

Lawyers CPD Club

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**Tactically Approaching Employment Law Cases - A Practical
Guide to the WRC and Labour Court**

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These notes are intended to do no more than refresh the memories of those attending this seminar.

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INTRODUCTION

My approach to Employment Law is possibly different than many. I am as interested in what my clients do not tell me as much as in what they tell me. This I will expand upon later. Secondly it was said about me recently that a colleague would hate to be against me in a case. That concerns me. I always give due courtesy to colleagues. I will fight a case hard but very fairly. I am always available to consider settlement. I never have taken a colleague short. Possibly the complexity of cases scared them more than I do.

While my firm is known as a firm which represents employees we also represent employers. The difference is we try to keep our employer clients out of the WRC and to head off claims or potential claims before they arise. Equally we are probably known as employee representatives because of the number of cases reported. This I put down to the fact that we do represent non-Irish Nationals. The realities of life are that employers are far quicker to settle claims by Irish employees than those of non-Irish employees. This is certainly the experience we have in our firm.

We do have, what we like to call, “correspondent law firm” agreements with other colleagues. This means we will act for them or their clients in employment cases but only for work directly referred by colleagues with the client remaining the client of the referring firm. It enables colleagues to get assistance in such cases.

Before dealing with issues of claims I thought it is useful to possibly debunk some of the irrelevant defences which are raised and some which can create a real headache for employers.

The first issue I would raise is that we often hear that

“The employer is a good, decent person”.

My answer to this is firstly whether they are or are not is irrelevant to any claim or setting compensation. Secondly, my firm has never issued a claim saying an employer is a bad person or that an employer company is a bad company.

The second defence is that

“The employee is a bad person” or “The employee was treated like a member of the family”.

The issue of being a good or bad employee is rarely relevant. The issue is does the employee have a claim. The issue of being treated like a member of the family is equally irrelevant. That particular defence can actually be turned around to put up the issue that the employer clearly did not comply with Employment Law. The

reason on that is that family members are more often than not excluded from any rights. When that is said you usually have an outcry from the employer representative and it can equally be backed up with “well you are the one who raised it”.

The next is that in setting compensation regard should be had on the fact that the employer has limited means. In setting compensation for a breach whether an employer is a big profitable employer or nearly insolvent is relevant. This issue did arise in case EDA98 Juri Panuta and Waters Garden World Limited. In that case the argument was raised that the employer was an entity of limited means. The Labour Court held that in setting compensation no regard could be had whatsoever in setting compensation in respect of the breach. The only issue is on the issue of the persuasive element of any award which can only apply to claims which derives from EU Law. Therefore it is completely irrelevant to an Unfair Dismissal claim but would be relevant as regards persuasive element for example on an Equality claim or a claim under the Organisation of Working Time Act.

There is a danger in raising this defence. The very fact of saying it may be met with the response

“Prove it”.

What does this mean? This means management accounts. This means the company accounts. This means questions being asked about what drawings did the employer take. In many companies it is not just Directors’ fees but everything from car and house insurance to weekly groceries and the golf club fees. Once you raise that defence you open up the vista of an employee representative seeking to get this information on the basis that the mere statement is prejudicial to the employee and could have a bearing on the compensation that is set. If you are in that situation and that defence is put forward and it is shown that substantial sums have been paid you can be met then with an argument that

“The statement by or on behalf of the employer was untruthful and that runs through to credibility in respect of their entire defence”.

The other issue is, do you really want employees in the firm exactly what the Directors took out as drawings. In many companies employees would have sought salary increases. They may be met with arguments that the firm or company does not have the resources to give substantial increases. If it subsequently transpires in a Court case that in the preceding year a brand new car was purchased for a spouse and two children, that school fees in private schools have been paid for and that the drawings for 2016 when you take everything into account were 50% higher than those in 2015.

I find some colleagues very keen on starting any case when defending matters by stating that they are put in the other side on full formal proof. That can be also very dangerous. The response then can be “ditto” which results in the employer representative equally being on full proof. If acting for an employer that can mean having to have somebody there just to prove a signature on a contract.

Finally I find some work on the issue of “deny everything”. This I cannot understand. If you deny everything it is difficult then to try and justify or explain a breach you claimed never occurred.

We came across a case, not so long ago, where the employer through their representative attempted to run a defence on an Unfair Dismissal case that the employee resigned and if it was found that the employee did not resign that the employee was fairly dismissed. They were very quickly put on their election as to whether they were claiming it was a Constructive Dismissal or whether they were claiming it was a Dismissal and had been advised that if it was held that it was not a Constructive Dismissal that was the end of everything as regards any justification they would want to put forward. They decided that it was a Dismissal and they went first. They did not do themselves an awful lot of favours and went down for approximately a year and a half wages.

If fighting any case pick your battles carefully. If looking for full proof you may not need it on everything - so limit defences to those issues. You do not want to unnecessarily need to have to prove a signature. Agree with your opposite colleague, in advance, what you can if only start dates, rates of pay or correspondence.

I would advise colleagues to explore settlements early rather than at the door of a hearing. The reason is that the WRC does not generally like to adjourn or implementation. If representing an employee this means you lose the benefit of the Social Fund. If the employer does not pay and becomes insolvent, then you cannot claim from the Social Fund. Therefore when acting for employees, unless you are very sure of the employer, it is an issue that settling on the door of the WRC may not be in your best interest and it may be better to simply run the case and then subsequently put in place the settlement before any Decision issues. This can be by agreement with the other side which is: “This is our case” and the other side saying “This is our case. We are going no further. Thank you very much”. Equally, in forcing an agreement is by way of specific performance in the Circuit Court not an application to the District Court. For both sides whether acting for employers or employees, having ten or fifteen minutes gives little chance to seriously consider tax issues and even pension issues, confidentiality, non-disparaging clauses and a myriad of other matters. It is very easy for employers to get the tax treatment wrong.

It is far cheaper for employers and employees if matters are settled early. When matters are settled early there is a saving on a hearing. It saves everybody money. Admittedly the Solicitor will not have incurred as many hours work and therefore will get a lower fee. However, all our duties are firstly to our client and not to create additional work to create additional fees. When acting for employees of course there is going to be a discount if the case is settled early. There has to be. It is because of the fact that you do not have to prepare for a hearing. You do not have to allocate time for a hearing. You do not have to attend at a hearing. Equally, for employers the same savings are there. Of course there are times when both parties need to see the door of the Court before they are going to settle anything but that should not be the norm.

There is also a misconception that the WRC is a Court. It most definitely is not a Court. It is a quasi-judicial Tribunal. It does not work like a Court. While evidence is taken and there can be cross-examination nothing is done on oath. Representatives will submit in relation to various matters. These can be matters of fact. For example, if there is a claim that an employee, for example, worked in excess of 48 hours this is going to be determined by records if the records are there. If the records are not there the employee will be saying "I worked over 48 hours a week averaged" and would set out what their normal start times were between certain times and certain times and finishing times were. It is then a matter that the burden of proof shifts to the employer under the case of Nolan Transport and Jakonis DWT1117.

ISSUES TO CONSIDER OVER THE COMING MONTHS

In Employment Law cases Data Protection requests should always be made. They are not always replied to. Going to the Data Protection Commissioner is lengthy at times. From next May 25th the GDPR will apply. The time limit for responding will now be 30 days. Where the employer fails to respond, and without showing any loss, as a current situation would be, the employee can sue. The compensation may be small. However, we believe this would be a Circuit Court case. Ipso facto full Circuit Court fees will become due.

Secondly, in many Employment Law cases documents which are out of time are given such as warning letters on a personal file which have elapsed. Because of the 30 day period there is every likelihood that these documents will be furnished. If you are acting for an employer, you will probably have a further claim requested that all matters are deleted. This would have to be done very quickly. It will also be a matter where proceedings can issue.

The next issue where there is a failure to provide all the documentation. This regularly applies where documentation is suddenly produced at the Workplace Relations Commission or the Labour Court. This will invariably result now, going

forward, in an application to adjourn to consider same. A claim will then issue for the cost of the second day in the WRC or the Labour Court. Further set of Court costs will arise.

This issue normally arises in relation to records such as payroll records or working time records. An overview or synopsis will be furnished. These will be challenged and suddenly payslips or clocking in records will be produced. These will not have been originally produced and accordingly the claims will arise.

From my experience I can envisage in a majority of cases before the WRC at least one court application and probably two will be the norm. Happy hunting days if you are acting for employees and a lot of explaining if you are acting for employers. As Solicitors, if you see post May 2018 a data request then you better have everything ready to go to the client advising them to get the data delivered within those 30 days. There will be no grounds for extensions. This will need to be pointed out to your clients. The fact that the request is delivered on the 14th December 2018 and the business close from the 22nd or the 23rd December to the 1st January and that the company then goes into the January sales or the end of year accounts will not be relevant. No data furnished by the 14th January 2019 and on the 17th or 18th January, expect to find the proceedings issuing. If acting for employers it is going to be important to have that standard letter ready to go out to your client. Somebody in the office when documentation comes in in relation to an Employment Law matter whether it is your office manager or a Solicitors in the firm will need to review it to see, was there a Data Protection request and to make sure that that letter gets out even if you are in a 3 day High Court action or a week of the Circuit Court in your local area. The GDPR is dynamite. Failure to get the notification out to the client advising them as to what they must furnish is going to be a significant minefield for colleagues. It is of course going to be a minefield for employers. There is probably going to be a gold mine for employees' representatives. I can already anticipate some fairly spurious defences when claims issue for not having furnished data. I can see defences being raised that this was just an effort to extract monies from the employer or as a shakedown. I would caution colleagues on this. You may very well, by putting forward such a defence, find that your client becomes embroiled in High Court proceedings. You may have a Judicial Review or Point of Law applications to the High Court or even referrals to the European Court of Justice. If acting for an employer you must make sure that this date is furnished. You must make sure that all data is furnished. For those who act for employers at the present time it is worthwhile advising employers to make sure that their accounts and that their personnel files are cleaned up and that anything that is out of time or elapsed is got rid of. Do that now and at least you have covered yourselves. Fail to do it and, well, we will see what happens.

LITIGATION ADVICE PRIVILEGE AND LEGAL PRIVILEGE

For non-Solicitors these issues are currently in the High Court and before the Labour Court. The High Court involved a company called Philmic Limited where judgment will be given in November. In that case the Labour Court did not allow the representative of the employee to open a submission on the issue. In another case our colleague Mr Brian Morgan from Monaghan was successful before the Employment Appeals Tribunal in having a Decision that Litigation Advice Privilege did not apply definitely before the date of dismissal where the representatives were Peninsula Business Services (Ireland) Limited. The entire issue of Litigation Advice Privilege and Legal Privilege is going to start arising more often. For colleagues in acting for employer it is important to be careful when giving advice especially on a dismissal. Communications to an employer dealing with the disciplinary process is not subject to Litigation Advice Privilege. The only way you can win that argument is on the basis that litigation was contemplated. In an Unfair Dismissal case how you can anticipate litigation unless a decision has been made to dismiss. Therefore how could the procedure be fair? It could be argued that Legal Privilege applies. Certainly Legal Privilege will apply as regards an employer getting advice in relation to dismissal procedures but not if you were the Solicitor advising what actions he or she should take. There is nothing of course to stop a Solicitor advising on what action an employer can take once a decision has been made and setting out what types of actions can be contemplated. Of course Solicitors will always advise on the procedures to be followed. It is outside the scope of tonight to deal fully with the issue of Litigation Advice Privilege. It is a matter we might discuss on the evening. It will be discussed on March 9 next at the Employment Law Masterclass given by the Law Society where Brian Morgan is a speaker.

NEVER BRING ONE CLAIM WHEN TEN OR TWELVE WILL DO

It has been claimed by some that our firm when it comes to issuing proceedings do so on the basis of a scattergun approach. I do not fully accept that. What I will say is that our approach might be “different” to some. When a client comes to see you to bring Unfair Dismissal or an Equality claim instead to just diving into that consider what other claims there might be.

(1) Look at their contract. Does it comply with Section 3 of the Terms of Employment (Information) Act? There is only 18 items that have to be there. There are 15 in the Act as amended and a further 3 in Statutory Instrument 49 of 1998, so 18 in total. Do not look just at the Terms of Employment (Information) Act. You need to look at the amended Act.

Ask yourself did the contract issue within 3 months. Does it set out the provision of break periods under Sections 11, 12 and 13 of the Organisation of Working Time Act?

For example, does it cover the issue of Sunday working? Has the employee been advised of the pay reference period for the National Minimum Wage or the right to seek a statement under the National Minimum Wage Act?

In many cases where we bring these, the Irish Water case being TED161 is often quoted. There is also a more recent case. There were both cases presented by me. They are cases where the Labour Court has roundly criticised the bringing of the claims on the grounds that the law is not interested in trivial matters. I have lost other claims equally on similar grounds but without the full admonishment from the Labour Court. However, a number of these cases but not the ones that I have mentioned but brought on appeal on a Point of Law. The Irish Water case was not. None of them have gone for hearing. The ones that I have brought have all settled. They have settled when the Briefs were out. My position in matters is quite simple that the claim that an employee did not receive a proper contract is deriving from EU Law. I do not accept that there can be a trivial breach of a statutory minimum. I believe that a minimum following the Von Colson and Kamann Decision is entitled to cost of vindicating their rights. This is an issue which is that the Labour Court nor myself will back off from until there is a definitive High Court or possible European Court of Justice Decision.

In case C-350/1999 being the Lange case the ECJ held that being advised of “all aspects of the contract of employment relationship which are, by virtue of their nature, essential elements” must be given. In that case there was an obligation to work overtime and it was held to be an essential element to be advised. The Directive has a non-exhaustive enumeration of essential elements. Our legislation does not provide so if there is an essential element that is not set out there is also the issue of a possible claim against the State.

(2) It is useful to ask clients as regards:-

(a) Start and finishing times. Do they vary? If so, how much notice is given? Do they get 24 hours’ notice in writing? If the answers to any of these are “no”, namely that there are no set start and finishing times, then you have a claim under Section 17, Organisation of Working Time Act (“Organisation of Working Time Act”).

(b) Does the contract have start and finishing times? And if not then there is a claim under Section 17.

(c) Does the employee always get breaks at work they can use as their own in line with Section 12 OWTA?

(d) Does the employee always get 11 hours between finishing and starting work?

(e) Do they work weekends? Do they get 35 hours uninterrupted break? If not, a claim.

(f) Does the employee work on Sundays? Do they get a Sunday Premium that is specifically set out as a Sunday Premium in their contract or in their payslip?

(g) Is holiday pay paid in advance?

(h) Did the employee receive two week uninterrupted leave? I lost this in a case recently where the Labour Court held the client had agreed to this. I appealed on behalf of my client to the High Court. The case settled with costs. The provision of Section 18 (3) is one I see going someday for a full hearing in the High Court.

(i) Public Holidays (not Bank Holidays) the Act refers to Public Holidays. Did employee work that day? What did they get extra for it? If they work Sundays was the Sunday Premium taken into account in calculating the Public Holiday pay?

(j) For holidays and Public Holiday pay issues such as bonus payments or regular rostered overtime may be relevant for calculating pay due to be paid. The calculation is the average over the preceding 13 weeks so an employee who earns €500 gross per week but gets a €1,300 bonus payment in the second week in August who goes on holidays for two weeks in October should get €600 gross per week as holiday pay. Commission payments will equally be treated this way. Very few employees get such payments.

(k) If Part Time, Fixed-Term or Agency Workers then a whole myriad of other protection claims, from equal pay to be advised of positions, will arise.

The reason for mentioning these is that is that these additional claims which might never be ones the employee complained about and more often than not did not know about, may well be worth as much as their complaint they bring to you or at the minimum go some way to discharging your costs.

There are arguments raised by some that these sorts of claims are not ones that the employee ever came in and that they are ones that are simply being pursued by the Solicitor. That kind of argument is raised and my usual response is that if somebody comes in into my office having been a passenger in a car which was rear ended and suffered broken leg that if they come in and ask me:

“Is there any way that I can get my medical expenses?”

Then my answer is going to be:

“You were a passenger in a car. You can claim for the injury on top of the expenses and also for any loss of earnings or other expenses incurred by you.”

That is not making up a claim that is called advising somebody on their rights. The fact that a client might tell you:

“But of course I got a contract”.

Does not mean that you cannot say to them:

“Yes, but you did not get a proper one and you are entitled to bring a claim.”

That is what giving legal advice is about.

In many cases the employee’s main complaint may not actually relate to the one that is their best complaint. A number of years ago I had a client come in to me with an interpreter. She went through a litany of issues where, to be honest, I was sitting back in the chair going “No, that is not a claim”. None of the complaints or even ones that would warrant a claim of a trade dispute under the Industrial Relations Act. She then said to me “Then I suppose I do not have any claims” and asked could she ask one more question. I said, “of course” and the question was “Is it true that if you work in a small shop and you get pregnant that the employer is entitled to fire you?” My response was of course not and why did she ask that. I was then told that that is exactly what had happened to her 3 weeks previously. This individual had very limited English. She was amazed that she had any claim and was even more amazed when we got her compensation. That is fairly extreme example, but I certainly come across cases where employees would say

“But my contract says that I have to work 55 hours a week and I signed it.”

This is still a claim for excessive hours of work.

In my view the role of the Solicitor acting for an employee is to ascertain what claims they have which may not necessary be the ones that they actually come in to tell you about.

UNFAIR DISMISSALS

In dealing with matters tonight I am taking it that the issue of Unfair Dismissal is probably one that most are interested in.

There are a number of misconceptions.

(1) The most glaring misconception which those acting for employers or employees fall into, is believing that the employer must prove the guilt of the employee where the employee must prove they are not guilty. The case of Looney & Co Limited -v- Looney UD843/94 was the EAT Decision which importantly pointed out that it was not the function of an [Adjudicator] to establish the guilt or innocence of an employee. Rather it is whether a reasonable employer in the respondent's position and circumstances at the time would have done. This is the standard the employer's actions will be judged against. It is not the role of the Adjudicator to decide whether on the fact they would have dismissed the employee but rather whether a reasonable employer would have dismissed the employee or more properly was within the bounds of what a reasonable employer would do. So therefore employers depending on how they have their policies written may in certain circumstances be able to dismiss because they have a zero tolerance policy in respect of certain matters and win an Unfair Dismissal claim because of same whereas if they did not have that policy in place a similar dismissal would be held to be unfair. However, a zero tolerance policy in respect of certain matters can be completely unreasonable. To some employers mistakenly believe that by dismissing for gross misconduct this is strength in an Unfair Dismissal case. This I disagree with for the following reasons:

(a) If any employer dismisses for gross misconduct any previous indiscretions of an employee such as warnings cannot be taken into account or used to justify a dismissal.

(b) Even if the conduct warranted dismissal, if specified as gross misconduct, then if the action of the employee was not an action of "gross misconduct" then it is going to be hard to justify that any lesser sanction was considered. If it was not gross misconduct then there is a strong argument that, as the employee was dismissed for gross misconduct and it was not gross misconduct, that the dismissal was unfair.

The only advantage of a gross misconduct dismissal is that the notice need not be paid. There is no other real benefit.

Certainly I take the view that gross misconduct is a step employers should be very slow to use. Unless the company disciplinary policy covers the particular item as a specific answer then employers should shy away from gross misconduct dismissals. It is far easier to specify that

"While the issue found against you as the employee would possibly warrant being treated as gross misconduct under the company disciplinary policy I have determined that it is certainly misconduct warranting dismissal". So the employee is paid their notice you now have a lot more flexibility in defending a claim.

(2) The biggest misconception from employees is that the issue is that they can get two years wages. Yes, that is the maximum. However, an employee who is dismissed must seek to minimise their loss. The burden of proof is of course on the respondent employer to show the employee did not minimise their loss. However, the case of Sheehan -v- Continental Administration Company Limited UD8/99 is one where the EAT stated

“A claimant who finds himself [herself] out of work should employ a reasonable amount of time each week day in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an application to various companies seeking work...The time that a claimant finds on his [her] hands is not their own, unless he [she] choses it to be, but rather to be profitably employed in seeking to mitigate his [her] loss.”

Equally, an employee who is on sick from the date of dismissal and/or is unable to work has no loss. The maximum compensation is 4 weeks' pay. An interesting case on this is case ADJ-5398 which very clearly sets this out.

If an employee obtains new employment virtually immediately the loss is pure financial. There is no extra compensation for the stress of a dismissal or upset or event that it was done badly. The loss is the financial loss. That is what the legislation says. Some employees mistakenly believe because the dismissal was a bad dismissal and handled badly that they should get extra compensation. That is patently wrong.

In dealing with loss, and we might as well deal with it here, sometimes an Adjudication Officer or the other side will raise the issue of Social Welfare. This occurred in ADJ-6554. In that case the Adjudication Officer said that they were taking into account Social Welfare. This is incorrect. Section 7 [2A] Unfair Dismissal Acts 1977-1993 specifically provides that in calculating financial loss payments under the Social Welfare Consolidation Act 2005 are to be disregarded.

ACTING IN UNFAIR DISMISSAL CASES

When an employee comes to you to bring an Unfair Dismissal claim we would advise that the employee issues a request under Section 14 (4) Unfair Dismissals Act 1977-1993. When a request is made the employer has 14 days to respond. Failure to respond within 14 days and the employer can only justify dismissal on “substantial grounds”. What “substantial grounds” means is as yet unclear as it has never been litigated upon but probably one day will be.

The Labour Court in Faugill Properties Limited -and- O'Sullivan UDD1736 is one where the Labour Court pointed out that the employee had not sought reasons

for his dismissal under Section 14 (4). It would be our advice a request under Section 14 (4) is always made. There is a great advantage of this particularly if you have time to hold off in putting in the claim. The WRC request you set out the grounds of dismissal.

If claim is put under Section 14 (4) and is not responded to within the 14 days then you can fill out the claim form with “The employee made a request under Section 14 (4). It was not responded to. The employee does not know, according to the law, the ground under which he/she was dismissed.” When putting in your submission you can put in a copy of the request and the Certificate of Posting sending it.

You may be met by the employer representative coming and saying “But here is a load of documentation setting out the entire process.” That is irrelevant. The response was not given within 14 days and therefore the employee can put that in as their full submission and wait to see what happens from the other side. Where an employee comes our advice is that the employee always appeals the dismissal. Even if out of time, because many procedures will say that people only have 5 or 7 days, we would advise employees always to allow an appeal.

THE DISCIPLINARY PROCESS

In the case of Maybin Support Services (Ireland) Ltd and Niall Campbell UDD1732 the Labour Court had to deal with a situation where an employee had been put through disciplinary process. The employer determined that this was gross misconduct and dismissed the employee. The employee appealed the dismissal. The person hearing the appeal decided that taking into account the length of service for the company that the employee should be given a second chance and the sanction was to be reduced to a final written warning with the employee being assigned to duties on another site. The employee underwent training but after the short period decided the alternative assignment was not acceptable and informed the employer accordingly. At this stage the company decided to dismiss the employee on the basis that it had previously found him being guilty of gross misconduct. The Labour Court pointed out that the company had decided not to dismiss him and offered a different sanction. The Court held they did not find the justification for the dismissal one that would stand up. They held that the employee had moved beyond the issue of gross misconduct and should have been dealt with through the normal staff management process.

There are many cases which show that employers often get it wrong.

In ADJ-6307 the Adjudication Officer had issued an interesting Decision. It appears that at the time the employee attended disciplinary hearing he was

handed a letter which the Adjudication Officer held must have been typed up and signed in advance of the disciplinary hearing advising the employee that he was dismissed. The Adjudication Officer held that this was breach of fair procedures and awarded €9,000 to the employee.

A change has arisen in the area of disciplinary hearings. The case of Michael Lyons -and- Longford Westmeath Education and Training Board being a Judgment of Mr Justice Eager delivered on the 5th May 2017 is a significant Decision. It issued under High Court reference 2017 IEHC 272. I would recommend every Solicitor who deals with an Employment Law case involving Unfair Dismissal to carefully read the Decision and in particular paragraphs 90 onwards. In that case Graphit Recruitment HRN conducted an investigation. Mr Justice Eager held that they failed to adopt procedures in contravention of dicta of the Supreme Court in the decisions cited. Mr Justice Eager mentions a number of cases. One of these was *Borges -v- The Fitness Practice Committee* [2004] 1 IR 103 where Keane CJ stated:

“It is beyond argument that, where a tribunal such as the first respondent is inquiring into an allegation of conduct which reflects on a person’s good name or reputation, basic fairness of procedure requires that he or she be allowed to cross examine, by counsel, his accuser or accusers. This has been the law since the decision of this Court in *Re Haughey* [1971] I.R. 217 and the importance of observing that requirement is manifestly all the greater where, as here, the consequence of the tribunal’s finding may not simply reflect on his reputation but may also prevent him from practising as a doctor, either for a specified period or indefinitely”

Mr Justice Eager quoted extensively from the case of *In Re Haughey* and particularly the Decision of the then Chief Justice on page 264. Mr Justice Eager held that the investigation failed to vindicate the good name of the applicant in the refusal to hold an appropriate hearing whereby the applicant through his Solicitor or Counsel may have cross examined the complainant. He held that fair procedures manifestly indicated that the applicant had a right to confront and cross examine the individuals who had made allegations against him. He went on to say:

“It is clear that as a matter of law and as a matter of fair procedures an individual whose job at stake and against whom allegations are made would be entitled to challenge and cross examine evidence.”

He went on to state:

“It is noted by this Court that this is a process adapted by many companies when refusing to allow representation by Solicitors and examination and cross examination.

Effectively, it is now that an employer must advise an employee of the rights to be legally represented and to examine and cross examine witnesses. This is going to cause significant difficulties in many cases.

There have been two other Decisions which had been quoted as taking a different view than Mr Justice Eagar. However, those cases dealt with the issue of an investigation where the person conducting the investigation made no finding and made no recommendations and could not do so. They were simply stating the facts as found by them. It was then a matter for somebody else then to decide what disciplinary action, if any, would be taken.

In disciplinary matters now where an employee has not being advised of their right to legal representation and the right to examine and cross examine then in those circumstances the law would appeal to indicate that the dismissal will be unfair.

We have covered the issue of compensation. Compensation, however, in Unfair Dismissal claim is for loss of earnings. Therefore it is not compensation that is exempt from tax. It is always subject to tax. The basic exemption is €10,160 together with €765 for each complete year of service. Anything above that is subject to tax except when one or the other relieves applies. There had been issues where Adjudication Officer had been awarding compensation as tax free. This is an issue which our office wrote to the WRC about. In addition we were in contact with the Law Society and representations were made by the Law Society relating to the proper tax treatment of cases. We understand that the WRC now accept that these cases are subject to tax. Many colleagues believe that they are not. We can have a discussion about the rights and wrongs of it but the position under Section 192 A Taxes Consolidation Act 1977 inserted by Section 7 of the Finance Act 1984 is that anything which is compensation for loss of wages is subject to tax. Anything that is compensation for a breach, such as a claim under the Organisation of Working Time Act, even when it says that the employee is awarded say 10 weeks' wages, is compensation. It is only where any element of it includes an actual financial loss that the award becomes taxable.

CONSTRUCTIVE DISMISSAL

Constructive Dismissal now appears to become the flavour of the month. The number of individuals I have coming to me saying that they were constructively dismissed is staggering. Effectively it is normally cases where the employee walked out. The answer in such case, in my view, is that they have no chance or virtually no chance of winning a Constructive Dismissal case. An employee in a Constructive Dismissal case must show that they have gone through the grievance procedure. That means that they have dealt with the grievance procedure and that they have gone through the appeal procedure. Where there is

no grievance procedure it would appear that they at least have to put in a grievance and give the employer a reasonable opportunity of dealing with it. Then, and only then, can the employee consider resigning. It must however be for substantial grounds.

Of course there would be cases where an employee is entitled to simply walk out because they have been treated as having been dismissed. However, to justify a Constructive Dismissal claim without going through the grievance procedure the employee must be able to show that the actions of the employer were so bad that no employee could reasonably be expected to stay there and that there had been an absolute and complete breach of trust and confidence on the employer's part.

We do issue a newsletter. We regularly review Constructive Dismissal claims and at this stage it would be my view that approximately 90% of such claims are lost because the procedures are not followed to justify the employee resigning and in particular that they have not gone through the grievance procedures.

REDUNDANCY

We have seen recently a significant increase in a number of redundancies. It is an area where employers need to be very careful.

In selecting for Redundancy it is never on the basis of individual. It is on the job. The easiest one to operate where there is the least chance of a claim that the dismissal was unfair and that it converts a Redundancy into an Unfair Dismissal is where the employer uses the LIFO procedure. This is Last In, First Out. It is however a very blunt instrument.

If the employer is going to use a selection process then it is important that the employer sets out:

- a) A detailed business plan;
- b) The current structure;
- c) The new structure;
- d) What roles will be amalgamated or moved together or changed or got rid of;
- e) Employee whose jobs are at risk should be advised;
- f) They should be given an opportunity to comment on the proposed Redundancy, to put forward alternatives to them being selected or why they would be suitable for any other job. They should be encouraged to apply for any of the amalgamated posts. They should be allowed representation including legal representation.
- g) If they are selected for Redundancy they should be given the right of appeal to an independent third party who has not been involved in the process.

It is very easy for an employer to convert a Redundancy into a good Unfair Dismissal claim by an employee because they have chosen

“The best people.”

Redundancy is not personal. It is the job. This is something that is sometimes hard to put across to employers.

Some employers do lay off staff. If an employee is laid off for more than 4 weeks they can serve a notice on the employer. If the employer does not respond in 14 days with a counter notice stating that the employer within 4 weeks will get 13 weeks full time work, the employee is automatically entitled to Redundancy. The fact that the employee delivers the notice to the employer on a Friday before the employer is going on holidays for two weeks or even on the following Monday when they have gone on holidays for two weeks does not stop the time running. There is no provision for an extension of time.

Where an employee is claiming Redundancy they should furnish a form RP 9. It is a statutory obligation to request Redundancy. It is a statement seeking Redundancy. It is not necessary to use the form RP 9 but you should use one that is in a similar format.

MAKING A PREGNANT EMPLOYEE REDUNDANT

There is a recent opinion of the Advocate General on the case C-103/16. This deals with the issue of the notice of dismissal and the issues of social policy on Directive 92/85 EEC and Directive 89/59 EEC. The latter relates to Collective Redundancies. The former refers to the Health and Safety of Pregnant Workers and Workers who have recently given birth or who are breastfeeding. The Advocate General has held, which is subject to the full Court proving it, that for a dismissal of an employee by reason of a Redundancy to apply it must both be in writing and state duly substantial grounds regarding the exceptional case not connected with the pregnancy that permits the dismissal. It is for the national court to determine that. What is clear is that the employer now must set out what the exceptional circumstances are to dismiss a pregnant employee or a person who has recently given birth or who is breastfeeding to make them redundant.

It will be interesting to see the full Decision of the ECJ but usually they follow the Decision of the Advocate General.

It may mean some such workers will get an Equality Dismissal claim over the line even in a genuine redundancy case - so beware.

Please note that a self-employed contractor dismissed while pregnant can claim under the Equality Legislation. You do not have to be an employee to claim.

EMPLOYMENT EQUALITY

This would be a full lecture in itself not talking about a Seminar. In an Equality claim the burden of proof is on the employee to show a prima facie case. Once a prima facie is shown then the burden of proof goes over to the employer.

DECIDING WHETHER TO BRING AN UNFAIR DISMISSAL CLAIM OR AN EQUALITY CLAIM

We find it difficult to understand why any employee would bring an Unfair Dismissal case in relation to a pregnancy related dismissal rather than an Equality claim. In a pregnancy related dismissal the employee must show that they sought to minimise their loss. In an Equality claim they need show nothing. There is no requirement to minimise their loss. The compensation is based on the dismissal.

If you are bringing a claim on any of the other grounds you must be able to show a prima facie case setting how the employee claims they were discriminated against on any of the grounds. This means being able to show, for example, that they were treated different than a comparable worker who is of a different status than the employee who brings a claim on any of the relevant protective grounds. It could be on the basis that one is a non-Irish National and one is an Irish National or one is a female and one is a male.

In an equal pay claim it is important to be able to show that the employee was treated differently and it is necessary to have more than one comparator. So if the employee says that they were doing a particular job and somebody who is at the same level, doing the same job as them was paid higher then you need a second name. Once the employee has that then the burden of proof goes to the employer to prove the contrary, namely that it was not based on the difference that one was a male and one was a female or one was an Irish National and one was not an Irish National.

DATE OF DISMISSAL

In relation to the issue of date of dismissal and this goes back to the Unfair Dismissal claims the issue relates to what is the date of dismissal. In a Constructive Dismissal case the date of dismissal is the date of the resignation Stamp -v- McGrath UD1243/1983 also in Walsh -v- Health Service Executive

UD501/2007 the EAT confirmed that the “date of dismissal” in such a case is the date upon which a complainant submits his or her resignation and is not the date where the complainant is notified of acceptance of that resignation.

Where an employee is dismissed, however, the notice period under either the Minimum Notice or Terms of Employment (Information) Act or their contract whichever is longer or the notice period given will be the date of dismissal.

This is a trick that has been used in the past. Employees are dismissed, however, given a lengthy notice period. The employee issues the Unfair Dismissal claim quickly. The argument is that the date of dismissal has not occurred even though they have ceased working for the employer. This issue did arise in the case called Bohemian Football Club where the High Court said that you should not be penalised for issuing a claim too early. However, where an employee is dismissed and they are given a notice period it would be our view that if there is any issue as to when the date of dismissal is that you would issue a claim now.

You would issue a claim when the notice after the notice period elapses being the notice given or the contractual notice whichever happens to be the longest and this would include also the relevant legislation and just for good measures some date into the future if there was any issue at all as to when the notice expired particularly if an employee was put on Garden Leave or told to take holidays. Provided the last date is within the 6 months of the date of dismissal then that is the claim that can run.

In dealing with a claim before the WRC it is important that it is clarified at the very start what date the employer says the date of dismissal occurred on. The Adjudication Officer will note that and provided one of your claims issued subsequent to that date and within 6 months of it then the claim is in time.

OTHER CLAIMS

There are myriad of other claims and it is not practicable to go through a number of these. One of the ones that do come up regularly however is the National Minimum Wage Act. To issue a claim under the National Minimum Wage Act it is necessary to issue a request under Section 23 of the National Minimum Wage Act. This is for a pay reference period. It is important to clarify what the pay reference period is. The fact that an employee is paid weekly does not mean that that is their pay reference period. Their contract could provide for a longer pay reference period. If they are paid monthly could well be that their pay reference period is weekly in their contract or in some other document that they signed.

It is our advice that you issue a request under Section 23 for a period of 1 week, a period of 2 weeks, a period of 3 weeks, a period of 4 weeks and a period of 1

month. A week however commences on midnight on Saturday which is effectively a Sunday to Saturday.

In National Minimum Wage claims the employee can go back 6 years. It is a matter in this claims that the burden of proof is on the employer. It is specifically provided in the legislation that that burden rests with the employer and the employer alone. The employee needs to do nothing.

If acting for the employee is worthwhile putting in places calculation as to what you say is due but it is the employer to produce the calculation and it is on a week by week period. Because employers do not have to keep records for the full 6 years they need only produce for the relevant statutory period. However, that is a week by week calculation with all the backup documentation. That is a monster amount of work to do. For the employee they can in the alternative put in an estimate and in any case before an Adjudication Officer the answer is, it is a matter for the employer, they have to produce the documentation on a week by week basis. We have simply produced an estimate and not on a week by week basis.

In Equality claims the claim must be put in within 6 months of the last incident. However, once you get an action within the last six months then any similar type of action which may have happen even years back can be used. For example, if you have a claim of sexual harassment that occurred 5 months ago but that there had been incidents of sexual harassment for the preceding 3 years every 2 to 3 months all of those can be brought in. Some Adjudication Officers do not accept this but there is clear law on this point. The book by Alastair Purdy of Purdy Fitzgerald Solicitors in Galway is excellent for giving you the law on this.

In Equality claims particularly relating to pregnancy related dismissal a person may come in to you and your initial reaction is that they are self-employed and therefore they would not have a claim under Equality Legislation for being dismissed while pregnant. This is wrong. The ECJ have specifically ruled that the protection applies to self-employed persons so that a self-employed person can bring a claim under the Equality Legislation for being dismissed because they were pregnant. This is a trap that some employers fall into.

When bringing claims under the Organisation of Working Time Act it is sometimes thought that the burden of proof is on the employee. This is partly rights and partly wrong. Under Section 25 of the Organisation of Working Time Act where there are records in the statutory form and they are set out in the relevant Statutory Instrument then the burden of proof is on the employee. But that means that they have the records which would for example have their start and finishing time and all the breaks specified therein. Where they are not in the statutory form then the burden of proof is on the employer. In the case of Jakonis Antanas -and- Nolan Transport the Labour Court held in that case that it was

necessary for the employee to set out matters with sufficient particularity to enable the employer to know what claim they have to meet where there were no records in the statutory form. A lot of arguments have gone on around this. Some cases have actually gone to the High Court. It is our view that in those circumstances, for example, if an employee states “I did not always get my lunch break within 6 hours of commencing work of a minimum of 30 minutes and this happened two or three times every week, 4 to 5 times a week I was told around 4 or 5 o’clock that I had to work late, that twice a week I would finish at around 10 pm and start the following morning at 8 o’clock therefore not getting my 11 hour break, that I would work normally from 8 o’clock in the morning to 7 o’clock at night with just 1 hour breaks, 5 days a week being 50 hours a week” that in those circumstances that is all the employee needs to. It is then over to the employer on cogent evidence to prove that the employee got their entitlements.

PRESENTING CLAIMS

In presenting claims to the WRC there are few golden rules whether acting for the employer or the employee.

1. First of all, in acting for the employee check the correct name of the employer. It cannot be Murphys Corner Shop for example. If the employee does not have a contract or documentation with company or the name of the employer on it then send them to the Revenue and ask them to get a P21 or a letter to the Revenue setting out the name of the employer. When you have that do the company office search or a business name search to check where the registered office of the company is, what the correct name of the company is, that it is still in existence or, if in liquidation, who the Liquidators. That is who you sue against, that is where you serve it. The fact that the employee works in 1 Main Street in Sligo and the company is registered to South Mall, Cork then that is where the claim goes to, even though you would specify on the form where the employee normally works. The case will be heard in those circumstances in Sligo but implementation will have to take place in Cork. The same applies for non-registered entities. However, check all business name registrations. If P21 is even more important for non-corporate employers.

2. When acting for the employee try to set out some particulars of the claim. If it is that the employee did not receive a proper contract then set out they did not receive a document that complies with Section 3 and set out what they are. If it is for a breach of the Organisation of Working Time Act, which Section and what they say the breach was. If it is that they did not get a Contract of Indefinite Duration for Fixed Term Workers, then set out what contracts they received, what the periods were and how you claim that they are now entitled to a Contract of Indefinite Duration. In an Unfair Dismissal case set out the facts or if you had done Section 14 (4) that would be sufficient. In an Equal Pay claim, set out who

the comparators are and set out what your client says he or she says they were paid and what they say the other individuals were paid. It is my advice that you always get the employee to sign the claim form before you submit it.

3. In preparing for a case before the Adjudication Officer it is important to set out start date, finishing date (if relevant), rates of pay, hours of work, who the employer is. These are matters that will be checked and which should be able to be clarified with the other side very quickly. It is surprising the number of times that employers and employees cannot specify what their hourly rate of pay was or even what their average weekly wage was.

4. Have a statement as to what you say the facts are. Have that submission sent in in advance. Yes it will be sent to the other side but yet it will be read by the Adjudication Officer in advance.

5. If you have documents bring the documents with you. If you are bringing them with you have copies. However, if they have not been seen by the other side you may well an application for an adjournment. They can be submitted. You send in the submissions to the WRC. They can be sent in online at submissions@workplacerelations.ie. Quote your reference and quote the adjudication reference.

6. If you know who the representative on the other side is and even you are not going to settle, see what can be agreed. See what documents can be agreed.

7. If something cannot be justified do not try to justify it. Many employers will try to put the obligations for a breach of, for example, health and safety and this includes the Organisation of Working Time Act on to the employee when in fact it is the employer's duty to show compliance. It is a different matter to show that the employer sought to make sure the employee was working correctly but this means having appropriate documentary evidence and how this was put in place. Simply having a policy document is not sufficient if the payroll department have constantly being paying an employee for 54 hours work every week for the last 2 years.

8. Before any matter appears before the Labour Court see what actions the employer should take to rectify matters particularly in cases which derive from European Law so that an argument can be made that any aware need not be persuasive because the claim issuing itself has already been persuasive of the employer.

9. Always be aware that you can have a claim going on appeal to the Labour Court. While an appeal to the Labour Court is a de nova appeal the Labour Court will read the Adjudication Officer's Decision. They will look at what facts are there and they will expect you to set out your case on the basis of what you claim the facts are and what you say the defence to the claims are. However, the Labour Court will require you to produce the relevant documentation to back up statements.

TRANSFER OF UNDERTAKING

An issue is constantly arising under the Transfer of Undertaking Regulations. It arises firstly as to whether there has or has not been a transfer. Where a Transfer of Undertakings applies there is an obligation on both, the transferor and the transferee, to consult. Where they do not a claim arises. It is only 4 weeks' wages but it is 4 weeks and if the employee is earning €500 per week potentially it is a €2,000 award against both. An issue has arisen in a recent case as to whom the claim against the transferor goes. In one case it was that the claim goes against the transferor for not consulting. In another case it was held that because all rights transfer it goes against the transferee for the transferor not consulting so effectively there are two claims against the transferee. I do not think that both claims effectively go against the transferee. I may be wrong. Therefore pending re-clarification of this matter by the Labour Court, and I use the word re-clarification on purpose, it would be my view that you issue the claim against the transferor and the issue two claims against the transferee. One of it being that the transferee did not consult and the other is that the transferor did not consult but that the transferee is responsible for same.

Where an issue arises relating to dismissal or redundancy as a result of a transfer it is equally important that you issue those proceedings against both companies. You may ask why? Even if the employee has got documentation to say that this is a transfer under the Transfer of Undertakings, an Adjudication Officer or the Labour Court on appeal must determine whether there was actually a transfer under the Transfer of Undertakings rather than whether anybody said that there was. If there was a transfer under the Transfer of Undertakings then the claim goes against the transferee as all rights and obligations transfer over to the transferee. If there was no transfer then the claim goes against the transferor. If acting for an employee in, for example, redundancy situation, you sue both. You turn up in the WRC and you say "The employee was made redundant or he was dismissed". Let them fight it now between themselves. It is surprising the number of cases that arise where one company claims there was a transfer and the other company claims there was no transfer. Sue the wrong entity and your clients gets nothing. Sue both and you are fine. If the case is fought on the basis that there was no transfer it may be necessary to put in a protective appeal to the Labour Court.

The Transfer of Undertakings is probably one of the most difficult claims that you ever going to come across. The legislation is one of the most difficult and one that has been subject to numerous European Decisions many of which are contradictory. There is very little more that I can say other than that it is a minefield of problems.

PROTECTIVE DISCLOSURE ACT

This issue is coming up regularly. The Act is being attempted to be used by some employees to shoe in an Unfair Dismissal claim where they do not have the relevant 12 months' notice. If an employee is going to make a Protected Disclosure then to have the benefit of the Act it is absolutely vitally important that the disclosure is made to the right entity if it is being made outside the organisation. If inside of the organisation, equally, that a proper Protected Disclosure is made. I have had cases where people have come to me and said that they have disclosed to the Garda Siochana and to the employer after they believed that they were going to be put through the disciplinary process that a vehicle did not have road tax and therefore they had made a Protective Disclosure and were protected from dismissal.

If somebody comes to you in relation to a Protective Disclosure it is absolutely vital that you ascertain have they got a disclosure that is covered by the Legislation and secondly that any disclosure made is to the relevant party and the legislation is very specific as to whom the notification goes to. There is provision to get injunctions in certain circumstances. Again, these are covered by the legislation.

When acting for an employer if a disclosure is made which purports to be a Protective Disclosure it is again vitally important to check has the employee made a disclosure in accordance with the Protective Disclosure Legislation which would be a Protected Disclosure. This piece of legislation is an evening in itself. I am simply raising it tonight as an area where you need to be very careful.

INTRODUCTION TO THE ACT

The Workplace Relations Act, 2014 (the "Act of 2015") became operable on 1 October 2015. The Bill had been introduced in July 2014 following a lengthy consultation.

The Act of 2015 transformed the Employment Rights mechanisms in the State. The Act dissolved The Labour Relations Commission, The Equality Tribunal and The Employment Appeals Tribunal (The "EAT"). While the EAT will continue to sit to deal with existing cases all first instance functions from the three bodies transferred to the Workplace Relations Commission ("WRC") from that date. Sole appellate jurisdiction is conferred on the Labour Court.

This lecture might properly have been entitled "Buy a copy of Kerr's Irish Employment Law". Let me explain. We are not dealing with one Act. Yes there is the Act of 2015. You also have to deal with;

- (a) Industrial Relations (Amendment), 2015;
- (b) National Minimum Wage (Low Pay Commission) Act, 2015; and,
- (c) Credit Guarantee (Amendment) Act 2016.

You may well ask what the Credit Guarantee (Amendment) Act, 2016 has to do with employment Law. The answer is that Section 17 of that Act amends Section 101 of the Employment Equality Act, 1998 to provide that where an employee refers a claim under Section 77 of that Act being an Equality based dismissal claim and a claim under the Unfair Dismissals Act, 1977, then the Equality claim shall be deemed withdrawn unless within 42 days of the date of notification from the WRC the employee withdraws the Unfair Dismissal claim. The 42 day period is prescribed by SI 126/2016. Personally I believe this Section is contrary to EU law as dismissal under EU law is a fundamental social right and cannot be displaced by a non-fundamental social right being an Unfair Dismissal claim. Wait and see the claims against the State on this one. However that is an aside. The Credit Guarantee (Amendment) Act 2016 also in Section 18 amended Section 34 National Minimum Wage Act 2000 by renumbering subsection 6 inserted by Section 52(1) of Part 1 of Schedule 7 of the Act of 2015 at subsection (7).

THE LEGISLATION

The legislation which colleagues will have to deal with, who do not have access to Kerr's Irish Employment Law, is all the existing legislation. There are some 731 pieces of legislation being Acts and Statutory Instruments, EU Regulations and Directives to deal with.

I mentioned Kerr's Irish Employment Law for a number of reasons.

1. There is no consolidated Employment Legislation in Ireland. Kerr's Irish Employment Law does consolidate the legislation. You will get it on Westlaw.
2. If you do not have Kerr's Irish Employment Law I believe that you are going to be at a severe disadvantage. Let me give a simple example. You are bringing or defending a claim that an employee has not received a document which complies with Section 3 Terms of Employment (Information) Act 1994. (i.e. the "No contract claim")
Section 3 has been amended by
 - (a) Section 18 Industrial Relations (Amendment) Act 2012 (Clause f a)
 - (b) Section 44 National Minimum Wage Act Clauses (g) and (ga)
 - (c) Article 3 (1) Terms of Employment (Additional Information Order 1998 (SI 49/1998) Information on Sections 11, 12 and 13 Organisation of Working Time Act must be furnished.

There are other provisions which apply.

- (a) Young persons – Terms of Employment (Information) Act 1994 (Section 3(6)) Order 1997 SI 4/1997.
- (b) Section 10 (2) Protection of Employment (Temporary Agency Work) Act 2012
- (c) Section 8 (1) Protection of Employees (Fixed Term Work) Act 2003.

This Legislation enacted an EU Directive being 91/533/EEC.

I simply mention this as a very simple piece of legislation which will go before Adjudicators and on appeal to the Labour Court.

Personally I believe that a representative who appears before an Adjudicator or the Labour Court without Kerr's Irish Employment Law is like a Criminal Lawyer appearing before the District Court without the Garda Siochana Guide.

If the case is simply that an individual has or has not received a document which complies with Section 3 then I would envisage that the Labour Court at some stage may seek under the provisions of Section 47 (3) of the new Act to deal with the appeal under those provisions namely by way of written submission only. They can do this in any case.

There is still more legislation to come. The Act of 2015 has to be amended to provide for witness summonses in Unfair Dismissal cases. The provision was there in the original Bill as checked by ELAI, the Law Society, and members of the DSBA. It fell out when a renumbering was done.

We have asked the Minister to look at amending the Act to provide for settlements being treated like mediation agreements.

We have asked for a Fees Order to provide for fees for implementing a Determination or Decision of the WRC or Labour Court. Currently you can use Order 40C of the District Court Rules to get an implementation but you will not get any order for costs including outlays. There is a possible claim against the State here.

As a Solicitor who is involved in Employment Law I do not understand for the life of me how any practitioner whether a specialist or not could reasonably be expected to deal with the legislation without a codification. That is why I refer to Anthony Kerr's excellent publication and Westlaw (Westlaw is a bit behind so go for Kerr's book). Unless you are going to walk around in to the WRC or the Labour Court with a tablet or laptop and be able to skip between different Acts and Statutory Instruments you do need the hard copy. The background to the Bill and subsequently to the Act needs to be understood. We were told there

would be a world-class service. We were promised as part of the consultation various things. Professionals whether Solicitors, Barristers, Unions and Employer Representative Bodies such as Ibec fell into two distinct groups. You are either a supporter or opposer of the process. Being ambivalent was not an option. There are still those opposed to the process who keep up a valent vanguard action to snipe at the process whenever possible but that is a lost cause. The EAT is going and will not be rise like a phoenix from the ashes. The Law Society gave a “guarded” welcome to the Act. My suspicion is mainly because there were supporters and those who opposed on the committee.

I was from the outset a supporter of the process. I was roundly criticised by some for my stance. As one who supported the process I feel, to some extent, entitled to criticise areas of its implementation that I have a problem with namely;

1. The world-class availability of information on the law promised during the consultation process is absent. We have outdated and in some cases incorrect guides. Even the most recent Guide “Employment Rights Explained” is wrong. We wrote to the Director General on 16th August that Section 3 (g) Terms of Employment (Information) Act is not set out nor the provisions about Collective Agreements and the Guide to Maternity Protection Acts referred to in it is wrong as it says those in the Defence Forces or Gardai are not entitled to time off for ante-natal care. I am assured this will be addressed.
2. The Adjudication service seeks to have a paperless procedure. That was tried in Solicitors practices and Accountants practices decades ago and failed.
3. There is no codification of employment legislation. None is on the horizon. We have different definitions of even who is a “worker” or “employee”. We have different definitions as to who is the “employer”. I have had cases where acting for an employee I have sued one entity as the “employer” under one Act and a completely separate and totally unrelated entity as the “employer” for a different Act. I have had one case recently where my argument was accepted, on a reading of the legislation, the company who never had my client at or near its premises, and where he had never heard of them and visa versa was in fact the “employer” for employment law purposes. We have written recently to the Minister that the definition of “employer” in the Unfair Dismissal Acts is different than in the Redundancy Payments Acts and with a little bit of planning an employer in a “Group Company” can easily strip an employee of their rights under the Unfair Dismissal Acts. Like a magician you can convert an employee with 10 or 20 years’ service into an employee with less than 1 year’s service overnight. The legislation is therefore full of traps for the unwary. Whatever chance a Solicitor or Barrister has a member of the public has little or none.

4. Instead of designing a computer system based on the Act of 2015 and practice the Department purchased on “off the shelf” system which is designed to accept a claim, issue a hearing date and then for a decision to issue. Matters such as adjournments, amalgamating associated cases, or, follow on claims in alien to the system. The WRC computer system is dreadful. To be fair they are working on it. We have written to them about many problems with it. The Labour Court system is fine and works as they work with their existing system. This does mean the promised same reference number is absent which impacts on research.
5. One of the major criticisms of the WRC is that it is not in public. I have to say that I have had a number of cases in the EAT reported and the only thing I usually see as being completely accurate is the name of the parties along with possibly a photograph. I can agree with the argument over cases being in private but would support the idea of them being in public but with a caveat. The caveat would be that in public reporting it would be similar to the reporting of family law cases. By this I mean no names would be disclosed. There would be no photographs. Reporting of EAT cases has generally been on the basis of notoriety or public interest in the parties rather than in the case and any legal principles which would be advised. The Labour Court hearings, with limited exceptions, are in public. I appear there regularly. I have yet to see a reporter attend.
6. There is a criticism that our Adjudicators are not legally qualified. This is incorrect. One third are either Solicitors or Barristers. In the LRC there were no legally qualified persons. There are limited records but one unofficial review taken a number of years ago showed that only some 10% of Unfair Dismissal cases before the LRC were appealed and only 10% of these were overturned. Now of course some settled. However, just being “legally qualified” is not enough. The Employment Law Association of Ireland proposed a rate of pay equivalent to that of a District Justice for an Adjudicator. The Adjudicators are paid somewhere around €400 a day. They get no paid holidays, no pensions, and no sick pay. The Adjudicators do not have up to date books such as Kerr’s Irish Employment Law. We have sought for them to get this and I believe they will in due course.
7. Currently the system has problems. These were acknowledged by the Director General of the WRC at a conference in Dublin on 1 October last. These include, as listed by her;
 - Occasions where all parties were not notified of a hearing;
 - Linked or multiple cases not being scheduled together;
 - Correspondence being sent to an old address;.
 - Representatives being double booked for hearings (the system has always had a procedure in it to avoid this, it is just not always used); and
 - Adjudicators not being at a hearing when the parties were there.

Other than correspondence going to a wrong address we have had all these problems.

What she did not list were cases where decisions issued late i.e. the date of the covering letter postdates the decision. You only have 42 days to appeal from the date of the decision not the date of receipt. In one case we received three decisions in the same letter for the same employee. We appealed that day. One Appeal was 20 days from the date of the decision. One was the day after the date of the decision and the last was two days ahead of the date of the decision.

8. There is a lack of consistency in the decisions. This is acknowledged in the case of Adjudicators. This is to be addressed. I do have a concern about this. Adjudicators are supposed to be “independent”. It is one thing giving them training or pointing out where the Labour Court or High Court have overturned a decision or increased or decreased compensation. It is another thing that they would be constrained in their decisions. Saying this, we are seeing constantly the law being stated to be different by different Adjudication Officers.
9. There are a number of issues which affect consistency.
 - (a) Before the new WRC website you had the Labour Court website. You could check cases by Acts, section and subsection. You could even check it by the names of the representatives. That is no longer there. It is not in the system for Adjudicator’s decisions nor any longer for the Labour Court decisions. The Adjudication Officers Decisions have no name so it is quite hard actually to even remember cases by a number. The Labour Court and the WRC decisions to act as any kind of useful database needs to be able to be searched by Act, section and subsection at a very minimum,. An Act alone search is useless. Again I believe this will be addressed as part of their 2017 Budget.
 - (b) There is no Book of Quantum. How are cases valued? What is the value of a breach? What is the basis of setting compensation? In equality and UD cases we have quite high awards in some cases and lower in others. Why is one pregnancy related dismissal lower or higher than another. In cases under the Organisation of Working Time Act where the maximum can be two years wages I have yet to see one.
 - (c) Compensation figures are rarely broken down as a multiple of weeks. It would be useful if this was done. Some Adjudicators are doing this. I would hope the Labour Court might do so as a matter of course.

The WRC was designed to be Lawyer free.

It is my view that it is virtually impossible for an employer or an employee to utilise the system without the benefit of legal advice. Two recent cases ADJ1792 and ADJ1654 are prime examples of employees bringing their own cases and losing where a Solicitor could have won the cases. Any criticisms here today are intended to be positive as we all want the world class service promised.

THE TALK TODAY

For colleagues here today who do specialise in employment law hopefully you will get something out of today. For colleagues here today who do not claim to be specialists in employment law you do have a problem. You are dealing with a completely new process. There is no codified “Employment Law Act”. There is no comprehensive and definitive source of information freely available. You are dealing with disjointed legislation, with different definitions. For example the definition of “working hours” in the National Minimum Wage Act 2000 is totally different than “working time” in the Organisation of Working Time Act 1997. See for example the Labour Court Decision in Baku GLS and Mankauskas MWD1620

As I have limited time today I thought it would be appropriate to deal with the changes which will impact most on colleagues namely, Unfair Dismissal cases. For those of you who would have been involved in the LRC cases and on appeal to the Labour Court on such issues as the Fixed Term Work Act, the Organisation of Working Time Act and the myriad of other Acts that did not go at or near the EAT, the majority of changes are more cosmetic as regards their impact. Yes there are important changes in procedures but nothing hopefully to get overly excited about, especially as regards the Labour Court. There may however be some issues relating to the Labour Court procedures which may cause some difficulties.

For those who would have dealt with primarily Unfair Dismissal cases before the EAT, there are significant changes.

MISCONCEPTIONS

I think it is important that I would set out some of the misconceptions. Some of these need to be put to bed at the start.

The first is in relation to the Labour Court.

1. There is still an argument that unlike the EAT there is no legally qualified Chairman or Deputy Chairman in the Labour Court. This is wrong. There

are a number of legally qualified individuals in the Labour Court. More importantly, in my opinion, they are technically of the highest calibre.

2. It is not unusual in the Labour Court that significant legal issues will be raised by the Court relating to the interpretation of legislation or issues of case law. Sometimes these will be raised by the parties themselves but more often than not by the Labour Court itself. There is a level of legal expertise in the Labour Court which none of us who regularly appear before them underestimate.
3. The level of legal discussion before the Labour Court is of the highest quality. If an issue is raised and you don't know the answer my advice is to say so. The Labour Court does not take anybody short. Trying to "spoof" your way before the Labour Court is not a great idea. The Labour Court will have read and discussed any legal issue or case they raise with you. Saying you don't know and looking for time will result invariably in either an adjourned hearing or an opportunity to respond in writing.
4. The Labour Court will invariably follow decisions of other divisions of the Labour Court. The EAT did not. Therefore there is consistency.
5. The Labour Court will read in advance everything submitted. You can be sure in many cases they may well have read, digested everything to a greater degree to than the person even submitting the documentation. In, for example, Working Time cases it is not unusual for the party who submitted records, whether acting for the employer or employee, being questioned by the Court to a degree far in excess of what the submitter has read into those records.
6. The Labour Court will not allow ambushing. If an issue is raised that the other party could not reasonably have been on notice of or aware of the Labour Court will always give them time to respond either by way of an adjourned hearing or by way of written submission. My experience before the Labour Court is that the quality of input from the Chairman on the day of each division and the individuals nominated by each side of industry is of the highest technical quality. The questions will, from them all, be often as much on the law, by which I mean the relevant Act, section and subsection Statutory Instrument, EU law, and, case law both EU and domestic and their own prior decisions as much as on the facts.
7. The Labour Court is not a forum for practitioners to come in and just tell "the story". You will be questioned on the law. If you make a point expect to be met with the Labour Court seeking authority for the point made and asking for copies for them and the other side. You will be asked why this was not in the submission in advance of the hearing. Appearing before the

Labour Court and seeking to “pull a rabbit out of a hat” by way of legal argument, documentation or a witness will not be countenanced. The other side will be given time to respond and time to consider any “rabbit” you seek to pull from the hat.

Fair Procedures is the hallmark the Labour Court consistently states they apply and I certainly believe they always seek to do so.

THE ADJUDICATOR SERVICE

The procedures of the WRC indicate that cases will be listed within six to eight weeks of referral. They say in their Report cases are listed on average within 77 days. Now the Act means a day. They mean “working days”. Even this is incorrect. They claim 12-16 weeks but I am not seeing this for cases other than Dublin based. 28 days for a decision is now admitted to be 8 weeks. Except where the employee has failed to appear I do not see this happening. In some cases this time limit is being met. In others it is not.

The new Adjudicators have undergone training. They do not have hard copies of Kerr’s Irish Employment Law despite submissions by me and others. They do have it online but that is not sufficient. This is causing problems at hearings currently.

FAIR PROCEDURES

At the outset of the discussion on the Bill the issue of fair procedures had been raised. As the paper today deals with the WRC and the Labour Court I believe the issue of fair procedures as regards the WRC, is going to be an issue and that Judicial Reviews may become more relevant. Probably more so than the Labour Court. Both the Labour Court and the WRC are Statutory Bodies. Both derive their jurisdiction from the Act of 2015 and the Industrial Relations Acts. Their powers therefore come solely from these Acts. As they derive their authority from Statute they are bound by these. They cannot create or enlarge their jurisdiction and must act according to same. See the case of County Louth VEC – Equality Tribunal [2016] IESC40. There is an exception. The ECJ have ruled that under EU Law the principles of equivalence and effectiveness must apply. The Labour Court and the WRC must apply directly effective provisions of a relevant Directive even though there may be no express jurisdiction under Irish Law. Case C-286/06 Impact –v- Minister for Agriculture and Foods. The case of Minister for Justice Equality and Law Reform and another Appellant, the Workplace Relations Commission Respondent and Ronald Boyle and others Notice Parties has dramatically changed matters. In that case the Supreme Court in a decision by Mr Justice Frank Clarke stated that the WRC procedure is inquisitorial not

adversarial. This is at variance with the WRC procedures. It certainly is also as regards the Labour Court. How this important decision will be applied in practice is as yet unclear. The reference to the case is 2017 IESC43.

Neither the Labour Court nor the WRC are entitled to disregard the principles of fair procedures. While their procedures are informal in that they may take unsworn evidence, act on hearsay and depart from the strict rules of evidence they must act fairly and in accordance with the principles of natural and constitutional justice. *Kiely –v- Minister for Social Protection* [1977] IR286 at 281, *Calor Teo –v- McCarthy* [2009] ELR281 at 290 and *O Doherty –v- Independent Newspapers (Ireland) Limited* [2015] ELR6. Probably the best known case on this is *Ryanair Limited –v- Impact* [2007] 4 IR199 at 255 per Geoghegan J.

The case of *Petrea Stefan and The Minister for Justice Equality and Law Reform* [2001] IESC92 is a case I can see colleagues turning to. There were two issues to be determined. First whether the process was fair and secondly whether Certiorari should lie in view of the alternative remedy of appeal.

In *The State (Aberglen Properties Limited) –v- Dublin Corporation* [1984] IR381 Henchy J at page 405 stated;

“...where Parliament has provides a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of the error is adequate (and indeed more suitable) to meet the complaint on which the application for certiorari is grounded”.

Other cases have recognised that a Judicial Review is discretionary and may be refused where there is an adequate alternative remedy, for example, *the State (Glober) –v- McCarthy* [1981] ILRM46; *Nova Colour Graphic Supplies Limited –v- Employment Appeals Tribunal* [1987] IR426 and *Memorex –v- Employment Appeals Tribunal* [1992] I.R. 184. However, the Supreme Court in the Judgement of Ms. Susan Denham stated;

“However, to take that the above quotation of Henchy J in *Abenglen* in isolation is too simplistic an approach. In light of the judgement as a whole. An analysis of the Judgement of Henchy J in *Aberglen* indicates a comprehensive approach to the issue”.

The Judgement went on to say “...Henchy J held that where an inferior court or a tribunal errs within jurisdiction without recording that error on the face of the record, Certiorari does not lie. He stated that it was only in such cases where there is an extra flaw that the court or tribunal acted in disregard of the requirements of natural justice that certiorari will arise”.

The Supreme Court quoted the decision in the same case of Walsh J, who stated;

“There is no doubt that the existence of alternative remedies is not a bar to the making of an Order of Certiorari”.

In Mythen -v- Employment Appeals Tribunal [1990] 1. I.R. 1998 the Court quashed the decision of the EAT on the grounds that it had misapplied Council Directive 77/187/EEC (The TUPE Regulations). Barrington J. decided that Certiorari should not be refused on the grounds that the applicant should have appealed to the Circuit Court.

In the case before the Supreme Court an appeal was pending. The Court held that;

“The presence of a pending appeal is not a bar for the Court exercising its discretion”.

Certiorari may be granted where the decision maker acted in breach of fair procedures.

SUBMITTING CLAIMS CERTIFICATION OF CLAIMS

I do have concerns about the online document as regards the certification. The person lodging the document must certify that the facts in the form is correct. There is no provision for an alternate box where a representative such as a Solicitor lodging a claim to say;

“I certify that the facts herein are as advised to me”.

The Courts have an Affidavit of Verification procedure. We do not have this before the WRC.

The solution is that you could have your client submit the form but often this is not practicable. I have an issue with the online form. I do submit it in hard copy. I print off the form and use the old signing form for the client to sign. If you are going to lodge online I would strongly suggest that before doing so you get your client in to sign the form to certify that the facts as set out in the claim form are correct. Email the printed off and signed form to Director.General@workplacerelements.ie and secure.email@workplacerelements.ie.

The legislation in Section 41 (a) provides that an employee or where the employee consents a specified person may present a complaint. I can see the issue arising

as to what constitutes “consent”. If you are lodging online and are not having your client sign the form I would caution that;

- (a) You include a specific provision in your engagement letter authorising you to submit a complaint online.
- (b) That you have your client appoint you their Attorney for the purposes of Section 16 of the Power of Attorney Act 1996.

The claim form has gone through a number of changes. Some of the compulsory sections still cause a problem. You have to have an exact start date on the form. It is compulsory. From experience I know that employees will know when they left a job or were dismissed (but even that date can be uncertain as backdated P.45 are quite common) but very often they will not know the exact date on which they started. I was at a meeting in the Department when the form was being discussed. When I raised the issue of exact start dates I was told that everybody knows when they started. There were six people in the room and I asked would they mind telling me what date they actually started. Four of them had it right. One of them could only give the month and the year and one of them could give what they remembered was either November or December but couldn't actually remember the year.

Because you cannot submit the form without the exact start date if you have a problem the answer is to print it off and send it in in hard copy. If sending it to Carlow the address is Director General Workplace Relations Commission Department of Jobs Enterprise and Innovation, O' Brien Road, Carlow. Their DX is 271001 Carlow 2. Some will print it off and then scan it and send it to Director.General@workplacereleations.ie.

There is a hard copy complaint form. It has a signing page. The WRC does not publically admit to same but send a letter to the Director General at Director.General@workplacereleations.ie and they will send a hard copy complaint form by email. Crazy.

The online form is difficult to follow. It is not user friendly. This is something we have to deal with.

Why not to lodge just by completing the form online

If the form is completed online and lodged the WRC cannot recover the original claim form.

WRC Complaint Form

The WRC procedures document, unlike the Labour Court procedures, is riddled with incorrect statements, which are probably open to Judicial Review. There are

some issues relating to the Labour Courts own Rules which may cause some problems going forward. I would propose dealing with the WRC first.

1. At Point 1 it is stated that a complaint to the WRC should be made using the WRC Complaint Form.

This is incorrect.

The various Acts refer to a complaint being issued in “writing”. There is no Statutory Form or any requirement to use it. O’Halloran –v- Guidant Luxembourg Sarl UD808/2006 and A Female Employee –v- A Building Products Company DEC-E-2007-036. The WRC want the online form used. I have a problem with this. When the online form is used the “system” extracts information and sends the “extracted” information to the other side i.e. the employer. They cannot recover the Form as filled in online. What they recover is not actually everything they filled in. Some employer is going to seek a full copy and seek by Judicial Review to stop the hearing until it is furnished. Currently it cannot be. This is a negligence risk to colleagues. Remember the Peilow case. Just because you do what everyone else did and in line with the current practice you could still be negligent. There is a solution. Print off the Complaint Form. Have your client sign it. Scan it and send it to Director.General@workplacereleations.ie and secure.email@workplacereleations.ie. You do not have to have it signed by your client but always a useful exercise to stop a client “throwing you under the bus” as if they signed it you can at least say “what idiot would sign something without reading it”. Do not have it signed and you can get “My Solicitor didn’t set out all my complaints”.

2. It is stated at Point 1 “it is extremely important that the complainant keeps the WRC informed of his/her current address and contact details as failure to do so would result in the complaint being dismissed”. Mr Tom Malon BL addressed this in his excellent lecture to the Employment Law Association on 26th February 2016 when he said is it being suggested that a failure to update an address could, of itself, lead to a decision that a complaint would be dismissed. That cannot be right. If the suggestion is that a failure to update an address might result in the non-pursuit of the complaint for a period of a year, which could then lead to the dismissal then that is a very different thing and the procedures presumably to be read by lay people should make that clear”.

The WRC has no right to dismiss because addresses are not kept up to date.

3. Time Limits. Now the normal rule is that a dispute must be referred within six months of the alleged contravention. However they don’t point out that

there can be a contravention five year ago which is continuing and therefore a complaint can be made. See HSE and John McDermott High Court 2013 334 MCA. The Guidelines state different time limits apply for complaints under the Redundancy Payments Acts and Equal Status Acts.

This is far from a comprehensive overview. A complaint under Section 3, Terms of Employment (Information) Act can be made any time up to six months after the employment ceases. A claim under the National Minimum Wage Act goes back six years from lodgement and applies once a notice under Section 23 is served for a pay reference period any time in the preceding twelve months and then the employee has six months to lodge the claim. For example an employee is dismissed or leaves employment on 1 June 2016. The employee has up to 31 May 2017 to deliver a request under Section 23 to the employer and then has up to 29 November 2017 to get the claim into the WRC.

4. The Guides then states; as regards extensions of time

“Complainants should make this extension application when submitting the complaint form or as quickly as possibly thereafter after giving detailed reasons and including any supporting documents”.

There is no statutory power to insist on this. The WRC is questioning complaints and at times stating they are out of time and cannot be pursued. This is completely wrong. The application for an extension goes to an Adjudication Officer. It is not a matter to be dealt with without going to an Adjudication Officer. I have had this issue hidden in WRC letters saying that a complaint was out of time. I wrote back and said that unless it was sent to an Adjudicator to decide on I would issue Judicial Review proceedings. They backed down two days later. The case settled but the point in issue was my client was in hospital and was unable to act being totally mentally incapacitated for a period.

5. Paragraph 5 of the procedures sets out the requirements for statements from persons on whom the onus of proof rests in Employment Equality and Unfair Dismissal matters. It provides that parties will be required to submit a clear statement setting out details of the complaint within 21 days. The final sentence then states;

“An Adjudication Officer hearing the complaint may draw such inference or inferences as he or she deems appropriate where relevant information is not presented in a timely fashion”.

This is wrong. There is no statutory right to do so. There are limited exceptions which I will set out. If an Adjudication Officer did so then

Judicial Review is an option. See Halal Meat Packers (Ballyhaunis) Ltd and EAT No 248 and 252 of 1998 (Supreme Court Decision).

It appears from that case the WRC or Labour Court could require the person bringing the claim or appeal to do so but not the Respondent.

An Adjudication Officer may draw an inference in Equality Cases where a Form EE2 is not responded to by virtue of Section 81 of the Employment Equality legislation. An Adjudication Officer may draw an inference under section 14 (4) Unfair Dismissals Act where a notice is sent requesting particulars as to the grounds on which an employee says an employee was dismissed and was not responded to within 14 days. I attach a copy of an extended article on this issue in Appendix 7 which was published by the Dublin Solicitor Bar Association. There is no power in Unfair Dismissal cases to draw any inference from failure to submit. Now in UD cases it is common practice for the Respondent to arrive on the day with the submission. I adopt three approaches.

- a) If it suits me or my client I proceed;
- b) If it does not suit me or my client I say I want an adjournment to consider the issues and look for a new date.

It is better for employers to give a submission as an adjourned date with witnesses and additional costs is more costly for them.

Ambushing is not allowed by the Labour Court and I don't see any reason to have it happen in the WRC. My client has their appeal to the Labour Court. I have had cases where bankers boxes are produced at hearings with various documents and witness statements. You need time to review these.

In Equality cases we regularly now get nothing until the day. The practice of Adjudicators is to adjourn as they cannot do the questioning in such cases themselves. Clearly if a case was forced on the issue of a Judicial Review would be a relevant issue to consider. In the alternative you may have issued being listed for the first time on appeal to any great extent.

6. Section 41 of the WRA sets out in detail the provisions relating to the presentation of complaints. There is nothing providing for the drawing of inferences nor that the current complaint form is used. In Equality Dismissal claims and Constructive Dismissal cases they both state;

"If no statement is received from the complainant in these cases the Director General may decide to dismiss the complaint for non-pursuit".

These statements are completely contrary to Section 48 (1) of the Act which states;

“Where a complaint is presented to the Director General under Section 41 the Director General may strike out the complaint where he or she is satisfied that the complainant has not pursued the complaint within the period of one year (or such other period as may be prescribed immediately preceding it being struck out)”.

The Director General has no power to dismiss a complaint by reason of no statement having been received. The Director General may dismiss if nothing happens for one year but not otherwise. In Section 6 of the Guidelines it states that there is provision which allows an Adjudication Officer to draw inferences where relevant information is not provided “in a timely fashion”. In UD cases this is a 21 day period. For colleagues involved in Unfair Dismissal cases now when acting for employers they will be getting a request to furnish a statement.

There is no statutory basis whatsoever for these statement. It is quite disgraceful that assertions would be made in a document produced by the WRC with no statutory basis whatsoever. The WRC does not have these draconian powers currently and the document as produced is misleading. However it is better practice to make a submission as you might find an Adjudicator “not departing from strict rules of evidence”.

7. In Paragraph 6 of their Guidelines it refers to other employment and Equality cases. It states that where a Respondent wishes to raise a legal point or any other legal issue these must be included in a statement sent to the WRC within 21 days of the date of the complaint form is forwarded to the Respondent. There is no legal basis for this. Again, it states that an Adjudication Officer hearing a complaint may draw such inferences or inferences as he or she deems appropriate where relevant information is not presented in a timely manner. There is no statutory basis for doing so. However there are issues about this which I will deal with later in this paper which colleagues need to be aware of.
8. In Paragraph 7 it relates to the hearing of cases. It does not relate to information being provided and there being examination and cross examination. This is no formal evidence on oath. It would however appear that the normal rules of evidence would have to be dealt with but with the usual caveat for a Tribunal.

The Rules state that witnesses would be allowed to remain or may be asked to come in only for their own evidence. This is contrary to the normal rules

in Court cases though there may be particular circumstances where this is relevant.

9. The Act of 2015 has no provision for witness summonses in UD cases. A flaw that will be rectified by having it dealt with in a “suitable piece of legislation”. This could be anything include a Planning Act. There is no current legislation in the pipeline so this defect could be here for some time.

WHERE THERE MUST BE SUBMISSIONS

There are limited circumstances where submissions do have to be submitted. Some Regulations under previous procedures are still relevant.

- (a) Redundancy (Redundancy Appeals Tribunal) Regulations 1968 SI24 of 1968 as amended by SI 114 of 1979.

Regulation 4 sets out that the notice set out a Statement of the “facts and contentions” on which the complainant intends to rely. This could be as simply as “I was made redundant. I was not paid redundancy” or it could be “I served an RP9 and my employer did not give a counter notice within 7 days so I am entitled to redundancy”.

- (b) Minimum Notice and Terms of Employment (Reference of Disputes) Regulations 1973 SI 243 of 1973.

Equally Regulation 4 of these regulations provides that the claim must include “a statement of the facts and contentions” on which the complainant intends to rely. It should be remembered you can only claim the Statutory Minimum Notice. If the contract provides for longer notice a separate claim for the balance can be brought under the Payment of Wages Act or to the Courts for Breach of Contract.

- (c) Unfair Dismissal (Claims and Appeals) Regulations 1977 SI 284 of 1977.

It is a requirement to set out the employees’ remuneration. If this is less than the National Minimum Wage Act, which can occur, it is advisable to set out both. These Regulations do not require a statement to be set out relating to the grounds in which an Unfair Dismissal claim is being brought.

- (d) Maternity Protection (Disputes and Appeals) Regulations 1995 SI 17 of 1995.

Again the facts and contentions to be relied on would need to be set out. This can be everything from not getting the same job back on returning to

work or not getting time off from work or reduction of working hours for breastfeeding mothers. Effectively it covers all claims under Part II of the Maternity Protection Act 1994. One can see the reason for this requirement as there are various claims under this particular Act.

- (e) Adoptive Leave (Referral of Disputes and Appeals) (Part B) Regulations 1995 SI 195 of 1995.

It is necessary to set out;

- The grounds of the complaint
- The day of placement or where no placement, the date the employer received first notification of the intention to take adoptive leave, or, in the case of an adopting father, the date the adopting mother died.
- Where notice is not given within the appropriate period the reasons for the delay, and
- the weekly pay of the parents.

- (f) Parental Leave (Disputes and Appeals) Regulations 1999 DI 6 of 1999.

The information required depends on whether it is a Parental Leave or Force Majeure Leave claim.

I have commented upon the WRC requirements for submissions separately but the Acts listed above and the various Statutory Instruments are the only ones which indicate what information must be furnished. Of course we can expect Statutory Instruments detailing great detail what must be provided but hopefully this would be one where there would be advanced consultation. For example having to set out the date an employee commenced work when that date may not actually be readily available to a number of employee's means that there will be cases where if there are very rigid rules introduced some employees may not be able to properly complete a claim form and equally rigid rules on submissions would need to be in amending legislation rather than by Statutory Instrument. Since the Act of 2015 was introduced the requirement for example in Unfair Dismissal claims for an employer to lodge a response are gone.

However unusually Regulation 3 (2) of the Maternity Protection (Disputes and Appeals) regulations 1995 SI 17 of 1995 provides that the Respondent shall within 14 days of the receipt of the claim or such longer period as an Adjudication Officer may allow indicate whether he or she intends to contest the complaint. If so, they must set out the facts or contentions which would be put forward. It would therefore appear an employee would clearly be entitled to an adjournment if only advised on the day. Equally the Unfair Dismissals (Claims and Appeals) Regulations 1977 SI 286 of 1977 require an employer within 14 days to enter an appearance. Clearly

following the Halal Meat case referred to previously the Adjudication Officer will probably have to hear the employer but the employee may still be entitled to an Adjournment on the day, until an appearance is entered.

SERVICE OF DOCUMENTS

For the service of documentation under the Act the provisions of Section 6 provide for personal service, leaving it at the address at which the person ordinarily resides or in a case in which an address for service has been furnished at that address.

Where service is by way of post it is to be by way of a prepaid registered letter to the address at which the person ordinarily resides or in the case in which h an address for service has been furnished, to that address.

Section 6 (1) (c) would appear to allow service at a business address in the case of an individual non incorporated individual or entity. Section 6 (1) (d) does provide for service by electronic means where the person has given notice in writing to the person service or giving the notice or document concerned of his or her consent to the notice or document being served by electronic means. For the purposes of service on a company the company shall be deemed to be ordinarily resident at its registered office and every corporate and unincorporated body or person shall be deemed to be ordinarily resident at its principal office or place of business.

Section 6 (2) does provide for service on an unincorporated body at its principal office or place of business.

In the case of a company up to now, service would have been by ordinary prepaid post. Section 6 appears to amend this requirement. Pending this issue being clarified it may be as well to service documentation by registered post and by way of ordinary post with a Certificate of Posting in the case of a company.

SUBMISSIONS

Submissions you can send by email to submissions@workplacereactions.ie. This only applies to WRC submission. Labour Court is hard copies only, now.

One issue which I find amusing relating to records is that if an employer intends to rely on Statutory records they should be sent to the WRC prior to the hearing by electronic means if possible. Clearly this was put in place by somebody who had never gone through Tachograph records.

MEDIATION

I deal with mediation at this stage as the very tenor of the Act is to finalise matters quickly. The Act envisages a claim being presented and effectively unless the employee objects to mediation, or the employer, the case will first go to mediation.

The claim form should have an opt out provision for mediation. Instead you must opt in.

I do opt in but on the basis of Section 39 (2) (a) by which I mean a mediation meeting. Section 39 (2) (b) would appear to include what I term "telephone mediation". It refers to other forms of mediation. I take this as getting a phone call. That is not mediation under any definition of "mediation". I write in the words "I consent to a face to face mediation only".

When the initial trial of mediation was put in place I did consent to take part. Other than some redundancy claims I never successfully had a telephone mediation that resolved matters.

Face to face mediation, where parties want to settle, will work.

I certainly believe that mediation is an option colleagues should seriously consider.

Mediation under what was the LRC was a practical and viable option for practitioners. Practitioners will be aware of equality mediation which was very formalised with the Equality Officer meeting both sides separately, explaining the process and allowing both sides give their story is not the experience of mediation when the mediation process was taken over effectively by the Conciliation Service of the LRC. Such officers from the LRC had a practical approach. They dealt with Workplace Disputes on a practical level.

Where the employee is still in employment then there is one approach. When the employment has ceased then equally they tended to take a practical approach where experienced practitioners are involved. Before Equality Officers you could have on mediation an entire afternoon spent going nowhere. Under LRC mediation they tended to cut to the chase. Hopefully under the WRC this will continue. I have not had any WRC mediations yet. One reason was a lack of consent from the opposite side. The second was a lack of mediators. By "lack" I mean none. The Unions in the WRC would not consent to non-Public Servant Mediators being used. Now the WRC have informed me they do have mediators and can do face to face mediations.

Under Section 29 the Director General where the Director General is of the opinion that a case can be resolved through mediation may refer a case to mediation. The Director General, may not do so, if either party objects.

If mediation is successful a mediation agreement will be written up, signed by both parties and the mediation officer and will be binding on both. If mediation is not successful the case will be sent to an Adjudication Officer for hearing.

CODES OF PRACTICE / REFERRALS TO THE HIGH COURT

The WRC and the Labour Court will be able to issue Codes of Practice. I see these being done to regulate hearings and processing cases. These Codes, include the Guidelines issued to date, and these Guidelines have the same force and effect as a Statutory Instrument but only in the case of the Labour Court as at the present time. I would also see such Codes being utilised to set out how matters are dealt with in the workplace to facilitate internal resolutions as far as practicable. This may take cases away from practitioners but we are not here to encourage litigation.

The Labour Court can refer issues to the High Court. Previously it needed the consent of the Minister. Now they can do so themselves without consent. The previous entitlement was never used. I would hope the Court would consider using its new powers in appropriate cases. The Labour Court has referred case to the European Court of Justice. Adjudication Officers cannot refer a case to the High Court nor to the ECJ.

EXTENSION OF TIME

The issue of an extension of time is an issue where perhaps an employer seeking to rely on any point where an extension of time application may have to be made by an employee may be required to put an employee on notice of same.

In Stokes -v- Christian Brothers High School Clonmel [2015] ELR113F128 Clarke J said it was incumbent on a Respondent to make any point concerning time so as to put the employee on notice that there is an issue and to give them an opportunity to seek an extension. So a failure to raise a time limit issue with the WRC may lead to a legitimate conclusion that an employer is precluded from raising the point of Appeal. The Labour Court took a similar approach in a Worker -v- An Employer EDA 1304.

However, this is different where it goes to the heart of their Jurisdiction. In County Louth VEC-v- Equality Tribunal [2016] IESC40 where McKechnie J said

that the time period did not operate as the defence point and is a “condition precedent” to the exercise of jurisdiction.

So what does this mean in practice?

If an employee is bringing a claim where say he/she was dismissed seven months prior to lodging the claim the employee is within the time limit for the WRC or the Labour Court on Appeal to extend the time to bring a claim. Therefore it may well be that an employer must notify the employee in such circumstances that they will be putting the employee on notice to seek an extension of time.

If however, an employee was dismissed more than 12 months prior to lodging the claim then it would appear that the employer would not be obliged to put the employee on notice of the intention to raise the time limit as the time limit would be a condition precedent to the exercise of jurisdiction.

PRELIMINARY ISSUES

At times there will be preliminary issues which arise.

Normally an Adjudication Officer will deal with the preliminary issue and the substantive claim in one decision. However, there can be times when the preliminary issue will determine matters. For example a claim that the employee was dismissed more than six months prior to the filing of the claim or that it was outside the twelve month period. The employment Equality Acts confers on an Adjudication Officer under Section 79 (3) and (3A) that matters can be dealt with by way of a preliminary determination. If that is against the complainant it can be appealed to the Labour Court and the Labour Court if they find in favour of the complainant then under Section 83 (5) of the Employment Equality Act 1998 the case is referred back for an investigation on the substantive issue.

In all other cases the Labour Court has no right to send a matter back to an Adjudication Officer for consideration of a substantive issue save and except where an Adjudication Officer held that the complaint was either vexatious or frivolous. There is no appeal to the Labour Court where there is a preliminary finding in favour of a complainant. In all cases other than the Equality Legislation if there was a finding on a preliminary point in favour of the employer the employee is still entitled to appeal to the Labour Court and this will be a hearing which will determine both the preliminary ruling and the substantive case. The Labour Court can determine the issue on the preliminary matter.

It is a defect in the legislation that where the Labour Court, for example, fined that an Adjudication Officer has failed to properly apply the law they cannot remit the matter back to the Adjudication Service.

It appears now to be settled that a party can have a stenographer. However recordings on an iPhone would not be permitted. Neither an Adjudication Officer nor the Labour Court can direct that a copy of the stenographer notes being given to the other party.

However, if you do use a stenographer and an Adjudication Officer or the Labour Court asks for a copy of the transcript and it is given to them then it would appear that copies must be provided by the Labour Court or the Adjudication Officer to the other side.

TIME LIMIT FOR BRINGING A CLAIM

The time limit for bringing complaints and extension of Time
Section 41 subsection 6 2015 Act provides that an Adjudication Officer shall not entertain a complaint if it is presented to the WRC after 6 months beginning on the date of the contravention.

Section 41 subsection 7 as amended by Section 37 of the Parental Leave and Benefits Act 2016 stipulates that the date the case of disputes relating to entitlements under the Maternity Protection Acts 1994 and 2004, the Adoptive Leave Acts 1995 and 2005, The Parental Leave Act 1998 and 2006, The National Minimum Wage Act 2000 and 2015 and the Paternity Leave and Benefit Act 2016 can be different.

In certain circumstances there can be a continuing breach and therefore where there is a continuing breach it will not be the first contravention.

Section 41 Subsection 8 of the Act of 2015 enables an Adjudication Officer to extend the initial six months limitation period by no more than a further six months if he or she is satisfied that the failure to present the complaint was due to reasonable cause.

This issue was recently considered by the Labour Court in the case of Kepak Group and Valsomiro Augusto Arantes UDD1625. In this case the Labour Court restated their decision on reasonable cause in determination WTC0338 Cementations Skanska -v- Carroll.

In that case the Court said;

“It is the Court’s view that in considering if reasonable cause exists, it is for the claimant to show that there are reasons which both explain the delay and afford and excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd. In the

context in which the expression reasonable cause appears in the statute it suggests an objective standard but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claim within a six month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time. The length of the delay should be taken into account. A short delay may require only a slight explanation whereas a long delay may require more cogent reasons. Where reasonable cause is shown the Court must still consider if it is appropriate in the circumstances to exercise its discretion in favour of granting an extension of time. Here the Court should consider if the respondent has suffered prejudice by the delay and should also consider the claimant has a good arguable case".

The Labour Court in that case cited the case of Minister for Finance –v- CPSU and Others [2007] 18 ELR36.

In case UDD1625 the Court refused to extend time. In that case the Court took into account that within the relevant time period the complainant had been able to attend with his Solicitor and had been able to complete a PIAB claim form.

The Court has held that ignorance of the Law will not in itself be a ground for an extension of time.

However, in Alert 1 Security Ltd –v- Khan DWT7215 the Labour Court extended time in that case where the employee was both ignorant of how to process a complaint but was relying on assurances given to him by his employer. Those assurances were to the effect that the employee was either receiving his legal entitlements or that those entitlements would be met. In that case the Court took the view that there were material misrepresentations which caused or contributed to the delay. It is clear therefore that both the actions of the employee and the employer will be looked at in relation to reasons for extending time.

HEARING

The WRC Guide states that the WRC will contact the parties with a time and date. They say they will be "reasonable notice". During this year we were getting three weeks' notice of hearing resulting in many adjournments. This has moved out. Despite requests for case management which occurs in the Labour Court there is none in the WRC.

At hearings it is useful to bring an extra copy of the claim form and any submissions made online for the Adjudication Officer. While Adjudication Officers

will have it on an IT system even if it is submitted in hard copy, they will not have a hard copy and it is often difficult particularly in an Unfair Dismissal case or an Equality Case where there may be many witness statements and submissions to effectively review it online.

If bringing documentation on the day, you should have three copies. One for you, one for the Adjudication Officer, and one for the other side. The Adjudication Officer will allow each party to give evidence, call witnesses and question the other party in any witnesses and the respond to any legal points. Witnesses may or may not be asked to absent themselves or may be allowed remain. There are issues with this but there could be instances where it would be relevant. It would be especially so if two or more employees have claims heard on the same day and each is a witness for the other. An Adjudication Officer is entitled to ask questions of the parties or witnesses. In Equality cases the Adjudication Officer will usually start on that basis. In all cases Adjudication Officers will usually seek to confirm identities and to seek confirmation of the legal name of the employer.

For those appearing before the LRC the new system is more formal. Gone is the “sidebar” to see if agreement could be reached. I had no problem with this. It was also done regularly in the EAT with a Chair asking “would the parties like some time”. It is done in every Court. The only difference in the LRC was that the Rights Commissioner might give a “view”. It is still “possible” despite the WRC rules to do a “sidebar” In Industrial relations Act claims the Adjudicator must see if settlement can be reached to resolve matters and this could equally include all “ancillary claims”. . For those who appear before the Equality Tribunal there is no real difference. For those used to the EAT the requirements for submissions in advance is a significant change and the system of hearings is less formal. For those who did appear before the EAT the requirement to issue submissions create significant additional work and therefore expense. The submissions would include;

1. An Outline of the facts.
2. A list of witnesses
3. Witness statements / An outline of the evidence a witness will give
4. Any legal points
5. In an Unfair Dismissal case particulars of the entire disciplinary process including all correspondence and documentation both typed up and the original written notes.

As yet employees do not have to lodge in advance particulars of efforts to obtain new employment. I believe they should.

An issue does arise with records. An Adjudication Officer may require a party to furnish particulars or to produce documents. An Adjudication Officer can draw

an inference from a failure of a party to produce documents or to answer a question put by an Adjudication Officer. This is reasonable. While a Party may not wish to give evidence and be cross examined, as may happen, an Adjudication Officer can still question them. They may not however be subject to cross examination by the other side. In general, Adjudication Officers do apply fair procedures. Of course there will be challenges into the future to Adjudication Officers decisions. I expected them sooner but they will come. It is unlikely to arise in relation to the conduct of hearings and more to issues relating to the hearings themselves because of the actions of one of the parties. A party can issue a Judicial Review against the decision of an Adjudication Officer. Now normally in such cases an employer or employee will only be the Notice Party. A Notice Party unless they take part, in a Judicial Review are not normally liable for costs. However, there is an exception. If a submission by an employer or an employee leads an Adjudication Officer to make an incorrect finding in law or a failure to apply fair procedures the Notice Party can be held liable for the costs, even if they do not take part in the Judicial Review.

This issue is relevant.

Some representatives do not see the WRC or the Labour Court as a “Court” per say or one where what might be termed “normal professional ethical duties apply”. Therefore the issue of not making submissions which are wrong at law does not seem to deter some representatives. Now some of this can actually be down to misunderstanding the law rather than any intention to mislead. However, even though an employer or employee may appeal a decision to the Labour Court if an application for Judicial Review is successful and if a Cost Order is made, it may wipe out an employee’s compensation or land the employer with substantial costs.

There is provision for issues to be determined by submissions but this is only when Section 47 (1) of the Act of 2015 is triggered. Both parties must be notified in writing and both have 42 days to object. This section is similar to Section 79 (2)(A) Employment Equality Act 1998 inserted by section 24 of the Civil Law (Miscellaneous Provisions) Act 2011.

Normally an Adjudication Officer will, if finding against an employee, simply dismiss. However Section 42 (1) of the Act of 2015 allows an Adjudication Officer to dismiss a complaint if an Adjudication Officer regards it as “frivolous” or “vexatious”. Under Section 77 A Employment Equality Act 1998 the power to dismiss also includes claims found to be “misconceived” or of a “trivial matter”. There is no such provision for either “misconceived” or “trivial matters” being a ground for dismissal under any legislation other than the Equality Legislation. Now in cases currently claims are regularly being made that complaints by employees are “frivolous” and “vexatious” or “trivial”. When such a defence is raised I sometimes wonder whether the words have been considered or are they

just used. In *Nowak -v- Data Protection Commissioner* [2013] ILRM 2007 Birmingham J said that the word meant a complaint which was “futile” or “hopeless” in that it could not have the desired result. In *O’N-v- McD* 2013 IHC he expanded on this as meaning a complaint which had no reasonable chance of succeeding.

There is a danger again in running such a defence. Firstly if successful and the matter is appealed to the Labour Court and the Labour Court determine that the claim was not frivolous or vexatious the Labour Court can remit the matter back to an Adjudication Officer. Secondly, if a defence is put forward again that the complaint is frivolous or vexatious relating to a legal argument that is put up and the employer argument is upheld and the employee subsequently goes by way of Judicial Review if the High Court upholds that the case was not frivolous and vexatious then it will be the employer who lead the Adjudication Officer to make a mistake in law and in those circumstances the employer can be responsible for the costs.

Equally the employer puts forward an argument on the facts and it is found on Judicial Review that that was an unsustainable finding of fact then again the employer could end up being responsible for the costs.

The same risks apply to employees.

The defence of frivolous and vexatious now seems to be a stock phrase that is thrown out by certain employer representatives. Solicitors and Barristers are certainly not the culprits and tend to do so in limited circumstances.

Claims before an Adjudication Officer – Section 41

Section 41 sets out the provisions for making a complaint. Section 41 (10) provides that an Adjudication Officer may require a person specified in a notice to attend and to produce to the Adjudication Officer any document in his or her possession custody or control that relate to any matter to which the proceedings relate.

It would be my view that this will be used extensively, particularly by employees, For example, in claims under the Organisation of Working Time Act to require the Secretary to produce all records. This would be, for example, where records were requested and were not furnished or where they were not given in advance of the hearing. I would also see it applying in cases involving Unfair Dismissal for the purposes of producing all documentation relating to the investigation and the dismissal itself. In National Minimum Wage claims for all the records, on a weekly basis, to show the calculation of hours worked and the rate of pay. It is not currently being done as cases are adjourned for documentation to be furnished but the threat of a summons is currently enough to obtain documents.

Where a Data Protection request has been made and “suddenly” documents appear on the day not previously furnished these are being “questioned” by Adjudicating Officers.

Where an employer does not appear the Adjudicator Officer can continue with the hearing.

Non Appearances where an employee does not attend means the case is dismissed.

REPRESENTATION BEFORE THE WRC AND THE LABOUR COURT

The right of representation is set out in Section 44 (9) (a). It includes Trade Unions and a Solicitor and a Barrister.

Representative bodies who represent a large number of employers have a right of representation such as IBEC or CIF and probably the Small Firms Association. Section 44 (9) (a) (iv) provides that any other person will have a right of audience if under Section 41 the Adjudicator so permits or under Section 44 (9) if the Labour Court so permits. This would include HR / IR representative or entities such as Insurance companies who represent employers.

While some entities will have an automatic right of audience others will not.

This issue of the right of representation was raised by among others the Employment Law Association of Ireland and the current legislation effectively mirrors what is in the Statutory Instrument which dealt with the Employment Appeals Tribunal. (S.I. 24 of 1968)

One issue which has not been litigated so far is what is the status of certain entities. There is one entity that represents a large number of employers who is in fact an insurance company. In many cases they are indemnifying the employer against any award made but will appear simply stating they are representing the employer. The issue then which is arising is whether they are representing the employer or representing themselves. If they are representing themselves because of the financial exposure they could be subjected to if an award is made then there is an issue as to just how independent they are, to what extent they should disclose to an Adjudicator or the Labour Court their interest in the case. A Trade Union certainly has no financial gain one way or the other from representing an employee. Entities, such as Ibec or CIF of the Small Firms Association, receive a fee annually from members. There can be no hidden agenda. A Solicitor or Barrister who works on the basis of an engagement letter but Solicitors and Barristers are precluded by Law from acting on contingency fees.

I have certain difficulties with an Insurance company representing an employer where they may have a financial exposure themselves if any award is to be made and that this is not disclosed to the Court or an Adjudicator. In Personal Injury claims you know whom a Solicitor is acting for as they are nominated by the Insurance Company in open correspondence. This point has never been raised before an Adjudicator or the Labour Court but I am aware of it having been raised before the EAT as regards legal advice privilege and litigation privilege and recently by the writer as regards legal privilege and litigation advice privilege. The issue of litigation advice privilege as it applies to one insurance company who represent employers only in cases is a point in issue in a High Court Point of Law Appeal from the Labour Court currently due for hearing under High Court reference 2016/253 MCA.

We will have to see how this develops. It is an interesting point if nothing else.

A Trade Union, Solicitor or Barrister or an entity which represents a large number of employers and has effectively representative status have automatic rights of audience.

Burden of Proof

The normal rules of evidence are that the person complaining must prove all the facts essential to his or her complaint. The standard of proof applied is the balance of probabilities.

In most employment cases the complainant will present their case first. It may be by way of submission, evidence or both.

I will deal with the issue of Unfair Dismissal cases and Equality claims later.

In claims under the Organisation of Working Time Act the case of Antanas Jakonis and Nolan Transport DWT1711 which was reported in [2011] ELR311 is a case where the Court held that the initial burden by way of an evidential burden was on the employee because of the provisions of Section 25 of the Act to set out the case with sufficient particularity to enable the employer to know in board terms the nature of the case. The Court held that the initial burden was on the complainant to support a stateable case of noncompliance with whatever was available to him or her to do so. Section 25 of the Organisation of Working Time Act states that in the absence of records the Burden of Proof is on the employer. Where there are records in accordance with the Organisation of Working Time Act then the legal and evidential burden rests on the employee. I have rarely seen records which comply strictly with the relevant Statutory Instrument. Where there are no records or where there are only partial records the employee in those cases need only set out matters with sufficient particularity to enable the

employer to know a broad outline of the case. In the absence of records then the legal and evidential burden will pass to the employer.

A regular defence which was coming forward from employers in relation to such claims was that it was a matter for the employee to specify times and dates for example when he or she didn't get rest periods even when records had not been produced.

In *Marcinuk -v- Wicklow Recreational Services Limited* which was an Appeal against the decision of the Labour Court DWT1315 Baker J said that as a matter of Law there was no requirement under the legislation that formal documentary or hard evidence be adduced to support an assertion or statements. In that case the Labour Court had held that assertions or statements were not sufficient to establish a case before. Baker J said that this was not a correct assertion of the law.

It would therefore appear that if an employee appears and there are no records and states that they regularly worked over 48 hours a week and can give their normal start and finishing times or contends that they didn't get their rest breaks where they may contend;

"Twice a week I would work up until 10pm and would start the next day at 11 o'clock" i.e. no 11 hour break; or "I would work 9-6.30. normally I would get a lunch break between 1 and 2 pm but sometimes it was between 12 and 1pm about twice a week and I didn't get an extra break", i.e., an additional break after working 4.5 hours.

That would appear to be sufficient. In claims under the national Minimum Wage Act the legislation is specific and provides that the Burden of Proof is on the employer to show that the employee received the National Minimum Wage. The terms of that legislation is slightly different and it would be my view that an employee coming in and saying I worked 40 hours a week and normally got paid €200 would be sufficient. The employee might well say that I worked 40 hours a week and received €200 as pay and €200 as expenses". Expenses are not wages under that Act. That would be sufficient.

In a claim under for example the Terms of Employment (Information) Act the claim is that the employee did not receive a document which complied with Section 3. In such circumstances the complainant would have to set out how they claim any contract they received did not comply but it would be sufficient if that was done by way of written submission.

In Unfair Dismissal cases then where dismissal is not an issue the Burden of Proof is on the employer. In a Constructive Dismissal case the Burden of Proof is on the employee. Some representatives can get into difficulty when asked

whether dismissal is in dispute and they say dismissal is in dispute. In such circumstances the employee goes first. I have been involved in cases where the employee has got into the box and produced a P45 along with a letter from the employer saying that your employment was being terminated by reason of Misconduct. In those circumstances the employer has effectively put up a defence that the employee has resigned. In those circumstances the employer is effectively tied and cannot then bring in evidence to justify the dismissal.

In Equality cases Section 85 (8) (1) of the Employment Equality Act 1996 provides that where facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her it shall be for the respondent to prove to the contrary. A similar provision is in the Maternity Protection Act 1994 Section 33 (A) (2). It is outside the remit of today's talk to talk about the Burden of Proof in equality cases which can be complex but I would refer you to an excellent paper given on the Practice and Procedure before the WRC and the Labour Court given by Mr. Tony Kerr on 1st October at the UCD Southern School of Law and Alastair Purdy's book on "Equality in the Workplace".

One issue which is regularly coming up is the issue of documentation produced by employers. Sometimes these will be off the shelf contracts of employment or staff handbooks which the employer has obtained. It will often be contended that this was what not what was originally intended or that a written contract actually meant something else. Again, it is outside the remit of this talk but colleagues should look at the issue of Parol Evidence as Parol Evidence cannot be accepted to vary any contractual documentation in the absence of ambiguity.

For colleagues who raise the issue that the breach, which may be a continuing breach, commenced some considerable time in the past and therefore the employee has no right to pursue a claim. I would refer you to the case of HSE and McDermot 2013 334MCA being a decision of Mr. Justice Hogan where he contended that there can be a continuing breach and an employee is not precluded from bringing a claim for same provided it covers the statutory period only. For example a case under the Payment of Wages Act this would be limited to six months prior to the date of submission or application to extend time back for 12 months.

PROVIDING REASONS

It is a requirement that an Adjudication Officer and the Labour Court give sufficient reasons for the decisions. Parties are entitled to know the reasons why they won or lost. This is covered in the case of OTA-v-Minister for Justice and Equality [2016] IEHC173 being a decision of Flaherty J. In Earagailiesc Teo -v-Doherty 2015 ELR326 Kearns P accepted bodies such as the Employment

Appeals Tribunal which would therefore include an Adjudication Officer or the Labour Court were only required to give a broad gist for the basis of their decision.

However, when dealing with European Legislation Case C-41711P is interesting in that in that case the European Court of Justice stated;

“according to a consistent body of case law, the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based which is a corollary of the principle of respect for the rights of the defence, is, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of the act”.

This may indicate that a different level of decision will be required in cases under legislation which came from the EU as opposed to local legislation. By this I mean a case under for example Equality legislation of the Organisation of Working Time Act as opposed to a claim under the Payment of Wages Act or the unfair Dismissal Legislation.

EMAILS

Unless you consent the other party cannot serve documents or submissions on you by email. This includes the WRC itself and the Labour Court.

Service is by “registered post”. Service before on a company would be by ordinary prepaid post but now must be by “registered post”. Section 6 of the Act of 2015.

I would caution against consenting to email. You could get more paper than you bargained for.

CONSTRUCTIVE DISMISSAL

In such cases previously an employee would simply submit a claim such as;

“I was constructively dismissed due to the actions of my employer”.

Now the guideline states that there must be;

“A clear statement setting out the details of the complaint”. This must be done when submitting the form.

Following the decision of the Supreme Court in Halal Meat Packers (Ballyhaunis) Limited –v- EAT [1990] E.L.R.49 pages 60-64 I have my doubts as to whether the Director General or an Adjudication Officer could refuse to hear a case. I have my doubt as to whether an inference can be drawn by the failure to set out all the details. I do envisage that this is an issue which will go to the Courts ultimately. Equally in a straight dismissal case I am entirely reject Paragraph 5 of the WRC guidelines that “An Adjudication Officer hearing the complaint may draw such inferences as he or she deems appropriate where relevant information is not presented in a timely fashion”.

Paragraph 5 states parties will be “required to submit” a clear statement setting out details of the complaint. This is completely contrary to Section 41 of the Act. That Section deals in considerable detail with the presentation of complaints and referral of disputes. Paragraph 5 of the WRC Guidelines has been simply licked from the wall with no statutory basis for same. If an Adjudication Officer were to draw an inference with no statutory basis to do so it would be a perfect Judicial Review. Saying that, they can draw inferences where provided for by Statute such as Section 14 Unfair Dismissal Act. In Constructive Dismissal cases my advice would still be to get a detailed statement and to submit it at the start. There will be cases where there are time constraints or it will not be possible or practicable to get the written statement from your client and to have it set out in detail when submitting the claim.

In such cases I would say submit first then as quickly as possible resubmit the form in hard copy with a full statement and requesting that both claims be amalgamated together. Nobody needs to be the first test case. Where time allows of course my advice would be to get the full statement written out. You will also need to set out the evidence of your witnesses. Before any statement is submitted it is probably advisable to have your client either writes their statement out themselves as to what they say happened and the reasons why they say that they were justified in leaving the employment or that you take instructions, complete the statement and have it approved by your client in advance. In cases where dismissal is not in dispute the employer side should submit.

Personally I rather the client writes it out in pen themselves and give it to me. This means that their words are used. This means that it is their story. This means that there can be no complaint that you didn't set out something or misunderstood something they said.

In Equality cases of course submissions would need to be done as this is required by the legislation.

You should note you will now have to make a choice between a UD and an Equality case. If you lodge both, the Equality will be deemed to be withdrawn unless you withdraw the UD case. You may therefore need to consider which

claim you should issue first particularly where there is a good chance the employee will get work and they have both a UD and an Equality claim for example a pregnancy related dismissal. You might also wish to consider a case against the State for dismissing the Equality claim but that is outside the remit of this talk.

UNFAIR DISMISSAL CLAIMS – DISMISSAL NOT IN DISPUTE

Where the dismissal is not a constructive dismissal case then the employer will be required within 21 days of the date of the request from the WRC to submit a statement in the original document and now the 21 days has been taken out. You will however get a request to do so within 21 days from the WRC. Mere assertions or denials, without details, will not be sufficient.

From now on in an Unfair Dismissal claim an assertion that the employee was fairly dismissed without submitting full details with back up documentation as to how the procedures were applied is unlikely to suffice. This will include setting out the employer's procedures on dismissal and how those procedures were actually applied and the evidence witnesses will give. For colleagues this means getting out the policies and procedures which the employer had in place. These policies and procedures while they may be set out in a staff handbook or often ones in smaller organisations which, in my experience, the employer is absolutely and completely unaware of. Colleagues are going to have to go through the staff handbook and then look to see how these procedures were actually applied in this particular case.

Where an employer's procedures were not followed it is my belief, and I may be wrong on this, that in cases before an Adjudication Officer or the Labour Court these procedures will be carefully examined. Failure to have followed those procedures may well result in a determination that there was an Unfair Dismissal and you will then be dealing with the issue of quantum rather than whether or not it was an Unfair Dismissal. Even where you do not submit in advance do not expect to get an adjournment to submit and expect to be questioned on the procedures and the Code of Practice on Grievance and Disciplinary procedures.

Where there are no procedures I can see that Section 14 Unfair Dismissal Act 1997 as amended will be applied. Section 14 (1) of that Act provides that an employer shall within 28 days after an employee enters employment give to the employee notice in writing of the procedures which apply.

Where no procedures are notified, which is unfortunately in a large number of entities, then I believe that the Code of Practice on Grievance and Disciplinary Procedures will be the standard applied by an Adjudication Officer or the Labour

Court to any dismissal procedures including cases where the procedures do not meet the standard.

I would caution those representing employers to go through the Code of Practice, where the company or employer does not have a disciplinary procedure to see were these applied and even where employers have procedures, to see if they comply with the Code of Practice. If they were not applied then I believe the employer is going to be in difficulties.

Employee representatives will have to submit their case also, their witness evidence and efforts to minimise loss.

SECTION 14 (4) UNFAIR DISMISSAL ACT 1977 AS AMENDED

I would say in cases going forward that the provisions of Section (4) of the Unfair Dismissal Act will be used far more often by employees. I consistently use Section 14. I have never yet received a response within the 14 day time limit to a Section 14 request. There are no provisions to extend time.

If you are acting for an employee and you have sufficient time it is worthwhile first serving a notice under Section 14. In those circumstances I believe that a claim form that sets out;

“I was unfairly dismissed. I submitted a request under Section 14 Unfair Dismissals Act 1977 as amended. The employer has failed to respond to my request for a statement; I do not know, according to the law, the grounds under which I was dismissed”.

This is in my opinion more than sufficient to ground a claim for Unfair Dismissal and sufficient to set out a “clear statement”. It will not work for an appeal to the Labour Court where there has been a hearing. It might if the employer fails to appear and you get an appeal in quickly.

I can see the issue being raised that the employee did not set out full grounds. The converse is that the employee made a request. It was a legal request that he or she was entitled to make. It was not responded to so the employee has not received the notification setting out the grounds that they were dismissed on despite the fact that they may have a lot of correspondence setting it out.

If furnishing such a request I would advise that the case of an individual employer that it is sent by registered post and by ordinary post with a certificate of posting as sometimes registered post is refused. In the case of a company serving it by ordinary post would, in my view, be sufficient but the Act of 2015 does refer to registered post so both might be preferable. I think it is also worth

requesting at the very start copies of all correspondence, notice of meetings, disciplinary procedures and grievance procedures that apply in the workplace. A Data Protection request should also be furnished. Many employers never respond. It is much easier to make a short submission where you requested documentation but got nothing.

Some policies within companies will provide that an employee must appeal within a specific period of time. If an employee has been dismissed and no appeal has been lodged, even if you are outside that period of time it would be my advice that you lodge an appeal even if it simply states "I appeal my dismissal".

If acting for employers I would be slow to refuse an appeal even if it is out of time or sets out no grounds. Even if the employee has lodged an Unfair Dismissal claim and has appealed in or around the same time I would go through the appeal procedure.

For those acting for employees I would advise them to spend the €6.35 and send in a Data Protection request. If something subsequently transpires that is not furnished to you it may assist.

PRACTICAL ISSUES ON UNFAIR DISMISSAL CASES

For most colleagues Unfair Dismissal cases are the most usual. One issue which arises in an Unfair Dismissal case is the loss of income. The Adjudication service is now stating that you are likely to be advised of a hearing date within 77 days (working) of lodging recently moved to between 3 and 6 months. Let us assume for example that hearing dates are now going to be scheduled within three to four months of a claim being notified. Let us assume an individual is dismissed on 1 December. The case comes before an Adjudicator for hearing on 1 March 2017 or even 1 April 2017. The loss in those circumstances is 3-4 months wages at that stage. The Unfair Dismissal Acts in Section 7 (3) refers to "prospective" loss. For representatives used to a 2 year delay this issue is going to be a new matter to deal with. I can see many employer representatives arguing "actual loss" only being due. The Unfair Dismissal Legislation allows an Adjudicator to look into the future to see what is the possibility of an employee obtaining employment.

The Unfair Dismissal Legislation does refer to the economic loss. It would be my view that an Adjudicator or the Labour Court will look to see what the economic loss is going to be. This was done in the case of Nurendale Trading as Panda Waste and Robert Burke UDD163 (currently the subject of a Judicial Review by the employer) I see that they are in no different position than a High Court Judge in a Personal Injury claim assessing future loss of earnings. Where reinstatement is the preferred remedy then I would advise that the proceedings issue as soon as

possible because the sooner the issue the stronger is the argument for reinstatement.

APPEALS

There is a right of appeal within 42 days of the date the Decision is made. Previously the legislation was 42 days from the date of receipt. Now it is from the date the decision is given. Extensions are only on “exceptional grounds”.

If a party does not appear before the WRC then there is a fee of €300 to appeal to the Labour Court. This arises by virtue of Statutory Instrument 536/2015. It is interesting that if one party appears before an Adjudication Officer and the other party does not and the party who appears decides to appeal there is no fee for the other party then subsequently coming to the Labour Court and defending the Appeal.

A further issue arises in relation to the “fee”. The provisions of Section 44 make no provision for a valid appeal being lodged requiring a fee. If the “fee” is not paid the Labour Court may refuse to list the case but you have appealed. This may well suit a party against whom an award is made to “delay” a hearing.

The Second issue is the “fee” itself. It is not set out in any Statutory Instrument. It is not set out in the 2015 or 2016 Rules of the Labour Court. It is set out in a Non Statutory Appeal Form only.

What happens if a non-represented person of limited means appeals, having not attended at the WRC? S.I. 536 of 2015 makes no provision for a refund. But equally I cannot find in the legislation a statutory power for the Labour Court to change a “fee”. The Minister may set a “fee” by Statutory Instrument but failed to do so. The Minister has that power under Section 71 of the Act, not the Labour Court.

LABOUR COURT (EMPLOYMENT RIGHTS ENACTMENT) RULES 2015 AND 2016

The Labour Court Rules are very carefully drafted. Saying this, there can be issues with some of the Rules. Firstly if course they are not Statutory Rules and the requirement to make written submissions may be contrary to Section 44 on a plain reading. Equally most Acts provide for the parties bring “heard”. The Acts do not provide for submissions.

Rule 6 provides for the delivery of submissions not later than 3 weeks after the delivery of the appeal. This is not three weeks after you are notified of receipt of an appeal. It is three weeks from the date that you deliver an appeal to the

Labour Court. This only applies in Unfair Dismissal Act cases and Employment Equality Act cases. I would anticipate it may well start to apply in other cases in due course. I have no problem with this. Exchanging submissions is beneficial.

Rule 12 provides that the Labour Court may extend the time for filing submissions “where exceptional circumstances are shown for the delay”.

The provisions of Section 44 (4) of the Act are incorporated into the Administrative Rule set out in Rule 6 and 12. At the present time some leeway is being given. However, the three week rule or 21 days as it is set out in the Rules is extremely restrictive. The Court may be seeking to rely on Section 20 of the Industrial Relations Act 1946. However that Act refers to the “regulations of its proceedings” but the “exceptional circumstances” may well be ultra vires the powers of the Court.

Rule 13 does properly record that there may be an extension of time for bringing an appeal in accordance with section 44 (4). These however are exceptional circumstances. Colleagues have 42 days from the date that the decision issues to lodge an appeal and exceptional circumstances is a high bar for a person to get over. This issue was recently dealt with by the Labour Court in Aiseiri Limited and Mary McCormack PTW/16/3. Rule 18 provides for the delivery of the Court not later than 7 days before a hearing date of details of the witnesses whom it is proposed to call and a summary of their evidence together with any documents upon which the parties intend to rely. Rule 18 and Rule 11 appear to contradict. It would appear that certain of the information certainly should have been given in the submission and replying submissions rather than simply seven days in advance of the hearing. Rule 18 does not appear to require that these would be sent to the other party by the party submitting nor that 6 copies are submitted.

Rule 55 dealing with procedures at hearing provides that the Court may curtail the examination of a witness which it considers repetitive or irrelevant and may curtail cross examination which it considers oppressive. Some concerns have been raised in relation to the use of the word “curtail” particularly in relation to cross examination. Of course oppressive examination of a witness should be curtailed. However, that cannot be allowed to lead to a bar on the adducing of relevant evidence or challenging evidence which has been given as Tom Mallon BL in his lecture to ELAI clearly set out.

Rule 56 is one which I consider varies from the current practices of the Labour Court to date. It provides that a member of the Court may address questions to a witness “for the purposes of clarifying any incomplete or unclear part of his or her evidence”. This Rule limits the Court to investigate issues raised by a party. It was not the prior practice but now the Court appears to me to be bound by this.

The practice of the Labour Court has been in many cases to go beyond what has been put in evidence by either party. Certainly the Court is entitled to clarify any incomplete or unclear part of evidence. The issue is whether the Court, when it has issued these Rules can go beyond that and certainly the practice to date has certainly been so, in line with is “pre rule procedures”. I see no issue with requiring more extensive legal submissions or to submit on a legal issue or a decided case.

In relation to Rule 62, it states that the Court may admit any duly authenticated written statement as prima facia evidence of any facts whenever it thinks it just and proper to do so. It has been argued by some that one could see the sense of permitting documents as proof of the contents such as attendance records, medical certificates or tachographs. However, the normal rules of evidence would be that originals, where they would be available, should be produced and should certainly be available for inspection. Certainly if a document is challenged than it would need to be proved. Now I am not saying that for example a medical certificate would require the Doctor to attend but certainly would require the original to be available for inspection if a question does arise as to how far this admission of evidence can go. It is difficult to see how a statement of evidence could be admitted from a witness who is not there to be cross examined. Certainly a Tribunal may admit hearsay evidence but its weight is limited if challenged.

Rule 63 provides for a single Decision being issued. There have been some arguments that there should be the potential for a dissenting opinion. Tom Mallon very clearly argued this point in a paper to ELAI this year. This has never been the practice of the Labour Court in the past but it has occurred in the EAT in the past on rare occasions. There are arguments both for and against this but the current system of having a single decision does, in my opinion, have significant merit. I can equally accept the counter argument eloquently put by Tom Mallon BL to the ELAI lecture that in the jurisprudence of the Courts dissenting opinions given in the past have become the rationale for majority decisions in the future. However the Labour Court does follow previous decisions normally to provide for certainty. I would certainly support the existing procedure but can see the logic for a dissenting opinion on legal issues but only one quantum figure.

SUBMITTING DOCUMENTATION TO THE LABOUR COURT POST THE 2016 RULES

I have included both the 2015 and 2016 Rules. The 2015 Rules are no longer on the WRC website. Rules 9 and 40 have changed. Previously before the 2016 Rules you could submit online. Now it has to be hard copies.

If a party acts for an employee in a case under a law implementing a Directive or Regulation an argument may possibly be made that under the Von Colson and Kamann principles this is an economic cost now placed on successful employee. This issue is, can that be compensated for.

APPEALS TO THE LABOUR COURT

Where a party appeals a decision of an Adjudication Officer to the Labour Court in an Unfair Dismissal or Equality case the party appealing will be written to by the Labour Court giving that party three weeks to submit detailed grounds of their appeal. They will be required to submit five copies. They will be required to submit one further copy to the respondent or the respondent's representative if the respondent to the appeal had nominated a representative. Evidence of furnishing same will be required. The Labour Court will then write to the Respondent in the appeal, whether they are the employer or the employee and giving them a period of three weeks to lodge their documentation in a similar fashion. It appears that you are going to get one chance to submit the documentation. It is not going to be a matter of submitting something and then turning up for a hearing with a load of additional documents or witnesses. If witness is going to be called you are going to have to set out an outline of the evidence that they are going to give. Failure to submit the documentation in time will mean that you are treated as having abandoned the appeal. There are the usual "exceptional circumstances" extensions. I would envisage this issue going to the High Court at some stage. I believe such a challenge may well be rejected as the Labour Court is entitled to set its own proceedings unless they are "unfair". I do not see them as unfair per se. However, if submitted well in advance and there is no prejudice to the other side particularly if there is case law issues of significant documentation to assemble as the time limits are tight. These new Rules I believe will be applied not just to Unfair Dismissal cases and Equality cases in the future. If so there is a lot of work to be done very quickly. I do see "tactical appeals". You act for an employee. You win. The employer did not appear or appeared and presented little evidence. If you get your appeal in first you can submit effectively a very concise statement. You can always withdraw it later. If you let the employer appeal you may well have to deal with a very extensive appeal document. If you can get in first and even if the other side submits extensive documentation you do not have to submit further. For an employer who wins lodging an appeal first can give you control of the process.

In cases other than Unfair Dismissal and Equality six copies must be submitted seven days before the hearing but you do not have to serve the other side, currently.

LEGAL ADVICE PRIVILEGE AND LITIGATION PRIVILEGE – TRAPS

This issue has been heard before the Employment Appeals Tribunal from a colleague of ours from Monaghan being Mr. Brian Morgan. I have already made a submission to the Labour Court in an Unfair Dismissal case on this issue where we requested a witness summons to an in-house Solicitor. It did not need to proceed but the issue will be litigated upon fully I believe in due course. Colleagues here today who are not in-house Solicitors may well ask why would this be relevant to them. I would simply say AKZO Nobel Chemicals Ltd and another and European Commission C-550/07. Let me explain. In house lawyers for EU law cases have no legal privilege.

My understanding of legal advice privilege is that it only applies in the case of a company to Directors. It does not therefore apply to a HR Manager or other individuals within the organisation. If it is communicated from a Solicitor who is in practice to, for example, a Director and the Director then communicates it to others within the organisation that are not authorised to receive legal advice then it is treated as third party correspondence which can be discovered. Equally a Solicitor dealing with a HR Manager unless there is a Board Resolution allowing him or her to receive legal advice an application can be made to disclose discussions with the Solicitor.

In employment cases going forward I perceive that there will be a lot more legal arguments coming up. One of these is going to relate to the professional privilege which Solicitors have. It is not unfettered. Persons who are not Solicitors/ Barristers do not have legal privilege. Will there be an attempt to restrict access in Workplace Rights disputes. I certainly see there being resistance to disclosure of advice. I envisage that Adjudicators may attempt to side step the issue. This has been done in one case of mine. The Labour Court will have to rule on the issue. I do not see the Labour Court doing anything but applying the law. This issue is before the High Court, as it is.

I would strongly advise for corporate clients that you get the Board to pass a resolution as to who within the organisation is authorised to obtain legal advice.

Once you have that resolution I would advise that it is faxed to you and placed on a general file. You may ask why you would say faxed rather than emailed. If it is faxed to you there is a date stamp when it is received. It is then very easy to prove when it was put in place. You could have it emailed but then you need to be able to print off the email and the resolution. Maybe you do both.

It is then necessary to make sure that it is clearly understood that legal advice will only be given to those named individuals and that in distributing it within the organisation the contents of any such legal advice should only be given to those who are authorised to receive it. Employers should be carefully advised

that legal advice privilege is not absolute. It is outside the remit of this seminar to deal with the issue of legal advice privilege but it is probably one which practitioners are going to need to start carefully reviewing.

In the case of non-legal representatives I envisage that the issue of legal advice privilege is going to become a significant issue,. It is likely to be an issue which will be litigated before the Labour Court regardless as to which way the Labour Court rules because of the importance it is likely to go to the Courts for a final determination.

If a representative of an employee in an Unfair Dismissal case can get their hands on all the advice to the employer this can be significant as there is no discovery process in the WRC or Labour Court. I envisage in cases on Appeal to the Labour Court there will be more application for witness summons to employer or Company Secretaries of Non Solicitor representative entities particularly those who act “for gain” as opposed to being a representative body. Even probably against representative bodies. These issues did not arise in the EAT but I fully expect them to be the subject of litigation.

PROTECTED DISCLOSURES ACT

It should be remembered that Act covers protection from penalisation. In dismissal cases compensation to a maximum of 5 years remuneration can be made. There is also provision for interim relief for an application to the Circuit Court to prevent an Unfair Dismissal. It is outside the scope of today’s talk to deal with this in any detail but I thought it important to bring SI 464/2015 to the attention of colleagues, as a reminder.

PUBLICATIONS OF DECISIONS

The Labour Court applies its existing procedures. Publication is speedy. The WRC will be issuing REDACTED decisions every 3 months. There is a huge amount of work to be done to ensure the parties cannot be identified. This problem was not envisaged by the drafters of the legislation. They thought, I believe, it was just a matter of deleting the names. This was not foreseen as a problem due to lack of consultation with practitioners. The Labour Court regularly issues updates of recent decisions. Open it up and you just get the new ones. The WRC just dump them onto the website. No note at the side highlighting the recent ones so you have to keep track if the latest published WRC to review them. There is work identified to create a website more akin to the old Labour Court website. Equally recent instead of “a worker” and “an employer” the industry is identified for example “managed service provider” in future it is likely to be identification such as “a Nurse -v- a Nursing Home”.

ENFORCEMENT

Where a Decision of an Adjudication Officer is not carried out then after 56 days an application may be made to the District Court under Section 43.

The District Court shall give an Order or like effect. There is no right for the employer, in such circumstances, to be heard.

In an Unfair Dismissal case where reinstatement or reengagement is ordered the District Court may instead of directing the employer to comply order compensation of an amount as is “just and equitable” up to 104 weeks remuneration. This is provided for by Section 42 (2). However, in cases before the Labour Court should their decision be ordering reinstatement or reengagement no similar provision appears? In the case of a decision by an Adjudication Officer the matter going before the District Court will be another level of expense for parties. Effectively it will be a hearing of the issue of compensation unless you have a labour Court Determination. Previously in cases involving reinstatement it was an application to the Circuit Court and if reinstatement was not being consented to effectively an award of 104 weeks wages was made.

Where cases go before the District Court colleagues may well be in a situation that, in the case of a company, that a company Director will attend to argue that compensation rather than reinstatement or reengagement would be appropriate. In the case of Declan McDonald and McCaughey Developments Limited and Martin McCaughey [2014] IEHC 455 being a Judgement of Mr. Justice Gilligan is interesting in that effectively it would appear that a company Director has no right of audience in such a case. In the case of an Unfair Dismissal claim, instead of ordering reinstatement or reengagement if an Adjudication Officer had ordered for example 104 weeks remuneration as compensation then there appears to be no right for the employer to go to the District Court and argue in relation to the level of compensation. In any decision other than Unfair Dismissal the District Courts only role is to affirm the decision.

If either party appeals a Decision and the appeal is abandoned then the 56 days after which an application can be made to the District Court will run from the date of Abandonment.

It will be interesting to see what happens where, for example, there is an appeal to the Labour Court. The Labour Court is providing, for example, in Unfair Dismissal cases that the party appealing will have three weeks to lodge their documentation and if they fail to do so they will be deemed to have abandoned their appeal. Clearly the Respondent will be so advised. In such circumstances then there will be an application probably to the District Court.

I can envisage issues arising where the Labour Court so orders that an appeal is deemed to have been abandoned and the party who issued the appeal seeks to challenge same.

This is an issue that I do see ultimately going to the High Court, particularly as regards to the Rules specified by the Labour Court as to the time limits for lodging documentation and whether a matter can be deemed to have been abandoned.

Where matters go before the District Court the District Court can award interest under Section 22 of the Act 1981. If there is to be an application for interest then clearly an issue is going to arise as regards the right of representation because this will be a new matter which will need to be argued.

Until the Act came into operation an application previously was to where the employee was employed. Now Section 43 (5) provides it will be to where the employer concerned ordinarily resides or carries out any profession, business or occupation. Now let us take the example of where an employee works in Cork. The business closes in Cork. The remaining business premises of the employer is in Co. Donegal. The application will now be to a District Court in Donegal. This will be an unnecessary additional cost to an employee having to get representation. It will mean that the instructing Solicitor will have to instruct another firm of Solicitors in Co. Donegal to move the application. This involves significant additional work and costs. If it is a case where reinstatement or reengagement has been awarded it may mean briefing a Counsel in the locality or going yourself before a District Court you are not used to appearing before. Again, this will be dealing with Counsel and Solicitors which colleagues may not normally deal with if using local Solicitors and who will not know your client. I do not know why this provision was put in.

Claims will still be heard in the place where the employee worked. Implementation will be where the employer resides or carries on business.

In the case of a company which would operate in Cork but would have its registered offices in say Dublin then I believe the provisions are wide enough to enable the employee to bring implementation in Cork. One issue which I perceive will create difficulties is where the employer is based abroad. There is no provision relating to same. If you have an employee working in Ireland as a sales person. They are based in Cork. The company is a French company. They have not complied with the Companies Act in having a registration on the external register. If they did and their office for service of documentation is in Mayo the implementation is in Mayo. If they have not what is the position? Will implementation then be in Cork or where will it be? If the wrong application is brought, by which I mean the wrong location, this may very well result in a Point of Law Appeal where the cost could wipe out the award to the employee. You

certainly can't bring the case in Paris but the legislation is silent on the issue of such companies.

THE ROLE OF THE CIRCUIT COURT

The talk that we are giving today is about the Workplace Relations Commission. Saying this, it is important to understand that the Circuit Court still have a role. That role is Employment Equality Legislation and certain interim reliefs in Unfair Dismissal cases and enforcement of Labour Court determinations under the Industrial Relations (Amendment) Act 2001 as amended.

Gender discrimination claims under Section 71 (3) of the Employment Equality Acts 1998 may be referred to the WRC or to the Circuit Court.

There is an unusual provision in that Section 80 (4) of the Employment Equality Act 1998 does enable a Circuit Court Judge to request the Director General of the WRC to nominate an Adjudication Officer to investigate and prepare a report on any questions specified by the Judge. Where such a report is prepared it must be furnished to the Plaintiff and the Defendant. It will not be treated as evidence and an Adjudication Officer may be called as a witness to give evidence in the proceedings. At the conclusion of the evidence in a case a Circuit Court Judge may refer any issue relating to the application of the law to the Supreme Court.

The Circuit Court has a role under Section 6 (2) (aa) or (ba) of the Unfair Dismissals Act 1977, Section 11 A91) of the Industrial Relations (Amendment) Act 2001 and Section 11 (2) of the Protected Disclosures Act 2014 for interim relief pending a determination of a complaint.

INSPECTION OF EMPLOYERS RECORDS PURSUANT TO A DIRECTION OF THE LABOUR COURT.

Section 30 provides that the Labour Court may direct the Director General to arrange for an inspector to enter any place or premises belonging to the employer who is party to the appeal and performing the functions under Section 27 as specified in the direction concerned. Where an inspector completed the inspection the report prepared will be provided to the Labour Court. The Labour Court shall consider the report and should give a copy of that report to the parties to the appeal concerned.

This is a very important power which the Labour Court will have.

I can see this Section could be used in a number of cases for example;

1. National Minimum Wage Act claims for the purposes of producing the records and preparing calculations of wages due.
2. In Equality cases in equal pay claims and possibly even for example in equal treatment issues where for example there is a claim that individuals in a separate category receive better conditions of employment or additional hours.
3. Organisation of Working Time. I can envisage issues relating to working time records, particularly the review of documentation for employees claiming that they did not get appropriate rest and break intervals and in the case of trucking companies that this is likely to be an issue which will arise particularly where records are not produced.
4. Clearly in the area of agency workers, fixed-term workers and part-time workers where issues arise as regards the categorisation of particular workers and in interaction with others in the workplace as regards conditions of employment are issues which often arise in cases.

In cases where the employee can, on the balance of probabilities, indicate to the Labour Court that there are records which are not being produced I would envisage that this Section may be used by the Court to obtain those records. There is no procedure, in the Labour Court, or before Adjudicators for discovery.

Because of the interaction with Section 29 such reports are likely to be the subject of an examination or cross examination at a subsequent hearing before the Labour Court.

Where employers do not produce the records and an inspection is requested by the Labour Court it is likely that any non-compliance with any area of employment law is likely to result in the possibility of a compliance notice also under Section 28 as the inspection will have been carried out under the powers in Section 27.

APPEALS TO THE HIGH COURT

The time limit for an appeal to the High Court has effectively been extended to 42 days. This is a useful extension to practitioners. Colleagues need to be careful about such appeals. Where the appeal relates to an Equality case under the Employment Equality Acts Rule 106 of the High Court applies.

In Point of Law appeals to the High Court the Respondent is the other party to the case before the Labour Court. The Labour Court is not a Notice Party Rule 84C and Rules of the Superior Courts 1986 Order 1 2 Rule 2(A 9a) If you are acting for a Respondent you must enter an Appearance within eight days . This can be extended. However you must lodge a statement of opposition BEFORE the return date. The Central Office staff sometimes try to cajole persons into having

the Labour Court as the Respondent. The Labour Court should not appear in the title to the case.

In Judicial Review proceedings the Labour Court is the Respondent with the other party to the case before the Labour Court as the Notice Party in the title.

I had it recently where the Central Office insisted the proceedings were changed by having the Labour Court as the Respondent or at least the Notice Party and it had to go to a Registrar to have it rectified. You must serve the Labour Court in Point of Law cases and they should appear at the end with the parties to be served.

FAILURE TO PAY COMPENSATION

Where an employer effectively fails to comply with Section 43 or 45 directing an employer to pay compensation to an employee it will be an offence not to do so. It shall be a defence in proceedings under the Section for the defendant to prove on the balance of probabilities that he or she was unable to comply with an order due to the financial circumstances. These complaints will not be brought by employees. They will be brought by Inspectors. In cases where compensation is not paid I would envisage that complaints will issue to Inspectors and that prosecutions would follow.

If fined it is a Class A fine or imprisonment for a term not exceed 6 months or both. I can see the defence of inability to pay being raised. If it is a company that raises such a defence then there is to be the issue of fraudulent trading if it continues to trade. It will certainly be enough to back up an application to the Courts for a winding up of the company on the basis that evidence was given that they were unable to pay their debts and liabilities as they became due. In the case of an individual they may very well be handing the bankruptcy application on a plate to the employee.

INSPECTORS

Section 26 provides for the appointment of inspectors.

Section 27 sets out significant powers for inspectors.

Inspectors will be entitled to enter any place of work which is being used in connection with the employment of a person or where they believe that records or documents relating to a person so employed are kept. To 1 October 2016 there were 3400 inspections and 1300 employers were found in breach of legislation. €1 million in wages have been recovered. This sounds a lot. It is in fact just less

than €20,000 a week or €770 per employer found to be in breach. A minimum Notice claim for a €400 net a week for an employee with 5 years service would exceed this alone. This will include not only the workplace itself but also possibly an Accountant's office or those providing book keeping services.

The inspector will be entitled to take copies of any books records or other documents. This includes records stored in non-legible form. This would include for example documentation which is encrypted. Clearly the inspector will be entitled to obtain the codes. The inspector can remove such books and records. There are restrictions on entering into a private dwelling without consent. If consent is not forthcoming then an inspector can obtain a warrant.

Reports of an inspector pursuant to Section 29 may be used and admissible in evidence in proceedings against an employer before an Adjudication Officer, the Labour Court or a Court established by law. What is interesting is that Section 29 (3) will allow the examination and cross examination of an inspector in proceedings.

COMPLIANCE NOTICES

One issue which colleagues are going to have to deal with is the issue of compliance notices.

I would be of the view that they would be substantial additional work which colleagues would need to be prepared to undertake.

Where a compliance notice is served colleagues will be dealing with;

- (a) A contravention;
- (b) Assisting an employer complying with any direction or refraining from acting in contravention of any compliance notice. An employer will have 42 days to appeal any notice.

The provisions of Section 20 (5) of the Industrial Relations Act, 1946 will apply to any appeal to the Labour Court. There is a further appeal to the Circuit Court.

An Inspector can withdraw a compliance notice. I would envisage that this would occur where there has been compliance.

The provisions of Section 28 will not prevent an employee bringing a claim even when a notice is withdrawn.

Where a compliance notice has been appealed to the Labour Court or on to the Circuit Court I do not see such an appeal being able to be used to delay cases coming on before an Adjudicator.

FIXED PAYMENT NOTICES

Where an inspector has reasonable grounds for believing that a person has committed a relevant offence the inspector can issue what is termed a fixed payment notice. Five Fixed Payment Notices issued to 1 October 2016. This sum cannot exceed €2000. The individual or company receiving it has a period of 42 days to appeal. What is interesting in the legislation is that the person who receives the fixed payment notice is not obliged to make the payment but if they do not then a prosecution can issue after 42 days. The relevant offences are ones which are most likely to arise in employment rights cases. They could very well result from an inspection requested by the Labour Court. The three relevant offences are under Section 11 Protection of Employment Act 1977, Section 4 (4) of the Payment of Wages Act 1991 which effectively is not providing payslips showing gross and net wages and Section 23 of the National Minimum Wage Act being failure to comply with a Section 23 notice within the statutory period.

In National Minimum Wage claims it is a requirement, before proceedings can issue, that a request under Section 23 is furnished. In a significant number of cases a response is not furnished within the statutory period.

For the purposes of getting a response, prior to the Act coming into play, complaints could be issued to NERA but now to an inspector. When submitting such complaints it is important to set out that a request was made under Section 23 and to notify that there is a claim before the WRC who are seised of the proceedings. If you do not an inspector can investigate a complaint of non-payment of National Minimum Wage and if they do not being aware that there is proceedings in place your right to pursue a claim may be lost.

I would envisage that where complaints are made that the fixed-payment provision will start to be used.

INDUSTRIAL RELATIONS (AMENDMENT) ACT 2015

This is an Act which colleagues may not normally come across. The Act relates to submissions being made to the Labour Court for Sectoral Employment Orders. Section 20 of the Act provides for a prohibition on penalisation. This can result in a claim for penalisation under the Industrial Relations (Amendment) Act 2015 or an Unfair Dismissal claim, but not both.

Section 34 inserts a new interim relief where an employee makes a claim for Unfair Dismissal under Section 6 (2) Unfair Dismissal Act 1977 by inserting a new paragraph (aa). In such circumstances an application may be made to the Circuit Court for relief. The relief is similar to that in Section 39 of the Protected Disclosures Act.