Law Society of Ireland/Skillnet

Termination of Employments

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INTRODUCTION

When looking at the topic of Termination of Employment they can roughly be split between:

1. Unfair Dismissals;
2. Equality Dismissals; and
3. Redundancy.

I used the word "roughly" on purpose. Sometimes the Redundancy can become an Unfair Dismissal or an Unfair Dismissal can be a Redundancy. Sometimes the determination can both be an Unfair Dismissal and a Redundancy. At times we may have an Equality claim and an Unfair Dismissal claim. The WRC will point out that you cannot run an Equality and an Unfair Dismissal claim and you must elect. They will say that if you fail to elect the Equality case will be dismissed. This I have a problem with. There is nothing to stop the State in enacting legislation to provide that you cannot bring both, an Unfair Dismissal and an Equality Dismissal case. However, as the Equality Legislation derives from European Law it is cannot be secondary to local legislation being the Unfair Dismissal Legislation. Therefore, someday I see the Equality Dismissal case being dismissed by the WRC and this matter going then on either the Point of Law or more likely a claim against the State for failing to vindicate rights. Saying this, it is possible to bring an Equality case and an Unfair Dismissal case particularly where the Equality claim is brought up to the date of the dismissal but not including that date and the Unfair Dismissal applies to the dismissal itself.

Now that we have got the easy issues out of the way, I would propose looking at the issue of termination of employments. I am going to concentrate on Unfair Dismissal claims and Redundancy claims primarily because of the fact that these are the cases which you will more often than not come across. I will however cover the issue of Equality dismissals particularly in the area of pregnancy related dismissals or the dismissal of a woman who has recently given birth or is breastfeeding.

In dealing with the Termination of Employments this is an issue which I have been given an hour to speak on today. The reality on it is that this is a topic which could take a whole day in itself. On that basis I am going to try to highlight the issues which are effectively the traps for those either acting for employers or employees.

APPROACHING CASES

One issue which invariably now seems to arise in cases is that of the defence of a claim being spurious and vexatious arising nearly as of course. I am constantly surprised at this being raised by those who might not

actually know what it means. I therefore thought it might be useful to set out what this actually is.

SPURIOUS AND VEXATIOUS - WHAT IS IT?

This argument is regularly raised nearly as a throw away comment by some representatives when claims are brought to the WRC and they are defending on behalf of employers.

Helpfully in case ADJ-00010961 the Adjudication Officer in this case has helpfully set out what this phrase actually means.

The Adjudication Officer has stated that;

"A legal complaint is said to be frivolous when any decision made by a Court or Tribunal cannot change, or improve upon as it may be, the outcome which already exists for the parties."

The Adjudication Officer in this case pointed out the meaning of the words frivolous and vexatious were articulated by a decision of the Supreme Court by Barron J in Farley -v- Ireland and Others [1997] IESC60 where he stated;

"So far as the legality of the matter is concerned frivolous and vexatious are legal terms. They are not pejorative in any sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case. Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious."

The Adjudication Officer pointed out that in the case of Fay -v- Tegral Pipes Limited and others [2005] 2. IR261 the Supreme Court reiterated the principles already well established and where Mr. Justice McCracken stressed that the real purpose of the Courts inherent jurisdiction to dismiss frivolous and vexatious claims was firstly to ensure that the Courts would be used only for the resolution of genuine disputes and not for "lost causes" and secondly, that parties would not be required to defend proceedings which could not succeed.

The reason for quoting this case at some length is that the test of what is frivolous and vexatious is quite narrow. The phrase unfortunately seems now to be used nearly on a daily basis as a defence to any claim that is brought by an employee.

Some, when representing employers, believe that it sounds very good to make such a claim. If we could just give an example of the type of case where the allegation of a claim being frivolous and vexatious would be raised but which is not frivolous and vexatious would be where example an

employee claims that they were not paid for their holiday pay in advance contrary to the provisions of the Organisation of Working Time Act. In cases like that often the employer will come in to say that the holiday pay was paid albeit not before they went on holidays and therefore that the claim was frivolous and vexatious. Such a claim can never be frivolous and vexatious because if the monies were not paid before an employee went on holidays then in those circumstances there is a potential to obtain compensation of up to 2 years wages. Of course, nobody is going to get two years wages for that but it is not a frivolous and vexatious case. If however an employee was to claim, for example, that they did not receive an enhanced rate of pay for overtime where their contract simply provided for a set hourly rate or pay then if they brought a claim for enhanced overtime payments that may well be and most likely would be a frivolous and vexatious case.

CCTV

Before getting into the issue of terminations I think it might be useful to raise an issue relating to CCTV.

We are seeing an increased development in technology. This means that companies, and in particular HR professionals, are increasingly having to consider the ways in which data protection and privacy may impact on employment issues. A common challenge is CCTV.

Installing CCTV

It is very important to check the Data Protection Commissioner's website on the use of CCTV. Employers should inform staff of the presence of cameras. They should also be informed of the purpose for which they have been installed. It is useful to conduct a privacy impact assessment before installing CCTV so that if a query is ever raised, the employer is able to demonstrate that it was a balanced exercise between the employer's legitimate purpose and the right of individuals. Employers will have to advise employees that there is this CCTV, that they may be recorded, the purpose of same and their right to have it deleted and to inspect it.

Covert CCTV

Sometimes the reason for informing employees about the presence of cameras would defeat the intended purpose. Covert CCTV can be used. It is not automatically unlawful. However, the employer will have to show that there were legitimate reasons for doing this. It will be more difficult to prove and the employer is going to have to put additional safeguards in place.

Employers need to be aware of the recent European Court of Human Rights decision is Lopez Ribalda -v- Spain. This is one where covert surveillance was used. A group of 5 supermarket cashiers were dismissed following a disciplinary investigation. In that case CCTV was relied upon as evidence. The images were taken by hidden cameras. Staff had been informed that CCTV was being installed. The purpose they were informed was to combat

the increase in thefts in the store. What the employees were not told is that the employer was concerned that some of the cashiers were involved in these thefts and that a separate set of hidden cameras were put in place to secretly film the cashiers at work. The cashiers knew where the CCTV as advised to them was but not where the hidden cameras were. In this case the employee admitted that they stole goods. They brought claims. The claims were not in relation to the dismissal as they had admitted it. It was that there was a breach of the Spanish Data Protection Legislation and their right to private life had been infringed without sufficient justification.

Employers need to be aware that even if an employee may not be able to pursue an Unfair Dismissal case because of the fact that it involved theft, the employee may still be able to bring a separate claim for breach of Data Protection Legislation and/or interference with their private life.

This is a risk which employers need to very careful of.

Where CCTV is being used it is vitally important that:

a) The employees are advised that CCTV is being installed;
b) The purpose of same;
c) That appropriate signs are put in place advising that there is CCTV and what its purpose is.

If the employer intends to use the CCTV for a different purpose or to use hidden CCTV then in those circumstances the employer needs to be able to justify at the time that the CCTV is being installed what the justification was and why it was not being advised to the employees.

In addition employers must be aware now under Data Protection Legislation that if there is CCTV whether covert or not and an employee requests a copy of it even covert CCTV will have to be produced. Failure to do so could subsequently result in a claim against the employer.

WHAT KIND OF PROCESS DO WE HAVE?

For those who dealt with the Equality Tribunal ("ET") there is little change. Submissions were put in. They were exchanged. The changes before the WRC is they now tend to look for the case law which an Equality Officer rarely did.

For those who would then have dealt with appeals to the Labour Court, again, there is little change.

For those who were used to dealing with the Employment Appeals Tribunal (EAT) matters have utterly changed. You now have the issue of submissions in advance, having to deal with case law and a myriad of other factors.

The WRC were set up as an adversarial system. That is the basis of their current rules. These will be changed. The case of Minister for Justice, Equality and Law Reform - Appellant, the Workplace Relations Commission

- Respondent, and Ronald Boyle and others -Notice Parties, 2017 IESC43 is a Supreme Court decision. This utterly changed the jurisprudence of the WRC and the Labour Court. The Supreme Court has held that the WRC is an inquisitorial system. The Labour Court had stated in two cases, admittedly orally, that the Labour Court is an inquisitorial system. Sections 41 (1) (5) and Section 44 (1) which relate to the WRC and the Labour Court are virtually identical.

I will readily admit that I understand what an adversarial system is. I am unsure as to what an inquisitorial system is. The best that I can say is that the Equality Tribunal was more of an inquisitorial process than an adversarial process. Submissions were exchanged. A hearing was called. The Equality Officer came in to the room. They started the questioning. Yes, both parties could then raise other issues with their client that they felt may not have been covered and there was cross examination. However, it was very much an inquisitorial process and Equality Officers did exercise their powers to go and visit premises and undertake an on-site inspection. How the WRC and the Labour Court are going to apply the inquisitorial process, is going to be interesting and is going to be a challenge for everybody involved in Employment Law.

SOME PRELIMINARY THOUGHTS

Before getting in to the body of the talk today, I think it is useful to look at some practical issues which those of you running termination cases are going to need to address over the coming months.

ACTING FOR EMPLOYEES

The first issue when acting for employees is not so much to concentrate on what their complaint is but rather what complaint or complaints whey may have. I will be dealing with this later in this talk under the heading “Why bring one claim when twelve will do?”

While taking full instructions from an employee, as to the all issues relating to their employment, it often emerges that they have many more complaints than the one that they came in about. I would equally point out that often the complaints that they come in about may not be a good claim but when you go through matters with them you may identify other claims which they may have.

I accept everything my clients tell me. I equally accept nothing they tell me. Because employment cases are extremely important, and this is particularly so for employees, it is vitally important to go through their story and to check it. Sometimes it may in fact be a form of cross examination of your own client. There is a lot of drilling down that may have to be done. For

example in an Unfair Dismissal case you will normally ask an employee who has been dismissed have they had any previous warnings. Many times I have been told no and that when this is then questioned you get told that there were previous warning but

"*They had not accepted them".*

It would be my view that when acting for employees that you get a statement from them as to what their claim their case is. In dismissal cases I would ask them to set out what they say the reason for the dismissal is and what the employer says the reason for their dismissal was. Often these are mutually exclusive.

At this stage, I think it is useful to look at the issue of costs when acting for employees. You will meet the employee. You will go through matters with them. In an Unfair Dismissal claim you will have to go through the disciplinary procedure that they went through and the appeal procedure and often you may have to advise them to put in an appeal. I want to look at some of the time that is involved in actually bringing an Unfair Dismissal case under the procedures that we have at present which hopefully will become a lot less complex when the new WRC Rules issue.

Some of these costs will, however, still arise. I am going to look at the position of an Unfair Dismissal case.

a) 1 hour to get instructions.
b) 30 minutes to set out a claim - short version.
c) 1.5 hours to finalise submissions to take account of meeting the client and getting their instructions.
d) 30 minutes to advise on Data Protection and Mediation both of which can be extremely important.
e) 1 hour minimum between lodging a claim to get a hearing date for usual client interaction.
f) 1 hour for a final meeting with the client before the hearing.
g) 1 hour to review the employer's submission and to get your clients responses and to go through them with your client.
h) 2 hours for a hearing - minimum.
i) Travel to and from the hearing, say 30 minutes.
j) 1 hour to review the decision and to discuss with the client whether there will be an appeal.

That is a minimum time of 10 hours. Take your hourly rate and multiply it. Let us assume it is €300 an hour. The cost is going to be €3,690. Do you run the case on the basis that you have to win to collect this? We all run businesses so you need to get a decent deposit. Personally, I believe that the cost now of running an Unfair Dismissal claim is closer to around €6,000 inclusive of VAT.

I will look in this talk at other claims that can be brought often which may go some of the way of getting some monies toward defraying costs. There will be a cost in dealing with those claims themselves but often they are worth enough to significantly recoup some of the costs in running an Unfair Dismissal case.

ACTING FOR EMPLOYERS

If acting for employers you will have to review the entire disciplinary process in an Unfair Dismissal case. You will have to look at lodging a detailed statement of all your evidence. You will at least have to have all the evidence available for an Adjudication Officer to go through. If you have the add on cases, your opposite number will have put you through reviewing for example all rest periods in a working time case. If you do the simply deny everything and say simply that the employee got a fair hearing and all their rights and good representative on the other side may show your statements to be "untruths". And this then goes to the whole issue of credibility in relation to the entire process.

There is therefore a significant cost in reviewing matters to date and preparing going forward.

Some employer representatives work on the basis that the statement will be produced on the day. That is no acceptable. An individual is entitled to have a fair hearing. Producing the documentation on the day may well result in the employee representative saying "I want an adjournment". If they do not get it, they have turned up and they can potentially look for a Judicial Review of the WRC for forcing them on in a case where they have not have an opportunity to see the employer's case.

When acting for an employer, you need to work out the strengths and weaknesses of your case.

When acting for an employer sometimes it will just not be economical. Let us take the situation of an employee who earns €400 net a week. They were fired 6 weeks ago and yesterday got a new job at €400 a week. Their maximum compensation is therefore €2,400. Unless you have a lot of add-ons, it is just not economical often if acting for an employee to bring the case. If acting for an employer is it going to be economical to defend a case where the maximum value is €2,400. Of course there may be "reasons" why the case must be defended but there is an issue of an economic value.

When acting for employers you have a difficult task of working our whether your client has complied with all procedures. If not, the employee will win. You can reduce the maximum award if you can show the employee contributed to the dismissal or fail to mitigate their loss. That mitigation of loss may not be known for a while.

MEDIATION

If acting for either employers or employees, you should consider mediation in the WRC. It costs nothing. It is not a sign of weakness to attend. You may get the case resolved. Many employers actually just want to tell somebody they are "good people" and then they are prepared to settle. Some colleagues forget that. Equally there are some employees who just want to be able to get it out that their employer was a "bad employer" and then they equally are prepared to settle. I would advise that you would consider settlements earlier. The earlier the settlement the less the costs to both sides. This helps to keep a settlement cost down for employers. For employee representatives an Unfair Dismissal award is fully taxable. There are no exemptions. Many believe that it is stated to be compensation that it is exempt from tax. It most definitely is not. If you settle you can claim the tax free termination exemption being the €10,160. In addition, you can claim a sum of €765 for each completed year of service. This has the advantage for both employers and employee representatives. The reality is that an Unfair Dismissal award is fully taxable. That means that 40% tax and 8% USC will be deducted from what the employee receives. For employers there is the employer's PRSI of 10.5%.

In a case which results in an award where the employee receives an award of €20,000 the result is:

Employer		**Employee**	
Award	€20,000	Award	€20,000
PRSI	€2,100	Tax and USC	(€9,600)
Cost	€22,100	Receives	€11,400

If the case settles for €15,000 and the employee only has one year service.

Employer		**Employee**	
Settlement	€15,000	Settlement	€15,000
Cost	€15,000	Exemption	(€10,925)
		Taxable	€4,075
		Tax	(€1,955)
		Receives	€13,045

Both the employer and the employee are better off. If the employee had six years services, there is no tax.

If acting for an employer or an employee, if the value of the case is in the region of €15,000 to €20,000 in an Unfair Dismissal case, it is better to settle for €15,000 then to fight for €20,000. If you are acting for higher paid executives, you may have SCSB. You need to be very careful if the employee

has a contributory pension, unless the employee can get €200,000 now tax free.

The issue of tax and Unfair Dismissal awards comes as a surprise to some. I have had comments like

"*But it was awarded as compensation".*

Yes it was, but Section 123 TCA 97 applies and the exemptions in Section 192 A TCA 97 do not apply.

The basis of the tax is that it is for lost wages such as Payment of Wages claims, Unfair Dismissal claims, Equal Pay claims or none payment of holiday pay as examples of awards which are taxable.

If it is for breach of a right such as not getting paid holiday pay in advance (a subtle difference), working too many hours, being dismissed for a ground under the Equality Acts or for compensation for breach of a right then it is not taxable. Unfair Dismissal is not a "right".

If you are acting for an employer and you get it wrong, the Revenue can go back up to 6 years and seek the tax, penalty and interest. In the previous example it is not just €9,600 but rather closer to €19,000. Take tax and penalties and the cost is €38,000 approximately

When acting for an employee, you will have a lot of explaining if the cheque comes in and is only for €11,400 when you have told them that the case is settled for €20,000.

For colleagues dealing with such cases, it is important to advise clients as to the tax implications. If you do not have the expertise you need to advise them to get tax advice. For employers this is not their accountant. It is from a tax advisor. This is a different kettle of fish altogether than their accountant. Unless you can walk to talk when it comes to tax, you have to get advice. You need to be able to build that into the cost. You cannot simply say "*I know nothing about this"*. You need to at least be able to look and see where the exposures are and then to get the appropriate advice.

SETTLING CASES

In settling an unfair dismissal claim or a wages claim or a case that relates to any loss of income as an employer's representative you will want to include that great phrase in any settlement

"Without admission of liability"

If acting for the employee, it makes no difference.

However, in a case involving "compensation" such as an equality dismissal or for not having got a document that complies with Section 3 of the Terms of Employment (Information) Act or for working excessive hours as just examples, you cannot use the phrase

"*Without admission of liability".*

Well, technically you can but if you do, you lose the benefit of a settlement being deemed to be tax free.

I have set out examples previously as to how the compensation is taxed in an Unfair Dismissal case. That would equally apply then in one of these cases, except that there would be no allowance as a termination payment.

Where you are claiming the benefit of Section 192 A TCA 97, there needs to be an admission that

"*The parties agree that if the case went for hearing, it is likely an award of €X would have been made."*

If you do not include it then the entire amount is taxed as if you would include the words "*Without admission of liability".*

I have seen settlements fall down because of this but it is one that colleagues need to be aware of.

Last year I did present the paper to the Wicklow Bar Association and a copy of that lecture note is attached in the Appendix.

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.

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.

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 or where acting for the employee that 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.

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 be reduce 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 employee 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 Eagar 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 Graphite Recruitment HRN conducted an investigation. Mr Justice Eagar 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 Eagar quoted extensively from the case of In Re Haughey and particularly the Decision of the then Chief Justice on page 264. Mr Justice Eagar 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 is 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 adopted 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 appear 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 as discussed previously.

FAIR PROCEDURES

As I stated the issue in an Unfair Dismissal case is nothing to do with the guilt or innocence of the employee.

An example of this is the case of the Governor/and Company of the Bank of Ireland -and- James Reilly, 2015 IEHC241. It is not necessary to go into the facts of the case but in this case the employee was awarded reinstatement having been our work through being dismissed for approximately 7 years. The employee claimed that he had been treated differently than other employees who may have performed a similar breach in the employment. The High Court agreed and awarded reinstatement. It is a prime example of

the issue of fair procedures. This is namely that the same penalty needs to be applied to all employees who may have been in breach of discipline.

The Labour Court in the cases of Commercial State Body and a Worker being UDD1815 is one where the Labour Court considered the issue of procedures where the Court pointed out that the three principles they were quoting effectively related to the particular circumstances. They quoted the case of Kilsaran International Limited -v- VET UDD1611 where the Labour Court referred to the Supreme Court decision in Glover -v- BLN Ltd 1973 IR 338 as the three relevant principles being:

1. That there was a requirement to make the employee who is the subject of an investigation aware of all the allegations against him or her at the outset of the process;
2. The requirement that the employer who has published the disciplinary procedure to its employees follows those procedures scrupulously when conducting a disciplinary process; and
3. In the event that an allegation against an employee is upheld, any disciplinary sanction imposed is proportionate to the complaint that has been substantiated.

In case UDD1814 being a case of Lagan Cement and James Hilton which is another case where the issue arose and where the respondent company did not dispute that there were flaws in the process. The respondent company accepted that they had not complied with the principles of natural justice set out by Samuel J in Frizell -v- New Ross Credit Union 1997 IEHC 137.

I have already covered the case of Michael Lyons -v- Longford Westmeath Education & Training Board. There has been some criticism of this case. Some Adjudication Officers are following the decision. Some are not. This issue will ultimately go to the Labour Court. It is a case may well have to be argued again in the High Court depending on the attitude of some Adjudication Officers.

However, for the present it would appear to me that when looking at the issue of disciplinary hearing, it is necessary to:

1. Ensure that all issues relating to a Disciplinary Process are fully set out to an employee and that the company's disciplinary policy is furnished.
2. That the policy is looked at in light of the Code of Practice on Grievance and Disciplinary Procedure and if any amendments need to be made to comply with same as additional safeguards to the employee in the process that the employee is advised of same. It is important that the employees advise of any such amendments to the disciplinary policy procedures which would be more beneficial to him or her.
3. That following the Lyons case that the employee will be advised of their rights to be represented by a Solicitor or Trade Union official

along with any other person who might be referred to in an existing disciplinary policy. It would my view that if they want to bring member of the family that equally that should be allowed.

4. That the employee would be advised of their right to cross examine witnesses.
5. That all allegations against the employee are clearly set out in writing.
6. That all witness statements are furnished to the employee.
7. That the employee is advised of their entitlement to call any witnesses or to put forward any evidence or argument or statement in support of the employee's position either personally or by their representative.
8. That the employee is advised at all stages of their right to appeal any disciplinary matter.
9. That in any appeal that the employee is given effectively a restatement of all relevant matters and all appropriate rights and that the appeal is a full rehearing.
10. That those conducting any investigation, disciplinary process or appeal are independent of their process that is under investigation by which we mean that they are not themselves witnesses or a party in the case against the employee.

The right to put forward a defence and to be heard is extremely important. In Pottle Pig Farm and Pavasov UDD1735 the Labour Court in this case quoted the case of Gearon -v- Dunnes Stores Ltd when it said:

"*The right to defend herself and have her arguments and submission listened to and evaluated by the Respondent in relation to the threat to her employment is a right of the Claimant and is not a gift of the Respondent or the Tribunal… As the right is a fundamental one under natural and constitutional justice; it is not open to the Tribunal to forgive the breach".*

The Labour Court held that it was their view that a failure to properly investigate allegation of misconduct or to afford an employee a fair opportunity to advance a defence will take the decision to dismiss outside the range of reasonable responses thus rendering the dismissal unfair.

In EG and the Society of Actuaries in Ireland 2017 IEHC392 the High Court held that there is an implied terms that an employee is treated fairly and in accordance with the principles of natural justice during the various stages of the disciplinary process including the investigative stage. In UDD1723 Britsavers Ltd and Zhong the Labour Court was critical of an employer not keeping an employee advised of what was happening during the process.

There are many cases where the Labour Court and the EAT in the past have both held that it is not the role of an Adjudication Officer, the Labour Court or formerly the EAT to determine the guilt or innocence of the employee. It is a matter for the Tribunal hearing the case to determine whether a reasonable employer in the circumstances of the employer with the facts that they have before them could reasonably have come to the decision that they took to dismiss. It must however be remembered that the burden of

proof is on the employer in an Unfair Dismissal claim to show that the dismissal was fair. This means that the employer needs to be able to show that fair procedures were applied. If fair procedures were not applied then this negates any decision by the employer to dismiss.

REVIEWING AN EMPLOYEE'S DEFENCE

In case ADJ-8083 the case involved an employee where the employer contended that it had received complaints regarding potential misselling of products by a customer of theirs for whom they had operated a contract centre company. It appears that this was quite an extensive investigation with over 40 employees investigated and 18 dismissed. The case is extremely useful for the fact that the Adjudication Officer in this case has set out at some length the law relating to the role of the Adjudication Officer and the tests to be decided in whether to dismiss or not. The Adjudication Officer in this case set out that a considerable amount of case law including the case of Bank of Ireland -v- O'Reilly 2015 IEHC241 where it was held that:

"*The onus is on the employer to establish that there was substantial grounds justifying the dismissal and it resulted wholly and mainly from one of the matters specified in Section 6 (4)… Section 6 (7) makes clear that the Court may have regarded the reasonableness of the employer's conduct in relation to the dismissal…"*

The Adjudication Officer in this case went on to quote the views expressed by Judge Linnane in Allied Irish Banks -v- Purcell 2012 23ELR189 where she commented:

"*References made to the decision of the Court of Appeal in British Leyland UK Limited -v- Swift 1981 IRLR91 and the following statement of Lord Denning MR at page 93*

"The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonable take one view, and other quite reasonably take a different view."

We believe that the Adjudication Officer has very correctly stated the law on this point. The Adjudication Officer went on to quote the case of O'Riordan -v- Great Southern Hotels UD1469-2003 where there the EAT set out the appropriate test for determining the claim relating to gross misconduct stating:

"In case of gross misconduct the function of the Tribunal is not to determine the innocence or guilt of the person accused of wrong doing. The test for the Tribunal in such cases is whether the respondent had a genuine base to

believe on reasonable ground arising from a fair investigation that the employee was guilty of the alleged wrong doing."

Various other cases were also quoted. We have a belief that that this is a very helpful statement in relation to the law. The Adjudication Officer has also then set out the relevant code of practice being S.I. 146 of 2000. The Adjudication Officer pointed out that the case of Foley -v- Post Office 2000 CR1283 which is authority for the proposition that it is not the role of a Tribunal to put itself in the shoes of the employer but rather

"The function of the Tribunal is to decide whether that investigation is reasonable in the circumstances and whether the decision to dismiss, in light of the results of that investigation, is a reasonable response."

What the Adjudication Officer then went on to point out is, and this is an extremely relevant issue which is sometimes discounted by some employers, namely that it is important for the employer to remember that there must be a genuine investigation. In addition the Adjudication Officer pointed out that

"I am satisfied that before concluding that the complainant's defence holds not substance, it needs to examine and address that defence and I do not see that they have been addressed anywhere. For the reasons outlined above, the respondent's dismissal of the complaint was procedurally unfair."

Some employers will unfortunately not review an employee's defence. This case highlights the importance of the employer doing so.

PROCEDURES

From what I have said before it may appear that I am placing a significant amount of stress on procedures. I make no apology for this. When it comes to dismissal cases, it is very much like the old say as regards property being its

"Location, Location, Location".

In dismissal cases it is

"Procedures, Procedures, Procedures."

It is surprising that in a number of cases employers who have procedures do not apply those procedures. Failure to apply procedures will result in a dismissal being deemed unfair. In case UDD182 being a case of Limerick City and County Council and Richard Moore the Labour Court held that it was a basic requirement of fair procedures that where a procedure is set out in writing as being the applicable procedure in a particular circumstance the published procedure is in fact a procedure that is followed when such circumstances arise. In that case the Court held that the procedure advised that if a staff member continues to fail to achieve the required work

standards a sequential process will be followed as necessary. The Court then set out what that was. The Court then stated that it was satisfied that this procedure was not followed at all by the Respondent.

While it is not set out in the decision if an employer has a procedure which may be defective and advised an employee of a more beneficial procedure then provided such procedure is followed the employer will not be restricted to following a procedure which has a known breach of fair procedures in it.

It is equally important that employers check that they are applying the correct policy. In 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 a disciplinary process. The process found that the employee had been guilty of gross misconduct. The employee appealed and on appeal it was decided that the employee would not be dismissed but would be transferred. The employee went through the training required but after a short period decided the alternative assignment was not acceptable and informed the Respondent Company. At this stage the Respondent Company decided to dismiss the employee on the basis that it had made a previous finding that he had been guilty of a gross misconduct.

The Labour Court was highly critical of this. The Court pointed out that the employee had moved beyond the finding of gross misconduct and was now complaining of the nature of the reassignment. The Court stated that he was entitled to do so and to expect that this would be dealt through the normal staff management process. The Court pointed out that instead he was met with the summary dismissal on the basis of an incident that had already been dealt with and disposed of. The Court held that there was not merit in this approach and held that it was an Unfair Dismissal.

Even when employers have a policy, it is important to ensure that that policy is communicated to employees.

Two recent cases issued from the Labour Court being the case of Martin - Brower Ireland Ltd and William Clancy UDD1761 and Max Stone Systems Ltd -and- Tyka. In the first case it involved a case where an employee had failed to adhere to new health and safety procedures. The Court found that the process had been gone out to employees but was at a very early stage and had not gained widespread understanding or adoption in the warehouse. The Court held that the reaction to the incident was premature and excessive and would not had been similarly reacted to by good employee in similar circumstances. Reengagement of the employee was awarded.

In the second case the Labour Court decided that the action of the employee was sufficiently great to justify dismissal due to the serious risks involved and the impact on the business. However, the Court pointed out importantly that the employee had not been given an opportunity to put his side of the events and a decision was made to discipline him without any recourse to mitigation on his behalf. The Court pointed out that in not conducting an

investigation the Respondents were in breach of their own disciplinary procedures and that the Complainant had never been supplied with a copy of the disciplinary procedure and could not have known what to expect. The Court in this case pointed out the case of Gearon -v- Dunnes Stores Ltd UD367/88 where the EAT had held:

"The right to defend herself and have her arguments and submissions listened to and evaluated by the Respondent in relation to the threat to her employment is a right of the Claimant and is not the gift of the Respondent or the Tribunal…as the right is a fundamental one under natural and constitutional justice; it is not open to the Tribunal to forgive its breach."

The Court importantly pointed out that it was of the view that the failure to properly and fully investigate allegations of misconduct and to afford an employee who was accused of misconduct with fair and sufficient opportunity to advance a defence will take the decision to dismiss outside the range of reasonable responses which will probably render any resulting dismissal unfair.

WHAT HAPPENS IF THE INITIAL PROCEDURE IS UNFAIR?

There is a view by some employment Solicitors that if the initial process is unfair it cannot be subsequently dealt with later in the process. This is something which in recent High Court cases involving issues of seeking injunctions has been declared to be incorrect. Whether it is an investigation or disciplinary hearing, any defects can be cured in a subsequent hearing or appeal.

For colleagues dealing with employers it is vitally important that the company procedures are checked. It is vitally important to ensure that those procedures complied with the Code of Practice in Grievance and Disciplinary Procedures and relevant case law, particularly the right of representation, and that the employee is given the right for a fair hearing. The vast majority of cases which employees win in Unfair Dismissal cases result from the investigation not complying with fair procedures. The fact that an employee may be guilty of misconduct including gross misconduct does not mean that an employee cannot succeed in an Unfair Dismissal case purely on the basis that the employee was not given fair procedures.

WHERE THERE IS AN ADVERSE FINDING AGAINST AN EMPLOYEE

Where an employer has made an adverse finding against an employee it is extremely important that the employee appeals. Where an employee does not appeal a disciplinary sanction where there will be warning or final written

warning this can be deemed to be an acceptance by the employee of the sanction.

In a subsequent disciplinary matter then this can be held to be an admission of prior inappropriate behaviour which coupled with the current issue under investigation if found against the employee can warrant dismissal.

Where an employee appeals then in those circumstances they can argue that he did not accept the sanction even if the appeal is unsuccessful.

In Unfair Dismissal cases the Labour Court in a case of Aryzta Bakeries and Vilnis UDD1812 is a case where the Labour Court held that there is an obligation on employees to exhausted internal appeal procedures. The Court in that case held that the failure to exercise same can be taken into account in an Unfair Dismissal case. Very often employers will give a very short period of time for an employee to appeal. Sometimes the employee will appeal outside that period. For those acting for employers, it is important that reasonable notice of a right to appeal is given and that even if the appeal comes out of time that the appeal is heard. Failure to allow an employee to appeal even when they appeal out of time can be deemed to be a lack of fair procedures.

SOME COMMON PROBLEMS WHICH ARISE

Can a Redundancy become an Unfair Dismissal?

The simple answer to this is yes. In Tolerance Technologies Ltd and Foran UDD1638 the Labour Court held that the employee's position had become redundancy. However, the Labour Court held that the procedure applied was unfair. The employee was not consulted. The employee was not afforded representation. The employee was denied an opportunity to engage with the Board when he requested to do so. In this case the Labour Court awarded €20,000 as an Unfair Dismissal award. Of course an employee cannot recover under both Redundancy Legislation and Unfair Dismissal Legislation.

Saying this, in the case of Kusak -v- Dejay Alarms Ltd UD1157/2004 being the EAT case, which held that compensation may not be awarded twice on the grounds that the employee was dismissed by reason of Redundancy and for Unfair Dismissal. This was reinforced in a case UD1114/2012. However, Redundancy can be awarded as part of an employee's compensation for Unfair Dismissal. This was set out in ADJ-6787.

This situation can arise for example where an employee is dismissed and subsequently the company goes into liquidation. In those situations the loss would have terminated once the company went into liquidation and it effectively becomes at that stage a redundancy situation.

There are certain benefits for an employee from having a case deemed to be partly Redundancy and partly Unfair Dismissal. A Redundancy award is exempt from tax whereas an Unfair Dismissal award is subject to tax.

DISMISSAL DUE TO AN EMPLOYEE BEING UNFIT

This is a difficult issue for any employer to deal with. In the Labour Court case of Noonan Services Group Ltd and Kravcova an employee was dismissed. The company submitted that the dismissal arose out of the incapacity to undertake the duties.

The Labour Court found that the medical evidence available to the company stated that it was clear that the employee was at best partially fit for the work as a cleaner and would benefit from a change of work environment. The Court found that the company did not contact the doctor to discuss her condition nor did it notify the employee that her continuing employment was at risk. The Labour Court found that the company took no steps to establish the extent of the incapacity, the tasks which she could undertake and those she could not or to advise her to consult her own medical advisor in this regard.

An Unfair Dismissal award was made.

This case can be considered with a case ADJ-4138. Equally, this is a case where the employer had to deal with an employee being unfit.

The employer obtained medical evidence. The employer ensured the employee had every opportunity to comment on the medical evidence and the employer investigated if any other alternative role would be available.

The leading case on this is Bolger -v- Showering (Ireland) Ltd 1990 ELR 184 which sets out the requirements as:

1. Ill health must be the reason for the dismissal.
2. Ill health must be the substantial reason.
3. The employee must have received fair notice of the questions of dismissal for the reason for incapacity and that this was what was being considered.
4. The employee must be given every opportunity to be heard.

An issue which arises subsequently in cases is whether or not the employee was incapable. In UDD1714 being the case of Dunnes Stores and the Elaine O'Brien the Labour Court held that it is not for the Labour Court to establish whether the employee was incapable of carrying out duties but rather it is sufficient if a Respondent honestly believed on reasonable grounds that the employee was.

NON-PAYMENT OF WAGES

In a case of Barry O'Hea Landscaping and Robertas Gailius UDD1639 is a case where the Labour Court held it was common case that the employer failed to pay the appropriate wages to the employee over an extended period of time.

The Court stated

"*The Court accepts that the Respondent's failure over an extended period to pay wages which were properly due to the Appellant in full occasionally at all undermined a basic tenet of the employment relationship in a manner which goes to the heart of the contract of employment."*

TERMINATION DATE

Some people believe that the termination date is the date of the P45. A P45 is not a termination document. It is a cessation of payment document. The fact that somebody receives a P45 does not mean that they have been dismissed. Normally it does. There are many industries where individuals will be laid off annually such as in the hospitality industry in certain hotels in October and would be reengaged in April. They will receive a P45 so that they can obtain Social Welfare.

Where an employer continues to pay an employee though not requiring an employee to work the Labour Court in the case of HSE and Lang UDD1731 held that that appeared to be a clear acknowledgment that the employment continued. It is always useful to look at Section 1 subsection 1 Unfair Dismissal Act 1977. Where notice is not given in accordance with the contract or the Minimum Notice in Terms of Employment Act 1973 then the date of dismissal is the date on which such notice would have expired if given.

Issues sometimes come up in cases as to what the correct termination date is and whether somebody has issued proceedings too soon. Take the situation of an employee who is entitled to 8 weeks' notice. They are dismissed with 1 weeks' notice. The dismissal takes place 30th April. Can the employee then issue the proceedings on 8th May or should they wait until the 25th June?

Issues will arise particularly where there is an issue of an extension of time. in the above circumstances it would my view that the termination date is not 6th May but rather the 25th June though there is an argument that it is possibly the 27th June. If acting for an employee who comes in very quickly it would be argued that you would issue the proceedings immediately but then issue a second set after the Notice Period in the contract or under the Act has expired.

MINIMISING LOSS

An employee who is dismissed must seek to minimise their loss. The leading case on this is Sheenan -v- Continental Administration Company Ltd UD858/1999 where the EAT stated

"A Claimant who finds himself out of work should spent a reasonable amount of time each week day in seeking work… The time that the Claimant finds on his hands is not his own unless he chooses it to be, but rather to be seeking to mitigate his loss."

This case is consistently quoted.

When acting for an employee, it is absolutely imperative to advise the employee that they must actually seek work. This is not occasionally looking for work but that this is effectively their new job.

SOCIAL WELFARE PAYMENTS

In many Unfair Dismissal cases an employer representatives would seek particulars as to what Social Welfare payments the employee has received.

Section 7 (2a) Unfair Dismissal Acts specifically provides that Social Welfare is not to be taken into account. However, it is reasonable for an employer representative to seek to find out what type of Social Welfare an employee is receiving.

If an employee is receiving illness or disability benefits then in those circumstances the employee is not available for work and therefore has not been seeking to mitigate their loss.

When an employee has failed to mitigate their loss, the maximum compensation the employee can receive is 4 weeks wages.

The loss which an employee can claim after the show that they have sought to mitigate their loss is their actual loss. There is also then estimated prospective loss or diminution attributable to the dismissal. This includes such issues as superannuation benefits. It would include benefits in kind which an employee might have received such a travel expenses or a bus pass. It can also include additional costs which an employee incurs due to having to travel a further distance for the purposes of having taken up a new job.

BRINGING CLAIMS FOR UNFAIR DISMISSAL TO THE WRC AND ON APPEAL TO THE LABOUR COURT

The first issue which I would raise with the colleagues is the issue of time. Time can very much be of the essence. Rather than getting out lengthy letter

to the employer and getting involved in correspondence it is far better to consider issuing proceedings first and then getting into negotiations.

In an Unfair Dismissal case before any action is taken a request under Section 14 (4) of the Unfair Dismissal Acts should be sent. This gives the employer a period of 14 days to respond. Where an employer does not respond then an employer is restricted to substantial grounds justifying the dismissal.

Very rarely will it be responded to.

It has an added advantage in that in submitting claims to the WRC there is a requirement for the employee to put in a statement.

Where an employee has issued a request under Section 14(4) of the Act and gets no response within the statutory period then it is very easy to put a submission stating

"*The employee was dismissed. The employee made a request under Section 14 (4) of the Act. No response has been received. The employee does not know the grounds under which he/she was dismissed*".

The response from some employers would be that the employee has received various correspondence and letters. That does not change the position. No response under the statutory provisions has been made and it is legitimate for an employee put his or her submission in as simply as that.

Equally an employer must submit a submission.

Once these have been submitted or even when they have not been submitted the case will be listed for hearing. The hearing realistically from a legal perspective is relatively straight forward.

The first issue which an Adjudication Officer should be dealing with is the procedures relating to the dismissal. If the procedures were not fair procedures then it is an Unfair Dismissal.

The next issue is, if the procedures were fair, was it reasonable for the employer to dismiss. This is set out in the case of Allied Irish Banks -v- Purcell 2012, 23ELR189 where Judge Linnane commented:

"Reference was made in the decision of the Court of Appeal in British Leyland UK Ltd -v- Swift, 1981 IRLR91 and the following statement of Lord Denning MR at page 93

"The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismiss him, then the dismissal was unfair but if a reasonable employer might reasonably have dismiss him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view, and another reasonably take a different view."

Some believe that the role of the WRC or the Labour Court is to determine the innocence or guilt of the relevant parties. This is not part of the role. The case of O'Riordan -v- Great Southern Hotels UD1469-2003 is one where the EAT set out the appropriate test for determining a claim relating to gross misconduct stating:

"*In case of gross misconduct the function of the Tribunal is not to determine the innocence or guilt of the person accused of wrong doing. The test for the Tribunal in such cases is whether the Respondent had a genuine base to believe on reasonable grounds arising from a fair investigation that the employee was guilty of the alleged wrong doing.*"

In the case of Foley -v- Post Office 2000 CR1283 it was stated:

"The function of the Tribunal is to decide whether the investigation is reasonable in the circumstances and whether the decision to dismiss, in light of the results of that investigation is a reasonable response."

If the Adjudicator or the Labour Court finds that either the procedure was not fair or that it was not reasonable to dismiss then in those circumstances the next step for the Adjudicator is to look at whether the employee contributed to the dismissal. To the extent, that the employee contributed to the dismissal to a greater or lesser extent this can be taken into account by the Adjudicator in setting compensation.

The step in setting compensation is also for the Adjudicator to look at the efforts of the employee to minimise their loss.

In Unfair Dismissal cases there is no compensation for the fact that somebody was badly dismissed or that the allegations against them were totally untrue. It is an economic loss situation only and there is no element of punishment, if I can use that phrase, on an employer no matter how bad the dismissal was.

CONSTRUCTIVE DISMISSAL

Constructive Dismissal cases now seem to be becoming the flavour of the month. However employees who resign need to be extremely careful. In an Unfair Dismissal case the burden of proof is on the employer. In a Constructive Dismissal case that burden is on the employee. In UDD1744 G4S Secure Solutions (IRE) Limited and Shine the Labour Court in this case helpfully set out the applicable law. The relevant legislation is Section 1 and Section 6 (1) of the Act.

Section 1 of the Unfair Dismissal Act envisages two circumstances in which a resignation may be considered a Constructive Dismissal. As the Labour Court pointed out, where the employer's conduct amounts to a repudiatory breach of the contract of employment and in such circumstances the employee would be entitled to regard himself or herself as having been

dismissed. This is often referred to as the "contract test". In Western Excavating (EEC) Limited -v- Sharp 1978 IRL332 it was held that to meet the contract test an employer must be

"Guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance."
Then there is the reasonable test.

This was stated to be

"Secondly, there is an additional reasonableness test which may be relied upon in either an alternative to the contract test or in combination with that test. This test asks whether the employer conducted his or her affairs in relation to the employee so unreasonably that the employee cannot barely be treated to put up with it any longer, if so, he is justified in leaving."

The Labour Court helpfully quoted the cases of Batty -v- Bayside Supermarket UD142-1987 relating to the need to utilise grievance procedures and at the same time quoted the case of Allen -v- Independent Newspapers (Ireland) Limited 2002 ELR84 as an alternative where it was held that it would not be reasonable to expect the employee to use the said grievance procedures. In the particular case the Labour Court held that it could not see how it would not have been reasonable for the employee to terminate the employment without having sought to ventilate and resolve whatever grievances he had through the internal procedures.

There are a number of decisions of the Labour Court on the issue of utilising the grievance procedures. However, except in very significant cases the reality of matters is that the employee needs to utilise the grievance procedure before resigning. Very few do.

In Zabiello -v- Ashgrow Facility Management Ltd UD1106/2008 the EAT stated:

"For a claim of Constructive Dismissal to succeed the Claimant needs to satisfy the Tribunal that her working conditions were such that she had no choice but to resign…The Tribunal is satisfied that the Claimant did not exhaust the grievance procedures before she resigned."

In relation to utilising the grievance procedures then as it was set out in the case of Kirwan -v- Primark UD270/2003 in going through the grievance procedures it must be a genuine attempt rather than simply going through a process.

In Barry -v- HSE trading as HSE North West 2016 27ELR268 it was stated:

"The Tribunal finds that the Claimant did not give her employer an opportunity to deal with her complaint."

In dealing with a Constructive Dismissal case the test which is on the employee as the burden of proof is on the employee was set out in Berber -v- Dunnes Stores 2009 ELR61 where it was stated by Fennegan J

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it."

The reality in Constructive Dismissal cases is often that the employee will arrive in the Solicitors office having resigned. Rarely have they gone through the grievance procedure.

In Murray -v- Rockavill Shellfish Ltd 2002 23ILR331 the EAT held

"It is well established that a question of Constructive Dismissal must be considered under two headings. Entitlement and reasonableness. An employee must act reasonably in terminating his contract of employment. Resignation must not be the first option… An employee must pursue his grievance through the procedure laid down before taking the drastic step of resigning."

I would issue a cautionary tale in relation to a resignation.

In case UDD1730 the Court had to deal with a situation where an employer had told an employee that her husband could not undertake her shift because of the fact that her husband had worked 60 hours that week and for a number of weeks prior to that date. The employee got annoyed and resigned. The Labour Court in this case helpfully pointed out in relation to Constructive Dismissal where an individual resigns that in those circumstances an employee has an opportunity shortly thereafter to rescind any resignation and to come to work as rostered. The Court pointed out that she had done neither.

This has always been accepted to be the position. However, I would caution in relation to resignation letters. In UDD1753 being Longford County Council and McManus the Labour Court held that it is set law that a resignation is an unilateral act which if expressed in unambiguous and unconditional terms cannot be reconstituted by a subsequent unilateral withdrawal. Walking out in the heat of the moment is one thing but giving a resignation letter probably does not allow the employee to rescind same.

There is no requirement for an employer to accept the resignation letter become it becomes effective. This was held in Millett -v- Shinkuwin 2004 15ELR319.

The burden of proof is on an employee in a Constructive Dismissal case. From reviewing those cases in the WRC and the Labour Court it is quite clear that the number of successful Constructive Dismissal cases is very limited.

PROTECTED DISCLOSURES ACT

One issue constantly now is coming up, namely that employees claim that they were dismissed for having made a Protected Disclosure. They seek to 5 years. The compensation set in the Protected Disclosures Legislation is up to 5 years. However, that is based on the same basis as under the Unfair Dismissal Legislation, namely, it is economic loss not a compensation figure.

Where an employee is stating that they were dismissed or penalised for having made a Protected Disclosure the test is effectively "but for" making the disclosure.

In McGrath Partnership -v- Monaghan PDD162 the Labour Court held that the Protected Disclosure Act in its provisions regarding penalisation are broadly similar to those in the Safety, Health and Welfare at Work Act 2005. They quoted the case of O'Neill -v- Toni & Guy (Blackrock) Ltd 2010 ELR21 where it was held that it was clear from the language of Section 27 (of the Safety, Health and Welfare at Work Act) that in order to make a complaint of penalisation it is necessary for the Complainant to establish that the detriment to which he/she complaints of was imposed "for" having raised one of the Acts protected by Section 27 (3) in the 2005 Act.

Before relying on the Protected Disclosure Act it is necessary to check that the employee has actually made a Protected Disclosure and has made same correctly and that Act complaint of is one that was covered under the Protected Disclosure Legislation.

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 coverts 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. I have mentioned the Labour Court case earlier under reference RPD181.

There is a trap which those acting for employers sometimes fall into in the area of Redundancy. A case under RPD181 being a case of D&T Forkan Construction Limited and Michael Diamond highlighted the case.

There was no dispute as regards the facts. The employee was placed on temporary lay-off on 4 January 2017. Some 4 weeks later on the 2nd February 2017 pursuant to Section 12 (1) of the Act the employee served a Form RP9 on the employer. A counter notice issued on 7th March pursuant to Section 13 (2) of the Act.

The Court pointed out that Section 13 (2) permits an employer who has received the notice of an intention to claim Redundancy in a lay-off situation to serve a counter notice within 7 days. The time limit would have expired no later than 10th February. The Court in that case set out the provisions of Section 11 and 13 of the Act in full.

The employee in this case the Court pointed out had fulfilled the requirement specified in the Act. The employer had failed to do so. The Court pointed out that having regard to the strict wording of Section 11 to 13 inclusive of the Act the Court was obliged to confirm the decision which was that the employee was entitled to Redundancy.

The 7 day period is one that can cause problems for employers.

There is second trap which those acting for employers need to be careful of. If a counter notice is served then the employer is obliged not later than 4 weeks after that notice to provide the employee with 13 weeks continuous full time work. If that cannot be done the employee can wait, issue a new claim for Redundancy and at the same time, in our opinion, sue for 13 weeks wages.

Another issue that comes up is the issue of the notice. In a case of G4S Secure Solutions (Ireland) Ltd and Stanek RPD182 the employee claimed that following a period of the lay-off he was entitled to claim Redundancy. The employee claimed that it was for a period of more than 4 weeks. In this case the employee had received a phone call on 3rd November when he was advised that the upcoming rosters up to an including 20th November were cancelled. The employee contended that the phone call amounted to a notice in accordance with the Section 11 (1) (b) of the Act. No further hours were received before the employment terminated on or about the 21st December 2016. The employer did not dispute the contents of the phone call but disputed that it amounted to a notification of lay-off.

The Court in this case helpfully set out again the provisions of Section 11.

The Court pointed out that the provisions of Section 11 (1) (3) which provide that while there is a requirement to notify the employee the provisions of Subsection 3 specifically state:

"In this Section reference to the delivery of a notice shall, in relation to a notice not required by this Act to be in writing, be construed as including the reference to the all communication of the notice."

The Court held that on a plain reading of the legislation a phone call notified the employee of a cessation of his employment and that the employee was on a period of lay-off following the phone call in November 2016.

The amount that an employee can obtain is effectively on the basis of a maximum of €600 per week. An employee is entitled to 2 weeks per year of service subject to maximum of €600 per week being effectively €1,200 for each full year of service provided the employee has 2 years' service. In addition, there would be a further 1 week wages subject to a maximum of €600.

I would again point out that it is important to be careful that Redundancy is not used as a cloak for a dismissal. In ADJ-4920 the Adjudication Officer in that case held that the selection of the employee for Redundancy was not valid and was an attempt to dismiss the employee because of shortcomings in his performance. The Adjudication Officer held that the use of Redundancy in such circumstances is precluded and quoted the case of JBC Europe Limited -v- Panisi 2011 IEHC279. An award of €12,000 was made.

We are seeing at the present time a considerable increase in the number of Redundancy claims. You might wonder why an employer would not simply complete the Redundancy documentation and give it to the employee giving them the Redundancy payment or letting the employee claim off the Social Fund. There is a very good reason for this. If an employee puts in a claim now, it is going to take somewhere between 3 to 6 months for the case to come on for hearing. A decision has to then issue which is going to take another 3 or 4 months. There is then 42 day period for an appeal. After that the employee then has to seek implementation through the Social Fund. The Social Fund will then write to the employer about discharging the monies. Effectively, the employer can delay payments to the employee for a minimum of 12 months. The old system was that the employer could get a rebate. The employer could use that rebate immediately against any taxes and therefore there was a limited cost to the employer. We would see an anticipate that there will be a considerable number of Redundancy claims simply being let go through the system so as to delay payment because of the lack of a rebate provision.

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 the 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.

There is an issue of timing. Even if an employer waits until an employee returns from Maternity Leave to advise she is being made redundant this is still a dismissal contrary to the Equality Legislation. This was confirmed in Paquay and Societe D'Architects case C-460/06.

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 facia case. Once a prima facia 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 facia 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 is 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.

CONCLUSION

I would like to thank you for the invitation to speak to you here today. The topic which I am speaking on would warrant a full day as an Employment Law Masterclass. I have tried to cover matters today on a broad brush approach in the 1 hour that was allocated. I have produced this paper as an aide memoir for those attending.

Employment Law is complex. We have over 700 pieces of legislation being Act, Statutory Instruments and Regulations that we have to cover. We have legislation which is contradictory as between various Acts. There is a large volume of case law in this area as well.

I hope that I have given you a flavour of the issues that we as Solicitors will have to deal with in representing either employers or employees.

In providing our services and I include all Solicitors in this, we do so as Solicitors. We have ethical and moral duties to our clients. We are regulated. We have professional standards which we have to meet. We do not have a level plain field. There are many providing services in the Employment Law area who are not regulated. Many of them are not properly trained. Many of them are charging quite substantial fees to their clients way above what we as Solicitors could reasonably justify if our costs were taxed. They do not have that. We have some of them who are disguising their fees under various guises. Many of these unregulated entities firms and individuals provide a substandard service. There are some who provide a quality service and do so to very high standards. However, no matter what the quality of the service they provide they are not Solicitors. Clients should be encouraged to go to Solicitors in relation to Employment Law matters because of the protections those clients have which they do not have with anybody else.

I always like traveling to this part of the country. There are many fine Employment Law Solicitors in this area. I have had the pleasure of being opposite most of them and various stages of my career. The great thing about Solicitors from this area is that they will fight you hard. However, they fight fair. The quality of the Solicitors doing this type of work in this area is of the very highest standard. While I greatly appreciate the honour of being

asked back to speak here having spoken in 2016 there is a fear factor in coming to this part of the country knowing that you are dealing with some great Solicitors and that you have to be on your game if you travel in this part of the world dealing with Employment Law matters.

Again, I thank you for the invitation to speak here today. It has been an honour for me to be invited and I am grateful for the invitation.

APPENDIX 1

The Taxation of Employment Law Awards and Settlements

The talk today intends to deal with the taxation aspect of employment law awards, settlements and termination payments as it affects Adjudicators.

This paper will deal with the taxation of employment law awards and settlements. Unlike other areas of law there is no "equity" in tax. Tax follows the law or more precisely how a decision is written. Write it one way and it is tax free. Write it another way and it is taxable. That may not seem fair but as I said "there is no equity in tax". Something is taxable or not taxable. There is no half way or middle ground. Therefore as Adjudicators you have a huge responsibility to get it right. Get it wrong and you either cost the State lost revenue or you put unnecessary tax on both the employer and the employee.

In presenting this paper I am conscious of the fact that often when the word "Tax" arises in employment law matters whether it be an award, settlement or a termination payment there is a tendency especially for Lawyers to believe that this all revolves around numbers, calculations and that it is something which is alien to Lawyers, employer and employee representatives and is a specialist area for Accountants. Hopefully this paper will show that the taxation treatment of termination payments, employment law awards and settlements is the application of relatively simple rules.

For those who represent employers I sometimes come across the view expressed that the employer is going to tax the award and it is a matter for the employee to make a reclaim.

At the outset I would say that it is as important for an employer to be able to avail of the tax exemptions as it is for an employee. If an award, settlement or termination payment is subject to tax the employer has employers PRSI to pay which is an additional amount of money which is payable by the employer. The income of the employee is subject to employer PRSI. Therefore the difference on what an employer has to pay if for example an award is for €15,000 which is exempt from tax as opposed to an award which is subject to tax is €1612.50 as an additional cost to the employer.

If the tax treatment is done incorrectly by the employer and is taxed the employee may still be able to make a reclaim of all the tax but the employer would still have liability for the PRSI as the employer will have categorised it as a taxable amount. In addition the employer will be subject to an implementation claim. An incorrect payment to the Revenue does not avoid such a case arising.

THE RELEVANT TAX LEGISLATION

The starting point in relation to an understanding of the tax treatment of employment law awards and settlements is the relevant legislation.

Section 192 (A) TCA97 was inserted by Section 7 FA2004. This Section was inserted because of the fact that the Revenue in 2003 sought to tax all employment law awards and settlements. A subcommittee of the Taxation Committee of the Law Society (now the Taxation and Probate Committee) met with the Department of Finance. As a result of those negotiations the legislation was implemented and can be simply understood as follows.

If the award relates to a loss of wages such as an Unfair Dismissal claim or a Payment of Wages claim it is taxable

If the award of settlement relates to compensation for breach of a statutory entitlement, which is not wages, it is exempt.

The fact that an award may look like it is an award of wages does not make it taxable. I think it is useful at this stage to give an example.

If an Adjudicator gives an award of 10 weeks wages for breach of Section 11 Organisation of Working Time Act (OWTA) which is a breach of the provision relating to the employee getting an 11 hour break that is exempt from tax as it relates to compensation for the infringement of an employment right.

If the Adjudicator awards 10 weeks wages for an Unfair Dismissal claim that is a payment of a financial loss and is taxable.

UNDERSTANDING THE LEGISLATION

The provisions of Section 192 A TCA97 provides that, with effect from 4th February 2004, compensation awards paid following a formal hearing by a "relevant authority" or a settlement (in certain circumstances) in respect of the infringement of an employee's rights and entitlements under the law are exempt from Income Tax. The exemption does not apply, however, to payments which are in respect of earnings, changes in function or procedures of an employment or the termination of an employment. Saying this, there are exemptions in relation to.

While the commentaries on this piece of legislation seem clear their application in practice is often misunderstood. This misunderstanding is not limited to Solicitors and Barristers. Accountants, in particular staff of Liquidators and Receivers, and even some "Tax Advisors" fail to comprehend the practical effect of the legislation.

Those seeking rulings from the Revenue often ask the "question" the wrong way and therefore an "incorrect" answer is received from the Revenue.

The legislation itself is reasonably simple. It is its application in practice which some confuse.

THE LEGISLATION

Section 192 A TCA97 can be summarised as follows;

1. An award or settlement for the breach of an employment right of an employee or former employee is exempt from tax, provided;

A It is not a payment in respect of remuneration or arrears of remuneration and

B It is not a payment for a change in function or a termination payment.

However, a termination payment may itself be exempt by Section 201 TCA 97. This I will deal with later.

THE SCOPE OF THE LEGISLATION

The legislation refers to "a Relevant Act". This is an enactment which contains provisions for the protection of employees' rights and entitlements or for the obligation of employers towards their employees. In practice this means any piece of employment legislation. It will include legislation post 2004. Therefore it would include the Protection of Employees (Temporary Agency Work Act) 2012. The exemption applies for payment under a Relevant Act to an employee or former employee by an employer or former employer after 4th February 2004 in accordance with;

A A Recommendation
B Decision; or
C Determination by a Relevant Authority

A "Relevant Authority" is defined as

A A Rights Commissioner,
B The Director of Equality Investigations,
B (a) An Adjudicator Officer of the Workplace Relations Commission,
B (b) The Workplace Relations Commission,
B (c) The District Court,
C The Employment Appeals Tribunal,
D The Labour Court,
E The Circuit Court, or
F The High Court.

(The Legislation was amended to insert (BA) (BB) and (BC) by the Finance Act 2015)

The exemptions will also apply to a settlement under a mediation process provided for in a Relevant Act and shall be treated as if made in accordance with a Recommendation, Decision or Determination under the Act of a Relevant Authority subject to certain conditions.

Currently the only "mediation process" provided for under Legislation is Section 78 Employment Equality Acts. The Workplace Relations Customer Service "mediation" process is now provided for under a "Relevant Act". Therefore such mediation agreements do have the benefit of Section 192 A TCA 97. Such "settlements" are therefore fully taxable even for a case which if a decision issued would be exempt. This is often overlooked by many. Again the writer has sought for this to be amended.

STRUCTURING SETTLEMENT AGREEMENTS TO BE EXEMPT FROM TAX

The provisions of Section 192A TCA97 also apply to out of Court Settlements. Therefore the agreement under the WRCS could qualify. However to qualify certain conditions must be met namely;

1. That it is a bona Fide claim made under the provisions of a relevant Act,
2. Which is evidenced in writing, and
3. Which had the claim not been settled by agreement, is likely to have been the subject of a Recommendation, Decision or Determination under that Act by a Relevant Authority that a payment be made. (underlining added).

The first two conditions are met by the WRCS mediation. The one that does not is the condition that the agreement certifies that had not the agreement been made it would have been the subject of a Recommendation, Decision or Determination. This condition is set out in Section 192 A (4) (a) (i) (iii). This is the one condition which Solicitors for employers, for some reason have the greatest resistance to incorporate into any agreement. It is however a condition precedent to obtain the exemption. If however such a provision is incorporated into any such agreement / settlement/WRCS Mediation Agreement the exemption will apply.

The form of words which is sufficient for including in this settlement agreement is as follows.

"the employer and the employee agree that the sum of €xxx is a fair and reasonable settlement sum and that such a sum is likely to have been awarded by an Adjudicator / Labour Court in any claim".

The above provision requires to be inserted. This clause is the one clause that causes the greatest difficulty for employers. There is a preconceived view that any settlement agreement must have the words it is made "Without Prejudice" and "Without an Admission of Liability".

If such a clause as set out above is not included the settlement agreement does not gain the benefit of Section 192 A. If it is included then it does have the benefit of Section 192A. Where made "Without Prejudice" or "Without Admission of Liability" no tax exemption.

Where a settlement document is entered into there is an obligation on the employer to maintain same for a period of 6 years. Section 192 A (4) (a) (iii) provides that copies must be retained for the period of 6 years.

Sub Section (4) (b) provides that copies of these documents can be requested by the Revenue Commissioners.

I do appreciate that some employers and practitioners have a real difficulty with this condition.

It is not that the settlement would not have been one which would **likely** have been made by for example an Adjudicator but the fact of any admission. The word used is "likely" not "certainly" or any similar word.

There is nothing to stop parties including in a settlement agreement the following.

"It is agreed between the parties that the settlement herein relates solely to case reference xxx and may not be used by either party for the purposes of grounding or defending any other claim under any other Act or at Common Law or otherwise and may not be produced in any other Court, Tribunal or otherwise for the purposes of grounding, supporting, defending or otherwise dealing with any claim by either party against the other party under any other piece of legislation or at Common Law or otherwise whatsoever".

I would say in passing that there is nothing to stop a party settling a matter under for example the Organisation of Working Time Act and then including clause that it resolves all matters between the parties and setting out all the relevant Acts. This is a standard procedure by many Solicitors.

I would be of the view that it is better in those circumstances to provide as follows;

"it is agreed between the parties that the settlement under reference xxx shall be deemed to be in full and final settlement of all claims which the employee may have against the employer and that the employee undertakes not to bring any further claims and to withdraw any other claims already in existence under any of the following pieces of legislation. (And then insert the normal list)".

When a settlement will not be exempt from tax but a Decision, Determination or Recommendation would be.

Section 10 TCA 97 defines connected person

A connected person is "connected with the other person if they are a Husband, Wife or Civil Partner or is a relative or the Husband, Wife, Civil Partner of a relative of the individual or of the individual's Husband, Wife or Civil Partner".

This looks like a bit of a mouthful.

This is additionally so when a relative means a Brother, Sister, Ancestor or Lineal Descendant. This is different than the exception in say the National Minimum Wages Act Section 5. It may be useful to give an example.

Let us assume that employee A in the previous example is a Sister in Law of the employer and employee B is a Brother in Law of the employer. Employment Acts will not exclude the employees claiming.

Where employee A has a decision from a Rights Commissioner and employee B has a settlement only.

Even if the settlement with employee B includes the three conditions for the exemption to apply, as set out above, the exemption in the case of a settlement or mediation by virtue of Section 192 (A) (4) (i) is excluded from the exemption. This is because of the fact that employee B is a "connected person". Employee A can receive the Decision exempt from Tax as she will not be relying on the provisions of Section 192 A (4).

Therefore if you are acting in the case of a relative of an employer it is important for Representatives that they proceed the full way for a hearing and get a Determination, Decision or an Order. The provisions of Section 192 A (4) (i) specifically excludes "connected persons".

Mediation agreement by the WRC would however be exempt under Section 192 A (3). The restrictions only apply to an out of Court settlement not under a mediation process provided for under a Relevant Act.

The Tax treatment of Decisions, Determinations, and Recommendations

The basic distinction between an award or settlement which is exempt and one which is not exempt is a distinction between salary / wages and compensation.

This is the concept which is often misunderstood. The misunderstanding is understandable as employment legislation before an Adjudicator and the

Labour Court is denominated as regards compensation on the basis of weeks of wages.

The Maternity Protection Act in Section 32 refers to up to 20 weeks wages. The Unfair Dismissal Act ("UDA") is up to 104 weeks wages. The OWTA is the same. The first and third Acts are gross wages. The UDA is net wages. Decisions may say in a Terms of Employment (Information) Act case that one week or two weeks wages being €x is awarded as compensation.

It is still compensation for infringement of a right rather than the reimbursement of salary or wages. The difficulty can be caused not by the legislation but rather by the application of Employment Legislation by Adjudicators, the EAT and the Labour Court with regards to Section 192 A TCA97 currently. I purposely do not include the Equality Tribunal as they, did to be fair to them, invariably set out the tax treatment of their awards, currently.

The Equality Tribunal did, if the award is compensation for the infringement of a right, would specify that it is exempt from tax. If it is for example an equal pay claim they would specify that it was subject to tax. They had the advantage of limited legislation unlike the other bodies to be fair to the others.

It is useful at this stage to give possible examples of how difficulties can arise with Decisions.

Let us for example take the following case.

Example

Employee C brings a claim to an Adjudicator under the Organisation of Working Time Act. The claims are under Sections 15 for working excessive hours and in relation to not being paid Public Holidays and Annual Leave. Let us assume that the employee earns €400 a week for a 5 day week. There is one Public Holiday that is not paid with a value of €80 as unpaid wages for that date and one week's Annual Leave not paid with an economic value of €400. The Adjudicator declares;

"I find that the complaint is well founded in relation to working excessive hours contrary to Section 15, Public Holidays and Annual Leave. I award the complainant €10,000 as compensation".

In such cases because the award under three Section were all dealt with as a global figure the entire determination is subject to tax. This means that the employer pays the €10,000 to the employee less tax submitted to the Revenue and PRSI and USC to Social Welfare. The employer is also responsible for €1075 employers PRSI. The employer must submit and amended P45. The employee then reclaims the tax. The employer has paid

an additional €1,075. Let us assume that the Adjudicator deals with the Decision as follows.

The Adjudicators Decision states;

"I declare that the complaints under three Section of the Act in relation to working in excess of 48 hours, public holidays and annual leave entitlements is well founded and is upheld.

I award the sum of €8000 for breach of Section 15.

I award the employee €80 for non-payment of public holidays, €400 for non-payment of annual leave and a sum of €1520 for the infringement of the employees' rights under the Act".

In the alternative as has been set out in the past, it could be provided as follows;

"Redress

Having regard to all the circumstances of this case I award the employee compensation in the sum of €10,000 for the contraventions of the Act which I have found to have occurred. Of this amount €480 is in respect of annual leave and public holiday entitlements. The remaining €9520 is in the nature of a general compensatory amount".

In the first circumstance as set out the entire award as previously stated is subject to tax. In the two latter examples the sum of €480 only is subject to tax with the balance being exempt.

The reason for same is that the Decision clearly sets out that the compensation is compensation for an infringement of a right.

It would be beneficial if the decision added on the words

"In respect of the award of €9,520 same is exempt from tax by virtue of the provisions of Section 192 A Taxes Consolidation Act 1997 as it is compensation for infringement of an entitlement under the Act".

You may say that it is the same amount being awarded. You are correct in saying that but it is the words that are used in the Decision determine the tax treatment.

Legislation is clear in that any award is subject to tax if it is a payment, however described in respect of remuneration including arrears of remuneration.

In the first example set out above the award of €10,000 includes arrears of wages. It includes remuneration and is therefore subject to tax.

If the employee has ceased employment then S. 201 TCA 97 applies and the employee can claim a refund of tax on the €10,000 or €480.

How the tax treatment of a particular matter may ultimately be dealt with depends on the wording of the Decision. If I can give you one example where the Decision of an Adjudicator would be subject to tax and the Decision of the Labour Court would be exempt from tax and while I am not giving the parties names I am setting out the wording of the Decision.

Before the Rights Commissioner The Rights Commissioner held;

"There were X public holidays during this reference period. The shortfall is 39 hours multiplied Y per hour equals Z. There were X annual leave entitlements during this reference period. The shortfall is 78 hours multiplied by Y per hour equals Z.

I order the employer to pay to the claimant compensation in the sum of Z + Z for breaches of Section 21 (1) and 19 (1) of the Act".

The matter was appealed to the Labour Court

The Determination of the Labour Court was as follows;

"The complaint is well founded. The Court awards the complainant the sum of "A" compensation for the infringement of his entitlements under the Act".

The total sum was minimal. However that is not relevant.

The issue is what is the tax treatment?

Clearly the decision of the Rights Commissioner was taxable as it is arrears of remuneration.

The Decision of the Labour Court was not taxable as the Labour Court provided compensation for the infringement of the entitlement. However a Revenue Official might argue as the case involved "arrears" the decision could be deemed to include arrears and is taxable. The value would be preclude any real challenge to a Revenue ruling.

In another case the tax treatment of an award by the Labour Court could not have been clearer or more precise.

"Having regard to all the circumstances of this case the Court awards the claimant compensation in the amount of €5000 for the

contraventions of the Act which it has found to have occurred. Of this amount €2000 is in respect of arrears of holiday and cessor pay. The remaining €3000 is in the nature of a general compensatory amount".

The case reference is DWT1223.

The €3000 is exempt under S. 192A. The €2000 is subject to tax but as it is "cessor" pay arising on cessation of employment relief under Section 201 is available. Therefore no tax is payable.
That Decision could not have been clearer for the tax treatment. Because the decision stated "cessor pay" S. 201 is available. Even if it had not it would on the facts of the decision been available but by putting it in the redress section of the decision the tax treatment is clearly and precisely stated.

It is much more beneficial if any amount of remuneration including arrears, holiday pay or public holiday pay or any matter which was in the form of compensation for an economic loss that is quantifiable in euros and cent is separately provided for with any general compensation being separately specified.

At a minimum it would be far more beneficial if Decisions did specify at least claims on a section by section basis. Therefore the tax treatment would be absolutely clear as regards exempt awards. Therefore if say arrears of wages and compensation are lumped together only part of an award would be taxable and an exempt award for another section would be exempt.

Payments not covered by the exemption.

I would refer you to Schedule 7.1.27 of the Revenue Tax Manual and the Revenue notice for guidance notes.

Payments not covered can be summarised as follows.

1. Actual remuneration of arrears of remuneration.

This would include a claim for wages under the Payment of Wages Act or an award under the Unfair Dismissal Acts. It would include claims under the Industrial Relations Act and Equal Pay claims under the Employment Equality Acts. It would include a claim for Annual Leave pay or Public Holiday pay under the Organisation of Working Time Act, i.e. actual loss.

It does not include as remuneration or arrears of remuneration an award under the Terms of Employment (Information) Act even if it specifies that it is four weeks wages or a Decision under the Maternity Protection Act awarding an employee 20 weeks wages or an award for infringement of say the OWTA as regards Annual Leave entitlements as opposed to holiday pay. The fact that the compensation is denominated in weeks of wages does not make it taxable.

2. Compensation for a reduction of future remuneration arising from a reorganisation, a change in working procedures will be subject to tax subject to the relief under Section 480 TCA97.

Section 480 TCA 1997 refers to lump sum payments made to an employee as compensation for a change in working conditions. This applies to any payment chargeable to tax under Schedule E (e.g. PAYE) made to an employee to compensate the employee for;

(a) A reduction or possible reduction of future remuneration arising from a reorganisation of the employers business e.g. a loss of promotional prospects, with attendant loss of possible higher earnings,

(b) A change in working procedures or working method. Examples might be the introduction of new technology or agreed changes in working methods

(c) A change in duties e.g. a machinist agreeing to load raw material or pack the finished product.

(d) A change in the rate or remuneration e.g. the introduction of a higher basic salary and substitution for a basic salary or commission or the cessation of overtime at a higher rate of pay

(e) A transfer of the employer's place of employment from one location to another.

Payments excluded from the relief are lump sum payments made to directors and employees with proprietary interests or part time directors and part time employees. The relief is claimed after the tax year ends. The relief is such as to reduce the total income for the year or assessment to

(a) The income tax which would have been payable by the employee if he / she had not received the lump sum, plus

(b) Tax on the whole of the lump sum computed at a special rate (an effective rate on the payment of 1/3 only of the lump sum paid).

You require to make a written claim and evidence that any of the items have happened must be furnished for example a statement from the employee.

The timing of payments can be significant.

Example

Let us assume you have an employee earning €15 an hour. You agree to a reduction to €12 an hour. The loss for a 40 hour week is €6340 per annum. The employer agrees to pay €7,540 for this change in work practices on the 1st December 2016 effective as of 31 December 2017. The payment is made on 31st December 2013. The tax treatment is €2513 subject to tax being 1/3 of €7540.

If the payment is made on 1st January 2014 the employee's salary will have reduced by €6340. So there will be no relief on the €6340. Only €1200 will be available to get tax relief on. The employee will pay tax on €400. They will however pay full tax on the sum of €6340.

As such structures are put in place to negotiate with employees very often in effect you are dealing with what they are going to receive net into their hand. There is a significant net difference by paying it on 31st December as opposed to 1st January.

Wages and Arrears of Wages

Claims under the Payment of Wages Act for non-payment of wages are clearly arrears of remuneration.

A claim under Section 18 of the Organisation of Working Time Act where the employee can claim that they were available to work but were not paid where the award would be 25% of the amount which they would otherwise have received is clearly wages and is taxable. Compensation in addition to this for breach of the Act is not wages and is not taxable.

Awards under the Unfair Dismissal Legislation are wages. The reason for this is the terminology of the legislation itself. The maximum award which can be awarded under the Unfair Dismissals Acts is 104 weeks loss. The legislation refers to loss. Therefore the tax treatment follows the legislation.

There are a number of confusing aspects on this. Under Payment of Wages Legislation and the Unfair Dismissal legislation. The awards are "net" wages. In respect of a claim under Section 18 of the Organisation of Working Time Act it would be the gross amount. In addition under Section 18 of the Organisation of Working Time Act an Adjudicator or the Labour Court could award up to two years wages as compensation and the tax treatment will depend on the wording used by the Adjudicator or Labour Court. In respect of the Payment of Wages or Unfair Dismissal Act claim it will always be net wages. This does not mean however that all wages are taxable. This may appear a contradiction.

Example

Employee D has one year service. He is dismissed. He was not paid his last 3 weeks wages. He was not given Minimum Notice. His gross wages was €500 per week. His net was €400.

The Adjudicator awards €1200 under the Payment of Wages Act for Unpaid Wages and €500 for Minimum Notice (Minimum Notice in Gross). In addition a sum of €5000 is awarded under the Unfair Dismissal Acts.

On appeal the Decision is upheld by the EAT. At first sight all awards are "wages" and are taxable. This seems logical. However this is not the position. Section 201 TCA 97 will exempt the Unfair Dismissal Act award as it is less than €10,160. The Minimum Notice Payment will also be exempt. The reason for this is that it is a termination payment. The wages of €1200 is taxable and subject to employers PRSI. It is not a termination payment so S. 201 does not apply.

A claim for wages or a claim for breach of contract for non-payment of wages in the Circuit Court or High Court will always be taxable. A payment which is a termination payment will get the benefit of section 201 TCA 97 subject to the threshold. The threshold amount is €10,160. There is also an additional sum of €765 for each complete year of service in the employment in respect of which the payment is made. It is complete years. Therefore if an employee has 1 year and 11 months service they will get the additional €765. If they have 2 years and 1 month they get an additional €1530.

While it is not strictly speaking part of the seminar the issue which has never really been determined by anybody is what are "net wages".

Example

Let us assume there are two employees who are higher level employees. They are employed for one year. The base exemption applies. They are paid €200k per annum gross. The net for employee A is €150k per annum and for employee B €130k. Employee A maximises every relief that she can under the Taxes Acts while employee B does not.

Nobody has ever described how "net" is arrived at. Whether it is actual or notional.

Saying this, let us assume the Adjudicator awards each 1 years net wages.

Employee A receives €150k. Employee B receives €130K. This is their "net" loss. However, both awards will be subject to tax. Employee A is taxed on €150,000 less €10,925.. Employee B is taxed 130K less €10,925.

As the "employee" will have no tax credits for their tax will be deducted at 40% plus 8% USC (as over €70,044) would be an effective rate of 48% on the

Net award. The employer will pay 10.75 for employee A and for employee B but on different amounts as employees PRSI.

The two employees could seek a refund of the tax or they may be able to avail of the other exemptions.

It does however seem unfair to one employee who had put in place for example VHI, put in place permanent health insurance, may have invested in a home and being able to obtain mortgage relief and may have purchased a bike to cycle to and from work where tax relief would have been available that that employee would be deemed to have a higher net than an employee who just took the money at the end of the month and made no provision for their future. I am simply raising it that there would appear to be an argument under the legislation that net wages would be a notional rather than an actual net being calculated on the basis of the tax treatment of the individual as if they were an individual simply claiming the basic allowances. In the example above there would a significant difference between two employees if one is married and has a working spouse and the other Single that is an issue which is going to have to be determined at some stage.

Conclusion of the Tax Treatment

There is an old adage in taxation that;

"Taxation follows the law".

By this I mean that the tax code will apply to a payment to an individual depending on how it is categorised under the law.

Again, I think it might be useful to give an example.

Let us assume there are two employers.

Both employers sell their business. The business transfers under the Transfer of Undertaking Regulations

Employer A writes to an employee as follows.

"Now that your employment has transferred under the Transfer of Undertaking Regulations to the new employer I would like to thank you for all your work over the years and now that you are finished working for me I would like to make a gift to you of €3000 in appreciation of your work and to thank you for your assistance in the transfer of the business over to your new employer".

The second employer sends the following letter;

"I would like to make you a gift of €3000"

The first payment is subject to tax as it relates to a change in conditions.

The second payment is a gift and it's completely exempt under the Capital Acquisitions Act. this is not an Act you could deal with but it shows there is no equity in tax.

Both employers may have intended to make a gift simplicitor. The nuances of words will determine the tax treatment.

I give the above as a simple example of how the categorisation of matters will determine the tax treatment. If there is a settlement that is put in place under the Payment of Wages Act, The Organisation of Working Time Act, the Maternity Protection Act, the Employment Equality Acts and the National Minimum Wage Act and a global figure is inserted in the settlement agreement the entire will be subject to tax.

If it is split up between the various Acts only the Payment of Wages and the National Minimum Wage Act settlement elements only will be subject to Tax.

For employees it is important so as to maximise the amount of money that they receive now.

For employers it is equally important so as to minimise an unnecessary cost of 10.75% PRSI charge. Where there is no liability to pay it but incorrect structuring of a settlement could cause it to be payable.

When considering a settlement you must always consider Section 201 in respect of any payment which is subject to tax.

If the exemption applies then the employee receives the award without tax and PRSI having been charged. The employer avoids unnecessary cost of 10.75% PRSI charge.

If you have a claim under all of the above Acts this is not a reason for lumping everything under one of the exemption sections. For example the Employment Equality Legislation of the Organisation of Working Time Act.

A settlement must be "bona fide".

It is certainly useful for a representative of an employer particularly to set out the rationale as to why a particular settlement might have been put in place.

For example. You could have a situation of a claim under the Organisation of Working Time Act. If you are acting for a large employer it may well be

that a defence which would be acceptable for the owner of a small corner shop might not suffice for a claim by a significant employer and the level of compensation might well be different. It is therefore useful to specify why a particular award was recommended to an employer. When considering settlement it is a settlement or an employment law award it is imperative to, look at section 192 A TCA 97 firstly to see if it is exempt. It is then necessary to look at the other exemptions such as section 201 as a fall-back position. Section 192 A TCA97 is not a catch all solution to pay tax free by lumping everything under an "Exempt Act".

The Tax Treatment of Legal Fees

It is always nice to finish with something which is close to the heart of all lawyers. That is the tax treatment of their fees.

Legal fees paid in employment cases provided they are reasonable are exempt from tax in calculation the tax in settlement or award.

Let us assume for example there is a case under the Unfair Dismissal Acts. The employee has worked for the employer for 10 years. They are therefore entitled to the exemption of €765 for each complete year of service being €7650 together with the section 201 exemption of €10160. This amounts to €17810. The claim settles for €25000. The settlement document specifies as follows.

"The employer shall pay the employee the sum of €25000 as to €18850 to the employee and a sum of €6150 (inclusive of VAT) being legal fees to X solicitors".

As the exemption of Section 1912 A does not apply it is not necessary to specify this.

The exemption under Section 201 together with the additional €765 per annum gives the employee the sum of €17,810 exempt from tax.

The €6150 inclusive of VAT payable to the Solicitors is exempt in the calculation of tax. The only sum subject to tax is €1040.

If the settlement had simply been;

"The employer shall pay to the employee the sum of €25000".

Then the position would be that even if the employee has agreed to pay their Solicitor the sum of €6150 the sum of €7190 would be subject to tax. The employer pays full PRSI.

It is therefore beneficial to both employers and employees in the above example to split the settlement as to what shall be paid to the employee and what should be paid to their legal representatives.

If this had been a decision by an Adudicator, then the sum of €7190 is taxable. Both the employer and the employee have a liability.

It therefore makes economic sense for both representatives of employers and employees who are putting in place settlement agreements to specify what the legal fees will be. It also makes sense to settle. In the above example it would be better for the employee, financially, to settle for €23,000 as to €17,000 to the employee and €6000 to their Solicitor than receive an award of €25,000.

Overall conclusion

I do hope that this seminar will be of some practicable benefit to you.

This is not some form of tax avoidance scheme. It is simply structuring matters correctly in accordance with the Decisions so that the correct amount of tax is charged.

When I was being trained in what was the Pricewaterhouse "way" (and now PricewaterhouseCoopers) on tax I was trained by an ex Inspector of Taxes. He specified that in his view there were only two sins. I don't believe that he had read the Ten Commandments. The two sins which he specified were;

a. Paying less tax than you are obliged to pay; and

b. The greatest of all the sins – paying too much tax.

I believe that he could have added a third one which is

a. Having to pay for tax advice where a Decision could have specified which elements were taxable and which elements were not taxable.

I many years ago wrote a book entitled "Payroll and Taxation for Employers" with Ken O'Brien of PwC.

If I remember correctly our working title on it was "The Complete Cure for Insomnia".

I hope that we do not send you to sleep and equally I hope that I have explained matters in a simple way.

The legislation is not that complex. It is its application where matters proceed without reference to the legislation which causes the problems. Tax follows the law. It is not something to be scared of. The exemption in the legislation is there to be claimed. It is not a tax avoidance scheme. It is an exemption specifically introduced by the Minister for Finance because of an

anomaly in the tax legislation. It is no different that claiming the VHI premium against your tax or your pension contribution. If an exemption is there it should be claimed. It should be recognised and it should be applied.

It benefits both employers and employee.

It results in both paying the tax which they are obliged to pay and nothing more or less.