Law Society Skillnet Meeting

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The Workplace Relations Act 2015

The New Workplace Relations Dispute Resolution Procedures & Practical Issues of Bringing and Defending Claims before the Workplace Relations Commission and the Labour Court

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

Whilst every care has been taken in preparing these notes to ensure their accuracy as of 14 October 2016 they cannot be exhausted and are no substitute for a detailed examination of the relevant Statutes, cases and other materials when advising clients on a particular matter. No responsibility can be accepted by the Dublin Solicitors Bar Association, their Officers or the speaker for any loss sustained or occasioned to any person acting or refraining from acting in reliance on anything contained in these notes. No part of these notes can be reproduced in any form without the prior permission of Richard Grogan of Richard Grogan & Associates Solicitors.

Introduction

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

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

The title which I was given for today was the Workplace Relations Act 2015. You will note that I have changed the title of this lecture note.

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

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

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

The Legislation

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

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

1. There is no consolidated Employment Legislation in Ireland. Kerr's Irish Employment Law does consolidate the legislation. You will get it on Westlaw.
2. If you do not have Kerr's Irish Employment Law I believe that you are going to be at a severe disadvantage. Let me give a simple example. You are bringing or defending a claim that an employee has not received a document which complies with Section 3 Terms of Employment (Information) Act 1994. (i.e. the "No contract claim")
   Section 3 has been amended by

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

There are other provisions which apply.

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

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

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

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

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

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

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

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

As a Solicitor who is involved in Employment Law I do not understand for the life of me how any practitioner whether a specialist or not could reasonably be expected to deal with the legislation without a codification. That is why I refer to Anthony Kerr's excellent publication and Westlaw (Westlaw is a bit behind so go for Kerr's book). Unless you are going to walk around in to the WRC or the Labour Court with a tablet or laptop and be able to skip between different Acts and Statutory Instruments you do need the hard copy. The background to the Bill and subsequently to the Act needs to be understood. We were told there would be a world-class service. We were promised as part of the consultation various things. Professionals whether Solicitors, Barristers, Unions and Employer Representative Bodies such as Ibec fell into two distinct groups. You are either a supporter or opposer of the process. Being ambivalent was not an option. There are still those opposed to the process who keep up a valent vanguard action to snipe at the process whenever possible but that is a lost cause. The EAT is going and will not be rise like a phoenix from the ashes. The Law Society gave a "guarded" welcome to the Act. My suspicion is mainly because there were supporters and those who opposed on the committee.

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

1. The world-class availability of information on the law promised during the consultation process is absent. We have outdated and in some cases incorrect guides. Even the most recent Guide "Employment Rights Explained" is wrong. We wrote to the Director General on 16th August that Section 3 (g) Terms of Employment (Information) Act is not set out nor the provisions about Collective Agreements and the Guide to Maternity Protection Acts referred to in it is wrong as it says those in the Defence Forces or Gardaí are not entitled to time off for ante-natal care. I am assured this will be addressed.
2. The Adjudication service seeks to have a paperless procedure. That was tried in Solicitors practices and Accountants practices decades ago and failed.
3. There is no codification of employment legislation. None is on the horizon. We have different definitions of even who is a "worker" or "employee". We

have different definitions as to who is the “employer”. I have had cases where acting for an employee I have sued one entity as the “employer” under one Act and a completely separate and totally unrelated entity as the “employer” for a different Act. I have had one case recently where my argument was accepted, on a reading of the legislation, the company who never had my client at or near its premises, and where he had never heard of them and visa versa was in fact the “employer” for employment law purposes. We have written recently to the Minister that the definition of “employer” in the Unfair Dismissal Acts is different than in the Redundancy Payments Acts and with a little bit of planning an employer in a “Group Company” can easily strip an employee of their rights under the Unfair Dismissal Acts. Like a magician you can convert an employee with 10 or 20 years’ service into an employee with less than 1 years’ service overnight. The legislation is therefore full of traps for the unwary. Whatever chance a Solicitor or Barrister has a member of the public has little or none.

4. Instead of designing a computer system based on the Act of 2015 and practice the Department purchased on “off the shelf” system which is designed to accept a claim, issue a hearing date and then for a decision to issue. Matters such as adjournments, amalgamating associated cases, or, follow on claims in alien to the system. The WRC computer system is dreadful. To be fair they are working on it. We have written to them about many problems with it. The Labour Court system is fine and works as they work with their existing system. This does mean the promised same reference number is absent which impacts on research.
5. One of the major criticisms of the WRC is that it is not in public. I have to say that I have had a number of cases in the EAT reported and the only thing I usually see as being completely accurate is the name of the parties along with possibly a photograph. I can agree with the argument over cases being in private but would support the idea of them being in public but with a caveat. The caveat would be that in public reporting it would be similar to the reporting of family law cases. By this I mean no names would be disclosed. There would be no photographs. Reporting of EAT cases has generally been on the basis of notoriority or public interest in the parties rather than in the case and any legal principles which would be advised. The Labour Court hearings, with limited exceptions, are in public. I appear there regularly. I have yet to see a reporter attend.
6. There is a criticism that our Adjudicators are not legally qualified. This is incorrect. One third are either Solicitors or Barristers. In the LRC there were no legally qualified persons. There are limited records but one unofficial review taken a number of years ago showed that only some 10% of Unfair Dismissal cases before the LRC were appealed and only 10% of these were overturned. Now of course some settled. However, just being “legally qualified” is not enough. The Employment Law Association of Ireland proposed a rate of pay equivalent to that of a District Justice for an

Adjudicator. The Adjudicators are paid somewhere around €400 a day. They get no paid holidays, no pensions, and no sick pay. The Adjudicators do not have up to date books such as Kerr's Irish Employment Law. We have sought for them to get this and I believe they will in due course.

7. Currently the system has problems. These were acknowledged by the Director General of the WRC at a conference in Dublin on 1 October last. These include, as listed by her;

    - Occasions where all parties were not notified of a hearing;
    - Linked or multiple cases not being scheduled together;
    - Correspondence being sent to an old address;
    - Representatives being double booked for hearings (the system has always had a procedure in it to avoid this, it is just not always used); and
    - Adjudicators not being at a hearing when the parties were there.

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

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

8. There is a lack of consistency in the decisions. This is acknowledged in the case of Adjudicators. This is to be addressed. I do have a concern about this. Adjudicators are supposed to be "independent". It is one thing giving them training or pointing out where the Labour Court or High Court have overturned a decision or increased or decreased compensation. It is another thing that they would be constrained in their decisions.

9. There are a number of issues which affect consistency.

    (a) Before the new WRC website you had the Labour Court website. You could check cases by Acts, section and subsection. You could even check it by the names of the representatives. That is no longer there. It is not in the system for Adjudicator's decisions nor any longer for the Labour Court decisions. The Adjudication Officers decisions have no name so it is quite hard actually to even remember cases by a number. The Labour Court and the WRC decisions to act as any kind of useful database needs to be able to be searched by Act, section and subsection

at a very minimum,. An Act alone search is useless. Again I believe this will be addressed as part of their 2017 Budget.

(b) There is no Book of Quantum. How are cases valued? What is the value of a breach? What is the basis of setting compensation? In equality and UD cases we have quite high awards in some cases and lower in others. Why is one pregnancy related dismissal lower or higher then another. In cases under the Organisation of Working Time Act where the maximum can be two years wages I have yet to see one.

(c) Compensation figures are rarely broken down as a multiple of weeks. It would be useful if this was done. Some Adjudicators are doing this. See ADJ2040 where the compensation was set at 52 weeks. I would hope the Labour Court might do so as a matter of course.

The WRC was designed to be Lawyer free.

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

The Talk Today

For colleagues here today who do specialise in employment law hopefully you will get something out of today. For colleagues here today who do not claim to be specialists in employment law you do have a problem. You are dealing with a completely new process. There is no codified "Employment Law Act". There will be none. There is no comprehensive and definitive source of information freely available. You are dealing with disjointed legislation, with different definitions. For example the definition of "working hours" in the National Minimum Wage Act 2000 is totally different than "working time" in the Organisation of Working Time Act 1997. See for example the recent Labour Court Decision in Baku GLS and Mankauskas MWD1620

You will see today that there is quite a lot of paper being produced. The documents in the following Appendices are attached as they are relevant or practitioners and for the talk today.

Appendix 1	WRC Procedures
Appendix 2	Labour Court (Employment Rights Enactments) Rules 2015 and 2016
Appendix 3	SI 464/2015 Industrial Relations Act 1990 (Code of Practice of Protected Disclosures Act 2014) (Declaration) Order 2015
Appendix 4	Employment Equality Act 1998 (Withdrawal of Certain Claims) (Relevant Date) Regulations 2016 SI 126 of 2016
Appendix 5	Copy letter received from WRC of 11th April 2016
Appendix 6	Copy email which is only going to be available to those here today.
Appendix 7	Copy of an extended version of an article which was published in the Parchment
Appendix 8	SI 419/2015 – Fixed Payment Notice
Appendix 9	Draft letter to clients
Appendix 10	Time Limits for Appeals to the Labour Court

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

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

Misconceptions

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

The first is in relation to the Labour Court.

1. There is still an argument that unlike the EAT there is no legally qualified Chairman or Deputy Chairman in the Labour Court. This is wrong. There are a number of legally qualified individuals in the Labour Court. More importantly, in my opinion, the matters are all technically of the highest calibre.

2. The Labour Court has a Registrar in Hugh O Neill who is a Solicitor and who is a brilliant Employment Law expert. This is not an opinion it is a fact. The Labour Court has the advantage of a Registrar in Hugh O Neill to whom they can refer to for legal advice.

3. It is not unusual in the Labour Court that significant legal issues will be raised by the Court relating to the interpretation of legislation or issues of case law. Sometimes these will be raised by the parties themselves but more often than not by the Labour Court itself. There is a level of legal expertise in the Labour Court which none of us who regularly appear before them underestimate.

4. The level of legal discussion before the Labour Court is of the highest quality. If an issue is raised and you don't know the answer my advice is to say so. The Labour Court does not take anybody short. Trying to "spoof" your way before the Labour Court is not a great idea. The Labour Court will have read and discussed any legal issue or case they raise with you. Saying you don't know and looking for time will result invariably in either an adjourned hearing or an opportunity to respond in writing.

5. The Labour Court will invariably follow decisions of other divisions of the Labour Court. The EAT did not. Therefore there is consistency.

6. The Labour Court will read in advance everything submitted. You can be sure in many cases they may well have read, digested everything to a greater degree to than the person even submitting the documentation. In, for example, Working Time cases it is not unusual for the party who submitted records, whether acting for the employer or employee, being questioned by the Court to a degree far in excess of what the submitter has read into those records.

7. The Labour Court will not allow ambushing. If an issue is raised that the other party could not reasonably have been on notice of or aware of the Labour Court will always give them time to respond either by way of an adjourned hearing or by way or written submission. My experience before the Labour Court is that the quality of input from the Chairman on the day of each division and the individuals nominated by each side of industry is of the highest technical quality. The questions will, from them all, be often as much on the law, by which I mean the relevant Act, section and subsection Statutory Instrument, EU law, and, case law both EU and domestic and their own prior decisions as much as on the facts.

8. The Labour Court is not a forum for practitioners to come in and just tell "the story". You will be questioned on the law. If you make a point expect to be met with the Labour Court seeking authority for the point made and asking for copies for them and the other side. You will be asked why this was not in the submission in advance of the hearing. Appearing before the Labour Court and seeking to "pull a rabbit out of a hat" by way of legal argument, documentation or a witness will not be countenanced. The other side will be given time to respond and time to consider any "rabbit" you seek to pull from the hat.

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

<u>The Adjudicator Service</u>

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

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

<u>Fair Procedures</u>

At the outset of the discussion on the Bill the issue of fair procedures had been raised. As the paper today deals with the WRC and the Labour Court I believe the issue of fair procedures as regards the WRC, is going to be an issue and that

Judicial Reviews may become more relevant. Probably more so than the Labour Court. Both the Labour Court and the WRC are Statutory Bodies. Both derive their jurisdiction from the Act of 2015 and the Industrial Relations Acts. Their powers therefore come solely from these Acts. As they derive their authority from Statute they are bound by these. They cannot create or enlarge their jurisdiction and must act according to same. See the case of County Louth VEC – Equality Tribunal [2016] IESC40. There is an exception. The ECJ have ruled that under EU Law the principles of equivalence and effectiveness must apply. The Labour Court and the WRC must apply directly effective provisions of a relevant Directive even though there may be no express jurisdiction under Irish Law. Case C-286/06 Impact –v- Minister for Agriculture and Foods.

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

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

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

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

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

"However, to take that the above quotation of Henchy J in Abenglen in isolation is too simplistic an approach. In light of the judgement as a whole, an analysis of

the Judgement of Henchy J in Aberglen indicates a comprehensive approach to the issue".

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

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

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

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

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

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

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

<u>Submitting Claims</u>
<u>Certification of Claims</u>

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 do not have this before the WRC.

The solution is that you could have your client submit the form but often this is not practicable. I have an issue with the online form. I do submit it in hard copy. I print off the form and use the old signing form for the client to sign. If you are

going to lodge online I would strongly suggest that before doing so you get your client in to sign the form to certify that the facts as set out in the claim form are correct. Email the printed off and signed form to Director.General@workplacerelations.ie – It is a Capital "D" and "G".

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

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

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

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

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

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

Why not to lodge just by completing the form online

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

WRC Complaint Form

The WRC procedures document, unlike the Labour Court procedures, is riddled with incorrect statements, which are probably open to Judicial Review. There are some issues relating to the Labour Courts own Rules which may cause some problems going forward. I would propose dealing with the WRC first.

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

   This is incorrect.

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

2. It is stated at Point 1 "it is extremely important that the complainant keeps the WRC informed of his/her current address and contact details as failure to do so would result in the complaint being dismissed". Mr Tom Malon BL addressed this in his excellent lecture to the Employment Law Association on 26th February 2016 when he said is it being suggested that a failure to update an address could, of itself, lead to a decision that a complaint would be dismissed. That cannot be right. It the suggestion is that a failure

to update an address might result in the non-pursuit of the complaint for a period of a year, which could then lead to the dismissal then that is a very different thing and the procedures presumably to be read by lay people should make that clear".

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

3. Time Limits. Now the normal rule is that a dispute must be referred within six months of the alleged contravention. However they don't point out that there can be a contravention five year ago which is continuing and therefore a complaint can be made. See HSE and John McDermott High Court 2013 334 MCA. The Guidelines state different time limits apply for complaints under the Redundancy Payments Acts and Equal Status Acts.

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

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

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

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

5. Paragraph 5 of the procedures sets out the requirements for statements from persons on whom the onus of proof rests in Employment Equality and Unfair Dismissal matters. It provides that parties will be required to submit

a clear statement setting out details of the complaint within 21 days. The final sentence then states;

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

This is wrong. There is no statutory right to do so. There are limited exceptions which I will set out. If an Adjudication Officer did so then Judicial Review is an option. See Halal Meat Packers (Ballyhaunis) Ltd and EAT No 248 and 252 of 1998 (Supreme Court Decision).

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

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

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

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

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

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

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

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

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

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

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

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

7. In Paragraph 6 of their Guidelines it refers to other employment and Equality cases. It states that where a Respondent wishes to raise a legal point or any other legal issue these must be included in a statement sent to the WRC within 21 days of the date of the complaint form is forwarded to the Respondent. There is no legal basis for this. Again, it states that an Adjudication Officer hearing a complaint may draw such inferences or inferences as he or she deems appropriate where relevant information is not presented in a timely manner. There is no statutory basis for doing so. However there are issues about this which I will deal with later in this paper which colleagues need to be aware of.

8. In Paragraph 7 it relates to the hearing of cases. It does not relate to information being provided and there being examination and cross examination. This is no formal evidence on oath. It would however appear that the normal rules of evidence would have to be dealt with but with the usual caveat for a Tribunal.

   The Rules state that witnesses would be allowed to remain or may be asked to come in only for their own evidence. This is contrary to the normal rules in Court cases though there may be particular circumstances where this is relevant.

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

<u>Where there must be submissions</u>

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

(a) Redundancy (Redundancy Appeals Tribunal) Regulations 1968 SI24 of 1968 as amended by SI 114 of 1979.
Regulation 4 sets out that the notice set out a Statement of the "facts and contentions" on which the complainant intends to rely. This could be as simply as "I was made redundant. I was not paid redundancy" or it could be "I served an RP9 and my employer did not give a counter notice within 7 days so I am entitled to redundancy".

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

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

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

   It is a requirement to set out the employee's remuneration. If this is less than the National Minimum Wage Act, which can occur, it is advisable to set out both. These Regulations do not require a statement to be set out

relating to the grounds in which an Unfair Dismissal claim is being brought.

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

Again the facts and contentions to be relied on would need to be set out. This can be everything from not getting the same job back on returning to work or not getting time off from work or reduction of working hours for breastfeeding mothers. Effectively it covers all claims under Part II of the Maternity Protection Act 1994. One can see the reason for this requirement as there are various claims under this particular Act.

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

It is necessary to set out;

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

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

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

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

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

Service of Documents

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

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

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

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

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

Submissions

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

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

Mediation

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

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

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

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

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

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

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

Where the employee is still in employment then there is one approach. When the employment has ceased then equally they tended to take a practical approach

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

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

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

Will mediation work?

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

"No" in that Mr. Mulvey, the previous Director General, has publically on the record stated he did not have enough trained mediators. "Yes" if as I am told now they have sufficient 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 call "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".

Mediation does not always work. However, it depends on how you approach it. It equally depends on how you deal with your client and sometimes with your colleague. There are and have been mediations which I have been involved where the employer for some reason has needed to berate either the employee or their representative before any settlement can be reached. The same applies to employees who may feel that they want to set out how badly they felt they have been treated. If your colleague knows that your client needs to go through this process they can at least let their client know so that when it happens it is not going to cause the mediation to breakdown. We have all been in cases before the

LRC or the EAT when we know that our respective clients had needed to get their story off their chest and only when this is done can matters be resolved and settled. Rather than trying to ambush the other side if this is part of the process that needs to be gone through let the other side know. They can alert their client that this is part of a process that they are going to have to sit through and that when this is done then maybe the case can be resolved.

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 but only in the case of the Labour Court as at the present time. I would also see such Codes being utilised to set out how matters are dealt with in the workplace to facilitate internal resolutions as far as practicable. This may take cases away from practitioners but we are not here to encourage litigation.

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

Extension of Time

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

In Stokes –v- Christian Brothers High School Clonmel [2015] ELR113F128 Clarke J said it was incumbent on a Respondent to make any point concerning time so as to put the employee on notice that there is an issue and to give them an opportunity to seek an extension. So a failure to raise a time limit issue with the WRC may lead to a legitimate conclusion that an employer is precluded from

raising the point of Appeal. The Labour Court took a similar approach in a Worker –v- An Employer EDA 1304.

However, this is different where it goes to the heart of their Jurisdiction. In County Louth VEC-v- Equality Tribunal [2016] IESC40 where McKechnie J said that the time period did not operate as the defence point and is a "condition precedent" to the exercise of jurisdiction.

An interesting case on "exceptional circumstances" is J McE –and- The Residential Institutions redress Board The Court of Appeal 2014/1326.

So what does this mean in practice?

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

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

Preliminary issues

At times there will be preliminary issues which arise.

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

In all other cases the Labour Court has no right to send a matter back to an Adjudication Officer for consideration of a substantive issue save and except where an Adjudication Officer held that the complaint was either vexatious or frivolous. There is no appeal to the Labour Court where there is a preliminary finding in favour of a complainant. In all cases other than the Equality Legislation if there was a finding on a preliminary point in favour of the employer

the employee is still entitled to appeal to the Labour Court and this will be a hearing which will determine both the preliminary ruling and the substantive case. The Labour Court can determine the issue on the preliminary matter.

It is a defect in the legislation that where the Labour Court, for example, fined that an Adjudication Officer has failed to properly apply the law they cannot remit the matter back to the Adjudication Service except in Equality cases. That is something I believe is a weakness in the legislation.

Recording Proceedings

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

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

Time Limit for bringing a Claim

Section 41 subsection 6 2015 Act provides that an Adjudication Officer shall not entertain a complaint if it is presented to the WRC after 6 months beginning on the date of the contravention.

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

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

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

This issue was recently considered by the Labour Court in the case of Kepak Group and Valsomiro Augusto Arantes UDD1625. In this case the Labour Court

restated their decision on reasonable cause in determination WTC0338 Cementations Skanska –v- Carroll.

In that case the Court said;

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

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

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

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

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

<u>Hearing</u>

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

At hearings it is useful to bring an extra copy of the claim form and any submissions made online for the Adjudication Officer. While Adjudication Officers will have it on an IT system even if it is submitted in hard copy, they will not have a hard copy and it is often difficult particularly in an Unfair Dismissal case or an Equality Case where there may be many witness statements and submissions to effectively review it online.

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

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

1. An Outline of the facts.
2. A list of witnesses
3. Witness statements / An outline of the evidence a witness will give
4. Any legal points

5. In an Unfair Dismissal case particulars of the entire disciplinary process including all correspondence and documentation both typed up and the original written notes.

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

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

This issue is relevant.

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

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

Normally an Adjudication Officer will, if finding against an employee, simply dismiss. However Section 42 (1) of the Act of 2015 allows an Adjudication Officer to dismiss a complaint if an Adjudication Officer regards it as "frivolous" or "vexatious". Under Section 77 A Employment Equality Act 1998 the power to dismiss also includes claims found to be "misconceived" or of a "trivial matter". There is no such provision for either "misconceived" or "trivial matters" being a ground for dismissal under any legislation other than the Equality Legislation. Now in cases currently claims are regularly being made that complaints by employees are "frivolous" and "vexatious" or "trivial". When such a defence is raised I sometimes wonder whether the words have been considered or are just used. In Nowak –v- Data Protection Commissioner [2013] ILRM 2007 Birmingham J said that the word meant a complaint which was "futile" or "hopeless" in that it could not have the desired result. In O'N-v- McD 2013 IHC he expanded on this as meaning a complaint which had no reasonable chance of succeeding.

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

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

The same risks apply to employees.

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

<u>Claims before an Adjudication Officer – Section 41</u>

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

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

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

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

Representation before the WRC and the Labour Court

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

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

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

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

One issue which has not been litigated so far is what is the status of certain entities. There is one entity that represents a large number of employers who is in fact an insurance company. In many cases they are indemnifying the employer against any award made but will appear simply stating they are representing the employer. The issue then which is arising is whether they are representing the employer or representing themselves. If they are representing themselves because

of the financial exposure they could be subjected to if an award is made then there is an issue as to just how independent they are, to what extent they should disclose to an Adjudicator or the Labour Court their interest in the case. A Trade Union certainly has no financial gain one way or the other from representing an employee. An entity such as Ibec or CIF of the Small Firms Association receives a fee annually from members. There can be no hidden agenda. A Solicitor or Barrister who works on the basis of an engagement letter but Solicitors and Barristers are precluded by Law from acting on contingency fees.

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

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

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

Burden of Proof

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

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

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

In claims under the Organisation of Working Time Act the case of Antanas Jakonis and Nolan Transport DWT1711 which was reported in [2011] ELR311 is a case where the Court held that the initial burden by way of an evidential burden was on the employee because of the provisions of Section 25 of the Act to set out the case with sufficient particularity to enable the employer to know in board terms the nature of the case. The Court held that the initial burden was on

the complainant to support a stateable case of noncompliance with whatever was available to him or her to do so. Section 25 of the Organisation of Working Time Act states that in the absence of records the Burden of Proof is on the employer. Where there are records in accordance with the Organisation of Working Time Act then the legal and evidential burden rests on the employee. I have rarely seen records which comply strictly with the relevant Statutory Instrument. Where there are no records or where there are only partial records the employee in those cases need only set out matters with sufficient particularity to enable the employer to know a broad outline of the case. In the absence of records then the legal and evidential burden will pass to the employer.

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

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

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

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

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

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

In Unfair Dismissal cases then where dismissal is not an issue the Burden of Proof is on the employer. In a Constructive Dismissal case the Burden of Proof is on the employee. Some representatives can get into difficulty when asked whether dismissal is in dispute and they say dismissal is in dispute. In such circumstances the employee goes first. I have been involved in cases where the employee has got into the box and produced a P45 along with a letter from the employer saying that your employment was being terminated by reason of misconduct. In those circumstances the employer has effectively put up a defence that the employee has resigned. In those circumstances the employer is effectively tied and cannot then bring in evidence to justify the dismissal.

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

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

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

Providing Reasons

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

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

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

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

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.

Emails

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

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

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

Constructive Dismissal

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

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

Now the guideline states that there must be;

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

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

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

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

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

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

You should note you will now have to make a choice between a UD and an Equality case. If you lodge both the Equality will be deemed to be withdrawn unless you withdraw the UD case. You may therefore need to consider which claim you should issue first particularly where there is a good chance the employee will get work and they have both a UD and an Equality claim for example a pregnancy related dismissal. You might also wish to consider a case against the State for dismissing the Equality claim but that is outside the remit of this talk.

<u>Unfair Dismissal Claims – Dismissal not in Dispute</u>

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

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

handbook and then look to see how these procedures were actually applied in this particular case.

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

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

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

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

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

Section 14 (4) Unfair Dismissal Act 1977 as amended

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

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

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

request for a statement; I do not know, according to the law, the grounds under which I was dismissed".

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

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

If furnishing such a request I would advise that the case of an individual employer that it is sent by registered post and by ordinary post with a certificate of posting as sometimes registered post is refused. In the case of a company serving it by ordinary post would, in my view, be sufficient but the Act of 2015 does refer to registered post so both might be preferable. I think it is also worth requesting at the very start copies of all correspondence, notice of meetings, disciplinary procedures and grievance procedures that apply in the workplace. A Data Protection request should also be furnished. Many employers never respond. It is much easier to make a short submission where you requested documentation but got nothing.

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

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

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

<u>Practical Issues on Unfair Dismissal Cases</u>

For most colleagues Unfair Dismissal cases are the most usual. One issue which arises in an Unfair Dismissal case is the loss of income. The Adjudication service is now stating that you are likely to be advised of a hearing date within 77 days (working) of lodging recently moved to between 3 and 6 months. Let us assume

for example that hearing dates are now going to be scheduled within three to four months of a claim being notified. Let us assume an individual is dismissed on 1 December. The case comes before an Adjudicator for hearing on 1 March 2017 or even 1 April 2017. The loss in those circumstances is 3-4 months wages at that stage. The Unfair Dismissal Acts in Section 7 (3) refers to "prospective" loss. For representatives used to a 2 year delay this issue is going to be a new matter to deal with. I can see many employer representatives arguing "actual loss" only being due. The Unfair Dismissal Legislation allows an Adjudicator to look into the future to see what is the possibility of an employee obtaining employment.

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

Appeals

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

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

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

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

What happens if a non-represented person of limited means appeals, having not attended at the WRC? S.I. 536 of 2015 makes no provision for a refund. But

equally I cannot find in the legislation a statutory power for the Labour Court to change a “fee”. The Minister may set a “fee” by Statutory Instrument but failed to do so. The Minister has that power under Section 71 of the Act, not the Labour Court.

Labour Court (Employment Rights Enactment) Rules 2015 and 2016

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

Rule 6 provides for the delivery of submissions not later than 3 weeks after the delivery of the appeal. This is not three weeks after you are notified of receipt of an appeal. It is three weeks from the date that you deliver an appeal to the Labour Court. This only applies in Unfair Dismissal Act cases and Employment Equality Act cases. I would anticipate it may well start to apply in other cases in due course. I have no problem with this. Exchanging submissions is beneficial.

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

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

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

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

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

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

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

Rule 63 provides for a single decision being issued. There have been some arguments that there should be the potential for a dissenting opinion. Tom Mallon very clearly argued this point in a paper to ELAI this year. This has never been the practice of the Labour Court in the past but it has occurred in the EAT in the past, on rare occasions. There are arguments both for and against this but the current system of having a single decision does, in my opinion, have

significant merit. I can equally accept the counter argument eloquently put by Tom Mallon BL to the ELAI lecture that in the jurisprudence of the Courts dissenting opinions given in the past have become the rationale for majority decisions in the future. However the Labour Court does follow previous decisions normally to provide for certainty. I would certainly support the existing procedure but can see the logic for a dissenting opinion on legal issues but only one quantum figure.

Submitting documentation to the Labour Court post the 2016 Rules

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

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

1. 6 copies to be made at say €0.20 a page.
2. Postage of 6 copies (the Labour court is in but does not receive DX except internally), Postage to the Labour Court and the other side, in Unfair Dismissal and Equality cases.
3. Having to prepare submissions quicker as the time limits have not been increased to take account of posting rather than email. No allowance for "snail mail".
4. The time in copying 6 copies.
5. Possibly the cost of putting a submission together in writing especially if the employee has limited "writing skills" and whether this is a requirement which is an "economic cost" for an employee, and even if this requirement is an unnecessary burden parties are entitled to be heard. Limited Acts only provide for submissions.

The Labour Court in deleting the ability to lodge online may well have opened up a hornets nest for employers.

Appeals to the Labour Court

Where a party appeals a decision of an Adjudication Officer to the Labour Court in an Unfair Dismissal or Equality case the party appealing will be written to by the Labour Court giving that party three weeks to submit detailed grounds of their appeal. They will be required to submit five copies. They will be required to submit one further copy to the respondent or the respondent's representative if the respondent to the appeal had nominated a representative. Evidence of

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

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

<u>Legal Advice Privilege and Litigation Privilege – Traps</u>

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

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

in practice to, for example, a Director and the Director then communicates it to others within the organisation that are not authorised to receive legal advice then it is treated as third party correspondence which can be discovered. Equally a Solicitor dealing with a HR Manager unless there is a Board Resolution allowing him or her to receive legal advice an application can be made to disclose discussions with the Solicitor.

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

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

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

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

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

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

who act “for gain” as opposed to being a representative body. Even probably against representative bodies. These issues did arise in the EAT and I fully expect this to be the subject of litigation.

Protected Disclosures Act

In Appendix 3 I have set out a copy of the Statutory Instrument dealing with cases under the Protected Disclosures Act 2014. It should be remembered that Act covers protection from penalisation. In dismissal cases compensation to a maximum of 5 years remuneration can be made. There is also provision for interim relief for an application to the Circuit Court to prevent an Unfair Dismissal. It is outside the scope of today’s talk to deal with this in any detail but I thought it important to bring SI 464/2015 to the attention of colleagues, as a reminder. Recently the Circuit Court granted injunctions in a case against Lifeline Ambulance Service and in PDD162 the Labour Court awarded €17,500.

Publications of Decisions

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

Enforcement

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

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

In an Unfair Dismissal case where reinstatement or reengagement is ordered the District Court may instead of directing the employer to comply order compensation of an amount as is “just and equitable” up to 104 weeks remuneration. This is provided for by Section 42 (2). However, in cases before the

Labour Court should their decision be ordering reinstatement or reengagement no similar provision appears? In the case of a decision by an Adjudication Officer the matter going before the District Court will be another level of expense for parties. Effectively it will be a hearing of the issue of compensation unless you have a labour Court Determination. Previously in cases involving reinstatement it was an application to the Circuit Court and if reinstatement was not being consented to effectively an award of 104 weeks wages was made.

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

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

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

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

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

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

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

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

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

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 do not 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. We have written to the Minister about this. If you enter into a settlement and withdraw your appeal before the Labour Court or WRC and the employer fails to pay the safety net of the Insolvency Legislation is lost.

The Role of the Circuit Court

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

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

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

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

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

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

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

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

I can see this Section 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>Appeals to the High Court</u>

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

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

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

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

Failure to Pay Compensation

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

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

Inspectors

Section 26 provides for the appointment of inspectors.

Section 27 sets out significant powers for inspectors.

Inspectors will be entitled to enter any place of work which is being used in connection with the employment of a person or where they believe that records or documents relating to a person so employed are kept. To 1 October 2016 there were 3400 inspections and 1300 employers were found in breach of legislation. €1 million in wages have been recovered. This sounds a lot. It is in fact just less than €20,000 a week or €770 per employer found to be in breach. A minimum Notice claim for a €400 net a week for an employee with 5 years' service would exceed this alone. This will include not only the workplace itself but also possibly an Accountant's office or those providing book keeping services.

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

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

Compliance Notices

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

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

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

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

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

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

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

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

Fixed Payment Notices

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

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

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

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

Industrial Relations (Amendment) Act 2015

This is an Act which colleagues may not normally come across. The Act relates to submissions being made to the Labour Court for Sectoral Employment Orders.

Section 20 of the Act provides for a prohibition on penalisation. This can result in a claim for penalisation under the Industrial Relations (Amendment) Act 2015 or an Unfair Dismissal claim, but not both.

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

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 are small in number currently.

Significant resistance is there especially from some quarters. The resistance is that they are not going to be "dictated to" as to how run cases.

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 some. 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. None have stepped up so far. 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.

Some Solicitors 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 and notes 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 or at least an adjourned date 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 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 and the parties.
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 and even some agrees facts.

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. Already some colleagues I would regularly have met in the old LRC are ceasing to take employment law because of the cost issues. The days of doing a UD case for €700 - €1000 plus VAT are fast going. A UD case in the WRC is now closer to 5 to 10 hours work to include a hearing. Look at your hourly rate. That is the cost. An appeal to the Labour Court probably the same if not more. Put Counsels fees on top for meeting the client, witnesses, preparing a submission, going through all company procedures and explaining the realities to clients and you can see the economic cost. Representing employees is less time consuming, normally.

Saying this, a Tribunal such as the WRC or body such as the Labour Court are entitled to set its own procedures provided they are fair. The new procedures published to date are, I believe as regards the Labour Court, fair and reasonable, in the round, with some exceptions. 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 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 or allowed to. The Labour Court may well be "happy" to see you go to the High Court to challenge a procedure they have but they will apply theirs until you do.

Conclusion

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. There may be however limited availability as the ability to take on the "odd case" may be uneconomic. It may be this area of law will become more specialised with more specialist firms and limited choice of providers due to cost issues. 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 savings 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. It cannot be under an Unfair Dismissal case so funding by clients is going to be an issue for most clients.

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 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. Hopefully the Law Society and Bar Councils will seek ways to do so.

The good news is that the WRC is going to be having meetings with “stakeholders” now “customers”. Hopefully Bar Associations and the Law Society will seek to have representation who run cases in the WRC take part. Hopefully the Bar Council will do likewise. This will be about making the system work not an opportunity to criticise the legislation. If we as Solicitors work with the Bar Council, employer and employee bodies we can smooth out a lot of the rough edges. The Labour Court has, as yet, not indicated an intention to consult with those who use its services but I would hope they will. Everyone has an interest in a system which works effectively and efficiently and delivers the cost savings to the State, employers and employees as promised. Unfortunately some of the "promises” have not happened and will not. We therefore have to make the most of what we have and this can be made the best it can by an exchange of ideas on practical day to day issues.

I would like to finally thank you for the invitation to speak here today. It is both a privilege and an honour to be invited.

Finally the views expressed by me are personal to me. Any comments of the new procedures the WRC or the Labour Court should not be regarded as a criticism. We all want a world class employment rights service. We can only have it by having an open discussion.