**Waterford Law Society**

**CPD Seminar**

# Employment Cases - Walking the Talk not Talking the Talk

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## INTRODUCTION

The title of the talk today some might have thought would be "Walking the Walk not Talking the Talk". However, the title was specifically chosen because of the way employment cases are run in Ireland.

At the start of this talk I think it is important to point out that the Supreme Court recently have held that the procedure in the Workplace Relations Commission in inquisitorial. It is not adversarial. The Labour Court has equally recently confirmed that is the position with them also. Both of these issues I will deal with later. This means that there is going to be a mind change as to how cases are dealt with whether acting for employees or employers.

In approaching any employment case I am somewhat immune at this stage to the approach of some. When acting for employees the first communication we often see coming in will be a letter saying the case will be "vigorously defended". I still fail to understand the difference between "defending" and "vigorously defending" case. The second issue is that we get a letter, normally the same letter, stating that the employee will be put on "full proof" of their case. As I have said we are now changing from an adversarial to an inquisitorial process. However, that was never really ever there when acting for an employee. In an Unfair Dismissal case the burden of proof is on the employer where the dismissal is not in dispute. If you have a case under the Organisation of Working Time Act then following the case of Antanas Jakonis and Nolan Transport Limited it is only necessary for the employee to set matters out with sufficient particularity for the employer to know what the case against them is. Thereafter in the absence of records in the statutory form the burden of proof is on the employer. Where they are in the statutory form and are produced, the burden of proof passes to the employee. The number of times that we find records in the statutory form when acting for employees or employers is minimal.

## ACTING FOR EMPLOYEES

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

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

I accept everything my clients tell me. I equally accept nothing they tell me. Because employment cases are extremely important, and this is particularly so for employees, it is vitally important to go through their story and to check it. Sometimes it may in fact be a form of cross examination of your own client. There is a lot of drilling down that may have to be done. For example in an Unfair Dismissal case you will normally ask an employee who has been dismissed have they had any previous warnings. Many times I have been told no and that when this is then questioned you get told that there were previous warning but

"*They had not accepted them".*

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

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

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

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

That is a minimum time of 10 hours. Take your hourly rate and multiply it. Let us assume it is €300 an hour. The cost is going to be €3,690. Do you

run the case on the basis that you have to win to collect this? We all run businesses so you need to get a decent deposit. Personally, I believe that the cost now of running an Unfair Dismissal claim is closer to around €6,000 inclusive of VAT.

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

## ACTING FOR EMPLOYERS

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

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

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

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

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

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

**MEDIATION**

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

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

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

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

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

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

If acting for an employer or an employee, if the value of the case is in the region of €15,000 to €20,000 in an Unfair Dismissal case, it is better to settle for €15,000 then to fight for €20,000. If you are acting for higher paid executives, you may have SCSB. You need to be very careful if the employee has a contributory pension, unless the employee can get €200,000 now tax free.

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

"*But it was awarded as compensation".*

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

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

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

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

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

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

## SETTLING CASES

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

"*Without admission of liability"*

If acting for the employee, it makes no difference.

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

"*Without admission of liability".*

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

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

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

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

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

This is a tax trap that those who "talk the talk" rather than "walk the talk" regularly fall into.

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

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

## THE IMPORTANCE OF READING LEGISLATION

Employment cases can be very complex. I just want to give one example of how it is so easy when acting for an employer to fall into problems.

I am going to deal with a recent case involving the Redundancy Payment Acts. I would caution colleagues to read Sections 11-13 of the Redundancy Payment Acts.

In the recent case the employee had been on lay off for over 4 weeks. It could equally be short time earnings but why the employee was earning less than 50% of the normal gross pay.

The employee lodged the claim for redundancy. The employer did not furnish a counter notice within 7 days. They did furnish one offering 13 weeks full time work to commence within 4 weeks but did so after the 7 day period. They subsequently twice more offered full time work.

The Labour Court ruled that as the counter notice was not served within 7 days the employee was entitled to redundancy. This case was a case of Forkam Construction Limited and Michael Diamond RPD181.

I would caution those acting for employers, if you do serve the counter notice and 13 weeks full time work is not given within 4 weeks then in those circumstances the employee may very well have a claim for the 13 weeks wages in addition to the redundancy.

**ISSUES TO CONSIDER OVER THE COMING MONTHS**

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

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

The next issue where there is a failure to provide all the documentation. This regularly applies where documentation is suddenly produced at the Workplace Relations Commission or the Labour Court. This will invariably result now, going forward, in an application to adjourn to consider same. A claim will then issue for the cost of the second day in the WRC or the Labour Court. Further set of Court costs will arise.

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

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

**LITIGATION ADVICE PRIVILEGE AND LEGAL PRIVILEGE**

For non-Solicitors these issues are currently in the High Court and before the Labour Court. The High Court involved a company called Philmic

Limited where judgment has been given. In that case the request for discovery was held to be too wide. In another case our colleague Mr Brian Morgan from Monaghan was successful before the Employment Appeals Tribunal in having a Decision that Litigation Advice Privilege did not apply definitely before the date of dismissal where the representatives were Peninsula Business Services (Ireland) Limited.

In a recent case before the Labour Court in a case management conference the Labour Court stated they did not have the power to compel discovery and in the particular case to issue a witness summons to attend and bring documents. I disagree. Section 41 (10) Workplace Relations Act, 2015 provides:

"*An adjudication officer may, by giving notice in that behalf in writing to any person, require such person to attend at such time and place as is specified in the notice to give evidence in proceedings under this section or to produce to the adjudication officer any documents in his or her possession, custody or control that relates to any matter to which those proceedings relate.*"

It would be my opinion that as the Labour Court is the appellate body the rights of an Adjudication Officer to issue a summons would also apply to them.

In addition Section 74 of the workplace Relations Act amends Section 21 of the Industrial relations Act 1946 to provide that the Court has power to issue a witness summons under the Unfair Dismissal Act 1977 or Part 4 of the Workplace Relations Acts to include producing documentation.

Further the decision of Mr Justice Charleton in Galway - Mayo Institute of Technology Applicant, EAT Respondent and Helena Pidgeon and another Notice Parties 2007 IEHC 210 and in particular paragraph 3 which clearly leaves open the adoption of procedures similar to a plenary hearing.

In the case of Minister for Justice Appellant, The WRC Respondent and Ronald Boyle and others Notice Parties 2017 IESC 43 the Supreme Court held the WRC was an inquisitorial process.

The Labour Court has held, orally, they are an inquisitorial process. Section 41 (5) and Section 44 (1) are virtually identical.

It is my view that when the Workplace Relations Act, the Industrial Relations Act, 1946 both as amended and the decisions referred to above are read in conjunction there is power to require witness summons to produce documents and in effect discovery. Equally under Section 30 the Labour Court may direct effectively an Inspector to carry out an inspection and report to the Labour Court and there to be examined and cross examined.

This issue is not going to go away and I anticipate issues will arise where a witness summons is not issued.

The entire issue of Litigation Advice Privilege and Legal Privilege is going to start arising more often. For colleagues in acting for employer it is important to be careful when giving advice especially on a dismissal. Communications to an employer dealing with the disciplinary process is not subject to Litigation Advice Privilege. The only way you can win that argument is on the basis that litigation was contemplated. In an Unfair Dismissal case how you can anticipate litigation unless a decision has been made to dismiss. Therefore how could the procedure be fair? It could be argued that Legal Advice Privilege applies. Certainly Legal Advice Privilege will apply as regards an employer getting advice in relation to dismissal procedures but not if you were the Solicitor advising what actions he or she should take. There is nothing of course to stop a Solicitor advising on what action an employer can take once a decision has been made and setting out what types of actions can be contemplated. Of course Solicitors will always advise on the procedures to be followed. It is outside the scope of today's talk to deal fully with the issue of Litigation Advice Privilege. It is a matter we might discuss on some other date. It was discussed on March 9 next at the Employment Law Masterclass given by the Law Society where Brian Morgan was the speaker.

**NEVER BRING ONE CLAIM WHEN TEN OR TWELVE WILL DO**

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

(1) Look at their contract. Does it comply with Section 3 of the Terms of Employment (Information) Act? There is only 18 items that have to be there. There are 15 in the Act as amended and a further 3 in Statutory Instrument 49 of 1998, so 18 in total. Do not look just at the Terms of Employment (Information) Act. You need to look at the amended Act.
Ask yourself did the contract issue within 3 months. Does it set out the provision of break periods under Sections 11, 12 and 13 of the Organisation of Working Time Act?
For example, does it cover the issue of Sunday working? Has the employee been advised of the pay reference period for the National Minimum Wage or the right to seek a statement under the National Minimum Wage Act?

In many cases where we bring these, the Irish Water case being TED161 is often quoted. There is also a more recent case. There were both cases presented by me. They are cases where the Labour Court has roundly criticised the bringing of the claims on the grounds that the law is not interested in trivial matters. I have lost other claims equally on similar

grounds but without the full admonishment from the Labour Court. However, a number of these cases but not the ones that I have mentioned but brought on appeal on a Point of Law. The Irish Water case was not. None of them have gone for hearing. The ones that I have brought have all settled. They have settled when the Briefs were out. My position in matters is quite simple that the claim that an employee did not receive a proper contract is deriving from EU Law. I do not accept that there can be a trivial breach of a statutory minimum. I believe that a minimum following the Von Colson and Kamann Decision is entitled to cost of vindicating their rights. This is an issue which is that the Labour Court nor myself will back off from until there is a definitive High Court or possible European Court of Justice Decision.

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

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

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

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

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

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

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

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

(g) Is holiday pay paid in advance?

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

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

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

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

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

There are arguments raised by some that these sorts of claims are not ones that the employee never came in and that they are ones that are simply being pursued by the Solicitor. That kind of argument is raised and my usual response is that if somebody comes in into my office having been a passenger in a car which was rear ended and suffered broken leg that if they come in and ask me:

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

Then my answer is going to be:

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

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

“But of course I got a contract”.

Does not mean that you cannot say to them:

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

That is what giving legal advice is about.

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

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

This is still a claim for excessive hours of work.

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

**UNFAIR DISMISSALS**

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

There are a number of misconceptions.

(1) The most glaring misconception which those acting for employers or employees fall into, is believing that the employer must prove the guilt of the employee where the employee must prove they are not guilty. The case of Looney & Co Limited -v- Looney UD843/94 was the EAT Decision which importantly pointed out that it was not the function of an [Adjudicator] to establish the guilt or innocence of an employee. Rather it is whether a reasonable employer in the respondent's position and circumstances at the time would have done. This is the standard the employer's actions will be

judged against. It is not the role of the Adjudicator to decide whether on the fact they would have dismissed the employee but rather whether a reasonable employer would have dismissed the employee or more properly was within the bounds of what a reasonable employer would do. So therefore employers depending on how they have their policies written may in certain circumstances be able to dismiss because they have a zero tolerance policy in respect of certain matters and win an Unfair Dismissal claim because of same whereas if they did not have that policy in place a similar dismissal would be held to be unfair. However, a zero tolerance policy in respect of certain matters can be completely unreasonable. To some employers mistakenly believe that by dismissing for gross misconduct this is strength in an Unfair Dismissal case. This I disagree with for the following reasons:

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

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

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

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

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

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

"A claimant who finds himself [herself]) out of work should employ a reasonable amount of time each week day in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an

application to various companies seeking work…The time that a claimant finds on his [her] hands is not their own, unless he [she] choses it to be, but rather to be profitably employed in seeking to mitigate his [her] loss."

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

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

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

## ACTING IN UNFAIR DISMISSAL CASES

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

The Labour Court in Faugill Properties Limited -and- O'Sullivan UDD1736 is one where the Labour Court pointed out that the employee had not sought reasons for his dismissal under Section 14 (4). It would be our advice a request under Section 14 (4) is always made. There is a great advantage of this particularly if you have time to hold off in putting in the claim. The WRC request you set out the grounds of dismissal.

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

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

**THE DISCIPLINARY PROCESS**

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

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

In ADJ-6307 the Adjudication Officer had issued an interesting Decision. It appears that at the time the employee attended disciplinary hearing he was handed a letter which the Adjudication Officer held must have been typed up and signed in advance of the disciplinary hearing advising the employee that he was dismissed. The Adjudication Officer held that this was breach of fair procedures and awarded €9,000 to the employee.

A change has arisen in the area of disciplinary hearings. The case of Michael Lyons -and- Longford Westmeath Education and Training Board being a Judgment of Mr Justice Eagar delivered on the 5th May 2017 is a significant Decision. It issued under High Court reference 2017 IEHC 272. I would recommend every Solicitor who deals with an Employment Law case involving Unfair Dismissal to carefully ready the Decision and in particular paragraphs 90 onwards. In that case Graphite Recruitment HRN conducted an investigation. Mr Justice Eagar held that they failed to adopt procedures

in contravention of dicta of the Supreme Court in the decisions cited. Mr Justice Eager mentions a number of cases. One of these was Borges -v- The Fitness Practice Committee [2004] 1 IR 103 where Keane CJ stated:

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

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

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

He went on to state:

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

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

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

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

We have covered the issue of compensation. Compensation, however, in Unfair Dismissal claim is for loss of earnings. Therefore it is not compensation that is exempt from tax. It is always subject to tax as discussed provisionally.

## CONSTRUCTIVE DISMISSAL

Constructive Dismissal now appears to become the flavour of the month. The number of individuals I have coming to me saying that they were constructively dismissed is staggering. Effectively it is normally cases where the employee walked out. The answer in such case, in my view, is that they have no chance or virtually no chance of winning a Constructive Dismissal case. An employee in a Constructive Dismissal case must show that they have gone through the grievance procedure. That means that they have dealt with the grievance procedure and that they have gone through the appeal procedure. Where there is no grievance procedure it would appear that they at least have to put in a grievance and give the employer a reasonable opportunity of dealing with it. Then, and only then, can the employee consider resigning. It must however be for substantial grounds.

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

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

## REDUNDANCY

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

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

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

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

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

"The best people."

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

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

Where an employee is claiming Redundancy they should furnish a form RP 9. It is a statutory obligation to request Redundancy. It is a statement seeking Redundancy. It is not necessary to use the form RP 9 but you should use one that is in a similar format. I have mentioned the Labour Court case earlier under reference RPD181.

## MAKING A PREGNANT EMPLOYEE REDUNDANT

There is a recent opinion of the Advocate General on the case C-103/16. This deals with the issue of the notice of dismissal and the issues of social

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

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

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

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

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

**EMPLOYMENT EQUALITY**

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

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

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

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

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

**DATE OF DISMISSAL**

In relation to the issue of date of dismissal and this goes back to the Unfair Dismissal claims the issue relates to what is the date of dismissal. In a Constructive Dismissal case the date of dismissal is the date of the resignation Stamp -v- McGrath UD1243/1983 also in Walsh -v- Health Service Executive UD501/2007 the EAT confirmed that the “date of dismissal” in such a case is the date upon which a complainant submits his or her resignation and is not the date where the complainant is notified of acceptance of that resignation.

Where an employee is dismissed, however, the notice period under either the Minimum Notice or Terms of Employment (Information) Act or their contract whichever is longer or the notice period given will be the date of dismissal. Interestingly in EDA184 being an Equality case of Dublin Port Company and Kiernan the Labour Court stated they could not accept that the date of notification of termination was the relevant date of discrimination and held it was the later actual date of termination.

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

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

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

**OTHER CLAIMS**

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

It is our advice that you issue a request under Section 23 for a period of 1 week, a period of 2 weeks, a period of 3 weeks, a period of 4 weeks and a period of 1 month. A week however commences on midnight on Saturday which is effectively a Sunday to Saturday.

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

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

to produce the documentation on a week by week basis. We have simply produced an estimate and not on a week by week basis.

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

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

When bringing claims under the Organisation of Working Time Act it is sometimes thought that the burden of proof is on the employee. This is partly rights and partly wrong. Under Section 25 of the Organisation of Working Time Act where there are records in the statutory form and they are set out in the relevant Statutory Instrument then the burden of proof is on the employee. But that means that they have the records which would for example have their start and finishing time and all the breaks specified therein. Where they are not in the statutory form then the burden of proof is on the employer. In the case of Jakonis Antanas -and- Nolan Transport the Labour Court held in that case that it was necessary for the employee to set out matters with sufficient particularity to enable the employer to know what claim they have to meet where there were no records in the statutory form. A lot of arguments have gone on around this. Some cases have actually gone to the High Court. It is our view that in those circumstances, for example, if an employee states "I did not always get my lunch break within 6 hours of commencing work of a minimum of 30 minutes and this happened two or three times every week, 4 to 5 times a week I was told around 4 or 5 o'clock that I had to work late, that twice a week I would finish at around 10 pm and start the following morning at 8 o'clock therefore not getting my 11 hour break, that I would work normally from 8 o'clock in the morning to 7 o'clock at night with just 1 hour breaks, 5 days a week being 50 hours a week" that in those circumstances that is all the employee needs to. It is then over to the employer on cogent evidence to prove that the employee got their entitlements.

## BRINGING CLAIMS AND DEFENDING CLAIMS

In the talk today I am looking at the procedures for bringing claims in the Workplace Relations Commission ("WRC") and in the The Labour Court. For those who are used to appearing before the Labour Relations Commission in areas such as Organisation of Working Time Act and a myriad of other cases which all went on appeal to The Labour Court or in equality cases where they went on appeal from the Equality Tribunal to The Labour Court, there is no huge change in procedures. For those who are more used to bringing claims to the Employment Appeals Tribunal, the procedures have changed significantly.

At the start today I must admit when the new procedures were being put forward I was an enthusiastic supporter. I, in a meantime, have had probably a road to Damascus conversion. I still have the same level of the highest respect for The Labour Court which I always had. In the case of the WRC it has failed miserably in many respects to live up to the hype surrounding its announcement.

This is not the fault of staff in the WRC. There are many committed individuals who do their level best to provide the best service they can. However, there are structural problems with the WRC.

As regards the WRC and the Government Departments, I see their approach to actually implementing the concept of a world class service being that their strategy is one probably best articulated by the Steven Fry character General Melchett in Blackadder when he said:

"*If nothing else works, a total pig headed unwillingness to look facts in the face will see us through."*

Great things were promised from the WRC. Few have been delivered. In many cases the fallacy is promises have been made. The reality is they have not been delivered upon.

## THE LEGISLATION

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

The Act of 2015 transformed the Employment Rights mechanisms in the State. The Act dissolved The Labour Relations Commission, The Equality Tribunal and The Employment Appeals Tribunal (The "EAT"). While the EAT

will continue to sit to deal with existing cases all first instance functions from the three bodies transferred to the Workplace Relations Commission ("WRC") from that date. Sole appellate jurisdiction is conferred on the Labour Court.

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

(a) Industrial Relations (Amendment), 2015;

(b) National Minimum Wage (Low Pay Commission) Act, 2015; and,

(c) Credit Guarantee (Amendment) Act 2016.

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

The legislation 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. To be fair the Law Reform Commission do put in place consolidated legislation.
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, but this is one which would seem to be the most clear cut. As yet the procedure under Section 47 (3) has not been used as far as I am aware.

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.

In an appropriate case there may well be a Franchevik case against the State when it comes to implementation of a right deriving from EU Law. However, it is very unfortunate that over two and a half years down the road since the Act was implemented, we do not have a Fees Order.

The approach of Government Departments is quite reprehensible. We have over seven hundred pieces of legislation whether Acts, Statutory Instruments or EU Regulations to deal with as an employee or employer representative. Then to make things even more difficult Government Department seem intent in hiding the law. An example of this would be the Social Welfare Act, 2017. This was introduced by the Department of Employment Rights and Social Protection. The State helpfully gave Social Welfare to women for additional Maternity Benefit to include periods where there had been a premature birth. This is laudable. They then amended the Maternity Protection Act by extending the period between the date of the premature birth and when the employee would have normally gone on Maternity Leave by extending the period of Maternity Leave. That makes sense. Instead of putting it in a new Maternity Protection (Amendment) Act, they instead amended the Maternity Protection Act by inserting the amendment in the Social Welfare Act, 2017.

For the life of me it is impossible to understand how anybody could reasonably have found that amendment without spending a considerable amount of time checking legislation. Of course those who specialise in Employment Law will be more likely to find it. How the non-specialist is to find legislation that is hidden away is impossible to understand.

It is for this reason that I say that individuals doing Employment Law do seriously need to consider purchasing a copy of Kerr's Irish Employment Legislation and keeping it up to date.

Before the Labour Relations Commission, Rights Commissioners all obtained a copy of Kerr's Irish Employment Legislation. They obtained the updates. They had that legislation available to them in a consolidated format. In the WRC my understanding of matters is that each Adjudicator simply now has access to copies of the book in the WRC library and they have it on their computer. It is fine if an Adjudication Officer is dealing with one specific piece of legislation but where you have multiple legislation problems can arise, at hearings.

There are considerable difficulties with the legislation.

The Act of 2015 transformed the employment rights mechanisms in the State. The Act abolished the Labour Relations Commission, the Equality Tribunal and the Employment Appeals Tribunal ("EAT"). The basis of the scheme was that the EAT, the Equality Tribunal and the LRC would continue to sit to deal with existing cases but all first instance cases would be transferred to the WRC and all appellant functions would transfer to The Labour Court from the 1 October 2015 save and except of those appeals which have already been lodged, for example from the LRC to the EAT. Implementation was to continue as before except for new cases which would be going to the WRC post 1 October 2015.

This has been thrown into disarray. In the case Nurendale trading as Panda Waste - Applicant, The Labour Court - Respondent and Robert Burke - Notice Party, where the case commenced in the LRC prior to 1 October 2015 and the decision issued at the end of September 2015 the appeal was lodged post 1 October 2015. In this case the appeal was lodged to both the EAT and to The Labour Court. The EAT refused to accept the appeal. The High Court has determined that the appeal should have gone to the EAT.

This issue fought for a full day in the High Court as to what the legislation meant as regards where an appeal would go.

Even the issue of implementation is a little bit in the air. In case of Bondarenko - Applicant, the EAT - Respondent and Keegan Quarries Limited - Notice Party, the issue as to the correct method for the implementation of a Labour Relations decision was fought for three days in the High Court recently. A decision is awaited.

I mentioned the above as just two examples of the level of uncertainty surrounding the drafting of the Act of 2015.

Realistically neither of these cases should have had to have been fought.

There are some crazy provisions which jump out of the Legislation. Take the position of the Labour Court in an Unfair Dismissal case awarding reinstatement. Section 45 of the Act of 2015 provides for implementation without hearing the employer. It is therefore simple order of reinstatement or reengagement. In the case of a WRC decision, Section 43 Subsection (2) provides that the District Court may instead of requiring the employer to reinstate or reengage the employee make an order directing the employer to pay the employee compensation of such amount to not exceeding 104 weeks remuneration. It might appear to me that an employer would be entitled to make representation to the District Court. That would be incorrect. Section 43 (1) specifically provides the District Court in making their determination shall do so:

"*…without hearing the employer…*"

Clearly Section 43 Subsection (1) would allow the employer to say they had complied with any decision but it appears they cannot go any further. This is totally illogical. It arose, I believe, from sloppy drafting. The drafter took part of the old rules and added in a new Section 43 Subsection (2) but without looking at Subsection (1).

I mentioned this issue as someday this issue will go to the High Court on a Judicial Review.

I simply mention these as examples of a dysfunctional system which every practitioner has to deal with. The reality is the complete lack of attention in putting in place a working system is unnecessary costly to employees. I

would admit it also costs employers. This is completely unfair. The system was designed to be one any employee or employer could bring or defend a claim without the benefit of legal representation. This fallacy is being weekly identified as being a fallacy.

There are many cases on a weekly basis where I will see employees' claims being dismissed on the reported decisions where it is quite clear that the employees got the claim wrong. If there was ever a case which identified the problems with the WRC claim form, it is case UDD1755 being a case of Loxan Limited and Kevin Brunkard. What is clear in relation to matters is at the time the employee lodged the claim the WRC claim form would not allow the claim to be submitted. This is because of the fact that the employee did not have 12 months service. However, the employee in this case contended he was relying on Section 6 (2) of the Unfair Dismissals Act which is an exception where the dismissal is arising wholly and mainly from one or more of the exception which would include civil proceedings where there are actual, threatened or proposed proceedings against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness. The employee claimed that this is what occurred and the only way he could submit the claim was by using the Industrial Relations claim form element which he did. The employee sought to extend time. The Labour Court went through matters in some detail and to be very fair to the Labour Court they held that the employee had taken little or no action to communicate with the WRC the relevant issues once the claims had been lodged. The employee's claim was dismissed.

I do not blame the Labour Court. Their decision makes admirable legal sense. I do blame the WRC for having a system where the claim form is that dysfunctional.

We have come across a number of occasions where employees have submitted a claim form and where the claims have been rejected by the WRC. We know of no provision of the legislation which allows administrative staff in Carlow to dismiss claims. A claim can only be dismissed by an Adjudication Officer. Even if it is argued that somebody operating in Carlow is an Adjudication Officer, they cannot dismiss without giving the individual an opportunity to be heard or on the basis of written submissions. We have one case where an employee going on Maternity when she returned from Maternity found out that she had been dismissed. She lodged her own claim. She included on the front page the date the employer stated she was dismissed. In the body of the claim for she set out the facts that she did not become aware of the fact that she had been dismissed until she had notified the employer of her intention to return to work. She submitted the claim within a matter of weeks of being so notified. This was however outside the six months period from the date the employer says she was dismissed on. The WRC in Carlow rejected the claim. What is quite clear is that they no account of the provisions of the Maternity Protection Act which specifically provides that a dismissal during Maternity Leave is void.

My letter to the Director General was less than polite as regards the purported actions of the WRC. Backtracking occurred.

We mention this as another example as to where employees do need legal representation.

The guides issued by the WRC are certainly questionable. I will be dealing with some of these later but in relation to the general guides in relation to the law we were told that we were going to have a world class service which we presumed world class guides. It may well be following the recent Supreme Court case of Eugene Bates and Brendan Moore Plaintiff/Respondents and the Minister for Agriculture Fisheries and Food Ireland and the Attorney General Defendant/Appellants, The Supreme Court [2018] IESC 52018 may well have opened the floodgates to claims against the WRC for giving incorrect advice. I only mention it in passing as a case which may become more interesting for colleagues going forward.

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.

**MISCONCEPTIONS**

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

The first is in relation to the Labour Court.

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

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

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

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

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

6. The Labour Court will not allow ambushing. If an issue is raised that the other party could not reasonably have been on notice of or aware of the Labour Court will always give them time to respond either by way of an adjourned hearing or by way 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.

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

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

**THE ADJUDICATOR SERVICE**

The procedures of the WRC indicate that cases will be listed within six to eight weeks of referral. They say in their Report cases are listed on average within 77 days. Now the Act means a day. They mean "working days". Even this is incorrect. They claim 12-16 weeks but I am not seeing this for cases other than Dublin based. 28 days for a decision 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 most definitely not met.

Now a recent case before the Courts did deal with this issue of the procedures in the WRC and was lost by the Applicant at the time of writing I have not seen the decision so cannot fully comment.

**SUBMITTING CLAIMS**
**CERTIFICATION OF CLAIMS**

I do have concerns about the online document as regards the certification. The person lodging the document must certify that the facts in the form 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 and secure.email@workplacerelations.ie.

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

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

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

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

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. In fact the recent Labour Court case of Loxan Limited and Brunkard UDD1755 is a very good reason not to.

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 2018. The employee has up to 31 May 2019 to deliver a request under Section 23 to the employer and then has up to 29 November 2019 to get the claim into the WRC.

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

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

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

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

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

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

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

   An Adjudication Officer may draw an inference in Equality Cases where a Form EE2 is not responded to by virtue of Section 81 of the Employment Equality legislation. An Adjudication Officer may draw an inference under section 14 (4) Unfair Dismissals Act where a notice is sent requesting particulars as to the grounds on which an employee

says an employee was dismissed and was not responded to within 14 days. 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 two approaches.

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

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

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

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

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

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

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

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

   The Director General has no power to dismiss a complaint by reason of no statement having been received. The Director General may dismiss if nothing happens for one year but not otherwise. In Section 6 of the Guidelines it states that there is provision which allows an Adjudication Officer to draw inferences where relevant information is

not provided “in a timely fashion”. In UD cases this is a 21 day period. For colleagues involved in Unfair Dismissal cases now when acting for employers they will be getting a request to furnish a statement.

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

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

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

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

9. The Act of 2015 has no provision for witness summonses in UD cases before the WRC. 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 provide that the claim must include “a statement of the facts and contentions” on which the complainant intends to rely. It should be remembered you can only claim the Statutory Minimum Notice. If the contract provides for longer notice a separate claim for the balance can be brought under the Payment of Wages Act or to the Courts for Breach of Contract.

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

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

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

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

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

It is necessary to set out;

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

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

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

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

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

**SERVICE OF DOCUMENTS**

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

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

Section 6 (1) (c) would appear to allow service at a business address in the case of an individual non incorporated individual or entity. Section 6 (1) (d) does provide for service by electronic means where the person has given notice in writing to the person service or giving the notice or document concerned of his or her consent to the notice or document being served by electronic means. For the purposes of service on a company the company

shall be deemed to be ordinarily resident at its registered office and every corporate and unincorporated body or person shall be deemed to be ordinarily resident at its principal office or place of business.

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

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

**SUBMISSIONS**

Submissions you can send by email to submissions@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. The WRC then scan them and destroy the hard copies. The Adjudication Officer will then have to print them off.

**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.

## 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 giove them an opportunity to seek an extension. So a failure to raise a time limit issue with the WRC may lead to a legitimate conclusion that an

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

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

**SO WHAT DOES THIS MEAN IN PRACTICE?**

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

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

**PRELIMINARY ISSUES**

At times there will be preliminary issues which arise.

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

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

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

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

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

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

**TIME LIMIT FOR BRINGING A CLAIM**

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

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

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

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

This issue was 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.

**HEARING**

The WRC Guide states that the WRC will contact the parties with a time and date. They say they will be "reasonable notice". During this year we were getting three weeks' notice of hearing resulting in many adjournments. This

has moved out. Despite requests for case management which occurs in the Labour Court there is none in the WRC.

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

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

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

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

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

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

This issue is relevant.

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

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

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

**CLAIMS BEFORE AN ADJUDICATION OFFICER – SECTION 41**

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

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

on the day not previously furnished these are being “questioned” by Adjudicating Officers.

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

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

**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.

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

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

In Marcinuk –v- Wicklow Recreational Services Limited which was an Appeal against the decision of the Labour Court DWT1315 Baker J said that as a matter of Law there was no requirement under the legislation that formal documentary or hard evidence be adduced to support an assertion or statements. In that case the Labour Court had held that assertions or

statements were not sufficient to establish a case before. Baker J said that this was not a correct assertion of the law.

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

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

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

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

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

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

Court given by Mr. Tony Kerr on 1st October at the UCD Southern School of Law and Alastair Purdy's book on "Equality in the Workplace".

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

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

**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.

**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. Personally I believe in an inquisitorial system, which the Court is this Rule is one which needs to be deleted.

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. Traditionally the Labour Court was inquisitorial and therefore now I believe Rule 56 is contrary to tis inherent jurisdiction. However, can the Court simply ignore its own Rules?

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**

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

If a party acts for an employee in a case under a law implementing a Directive or Regulation an argument may possibly be made that under the Von Colson and Kamann principles this is an economic cost now placed on a 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. No claim has successfully run on this issue but it may well arise at some stage.

**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 six 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. The one rule on this is Section 49 which allows parties to attend and be heard and the Act of 2015 makes no provision for having to lodge submissions. 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.

**PROTECTED DISCLOSURES ACT**

It should be remembered that Act covers protection from penalisation. In dismissal cases compensation to a maximum of 5 years remuneration can be made. There is also provision for interim relief for an application to the Circuit Court to prevent an Unfair Dismissal. It is outside the scope of today’s talk to deal with this in any detail but I thought it important to bring SI 464/2015 to the attention of colleagues, as a reminder. However, in calculating the 5 years remuneration it is under the Unfair Dismissal Act rules. It is economic loss. So if an employee gets a new job at the same salary very quickly the compensation may be minimal. Employees certainly tell me about the maximums as if they are minimums.

**PUBLICATIONS OF DECISIONS**

The Labour Court applies its existing procedures. Publication is speedy. The WRC issue redacted decisions. 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” or 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. 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. As I have said, Section 43 (1) specifically provides for the District Court to make the decision without hearing the employer. 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 at all. In any decision other than Unfair Dismissal the District Courts only role is to affirm the decision.

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

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

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

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

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

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

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

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

## 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.

**APPEALS TO THE HIGH COURT**

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

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

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

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

**FAILURE TO PAY COMPENSATION**

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

If fined it is a Class A fine or imprisonment for a term not exceed 6 months or both. I can see the defence of inability to pay being raised. If it is a

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

**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.

Issues where I readily admit that I have difficulties in giving any specific opinion that I would be happy to stand over. However, I think it is important that I would deal with them.

**INTERPRETERS**

I raise the issue of interpreters. I must admit I have yet to see any interpreter in either the WRC or the Labour Court comply with the ITIA Code of Ethics of Community Interpreters.

As an office that does represent non-Irish nationals, we have consistent problems with interpreters approaching clients of ours to speak to them before the hearing to "find out what the case is about". Of course there is no right or entitlement or duty of the interpreter to do so.

My own view is that many of the interpreters are below standard and effectively what they are trying to do is get the story from our clients so that they can give some kind of story when the matters comes on. Of course there are some excellent interpreters but many of them are poor.

Before the Labour Court I had one case where the case was adjourned as the Court, the employer and the employee representatives did not believe the interpreter was interpreting correctly. In the past, I have had a Chair of the Labour Court asking interpreter whether they actually spoke the language of

my client. It was actually followed up because my Counsel on the day had challenged translations. This was the case of Juri Panuta and Watters Garden World.

The problem we have here in Ireland is that there is a lack of training and testing of legal interpreters or any interpreters. In the UK where testing takes place the pass rate is 20%.

On that basis 4/5 of all interpreting done before the WRC and the Labour Court is defective. At some stage there will be a stenographer there and issues may well arise in relation to the issue of challenging a decision where there is incorrect interpreting having occurred.

I would say that due to the level of frustration with a quality of interpreters, it is worse asking in particular cases:

1. What qualifications do you have?
2. What interpreting training do you have?
3. How long did the training last?
4. Who provided the training?
5. Can you tell me about the Interpreter Code of Ethics?
6. How did you learn English?

It is not unusual in the WRC and the Labour Court for questions to be asked which could be quite simple straightforward questions and an ongoing discussion going between the individual giving evidence and the interpreter.

In interpreting matters my understanding of matters is that the duty of the interpreter is to interpret literally what is said. Therefore if the person giving evidence states:

“I was told by my employer I was fired”.

What we are likely to get from an interpreter currently is

“He/She says the employer said he/she was fired”.

This is not interpreting in line with the Code.

Where there ever been a successful challenge in relation to interpreting? I simply do not know. There can be no criticism of either the Labour Court or the WRC in relation to interpreters. It is a problem which affects all legal services in the State. It is however a problem.

**FAIR PROCEDURES IN UNFAIR DISMISSAL CASES**

This might be headed fair dismissal procedures. I am dealing with this here again as this issue some believe is not settled law as yet. The decision of Mr Justice Eager in the case of Lyons -v- Longford Westmeath Education and Training Board, 2007 IEHC 272 has, I believe, changed the landscape. There is an excellent paper which was given by Ms Marguerite Bolger SC to the Dublin Solicitors Bar Employment Law Committee launch on the 17th October 2017 entitled "Internal Employment Investigations - all changed … or not?".

The issue of the Lyons case has yet to go before the Labour Court.

In the WRC some Adjudicators are following the Lyons decision. Some are not.

There are two arguments in relation to this. One is that the Lyons case has been somewhat watered down by two further decisions. One of these for example is the case EG Applicant and the Society of Actuaries in Ireland Respondents, the High Court 2017 IEHC 392 being a decision of Mr Justice McDermott. However, that case did refer to procedures at an investigation stage. Also in that case the employee had a right of representation through Solicitors at all times. There is also a case of Rowland -v- An Post 2017 IESC 20 where Mr Justice Clarke delivered the majority judgment. That case stated that the entire procedure must be looked at to determine whether taken as a whole the ultimate conclusion can be sustained having regarded the principles of constitutional justice. Because procedural problems can be corrected and there may be a significant margin of appreciation as to the precise procedures to be followed, Mr Justice Clarke said it will frequently be premature for a Court to reach any conclusion until the process has been concluded.

The Lyons case raises two issues. Either an employee is entitled to be advised of a right to legal representation and failure to advise the employee in the disciplinary process of that right may render the entire process unfair.

The second argument is that there is no requirement for there to be legal representation advised.

In two recent WRC decisions one Adjudication Officer held that the failure to advise as to the right of representation was such as to create an unfair dismissal. In the second case the Adjudication Officer held that there was no right to be legally represented because the procedures in the employer company have referred to a right to be represented by a trade union or a colleague.

Both of these decisions cannot be right. Clearly there will need to be a decision from the Labour Court. Because of the level of uncertainty which appears to surround the issue following the Lyons case it is likely that this matter will sooner rather than later go to the High Court, again.

The second issue related to the right of cross examination. Again, similar issues arise. Again, in the recent WRC decision the Adjudication Officer who held that there was no right to be legally represented then held that the right to cross examination would only apply where there was a Solicitor. As the employee did not have a Solicitor there was no right to cross examine. That case is interesting in that the Adjudication Officer held that because the employee has submitted a Personal Injury claim they have clearly seen a Solicitor and therefore have been able to avail of legal representation. I have a certain problem with that leap of faith from the Adjudication Officer. There are Personal Injury Solicitors, there are Employment Law Solicitors. There are Employment Law Solicitors who would not claim to have any expertise in Personal Injury work and there are certainly Personal Injury Solicitors who would not claim to have expertise in Employment Law.

I have my own view in relation to matters but pending clarification this issue is very much still up in the air. I have certainly heard various arguments put to me as to why there would be a right of representation and why there would not be a right of representation.

**CONCLUSION**

In the hour that was set aside today I believe that when setting out the issues relating to representing an employee it is possible to scratch the service. I hope in the notes I have set out the arguments and the issues with sufficient clarity to facilitate colleagues in understanding the complexity of the issues which those of us representing employees face. I do not think that the complexities are any less for those representing employers or for those who are acting as Adjudicators or in the Labour Court.

Employment Law in Ireland is extremely complex. The lack of codification of the law, I believe, is detrimental to a properly functioning system. I believe, that all of us involved in Employment Law do the very best we can with the legislation.

There are challenging times ahead.

I believe Brexit is going to be a major challenge. The issue of cross border workers because of our relationship with the United Kingdom and Northern Ireland is a significant issue which we now have less than a year to actually get ironed out as to how matters are going to work. This will be a particular challenge for those representing employees.

In this talk there have been some matters that I have criticised. I do not criticise the personnel in the WRC or those in the Labour Court. I believe that the Labour Court has in particular been very strong in protecting its borders. The worst excesses of the Workplace Relations Act, 2015 as amended have not impacted on their functions. The Labour Court continues to deal with cases in a very effective and efficient manner. I believe that the

WRC unfortunately has been underfunded. There is a lot of overpromising without the resources there to actually comply.

Employment Law is a challenge. It is one where I believe Solicitors have a particular role to play in providing quality services. There are lot of non-qualified entities providing services in this area. I believe that only Solicitors and Barristers can apply the appropriate ethical rules which ultimately benefit our clients whether employers or employees.

I thank you for your attention today and I hope those who are involved in Employment Law or who wish to get involved in Employment Law find the talk today and these notes useful

# APPENDIX 1

## The Taxation of Employment Law Awards and Settlements

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

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

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

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

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

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

**THE RELEVANT TAX LEGISLATION**

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

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

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

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

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

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

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

**UNDERSTANDING THE LEGISLATION**

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

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

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

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

**THE LEGISLATION**

Section 192 A TCA97 can be summarised as follows;

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

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

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

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

**THE SCOPE OF THE LEGISLATION**

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

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

A "Relevant Authority" is defined as

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

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

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

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

**STRUCTURING SETTLEMENT AGREEMENTS TO BE EXEMPT FROM TAX**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 10 TCA 97 defines connected person

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

This looks like a bit of a mouthful.

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

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

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

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

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

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

**The Tax treatment of Decisions, Determinations, and Recommendations**

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

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

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

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

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

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

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

Let us for example take the following case.

Example

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

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

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

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

The Adjudicators Decision states;

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

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

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

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

**“Redress**

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

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

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

It would be beneficial if the decision added on the words

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

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

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

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

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

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

Before the Rights Commissioner The Rights Commissioner held;

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

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

The matter was appealed to the Labour Court

The Determination of the Labour Court was as follows;

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

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

The issue is what is the tax treatment?

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

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

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

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

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

The case reference is DWT1223.

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

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

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

**Payments not covered by the exemption.**

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

Payments not covered can be summarised as follows.

1. Actual remuneration of arrears of remuneration.

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

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

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

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

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

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

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

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

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

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

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

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

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

The timing of payments can be significant.

**Example**

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

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

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

**Wages and Arrears of Wages**

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

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

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

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

Example

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

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

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

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

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

Example

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

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

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

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

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

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

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

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

**Conclusion of the Tax Treatment**

There is an old adage in taxation that;

“Taxation follows the law”.

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

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

Let us assume there are two employers.

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

Employer A writes to an employee as follows.

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

The second employer sends the following letter;

“I would like to make you a gift of €3000”

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

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

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

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

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

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

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

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

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

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

**A settlement must be “bona fide”.**

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

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

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

**The Tax Treatment of Legal Fees**

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

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

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

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

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

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

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

If the settlement had simply been;

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

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

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

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

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

**Overall conclusion**

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

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

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

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

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

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

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

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

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

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

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

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

It benefits both employers and employee.

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