

**Review of Cox, Corbett and Ryan, *Employment Law in Ireland*
(Dublin: Clarus Press, 2009)**

Dr. Elaine Dewhurst*

The submission of the Employment Appeals Tribunal to the *Report of the Review Group on the Functions of the Employment Rights Bodies*¹ characterised the Irish employment law regime as “complex, complicated and confusing for those whom it was intended to benefit.”² While the law, the methods and fora of enforcement and the remedies may not have altered considerably in the years following this report, *Employment Law in Ireland* by Cox, Corbett and Ryan, assists the reader in overcoming these shortfalls by simplifying and synthesising the key legal principles and presenting them in an accessible manner.

This book manages to thread the fine line between being of practical benefit to legal professionals, and of scholastic interest to legal academics, successfully. The book, overall, is a very good reference source for practitioners, academics, students of law and also employers, employer bodies and trade unions and should be commended for encompassing four very unique strengths. Firstly, the book distils what is a very complex area of law into clear, concise and readily identifiable sections that are highly referenced and succinct. Secondly, it manages, despite the rapidly growing nature of the topic, to introduce and situate new and evolving practices in the area. Thirdly, the book offers the reader an opportunity to consider the overlap between this area of law and other very discrete legal subjects. Finally, despite the fact that the book does tend to lend itself more to the practitioner, the book is somewhat analytical in nature and provides, in parts, a detailed expression of the current legal principles and offers insightful comments on the future development of employment law in Ireland.

*Lecturer in Law, Dublin City University.

¹ Department of Enterprise, Trade and Innovation, *Report of the Review Group on the Functions of the Employment Rights Bodies* (Dublin: Government Publications, 2004).

² *Ibid.* at 38.

From a practitioner, academic and student perspective, the book manages to distil all the very complicated areas of employment law into four very succinct and logical sections dealing with the nature of the employment relationship,³ employment equality,⁴ the operation of the employment relationship⁵ and the breakdown of the employment relationship.⁶ Part 1 of the book dealing specifically with the introduction to the sources of employment law and the variety of employment law fora was especially useful in its explanation of the interaction of legislation with the various employment law tribunals and courts and the significance of their determinations. Such a simple elucidation of the sources and determining bodies will be a very useful resource to the novice reading employment law for the first time and an invaluable reference source for the advanced reader or practitioner.

This book certainly excels at providing succinct descriptions of complicated legal subjects. A distinct example of this is Chapter 23 on the Transfer of Undertakings. A complicated area of employment law, infused, necessarily by its origins, with case law from the Court of Justice of the European Union, the book manages to explain the development and current state of the law succinctly. From the unyielding position of common law, where once a business had closed down or ceased to exist in its original form, the contracts of employment of the employees were automatically terminated, the authors introduce the radical change in the law brought about by the Transfer of Undertakings Regulations.⁷ These Regulations have been substantially updated and amended over the years and now provide

³ See Part II: The Nature of the Employment Relationship encompassing chapters on Employment Status (Chapter 3 at 63-106), The Contract of Employment (Chapter 4 at 107-162), Employment Permits (Chapter 5, at 163-190) and Atypical Workers: Part-time and Fixed Time Workers (Chapter 6 at 191-240).

⁴ Part III: Employment Equality encompassing chapters on Introduction to Employment Equality Law (Chapter 7 at 241-278), Equal Pay (Chapter 8 at 279-306), The Discriminatory Grounds (Chapter 9 at 307-354) and Harassment and Victimisation (Chapter 10 at 355-380).

⁵ Part IV: The Operation of the Employment Relationship encompassing chapters on Organisation of Working Time (Chapter 11 at 381-418), Wages (Chapter 12 at 419-440), Protective Leave Entitlements (Chapter 13 at 441-486), Information and Consultation Entitlements (Chapter 14 at 487-512), Health and Safety in Employment Law (Chapter 15 at 513-564), Legal Obligations for the Employer in Respect of Workplace Stress and Bullying (Chapter 16 at 565-616), Privacy and Employment (Chapter 17 at 617-646).

⁶ Part V: The Breakdown of the Employment Relationship encompassing chapters on Procedural Fairness and Disciplinary Action (Chapter 18 at 647-676), Termination of Employment (Chapter 19 at 677-696), Notice (Chapter 20 at 697-710), Unfair Dismissals (Chapter 21 at 711-772), Redundancy (Chapter 22 at 773-794), Transfer of Undertakings (Chapter 23 at 801-834) and the Employment Injunction (Chapter 24 at 835-862).

⁷ Council Directive No. 2001/23, O.J. L 82 at 16 (2001).

extensive protection for employees on the transfer of a business.⁸ The authors of this book rightfully point out that “all of the directives and regulations dealing with this area have been less than satisfactory in the sense that many uncertainties remain as far as the law is concerned,”⁹ an issue that is only complicated further by the “wealth of case law in the area from which, on occasion, conflicting principles emerge.”¹⁰ However, the authors seek to provide some measure of clarity to the area or at least refer the reader to more detailed analysis, where such an analysis was not possible within the confines of the book.¹¹

As an example of the manner in which the authors distil complicated legal topics into distinctive principles, Chapter 23 is commendable. Through an examination of the scope of the Regulations, they seek a simple definition of the concept based on a consideration of three separate (and “notoriously uncertain”¹²) concepts; the definition of an undertaking, the definition of a transfer and the definition of a transfer of undertakings.¹³ They also deal with the important protections inherent in the Regulations, the most important of which is the right to protection against dismissal¹⁴ and the exception to this right provided to employers in cases where dismissals occur for economic, technical or organisational reasons requiring changes in the workforce.¹⁵ The scope of this exception is not defined in the Regulations and has been the source of much debate in the courts and in academic discourse but the authors in this book set out three very important principles distilled from this debate which clarifies the area immensely.¹⁶ Firstly, they contend that in reality only the transferee can rely on the defence. Secondly, that the defence will only apply where the economic, technical or organisational reasons in question entail *bona fide* changes in the workforce and thirdly, that a dismissal as a result of a transfer will still be invalid even if it takes place some time after the transfer, in circumstances where the reason for the dismissal relates to the

⁸ Council Directive No. 2001/23, *ibid.* was transposed into Irish law by the European Communities (Protection of Employees on transfer of Undertakings) Regulations (S.I. No. 131 of 2003).

⁹ Cox, Corbett and Ryan, *Employment Law in Ireland* (Dublin: Clarus Press, 2009) at 802 [hereinafter Cox, Corbett & Ryan].

¹⁰ *Ibid.* at 802.

¹¹ *Ibid.*

¹² *Ibid.* at 805.

¹³ *Ibid.* at 803.

¹⁴ European Communities (Protection of Employees on transfer of Undertakings) Regulations (S.I. No. 131 of 2003), Regulation 5(1).

¹⁵ *Ibid.* Regulation 5(2).

¹⁶ Cox, Corbett & Ryan, at 830–832.

fact of the transfer rather than to any broader economic, technical or organisation reasons. This type of analysis, sharp and concise, is typical of the authors and of great benefit to practitioners and academics alike.

One slight criticism of the content of the book that can be levied at the authors is the lack of factual background given in relation to the case law relied on in formulating the legal principles. It appears that in an attempt to distil the complex legal cases and legislative enactments down into easily communicated principles, often the context within which legal principles have emerged is omitted. This is particularly obvious in complex chapters such as Chapter 23, where reliance on case law from the Court of Justice of the European Union is important as an aid to the interpretation of the legal concepts. However, this slight omission does not detract from the overall impression of the book which is one that is trying to shape a complex area of law into sound and logical principles.

The book's treatment of developments in Irish employment law is also commendable. Topics such as the very recent Employment Law Compliance Bill,¹⁷ privacy in the employment context¹⁸ and atypical workers, such as agency workers¹⁹ are given space within the book and while some developments, such as privacy, are given lengthy appraisal, others are given more cursory attention. However, this lack of depth is often mitigated by the extensive references provided by the authors for further reading.

A prime example of the attention given to recent developments by the authors is Chapter 5 which is dedicated to the law relating to employment permits,²⁰ a very substantial area of law which is clearly written and, in parts, insightful.²¹ However, where a work of this nature makes attempts to be inclusive of new legal topics, there is a danger that it will fall into the potential criticism that other areas

¹⁷ *Ibid.* at 20.

¹⁸ *Ibid.* at Chapter 17.

¹⁹ *Ibid.* at 80-87.

²⁰ *Ibid.* at Chapter 5. This author does not necessarily agree that this is an appropriate title for the Chapter as it deals with a variety of third country national migrant workers, including those not employed on employment permits. It might be more fruitfully entitled "Third Country National Migrant Workers."

²¹ This author particularly enjoyed the reference in Chapter 5 at 165 as to the "doubtful legitimacy" of the departmental schemes imposed by the Government in this area as the *Employment Permits Act 2006* specifically provides that certain matters should be dealt with in ministerial regulations. See *Employment Permits Act 2006*, s.14.

have been omitted. This could definitely be said of Chapter 5. One major and unfortunate omission immediately apparent to this author is the failure to address the legal status of the E.U./E.E.A. worker. While the author is aware of the fact that this strays into the auspices of European Union Law,²² a short and succinct analysis of the relevant legal principles would have been a great addition to the book. E.E.A. workers are the largest group of migrant workers in Ireland. The most recent statistics on immigration produced by the Central Statistics Office²³ estimates that of the 88,100 people who immigrated to Ireland between April 2008 and April 2010, 36% are Irish nationals returning to Ireland and 44% are nationals of the E.U., with the majority of these originating from the E.U.12.²⁴ Therefore, the omission of the legal principles governing this group of workers is regrettable.

Employment law, by its very nature, is not a self-contained legal subject and is related significantly to other subject areas such as contract law, commercial law and criminal law. In particular, the authors focus on the substantial relationship between employment law and industrial relations law and dedicate a chapter of the book to the issue of industrial relations law.²⁵ While this is a very logical addition, the lack of rigorous analysis which characterises other chapters in the book does undermine this, otherwise excellent, book. However, the Chapter does provide a useful introduction to the topic of industrial relations law and, once more, the considerable references somewhat ameliorate the introductory nature of the analysis.

A better example of the interaction of employment law with other legal subjects is Chapter 24 on employment injunctions.²⁶ This is an exceptionally interesting Chapter as it deals with the very new and developing area of employment law remedies. Interlocutory relief in the employment context can amount to orders such as, orders for reinstatement,²⁷ a “*Fennelly* Order,”²⁸ orders restraining the

²² A point acknowledged by the authors in this book at 163.

²³ Central Statistics Office, *Population and Migration Statistics* (April 2010) <<http://www.cso.ie/releasespublications/documents/population/current/popmig.pdf>> (date accessed: 11 January 2011).

²⁴ E.U.12: defined as the ten accession countries that joined the E.U. on 1 May 2004 (*i.e.*, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia), and includes the two new accession states that joined the E.U. on 1 January 2007 (*i.e.*, Bulgaria and Romania).

²⁵ Cox, Corbett & Ryan at Chapter 2.

²⁶ *Ibid.* at Chapter 24.

²⁷ *Ibid.* at 849-852.

employer from replacing the employee,²⁹ and orders requiring that disciplinary hearings be conducted in accordance with fair procedures.³⁰ The authors manage to discern a number of emerging principles in this area which can operate in tandem with the traditional rules regarding the grant of interlocutory injunctions in an area of law which is “in a state of evolution and [where] the precise current state of the jurisprudence is far from clear.”³¹ In particular, the authors discuss the use of employment injunctions from a very practical perspective, identifying that a mere dismissal is not enough to succeed in obtaining injunctive relief.³² This would appear to stem from a due deference to the jurisdiction of the statutory fora (such as the Employment Appeals Tribunal) which are tasked with dealing with such disputes and to the fact that in order to seek an interlocutory injunction, the manner of the dismissal must either involve “a substantive breach of his or her employment contract, or else that there were procedural flaws in the lead up to that dismissal.” In keeping with the practical nature of the book, the authors indicate an inherent flaw in the development of these legal principles - that employers are incentivised, in cases where they are faced with an employee who are contravened disciplinary rules, “to hold no investigation and no disciplinary proceedings, but rather simply to dismiss the employee for no stated reason having given him or her notice to which [s]he was entitled.”³³ This practical approach emphasises the potential influential nature this book may have on the development of the law in Ireland.

This is a book that assists the reader in finding, locating, determining and understanding the law. However, the reader is offered at times more than this simple exposition of the law. The authors instil within the pages of the book interesting analysis relating to the current and future development of the law in Ireland. One recent development of note is the *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007*.³⁴ Under this Act, an employee shall be considered to have been dismissed in a situation where there is a collective redundancy, effected on a compulsory basis, where the existing employees were or

²⁸ This type of injunction requires that the employer not proceed with the dismissal and/or to pay the salary of the employee pending the trial of action. See *ibid.* Chapter 24 at 853-857. This type of order was named after the case of *Fennelly v. Assicurazioni Generali SpA* [1985] I.L.T.R. 73.

²⁹ *Ibid.* at 857-858.

³⁰ *Ibid.* at 858-861.

³¹ *Bergin v. Galway Clinic Doughiska Ltd.* [2008] 2 I.R. 205 at 212 (*per* Clarke J.).

³² Cox, Corbett & Ryan, at 840-842.

³³ *Ibid.* at 842.

³⁴ *Ibid.* at 793-795.

are to be replaced in the same location or elsewhere in the State by persons who are to perform essentially the same functions as the dismissed employees; and the terms and conditions of those other persons are, or are to be, materially inferior to those of the dismissed employees.³⁵ The legislation also provides for the creation of a Redundancy Panel,³⁶ the function of which is to decide, at first instance, whether a particular situation falls within the definition of an exceptional collective redundancy. The book deals succinctly with this new piece of legislation and analyses very coherently the effect of various outcomes for the reader.

However, one small criticism that could be levied at this section, and other similar sections of the book, is the lack of any adequate exposition of the rationale for the legislative development, as often the rationale for the legislation can serve as an effective interpretive tool. This was particularly noticeable in this section on Exceptional Collective Redundancies – a recent area of Irish law (rather particular to the time) with a fascinating legislative history, knowledge of which would greatly enhance the understanding of the legislative provisions and the operation and purpose of this new employment forum.

The complexity and rapid growth of employment law in Ireland is exemplified by the almost 900 pages that are dedicated to its exposition in this “comprehensive, yet incisive”³⁷ work by three leading Irish academics. A legal subject³⁸ neglected by legal scholarship for many years,³⁹ this area of Irish law has become an area of legal practice that is steadily developing and an area of legal scholarship that is flourishing.⁴⁰ This book is, therefore, a welcome addition to Irish employment law scholarship and is to be recommended. Any slight criticisms made

³⁵ *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007*, s. 16. Section 16 inserts subsection (2A) after section 7(2) of the *Redundancy Payments Act 1967*.

³⁶ *Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007*, s. 5.

³⁷ Laffoy J. in Preface to Cox, Corbett & Ryan, at viii.

³⁸ This author is referring to employment law as a legal subject rather than discrete legal areas within the subject. Subjects such as discrimination law, employment rights and dismissal law have received distinct academic attention by leading scholars such as Kerr and Redmond.

³⁹ The author notes the exceptional contributions of F. Von Proznynski and C. McCarthy, *Employment Law*, 2nd ed. (London: Sweet & Maxwell, 1989); M. Forde, *Employment Law* (Dublin: Roundhall Press, 1992, 2001 and 2009) and F. Meenan, *Working within the Law*, 2nd ed. (Dublin: Oak Tree Press, 1999) *inter alia* as exceptions to this general statement.

⁴⁰ In 2009 and 2010 alone, a number of excellent contributions to employment law were published. See for example: A. Kerr, *Employment Equality Legislation* (Dublin: Roundhall, 2009); M. Regan (ed.), *Employment Law* (Sussex: Tottel, 2009) and B. Daly & M. Doherty, *Principles of Irish Employment Law* (Dublin: Clarus Press, 2010).

here should not detract from the overall achievements of the book and its authors. This is an interesting, instructive and excellent book and is one that will undoubtedly become a leading authority on employment law in Ireland.