The Southern Law Association

and

Employment Law Association of Ireland

The New Workplace Relations Dispute Resolution Procedures / Practical Issues of Bringing and Defending Claims

Paper presented by

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In these notes I will be referring primarily to Unfair Dismissal cases as those who deal with other cases before Rights Commissioners or the Labour Court, in the past, will in reality, have to deal with submissions earlier but otherwise will not be too unduly affected, or at least will be more ready to adapt existing procedures to be more front loaded and undertaken earlier. Colleagues who primarily did Unfair Dismissal cases before the EAT may have to adapt more.

The Road Travelled So Far

There has been a long road travelled for the Workplace Relations Disputes Procedures to finally having been enacted. It started with a consultation process, which I and many others contributed to. To be fair the process started before that within the Department. There were meetings. Some of these were formal. Some of them were informal about the new process. The Bill was introduced in July 2014 and became operable in October of this year. There were significant levels of opposition to the new process. One of the main arguments against the process is that it is not a "Lawyers" forum presided over by Lawyers. It has been alleged that there will not be the opportunity to test the evidence like there was in the Employment Appeals Tribunal.

There are a number of misconceptions which I think need to be put to rest.

Misconceptions

For those of us who regularly appeared before what was the Labour Relations Commission, now the Workplace Relations Commission ("WRC") or the Labour Court these arguments I believe are misconceived, at best, and plain wrong at worst.

Before Adjudicators there will be the opportunity to cross examine witnesses. The guidance notes clearly say so. I do believe that the evidence being put forward will be tested. Currently before Rights Commissioners they always allow a representative to have questions put through the Rights Commissioner to any person who is there whose evidence is relevant. Rights Commissioners regularly question what I might loosely term witnesses in relation to cases. Now before Adjudicators there will be cross examination. There are no formal figures in relation to cases before the Rights Commissioner service which went on appeal to the Employment Appeals Tribunal. I am aware that informal reviews have been undertaken whereby approximately 10% of Unfair Dismissal cases before Rights Commissioners go on appeal to the Employment Appeals Tribunal and approximately only 10% of these are overturned. This does indicate that the

Rights Commissioner Service has to date got matters right most of the time. I do accept that bigger cases in the past would not have gone before the Rights Commissioner Service and would have gone straight to the Employment Appeals Tribunal. They will now go to the WRC. My own view is that a significant number of these cases will settle and they will settle before they ever come on for hearing. I will be dealing with this later in the seminar notes. In addition I believe that cases which would previously have settled on the morning will continue to be settled on the first occasion rather than having to go on appeal to the Labour Court.

There are a number of significant misconceptions going around about the Labour Court. I have had the advantage of appearing on a number of occasions before them. I have had the advantage of dealing with both factual and technical issues before them. I believe that the Labour Court has significant advantages for practitioners and I would like to list some of these.

1. There are legally qualified individuals on the Labour Court. More importantly they are all technically of the highest calibre.
2. The standard of legal argument from the Labour Court in both discussions before them and in their opinions are very in-depth. I may not always agree with what the Labour Court says but it should be noted that they are rarely overturned either on a Point of Law or a Judicial Review. That says something in itself.
3. The Labour Court has a Registrar in Hugh of Neill who is a brilliant employment law expert, in my opinion. That view is shared by many. I know of no one nor have I met anyone who has ever questioned the legal expertise of the Registrar of the Labour Court. The Labour Court has the advantage of having a Registrar to whom they can refer to for assistance in cases.
4. It is not unusual in cases before the Labour Court that significant legal issues will be raised by the Court relating to the interpretation of legislation or the impact of decisions on the interpretation of legislation. Sometimes these will not be issues which have been raised by the parties in the appeals themselves but will be raised by the Labour Court. This level of in-depth knowledge indicates to me a significant level of legal expertise within the Labour Court which should never be underestimated. As often as not it will appear that these technical issues arise as a result of something said. The technical argument issue is then put by the Court. They know the law as well if not better than many practitioners.
5. The Labour Court in its various divisions follow decision of other divisions previously made, normally. They are not rigid if you have a valid legal argument not previously argued. However, it would want to be a good one. They do follow previous decisions which means there is a precedent value which brings certainty. All Lawyers like certainty. The EAT never felt

constrained by decisions of other divisions. When the Labour Court give a determination on a legal issue it is my view that it has been seriously considered by the Court and when I say the Court I do not mean just that division.

6. The Labour Court will read, in advance, everything submitted. Because of the way matters, up to now, in say an Organisation of Working Time case ran the various sides only see each other's submissions on the day. I have had many cases where the Labour Court has from the records they have had a few days before extracted significant numbers of issues from documentation submitted by or on behalf of employers and employees relating to records. You will regularly have the Labour Court specify particular dates, times, hours and even fraction of hours which they will raise questions on. Before any case will start the division will have read everything. Sometimes probably more than the parties themselves and even possibly those submitting documentation.
7. The level of attention to detail in reading documentation is quite staggering. I have appeared before the Labour Court with documentation being produced in languages that I am not conversant with where it is clear to me that the Labour Court has had the documentation translated and knows what exactly what it says. This is a level of attention to detail which is not always recognised and certainly has not been recognised in some of the criticisms of the new procedures.
8. The Labour Court will not allow either party to be ambushed. If an issue arises at a hearing that the other side could not reasonably have been on notice of or aware of the Labour Court will always give them time to respond either by way of an adjourned hearing or by way of written submissions, if requested and more often than not will be offered by the Court itself.
9. Where a legal issue arises or is raised, and this can often be by the Labour Court itself, both parties will always be given an opportunity to make a written submission. If a defence is made which was a new defence or a new legal point which would not have been made at an initial hearing the Labour Court will not allow the other sides representative not to have an opportunity to address the issue.

My experience before the Labour Court is that the quality of input from the Chairman of each division and from the individuals nominated by each side of industry is of the highest technical quality. The questioning will, from them all, be often as much on the law, by which I mean case law, sections and subsections of Acts, Statutory Instruments and EU Law as it will be on the facts. The Labour Court is not a forum where practitioners will simply come in and just tell "the story". You will be questioned on the law. I accept that those who would not previously have appeared before the Labour Court and would have appeared before the Employment Appeals Tribunal in Unfair Dismissal cases may find that

the in-depth preparation which the Labour Court puts into a case can come as a shock. However, nobody should be fearful of appearing before the Labour Court. In fact if the Labour Court raises a legal issue and you don't know the case or have not considered the legal issue then my advice would be to say so. If you ask for time to make a submission I have never known the Labour Court to refuse such an application. To be fair, you might get a bit of a dressing down if the Court considered it was such a basic point that you should know about but you are not going to be taken short. I have never known and I do not believe it will ever happen that the Labour Court will not give a representative the opportunity to present their case fully.

In the case of Adjudicators I have only appeared before them in Equality cases so far. They have however undergone training. If the process Adjudicators follow is the way Rights Commissioners operated I would have no concerns.

The Rights Commissioners regularly met and would adopt an approach on new developments which brings certainty. I expect that to continue. Rights Commissioners follow decisions of the Labour Court. Adjudicators will also be expected to do so, and, I expect they will.

The Adjudicator service will now have a legally qualified Registrar to advise on the application of the law and what the law is. This is a significant innovation and support for Adjudicators.

I do however have a concern that Adjudicators may not get the necessary support such as copies of Kerr's Irish Employment Law or access to Westlaw for relevant updates on the law.

Some of the criticisms raised have been in relation to fair procedures and I would like to deal with these.

Fair Procedures

The fact that cases will before an Adjudicator will require submissions in advance with a list of witnesses does mean additional work in advance. The opportunity to test the evidence on either side will not be just through the Adjudicator. The latest updated notes give a right to both make representatives and question witnesses. Many facts relating to the testing of evidence, even in cases before the EAT, will relate to procedures. In cases involving a claim where somebody received a document that complied with Section 3 of Terms of Employment (Information) Act this is a matter of fact. In relation to claims under the Organisation of Working Time Act they often relate to records. Either the records will show or will not show compliance. On cases under Fixed Term legislation, Part Time legislation of Agency Workers again most of these relate to factual

issues which should be there in documentation which can be produced. I do accept that the testing of evidence in the case of Unfair Dismissals is more difficult but my experience before the Employment Appeals Tribunal is that a considerable amount of the cases involve records, notices of meetings, the notes of those meetings and the procedures. The Adjudicator will have read the submissions in advance. I see such technical issues being dealt with quickly. Either procedures were followed or they were not.

Even in the more complex of cases I do accept will more likely go on appeal to the Labour Court the Adjudication process is going to be important. It will very often elicit the issues which are agreed. It will elicit the issues which are in dispute. The Adjudication process will, I believe, sort the wheat from the chaff relating to any case so that what goes on appeal to the Labour Court will be on the real issues which need to be determined.

When a matter goes on appeal to the Labour Court then it is my experience that the Labour Court applies fair procedures in all dealings. Parties will have a right to examine and cross examine witnesses both before Adjudicators and the Labour Court. However the parties will not have the opportunity as happened in the EAT to run out the first day. For matters that I will set out later on I believe that before the Labour Court and Adjudicators you are going to have the core witnesses giving their evidence and there will not be the opportunity to pad or run cases out with irrelevant witnesses.

Will the new procedures be more effective and efficient?

I believe the simple answer to this question is “yes”. The new procedures as we have them to date do indicate that a significant amount of additional work is going to have to be done at the initial stages. This will need to be done by both the employer and the employee. There will not be the possibility of kicking a case to touch. I believe that this will mean that employers and employees will have to seriously consider whether they wish to pursue a claim because the work is going to have to be done day one. I do believe this will result in a significant increase in cases being settled early. I use the word early on purpose. I do not say earlier. My experience to date is that cases are settling very quickly because of the amount of work that has to be done and employers having to make the decision as to whether or not they wish to defend the claim. Equally employees now will have to get their paperwork in place very quickly.

The Legislation

The legislation which colleagues will have to deal with, who do not have access to Kerr's Irish Employment Law, is in addition to all the existing legislation the following,

1. Workplace Relations Act 2015
2. National Minimum Wage (Low Pay Commission) Act 2015
3. Industrial Relations (Amendment) Act 2015

The Acts at number 2 and 3 above amend the Workplace Relations Act 2015.

You may ask why? The simple answer is that some matters that should have been in the Workplace Relations Act, 2015 were omitted and had to be rectified.

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

1. There is no consolidated Employment Legislation in Ireland. Kerr's Irish Employment Law does consolidate the legislation.
2. The Labour Court and hopefully Adjudicators will have access to Kerr's Irish Employment Law. The Labour Court definitely will. I am not sure at this stage whether Adjudicators will but I do hope that will be the position. I do know that Adjudicators are going to get a laptop. I don't know if they are going to have Westlaw on it which would include Kerr's Irish Employment Law. I believe they need both.
3. If you do not have Kerr's Irish Employment Law I believe that you are going to be at a severe disadvantage. Let me give a simple example. You are bringing or defending a claim that an employee has not received a document which complies with Section 3 Terms of Employment (Information) Act 1994. (i.e. the "No contract claim")
   Section 3 has been amended by

(a) Section 18 Industrial Relations (Amendment) Act 2012 (Clause f a)
(b) Section 44 National Minimum Wage Act Clauses (g) and (ga)
(c) Article 3 (1) Terms of Employment (Additional Information Order 1998 (SI 49/1998) Information on Sections 11, 12 and 13 Organisation of Working Time Act must be furnished.

There are other provisions which apply.

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

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

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

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

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

The Claim Form

There are continuing complaints from practitioners whether they are acting for employers or employees about the new form. Some parts of the form are just plain wrong. For example on the complaint "I did not receive a contract" the complaint is entirely incorrect. In the body of any such complaint I always put in

"The employee did not receive a document which complied with Section 3".

There is no claim under Section 3 of the Terms of Employment (Information) Act that an individual did not receive a contract of employment. There is a claim that an individual did not receive a document which complied with Section 3. The defence which often come in is "the employee received a contract". The claim may be that the employee may well have received a contract but a number of the provisions set out in Section 3 may not have been set out.

An Adjudicator or the Labour Court will simply be dealing with whether the document complied with Section 3.

There is no reason why such factual issues cannot be dealt with by way of submission.

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

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

The Courts have an Affidavit of Verification procedure. We don't have this before the WRC.

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

The legislation in Section 41 (a) provides that an employee or where the employee consents a specified person may present a complaint. I can see the issue arising as to what constitutes "consent". If you are lodging online and are not having your client sign the form I would caution that;

(a) You include a specific provision in your engagement letter authorising you to submit a complaint online.
(b) That you have your client appoint you their Attorney for the purposes of Section 16 of the Power of Attorney Act 1996.
(c) The claim form has gone through a number of changes. Some of the compulsory sections still cause a problem. You have to have an exact start date on the form. It is compulsory. From experience I know that employees will know when they left a job but very often they will not know the exact date on which they started. I was at a meeting in the Department when the form was being discussed. When I raised the issue of exact start dates I was told that everybody knows when they started. There were six people in the room and I asked would they mind telling me what date they actually started. Four of them had it right. One of them could only give the month and the year and one of them could give what they remembered was either November or December but couldn't actually remember the year.

Because you can't submit the form without the exact start date if you have a problem the answer is to print it off and send it in in hard copy. If sending it to Carlow in Workplace Relations Department of Jobs Enterprise and Innovation, O' Brien Road, Carlow. Their DX is 271001 Carlow 2. This DX is not put on any correspondence but you can use it.

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

<u>Mediation</u>

I deal with mediation at this stage as the very tenor of the Act is to finalise matters quickly. The Act envisages a claim being presented and effectively unless

the employee objects to mediation, or the employer, the case will first go to mediation.

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

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

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

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

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

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

Where the employee is still in employment then there is one approach. When the employment has ceased then equally they tended to take a practical approach where experienced practitioners are involved. Before Equality Officers you could have on mediation an entire afternoon spent going nowhere. Under LRC mediation they tended to cut to the chase.

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

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

Will mediation work?

The answer is “yes” and “no”. “Yes” if you approach mediation correctly it will work.

“No” in that Mr. Mulvey has publically on the record stated he does not have enough trained mediators.

Solicitors are trained to negotiate and while it may be called “mediation” many who made submissions asked that it be called conciliations or resolution rather than mediation. I am not going into defining “mediation” but the issue in Workplace Rights complaints is to try and get matters what I would called “settled”. If you have a case, especially of right based issued such as sexual harassment or breach of the Organisation of Working Time Act you are not really dealing with mediation as understood. You are there with negotiating a settlement. None of the Legislation defines what is meant by “mediation”.

I know that some colleagues will have a resistance to mediation on the basis that they are going into the unknown. Mediation of disputes whether they are equality cases or employment rights cases are ones that the mediators are well aware of. There is nothing they have not come across. They are used to the resolution of matters and the negotiation of matters to resolve disputes. It is far better to resolve matters at mediation than to have to go for a hearing. I would encourage colleagues to use mediation.

Codes of Practice / Referrals to the High Court

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

The Labour Court can refer issues to the High Court. Previously it needed the consent of the Minister. Now they can do so themselves without consent. The previous entitlement was never used. I would hope the Court would consider using its new powers in appropriate cases.

Representation before the WRC and the Labour Court

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

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

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

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

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

I have certain difficulties with an insurance company representing an employer where they may have a financial exposure themselves if any award is to be made and that this is not disclosed to the Court or an Adjudicator. In Personal Injury claims you know whom a Solicitor is acting for as they are nominated by the insurance company in open correspondence. This point has never been raised before an Adjudicator of the Labour Court and I am not aware of it having been raised before the EAT. A Trade Union, Solicitor or Barrister or an entity which represents a large number of employers and has effectively representative status have automatic rights of audience.

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

Unfair Dismissal cases.

Constructive Dismissal

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

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

Now the guideline states that there must be;

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

Following the decision of the Supreme Court in Halal Meat Packers (Ballyhaunis) Limited –v- EAT [1990] E.L.R.49 pages 60-64 I have my doubts as to whether the Director General or an Adjudication Officer could refuse to hear a case. I have my doubt as to whether an inference can be drawn by the failure to set out all the details. I do envisage that this is an issue which will go to the Courts ultimately. In Constructive Dismissal cases my advice would be to get a detailed statement and to submit it at the start. There will be cases where there are time constraints or it will not be possible or practicable to get the written statement from your client and to have it set out in detail when submitting the claim.

In such cases I would say submit first then as quickly as possible resubmit the form in hard copy with a full statement and requesting that both claims be amalgamated together. Nobody needs to be the first test case. Where time allows of course my advice would be to get the full statement written out. You will also need to set out the evidence of your witnesses. Before any statement is submitted it is probably advisable to have your client either writes their statement out themselves as to what they say happened and the reasons why they say that they were justified in leaving the employment or that you take instructions, complete the statement and have it approved by your client in advance.

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

In Equality cases of course the same would need to be done.

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

claim you should issue first particularly where there is a good chance the employee will get work and they have both a UD and an Equality claim for example a pregnancy related dismissal.

Unfair Dismissal Claims

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

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

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

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

Where no procedures are notified, which is unfortunately in a large number of entities, then I believe that the Code of Practice on Grievance and Disciplinary Procedures will be the standard applied by an Adjudication Officer or the Labour Court to any dismissal procedures including cases where the procedures do not meet the standard.

I would caution those representing employers to go through the Code of Practice, where the company or employer does not have a disciplinary procedure to see

were these applied and even where employers have procedures, to see if they comply with the Code of Practice. If they were not applied then I believe the employer is going to be in difficulties.

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

Appeals to the Labour Court

Where a party appeals a decision of an Adjudication Officer to the Labour Court the party appealing will be written to by the Labour Court giving that party three weeks to submit detailed grounds of their appeal. They will be required to submit five copies. They will be required to submit one further copy to the respondent or the respondent's representative if the respondent to the appeal had nominated a representative. Evidence of furnishing same will be required. The Labour Court will then write to the Respondent in the appeal, whether they are the employer or the employee and giving them a period of three weeks to lodge their documentation in a similar fashion. It appears that you are going to get one chance to submit the documentation. It is not going to be a matter of submitting something and then turning up for a hearing with a load of additional documents or witnesses. If witness is going to be called you are going to have to set out an outline of the evidence that they are going to give. Failure to submit the documentation in time will mean that you are treated as having abandoned the appeal. There are the unusual "exceptional circumstances" extensions. I would envisage this issue going to the High Court at some stage. I believe such a challenge may well be rejected as the Labour Court is entitled to set its own proceedings unless they are "unfair". I do not see them as unfair per se. These new rules I believe will be applied not just to Unfair Dismissal cases. If so there is a lot of work to be done very quickly.

Section 14 (4) Unfair Dismissal Act 1977 as amended

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

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

"I was unfairly dismissed. I submitted a claim under Section 14 Unfair Dismissals Act 1977 as amended. The employer has failed to respond to my request for a statement".

This may well be sufficient to ground a claim for Unfair Dismissal.

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

If furnishing such a request I would advise that the case of an individual employer that it is sent by registered post and by ordinary post with a certificate of posting as sometimes registered post is refused. In the case of a company serving it by ordinary post would, in my view, be sufficient. I think it is also worth requesting at the very start copies of all correspondence, notice of meetings, disciplinary procedures and grievance procedures that apply in the workplace. A Data Protection request should also be furnished. Many employers never respond. It is much easier to make a short submission where you requested documentation but got nothing.

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

If acting for employers I would be slow to refuse an appeal even if it is out of time. Even if the employee has lodged an Unfair Dismissal claim and has appealed in or around the same time I would go through the appeal procedure.

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

Legal Advice Privilege and Litigation Privilege

This issue has been heard before the Employment Appeals Tribunal from a colleague of ours from Monaghan being Mr. Brian Morgan. I have already made a submission to the Labour Court in an Unfair Dismissal case on this issue where we will be requesting a witness summons to an in-house Solicitor. Colleagues here today who are not in-house Solicitors may well ask why would this be relevant to the. Let me explain.

My understanding of legal advice privilege is that it only applies in the case of a company to Directors. It does not therefor apply to a HR Manager or other individuals within the organisation. If it is communicated from a Solicitor to for example a Director and the Director then communicates it to others within the

organisation that are not authorised to receive legal advice then it is treated as third party correspondence which can be discovered.

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

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

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

It is then necessary to make sure that it is clearly understood that legal advice will only be given to those named individuals and that in distributing it within the organisation the contents of any such legal advice should only be given to those who are authorised to receive it. Employers should be carefully advised that legal advice privilege is not absolute. It is outside the remit of this seminar to deal with the issue of legal advice privilege but it is probably one which practitioners are going to need to start carefully reviewing.

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

If a representative of an employee in an Unfair Dismissal case can get their hands on all the advice to the employer this can be significant as there is no discovery process in the WRC or Labour Court. I envisage in cases on Appeal to the Labour Court there will be more application for witness summons to employer or Company Secretaries of Non Solicitor representative entities particularly those who act “for gain” as opposed to being a representative body.

Service of Documents

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

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

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

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

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

Inspectors

Section 26 provides for the appointment of inspectors.

Section 27 sets out significant powers for inspectors.

Inspectors will be entitled to enter any place of work which is being used in connection with the employment of a person or where they believe that records or documents relating to a person so employed are kept. This will include not only the workplace itself but also possibly an Accountant's office or those providing book keeping services.

The inspector will be entitled to take copies of any books records or other documents. This includes records stored in non-legible form. This would include for example documentation which is encrypted. Clearly the inspector will be entitled to obtain the codes. The inspector can remove such books and records.

There are restrictions on entering into a private dwelling without consent. If consent is not forthcoming then an inspector can obtain a warrant.

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

Compliance Notices

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

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

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

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

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

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

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

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

Inspection of Employers Records pursuant to a direction of the Labour Court.

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

Court shall consider the report and should give a copy of that report to the parties to the appeal concerned.

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

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

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

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

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

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

<u>Fixed Payment Notices</u>

Where an inspector has reasonable grounds for believing that a person has committed a relevant offence the inspector can issue what is termed a fixed payment notice. This sum cannot exceed €2000. The individual or company receiving it has a period of 42 days to appeal. What is interesting in the legislation is that the person who receives the fixed payment notice is not obliged to make the payment but if they do not then a prosecution can issue after 42

days. The relevant offences are ones which are most likely to arise in employment rights cases. They could very well result from an inspection requested by the Labour Court. The three relevant offences are under Section 11 Protection of Employment Act 1977, Section 4 (4) of the Payment of Wages Act 1991 which effectively is not providing payslips showing gross and net wages and Section 23 of the National Minimum Wage Act being failure to comply with a Section 23 notice within the statutory period.

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

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

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

Claims before an Adjudication Officer

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

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

An Adjudication Officer may dismiss a complaint if they believe it is frivolous or vexatious. There is a right of appeal to the Labour Court in such circumstances who can either affirm or annul the decision and refer the matter pack to the

Director General to be sent to probably a different Adjudication Officer. The option to refer a dispute back is one that is to be welcomed. In relation however, to appeals from an Adjudicator Officer, this right to refer matters back to an Adjudication Officer to apply, for example, the Law as determined by the Labour Court to a particular point is not there and will have to be dealt with by way of a full appeal.

In cases where, for example, an employee does not appear an Adjudication Officer will dismiss the case. It will be interesting to see whether it is done under the provisions of Section 42 or just a simple dismiss. If it is dismissed then the matter will go on appeal in the normal way and will be subject to a full rehearing. If the Adjudication Officer uses the provisions of Section 42 there is then the option for the matter to be sent back.

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

Enforcement

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

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

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

Where cases go before the District Court colleagues may well be in a situation that, in the case of a company, that a company Director will attend to argue that compensation rather than reinstatement or reengagement would be appropriate. In the case of Declan McDonald and McCaughey Developments Limited and Martin McCaughey [2014] IEHC 455 being a Judgement of Mr. Justice Gilligan is interesting in that effectively it would appear that a company Director has no right of audience in such a case. In the case of an Unfair Dismissal claim, instead of ordering reinstatement or reengagement if an Adjudication Officer had ordered

for example 104 weeks remuneration as compensation then there appears to be no right for the employer to go to the District Court and argue in relation to the level of compensation. In any decision other than Unfair Dismissal the District Courts only role is to affirm the decision.

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

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

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

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

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

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

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

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

Appeals to the Labour Court

The Normal rules will apply as have applied until now namely that the employee has 42 days in which to appeal.

The Legislation has been amended to provide that under Section 44 there is a right to extend time in "exceptional circumstances".

The test of what is an "exceptional circumstance" is an extremely high test. The Labour Court has previously ruled on what are exceptional circumstances in cases involving extensions of time brought by employees. I would envisage that the Labour Court will most likely apply similar tests where an application to extend time for an appeal is made.

The Labour Court like the Director General can direct under Section 47 for cases to be dealt with by submission only. Either party will have 42 days to object to such a process applying. I would envisage that there will be resistance for matters to be dealt with by way of submissions only. Saying this, I can see many cases where it will be an appropriate process. For example, a claim relating to whether or not a document complied with section 3 of the Terms of Employment (Information) Act, the level of compensation awarded for breach of that Act and I can even see situations where issues such as the payment or non-payment of a Sunday Premium under the Organisation or Working Time Act or appeals on quantum relating to awards from Adjudication officers are matters which could be dealt with under Section 47.

Consent Orders

Pending clarification from the Labour Court I am not sure as to how cases will be dealt with where there is a settlement on the day. The EAT would adjourn for implementation.

If a colleague enters into a settlement and the employer does not implement same your client loses the benefit of the insolvency legislation. Particularly relevant if a company becomes insolvent.

If you don't enter a "good" settlement and then lose the case before the Labour Court then you have other issues.

It appears unless the Labour Court allows cases to be adjourned for implementation you may well need a standard letter given to the "employee client" in advance and clear written instructions accepting the risks of settling. This is a real problem issue for those representing employees. There is no procedure for consent orders which is unfortunate.

Appeals to the High Court

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

In Point of Law appeals to the High Court the Respondent is the other party to the case before the Labour Court. The Labour Court is the Notice Party Rule 84C. The Central Office staff sometimes try to cajole persons into having the Labour Court as the Respondent. This is not correct.

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

I had it recently where the Central Office insisted the proceedings were changed around and it had to go to a Registrar to have it rectified.

Failure to Pay Compensation

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

If fined it is a Class A fine or imprisonment for a term not exceed 6 months or both. I can see the defence of inability to pay being raised. If it is a company that raises such a defence then there is to be the issue of fraudulent trading if it

continues to trade. It will certainly be enough to back up an application to the Courts for a winding up of the company on the basis that evidence was given that they were unable to pay their debts and liabilities as they became due. In the case of an individual they may very well be handing the bankruptcy application on a plate to the employee.

Industrial Relations (Amendment) Act 2015

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

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

Resistance to the New Procedures

There is a significant if quiet resistance already being voiced about the new procedures. Solicitor colleagues will only now be coming to grips with the new procedures. The number of Unfair Dismissal appeals to the Labour Court were around six. The reason for saying this is that we received in documentation last Friday where the record number was UD/15/6. Maybe a few more now.

Significant resistance is there especially from Counsel. The resistance is that they are not going to be “dictated to” as to how run cases. I am being polite as regards some of the comments directed to me by in some Counsel voicing opposition.

The question is why is this? It is not an objection to procedures per se. It is the cost issue. The objections relating to how cases would be heard before Adjudication Officers has effectively been side-lined by the new procedures which will allow cross examination even if the issue of the cases being in private still causes a certain amount of problems for Counsel. However the “public” issue is more perception than anything else. I cannot see too many Counsel ultimately being concerned enough to act pro bono in a case about public access. In many UD cases in the past on the morning of a Rights Commissioner or EAT case Counsel would meet their client. Sometimes it might even be for the first time.

The Solicitor for the employee will arrive with the efforts to obtain employment and possibly copies of correspondence from the employer relating to the dismissal. The employer representative will have copies of the correspondence

note from meetings etc. They will be exchanged. Counsel is often brought in late in the day. There is no formal defence documentation other than possibly a short statement setting out that it is a fair dismissal. Now to defend an Unfair Dismissal case or to even bring one a detailed statement with documentation and outlines of the evidence of witnesses will have to be prepared in advance for the initial hearing and especially for any appeal. This is a time commitment, especially for Counsel. That is therefore a cost. This is time Counsel are well aware of. In appeals to the Labour Court where a technical issue is raised especially on a reply to the submissions by an appellant or a respondent which does not deal with the technical issue raised by the appellant and could result in management meetings in the Labour Court or a request for submissions on technical issues being requested.

This is a time cost for employers and employees, their representatives who are Solicitors but particularly Counsel who may have to run the case.

As Solicitors, if you are going to be using Counsel the last thing you want to do is that you have a submission put in and Counsel then contends that something else should have been put in. If you are going to use Counsel you may well need to brief them at the start. This is clearly a cost.

Lodging Appeal document, responses and dealing with technical issues is a time cost, not just for Solicitors but also for Counsel. This will have to be paid for. The approach of some appears that they are not going to be “dictated” as to how the new procedures will be applied and that they will simply rely on the Halal case which I have referred to previously. This is not an approach that I agree with.

It is not an approach I would recommend. It is an approach I would strongly state should not be adopted. In the transition period there may be some leeway, but not for too long. When I say “leeway” I should add the word “limited” before it.

Of course there are challenges. There are very good reasons for having matters fully set out. Some of these are;

1. The issue of compliance with a Code of Practice / employers procedures in Unfair Dismissal cases can be dealt with at the start. I would envisage that a lot of Unfair Dismissal cases are going to be dealt with as regards the issue or the dismissal itself as to whether fair procedures were applied. I believe that where an employer fails to follow their own procedures or the Code of Practice on Grievance and Disciplinary procedures whichever is more beneficial to the employee may well result in a determination that there is an Unfair Dismissal. The issue of compensation then would be a separate matter.
2. Employees will have to disclose their claims also.
3. Employees will have to show, in advance, efforts to minimise loss.

4. Employee and employers will have to show how they complied with procedures.
5. Neither party can be ambushed
6. Cases can be disposed of quicker, at hearings, so there is a cost saving to the State.
7. In other cases the exchange of documentation allows for cases to be dealt with a lot quicker at hearing. The “real” issue can be addressed particularly on factual issues or on issues covered or not covered in records.

The downside is that there will be upfront costs for both employers and employees defending and bringing claims. The upfront cost is the cost of putting in place a claim or a defence. This is a cost which will have to be paid for. For employers and employees I see some not using representatives until the very end. I am not sure how Adjudicators of the Labour Court will deal with cases where a representative comes on record “on the day” or shortly before. I can see some attempting to use this procedure to avoid having to do a lot of the work upfront. Not something I see being tolerated for too long, by persistent offenders, who might “regularly” receive instructions late. There will be upfront costs. They will have to be met. Colleagues taking on cases will have to be aware of the additional work that is going to have to be done at the very start. Because documentation is going to have to be lodged employers and employees may well be caught with what is in the submissions. For those colleagues who would normally use Counsel in Unfair Dismissal cases then they are going to have to seriously consider at the very start getting Counsel involved. The time limits are so tight that this is going to be a further issue that is going to be needed to be addressed as it is going to be a cost issue. I mentioned this before but the cost of doing the work upfront is substantial.

At the time of writing this note the new Labour Court rules have not been published. They are due out next week, I believe.

Saying this, any Tribunal or body such as the Labour Court is entitled to set its own procedures provided they are fair. The new procedures published to date are, I believe, fair and reasonable. I do however see them being challenged, There are two forms of challenges;

1. The first would be to the Courts. It has been clearly stated that such challenges will be made. We will see do these threats actually arise.
2. The second is simply there will be noncompliance with the rules before the Adjudicators of the Labour Court.

The second is the most invidious and if successful will undermine those who are compliant. I therefore do not envisage that colleagues will be able to simply ignore the new rules.

Practical Issues on Unfair Dismissal Cases

For most colleagues Unfair Dismissal cases are the most usual. One issue which arises in an Unfair Dismissal case is the loss of income. The Adjudication service is now stating that you are likely to be advised of a hearing date within six weeks of lodging. Let us assume for example that hearing dates are now going to be scheduled within three to four months of a claim being notified. Let us assume an individual is dismissed on 1 December. The case comes before an Adjudicator for hearing on 1 March 2016 or even 1 April 2016. The loss in those circumstances is 3-4 months wages at that stage. The Unfair Dismissal Acts in Section 7 (3) refers to "prospective" loss. For representatives used to a 2 year delay this issue is going to be a new matter to deal with. I can see many employer representatives arguing "actual loss" only being due. The Unfair Dismissal Legislation allows an Adjudicator to look into the future to see what is the possibility of an employee obtaining employment.

The Unfair Dismissal Legislation does refer to the economic loss. It would be my view that an Adjudicator or the Labour Court can look to see what the economic loss is going to be. I see that they are in no different position than a High Court Judge in a Personal Injury claim assessing future loss of earnings. Where reinstatement is the preferred remedy then I would advise that the proceedings issue as soon as possible because the sooner the issue the stronger is the argument for reinstatement.

The Road Travelled So Far

At the start of this seminar I referred to the road travelled so far. We are now in the bedding down stage. The Chairman of the Labour Court Mr. Kevin Duffy had had his period, in the Labour Court, extended until the middle of next year. On a personal level I would be of the view that it would be advantageous to everybody if Mr. Duffy, as Chairman, remained in the position for a further period of time. He has had an integral part in the process and in the development of Employment Rights Law in Ireland. I do not believe that his input into the process can be underestimated and the importance of continuity between the old system and the new system being bedded down does require continuity. There are four excellent Deputy Chairman of the Labour Court who of course could take over as Chairman. However, at this particular junction I personally am of the view that we need continuity as much as possible. Mr. Duffy brings that continuity along with considerable expertise in employment rights, the law which we all have to deal with, the application of the law and the rules of evidence and practice and procedure within the Court where there have been considerable developments on a technical level over the last number of years. That is my personal view. Mr. Duffy has both a brilliant technical knowledge of the law

coupled with a management expertise which I believe is needed for some time to come.

Conclusion

The notes for this seminar today cannot be definitive. We do not know what is going to happen. They are being given in advance of the new rules from the Labour Court issuing. Because of this I will be updating these notes on a regular basis. For those who give their contact details to me I will arrange to have copies of the updated notes furnished. Alternatively they can be given to Terence O' Sullivan and I am sure he will copy them to you.

Copies of these notes will be available on the ELAI website and on my own website www.grogansolicitors.ie. However the public version of the notes will be available. They will not be the full notes. Issues where I express a personal opinion will to a large extent be deleted from those notes, which are made public.

For colleagues in the area of employment law I believe that this is going to be an exciting period of time. Of course there is change. There is nothing to be afraid of in relation to change. I do see that the level of representation which is going to be needed to be involved for both employers and employees creates a huge opportunity for Employment Lawyers. Of course there will be challenges. There will be a challenge of undertaking the additional work. Those challenges will have to be met and dealt with. The original proposals were that the new processes would be quicker, more effective, more efficient and less costly. I believe they will be more effective, more efficient and quicker but I am not sure about the cost saying for employers and employees.

Our employment legislation does not provide for costs to be awarded to the successful party. However we have to look at European legislation and particular where rights are created under European legislation the decision in Von Colson and Kamann. Where an employee has to undertake a significant amount of work the issue will be is this a cost. It clearly is a cost. For example in the case of the Labour Court six copies of submissions have to be furnished. Photocopying alone is a cost. Where there are technical legal issues that have to be raised that is a cost. At some stage I see somebody raising the issue where compensation is awarded where there has been a considerable amount of costs involved bringing an application to Europe. It will of course require the right case. The right case is probably going to be one where some spurious defence is raised by an employer and time will have to have been spent dealing with same by way of a technical submission. The case will be on a piece of legislation implementing European Law.

I see that there is going to be significant activity in employment law over the next couple of years where there will be changes which will result from cases primilarly going before the Labour Court. It is going to be a challenging time for organisations such as the Employment Law Association of Ireland and local Bar Associations in keeping members up to date with developments. The same will apply to the Law Society.

I would hope that colleagues would share their experiences whether they are Solicitors, members of ELAI or both.

My special thanks go to Terence O'Sullivan who arranged today. He is both a colleague and friend but also a noted Employment Solicitor whom I have huge regard for. When Terence asks I always oblige. He is a great sounding board for me who is very generous with his time.

Dear _____,

You currently have a case due for hearing before the Labour Court. There is an issue which I need to bring to your attention.

If shortly before the case or on the day a settlement proposal is put in place and you agree to enter into it then if the employer does not comply with the settlement you will lose your entitlement to bring a claim against the employer which would ultimately be paid by the Insolvency Fund. This would apply if the employer was made bankrupt or went into liquidation. This is unless the Labour Court consent to a matter being adjourned for implementation. They do not usually do so.

If you reject the settlement while you will retain your protections you may receive a lower sum from the Court than the proposed settlement.

We are sending this advice to you so that you are aware of it. Ultimately it is your decision whether to accept or reject any settlement proposal but it will be on the basis of above. We cannot guarantee that any settlement would be adjourned by the Labour Court for implementation. If a case was adjourned for implementation and it was not complied with then of course there would be a right for the matter to go back to the Court for a full hearing.

If there is anything in this letter that you do not understand please contact us within the next seven days. We will take it that unless you write setting out any matters that you have any issues with we shall presume that you understand the contents of this letter and the implications.

Yours sincerely,

_____