

APPROVED

[2021] IEHC 667



THE HIGH COURT
JUDICIAL REVIEW

2021 No. 671 JR

BETWEEN

AMMI BURKE

APPLICANT

AND

AN ADJUDICATION OFFICER
THE WORKPLACE RELATIONS COMMISSION

RESPONDENTS

ARTHUR COX LLP

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 November 2021

INTRODUCTION

1. These judicial review proceedings seek to challenge the manner in which a claim for unfair dismissal has been dealt with. The claim for unfair dismissal had been submitted initially to the Director General of the Workplace Relations Commission, who duly referred it to an independent adjudication officer for determination.
2. The claim for unfair dismissal had been part heard, but not yet determined, when the Supreme Court delivered its landmark decision in *Zalewski v. An*

NO REDACTION REQUIRED

Adjudication Officer [2021] IESC 24; [2021] 32 E.L.R. 213. This decision has significant implications for the hearing and determination of claims under the auspices of the Workplace Relations Commission. Relevantly, the Supreme Court held that, in the case of a claim for unfair dismissal, the absence from the Unfair Dismissals Act 1977 of any provision for the administration of an oath, or any possibility of punishment for giving false evidence, was inconsistent with the Constitution of Ireland.

3. The legislation regulating the procedure for unfair dismissal claims has since been amended in an attempt to give effect to the decision of the Supreme Court. Prior to the introduction of this amending legislation, the adjudication officer, who had been assigned to determine the claim the subject-matter of these judicial review proceedings, had notified the parties that the hearing of the claim would have to commence afresh before a different adjudication officer once the (then anticipated) amending legislation had been enacted.
4. The claimant in the unfair dismissal proceedings seeks to challenge the legality of this approach. It is said, variously, that the decision in *Zalewski* does not apply to claims which were already part heard, and that, in any event, there is no requirement for an oath to be administered in the context of this particular claim for unfair dismissal.
5. The principal reliefs sought in these judicial review proceedings include, *inter alia*, an order directing the (original) adjudication officer to resume the hearing of the claim, and an order compelling the adjudication officer to direct the disclosure of certain documentation. In oral submission, it was said that this court has a duty to put the adjudication officer back in “*her judging box*” to hear out the rest of the claim for unfair dismissal.

PROCEDURAL HISTORY

6. The applicant for judicial review is a qualified solicitor and had been employed by the notice party, Arthur Cox Solicitors (“*the law firm*” where convenient). The applicant’s employment was terminated summarily in November 2019. The applicant has since brought a claim for unfair dismissal pursuant to the provisions of the Unfair Dismissals Act 1977.
7. The procedure governing unfair dismissal claims is prescribed principally under the Unfair Dismissals Act 1977, and partly under the Workplace Relations Act 2015.
8. The claim for unfair dismissal had been made to the Workplace Relations Commission on 31 January 2020. In accordance with the statutory procedure prescribed, the claim was referred by the Director General of the Workplace Relations Commission to an independent adjudication officer for determination. The claim has been part heard, having been before the adjudication officer on five separate occasions between September 2020 and May 2021. It should be explained that on a number of these days the hearing was limited to a matter of hours in compliance with the then applicable covid-related public health measures.
9. This judgment is not concerned with the underlying merits of the claim for unfair dismissal. However, to allow the reader to understand certain of the grounds of judicial review advanced, it is necessary to rehearse one aspect of the claim as follows.
10. It appears that the applicant’s former employer, Arthur Cox Solicitors, is seeking to defend the claim for unfair dismissal on the basis of the law firm’s

dissatisfaction with the applicant's (alleged) conduct and behaviour in the office and her relationship with her colleagues. It further appears that the law firm has sought to place particular reliance on an incident said to have taken place on Monday, 1 April 2019. There had been a conversation on that date between the applicant and a partner at the law firm, Mr. Kevin Lynch. This conversation related to events on the preceding Friday and Saturday. The applicant and Mr. Lynch had been acting on opposite sides of a so-called "*Chinese Wall*" in respect of a commercial transaction. The applicant maintains that there had been delays on the part of Mr. Lynch's team in progressing the transaction, and that these delays were as a result of Mr. Lynch and members of his team having attended a social event that evening marking the departure of a senior associate from the law firm.

11. The applicant, in her grounding affidavit, has described the conversation on Monday, 1 April 2019 as involving her "*respectfully*" mentioning to Mr. Lynch that she did not think it acceptable that she had been left in the office until 2 am as a result of his team's delays due to socialising. The applicant has explained, in submission to this court, that Mr. Lynch has described the conversation in very different terms, having told the adjudication officer that she (the applicant) had "*shouted*" at him on 1 April 2019 and had accused him of delays. Mr. Lynch is also said to have told the adjudication officer that he had never been treated like that in all of his years at the law firm.
12. The parties had given (unsworn) evidence on this issue at a hearing before the adjudication officer on 20 October 2020. It seems that there was a significant dispute at the hearing as to whether the relevant commercial transaction had been completed at 2 am or at 10.30 pm. Mr. Lynch had, seemingly, maintained the

position at the hearing that the transaction had been completed at the earlier time.

The applicant insisted that the transaction had not closed until 2 am.

13. It has subsequently been conceded on behalf of the law firm that the applicant had been correct in her recollection. This concession is stated as follows in a letter dated 25 March 2021 to the adjudication officer from the solicitors acting on behalf of the law firm:

“Since the matter was last heard our client has checked their records in respect of the transaction referenced in Ms Burke’s letter, and we are happy to confirm that Ms Burke’s position is correct, that the particular deal that Ms Burke worked on over 29/30 March 2019 closed at approximately 2 am, and that Mr Lynch was in his evidence confusing this with another matter that also closed on 30 March 2019.

It was the intention of our client that Mr Geoff Moore, Managing Partner would clarify this matter at the outset of the forthcoming hearing prior to his giving evidence, but as Ms Burke has sought clarity on this matter at this juncture, we are happy to correct the record in this regard.”

14. Prior to receipt of this letter, the applicant had made both an oral and a written request to the adjudication officer that relevant emails over a six-hour period on the night of 29 March 2019 be produced. The adjudication officer had declined this request, stating that she did not deem it necessary that these emails be produced to her at this time. The adjudication officer’s letter went on to say that if, during the course of the (unfair dismissal) proceedings, it became apparent that she needed sight of these emails, then she would review the matter accordingly.
15. As discussed at paragraph 86 *et seq.* below, the applicant remains aggrieved at the manner in which the adjudication officer dealt with her request for the disclosure of the emails. It is now said that the content of these emails would have confirmed, first, the time at which the commercial transaction closed; and

secondly, that the delay in completing the transaction occurred because Mr. Lynch had been out at a social event marking the departure of a senior associate from the law firm.

16. The hearing of the claim for unfair dismissal had been fixed to resume on 31 March 2021, but had been rescheduled, at the request of the law firm, to 12 May 2021.
17. The Supreme Court delivered its judgments in *Zalewski v. An Adjudication Officer* on 6 April 2021. Shortly thereafter, on 16 April 2021, the Workplace Relations Commission published a notice on its website outlining certain procedural changes consequent upon the decision of the Supreme Court. Relevantly, the approach to be taken in claims where an adjudication officer determines that there is a serious and direct conflict of evidence between the parties is stated as follows:

“Cases where there is a serious and direct conflict of Evidence

Save where the investigation or hearing does not amount to the administration of justice (ie in industrial relations disputes), where an Adjudication Officer determines that there is a serious and direct conflict of evidence between the parties to a complaint before him/her, or one emerges in the course of the hearing, the Adjudication Officer will adjourn the hearing to await the amendment of the Workplace Relations Act 2015 and related enactments to grant to Adjudication Officers the power to administer an oath or affirmation, and provide for a punishment for the giving of false evidence.

However, in order to minimise delay to the parties, unless a postponement is granted in advance, all scheduled hearings will commence in the normal manner and proceed to conclusion subject to the requirement that it will be necessary to adjourn where an adjudication officer concludes that it is necessary that an oath or affirmation be administered, as outlined above. Following the judgment, the fact that the parties indicate a view that there is no requirement for an oath to be administered is not

determinative of the question. Adjudication Officers will determine whether they consider the oath to be necessary.”

18. Approximately one month later, on 21 May 2021, a revised version of the notice was published on the Workplace Relations Commission’s website. Relevantly, this version indicated that the following procedures would apply in respect of part-heard cases:

“6. Cases part-heard as of 7 April 2021

Where a case commenced prior to 7 April 2021 which has not concluded, and where, inevitably, evidence was heard without an oath or affirmation being administered, the Adjudication Officer will now have to consider whether a serious and direct conflict of evidence arises in the case.

If the Adjudication Officer decides that there is such serious and direct conflict of evidence, then the case will* have to commence afresh before a different Adjudication Officer who will administer the oath or affirmation once the legislation is in place.

Parties will have the opportunity to make submissions before any determination is made on this question. It is intended that part-heard cases will be scheduled for hearing to determine whether there is a serious and direct conflict of evidence. This will be done by the Adjudication Officer who already part-heard the matter and they will decide whether the case can be completed without an oath or affirmation or whether it must start afresh.”

*The word “*will*” has since been amended to “*may*”.

19. The applicant’s claim for unfair dismissal had been scheduled to resume on 12 May 2021. There is no transcript of the hearing on that date, but it seems that, having heard submissions from both sides on the implications of the Supreme Court’s decision, the adjudication officer had indicated to the parties that there would have to be a fresh hearing of the claim for unfair dismissal by a different adjudication officer.

20. Some two weeks later, on 26 May 2021, the (original) adjudication officer wrote to the parties in the following terms:

“You will recall that, at the adjudication hearing on 12th May 2021, I drew your attention to the Supreme Court judgment in *Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General [2021] IESC 24* where the Supreme Court found that, where there was a serious and direct conflict of evidence in a case before a WRC Adjudication Officer, evidence must be taken under oath. The Supreme Court found that to do otherwise would be unconstitutional.

The judgment of the Supreme Court is reflected in the WRC web-notice Supreme Court judgment: Impact on WRC Adjudications, the Workplace Relations Act 2015 and related statutes - Workplace Relations Commission which contains information in relation to part-heard cases and cases where there is a direct and serious conflict of evidence.

I would draw your attention to the section of the web-notice concerning part-heard cases which provides that, where a case commenced prior to 7 April 2021 and has not concluded, and where, inevitably, evidence was heard without an oath or affirmation being administered, the Adjudication Officer will now have to consider whether a serious and direct conflict of evidence arises in the case.

I have noted the submissions you made in this regard at the hearing on 12th May 2021 and I have determined that there is a serious and direct conflict of evidence in this case. Accordingly, I am of the view that this case will have to commence afresh before a different Adjudication Officer who will administer the oath or affirmation once the enabling legislation is in place.

I will now inform the Adjudication Services administration section that, in light of the unique circumstances which pertain, I am recusing myself from this case and requesting that it be scheduled to recommence before a different Adjudication Officer. I am firmly of the view that, in light of the Supreme Court judgment, this is the safest and most prudent course of action.

I sincerely regret any difficulty that this may cause to the parties, but it is outside our control. However, I wish to reassure you that, once the necessary legislation has been enacted, this case will be scheduled as a priority.”

21. It should be explained that the applicant attaches great weight to the fact that the version of the public notice referenced in the above letter is the *revised* version which had been published a number of days after the hearing on 12 May 2021. The applicant had initially alleged, in her oral submission to this court, that the amended public notice represented an “*after the fact clean-up*” or a “*whitewashing*” of the adjudication officer’s decision made at the hearing on 12 May 2021.
22. The applicant engaged thereafter in correspondence with the adjudication officer and with other officials of the Workplace Relations Commission. Given the emphasis that the applicant places on it, it is necessary to set out the content of one particular letter *verbatim*. This is a letter dated 14 July 2021 sent to the applicant by the Director General of the Workplace Relations Commission. The operative part of the letter reads as follows:

“As you will be aware, once a case is assigned to an Adjudication Officer and she or he has seisin of the case: section 40 (8) of the Workplace Relations Act 2015 applies viz. *An adjudication officer shall be independent in the performance of his or her functions.*

My understanding is that the Adjudication Officer concerned has indicated to the parties that it would best serve the interests of those concerned that she recuses herself and indeed advised both parties of her decision by letter dated 26 May 2021.

Again, I understand that the Adjudication Officer has indicated that evidence was heard without an oath or affirmation being administered and has come to the view that there is a serious and direct conflict of evidence in this case. In light of the Supreme Court judgment in *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24, an oath or affirmation is required in such circumstances and, given the Adjudication Officer’s decision to recuse herself, this matter must commence afresh before a different Adjudication Officer who will administer the oath or affirmation if she or he is of the opinion that such an oath is indeed required.

The assigning of the complaint to a different Adjudication Officer is in train and the scheduling of the hearing will be done expeditiously once the enabling legislation is in place.”

23. I return to discuss this letter at paragraph 75 below.
24. The within proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 19 July 2021. The High Court (Barr J.) granted leave on that date. A number of days thereafter, the applicant applied to the High Court (Simons J.) for a priority hearing of the proceedings. That application for priority had been made *ex parte*, and the court directed that the application be made on notice to the respondent and notice party on 30 August 2021. On that date, the hearing of the substantive application for judicial review was fixed for a one-day hearing on 20 October 2021. Prior to the hearing date, there was a further application for directions on 15 October 2021.
25. The substantive hearing of the application for judicial review commenced on 20 October 2021, but did not finish on that date. The hearing was adjourned for a number of days to allow the applicant time to review the transcript of the first day’s hearing and to finalise her rebuttal points. The applicant completed her reply at a short hearing on 26 October 2021. Judgment was reserved until today’s date.
26. It should be noted that the Workplace Relations Commission and the adjudication officer (“*the respondents*”) have chosen to participate in these judicial review proceedings on a limited basis only. The submissions made on behalf of the respondents were directed principally to standing over the correctness of the guidance published on the Commission’s website. The respondents largely left it to the notice party, i.e. the applicant’s former employer, to respond to the other grounds of challenge.

27. The respondents' approach in this regard is informed by their view that the position of an adjudication officer is analogous to that of a judge of the District Court or the Circuit Court in respect of whose decisions judicial review proceedings have been taken. The respondents rely in this regard on, *inter alia*, the judgments of the Supreme Court in *Noonan Services Ltd v. Labour Court*, unreported, 14 May 2004, and *Miley v. Employment Appeals Tribunal* [2016] IESC 20; [2018] 1 I.R. 787.

WORKPLACE RELATIONS (MISCELLANEOUS PROVISIONS) ACT 2021

28. The procedures governing a claim for unfair dismissal have now been amended so as to confer an express statutory power to administer an oath and to prescribe penalties for false evidence. These amendments were introduced under the Workplace Relations (Miscellaneous Provisions) Act 2021.
29. Section 8 of the Unfair Dismissals Act 1977 now includes a new subsection, subsection (14), as follows:
- “(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.”.
30. This amendment was commenced with effect from 29 July 2021.

DETAILED DISCUSSION

TEMPORAL LIMITS OF SUPREME COURT'S DECISION IN *ZALEWSKI*

31. The Supreme Court in *Zalewski* held, by a majority, that the determination of a claim for unfair dismissal involves the administration of justice and that the carrying out of this function by a non-judicial body is permissible under Article 37 of the Constitution of Ireland. The Supreme Court emphasised that the standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34.
32. Relevantly, the Supreme Court held that, in the case of a claim for unfair dismissal, the absence of any provision under the then legislation for the administration of an oath, or of any possibility of punishment for giving false evidence, was inconsistent with the Constitution of Ireland.
33. The applicant submits that the finding of unconstitutionality made in *Zalewski* should not apply to part-heard claims for unfair dismissal in respect of which evidence had been tendered prior to the date of the Supreme Court's decision on 6 April 2021. It is also submitted that the amendments made to the Unfair Dismissals Act 1977 by the Workplace Relations (Miscellaneous Provisions) Act 2021 do not have retrospective effect, i.e. in the sense of applying to extant claims.
34. The applicant advances three principal arguments in support of the proposition that the finding of unconstitutionality should not apply to part-heard claims, as follows. First, it is sought to distinguish a line of case law, running from *A. v. Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 I.R. 88 to *Wansboro v. Director of Public Prosecutions* [2018] IESC 63;

[2019] 1 I.L.R.M. 305, on the basis that the claim here is a civil matter not a criminal matter. The point is made that a claim for unfair dismissal does not engage the right to personal liberty.

35. Secondly, it is said that the finding of unconstitutionality has caused a *disadvantage* to the applicant in that the procedural law has changed halfway through her claim for unfair dismissal. This is contrasted with the position of the litigants in the earlier case law, who are said to have been seeking to rely on a finding of unconstitutionality to their benefit.
36. Thirdly, it is sought to draw a distinction between a finding of unconstitutionality based on *omission*, i.e. the absence of a legislative provision deemed to be constitutionally required, and a finding based on the inclusion of an offending provision.
37. For the reasons which follow, I have concluded that none of these arguments are well founded.
38. The submission that a finding that legislation is unconstitutional operates differently as between civil and criminal proceedings is not borne out by the case law. The Supreme Court held in *A. v. Governor of Arbour Hill Prison* that, when an Act is declared unconstitutional, a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society. Thus, whereas the default position is that a legislative provision which is held to be invalid should be regarded as void *ab initio*, this is subject to an exception in circumstances where the rights of the

parties have already been finally and conclusively determined in legal proceedings.

39. The Supreme Court considered that this exception applies to both civil and criminal proceedings. See, for example, the following passage from the judgment of Murray C.J. in *A. v. Governor of Arbour Hill Prison* (at paragraph 85 of the reported judgment):

“Absolute retroactivity based solely on the notion of an Act being void *ab initio* so as to render any previous final judicial decisions null would lead the Constitution to have dysfunctional effects in the administration of justice. In the area of civil law it would cause injustice to those who had accepted and acted upon the finality of judicial decisions. Rights which had become vested in third parties as a consequence of such decisions would be put in jeopardy. [...]”.

40. Murray C.J. set out his conclusions on this issue as follows (at paragraphs 114 to 117 of the reported judgment):

“It follows from the principles and considerations set out in the cases, which I have cited, that final decisions in judicial proceedings, civil or criminal, which have been decided on foot of an Act of the Oireachtas which has been relied upon by parties because of its status as a law considered or presumed to be constitutional, should not be set aside by reason solely of a subsequent decision declaring the Act constitutionally invalid.

The parties have been before the courts, They have, in accordance with due process, had their opportunity to rely on the law and the Constitution and the matter has been decided. Once finality has been reached and the parties have in the context of each case exhausted their actual or potential remedies the judicial decision must be deemed valid and lawful.

Save in exceptional circumstances, any other approach would render the Constitution dysfunctional and ignore that it contains a complete set of rules and principles designed to ensure ‘an ordered society under the rule of law’ in the words of O’Flaherty J.

I am quite satisfied that the Constitution never intended to visit on that ordered society the potential unravelling of judicial decisions over many decades when a particular Act is found unconstitutional solely on the consideration of the *ab initio* principle to the exclusion of all others.”

41. As appears, the exception to the void *ab initio* principle is expressly stated to apply to both civil and criminal proceedings which have reached finality.
42. In the present case, the applicant’s claim for unfair dismissal had not concluded even at first-instance as of the date of the Supreme Court’s decision in *Zalewski*. Even if it had been concluded at first-instance, there would have been a statutory right of appeal against the adjudication officer’s determination to the Labour Court. It follows, therefore, that the applicant’s claim for unfair dismissal does not come within the exception to the general rule.
43. By contrast, the logic of the applicant’s argument is that the adjudication officer should now determine the outstanding claim for unfair dismissal by reference to the *unamended* version of the legislation, and pursuant to the very procedure which has been found to be unconstitutional. With respect, for the adjudication officer to have adopted this approach, in the particular circumstances of this case, would have resulted in an administration of justice being carried out and concluded in a manner which has been identified as insufficient to ensure that justice is done in cases where there is a serious and direct conflict of fact. (See further paragraph 63 *et seq.* below).
44. The second argument advanced by the applicant for distinguishing the *A. v. Governor of Arbour Hill Prison* line of case law seeks to characterise the finding of unconstitutional invalidity as a disadvantage to her. The disadvantage is described principally in terms of delay in the determination of the claim for

unfair dismissal, but it is also implied that a fresh hearing would confer some unarticulated advantage on her former employer.

45. The applicant's conception of the rights protected by the finding of constitutional invalidity is too narrow. As is apparent from the discussion at paragraphs 134 to 147 of the majority judgment in *Zalewski*, the procedural safeguards are intended to ensure that, in the case of a claim for unfair dismissal, the standard of justice administered under Article 37 of the Constitution of Ireland is not lower or less demanding than the justice administered in courts under Article 34. These procedural safeguards are necessary to permit a fair hearing and a proper application of the law. As such, the procedural safeguards are for the benefit of all parties to a claim for unfair dismissal: they are not the exclusive preserve of a claimant.
46. The finding that the previous procedure was deficient, and the subsequent introduction of amending legislation, is undoubtedly to the advantage of all sides, including the applicant. For the reasons explained at paragraph 63 *et seq.* below, it is essential that evidence in the applicant's unfair dismissal claim be given on oath and that both parties be entitled to defend their position by way of cross-examination on oath. It is inaccurate, therefore, to suggest that the applicant has been disadvantaged by the correction of the deficient procedure or that she is in a materially different position than the litigants in the earlier case law.
47. The third argument advanced by the applicant was that the decision in *Zalewski* did not apply to pending claims because the finding of unconstitutionality had been based on an *omission*, i.e. the absence of a legislative provision deemed to

be constitutionally required. Other than to assert the proposition, the applicant made no attempt to substantiate this argument.

48. There is no support to be found for this proposition in the case law, as is apparent from the detailed discussion of constitutional lacuna in legislation in the leading textbook on constitutional law, *Kelly: The Irish Constitution* (Hogan, Whyte, Kenny, and Walsh editors, 5th edition, Bloomsbury Professional, 2018). The learned authors explain, at §§6.2.334 to 6.2.351, by particular reference to *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71; [2010] 1 I.R. 635, the approach that is taken to vindicate constitutional rights in the case of an omission of a procedural requirement from legislation. It is incorrect, therefore, to suggest that it is permissible to continue to rely on an unconstitutional procedure simply because a legislative amendment is required to correct it.
49. It is sufficient to dispose of the applicant's argument to observe that the Supreme Court in *Zalewski* has ensured the effectiveness of its finding, i.e. that the absence from the Unfair Dismissals Act 1977 of any provision for the administration of an oath is unconstitutional, by indicating that proceedings in certain types of claim are precluded pending legislative amendment. See the following passage from the majority judgment of O'Donnell J. (at paragraph 149):

“These conclusions do not, moreover, appear to have any consequence for decisions already made in other cases under the 2015 Act, nor do they necessarily preclude current proceedings under the Act, even without amendment of the Act. The effect of this decision is that proceedings may be heard in public, and *it would appear that it is only in those cases where an adjudication officer concludes that it is necessary that an oath be administered that the flaw in the Act would preclude proceedings pending any considered amendment of the Act.** However, I would hear the parties

further on the question of the precise remedy, and the order to be made.”

*Emphasis (italics) added.

50. This approach is broadly analogous to the approach in *Carmody* as discussed in the passages from *Kelly: The Irish Constitution* cited above. Thus, the peculiarity that the unconstitutionality arose as a result of an *omission* from the legislation—far from telling against the judgment applying to pending claims for unfair dismissal—has precisely the opposite result.
51. The applicant submits that the phrase “*preclude proceedings pending any considered amendment of the Act*” should be interpreted as meaning that part-heard claims, which involve a serious and direct conflict of evidence, should merely be adjourned until the enactment of amending legislation. Now that the amending legislation has been enacted, it is submitted that such claims should proceed, with the (original) adjudication officers administering oaths as they deem necessary to any witnesses. It is further submitted that if the “*abortion*” of proceedings, i.e. the recommencement of hearings under a different adjudication officer, had been the judicial intention, then the reference to “*preclude ... pending*” makes no sense for there would be nothing to await in the amending legislation to affect the part-heard proceedings.
52. With respect, these submissions seek to read too much into this passage of the judgment. As is apparent from the passage itself, and more particularly from the subsequent ruling of the Supreme Court on 15 April 2021, *Zalewski v. An Adjudication Officer* [2021] IESC 29, the Supreme Court were careful to confine the remedy to the particular circumstances of that case. On the facts of *Zalewski*, the claim for unfair dismissal had been determined by the adjudication officer and an order of *certiorari* was sought setting aside that determination. The case

was not concerned with a part-heard claim, and the Supreme Court were not, therefore, required to address this specific contingency.

53. The passage at paragraph 149 of the majority judgment in *Zalewski* simply states that, in those cases where an adjudication officer concludes that it is necessary that an oath be administered, proceedings are precluded pending legislative amendment. This reflects the earlier finding that the structure created by a statutory 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 a serious and direct conflict of evidence. The absence of such a provision from the Unfair Dismissals Act 1977 rendered it unconstitutional.
54. The passage does no more than to highlight the potential consequences of the finding of unconstitutionality for current proceedings then pending before the Workplace Relations Commission. The passage does not attempt to anticipate what form a legislative amendment might take: that is a matter for the Oireachtas alone (*N.V.H. v. Minister for Justice and Equality (No. 2)* [2017] IESC 82). Still less does the passage seek to prescribe what should happen in circumstances where an adjudication officer has already heard unsworn evidence which discloses a serious and direct conflict. Indeed, the passage makes no specific reference to part-heard claims at all.
55. In summary, the fact that the applicant's claim for unfair dismissal had not been subject to a final and conclusive determination prior to the delivery of the Supreme Court's decision in *Zalewski* has the consequence that the determination of the claim must now be made in accordance with the principles identified by the Supreme Court.

NO LEGITIMATE EXPECTATION OR IMPERMISSIBLE RETROSPECTIVITY

56. The correct interpretation of the amendments introduced under the Workplace Relations (Miscellaneous Provisions) Act 2021 is that they apply to cases, such as the applicant's part-heard claim for unfair dismissal, which had not been finally and conclusively determined. This does not entail the amending legislation having an impermissible retrospective effect; rather the amendments apply prospectively to cases which have not yet been completed and in respect of which the rights of the parties have not yet been determined.
57. The applicant cannot be said to have any legitimate expectation that her claim for unfair dismissal would be completed under the unamended, invalid version of the legislation. It is long since established that there can be no *legitimate* expectation that a public authority will act contrary to law (*Wiley v. Revenue Commissioners* [1994] 2 I.R. 160).

DECISION TO DIRECT THAT HEARING RECOMMENCE

The applicant's position

58. Without prejudice to her principal argument that the judgment in *Zalewski* does not apply to part-heard claims, the applicant submitted, in the alternative, that the decision to direct that the hearing commence afresh under a different adjudication officer is unlawful. There are a number of related strands to this submission. I address these in sequence below.
59. The first argument is that there is no "*serious and direct*" conflict of fact such as would justify the taking of evidence on oath. The applicant submitted that there is only one major conflict of evidence, and that is in relation to Mr. Lynch's evidence. It was further submitted that the dispute as to the circumstances

surrounding the completion of the commercial transaction on the night of 29 March 2019 is one which will be resolved by requiring Arthur Cox Solicitors to disclose emails for a six-hour period.

60. The applicant appeared to moderate this position somewhat during the course of her reply. In answer to a direct question from the court, the applicant accepted that the content of the emails (if disclosed) would have to be put formally to Mr. Lynch, and he would have to be afforded an opportunity to respond to same. The applicant then submitted that the appropriate course would be for the adjudication officer to serve a statutory notice directing Mr. Lynch to give evidence in the proceedings and to produce the emails sought by the applicant. (The power to serve such a statutory notice is provided for under section 8(13) of the Unfair Dismissals Act 1977). The applicant also accepted that an oath might be required in relation to the *other* witnesses on behalf of the law firm.
61. The second and third arguments advanced by the applicant overlap. It is submitted that—even if certain evidence must now be given on oath—there is no requirement for the entire hearing of the claim for unfair dismissal to recommence, still less that such a fresh hearing be before a different adjudication officer.

Findings of the court

62. This court is being invited to set aside a number of procedural decisions made by an adjudication officer in the course of the determination of a claim for unfair dismissal. It should be emphasised that it would be most unusual for this court, in the exercise of its judicial review jurisdiction, to intervene in the proceedings of any tribunal exercising a judicial function *prior* to the conclusion of those proceedings. I will return to discuss the rationale for this approach, and the

appropriate standard of review, at paragraph 109 *et seq.* below. For present purposes, it is sufficient to note that one practical reason for this approach is that this court, on an application for judicial review, will only have a limited appreciation of what precisely has occurred in the proceedings before that tribunal.

63. There has been scant evidence adduced before this court regarding the proceedings before the adjudication officer. What is apparent, however, from what little has been put before this court is that the claim for unfair dismissal has given rise to significant disputes of fact. It is the applicant's case that one of the principal witnesses on behalf of the law firm has deliberately given false evidence to the adjudication officer. The applicant put the allegation as follows in her oral submissions to this court:

“Mr. Lynch gave false evidence. He sprung a story. I remember I was sitting in my seat and I was shocked in Lansdowne House on Lansdowne Road. He gave a complete mischaracterisation and false account of events and that account, Arthur Cox [had not] submitted a precis of his evidence, Arthur Cox submitted a legal submission of many pages and there was nothing in there warning me that Mr. Lynch had prepared a story and was going to tell lies in relation to the events of that day.”

64. The applicant reiterated this allegation on a number of occasions, referring variously to the “*falsification of*” and the “*fabrication of*” Mr. Lynch's evidence. This is, obviously, a very serious allegation to level against any witness, but is especially grave when made against a practising solicitor.
65. This factual controversy can only be properly and fairly resolved by requiring both sides in the unfair dismissal claim to give evidence on oath and to submit to cross-examination on oath. As explained by O'Donnell J. in the majority judgment in *Zalewski* (at paragraph 144), the significance of evidence on oath is

not because of any importance attached to the procedure itself, but because it triggers the power to punish for false evidence and thus provides an incentive to truthful testimony. The judgment also reiterates (at paragraph 145) that the right to cross-examine the opposing party is fundamental to fair procedures, and is one of the rights without which no party could hope to make any adequate defence of their good name.

66. The suggestion that the factual controversy between the applicant and Mr. Lynch can be resolved simply by directing the disclosure of copies of emails exchanged over a six-hour period on the night of 29 March 2019 is incorrect. In the event that the production of the emails sought by the applicant were to be directed, the imperatives of fair procedures dictate that Mr. Lynch would then have to be given an opportunity, under cross-examination, to explain, if that be possible, any matters which might go to the credibility or reliability of his evidence. (See, by analogy, *RAS Medical Ltd v. The Royal College of Surgeons in Ireland* [2019] IESC 4; [2019] 1 I.R. 63 (at paragraphs 90 to 93)). It is inevitable, therefore, that sworn evidence will be required.
67. It is also incorrect to suggest that there is only one major conflict of evidence and that is in relation to Mr. Lynch's evidence. The applicant herself has asserted that were it to be established that Mr. Lynch had given false evidence, then this would "*severely discount*" the authenticity and the reliability of the evidence of two other partners of the law firm.
68. Moreover, it is apparent that not only is there a factual dispute as to what occurred on the night of 29 March 2019, there is also a significant factual dispute as to what occurred in its aftermath. As explained at paragraph 11 above, two radically different versions of the conversation on Monday, 1 April 2019 have

been given to the adjudication officer, with one side describing it as respectful and the other saying that it involved shouting. It should also be noted that only part of the evidence intended to be called has been heard.

69. Having regard to the serious and direct conflicts of evidence which had emerged at the hearings before the adjudication officer to date, and having regard to the allegation that one witness has deliberately given false evidence to the adjudication officer, there can be no doubt but that the decision to discontinue the hearings, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer is legally correct. The determination of the claim for unfair dismissal has potentially grave implications for both parties. It is essential that evidence be given on oath, and that both parties be entitled to defend their positions by way of cross-examination on oath.
70. Any suggestion that the rights of the respective parties would be vindicated by some sort of hybrid hearing, whereby the balance of the evidence would be given on oath, but the unsworn evidence received to date would remain on the record, is misplaced. The same standard—and the same potential penalties—must apply to all of the evidence to be given. It would place a decision-maker in an invidious position if he or she were invited to prefer unsworn evidence to sworn evidence.
71. In order to ensure confidence in the process, it was entirely reasonable to direct that the fresh hearing be conducted by a different adjudication officer. As correctly observed by the Workplace Relations Commission in its submissions to this court, it can readily be anticipated that the hypothetical “*reasonable man*” would have concerns that an adjudication officer, who has previously heard *unsworn* evidence in relation to a serious and direct conflict of fact, could already

have reached a view on the basis of that unsworn evidence, which view would not necessarily be displaced upon a hearing of the evidence on a sworn basis.

72. It will be a question of fact and degree in any particular case as to whether the nature and extent of the unsworn evidence heard by an adjudication officer is such as to mandate that a claim be heard by a different adjudication officer. The present case, however, lies at the far end of the spectrum in that the allegation is that one of the parties deliberately gave false evidence. It was eminently sensible for the (original) adjudication officer to take the precaution of ensuring that the fresh hearing be before a different adjudication officer who had not had any prior involvement. Even were this decision to be characterised as conservative, it certainly cannot be condemned as unreasonable or irrational. Indeed, there would be much stronger grounds for judicial review had, counterfactually, the (original) adjudication officer decided to retain seisin of such a contentious part-heard claim for unfair dismissal rather than recuse herself.
73. The fact that the hearing will have to recommence will inevitably result in some delay and this is, understandably, a cause of frustration to both sides. It is crucial, however, that justice is not only done, but that it is seen to be done. The determination of a claim for unfair dismissal involves the administration of justice. The Supreme Court emphasised in *Zalewski* that the standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34.
74. As reiterated by the Court of Appeal in *Commissioner of an Garda Síochána v. Penfield Enterprises Ltd* [2016] IECA 141, considerations such as administrative convenience, efficiency or delay cannot trump the requirement that justice is not only done, but is seen to be done. The decision that the claim

for unfair dismissal be heard by a different adjudication officer ensures that there cannot be any question mark over the integrity of the process. Any delay caused is proportionate to this overarching objective. The benefit to the parties in terms of the elimination of any possible perception of predetermination by prior participation significantly outweighs any disbenefit in terms of delay. The Workplace Relations Commission has already indicated that priority will be given to the applicant's claim and the scheduling of the fresh hearing will be done expeditiously.

75. Finally, it should be recorded that there is no basis whatsoever for the applicant's attempted criticisms of the adjudication officer personally. The applicant had alleged that the decision to recuse herself from the fresh hearing of the claim for unfair dismissal was a unilateral decision made by the adjudication officer, separate from any *Zalewski* considerations, and is "*proof*" that the adjudication officer was more concerned about the other party and the interests of the other party. The applicant sought to rely in this regard on a selective and misleading reading of the letter of 14 July 2021 from the Director General of the Workplace Relations Commission. The operative part of this letter has been set out in full at paragraph 22 above. As appears therefrom, the recusal and the direction of a fresh hearing are clearly referable to the judgment of the Supreme Court.
76. The applicant had also alleged, in her initial oral submissions to this court, that the adjudication officer, in deciding to recuse herself, had been acting in the interests of a major law firm. This reflects a plea in the statement of grounds that the "*only possible explanation*" for the abortion of the proceedings and the refusal to direct disclosure is "*a desire to protect the interests of*" Arthur Cox Solicitors. It has also been pleaded that a reasonable observer would question

whether the adjudication officer is recusing herself “*for personal reasons, e.g. because she does not wish to direct Arthur Cox to disclose critical evidence or to make a finding of unfair dismissal against a major law firm*”.

77. It is entirely improper that these allegations should have been made: the adjudication officer’s decisions are objectively justified and there is no basis for attributing any ulterior motive to her. The applicant subsequently withdrew the allegations on the second day of the hearing before me, stating that she wished to correct the record and to make it “*crystal clear*” that she is not alleging bias against either the adjudication officer or the Workplace Relations Commission.

CRITICISM OF THE COMMISSION’S PUBLISHED NOTICES

78. The applicant has sought to criticise the content of the various iterations of the notices published on the Workplace Relations Commission’s website following the decision in *Zalewski*. The criticism, as pleaded in the statement of grounds, had been to the effect that the Workplace Relations Commission had applied an incorrect interpretation of the Supreme Court’s decision.
79. In the course of oral submission, however, the applicant sought to advance an additional argument as follows. It was alleged that the notice published on the website was amended on 21 May 2021 to give foundation retrospectively to the adjudicator’s decision to direct that the applicant’s claim for unfair dismissal be heard afresh by a different adjudication officer. The applicant characterised this as a “*whitewash*” by the Workplace Relations Commission of an unlawful decision by the adjudication officer, and as a deliberate change of policy intended to affect and frustrate her proceedings.

80. With respect, there is no evidential basis for these allegations. The registrar of the Workplace Relations Commission, in her affidavit of 15 September 2021, has explained the genesis of the revised version of the guidance notice published on the Commission's website as follows:

- “13. I also emphasise to this Honourable Court that the WRC is an organisation driven by a commitment to excellence and in so doing the WRC strives to deliver a service which is fair and effective; in deliberating the implementation of the Supreme Court's judgment, the WRC was acutely cognisant of the impact on parties. I also say and believe that the Guidance arrived at to deal with part-heard cases was the product of a good faith and faithful interpretation of the judgments of the Supreme Court.
14. Consequently, on 16 April 2021, the day after the Supreme Court's ruling, the WRC published the first version of the Guidance online, updating parties on the outcome of the Supreme Court judgments and the immediate practical implications for parties. The WRC reflected on the judgments and considered its practical implications, which warranted a more detailed version of the Guidance and an updating of the Guidance insofar as related to part-heard matters in a version published on 21 May 2021.
15. I note that the Applicant seems to imply at Ground (E)(35) of the Statement of Grounds that the amendment to the Guidance published on 21 May 2021 arose as a result of the oral arguments made by the Applicant on 12 May 2021 and pleads that it appears that the WRC's interpretation of *Zaleswski* changed after the Applicant's oral arguments on 12 May 2021. This suggestion is incorrect. The initial version of the Guidance was published the day after the ruling to update parties at that time, but that version necessitated further particulars once the WRC had an opportunity to consider all of the logistical implications of the judgments. I also confirm that I had already envisaged the amendments for part-heard hearings that were introduced in the version of the Guidance published on 21 May 2021 prior to oral arguments being made by the Applicant in her case on 12 May 2021.”

81. As appears, the registrar refutes any suggestion that the Workplace Relations Commission's interpretation of *Zalewski* changed after the applicant's oral arguments on 12 May 2021. The applicant has not sought to cross-examine the registrar on her affidavit.
82. More generally, it should be explained that an adjudication officer is independent in the exercise of his or her functions. Whereas the Workplace Relations Commission provides logistical support and training to adjudication officers, the notices published on the Commission's website in May 2021 did not have any statutory force and were not binding on the adjudication officers. The determination of any particular claim for unfair dismissal—and the making of procedural rulings in respect of such claim—is ultimately a matter for the adjudication officer alone. The adjudication officer to whom the applicant's claim for unfair dismissal had been referred had full jurisdiction to make the decisions that she did, and this jurisdiction was not contingent on the existence of any published policy by the Workplace Relations Commission.
83. The statement of grounds does not seek an order setting aside the published guidance. Indeed, given that the published guidance does not have statutory force, there might well be a question mark as to whether the guidance is amenable to judicial review. At all events, I am satisfied that the version of the guidance as revised on 30 July 2021 correctly identifies the implications of the decision in *Zalewski* for part-heard claims of unfair dismissal. This version of the guidance differs slightly from that published on 21 May 2021 in that it emphasises an adjudication officer's discretion to direct a fresh hearing, by changing the word “will” to “may” in the sentence “*If the Adjudication Officer*

decides that there is such serious and direct conflict of evidence, then the case will have to commence afresh before a different Adjudication Officer [...]”.

84. The fact that this additional change was introduced subsequently does not affect the validity of the decision made by the adjudicator on 12 May 2021 and confirmed in her letter of 26 May 2021. This is because, as explained above, the jurisdiction to direct a fresh hearing was not contingent on the existence of any published policy. For the reasons set out at paragraph 63 *et seq.* above, the decision to discontinue the hearing, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer, is legally correct.
85. Finally, the applicant sought to make something of the supposed failure of the Workplace Relations Commission to adduce statistics in respect of the precise number of part-heard claims which had been remitted to a fresh hearing. With respect, the legality of the decision to remit the applicant’s claim falls to be assessed solely by reference to the particular circumstances of that claim. The fact—if fact it be—that only a small proportion of claims may have been remitted to a fresh hearing does not affect this analysis.

PRODUCTION OF DOCUMENTS

86. The applicant has sought an order for *mandamus* compelling the (original) adjudication officer to direct the applicant’s former employer to produce certain documents, namely, emails for a six-hour period on the night of 29 March 2019.

Procedural history

87. The applicant had first sought the production of these documents by written request to the adjudication officer dated 23 March 2021. The written request

was made some six months after the hearing on 20 October 2020 at which the evidential dispute as to the events on 29 March 2019 and as to the conversation the following Monday (1 April 2019) had arisen.

88. The adjudication officer responded to the written request by letter dated 24 March 2021 as follows:

“I have considered your request for me to require the Respondent to produce all emails pertaining to the deal that was being closed on 29th and 30th March 2019. I do not deem it necessary that these emails are produced to me at this time.

If, during the course of the proceedings, it becomes apparent that I need sight of these emails, then I will review the matter accordingly.”

89. Thereafter, the applicant’s former employer confirmed by letter dated 25 March 2021 that the applicant had been correct in her recollection in respect of the timing of the commercial transaction. The operative part of this letter has already been set out at paragraph 13 above.
90. The applicant reiterated her request for the production of the emails by letter dated 26 March 2021, saying that she was challenging in full Mr. Lynch’s evidence in respect of the events that occurred on 29 and 30 March 2019, and that it was essential that the emails be produced to establish the facts of the matter.
91. By letter of the same date (26 March 2021), the adjudication officer confirmed that her position remained unchanged as follows:

“Further to your letter to me of 26th March 2021, I wish to confirm that my position with regard to your request for me to require the Respondent to produce certain emails remains unchanged from my position as stated in my letter to you of 24th March 2021.”

92. The applicant, by letter dated 29 March 2021, made a detailed submission as to why she considered that the production of the emails was necessary.
93. The adjudication officer replied by letter dated 31 March 2021, stating that she would address the matters raised at the outset of the hearing on 31 March 2021. As it happens, the hearing date was postponed at the request of the applicant's former employer. Thereafter, matters were overtaken by events in that the adjudication officer indicated at the resumed hearing on 12 May 2021 that the claim for unfair dismissal would have to be heard afresh.

Applicant's submissions

94. The applicant has made very detailed and comprehensive submissions on this issue. The court has carefully considered all of the submissions made. The summary below is not intended to be exhaustive, but rather is intended to assist the reader in understanding the gravamen of the applicant's complaint.
95. In brief outline, the applicant has argued that an adjudication officer is under an obligation to give the parties to a complaint the opportunity to present any evidence relevant to that complaint. Such evidence is not limited to what the adjudication officer *herself* considers relevant, but extends to "*any evidence*" relevant to the dispute. It is further submitted that an adjudication officer does not have an absolute, unqualified or arbitrary power to grant or refuse disclosure of evidence at her will.
96. The refusal to direct the production of the emails is said to represent, in effect, a breach of the rule of *audi alteram partem*, and to be so serious as to consist of a "*complete failure*" on the part of the adjudication officer to follow fair procedures.

97. It is further submitted, *inter alia*, that the emails are crucial to determining the facts of the dismissal, and represent the best evidence that can be obtained in relation to the circumstances of 29 and 30 March 2019.
98. It is then alleged that, by her refusal to direct or even request disclosure, the adjudication officer blatantly favoured the applicant's former employer, Arthur Cox Solicitors, and that the "*only possible explanation for the refusal is a desire to protect the interests and position of Arthur Cox*".
99. As explained at paragraphs 75 to 77 above, there is no basis whatsoever for the applicant's attempted criticisms of the adjudication officer personally, and the applicant subsequently withdrew this allegation on the second day of the hearing before me.

Findings of the court

100. Section 8(13)(a) of the Unfair Dismissals Act 1977 provides as follows:
- "An adjudication officer may, by giving notice in that behalf in writing to any person, require such person to attend at such time and place as is specified in the notice to give evidence in proceedings under this section or to produce to the adjudication officer any documents in his or her possession, custody or control that relate to any matter to which those proceedings relate."
101. The next subsections, subsections 8(13)(b) and (c), confer certain immunities and privileges on a person served with such a notice, and make it an offence, *inter alia*, to fail or refuse to produce any document to which the notice relates.
102. As is apparent, a decision as to whether or not to direct the production of documents involves the exercise of a statutory discretion by an adjudication officer. This discretion must, of course, be exercised in accordance with law. Moreover, the exercise of this discretion is, in principle, amenable to judicial review before the High Court.

103. It is important, however, to recognise the gravity of what the applicant is asking this court to do. The applicant seeks to have this court intervene in a part-heard claim for unfair dismissal and to make a significant decision as to how the claim is to be conducted. This is done against a background where the applicant has put only the most limited evidence before the court as to what has occurred before the adjudication officer.
104. For the reasons which follow, I am satisfied that this is not an appropriate case in which to grant mandatory relief of the type sought by the applicant.
105. First and foremost, any complaint in respect of the production of documents has been rendered moot. This court has upheld the validity of the decision that the hearing of the applicant's claim for unfair dismissal should commence afresh before a different adjudication officer. The new adjudication officer will have had no prior involvement in the claim, and it will be open to the applicant to make a fresh request for the production of documents if she considers it necessary. The new adjudication officer will not be bound by any views—preliminary or otherwise—expressed by the original adjudication officer.
106. Secondly, it is obvious from the exhibited correspondence that the original adjudication officer had not reached a concluded view in relation to the production of documents. The adjudication officer had expressly stated that she would review the matter if, during the course of the proceedings, it became apparent that she needed sight of the emails. The adjudication officer had also indicated that she would address the detailed written submission made by the applicant in her letter of 29 March 2021. Matters were, however, overtaken by events.

107. Having regard to the fact that it remained open to the adjudication officer to direct the production of documents, it would be premature to grant judicial review. See, by analogy, *Huntstown Air Park Ltd v. An Bord Pleanála* [1999] 1 I.L.R.M. 281.
108. Thirdly, judicial review will not normally be granted in circumstances where, first, the decision-making at first instance has not concluded, and, secondly, there is a full right of appeal against the first-instance determination. As this point has relevance to the other relief sought in these judicial review proceedings, it is discussed under a separate, dedicated heading below.

JUDICIAL REVIEW OF INTERIM PROCEDURAL RULINGS

109. For the reasons set out already, I have concluded that the applicant's challenge both to (i) the decision that the claim for unfair dismissal be heard afresh by a different adjudication officer, and (ii) the decision not to direct the production of documents, should be dismissed. This is sufficient to dispose of the within proceedings.
110. It is, however, apposite to make some general observations as to the appropriateness of seeking judicial review of interim procedural rulings made by an adjudication officer in the context of a claim for unfair dismissal. Judicial review is a discretionary remedy and the circumstances in which relief will be refused include those where the application is premature or where there is an adequate alternative remedy prescribed. In most instances, a party will be expected to await the substantive determination of a claim for unfair dismissal before contemplating an application for judicial review. It will only be in exceptional cases that it is appropriate to challenge an interim procedural ruling

by way of judicial review. Even in the case of a substantive determination, a party will normally be expected to exhaust their statutory right of appeal to the Labour Court (with a right of appeal thereafter to the High Court on a point of law).

111. The significance of the existence of an appeal to the Labour Court is unaffected by the finding of the Supreme Court in *Zalewski* to the effect that an adjudication officer is exercising a limited judicial function for the purpose of Article 37 of the Constitution of Ireland. Even in the case of a judicial body, such as the District Court or the Circuit Court, the existence of a statutory right of appeal is something to be considered in determining whether or not judicial review is appropriate. See, generally, the judgments of the Supreme Court in *Sweeney v. Fahy* [2014] IESC 50 and *E.R. v. Director of Public Prosecutions* [2019] IESC 86.
112. (As an aside, it should be noted that Mr. Zalewski had not been required to exhaust the procedures under the legislation in circumstances where he challenged the constitutionality of that very legislation: *Zalewski v. An Adjudication Officer* [2019] IESC 17; [2019] 2 I.L.R.M. 153).
113. There are both principled and practical reasons as to why the statutory procedures (including a statutory right of appeal) should be exhausted before recourse is had to the High Court by way of an application for judicial review. As to principle, the Supreme Court has held, in *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381, that where the Oireachtas has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the courts, *certiorari* should not issue when use of the statutory procedure for the correction of error is adequate (and, indeed, more

suitable) to meet the complaints on which the application for *certiorari* is grounded. Whereas this principle was stated by reference to a form of quasi-judicial decision-making, I am satisfied that similar logic applies to proceedings before an adjudication officer under Article 37. See, by analogy, the approach to criminal proceedings taken in *E.R. v. Director of Public Prosecutions* [2019] IESC 86.

114. The practical reasons underlying this approach include, first, that the High Court's jurisdiction on judicial review is much narrower than that of the Labour Court on a *de novo* appeal; and, secondly, that the High Court will not have a full appreciation of the "*nuts and bolts*" of the proceedings before an adjudication officer. An adjudication officer will normally be much better placed to make procedural rulings. This is not to say that such procedural rulings are immune to appeal or review, but rather to highlight the practical difficulty faced by the judicial review court. In the present case, for example, this court has only been provided with the barest outline of what evidence has been heard before the adjudication officer. It would have been very difficult for this court to reach an informed view on whether the interim decision not to direct the disclosure of the emails was unreasonable or unfair in the absence of a fuller understanding of the detail of the dispute between the parties.
115. Finally, it should be emphasised that, in deciding whether an interim procedural ruling should be set aside, the court of judicial review is concerned with the *legality* of the ruling. It is not the role of the court of judicial review to micromanage the proceedings before an adjudication officer. The court would have to be satisfied that the ruling was manifestly unfair, unreasonable or

otherwise made without jurisdiction before it could set aside an interim procedural ruling.

PARTIES' RELIANCE UPON EXTRANEOUS MATTERS

116. The scope of the High Court's jurisdiction in judicial review proceedings is confined to the grounds specified in the order granting leave to bring judicial review proceedings or any additional grounds arising from an amendment to that order (*A.P. v. Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729).
117. The applicant and the notice party have both raised issues in their affidavits which go well beyond the issues as delimited by the order granting leave. These extraneous matters included, *inter alia*, an allegation that the adjudication officer had acted improperly and in breach of the Commission's postponement guidelines in granting an adjournment of a five-day hearing scheduled for December 2020, and a counter allegation by the notice party that the applicant and members of her family had behaved unacceptably in the conduct of the hearings before the adjudication officer and had subjected the officer to abusive and oppressive behaviour. None of these matters are relevant to the issues which this court has to decide, and have, accordingly, been excluded from consideration.

SUMMARY OF CONCLUSIONS

118. The procedural requirements identified by the Supreme Court in its landmark decision in *Zalewski v. An Adjudication Officer* [2021] IESC 24; [2021] 32 E.L.R. 213 apply, in principle, to pending claims for unfair dismissal which

had not been subject to a final and conclusive determination prior to the date of the delivery of that judgment. It follows, therefore, that the applicant's part-heard claim for unfair dismissal is subject to those procedural requirements, and now falls to be determined by reference to the amended procedures introduced under the Workplace Relations (Miscellaneous Provisions) Act 2021.

119. Having regard to the serious and direct conflicts of evidence which had emerged at the hearings before the adjudication officer to date, and having regard to the allegation by the applicant that one witness has deliberately given false evidence to the adjudication officer, there can be no doubt but that the decision to discontinue the hearings, and to direct that this claim for unfair dismissal be heard and determined by a different adjudication officer, is legally correct. The determination of the claim for unfair dismissal has potentially grave implications for both parties. It is essential that evidence now be given on oath, and that both parties be entitled to defend their positions by way of cross-examination on oath. (See paragraphs 62 to 68 above).

120. In order to ensure confidence in the process, it was entirely reasonable to direct that the fresh hearing be conducted by a different adjudication officer who has not heard any of the *unsworn* evidence previously tendered. Considerations such as administrative convenience, efficiency or delay cannot trump the requirement that justice is not only done, but is seen to be done. (See paragraphs 69 to 77 above).

FORM OF ORDER

121. The application for judicial review is dismissed in its entirety. The parties are directed to file written legal submissions, in the following sequence, as to the

appropriate costs order, if any, to be made. The respondents and the notice party are to file their submissions within two weeks of today's date; the applicant will have a further two weeks thereafter to file her submissions. The case will be listed before me on 16 December 2021 at 10.30 am for oral argument on costs.

Appearances

The applicant represented herself
Catherine Donnelly, SC and Sharon Dillon-Lyons for the respondents instructed by the Workplace Relations Commission
Peter Ward, SC and Mairead McKenna for the notice party instructed by Daniel Spring & Co.

Approved
Gemma S. Mans