

ACCESS TO JUSTICE AND THE IMPACT OF DELAY ON MIGRANT WORKERS IN IRELAND

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A INTRODUCTION

An essential characteristic of any employment dispute resolution procedure is the assurance that the process will guarantee an adequate remedy to the affected party. The current structures of employment dispute resolution in Ireland provide for the remedies of compensation, reinstatement and reengagement, all of which could be considered to be adequate remedies for an afflicted worker.

However, the substantial delays in the employment dispute resolution procedures in Ireland has meant that many migrant workers,¹ whether from the EU or third countries, find that the remedies which they can be offered on the determination of their dispute are substantially reduced. As third country national migrant workers depend on the existence of the employment permit for their permission to remain in the State, the termination of their employment contract, and as a consequence their employment permit, inevitably means the termination of their residence in Ireland. Similarly, EU migrant workers also find that the termination of their employment contract can often signal the end of their stay in Ireland should they be unable to find alternative work. Due to the delay in hearing their case before the tribunals and other dispute resolution bodies and the lack of social welfare payments due to the habitual residence rule,² many migrant workers find that they will have returned to their sending state before the determination of the hearing and as such the only available remedy open to the tribunal is that of compensation.

This article explores some solutions to this particular problem in an effort to restore the concept of an adequate remedy back into the employment dispute resolution process. The article will examine the possibility of introducing interim measures to enable the migrant worker to remain in the State until the final hearing of their case and to ensure that other remedies are available to them. This is relevant to the situation of all migrant workers. However, the situation of third country nationals is more pressing in this context and so the article will also explore the benefits of bridging visas for such workers. It will be determined that while all these solutions are short term, a longer term solution such as the development of a fast-track procedure for employment disputes with adequate protections for employers would be a more effective solution.

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¹ In this article, a migrant worker is defined as any non-national who is in Ireland with the intention of partaking in employment. This includes EU, EEA (European Economic Area) and Swiss nationals, accession country nationals and third country nationals who are in Ireland on working permits such as employment permits, green card permits, intra-company transfer schemes, spousal/dependant permits and graduate schemes.

² Under the habitual residence rule, the Department of Social and Family Affairs are not liable to pay any social welfare entitlements to a person unless they have been resident in the State in the past and can show a prospect and expectation of residence in the future. The Social Welfare (Miscellaneous Provisions) Act 2004 section 17 and Schedule 1 which inserts section 208A into the Social Welfare (Consolidation) Act 1993 provides that a person must be present in the State or in the common travel area in the past two years in order to be considered habitually resident and entitled to certain benefits.

B A BRIEF OVERVIEW OF EMPLOYMENT DISPUTE RESOLUTION IN IRELAND

The employment dispute resolution landscape in Ireland is relatively complicated. Depending on the employment dispute in issue an employee can make a complaint to one of the various employment rights bodies in existence in Ireland. Complainants face a difficult task in deciding which employment body they should address their concern to due not only to the wide variety of dispute resolution bodies but also to the different pieces of legislation covering various claims.

Complaints in relation to certain rights can be made to the Rights Commissioner Service.³ This service can investigate the complaint and issue a non-binding recommendation or a decision depending on the legislation under which the complaint is made. An appeal is available either to the Employment Appeals Tribunal or the Labour Court depending on the legislation under which the complaint is made. If a complaint does not fall within the Rights Commissioner Service, a claim may lie to the Employment Appeals Tribunal.⁴ Alternatively where a claim relates to alleged discrimination on any one of nine grounds listed in the Employment Equality Acts 1998 & 2004, in the course of employment or application for employment, a complaint can be made to the Equality Tribunal.

C DELAY IN THE EMPLOYMENT DISPUTE RESOLUTION PROCESS

One of the most significant deficiencies associated with the employment dispute resolution process in Ireland is the fact that the procedure, from the first complaint, to the final hearing is a very lengthy one that is subject to substantial delays. At present, applicants can expect to wait for up to eighteen months for the final determination of their case. The effect such delays can have on migrant workers, in particular those employed on employment permits or visas, is possibly best illustrated by examining the situation which arose in November 2000, when over 1000 Turkish workers employed by GAMA Construction Ireland Limited,⁵ a subsidiary of GAMA International Building Contracting Incorporated, were found to have been subjected to illegal employment practices amounting to exploitation.⁶

³ Adoptive Leave Acts 1995-2005; Carers Leave Act 2001; Competition Acts 2002-2006; Employees (Information & Consultation) Act 2006; Employment Permits Act, 2006; Industrial Relations Acts 1969-1990; Industrial Relations (Miscellaneous Provisions) Act 2004; Maternity Protection Acts 1994-2004; National Minimum Wage Act 2000; Organisation of Working Time Act 1997; Parental Leave Act 1998; Payment of Wages Act 1991; Protection of Employees (Fixed-Term Work) Act 2003; Protection of Employees (Part – Time Work) Act 2001; Protection of Young Persons (Employment) Act 1996; Protections for Persons Reporting Child Abuse Act 1998; Safety, Health and Welfare at Work Act 2005; Terms of Employment (Information) Act 1994; Unfair Dismissals Acts 1977-2005; European Communities (Protection of Employment) Regulations 2000; European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations 2003; European Communities (European PLC) (Employee Involvement) Regulations 2006.

⁴ Redundancy Payments Acts 1967 to 2007; Minimum Notice and Terms of Employment Acts 1973 to 2001; Unfair Dismissals Acts 1977 to 2001; Protection of Employees (Employers' Insolvency) Acts 1984 to 2001; Organisation of Working Time Act 1997; Payment of Wages Act 1991; Terms of Employment (Information) Act 1994 and 2001; Maternity Protection Act 1994; Adoptive Leave Act 1995; Protection of Young Persons (Employment) Act 1996; Parental Leave Act 1998; Protections for Persons Reporting Child Abuse Act 1998; European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003; European Communities (Protection of Employment) Regulations 2000; Carer's Leave Act 2001; Competition Act 2002; The Civil Service Regulations (Amendment) Act 2005.

⁵ Hereinafter referred to as 'GAMA'.

After a strike that lasted seven weeks and an unsuccessful conciliation attempt by the Labour Relations Commission, the Labour Court exercised its jurisdiction under section 26(5) of the Industrial Relations Act 1990 to investigate the dispute. The strike was discontinued for the duration of the investigation. Both parties presented conflicting claims to the Labour Court.⁷ The unions argued that the workers had worked in excess of 80 hours per week for a basic rate of €2.20 per hour, with hours in excess of 248 per month paid for at €3.00-€3.30 per hour, that a number of workers such as surveyors, canteen staff, cooks and van drivers were paid below the legal minimum rate and that the Turkish workers had neither a proper time recording or payslip system. The company refuted these allegations and argued that the workers in dispute were making 'grossly exaggerated claims of overtime,'⁸ that non registered employment agreement workers were properly paid in accordance with their contracts of employment, and that regard must be had to accommodation and food provided by the company to the workers which was over and above their basic salary, plus travel costs paid on their behalf by the company and that the company had put in place a more comprehensive system for recording hours of work and ensuring that no further disputes similar to the current one could arise in relation to hours.

Due to this striking difference of opinion the Labour Court explored the possibility of embarking upon a full investigation of all factual matters in dispute or alternatively to seek to find an industrial relations solution to the issue without reaching a conclusion as to the veracity of each sides arguments in the case. For various reasons, the parties chose the latter approach. The Labour Court held⁹ that each of the workers should be paid a lump sum of €8000 in respect of each completed year of service with the Company and pro-rata in respect of part years. A minimum payment of €2000 should apply. This amount should be paid by the Company without admission of liability and should be accepted by the Union in full and final discharge of all claims by the Union in respect of alleged unpaid overtime. In addition each worker should receive an ex-gratia severance payment equal to one month's salary.¹⁰ On acceptance of these proposals all industrial action should cease and there should be a full resumption of normal working. The workers accepted this recommendation, as did GAMA. However, there was a general consensus that this was an insufficient reward for the work that had been completed and efforts were made to appeal the decision through the courts. However, after the workers were advised that it would take almost eighteen months for the case to be heard before a court, it was decided that they would not pursue this particular

⁶ O'Connor 'Migrant Workers suffer most because of a poorly resourced labour inspectorate' *SIPTU News Online* <http://www.siptu.ie/print/PressRoom/NewsReleases/2004/Name,2014,en.html> (14 July 2009); Newman 'GAMA workers await agreement confirmation' *Irish Times* (30 May 2005); Robinson 'Minister may survive "racist" kebab jibe' *Irish News* (20 May 2005). See also Dooley 'GAMA Staff Threaten Hunger Strike' *Irish Times* (25 May 2005); Fitzgerald 'GAMA workers reject offer to end strike' *Irish Times* (25 May 2005).

⁷ CD/05/459 Recommendation No LRC18214 *GAMA Endustri v Services Industrial Professional Technical Union, Union of Construction, Allied Trades and Technicals Opatsi*.

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.* The Labour Court also recommended that in the circumstances of this case the workers should be paid not less than the minimum General Operative rate for the industry and that workers whose rate of pay was less than that amount should be brought up to that rate back-dated to their commencement date subject to a maximum of 12 months retrospection. All workers employed by the Company, regardless of their nationality should clock in and out of work and be issued with pay slips each week which complied with the requirements of the Payment of Wages Act, 1991. There should be no distinction in these matters between workers of Irish or Turkish nationality.

option, given that their contracts were due to expire shortly and few of them would have the financial resources to return to Ireland for the hearing.

This particular case demonstrates very effectively the effect the current delays in the court system and in the employment tribunals can have on migrant workers. The Equality Authority has admitted that the assignment of Equality Officers to cases has in some circumstances taken up to three years.¹¹ The addition of cases of discriminatory dismissals to the remit of the Equality Tribunal in 2004¹² has only sought to heighten this problem, an issue that has also plagued employment tribunals in other countries to a similar extent. Morris has noted that in the UK the progressive extension of the jurisdiction of the employment tribunals has meant that there are now over seventy types of complaint that can be made to an employment tribunal bringing with it a commensurate increase in workload.¹³

D THE EFFECT OF DELAY

1 The Difficulties in Making out a Case

Many migrant workers, particularly those operating on employment permits and who have made claims for discriminatory dismissals, find that they are unable to attend their own case because they no longer have permission to reside in the state.¹⁴ While the non-attendance of the complainant is not necessarily fatal to a case for discrimination, particularly where they have managed to secure representation on their behalf, it does make it more difficult for the Tribunal to determine whether or not the complainant has made out a *prima facie* case of discrimination.

2 The Reduction in the Remedies Available

The most significant effect of these delays is that there is a reduction in the remedies that will be available to a migrant worker. Even if a complainant is successful in having a case found in their favour in their absence, their remedies are restricted to compensation in the form of damages. Unfortunately, due to the fact that the worker is no longer available for reinstatement or re-engagement due to their absence from the State, the discretion of the tribunal in determining a suitable remedy for the employee is fettered. Remedies such as reinstatement and re-engagement are obsolete and any orders for the employer to provide equal treatment or payment would be ineffective. Therefore the only remedy available is compensation and while this may be appropriate in the circumstances, it could not be said to

¹¹ Equality Authority *Annual Report 2005* (Brunswick Press Ltd Dublin 2006) 22.

¹² Under s 46 of the Equality Act 2004 (Ireland) the Equality Tribunal now has jurisdiction to hear cases involving discriminatory dismissals. Prior to this Labour Court only had jurisdiction to deal with such cases.

¹³ Morris 'Developments in Workplace Dispute Resolution: A Five Country Study: Britain: Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice?' (2004) 25 *Comparative Labour Law and Policy Journal* 477, 477-478.

¹⁴ *Ms Nkone Sarah Sapuru v Mount Carmel Hospital* DEC-E2004-021. The applicant was a theatre nurse who was dismissed from her position allegedly unfairly. Unfortunately she could not return from South Africa for the case so the union appeared on her behalf. Her claim, however, was unsuccessful. The Court noted that the claimant's failure to appear meant that she had '*failed to establish a prima facie claim of discrimination and victimisation.*' Similar events occurred in *Mr Omar v Aer Rianta* DEC-E2005-041.

be adequate. It also means that the culture of compliance, which the equality legislation was developed to achieve, is being severely undermined.¹⁵

E COMPATIBILITY OF THE CURRENT SYSTEM WITH EU LAW

The current situation with its significant delays could be contrary to the provisions of EU equality law.¹⁶ European equality legislation requires that remedies for discriminatory treatment must ‘guarantee real and effective judicial protection, have a deterrent effect on the employer and must in any event be adequate in relation to the damage sustained.’¹⁷ Article 7 of the Race Directive insists that Member States establish administrative and / or judicial procedures for the enforcement of obligations for persons who have suffered discrimination. The ECJ has stated that this guarantee ‘acknowledges that [such persons] have rights of which they may avail themselves before the courts.’¹⁸

1 Is Compensation a Sufficient Remedy?

It is questionable therefore, whether compensation is a sufficient remedy for migrant workers who have been unfairly dismissed. There is authority in the UK for the proposition that compensation is an appropriate remedy for instances of discrimination but may not be appropriate in cases of unfair or discriminatory dismissal.¹⁹ The process of employment dispute resolution should aim to compensate the worker for the loss of a job and this is why the remedies of reinstatement and re-engagement have been made available to them at a statutory level. It is doubtful whether compensation alone is sufficient to compensate the migrant for the loss, not only of a job, but a way of life in another country.

Morris would argue that compensation is the only appropriate remedy in the case of dismissals as in such cases, ‘neither the employer nor the employee is usually interested in a continuation of the contract and the compensation or other remedies seem more appropriate

¹⁵ Equality Authority (n 11).

¹⁶ *ibid.*

¹⁷ Case C-180/95 *Nils Draehmpaehl v Urania Immobilienservice DHC* [1997] ECR I-02195 at para 25. This case involved the interpretation of Article 6 of Council Directive 76/207/EEC of the 9 February 1976 on the implementation of the principle of equal treatment for men and women, as regards access to employment, vocational training and promotion and working conditions (OJ 1976 L39, p 40). Article 6 of that Directive refers to the need for Member States to introduce into their national legal systems necessary measures to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process. This guarantee is repeated in other equal treatment directives such as Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (29/7/EEC) (OJ 1979 No L6/24); Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes (86/378/EEC)(OJ 1986 No L225/40)(as amended by corrigendum 1986 L283/27 and Directive 96/97 (OJ No L46/20 1997 L241/8); Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303/16) Article 9. Most importantly from the perspective of migrant workers, the Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L180/22) states this in Article 7.

¹⁸ Case 14/18 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 01891.

¹⁹ *Bakersfield Entertainment Ltd v Church and Stuart* [2005] UK EAT/0523/05 ZT.

than reemployment.²⁰ However, it is arguable that this is an outmoded and unnecessary view of the employment relationship. The role of employer and employee has drastically changed in recent years and the traditional view of the employment relationship as being akin to that of a master and servant is no longer relevant in many professions.²¹ For this reason, it is appropriate to examine other potential solutions to this problem.

F THE POTENTIAL SOLUTIONS

It is evident that the serious delays at the employment tribunals present significant obstacles to migrant workers at the remedial stage of employment dispute resolution. One possible solution would be to prevent the termination of the contract of employment in the first instance by the use of interim relief. This next section examines the various ways in which this could be achieved.

1 Grant Interim Relief

The Equality Authority has suggested that interim hearings or interlocutory relief pending a full hearing of the case should be available to applicants to minimise the effects of the delays on proceedings.²² In effect this would amount to the reinstatement, re-engagement or the continuation of a contract of employment pending the full hearing of the case before the tribunal.

(a) What is Interim Relief and when is it Granted?

Interim relief is essentially a remedy in the form of a court order addressed to a particular person that either prohibits him or her from doing or continuing to do a certain act²³ or orders him or her to carry out a certain act.²⁴ In a normal case before the civil courts, the applicant must make out a legal case in connection with the claim it has instituted and it must be shown that the balance of convenience favours the grant of the interim relief.²⁵ The essential aim of an interlocutory injunction in an employment law context would be to preserve the status quo between the parties to the dispute until the final determination by an employment tribunal so as to prevent the applicant suffering irreparable harm as a result of the delay in hearing the proceedings.²⁶

²⁰ *Morris* (n 13) 478-479.

²¹ See Dickens 'Re-employment of Unfairly Dismissed Workers: The Lost Remedy' (1981) 10 *Industrial Law Journal* 161.

²² Equality Authority (n 11).

²³ This is referred to as a prohibitory injunction.

²⁴ This is referred to as a mandatory injunction.

²⁵ *Campus Oil Ltd v Minister for Industry and Energy (No 2)* [1983] IR 88. Chief Justice O' Higgins, at 7, stated that 'the test to be applied is whether a fair bona fide question has been raised by the person seeking the relief. If such a question has been raised, it is not for the Court to determine that question on an interlocutory application; that remains to be decided at the trial. Once a fair question has been raised... then the Court should consider the other matters which are appropriate to the exercise of its discretion to grant interlocutory relief.' The Supreme Court in Ireland was following the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. These principles were applied by the Supreme Court in subsequent cases such as *Westman Holdings Ltd v McCormack* [1992] 1 IR 151.

²⁶ *Delaney Equity and the Law of Trusts in Ireland* (3rd edn Thomson Roundhall Dublin 2003) 468.

The current use of interim relief in Ireland is alien to the employment dispute resolution process. Such remedies are normally granted in civil cases by the courts and are discretionary. Most importantly, it will not be granted where damages would be a sufficient remedy. It appears from the case law governing wrongful dismissal that the traditional relief at common law for unfair dismissal is a claim for damages and those other remedies, which may be sought, are in aid of this remedy and have no existence independent of it.²⁷ The difference, however, with a scheme which would be established in the employment tribunals would be that they are entitled under the legislation to order reinstatement, re-engagement or damages. As will be discussed below, in the case of migrant workers, damages would not adequately compensate third country national migrant workers were they to lose their permission to work in Ireland as this would effectively terminate their permission to remain in the country and any hope of establishing their case at a final hearing. Similarly workers from within the EU may not be able to afford to remain in Ireland pending the final determination of the Tribunal.

(b) Is there a Fair and *Bona Fide* Question to be Tried?

In considering whether to grant interim relief, the tribunal could firstly, insist that the applicant establish some legal grounds on which to institute proceedings, but not necessarily, that this would be successful at the final hearing.²⁸ This is the basis upon which interim relief is granted to employees in the UK by the employment tribunals.²⁹ Where an employee claims that they have been unfairly dismissed,³⁰ they then have seven days to apply to the employment tribunal for the application of interim relief pending trial.³¹ Where the employment tribunal is satisfied, that on the final hearing it will most probably be established that the dismissal is unfair,³² the tribunal will ask the employer whether or not they are willing to reinstate the employee, or in the alternative to re-engage that employee on the same terms and conditions as their previous contract of employment.³³ If the employer agrees to this, then the tribunal will order that such interim relief be granted.³⁴ If the employer refuses or does not attend this interim hearing, the tribunal will make an order that the employee's contract of employment will continue in operation pending the final hearing in the case.³⁵

The employee also has a power of veto over the remedy granted³⁶ and where the employee refuses to accept either reinstatement or re-engagement pending trial and the tribunal considers this refusal reasonable,³⁷ the tribunal may order that the contract of employment be continued until the final hearing.³⁸ An order that the contract of employment be continued essentially means that the employee will continue to be paid until the final

²⁷ *Parsons v Iarnrod Eireann* [1997] ELR 203.

²⁸ *European Chemical Industries Ltd v Bell* [1986] ILRM 345.

²⁹ This is granted under the Employment Rights Act 1996 (UK) sections 128-132.

³⁰ Employment Rights Act 1996 (UK) section 128(1).

³¹ Employment Rights Act 1996 (UK) section 128(2).

³² This is very close to a determination that there is a fair and bona fide question to be tried. See Employment Rights Act 1996 (UK) section 129(1).

³³ Employment Rights Act 1996 (UK) section 129(3) (a) and (b).

³⁴ Employment Rights Act 1996 (UK) section 129(5) and (6).

³⁵ Employment Rights Act 1996 (UK) section 129(9).

³⁶ Employment Rights Act 1996 (UK) section 129(7).

³⁷ Employment Rights Act 1996 (UK) section 129(8) (a).

³⁸ Employment Rights Act 1996 (UK) section 129(8) (a).

hearing and the time will be regarded as continuous employment with the employer.³⁹ Any sum paid by the employer to the employee during this time may go towards the discharge of any liability which may be found at the final hearing.⁴⁰ Provision is also made for variation or revocation of the order at any time by either party.⁴¹

(c) Does the Balance of Convenience Favour the Grant of the Interim Relief?

In Ireland, unlike the situation in the UK, the tribunal could be required to consider whether the balance of convenience favours the grant of the injunction as is required in civil proceedings. In this regard, the tribunal would be entitled to consider the situation which would arise were the injunction to be granted and later to find out that this decision was inappropriate or, on the other hand, what situation would arise were the injunction to be refused but at the final hearing the restriction is found to be valid.⁴²

Where the case involves a migrant worker on an employment permit who has been or is about to be dismissed, it is difficult to determine where the balance of convenience would fall. If the injunction was granted and the applicant failed in the tribunal, the employer would have suffered undue prejudice as a result of the case. They would have incurred financial loss as a result of the decision of the court to force the employer to employ a worker who was lawfully dismissed and perhaps the good will and morale of the other employees would also be affected. Due to the fact that it is unlikely that an employment tribunal would expect an employee to give an undertaking as to damages,⁴³ there is no way in which the employer could be reimbursed with these costs. It could be possible to overcome this by following the example of the UK where some of the money paid out by the employer, goes towards discharging the final liability which the tribunal orders the employer to pay the employee.⁴⁴

Where the injunction is not granted, there is also the significant danger that the court will be deciding the outcome of the case by inaction,⁴⁵ as any failure to grant an injunction would mean that the migrant worker would either not have permission to remain in the State or would not have the financial resources to remain and as such would be compelled to leave the State, would be unable to attend the final hearing of their case and even if the decision was made in their favour, they would no longer be able to enjoy the remedies of reinstatement or re-engagement.

(d) What Kind of Order Could be Made?

The introduction of the provisions in the UK into this jurisdiction would be one possible solution to this issue. The employee could therefore be re-engaged or reinstated pending the final hearing in the case. In this way the migrant worker would not have their

³⁹ Employment Rights Act 1996 (UK) section 130(1) (a) and (b).

⁴⁰ Employment Rights Act 1996 (UK) section 130(5).

⁴¹ Employment Rights Act 1996 (UK) section 131.

⁴² Deakin 'Stopping or Preventing Industrial Action in Australia' (2000) 24 *Melbourne University Law Review* 310, notes at 329 that the balance of convenience requires the court to weigh up the risks and benefits of granting injunctive relief.

⁴³ Due to the fact that the procedure before the employment tribunals is maintained relatively cost-free so as to encourage employees to report unfair treatment, it is unlikely that any interim relief proposals would suggest that the employee should give an undertaking as to damages.

⁴⁴ Employment Rights Act 1996 (UK) section 130(5).

⁴⁵ The courts are particularly reluctant to do this. See *Dunne v Dun Laoighaire-Rathdown County Council* [2003] 2 ILRM 147 where the court noted that if no relief was granted the court would be effectively deciding the case by inaction since the action would have been completed by the time the case came to trial.

employment permit terminated and would continue to have permission to remain in the country. The problem with this form of remedy from a practical and legal perspective is that it is not generally appropriate to force persons to work together when the trust and confidence between the parties has been damaged.⁴⁶ The courts, in this jurisdiction, are also reluctant to grant an injunction, which involves an element of ongoing supervision, as such an injunction would require.⁴⁷

The employment tribunals in this jurisdiction do not presently have the power to grant interlocutory relief pending the final hearing of the employment tribunal as they do in the UK. However, examples of how this could be achieved were the tribunals to have such power may be gleaned from the case law involving wrongful dismissal. The courts have been particularly conflicted in such cases. Often they have held that it is completely inappropriate to grant such an injunction, especially where the trust and confidence between the parties has been irreparably damaged.⁴⁸ However, in other cases the courts have held that exceptional circumstances existed which favoured the grant of the injunction.⁴⁹ It is possible that the tribunal would consider that where a migrant worker will lose or has lost their permission to remain in the State, this would be one of those exceptional cases in which it may be appropriate to order reinstatement or re-engagement of the employee. The courts may also have the jurisdiction to restrain the appointment of another person in place of the plaintiff⁵⁰ or to prevent the advertising of a plaintiff's post until the trial of action.⁵¹

One order which has also been granted in many cases, which is currently available in the UK and which would also be appropriate to migrant workers generally would be to order that a plaintiff's salary be paid while the trial of action is continuing.⁵² Such orders are not confined to those plaintiffs who have established that they would be impoverished until the trial of action although such an assertion would obviously weigh heavily on the mind of the court.⁵³

⁴⁶ *Warren v Mendy* [1989] 1 WLR 853, 867.

⁴⁷ *Delaney* (n 26) 506-507. Cf the decision of Costello P in *Wanze Properties (Ireland) Ltd v Five Star Supermarket* High Court (24 October 1997) and Geoghegan J in *O'Murchu v Eircell Ltd* (2000) Supreme Court No 336 (21 February 2001).

⁴⁸ *Delaney* (n 26) 510.

⁴⁹ *Courtney v Radio 2000 Ltd* [1997] 4 ELR 198 (Laffoy J). The Plaintiff was employed as a broadcaster on the radio. Justice Laffoy held that the job was highly specific and did not require a great deal of interaction with the employer. See also *Martin v Nationwide Building Society* [2001] IR 228 where the plaintiff sought reinstatement as a branch manager pending the substantive trial of action. Despite the great deal of trust and confidence required to do the job, Macken J held that this was a case in which the grant of an injunction was appropriate. This was due to the fact that this involved a suspension, which had gone on for far too long, and the employee should be reinstated because of this delay. Similarly in *Howard v University College Cork* (2000) High Court No 3372 P (O'Donovan J.) (25 July 2000) the court held that an injunction was appropriate in a case where the damage to the reputation of the plaintiff would not be adequately compensated by damages were the final trial of action to be found in her favour. Justice O'Donovan noted that it would be extremely difficult if not impossible for the trial court to determine the damages which would adequately compensate the plaintiff were her dismissal found to be unlawful.

⁵⁰ *Lonergan v Salter-Townshend* [2000] ELR 15.

⁵¹ *Harkins v Shannon Foynes Port Co* (2001) High Court No 433 P (O'Sullivan J) (29 January 2001).

⁵² *Fennelly v Azzicurazioni Generali* (1985) 3 ILT 73; *Shortt v Data Packaging Ltd.* [1994] ELR 251; *Boland v Phoenix Shannon plc* [1997] ELR 113; *Phelan v BIC (Ireland) Ltd.* [1997] ELR 208; *Lonergan v Salter-Townshend* [2000] ELR 15 and *Sheehy v Ryan* (2002) High Court No 10338P (Peart J) (29 August 2002). *Delaney* (n 26) 512.

⁵³ *Harte v Kelly* [1997] ELR 125, 130 (Laffoy J) See also *Phelan v BIC (Ireland) Ltd* [1997] ELR 208.

The use of interlocutory relief by the employment tribunals is one option, which would ameliorate the difficulties facing a migrant worker where they are faced with lengthy delays before their case will be heard. There are a number of significant issues, however, which would need consideration before any such scheme could be imposed. Firstly, it must be considered whether damages are an adequate remedy for migrant workers where they have been dismissed and for third country nationals who are forced to leave the State due to the termination of their permission to remain in the State. If it were considered that this is not appropriate, consideration would have to be given to the possible criteria, which should be established for the granting of interlocutory relief. Finally, it must be considered in what circumstances it is appropriate to grant injunctive relief to a migrant worker to be maintained in employment pending the hearing of their case. In this regard, the provisions currently in operation in the UK provide valuable guidance to the legislature in this country as to how such interim relief can be used to ameliorate the problems posed by delays in the employment dispute resolution process.

2 Introduction of Bridging Visas for Third Country National Migrant Workers

Bridging visas are temporary visas, the purpose of which are to bridge the time which elapses between the termination of a more substantive visa and the determination of a particular process. In Australia, they are utilised as temporary visas to bridge the time that passes while a more substantive visa is being processed or while arrangements are being made for a non-citizen to depart from the State.⁵⁴ It is possible that such visas could be granted to third country national migrant workers in Ireland who are awaiting the determination of a case before the Equality Tribunal or other employment body.

Such a visa would be of significant benefit to third country national migrant workers who have had their employment terminated, but who as a result of the fact that they no longer have an employer, have lost their employment permit and so are no longer entitled to remain in the State. The practice of the Department of Enterprise, Trade and Employment in Ireland, who are responsible for the issuing of employment permits, is generally to grant a second employment permit for the same employee once they have found an alternative employer. However, where the migrant worker is unable to find work, they are not entitled to remain in the State and thus are unable to remain in the country to attend the final hearing of their case. A bridging visa, therefore, would be extremely beneficial to third country national migrant workers in cases either where they have found alternative work or where they have been unable to do so.

Naturally, the grant of a bridging visa would have to be subject to stringent regulation so that it is not granted to persons who do not require its assistance. In Australia where bridging visas are regularly used, they are either granted automatically⁵⁵ or where certain

⁵⁴ Ss 37 Immigration Act 1958 (Australia). Taylor 'Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms' (2000) 22 *Sydney Law Review* 50, 51. See also Billings 'Recent Developments Federal Agency Focus: A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52 *Administrative Law Review* 253, n 71 where the system of bridging visas while waiting for deportation is described.

⁵⁵ See discussion in Taylor (n 54) 51. This occurs where the applicant has been cleared by immigration and is waiting for a substantial visa. See also Nafziger who also discusses the issue of removal pending bridging visa. Nafziger, 'Protection or Persecution? The Detention of Unaccompanied Immigrant Children in the United States' (2006) 28 *Hamline Journal of Public Law and Policy* 357.

criteria have been met.⁵⁶ In the employment law context one of these criteria would be that there is a case pending before an employment law tribunal and that the applicant is required at the hearing in order to establish certain facts, which are relevant to the case.

There is a reasonable concern that workers who have their employment terminated would misuse the visa in this context. However, there is anecdotal evidence to suggest that at present the Department of Enterprise, Trade and Employment have a general practice whereby they will grant another employment permit for an employee where that employee finds alternative employment. This is equivalent to granting the migrant worker a bridging visa capable of granting that worker permission to remain in the country pending the final hearing as it allows the worker to remain in the State until the final determination and for some time after.

In fact, the bridging visa would ensure that workers who are unable to find alternative employment are free to remain in the State until the final determination and that all such workers will leave the state once their action has been heard, as they would no longer have permission to remain. It is therefore unlikely that a migrant worker would take a case to the Employment Tribunals in order to obtain such a visa as it could threaten their ability to remain in the State should the trial be determined in favour of their employer. Essentially the decision to grant such a visa would be in the hands of the Minister for Justice, Equality and Law Reform, but the development would put onto statutory footing the general practice of the Government in such cases.

Naturally, this solution will only affect third country national migrant workers and would be of no benefit to EU workers. With this in mind, it may be more appropriate to develop a system that is more inclusive of all migrant workers so that distinctions on grounds of nationality do not become an excuse for disparate treatment.

3 Development of a Fast-Track Employment Dispute Process

One solution, which could be investigated as a possible solution to the lengthy dispute resolution process and which would be of benefit to all migrant workers in Ireland, is the introduction of a fast track procedure similar to that sought to be introduced in major planning and development judicial review cases.⁵⁷ Much can be learned from the development of a fast-track procedure capable of reducing the lengthy process of judicial review, which was often financially devastating to both parties in such cases.

In recent years the Commercial Court has subsumed some responsibility for certain planning and development cases⁵⁸ which has meant that the detrimental effect of the lengthy review process has been circumvented due to the adoption by the Commercial Court of fast-track hearings and special case management rules. However, this was never placed on a statutory footing and it has been recently proposed that there should be a statutorily designated planning judicial review court in the High Court to deal with such cases.⁵⁹ The

⁵⁶ *Taylor* (n 54) 51. Such conditions include that the applicant is under 18 or over 75 years, is unwell or traumatised, is a spouse of an Australian citizen, Australian permanent resident, eligible New Zealand citizen or family members of such citizens or have not received a primary protection visa order within six months.

⁵⁷ See for example the Planning and Development (Strategic Infrastructure) Act 2006 (Ireland).

⁵⁸ The value of the development must be over 1 million euro.

⁵⁹ *Planning and Development* (n 57).

Planning and Development (Strategic Infrastructure) Act 2006 (Ireland)⁶⁰ deals specifically with major developments, which have a 'strategic, economic or social importance'⁶¹ on the State or on the region. The principles set out in the Act could be helpful in determining how a similar scheme could be established in the case of employment disputes.

The Act sets out a number of procedural issues, which must be established before a case will be fast-tracked. Some of the most relevant provisions, which could be utilised in the context of employment law, are considered here. Firstly, the Act provides that the court must give permission for the case to be heard by fast track procedure.⁶² Applications for leave to appeal to the court can be made on an *ex parte* basis which circumvents the previous requirements whereby the applicant had to inform the other party of their intention to appeal and the grounds for such an appeal.⁶³ The Court will also be entitled to require the applicant to give an undertaking as to damages.⁶⁴ Despite the fact that this latter requirement was criticised for the fact that it may become an insurmountable barrier to some applicants, it has been adopted in the final Act.⁶⁵

(a) The Adoption of the Fast Track Procedure in the UK

In the UK, the Employment Bill 2008 (UK) envisages the development of a fast-track procedure for settling monetary disputes in certain limited jurisdictions. This arose out of a recommendation by Michael Gibbons in a Report compiled for the Department of Trade and Industry.⁶⁶ The Report recommended that the Government should 'encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system, and to increase user confidence in it.'⁶⁷ This is intended to operate without oral hearings. Each party will be required to submit documentation to the tribunal where both parties agree to it. This was provided for under the original Employment Tribunals Act 1996 (UK)⁶⁸ but it has never been used. Clause 4 of the Employment Bill 2008 provides that in such cases both parties must consent to the hearing or else must be given an opportunity to request a hearing instead of a decision based upon documentation.⁶⁹

⁶⁰ Sections 1 – 51 are now all in force. See Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) Order 2006 SI No 525 of 2006 (Ireland); Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No 2) Order 2006 SI No 553 of 2006 (Ireland) and Planning and Development (Strategic Infrastructure) Act 2006 (Commencement) (No 3) Order 2006 S I No 684 of 2006 (Ireland).

⁶¹ *Planning and Development* (n 57) s 3 (2) (a) inserting s 37A into the Planning and Development Act 2000 (Ireland).

⁶² *ibid* s 13 inserting s 50A into the Planning and Development Act 2000 (Ireland).

⁶³ *ibid* s 13 inserting s 50A (2) into the Planning and Development Act 2000 (Ireland).

⁶⁴ *ibid* s 13 inserting s 50A (6) into the Planning and Development Act 2000 (Ireland).

⁶⁵ Flynn 'The Planning and Development (Strategic Infrastructure) Bill 2006 – A Critical Analysis of its Implications for Environmental Law' *Paper for Delivery at the Fourth Law and Environment Conference* Faculty of Law University College Cork (27 April 2006).

⁶⁶ Gibbons *Better Dispute Resolution: A Review of Employment Dispute Resolution in Great Britain* (Department of Trade and Industry (now the Department of Business, Enterprise and Regulatory Reform) London March 2007).

⁶⁷ *ibid* 50.

⁶⁸ Section 7(3A) (UK).

⁶⁹ Clause 4 Employment Bill 2008 (UK) which will insert section 7(3AA) into the Employment Tribunals Act 1996 (UK).

(b) A Designated Division and Criterion for a Fast Track Procedure in Ireland

A similar fast-track procedure could be developed within the present structure of the Equality Tribunal or the Employment Appeals Tribunal. It would require the development of a division of the Tribunals specially dedicated to dealing with fast tracked decisions and the development of certain criteria under which it could be considered feasible to fast track a case taking into account the positions of both the applicant and the respondent and the effect any such decision would have on either party. One such criterion could be that the applicant is a migrant worker, working on an employment permit, who is unlikely to be present in the State for the final determination of the case.

(c) Early Investigations and Hearings

At present, in a case under the Equality Acts 1998-2004, the applicant submits a complaint form to the relevant body on an *ex parte* basis but in the interests of natural justice the respondent is sent a copy of this form, which contains detailed information of the complaint. After this, where mediation is either refused or unsuccessful, the Equality Officer conducts an investigation of the complaint by requesting detailed written submissions from both parties and by carrying out a joint hearing of the complaint. This process can take up to eighteen months to complete. In a fast-track process, this whole procedure could be made more efficient by early investigation and hearings. The employer could be adequately protected against any unfairness by the development of strict time frames, which both parties would have to adhere to in submitting their written evidence.

(d) No Undertaking as to Damages

Finally, it is submitted that the inclusion of a provision requiring the applicant to make an undertaking as to damages so as to protect the respondent would be unnecessary, contrary to the spirit of the employment resolution process and would act as a deterrent to employees to assert their employment rights. This is perhaps best displayed in the fact that the employment tribunals do not award costs to the employer in disputes, as this would deter employees from seeking to assert their employment rights. There are already adequate protections in place, such as time frames and service requirements that seek to shield the employer against financial loss. The fast track procedure in fact, may actually be more favourable to the employer as the case would be dealt with expeditiously, minimising any financial loss to the employer and any negative publicity that may adhere to the case.

G CONCLUSION

This Article has explored in depth the situation of migrant workers in Ireland who are engaged in the employment dispute resolution process. The effect of the substantial delays currently found in the employment dispute resolution processes cannot be underestimated. Migrant workers regularly find themselves unable to remain in the State until the determination of the hearing for financial or legal reasons relating to their right of residency. This means that the only remedy available to them is that of compensation. A discussion of the adequacy of this remedy in cases of dismissal was undertaken; the conclusion being that such a remedy did not adequately reimburse the migrant worker for the effect of that dismissal.

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Solutions to this problem are therefore necessary. Drawing on experience from the UK many suitable options were debated. These included the introduction of interim measures, bridging visas and fast track procedures. It became clear that the development of a solution that would benefit all migrant workers would be the most practical and sensible solution.