front of [them].”

“When it comes to continuing relationships in the workplace that is certainly not what you want.”

He continued that if there’s more space for industrial relations – “though I think we’re seeing an evaporation of that – the more space you want for a less regulated, less rigid frame or reference at the early stages.”

But, he added, you need the legal skillset to “stop the lawyers playing lawyers' games. I think that’s one of the big problems. It’s very easy to get away with procedural niceties when in fact they have no role whatsoever to play in the proceedings.”

He stressed the importance of keeping lawyers in check: “Issues like whether you can strike a case out for misconduct, or the ability to sanction in some way… you have to have a robust adjudication officer to apply those rules. You’ve got to make sure the armoury is not just there but is used on appropriate occasion.”

INFORMAL AND FAIR

A theme explored in detail at the conference was the in-camera or private setting of first instance adjudication hearings at the WRC (an overview of this discussion will be featured in a subsequent issue of IRN).

While this appears occasionally to be misunderstood as a regressive change – equivalent Rights Commissioner hearings of the LRC were private and RC decisions were not published (though an unfair dismissal case could be taken directly to the public EAT) – whether hearings should be held in public or private is the basis for continuing debate between practitioners, and within the context of the European Charter of Fundamental Rights Article 47, the ‘Right to an effective remedy and to a fair trial’ and its provision that “Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law”.

Kevin Duffy finds Ireland’s system “is such that the first instance hearings are relatively informal. A lot less formal than at the appeal stage and certainly less formal than at the EAT – and that’s how it should be.”

On informality and fairness, he said “they’re not mutually exclusive concepts by any means.”

“But what advantage would it bring having them in public? In fact, in a lot of cases workers would be put off by the newspapers turning up and [having] their names appearing in the public press.”

“Somebody that brings a case under employment law, and it's reported, and the employer Googles their name and something comes up showing they took a case against their previous employer, they’re banjaxed.”

“The relative informality that is inherent in the system – and it’s a highly desirable aspect – doesn’t lend itself to a public hearing.”

ESTABLISHING FACTS IS FUNDAMENTAL

Labour Court hearings on rights cases are open to the public, since the enactment of the Workplace Relations Act 2015.

Mr Duffy noted that despite some lamenting private hearings in some spheres, “there weren’t queues of people coming in to amuse themselves [in the Labour Court] – there wasn’t a demand for it.”

“Quite frankly I don’t subscribe to the view that […] the quality of the hearing or the outcome is in any way impaired by the requirement that the hearings are conducted in private.”

Prof Neal pointed to the importance of public accountability, “but there is a limit to that.”

“One of the problems we have [with public hearings] is that it fuels interest in the way in which courtroom technique takes over.”

“There’s a problem with lawyers using ‘lawyers tricks’, and they certainly use the press and the fact of public occasions.”

Referring to *Jose Mourinho v Eva Carneiro* case that flared up in the UK earlier this year, where the former Chelsea FC physio took a discrimination claim against Mr Mourinho (who was subsequently dismissed by Chelsea) but which was settled in private, Mr Neal noted: “All of the allegations were set out in witness statements and released to the press before the hearing got under way.”

Another UK case he highlighted was that of the ‘bonking dentist’, a discrimination claim taken by a nurse. Prof Neal explained “the problem was the press had got hold of a whole range of things that had nothing to do with the claims in question and the newspapers were full of this on the first day.”

The employment judge had to put out a press release directed at the press that it was publishing material that did not form part of the case, and did not form part of the evidence.

He said he is “very negative towards early or continued reporting of a case” before it's concluded.

Mr Duffy followed up that the “vast majority of cases are about establishing facts: people who come in, involved in the same incident and have a different version of events. The reality is that one person is probably telling the truth and somebody else is telling lies. What skills do you need? You need an ability to know a chancer from the person who’s sincere.”

“The fundamental part is about establishing facts and when you know the facts you apply the law to those facts.”

“People who have experience as trade union officials or HR managers are well qualified to do so.”

‘REMARKABLE’ FEES

Turning to the thorny issue of the fee system in UK employment tribunals, which were introduced in 2013, Mr Neal recounted there was a sense on the part of employer organisations and some media “that we’re absolutely inundated by unmeritorious claims.”

However, “there’s never been much chapter and verse to support this – it’s always been an allegation.”

The fees were introduced at a level “which is quite remarkable.”

For claims, such as unfair dismissal, “we’re talking about £1,200, paid in two parts - an issue fee and a hearing… this is for someone who’s just lost their job.”

“Even if you win your hearing at the Employment Tribunal and the employer appeals, the employer has to pay a fee to go to the Employment Appeals Tribunal – this is £1,600.”

“It has been held recently that this is recoverable if the employer wins the appeal from the unsuccessful employee.” This means an employee could be facing fees of up to £3,000.

A clear result of the fees was that there was an immediate drop in the cases of 81%.

“We no longer have any claims of non-payment of wages”, he noted. This is because the money recoverable from such claims can be less than the cost of taking such a claim.

There is now a majority of cases in the UK that are based on discrimination.

Case management and time spent disposing of cases has been drastically affected as a consequence. Before, it was the case that the stalls were set out and the key issues were homed in on, which would then take five or so days to deal with at the Tribunal.

But because claimants are paying £1,200 to take their claim, they are unwilling to give way on anything that is part of their claim. “So instead of having a 5-day hearing you’ve got a 25-day hearing”, said Neal.

“Now if that’s a move towards efficiency gain as a result of fees coming in, then I’m Santa Claus. And I’m not currently wearing a red and white outfit.”

The success rate of claims that went to a hearing, before the fees were introduced in the UK, was 30%. Since the fees were brought in, the success rate is within 0.5% of the pre-fees success rate –“that probably shoots stone dead the proposition that we were inundated with unmeritorious claims”.

The Unison claim against the fees is currently pending before the UK Supreme Court, but has been put off until next April.

An internal review of the fee system was completed by the former Tory-Lib Dem government, but it remains unpublished for nine months.

In the meantime a UK Parliament select committee “absolutely lambasted” the Government for its ‘indefensible procedures.’ *(see ‘News Feature’ in IRN 27/2016)*

Mr Neal predicts the fees system will be reformed, but not abolished. “I think we’re going to see fees but at a more realistic level.”

The fee system is hitting the EU-10 cohort of workers in the UK hardest, who are working in low-paid work where non-payment of wages has been more of an issue.

NEW HR GENERATION

Moving on to the topic of lay litigants, Mr Duffy says the challenge for the Court is to assist the unrepresented party to present their case.

He raised the problem of “lawyers tricks”, where they come in and object to the method of assisting the lay litigant.

He recalled a case two years ago where he and his colleague were accused of bias for assisting an unrepresented party in her claim.

“It requires a certain skill. It should never be the case that someone who is presenting their own case gets a lesser quality of hearing than if they have brought in a lawyer or a trade union.”

Prof Neal furthered: “The space for collective bargaining has disappeared; the space for in-house resolution has narrowed, I would suggest, by a new generation of much more aggressive, procedurally driven and normative HR officers.

“It sends a shiver up my spine when I see the self-description in the first paragraph of a witness statement how many CIPD qualifications this person has as you know what you’re in for.”

“The whole shift has been away from sorting out the issue at the workplace, […] you end up transferring the issue into a legal issue and that’s something I don’t think the system is set up for.”

Looking back to 1973, when he started as a trade union official, Kevin Duffy noted employment rights were determined through collective bargaining, but “that has changed, and changed utterly.”

In 1997, lawyers were rare in the Labour Court, he said; it was populated mainly by trade union officials and employer organisations. But by mid-2016, when he retired from the Court, it was about 80% lawyers.

Some other trends were “worrying to say the least.”

In a few, rare instances, “wholly unmeritorious claims were put together and often it was difficult to avoid the conclusion that it was being done for the purpose of extracting money from the employers who simply decided it was easier to settle all this stuff than be bombasted with all these claims.”

There were some instances of that and this “was a total abuse of the system.”

When he started in the Court in the mid-90s, about 90% of the workload was collective IR disputes.

However, “collectivism has been on the wane” and when he left the Court, collective cases accounted for “probably a third” of the Court’s workload.

HELP PRESENT, NOT MAKE CASE

Taking a question from employment lawyer Richard Grogan, on whether there is a need for a back up service for helping lay litigants present cases, using the example of when the wrong employer is identified for claims, Mr Duffy remarked “I’ve probably seen more lawyers do that than lay litigants.”

Workers are sometimes driven to hire lawyers because they believe that’s the best way of advancing their case, he said. “But I do think, and it was certainly my experience, and I’m sure it applies at the adjudication service […] you can deal with [mistakes] through case management.”

“A lot of the time, when you have to resort to case management, it was because of the lawyers.”

When questioned by former Labour Court chair, John Horgan, about the power of an adjudication officer, built into the WR Act of 2015, to refuse a choice of representative of a party (of which, Horgan says, there has already been an instance of), Mr Duffy responded:

“I certainly would take the view that if somebody wants to be represented by their granny or whatever, that’s their prerogative. I don’t think the adjudication service or the Court should interfere with that – that would be my view – but it’s in the legislation. Why was it was formulated that way? I think it was a throw back to the procedures of the Employment Appeals Tribunal. But I don’t think there should be a limitation on who people can have representing them.”

Mr Neal added: “I would underline with case management that where there is a problem with a lay litigant, it is to help them present their case not to help them make their case.”

"APPROPRIATE" REPORTING

Looking again at the role of the press, he said it is their function "to bring to the public eye that which should be known and has to be known. The outcomes of most of the cases are of little interest except to the immediate protagonists."

"But some of the cases can be extremely distressing. By and large, in the UK, the press is remarkably restrained." It is when there's sexual innuendo or an unpleasant race allegation when press coverage becomes an issue.

"Publication tends to take place on the morning the case begins. It's almost inevitable that you get the claimant's version put up as the version of what's under issue. If one were to report over the longer period you get a more balanced approach.

"I certainly wouldn't defend the exclusion of appropriate reporting at the right time."

Mr Duffy returned that the question is to do with reporting and the extent to which reports are comprehensive and available.

"The Equality Tribunal (with private hearings) had detailed written decisions, while Rights Commissioners didn't have reporting… and some of their decisions implied a great deal of economy of expression."

"What is important is that there are proper decisions and proper reporting of cases, not just for the case of accountability but also for establishing jurisprudence, which is equally important for practitioners."

"What I think is most important is that the outcome of the case is properly reported and that it's available."

'SKINNING THE CAT'

Employment lawyer Cathy Maguire BL took issue with Messrs Duffy and Neal on their characterisation of lawyers, connoting "lawyers tricks". She said there are rules and codes of conduct to govern the practice and behaviour of lawyers in the courts.

Taking up the comment, Prof Neal, who was called to bar in 1975, said the following:

"The most important tool in our [lawyers] armoury is the language which we use. And we've just heard an example of 'lawyers tricks', being evaluated, used linguistically – the trick element […] nobody suggests there is a wide spread activity on the part of legally qualified representatives to mislead, to construct misconceived claims, or to in other ways obstruct the course of justice.

"The point is, of course, there are different ways of skinning the cat. Delay, is one. It's not always the negligent lawyer who fails to get the claim processed in due time. Representations are made […] that, it seems, are not acted upon to the full extent of that which was understood to be the representation at the time of its being made."

"And during the course of proceedings, it may well be that a certain selectivity in the witness array or in the information covered gives rise to difficulty. When you have informality, that can either take place as a matter of course […] or can be used by some who would see an advantage in particular methods of adjusting their procedural behaviour."

"We have a lot of problems in the UK with non legally qualified who take claims on a contingency basis. There are persons disbarred from further conduct of cases. There are situations with [lawyers] in the UK who have been disbarred and it's a remarkable circumstance that for them the employment tribunals offer them an opportunity to get back into litigation.

"So when I talk about lawyers' tricks, I'm not talking about that sort of misconduct, although as I am indicating, it exists; what I'm talking about is the advantage that can be taken from procedures and processes through the skillset of the trained lawyer.

“Now the answer to that is that the judge, or the adjudicator, has an obligation to ensure parity […] and therefore it’s for us to deal with it. That’s why we use the ‘strike out’ rule.

“What I’m saying when I talk about lawyers' tricks is the advantage that can be taken procedurally from a thorough knowledge of rules, regulations and procedures. And that’s something that adjudicator has to be alive to, because there’s a requirement […] as a matter of natural justice […] that you give both sides an opportunity to present their cases.”

NOT QUITE ‘DOOM & GLOOM’

Earlier in the day, the new director general of the WRC, Oonagh Buckley, said the Commission is not yet “world class”- which was the somewhat slippery mantle given to the dispute resolution body by the former Minister for Jobs, Richard Bruton.

Looking at the results of the Dr Barry/ELAI survey on the WRC and the Labour Court (see WRC survey item in this issue), Mr Duffy went back to when the workplace reform project was first detailed, in 2011.

“There were predictions of doom and gloom”, he recalled; some comment had it that the Labour Court “would be inundated with appeals under the new system and couldn’t possibly handle it.”

The former Labour Court chair was asked at the time to establish the rate of appeal to the Labour Court (from the LRC and Equality Tribunal). The appeal rate was between 11% (for equality appeals) and 18% (working time cases were typically appealed more than any other type of claim).

Mr Duffy arrived at a projected appeal rate to the Labour Court of 20%, under the planned single appeal route – to the Labour Court. This, in turn influenced the expanded composition of the current Labour Court, which saw an extra division, two new deputy chairs and new worker and employer members, to ensure the projected extra workload could be covered.

He told the audience at UCD that “the ultimate test of the success of the system is the number of cases that go to appeal”.

His own understanding is that the appeal rate to the Labour Court, since the WRC came into being, is around 10%, though it is “early days”, he cautioned.

Notwithstanding the publicised difficulties the new Commission is facing – explored in the new survey of practitioners, as well as commented upon in this journal over the past year – “the system is working well”, he finds.

He said it was inevitable there were going to be difficulties with the adjudication service.

“If anyone seriously thought everything was going to work like clockwork on day one, they’re living on the wrong planet. Of course there were going to be difficulties.”

He furthered that all the problems with the system that have been identified are “all capable of being sorted out.”

DRAMATIC SHIFTS

Professor Alan Neal finds what matters most for dispute bodies is the “delivery of outcomes.”

“When you start to drill down to the actual individuals who are responsible for delivering the strategies the policies and the outcomes, then it’s the quality of those individuals and their commitment. It’s not the big statements of the level of the Minister, with the greatest respect, as to whether we shall adopt or achieve or promote a world-class system. It’s about the delivery outcomes and whether those stand up to scrutiny, in a global context.”

Looking to his experience in the UK, he related there have been some “dramatic shifts” in the past few years.

“The notion that we have any vestiges of a voluntarist system […] is quite honestly as far as away as Kevin [Duffy’s] notion that everything would work from day one in a new system.”

“What we have instead is a very, very juridified system [that] tends to give legal form to disputes at a much, much earlier stage than would historically have been the case.

“Sometimes that has some advantages: non-payment of wages, for example, there’s something to be said about. There’s not a lot to mediate about if you’re not being paid the wages you should be paid.

“On the other hand, when you start to move into interest areas, or move into areas of discrimination, you don’t want [legal form] at any early stage. You may need a framework against which you test the limits or the procedural expectations but actually what you want is a much more open forum.”