Cavan Solicitors Bar Association

Termination of Employment in Ireland

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Redundancy

In some ways Redundancy maybe seen as the poor relation when it comes to cases for compensation for an employee losing their employment. The compensation under the Redundancy Payment Act is limited to a figure of 2 weeks wages per year of service plus 1 week. The maximum award is based on a maximum salary of €600 per week.

An employee who is employed for 4 years and earns €500 per week gross will receive a figure of €4,500 as Redundancy. An employee who earns €1,000 a week will not receive €9,000. The employee will receive €5,400. The reason for this stated previously, is that the award is capped at a figure of a notional salary of €600 per week.

Saying this for some employees Redundancy can be a very attractive option. An employee who is dismissed under the Unfair Dismissal Legislation must be able to show they have suffered an economical loss. If they have no economical loss the maximum compensation is 4 weeks wages. Therefore an employee who immediately obtains new employment or who is out ill and is unable to obtain work may well prefer to try to see if they have a Redundancy Case.

There will be times when practitioners will meet a client and the issue will be whether the employee has been dismissed being an Unfair Dismissal or been dismissed by reason of Redundancy. In such cases it is important to issue both an Unfair Dismissal Claim and a Redundancy Payment Act Claim. The claims can state;-

"I am claiming my dismissal was an unfair dismissal. If it was not an Unfair Dismissal it was a Redundancy"

In the Redundancy Claim stating;-

"I was dismissed by reason of Redundancy. If it was not a Redundancy it was an Unfair Dismissal."

Both claims should issue at the same time.

This issue was dealt with comprehensively in a case of Top Security Limited and Dan Bolger RPD184. The facts of the case are interesting. In this case the employee issued an Unfair Dismissal Case and that was dealt with by the WRC and a decision issued. Subsequently the employee sought to bring a Redundancy Claim.

The Labour Court in that case helpfully pointed out the case of In Re Vantive Holdings [2010] 2 IR. where Chief Justice Murray cited with approval the following summary of the Rule in Henderson - v - Henderson stating;

"The rule in Henderson -v- Henderson is to the effect that a party to Litigation must make its whole case when the matter is before the Court for Adjudication and will not afterwards be permitted to re-open the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in the case. In its most recent application this rule is somewhat mitigated in order to avoid rigidity by taking into consideration circumstances that might otherwise render its imposition excessive, unfair or disproportionate. Viewing it through the prism of Estoppel and res judicata the rule in Henderson -v- Henderson strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligation between those parties. It is intended, inter alia, to promote finality in proceedings and protect a party from being harassed by successive actions by another party where the issue between them either were or could have been determined with finality in the first proceedings."

The Court went on to quote "*the case of*" Cunningham and Intel [Ireland] 2013 IEHC207 where Hedigan J stated;-

"All matters and issues arising in the same set of facts or circumstances must be litigated in one set of proceedings save for special circumstances this is a rule that is of benefit to both plaintiffs and defendants, to the Courts themselves and thus to the public interest."

The Labour Court in this case stated that the Labour Court must ensure that process is not abused by fragmenting litigation and relitigating the same set of facts at different times when both set of proceedings could have been brought in the first instance thereby avoiding unnecessary costs and inconvenience. The Court went on to state that the cause of action in the Redundancy proceedings was dealt with in the Unfair Dismissal proceedings by the decision of the Adjudication Officer and consequently the complainant was estopped by that decision from seeking to relitigate that cause of action again.

I only mention this matter at this stage as in various cases before the WRC this issue of issuing both claims is sometimes raised and it is for the very reasons set out in the decision of the Labour Court why both claims should issue. There was a time in the EAT where a person may bring a Redundancy claim to be met with a defence that it wasn't a Redundancy they were simply dismissed. The converse also applied in Unfair Dismissal cases namely that the defence was that it was a Redundancy. It would be my view that unless you have clear documentation, in writing, from an employer that either specifies that it is a Redundancy or a Dismissal for other than redundancy that regardless as to what your client tells you it is it is far better to issue both sets of proceedings.

There is another reason for this in that in theory an employee can obtain both an Unfair Dismissal Award and a Redundancy Award. In the past we would have had cases during the recession where an employee would have been dismissed and it would have clearly been an Unfair Dismissal and a number of months later the company would have gone into liquidation with all other employees being made Redundant. In those circumstances it was the practice of the EAT where they found an Unfair Dismissal occurred only to give compensation for the period, under the Unfair Dismissal Legislation up to the date that the company went into liquidation and thereafter to award the balance as a Redundancy Payment under the Redundancy Payment Acts.

This issue arose in a case of ADJ 6787 where the Adjudication Officer in this case took some time to set out the legislation and set out that an employee cannot seek compensation both under the Unfair Dismissal and Redundancy Legislation that this had been addressed in the case of Cusack -v- Dejay Alarms Limited UD1157/2004 which compensation may not awarded twice on the grounds that the employee was dismissed by reason of Redundancy and for Unfair Dismissal. This was re-enforced in the case UD1114/2012. However in this case the Adjudication Officer pointed out correctly, in my opinion that Redundancy can be awarded as part of the employee's compensation, for Unfair Dismissal. This was certainly the practice in the EAT. In this particular case the Adjudication Officer held that there had not been a Redundancy and awarded compensation for Unfair Dismissal.

In situations where a loss would have terminated once the company went into liquidation it may at that stage effectively become a Redundancy situation. I will be dealing with this issue later relating to Taxation but from an employee's perspective for a case to be deemed to be partly Redundancy and partly Unfair Dismissal can be helpful from a tax perspective as a

Redundancy Award is exempt in total from tax where as an Unfair Dismissal Award is subject to tax.

There has been some strange decisions coming out of the WRC in relation to Redundancy. Some of those decisions are indicated as in case ADJ 7973 that the entitlement to the Redundancy payment was subject to the employee fulfilling the Social Welfare requirements in relation to PRSI contributions. This certainly would not be our understanding of the legislation. Our understanding of the legislation is that the employee needs to have been in "insurable" employment. It has nothing to do to with whether the contributions were ever paid or not. Our view would be supported in a case ADJ 7291 where the Adjudication Officer in this case set out the test for determining the entitlement to Redundancy Payments. The Adjudication Officer pointed out that the relevant test is whether the individual was;-

"An employed contributor in employment which was insurable for all benefits under the Social Welfare Act, 1952-1963, immediately before the date of termination of his employment"

In such circumstances the Adjudication Officer held that the employee was entitled to Statutory Redundancy.

Our reading of the legislation is that it does not matter whether the employer paid the actual contribution. The issue is whether the employee was in insurable employment. In the particular case ADJ 7291 the Adjudication Officer pointed out that all parties believed that the contributions had been paid. In my view that is helpful but it is actually not the relevant test to determine whether an individual is entitled to Redundancy as it is simply being in insurable employment.

I would point out that there are difficulties currently with the Department of Social Protection in relation to the payment of Redundancy where contributions have not been paid. In such circumstances it is necessary when claiming from the Social fund for the employee to engage with the Social Welfare Office based in Donegal being the Records Section. The employee must produce what evidence they have in relation to payment and then to apply to have the matter rectified by providing notional credits. Of course payslips are the best proof as would P60's but they are generally not available where the employer has not been paying the contributions. Evidence of payment into a bank account or lodgements to bank accounts or any documentation which would indicate that the employee was in employment at various stages will be accepted. Where issues cannot be resolved with the Department then it is necessary to bring a case to the WRC and in certain circumstances on appeal to the Labour Court. There is a requirement that a consent is obtained from the Minister for such a case to be brought. The reality is that getting such consent is virtually impossible. They do not by which I mean the Department, hand them out readily. You may well have to write to say that unless the said consent is forthcoming that Judicial Review will issue. A claim cannot be brought to

the WRC or an appeal to the Labour Court without that consent having been forthcoming.

I thought it was useful to set out some of the issues which regularly arise before getting into the body of the paper and effectively set out some of the more common traps which do catch out employers and employees.

What is Redundancy?

This is one of those issues which actually sometimes arises and can cause some difficulties. Section 7 (2) of the Redundancy Payments Act 1967 as amended by Section 4 of the Redundancy Payment Act 1971 sets out that a person who is dismissed shall be deemed to be dismissed by reason of Redundancy if his or her dismissal results *" wholly or mainly"* from one of the following;-

(a) The fact that the employer has ceased or intends to cease to carry on the business for the purpose of which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place that the employee was so employed, or,

(b) The fact that the requirement of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or expected to cease or diminish, or,

(c) The fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or,

(d) The fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done in a different manner of which the employee is not sufficiently qualified or trained, or,

(e) The fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal)

should henceforth be done by a person who is capable of doing other work for which the employee is not sufficiently qualified or trained.

There will be times where the employee who has been made Redundant will effectively contend that it was an Unfair Dismissal disguised as a Redundancy. This is one of the reasons why sometimes it is necessary to bring, as I said before, both a Redundancy and an Unfair Dismissal Case. A case in point is a case of Capaldi -v- C-Step Shoes Limited UD 806/1989 where the EAT found on the basis of the evidence before them that the Managing Director did threaten to let the employee go but he could not do so instead he contrived a Redundancy to get rid of her.

It is a fact that Redundancies are sometimes manufactured, if I can call it that to set out a situation where by an employee who the employer wishes to get rid of and who cannot get rid of them tries to contrive a Redundancy.

With new Data Protection Legislation and the use of laptops and emails and text messages where such Redundancy situations are manufactured it is often relatively easy to acquire the evidence to show that it was not a valid Redundancy.

Many years ago, a Senior HR Director said to me that when dealing with Redundancies his approach was to get out a piece of paper draw the new structure and then put it through a sieve to see if the employees that he wanted to get rid of fell through the gaps. If that did not happen he shredded the piece of paper and went back to the drawing board. His approach was that until such time as a robust process was there on paper nothing was committed to anything which could be recovered. This may sound cynical but certainly it does happen. I simply mention it for the fact that where a Redundancy is challenged the Burden of Proof is not on the employee to show that it was an Unfair Dismissal but actually on the employer to show that it was a valid Redundancy.

There is a significant issue for an employer who tries to manufacture a Redundancy situation. If they fail to show that it is a valid Redundancy then it is effectively an Unfair Dismissal. The employer then does not have the option of running it as an Unfair Dismissal case on the basis that the employee may have contributed to their own dismissal. If an employer nails their colours to the mast that is was a Redundancy they are stuck with it if they defence of a Redundancy is rejected.

The Redundancy must be wholly or mainly.

This really follows on from the last section. The Redundancy must be the main reason for the dismissal.

This was seen in a case of Daly -v- Hanson Industries Limited UD 719/1986. In this case the EAT found there was a Redundancy element. This is a case however where the employee was dismissed on a Redundancy ground just after she had given evidence before the EAT in a claim by a former employee of the company. In this case the EAT set out that the defence of an employer may be tested in two ways namely;-

(a) Was the Redundancy genuine, or did the dismissal take place under the cloak of Redundancy

(b) Was there a cause and effect relationship between the Redundancy and the dismissal now as Desmond Ryan in his book *"Redmond on Dismissal Law"* at paragraph 17.11 Section 6 (4) of the Unfair Dismissal Act 1977 provides that for Redundancy defence it is expressed to be *"without prejudice to the generality of subsections (1) of section 6."*Therefore if a cause and effect relationship has been shown the WRC is still required to have regard to all the circumstances in considering whether the dismissal was unfair.

Where a reorganisation or a restructuring is taking place it is important to make sure that the employer is dealing with this as a valid Redundancy. It is important that other factors must not be taken into account. Redundancy is the job going. And the theory of the law is that it is impersonal. It has nothing to do with the employee it is solely to do with the job. Of course from an employee's perspective it is personal to them.

Employers very often will raise the issue as to whether they can retain the best employees. The answer is no. It is the job and therefore the selection process must be wholly or mainly due to a Redundancy.

When do Redundancy's normally arise?

Reorganisation

Reorganisations often result in Redundancy. It is the one that causes the greatest problems for employers as employers invariably want to retain the *"best workers"*. Fairness will be raised in the selection process. For those more used to dealing with Unfair Dismissal they would be use to the provisions of Section 6 (1) of the Unfair Dismissal Act 1977 where the issue is;-

"Having regard to all the circumstances."

In a Redundancy situation the requirement is of;-

"Substantial grounds justifying the dismissal"

This was looked at in the case of Philips -v- International Health Board (Ireland) Limited UD 331/1993 where even though the employee had been able to show that for a number of factors could have been deemed to be unfair it was a genuine Redundancy and therefore the employer had discharged the onus of proof. So even if there is provisions relating to consultation or failing to be transparent if it is a genuine Redundancy and the employee is fairly selected they are unable to challenge a Redundancy.

Redeployment

The issue of redeployment between different sites or different offices or premises of an employer or where an employer intends to move from one location to another often raises issues of Redundancy.

Where an employer is intending to change the job of the employee either from one location to another or within the organisation the issue then arises to whether the employee has been offered suitable alternative employment. The law in this issue is set out in Section 15 of the Act. There is a disentitlement to Redundancy for refusing to accept alternative employments. An employee is not entitled to a Redundancy payment if he has been offered to be reengaged or employed under a new contract of employment and those terms and conditions would not differ from a corresponding provisions of the contract inforce immediately before the termination of the contract or the employee has unreasonably refused the offer. Equally an employee will not be entitled to a Redundancy Payment if

the employer has made to him in writing an offer to renew the employee's contract of employment or to reengage him under a new contract where

there are changes the offer constitutes an offer of suitable employment in relation to the employee. And that the employee has refused same. There are time limits involved. This issue was looked at in a case of Cinder Limited and Celina Byrne RPD 1811. In this case there was a proposal to move the employee from one particular store to another store. The Court in that case accepted that the employee had at all times had acted in a bona fide manner in the attempts to retain the employee and by offering a number of options to do so. The Court helpfully pointed out in that case that where the employee had been employed in a standalone shop being asked to work in a concession shop would not have been suitable alternative employment. However in that particular case the employee also refused an offer of employment in a standalone shop on the basis that the employee contended it would ultimately cease to operate. The Court held that it was not reasonable for the employee to draw any such inference and there was no sufficient difference in the working environment she would have enjoyed in Wicklow Street and that which she had experienced for the previous 20 years or so working for the employer in different premises. The Court also noted that the employee would not have suffered any disadvantage with regard to her commute between her home and her work if the option had been accepted and on that basis the Labour Court set aside the decision of the Adjudication Officer.

The case is useful in pointing out that suitable alternative employment similar to the employment that the employee has been involved in is offered and the employee refuses same then the employee will not be entitled to Redundancy. Equally where an employee could show that for example their commute to and from work was substantial increased then an offer of employment which may be equivalent to the previous employment but in a different location may actually be a ground for claiming Redundancy. By this I mean that if an employee worked in Limerick and was a 5 minute walk to their place of employment and the employer proposed a move to Ennis and the employee refused even though the job they may have been doing as for example a receptionist in both locations maybe exactly the same the impact on the employee as regards having to travel instead of a 5 minute walk to drive or get a bus which would be a substantially increased commute may well be a ground to justify the employee refusing and seeking Redundancy.

In a case of Joe Lawlor Limited and Guerin the Labour Court dealing with a Constructive Dismissal claim held a move from Limerick to Dublin was a breach of contract.

Issues do arise in relation to redeployment where an employee may temporarily or under protest agree to take up a new job. The fact that the

employee agrees to do so may not disentitle the employee to Redundancy. Section 15 (2a) of the Act that provides where an employee who has been offered suitable employment and has carried this out for a period of not more than 4 weeks refuses the offer the temporary acceptance of the employee shall not solely constitute an unreasonable refusal for the purposes of Section 15.

You can also have situations where an employee's remuneration is reduced substantially. Many employee's may when there is a reorganisation or redeployment find that their salary is substantially reduced. Where an employee's salary is substantially reduced to less than one half of the normal weekly remuneration or the hours of work are reduced to less than one half of the normal weekly hours and the employee temporarily accepts the reduction in remuneration of hours of work and even indicates his acceptance to his employer that temporary acceptance for a period not exceeding 52 weeks. This shall not be taken to be an acceptance by the employee of an offer of suitable employment in relation to him or her. This is specifically set out in Section 15 (2b).

Selection Process

In putting in place a Redundancy it is important that there is a selection process and that selection process must be impersonal. As I have said before in this paper Redundancy is an impersonal process. It relates to the job not to the individual. Provided the selection process is a fair process then in those circumstances the Redundancy will stand as a fair selection.

The standard process being LIFO being "Last In First Out" is the oldest selection process. It is not open to challenge on the selection ground. Saying this LIFO is a very blunt instrument. It may be applied without impacting on an employer where you are dealing with a group of workers doing exactly the same job and where there roles are interchangeable.

In the majority of Redundancy situations the employer will need to look at what jobs the employer will require going forward and what qualifications for those jobs the employer will require. There is no reason why an employer cannot have combinations. For example if an employer has a production line along with office facilities and drivers and decides that the business does not need as many operatives and as many drivers then LIFO can easily be applied to those categories of workers. When it comes to other jobs sometimes certain jobs are going to be required. So in a company that is a production company you will often need to have a production manager. You may need to have an accounts person. You may need to have dispatchers. Now the LIFO Rule may not be applicable in a number of these jobs. Those who organise the trucks to go out with product and are in contact with the truck drivers may if you have a multicultural workforce which comprised drivers and you are only going to have one dispatcher going forward it may be reasonable to set out that the dispatcher will have a language that the drivers will understand. If dealing with the accounts section and there is

going to be a requirement that there are certain statutory returns that are going to have to be made which would require the person to be a qualified accountant then it is reasonable to set out that the job would be done by somebody who would have particular accountancy qualifications. In those type of situations, it may well be that the person with the least service will actually be the person retained.

What is important is that the selection process can be objectively justified if challenged. In case ADJ 16010 the Adjudication Officer had to deal with an Unfair Dismissal Case where it was claimed the employee had been made Redundant. The Adjudication Officer in that case helpfully set out that the test that a valid Redundancy was quoting the case of UD 206/2011 where the EAT stated;-

"When an employer is making an employee Redundant, while retaining other employees, the selection criteria being used should be applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria to be adopted will come under close scrutiny if an employee claims that they were unfairly selected for Redundancy. The employer must follow the agreed procedures when making the Redundancy. Where there are no agreement procedures in relation to selection for Redundancy, as in this case then the employer must act fairly and reasonably."

Problem Issues

In the talk today I think it is useful to look at the cases which cause the greatest problems.

As I set out at the start sometimes an employee will actually want Redundancy this can often arise in cases where the Transfer of Undertaking Regulations arise. For example in case RPD 1713 being a case of Ardcolum Motor Factors Limited and Gildea the Labour Court in that case held quoting a case of Symantec Limited -v- Leddy and Lines 2009 IAC 256 where Edwards J determine when a Transfer of Undertaking within the meaning of the regulations occur an employee who refuses to transfer does not therefore become entitled to a Redundancy Payment under the 1967 Act. An employee who does not transfer has no entitlement to Statutory Redundancy Payments from the Transferee Company. In both situations the employee's job is deemed to continue to be in being. A similar approach is taken in cases RPD 1710.

However when looking at the issue of Redundancy or continuity of service case ADJ 12160 is interesting.

The employee worked as a steel fixer for the respondent company from 4th May 2015 to 19th May 2017 earning €700 net per week. The employee contended that his employment was transferred to an agency on the 19th May 2017 and that the employment terminated on the 11th August 2017. The employee applied for a lump sum Redundancy payment from the respondent company who would have been if I can say it like this their first employer. The employer in this case contended that the employee was offered new employment but refused it. The company submitted that there was no cessation of employment to justify a claim for Redundancy. The employer contended that the employee had gone from the respondent to an agency following a period of lay off following an application for Job Seekers Benefit and that he resigned from employment during the period of lay off which contravened the protections contained in Section 12 of the Redundancy Payment Acts.

The Adjudication Officer in this case looked at a situation where the employer contended that the employee had transferred seamlessly to the agency.

The Adjudication Officer in this case looked at Section 9 (3) of the legislation which provides whether an employer shall not be treated for the purposes of this part of having been dismissed if;-

1. He is re-engaged by another employer immediately on the termination of his previous employment. That would of appeared to have happened here,

2. The re-engagement takes place with the agreement of the employee, the previous employer and the new employer. There was an issue in this case whether this actually occurred but for argument sake let’s say it did,

3. Before the commencement period of employment with the new employer the employee received a statement in writing on behalf of the previous employer and the new employer which,

(a) Sets out the Terms and Conditions of the employee’s Contract of Employment with the new employer,

(b) Specifies that the employee’s period of service with the previous employer will for the purposes of the Redundancy Payment Acts be regarded by the new employer as service with the new employer,

(c) Contains a statement as mentioned (b) above and,

(d) That the employee notifies in writing to the new employer that the employee accepts the statement required by this sub paragraph.

What is clear from this particular case is that this did not occur namely the requirements set out at 3 above. In this case only a P45 issued. It would be my view that if there is a transfer to avoid a claim by an employee bringing a claim under the Redundancy Payment Acts that all of these conditions in section 9 sub section 3 of the Redundancy Payment Acts must be complied with. Where they are not as it was found that this particular case the employee is entitled to Redundancy. In this case the time was the period he started with the respondent employer up to the date his employment transferred to the agency.

This may seem very hard on an employer but this is what is set out in the legislation. Unfortunately the Redundancy Payment Legislation is one of those pieces of legislation which is not always checked when a transfer takes place.

Fixed Term Contracts

There is a view with some employers because an employee is on a fixed term contract that in those circumstances the employee is not entitled to Redundancy. This issue was addressed by the Labour Court in case RPD 1812. This is a case of Smorgs Roi Management Limited and Buckley. In that case the Labour Court held that the employee worked on a series of uninterrupted fixed term contracts from November 2014 to October 2017. And the Court found no merit in this submission that the fixed termination of the successive fixed term contracts disqualified the employee from qualifying for Redundancy under the 1967 Act. The Court set out that is was settled law that the combined effect of Section 7(2) (b) and Section 9(1) (a) of the 1967 Act makes it clear that the termination of employment in these circumstances constitute a Redundancy which qualifies the employee to receive Redundancy Pay within the meaning of the Act.

Effectively once an employee has 2 years' service they are entitled to a Redundancy Payment if the contract is terminated by reason of Redundancy even where those Fixed Term Contracts will provide that the Unfair Dismissal Legislation does not apply. There is no opt out from the Redundancy Legislation. Therefore an employee placed on a Fixed Term Contract of 3 years at the end of that period is entitled to Redundancy even where the contract would have provided no right to claim under the Unfair Dismissal Legislation.

Lay-Off and Counterclaim

The issue of a lay-off and counterclaim is one of the issues which causes the greatest difficulty for employers particularly.

Maybe a way of dealing with this is to deal with a relatively recent case being the case G4S Secure Solutions (Ireland) Limited and Stanek being RPD182. In this case the employee claimed that following a period of lay-off he was entitled to claim for a Redundancy Payment in accordance with Section 12 (1) (b) of the Act.

The employee contended that he had been on lay-off for a period of excess of 4 weeks in late 2016.

The Labour Court pointed out that it is a condition precedent to an entitlement to claim Redundancy in accordance with the Act under Section 12 (1) (b) that there was in fact a period of lay-off.

The employee claimed he received a phone call on the 3rd November when he was advised that the upcoming rosters up to the end to and including the

20th November were cancelled. The employee contended that this amounted to a notice in according with Section 11 (1) (b) of the Act. He contended that no further offer of hours of employment was received before the employment terminated on or about the 21st December 2016. The employer did not dispute the phone call. The Court set out the provisions of Section 11 in full. The Court pointed out that the provisions provide that there is a requirement to notify the employee and that subsection 3 specifically states:-

"in this section reference to the delivery of a notice shall, in relation to a notice, not required by this act to be in writing, to be construed as including the reference to the oral communication of the notice."

The Court held that on the plain reading of the legislation the phone call notified the employee of a cessation of his employment and that the employee was on a period of lay-off following the phone call in November 2016. In this case the employer had contended that the employee was notified that the employer did not believe that this cessation would be permanent even so the employee was held to be on a period of lay-off following the phone call on the 3rd November.

Now once the appropriate notice is given the employer has a right to give a counter notice. This is specifically provided for in Section 13. This is however one of the most contentious pieces of legislation when it comes toemployer's. A case in point would be the case G4S Secure Solutions and Sonic RPD 186.

In this case the employee submitted that the lay-off started on the 3rd November 2016 and continued for more than 4 weeks. On the 14th December 2016 a notice in writing was sent to the employer in accordance

with Section 12 (1) (b) of his intentions to claim a Redundancy Payment in respect to the lay-off. He submitted on the 21st December he wrote to the employer to advise as no counterclaim had been received from the employer in accordance to section 13 (1) (b) he was proceeding to claim Redundancy. The employer submitted that efforts had been made from the 15th November onwards to contact the employee by phone but these efforts were unsuccessful because he was uncontactable.

The employer did accept a notice of intention to claim had been received from the employee. The employer also accepted that no counter notice in writing and this is the relevant bit in writing had issued to the appellant in the time frame specified in section 13 (2). The Court pointed out that the Act is very clear in respect of the matters before the Court and that the employer had not fulfilled the requirement of the Act in Section 13 (2). You therefore have a situation where a lay-off can be oral but a counterclaim must be in writing and it must be served in 7 days. There is no extension.

The issue that happens is what happens if a counter notice is actually served within the Statutory period. If a counter notice is served then in those circumstances the employer is obliged to provide the employee within 4 weeks with 13 weeks continuous employment. If that is not done we would be of the view that the employee would be able to lodge a further claim for Redundancy and in affect claim 13 weeks' wages on top.

Payment of Wages during Lay-Off

It is sometimes believed that simply placing an employee on lay-off means that the employer does not have to pay the employee. That is what most employers believe. In the case of Law –v- Irish Country Meats (Pig Meats) Limited 1988 ELR 266 it was held that unless there is an express or an implied term permitting the lay-off without pay then this is in breach of the employees Contract of Employment. An implied term would include custom of practice. This was set out in the case of PetKevicious -v- Good Concrete Limited 2014 IEHC 66. In case ADJ 12693 in looking at this case the Adjudication Officer set out that the case related to the construction industry where there would be ups and downs rather than the type of industry that the employee was in that particular case. The Adjudication Officer held that as there was no express term the employee was entitled to payment in that case the Adjudication Officer held that as the employee was still under a contract of employment the employee was entitled to payment during this period also. This raises significant issues for employers.

Contracts of Employment do need to cover provisions of lay-off without pay. If a contract has a provision that an employer is entitled to lay-off an employee without pay then is those circumstances the employer is entitled not to pay. If the employer does not have such a clause then the employer has the obligation to pay. There would however be the exceptional circumstances situation. For example if premises flooded or were destroyed by fire or some other reason that was highly unusual then in those

circumstances even without a clause entitling to lay-off without pay the employer would be entitled to lay-off without pay. But let us look at a situation where a premises is damaged by flood. The employer is advised that it is going to take 4 weeks to dry out the premises and make them fit for business again. In such a case even if there is no provision for lay-off without wages the employer is entitled to lay-off the staff and not to pay them because that would be an exceptional situation. If however the employer decides that instead of just drying out the premises and getting them back operational to put in place improvements that would take a further 6 weeks then that further 6 weeks would not be exceptional circumstances and the employees would be entitled to be paid during that period.

It is therefore imperative that Contracts of Employment have a specific provision allowing for lay-off without pay.

Resignation

An issue then arises in relation to the entitlement for an employee to claim Redundancy where an employee resigns. This arose in case ADJ 12935 in this case the company got into trading difficulties. It did however continue to operate. It made plans to move to a new location which required planning permission. It was expected that this would occur but it did not happen. The employee was placed on temporary lay-off on August 25th. The employee in this case sent out a letter stating she had been on lay-off since August 2017 and that she was giving notice to terminate her employment as stated her last day of employment was to be the 1st January 2018. The Adjudication Officer in this case pointed out that the relevant provisions of Section 11 and 12 of the Redundancy Payment as amended specifically provides that an employee must give the notice of intention to claim Redundancy in respect of the lay-off of short time. Part B of the RP9 notice form provides one means to do this. It is not actually necessary to use the RP9 Form. Any document in similar form would do. In this case the employee did not indicate in their notice an intention to claim the Redundancy Payment. The Adjudication Officer said that a clear and simple statement of intention to resign does not comply and actually indicates a voluntary resignation.

Now it might be thought if an employee resigns that in those circumstances an employee will not be entitled to Redundancy. This is not absolutely correct. The case in point of Drumcondra Child Care Limited and Szumera case RPD 1814. This was the appeal of ADJ 12935.

After a period in excess of 4 weeks on temporary lay-off the employee wrote to the employer terminating her employment with affect from 1st January the employee submitted that under the Provisions of Section 12 (2) of the Act she was entitled in the circumstances to a Statutory lump sum. The

employer contended that it served a counter letter on the employee offering her a period of continuous employment but that this was not done within the timeframe of 7 days of receipt of the intention to claim.

In this case the employee did not serve a Notice to Claim a Redundancy Payment. The employee relied on the provisions of Section 12. This it was considered and referred to by the Court in the High Court in the matter of Minimum Notice of Terms of Employment Act 1973 Industrial Yarns Limited -v- Leo Green Arthur Manly [1984] ILRM 15 at page 20 where Costello J stated;-

"The Section 12 procedures were amended by Section 11 of the 1971 Act. After the employer has served the Section 11 Notice of Lay-Off, the employee can now serve one of the two notices either;-

(a) a Notice of Intention to Claim Redundancy or,

(b) a Notice Terminating his contract (which is deemed to be a notice to claim Redundancy Payment). He cannot serve both."

In this case the Labour Court held that the claim fell within Section 12 (2) of the Act.

The Provisions of Section 12 (2) of the Act can catch employers out and sometimes representatives. Where the employee has been on lay-off broke 4 weeks and simply sent the letter terminating their employment that is actually a notice claiming Redundancy also. The resignation letter does not actually need to state that they are claiming Redundancy. It is by virtue of the Act effectively implied into the termination letter. The case is interesting in that this matter had previously been before an Adjudication Officer who had held that there was a requirement to claim Redundancy. The issue of a requirement to claim Redundancy is still being issued in WRC cases. The decision of the Labour Court was very clear. The Labour Court reviewed the legislation in full and I would say that this is a trap which some employees can catch the employer in because the employer would expect to get the Form RP9 where they can give a Counter Notice. Where an employer receives such a notice simply of resignation the employer can counter it by giving a Counter Notice under Section 13.

An Employee Anticipating the Expiry of the Employers Notice

This is unusual but it does apply at times. This applies when an employer gives notice to an employee to terminate the Contract of Employment and at a time within that period of notice the employee gives a notice in writing to the employer to terminate the Contract of Employment on a date earlier than the date on which the employers notice is due to expire then the employee shall for the purposes of the act been taken to be dismissed by his employer and the date of dismissal in relation to that dismissal will be the date on which the employees notice expires. If before the employees notice is due to expire the employer gives the employee notice in writing requiring the employee to withdraw the notice terminating the Contract of Employment and to continue in the employment until the date on which the employers notice expires and stating that unless he does so the employer will contest any liability to pay the employer Redundancy Payment and the employee reasonably refuses to comply with the requirement of that notice the employee shall not be entitled to a Redundancy Payment. An employer cannot of course agree to the earlier date and this does not affect the employee's entitlement to Redundancy.

The Provisions of Section 10 of the Act are sometimes attempted to be used by employee's there is a long notice period, where they would still be in employment, and where they have obtained a new job. Some Employer's tend to fall into the trap that because the employee serves a notice to terminate their employment at an earlier date then effectively the employee has resigned and lost their right to Redundancy then the employer in those circumstances would be incorrect. Some employers will in time seek to give a long notice period where the employee's will continue to be in employment in the hope that they will avoid a requirement to pay Redundancies where the employee's will go looking for new work and will get a job before the notice period expires and would simply resign. The Provisions of Section 10 are ones that the employer's need to be aware of as otherwise they can still be caught with a Redundancy claim.

Conclusion

As I said at the start Redundancy is often seen as the poor relation when it comes to termination. I hope from this paper it would be seen at times it is actually beneficial for an employee to get a Redundancy Payment as opposed to an Unfair Dismissal Award. There would be times where employees are on lay-off, they obtain a new job and they are delighted to get an opportunity to send in a form requesting Redundancy. The time limit for an employer to give a Counter Notice is so tight that often it is missed. Unlike other provisions and Legislation there is absolutely no right for an extension regardless of the circumstances. Therefore for example if a factory closes for 2 weeks in August and an employee knows that there is a post box and serves the relevant notice on the employer to be delivered in the ordinary

course of post on the Tuesday after the August Bank Holiday knowing that the factory is closed for 2 weeks there is no way in which the employer will get the notice by which I mean see it and have an opportunity to furnish a Counter Notice. That is not a problem for the employee it is a problem for the employer. The same applies close to the Christmas period when offices and factories tend to close.

For colleagues dealing with Unfair Dismissal Claims if a resignation letter comes in or a Notice to claim Redundancy comes in where employees have been on lay-off it is imperative that the Counter Notice is to be served it is done so immediately and within the Statutory Period by sending it in by post. The legislation does indicate that it has to be delivered within the 7 day period so you have to take into account the time for a letter to be delivered. When dealing with a company who is placing individuals on lay-off it is important that the management of the company are aware of the Provisions of Section 13 of the Act as regards keeping relevant Counter Notices. It is equally probably important that not only are management aware but the person who opens the post, during periods that any employees maybe on lay-off, is also aware of their obligation to make sure that somebody in management receives it immediately a Notice to claim Redundancy is delivered and that their representatives are contacted by the company immediately so that appropriate decisions can be made as to whether a Counter Notice should be served or not. If acting for employees there are a number of opportunities to claim Redundancy in a way where the employer will not think of serving a Counter Notice or will not have the opportunity to do so. That may sound cynical. But that is the Law. It is for the employer's representatives to make sure that they advise their clients of the nuances of the legislation.

Redundancy is one of those areas that I have been dealing with more years than I would wish to recall. I have dealt with both for employers and for employees. When I started in the area of Redundancy I was in a large Accountancy Firm and when we started this work we were advising on Redundancies. In dealing with HR Personnel we then went to downsizing. The jargon then changed to rightsizing of. It then changed again to re-engineering the workforce and now back to straight Redundancy. I was asked once by a trainee solicitor about 15 years ago when the firm I was with was dealing with a large Redundancy for an employer as to why in all the correspondence that were going out we referred to it as re-engineering the workforce. I was asked what was the difference between a Redundancy and re-engineering the workforce. The other Partner and myself started to laugh and it was given over to me to answer and the answer was it was about €200 an hour extra in fees in re-engineering the workforce as opposed to doing a Redundancy. When the recession hit in and around 2008 a lot of the HR jargon went and we reverted from re-engineering the workforce back to plain Redundancy.

I would finish on this point by saying that we are seeing at the present time in the cases going to the WRC and we do review them on a very regular basis a significant increase in Redundancy claims. We would also see them in the office. A lot of these claims going through now are ones which are being challenged. A significant number of these do not go for full hearing. There is currently as we have come out of a recession companies with money who are anxious to get rid of the employees that they no longer wish to have. They cannot do an Unfair Dismissal and therefore call it a Redundancy. When the bluff is called there is often a fund there to give an enhanced Redundancy Payment. A considerable number of the current Redundancies are not legitimate Redundancies. They are getting rid of workers who are maybe not as productive or as integrated into the organisation as the organisation would want. After transfers or mergers we are certainly seeing an increase in Redundancies sometimes for very Senior Officials which are not Redundancies but merely a clean out or clear out of employees the employer does not want.

If putting in place a Redundancy and even a valid Redundancy there are good commercial grounds for giving some form of an enhanced Redundancy. If you give an enhanced Redundancy then it is possible to put in a settlement agreement which excludes any claim being brought under any other Act. Because there is an enhanced payment it is what is termed "*consideration*" for the employee giving up these other rights. It would always be our advice in those circumstances to provide for the employee to get Independent Legal Advice. A fee should be paid. The going rate going is currently between €300 and €500 plus vat. Very few offices will agree to give the advice for €300. So you are really at a figure of €400 to €500 plus VAT the clause should provide that on receipt of an invoice addressed to the employee but marked payable by the employer that the fee will be paid directly to the Solicitor in issuing the invoice within a set number of days and that the agreement should be witnessed by that Solicitor. In those circumstances the employee will not be able to come back with a claim under any other Act as consideration will have been paid, they will have received Legal Advice and they are bound then by the agreement.

Transfer of Undertaking Regulations

The dismissal of an employee can occur where there is a transfer of an undertaking.

The first issue which sometimes catches colleagues out is that where an employee is dismissed because of or close to the time of a transfer of the undertaking, once the transfer of the undertaking occurs the claim goes against the transferee not the transferor.

I think it is important that I would stress this point.

Company A dismisses an employee whether it is on the grounds of redundancy or a straight dismissal just before a transfer of an undertaking occurs. Even if the dismissal had nothing to do with the transfer of the business the claim still goes against the transferee. The reason for this is that our legislation, unlike the UK legislation provides that the claim goes against the transferee. When reading UK decisions it is important to take this into account. There is an absolute prohibition on the dismissal of an employee to facilitate the transfer of an undertaking.

The case of Hare Wines –v- Kaur and Others 2019EWCA Civ216 is a case where an employee was dismissed by reason of personality clashes in advance of a business transfer under the UK Legislation.

In this case it was held that this may be an automatic Unfair Dismissal because the sole or principle reason for the dismissal was the transfer. It was held that there was no defence to say that the reason the dismissal was a personal reason related to the employee as such a defence is not contained in the legislation in either the UK or in Ireland.

The UK Court of Appeal confirmed in this case that in circumstances where a dismissal occurs shortly before a transfer the existence of purely personal reasons for the dismissal does not preclude the transfer being the reason for the dismissal.

The background of this case is interesting. Mrs. Kaur was a cashier in a wholesale wine business. She had a difficult working relationship with a colleague over the course of her employment. The colleague was set to become a Director in the new business. Financial difficulties were experienced into December 2014 and it was decided by the previous employer that they would cease trading as the business would transfer to Hare Wines Limited.

On 9 December 2014 the claimant received a letter after a meeting informing her that due to unforeseen circumstances that led to the business ceasing to trade it meant that she was dismissed with immediate effect. On the same date the transfer took place.

The UK Employment Appeals Tribunal found that the Employment Tribunal was entitled to find that the reason or principle reason for the dismissal was the transfer itself based on the circumstances of the case including the timing of the dismissal and its proximity to the transfer.

This case ultimately went to the UK Court of Appeal. The case highlights that a Tribunal will look at the circumstances of a dismissal to decide whether the sole or principle reason was the transfer. This case highlights the factors which may be key considerations including timing of a dismissal, the proximity of the transfer and any supporting documentary evidence. It is important that employers remember that they should not use a transfer from one entity to another as a reason to end the employment of an employee even if they see that individual as a problem employee. This is because the employment will be protected. Even where the new employer, being the transferee believes that they have a "problem employee" the effect of this decision is that the transferee will need to deal with that issue as they would any other issue in the workplace and not simply seek to have the employee dismissed.

Case ADJ2371 is helpful in setting out the law relating to who is responsible where a claim is made where there has been a transfer under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 SI131/2003.

The law in Ireland provides that it is the transferee being effectively the new employer who has total responsibility. This is even if the breach was caused by the transferor. This issue was dealt with in detail in the case of J Donoghue Beverages Limited and Collins TUD183.

Article 3 (1) of the relevant Directive being Directive 2001/23/EC had an option for both the transferor and transferee to be jointly liable. Ireland did not avail of that option. Therefore the transferor is totally liable.

For those acting for employers where a transfer of undertaking is taking place it is important that appropriate checks are put in place to make sure that all potential claims are identified as part of the due diligence.

I would point out that even if an employee was dismissed five months before the transfer takes place and then seeks to bring a claim it is against the transferee not against the transferor.

At times there can be difficulties in relation to this issue. It is advisable where there is a claim going against an entity where a transfer has occurred but the breach has occurred prior to the transfer that claims are issued against both the transferor and transferee. Invariably it is the transferee who will be responsible but sometimes it is better to cover the issue.

Where a colleague has issued proceedings against one entity on behalf of a client and subsequently the business transfers under the Transfer of Undertaking Regulations again it is advisable that a new set of proceedings would issue which exhibit the existing proceedings which were originally against the transferor but that would now be against the transferee. There is an arguement that effectively once a business transferred even in respect of existing claims it is the transferee who is responsible.

This may seem unfair. It may seem illogical. However, we are dealing with the law as it is rather than what it should be.

Constructive Dismissal

This is an area of law where there is a significant level of interest in by members of the public. It is equally an area of law where a significant number of people really do not understand the issues relevant to bringing a constructive dismissal case.

Overview

The starting point is always to look at the legislation. The phrase "Constructive Dismissal" is not specifically defined in the Unfair Dismissal Acts 1977-2015. However, Section 1 (b) of the Unfair Dismissal Acts includes in the definition of a "Dismissal" the following;

"The termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer…".

In this part of the paper I am going to look at the issue of Constructive Dismissal. It might be useful, in this particular circumstance to look at the conclusions first and then to give the reasons afterwards.

The conclusions can be summarised as follows;

(a) There is a high burden on claimants to prove Constructive Dismissal. Unlike Unfair Dismissal cases in a constructive dismissal cases the burden of proof is on the employee.
(b) To establish a claim for constructive dismissal there must be;

1. A repudiatory breach of contract and/ or unreasonable conduct by the employer;

2. A complaint / grievance by the employee in relation to the said breach and/or unreasonable conduct;
3. A failure by employers to address either adequately or at all the grievance,

(c) An Unfair Dismissal cases it is always procedures. Failure to follow fair procedures will invariably result in that there was an unfair dismissal.
(d) In a Constructive Dismissal case the fact that procedures may not be perfect will not always be detrimental for an employer.

What are the tests to determine whether there has been a Constructive Dismissal?

The leading case on this is a decision of Lord Denning M.R. in Western Excavating (ECC) Ltd –v- Sharp 1978 IRL332.

The two tests can be described as the “contract test” and the “reasonableness test”.

The contract test

This is where the employer is;

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

The Reasonableness Test

This is where the employer

“*Conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer. The employee is justified in leaving”.*

These two tests have been repeated a number of times by the Labour Court here in Ireland. A recent case on this was a case of Ryan Cannon and Kirk Accounting Services Limited and Kneite UDD1910. In that case the Labour Court again approved the rationale of Lord Denning M.R.

When it comes to the issue of breach of contract then in those situations the breach must go to the very root of a contract. It has to be effectively a fundamental breach of the contract. An example of this would be a case of A Bar Manager –v- A Bar Restaurant ADJ10415. In this case the bar owner stopped paying the bar manager and did not allow him to work over a significant period following what was referred to as a “bust up”. There had been allegations against the employee but no attempt had been made to put a disciplinary process in place. When the employer ceased paying the employee in full and then not at all the Adjudication Officer held that the employee was therefore entitled to conclude that the respondent had repudiated the contract of employment. In this case an award of €6,000 was made for constructive dismissal but it should be noted that the claim under the Payment of Wages Act was for €39,000.

In a further case which went before the WRC, the case involved an employer who failed to discharge travel expenses, travel pay, to discharge wages, annual leave and public holidays. The employee had made repeated attempts to resolve the complaints. The issue had been raised with payroll, HR and the operations manager without success over a six month period of time prior to resignation. The Adjudication Officer in that case pointed out that the employer had failed to comply with the contractual terms to act reasonably in addressing the issues in compliance with the Code of Practice SI146/2000 Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000. The Adjudication Officer held that the breach of the contract was one that was a significant breach going to the root of the contract of employment and relied on the case of Western Excavating (ECC) Limited –v- Sharp which I have referred to recently.

The Reasonableness Test / Unreasonable Conduct by the Employer

This is the issue which colleagues are more likely to come across. Invariably, though not always, you will be met with a situation where a person arrives in your office having already resigned. You are then left in the position of having to find out whether that individual will have complied with the requirements before resigning.

The first issue of course is to look at the conduct of the employer. In the Supreme Court case of Berber –v- Dunnes Stores 2009 ELR61 the Supreme Court set out that the response of employee to the conduct of the employer must be assessed on objective grounds. In that case the Court stated;

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

This is one of the issues which cause the most difficulty for colleagues. This is an objective test. It is not a subjective test. It is not what the employee perceived it to be but rather what a Court or Tribunal will perceive the conduct of the employer to be.

These cases go down to the reasonableness test. That test assesses the conduct of the employer and whether the employer conducts

"...affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, if so the employee is justified in leaving."

This view which is the same as that of the Supreme Court was set out in the Paris Bakery Pastery Limited Case and Mrzljak DWT1467.

Assuming that the employee had got over the test of reasonableness the next issue that the employee must address is whether the employee used the internal Grievance Proceedures fully. This in many cases is fatal to a claim by the employee.

In Reid –v- Oracle Emea Limited UD1350/2014 is a case where the EAT stated;

"It is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are unfair".

You will also often be met with the arguement that there was no benefit in going through the internal procedures. Where the employee has not used the internal procedures at all they will often fall foul of the case of Tierney –v- DER Ireland Limited UD866/1999 where the EAT stated;

"Central to this is that she shows she has pursued to a reasonable extent all reasonable avenues of appeal without a satisfactory or reasonable outcome having been achieved".

In the case of John Travers –v- MBNA Ireland Limited UD720/2006 is a case also where the EAT stated;

"We find that the claimant did not exhaust Grievance Procedures made available to him by the respondent and this proves fatal to the claimants case...".

"In constructive dismissal cases it is incumbent for a claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair".

This approach of the EAT has been adopted by the Labour Court as was set out in the case of Ranchin –v- Allianz Worldwide Care S.A. UDSD1636 where the Labour Court stated

"In Constructive Dismissal cases, the Court must examine the conduct of both parties. In normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the step to resign. Normally the failure to use the internal grievance procedures will be fatal to the claim by the employee before the WRC or the Labour Court".

There are exceptions. Possibly the best known exception is the case of Allen –v- Independent Newspaper (Ireland) Limited 2002 ELR84. However that was a particularly significant case. It is very much the exception rather than the rule.

As I have stated before many employees will claim that going though the grievance procedure would have been a waste of time. That they would not have got a fair hearing or that matters had already been predetermined by their employer. Very often this is a subjective view by the employee. It is an objective view which applies.

For colleagues dealing with an individual who comes to your office claiming that they have a Constructive Dismissal case having to explain to them that they may not have a claim simply because they did not use the internal grievance procedures is difficult. That might be an understatement.

The sad reality however, is that for most employees who resign without going through the internal grievance procedures and giving the employer at least an opportunity to address their grievance will be a situation which is fatal to their claim. The employee must give the employer a reasonable opportunity to deal with the grievance.

The fact that the employee has exhausted the internal grievance procedures does not mean that they are then free to resign and bring a Constructive Dismissal case.

The burden of proof

In an ordinary Unfair Dismissal claim the burden of proof is squarely on the employer. In a Constructive Dismissal case the burden of proof is on the employee.

In case UD1146/2001 the EAT held;

"In such cases a high level of proof is needed to justify the complainant's involuntary resignation from their employment i.e. he must persuade the Tribunal that his resignation was not voluntary".

This was further confirmed in the case of Allen –v- Independent Newspapers (Ireland) Limited 2002 ELR84 where it was stated;

"The "Onus" is on the claimant to prove his case. The test for the claimant is whether it was reasonable for him to terminate his contract".

The behaviours of the employer must be such that no employee could reasonably be expected to put up with it any longer.

This was held in the case of Donnegan –v- County. Limerick VEC UD828/2001 where it was held;

"In particular the claimant must show that the respondent acted in such a way that no ordinary person, could or would continue in the workplace".

In the case of McCormack –v- Dunnes Stores UD1421/2008 it was stated;

"The employee would need to demonstrate that the employers conduct was so unreasonable as to make the continuation of employment with the particular employer intolerable".

Mitigating Loss

While I will return to this is the case of an Unfair Dismissal case there is a requirement to minimise loss in a Constructive Dismissal case.

The case of Shehan –v- Continental Administration & Co. Limited UD858/1999 it was stated;

"A claimant who finds himself out of work should employ a reasonable amount of time each weekday in seeking work. It is not enough to inform agencies that you are available to work nor merely to post an application to varies companies seeking work. The time that a claimant finds on his hands is not his own, unless he chooses it to be, but rather to be profitably employed in seeking to mitigate his loss".

In Burke –v- Superior Express Limited UD1227/2014 the EAT had held that the standard required is a high one to show that the employee sought to mitigate their loss.

The Cause for an Employee to Resign

A significant number of cases arise out of complaints of bullying or harassment. These are not bullying cases which would have resulted in a psychiatric injury enabling an employee to go to the Courts on a stress claim normally nor harassment which would have been equivalent to discrimination on any of the 9 grounds under the Employment Equality Acts. Where an employee has been subjected to serious bullying or discrimination in breach of the Employment Equality Legislation it is more likely that they will be bringing a claim for breach of contract or a claim for Equality Dismissal rather than a Constructive Dismissal case. Cases which were successful was a case of a Dental Technician –v- Dental Laboratory ADJ12025 where a concealed camera was installed. The unfortunate fact is that in many of these cases an employee will simply resign where they believe they have been bullied or harassed without notifying the employer or going through any of the procedures or at least not going through all the procedures. Such cases would have included Byrne –v- Horwath Bastow Charlestown Wealth Management Limited UD67/2014, Cedarglade Limited –v- Tina Hliban UD17/45. Equally in a case of Torriam Hotel Operating Limited T/A Shelbourne Hotel –v- Byrne UDD1718 the Labour Court found that the claimant had not been Unfairly Dismissed as she had deprived the appellant of an opportunity to address any concerns she had through established procedures which were in place for such purposes.

Conclusion

Constructive Dismissal cases are ones where, from reviewing decisions of the WRC, employees loose the vast majority of these cases.

There are very few cases which are so severe that the breach is such that nobody could be expected to put up with it for one second longer and could not be expected to raise that grievance with the employer and go through the grievance procedures before resigning. To be fair to clients who come to Solicitors offices they will believe that that is the position. In reality that is a subjective test. Our duty as Solicitors is to apply an objective test. The fact that somebody has been treated badly or not treated how they should have been treated or would wish to have been treated or how they might have been treated in the past is not enough in itself to ground a Constructive Dismissal case. Even going through the grievance procedure you must still show that the actions of the employer are so unreasonably that the employee had no alternative but to resign. The burden of proof is always on the employee in these cases.

While we will all have empathy for a client it is vitally important in dealing with a person who comes to you claiming that they have been Constructively Dismissed that they are aware of the risks they are taking on. The reality is that from looking at WRC decisions approximately 85% of all Constructive

Dismissal cases are lost. This is an issue which colleagues need to be aware of when considering taking on a Constructive Dismissal case. It is equally one which needs to be clearly expressed to clients that they know the risk which they are taking on.

Unfair Dismissal

The issue of Unfair Dismissal is the area where colleagues will probably be most used to dealing with. Saying this, there are some issues which come into play, at times, where clarity is somewhat unclear.

1 Year's Service

Section 2 (a) of the Unfair Dismissal Acts provides that an employee must generally have 1 years continuous service before he can bring a claim for Unfair Dismissal.

The date of dismissal is thus highly relevant as to whether an employee may bring a complaint to the WRC. Let us take an employee who is employed on 1 January 2019. On 2 December the employer sends a letter terminating the employment. At first sight the employee does not have 12 months service. The employee would however be entitled to minimum notice which would be in this case one week. You might think that if the employee had not taken their full holiday entitlements that this could be added on to get over the 12 months service. The Labour Court has recently clearly set out that that is not an option. The case is BDO and Eimer Stynes UDD1947. This followed a decision of the EAT in Maher and B& I Line UD271/1998. However, you must then also look at the contract of employment for the employee. If the contract provides for say 4 weeks' notice then in those circumstances the date of dismissal is in fact after the twelve months and the employee would come under the provisions of the Act.

In looking at the issue of continuity of service Section 2 (4) of the Act sets out that continuity of service is calculated in accordance with the First Schedule of the Minimum Notice and Terms of Employment Act 1973, as amended.

At one stage there was a practice by some employers of dismissing employees over the Christmas break and reengaging them immediately in the New Year. Service will not be broken where the employee is dismissed and immediately reengaged. The cases on this have usually turned on their facts. There is a specific provision in Section 2 (5) of the Act that continuity of service shall not be broken where an employee is dismissed and later

reemployed by the same employer within 26 weeks when the dismissal was wholly or partly for the avoidance of liability under the Unfair Dismissal Acts.

It must also be remembered that where an employee is absent from employment for more than 26 weeks because of lay off, sickness or injury or by agreement with the employer those periods count as a period of service. There are a number of well known exceptions to the 1 year rule being;

1. Trade Union membership;
2. Pregnancy, Maternity or related matters;
3. Adoptive, parental, force majeure or carers leave;
4. Seeking to enforce rights under the National Minimum Wage Act 2000; and
5. Being dismissed for having made a protected disclosure.

Exclusions

An exclusion which colleagues need to be aware of is that Section 2 (1) (B) of the Act provides that employees who are dismissed having reached the normal retirement age either before or on the date of dismissal are generally excluded from bringing a claim. This also applies to employees under the age of 16 years of age. There is no statutory retirement age but most contracts will have a retirement age of say 65 years of age.

Where an employee is dismissed in those circumstances an Unfair Dismissal claim cannot be brought but a claim under the Equality Legislation can be brought. An interesting case on this is UDD1950 longford County Council and Neilon.

In looking at the issue of an Unfair Dismissal claim due to reaching a mandatory retirement age it is going to depend on whether or not the mandatory retirement age has been consistently applied, where the mandatory retirement age is said to arise from and whether the employee had notice of the mandatory retirement age. A well known case on this issue was that of Valery Cox and RTE ADJ6972.

Apprenticeships

The Unfair Dismissal Act does not apply to those employed under employment contract who are either receiving training allowances or undergoing instruction by SOLAS or both or employed by SOLAS under a contract of Apprenticeship. Section 4 of the Legislation provides that the Act does not apply to the dismissal of a person employed under a statutory apprenticeship where the person is dismissed within 6 months of commencement or within 1 month after completion of the Apprenticeship. For example a trainee Solicitor who is dismissed at the end of their traineeship cannot bring an Unfair Dismissal claim unless they are kept on for over a month in which case their traineeship and the period after they completed their traineeship are added together for the purposes of determining their service. I only mention this as some colleagues have got caught out on this in the past.

Fixed term Contracts

These contracts can be either for a fixed term or for a specific purpose. The legislation does not apply under the provisions of Section 2 (2) (b) where;

1. The contract is in writing;
2. It is signed by both parties;
3. It contains a statement to the effect that the Unfair Dismissal Act shall not apply to a dismissal consisting only of the expiry of the term or cesser of the purpose of the contract.

In order to outlaw a policy that was in place in some organisations of having rolling fixed term contracts, the provisions of Section 2, 2(A) prohibits this practice where;

1. An employee is rehired within 3 months of dismissal under a fixed term/ specific purpose contract and the nature of the employment is the same or similar to that under the previous contract;
2. The employee is dismissed under the subsequent contract; and
3. The subsequent contract results from the expiry of the term or end of the purposes of the contract

In these cases the WRC or the Labour Court will have to look to see whether a second or subsequent fixed term contract was used to avoid the provisions of the Unfair Dismissal Act.

It should be noted that where an employee has a number of fixed term contracts that the employee in those circumstances acquires a contract of indefinite duration.

One issue which arises in relation to fixed term contracts is that those who get to 65 can be met by an employer coming and stating that in effect the employer will agree to take them on for a further period of 12 months. The hope of it going on longer is often held out. These individuals would have been on permanent contracts and under the provisions of the Employment Equality Acts, if dismissed, could have brought an equality discrimination claim on the age ground.

In the case of Board of Management of Malahide Community School and Dawn Conaty 2019/IEHC486 being a decision delivered on 5th July of this year, great clarity on the issue of the use of fixed term contracts entered into where an employee had an existing permanent contract has been given.

This is a case well worth reading but importantly in that case the Court stated;

"Section 2 (2) (b) allows for the possibility of an employee, at the commencement of their employment, making an informed decision to waive their statutory rights. This waiver must be confirmed by the employee signing a written contract which states that the Unfair Dismissal Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The provisions of Section 2 (2) (b) carves out an exception to the general rule in the Unfair Dismissal Acts. As such, same falls to be interpreted strictly".

The Court held that this was not an exclusion but rather a waiver. In this case the Court pointed out that there had been a history of employment and stated that the exemption under Section 2 (2) (B) is only available in the case of a first time employment or perhaps employments pursuant to a series of fixed term contracts.

The Court however went on to importantly state at paragraph 76;

"Alternatively lest I am incorrect in my interpretation of Section 2 (2) (b) I am satisfied that, as a matter of contract law, an employer who requests an employee to agree to inferior terms and conditions, which involve the loss of statutory rights, is required to explain the precise legal affect of those changes

to the employee. This implied term is part of the implied obligations of mutual trust and confidence between an employer and an employee. It is also necessary to reflect the unequal bargaining power between an employer and an employee".

I simply mention this as there has been a move in recent years when individuals get to 65 to give them a fixed term contract. The relevant clauses to exclude the Unfair Dismissal Act are in the contract and at the end they are then dismissed. Of course they always had the potential to bring a claim under the Equality legislation but now this recent decision enables them to bring a claim under the Unfair Dismissal Acts.

The Disciplinary Process

In any Unfair Dismissal case or what might more properly be said where an employee who has been dismissed comes to you and you are looking at whether the dismissal was fair or unfair, one of the first issues to look at is the issue of the disciplinary process itself.

The first issue to look at is whether the employer had a disciplinary process in their staff handbook. If the employer has such a procedure then the employer will be expected to follow this. The Labour Court has been consistent on this point. In addition, it is necessary to look at the Code of Practice on Grievance and Disciplinary Procedures. Whichever is more beneficial to the employee namely the employer's disciplinary policy or the Code of Practice on Disciplinary and Grievance Procedures then the one most beneficial to the employee must be applied.

In practice, it is my experience that many employers have never read their own disciplinary procedures.

When acting for an employer who is considering disciplinary action against an employee my advice would be that the first question you ask them is whether they have a disciplinary policy and the second is whether they have ever read it. It is surprising that the answer to the second question is more often than not in the negative.

Some principles apply.

1. An employer must be consistent in applying procedures

2. Where an employer has accepted or condoned a particular practice in the past then before deciding to take disciplinary action for a breach of such a practice the employer must give adequate warning to employees that it is taking a new approach.

3. Where an employee in a similar situation to the person who comes to you for a similar offense has not been dismissed then the dismissal will be deemed to be unfair. Bank of Ireland –v- Reilly. Effectively employees must know what is expected of them and what will happen if they fall below accepted standards.

Suspension

Very often a contract of employment will have a provision in it which allows an employer to suspend an employee pending a full disciplinary hearing. There is a considerable amount of case law on this which would be a lecture in itself but it is sufficient to say that some simple principles apply.

1. The issue of a suspension is itself serious. Therefore the employer must be in a position to justify why an employee was suspended. For example, suspending an employee where there is a belief that the employee may have been involved in theft may well be justified. Suspending an employee to investigate whether they are consistently late for work or not is hardly going to be acceptable.

2. The length of the suspension must be reasonable. Where an employee has been suspended the employer must be seen to act with due diligence in completing the investigation. In the case of Bank of Ireland and Reilly, 2015 IEHC241 this case is important for a number of reasons but one of them is that the Court held that suspension of an employee whether paid or unpaid is an extremely serious matter. In that case it is noteworthy that the reputational consequences of even a holding or precautionary suspension can

be regarded as extremely serious for the individual concerned. In that case also Mr. Justice Noonan specifically emphasised that as suspension should only be done after full consideration of the necessity for it pending a full investigation of the conduct in question. In light of this I would take the view that it is important for employers to have documentary evidence of what considerations they gave in advance of the decision to suspend. Many employers will not have this. The Bank of Ireland and Reilly case is one which both the WRC and the Labour Court have consistently quoted.

3. It is necessary to ascertain the full facts before taking disciplinary action. It is necessary to undertake an investigation in most cases. This is so that the employer can set out all relevant facts to the employee.

4. Employees must be allowed to question the facts and present their defence. This is an area where consistently employers fall down on.

Natural justice has been held to apply in these situations.

At times employers have sought to limit the information which will be given to an employee. There have been cases where a written report is available in which case the employee ought to receive a copy of that report in good time before a disciplinary meeting. In Cook –v- Carroll UD 239/1994 a video tape showing the claimant removing money from a till was not shown to the claimant.

Issues can arise where there is a vulnerable witness. This creates its own difficulties. Even where cross examination may not always be appropriate due for example to the vulnerability of a complainant other measures to test credibility must be meaningfully engaged with by the employer as was held in FA-v- Child and Family Agency, 2018 IEHC806. In theory knowledge of the identity of those making allegations is not necessary for a fair hearing. However, it can be a mistaken approach by an employer to accept information from witnesses on a confidential basis. The evidence of value evidence which can be put in its entirety to the employee who is subject to the disciplinary hearing. This may be necessary if it is to be used later on before a Tribunal or a Court. A person who gives evidence in confidence to an employer may and perhaps often will have to attend as a witness before the WRC or the Labour Court. If for some reason it is unavoidable that witnesses remain confidential, at least before dismissal, the employer must

make sure that every opportunity is given to the employee to be informed of and to answer each allegation made.

It is best practice that en employee should be offered the opportunity to have the witnesses brought to the meeting and therefore those giving statements should be named. The employee should be asked if he or she wishes to meet them face to face.

5. An employee has a right to cross examine.

   Generally speaking an employee will have a right to cross examine their accuser. This may be by themselves or with the benefit of representation. However this is not like a cross examination in a Tribunal or Court. It is there to test the claim but is not some form of Court procedure. A Disciplinary procedure is not an Adversarial process. It is an Inquisitorial process.

6. Right to be represented

   Issues have arisen as to whether an employee is or is not entitled to be represented. Recently a view was expressed that in effect employees were entitled to have legal representation. It now appears to be that only in the most exceptional of circumstances, and that would not include simply that an employee might be dismissed, will an employee be entitled to legal representation.

7. Is there a good reason to give an employee the right of legal representation

   If acting for an employer at times this can be useful. Where an employee uses the services of a Solicitor then in those circumstances the Solicitor is obliged to raise any procedural issues during the process and if they do not, they cannot subsequently claim a lack of fair procedures. If acting for an employee because your attendance will effectively cure any defect it is normally not advisable that you would attend.

   There is another reason why Solicitors might be slow to attend. You might believe that you are being engaged to attend a disciplinary hearing on a Friday afternoon at 2pm and you would expect to be out by 5pm or 5.30pm. You then find that at 3pm because of an issue you raise or which your client raises, the person hearing the

disciplinary matter adjourns the disciplinary hearing. You can very quickly find yourself attending 3 or 4 meetings. I would caution colleagues to be very careful of getting involved in such processes where they have no idea how long they are going to last.

8. It is vitally important that the person who undertakes the investigation, the person who undertakes the initial disciplinary hearing and the person who hears the appeal will be different and will be independent of the previous process. The Labour Court has been critical in cases where an individual has effectively been involved in the investigation and the disciplinary process as the investigator and the person who holds the disciplinary hearing. It does often depend on the size of the organisation.

   Even if your disciplinary policy simply provides for matters to go through the organisation with different people at different levels investigating and hearing the disciplinary matters and appeals sometimes it can be useful to have an outside person. Personally I am a great believer that in serious matters an investigation by a person used to undertaking workplace investigations should be used. They have the great advantage of determining which issues should go for disciplinary hearing and which should not. The person undertaking an investigation should never make a finding of fact other than to determine if there are matters which should go for a disciplinary hearing without determining what the fact of that issue is.

9. Curing Defects

   At times I have heard colleagues talk about bringing an injunction during the disciplinary process. The case law on this is very clear in that until the disciplinary process finishes you do not know whether fair procedures have been applied or not. The fact that at one stage in the process an unfair procedure has been applied does not mean that the whole procedure is tainted. Right up until the very end of the process to just before the employee is dismissed any procedural defect can be cured. By this I mean that if an employee is being disciplined in relation to say three separate matters and it subsequently transpires in respect of one of those matters that a fair procedure was not applied there is nothing to stop the employer in the disciplinary hearing discounting that as an allegation against the employee. Therefore at any stage until the

decision to dismiss is made and in theory until after an appeal has issued the employer can cure any defect.

10. Appealing any disciplinary hearing

Appealing any disciplinary outcome. The Labour Court have consistently held in unfair dismissal cases that an employee must appeal. Colleagues will often find that the employee has been given a letter giving them 5 or 7 days to appeal. They come into you after 10 days. In those circumstances even though the time has elapsed it would be my advice that an appeal is lodged. When acting for an employer even if the appeal comes in out of time unless the employer can show that there is prejudice by extending the time the employer will not be able to contend that the employee failed to appeal. Most employers seem to work on the basis that an appeal must be lodged within 5 days. Some go for 7 days. If an employee comes to you within the time limit again it would be my advice that an appeal is lodged stating;

"I wish to appeal my dismissal. I will furnish the full grounds in due course".

In those circumstances I believe that the compliance has occurred.

The Grounds of Dismissal

The grounds of dismissal normally fall under one of two grounds namely misconduct incompetent / incapability.

Misconduct

Misconduct can be extremely wide. It can be everything from theft down to consistently being late for work to having been on a final written warning and a similar breach or a different breach of procedures applied.

There is a misconception by some that where a misconduct issue arises that the defence is solely that this was not misconduct. That is not the test.

The test in these cases is whether a reasonable employer acting in these circumstances could decide to dismiss. The view of the Tribunal or the Court is one which they have consistently held is not relevant. It is whether a reasonable employer in these circumstances would have dismissed or more properly be said could have dismissed.

Incompetence or Incapability

The Labour Court in the case of O Brien –v- Dunnes Stores Limited UDD1714 is a case where the Labour Court stated that it was not necessary for the Court to establish that the employee was actually incompetent or incapable of doing their work and that all that was necessary was to show that the employer honestly believed that the employee was unable. The leading case on this is Bolger –v- Showerings (Ireland) Limited 1990ELR184 where the High Court stated in the case of dismissal for ill health that for an employer to show that the dismissal was fair the employer must show that;

1. It was the ill health which was the reason for the dismissal;
2. That this was a substantial reason;
3. That the employee received fair notice that the question of his dismissal for incapacity was being considered; and
4. That the employee was afforded an opportunity to be heard.

In cases where an employer is relying on a medical report it is important that the employee is given that medical report and is given an opportunity to produce their own medical report.

Conclusion

In Unfair Dismissal cases of course the actions of the employer will firstly be looked at. The burden of proof is on the employer to prove that the dismissal was fair. The employer will lose generally where fair procedures are not applied. In such cases the employer is left in a situation of arguing that the employee contributed to their own dismissal. A dismissal will be deemed to be unfair if it is not a reasonable response by the employer to the disciplinary offence. In looking at this the test is not what a Court or Tribunal would say but what they say a reasonable employer in the situation of the employer could reasonably have done in that situation. A Court or Tribunal is not there to impose their own belief as to whether or

not the employee should have been dismissed. The test has been held by the Labour Court consistently and previously be the EAT was whether a reasonable employer in these circumstances would have decided to dismiss the employee.

The one issue that then comes up consistently is the issue of minimising loss. An employee who is dismissed must seek to minimise their loss. That means that there new job is effectively looking for a job. Where an employee has not sought to minimise their loss or has no loss their compensation will be limited to four weeks.

Many employees believe that they should get compensation for the manner in which they are dismissed. This is incorrect. The legislation specifically provides solely for the economic loss which the employee suffered. Therefore, and this would be an extreme example, if an employee was leaving the office on a Friday afternoon at 5.30pm and an employer from the third floor took out a megaphone and shouted out the window through it that the employee was fired and let us take for example they were a Secretary in a Solicitors Office and a Solicitor from another firm who was looking for a Secretary was coming up the road and heard this and knew that the particular person was an excellent secretary and that the person who was dismissing them had a tendency to overreact and offered the person a job to start on Monday at the same or a larger salary then in those circumstances the compensation which that secretary in that Solicitors office could obtain would be limited to four weeks wages. There is no compensation for hurt feelings. There is no compensation for reputational damage. There is no compensation for loss of opportunity. The compensation is simply limited to economic loss.

I simply mention this as the number of employees who towards the end of an Unfair Dismissal case suddenly come up the issue of reputational loss and the hurt that they sustained, even though this will have been covered at the very start, never fails to surprise me. It is therefore always advisable if acting for an employee to set out at the very start, preferably in writing, as to what compensation can cover and particularly what it cannot cover. It is always useful to be in a position to remind an employee as to what was put in the letter to them.

I do not blame employees in these circumstances. Dismissal is a very stressful claim for an employee to bring. There will often be significant hurt and upset. Employees will often not take in everything that is said and therefore it is important to stress these issues to them at the very start.

Protected Disclosure Act 2014

Where an employee is successful in bringing a claim under this Act, compensation of up to 5 years wages can be awarded. However, this Act amends the Unfair Dismissals Acts. Therefore you are back to the issue of Economic Loss. If the employee has suffered no economic loss then in those circumstances the employee is limited to compensation of 4 weeks.

As a matter of practice many employees believe that once they have made a Protected Disclosure that in some way they are therefore fully protected. To an extent they are right and to an extent they are wrong. Simply disclosing some wrong doing does not mean that the employee gains the benefit of the Legislation.

Section 5 (8) of the Act provides that in proceedings as to whether a disclosure is a protected disclosure it is presumed until the contrary is proved that it is. However, an employee must reasonably believe that the information disclosed by him or her tends to show one or more relevant wrong doings. The employee is permitted to be wrong as is outlined in the UK EAT case of Darnton –v- University of Surrey 2003 ICR651. That case set out that a reasonable belief must be based on facts as understood by the worker not as actually found to be the case. Section 5 (7) of the Act provides that the motivation is irrelevant in making a Protected Disclosure.

The main case on this is a case of Aidan and Henrietta McGrath Partnership and Anna Monaghan PDD2/2006 where the test was identified as;

1. To establish that a Protected Disclosure is in existence and;
2. An examination of the facts to establish whether penalisation has occurred.

The detriment giving rise to the complaints must have been incurred because of or in retaliation for the complainant having made a Protected Act. The commission of a Protected Act must be the operative cause in the sense that “but for” the employee having committed the Protected Act he or she would not have been subject to a detriment.

In Dougan and Clarke –v- Lifeline Ambulance Limited, being an unreported Circuit Court Decision of Comerford J it was a case where the Court concluded that such factors as to whether the dismissal had resulted wholly or mainly from making a Protected Disclosure would necessarily include the temporal proximity between the making of the Protected Disclosure and the dismissal, whether any animosity arose between the parties as a result of the Protected Disclosure prior to the dismissal, whether fair procedures of natural justice were afforded to the complainants in the dismissal procedure adopted by the employer and whether any such apparent fair procedures of natural justice were real or merely window dressing and whether the

complainant was treated in a less favourable manner to comparative employees who had not made Protected Disclosures.

As I said there is a belief by some employees that simply making a Protected Disclosure therefore means that they are immune from any action. As I said, this is partly correct and partly incorrect.

The first issue when acting for an employee or an employer is to ascertain what disclosure is alleged to have been made.

The next issue is whether it comes within the classification of a Protected Disclosure. Having an employee disclose to an employer that one of the company vans has a tax disc that is six months out of date will not be a protected disclosure.

The next issue is whether a disclosure has been made to the correct party.

Even if a disclosure would have been a Protected Disclosure if it is not made to the correct entity and sometimes even the relevant person within that entity, then it is not a Protected Disclosure. For example, some employees, in cases I have come across, have made a disclosure which would have been a Protected Disclosure had it been made to the relevant authority but has been made to, for example, An Garda Siochana.

In acting for an employee who comes to you and is considering making a Protected Disclosure it is imperative that the legislation is checked to make sure that the disclosure goes to the relevant body and sometimes even addressed to the relevant official in that body.

Pregnancy Dismissals

It is outside the scope of today's talk to go into the whole area of dismissals under the Equality legislation. Saying this, I think it is important that I have already mentioned the issue of age discrimination as regards terminating employment and a second one to look at is the issue of a pregnancy related dismissal.

In a pregnancy related dismissal the issue of minimising loss in an Unfair Dismissal case applies as much in one of these cases as it does in an ordinary Unfair Dismissal case. The difference is that no service is required.

The loss is therefore economic loss. Therefore the employee must show that the employee has been in a position and has been actively seeking work. The very fact of matters is that depending on when the employee was dismissed may impact on her ability to seek work. If she is not seeking work then there is no economic loss. This may seem hard but that appears to be the way

that the legislation is drafted. In addition, an award under the Unfair Dismissal legislation is subject to tax.

There is a solution. The alternative is a claim under the Equality Legislation. Equally under the Equality Legislation no service is required. Under an equality dismissal there is no requirement to prove loss. It is not open for an Adjudication Officer, the Labour Court, or the party representing an employer to ask questions about the employee having sought employment. It is completely irrelevant the process. In addition compensation in an equality claim is exempt from tax.

Another issue which arises in an Unfair Dismissal claim is whether the employer knew that the employee was pregnant. The Labour Court in a recent case held that the employer could not be held liable for a pregnancy related dismissal where the employer, at the time of the dismissal, was not aware that the employee was pregnant. It would be my view that particular case was one where the employer did not know that the employee was pregnant until sometime after the dismissal. If an employee is bought to a disciplinary meeting and is being advised that they are being let go and advises the employer that they are pregnant then in those circumstances it is hard to believe that the Court would not hold that the employer knew that the employee was pregnant at the relevant time.

Even in those cases I think it is probably more advisable to bring an equality case. The reason for same is that the Employment Equality Legislation has been interpreted by the Labour Court to hold that an employee who is pregnant is protected from the vary start of the pregnancy until the end of maternity leave. Now taking that rationale the reality on it is that no woman is going to know that she is pregnant from the moment that she becomes pregnant. There will be a period of time before she knows or has a suspicion even that she is pregnant. In addition, it would be normal for a woman not to advise her employer that she is pregnant for at least twelve weeks. Therefore there is a period of time when the employee is pregnant but taking the rationale of the Labour Court would not have the protection of the Unfair Dismissal legislation. The opposite is a position where the equality legislation is going to be relied upon because the Labour Court, as I have said, stated that the protection commences at the very start of the pregnancy.

This issue is going to arise and has already arisen in a case in the WRC where a decision is awaited. It is one where the employer did not know that the employee was pregnant at the time of the dismissal. The employee was dismissed due to the fact that the employee had an accident and the employer was of the view that the employee was incapable of performing their duties. The employer did not have the employee medically examined. The injury was such that if a medical examination had occurred as part of same it is probably that the employee would have been requested to advise the medical practitioner as to whether she was pregnant or not. The employee would probably have stated that she didn’t know in which case a

test would have happened. That would have disclosed that the employee was pregnant. What is interesting about this case which is before the WRC and in all likely will go to the Labour Court regardless of the outcome is that the employee herself did not know she was pregnant. It is not necessary for me to go into the relevant arguement that was made in that case but effectively we are relying upon the Directive and arguing as there is no specific law in Ireland as regards notifying an employer that an employee is pregnant and no custom or practice in Irish law on this, that the employee is protected from the start of her pregnancy. The Maternity Protected Legislation does provide for notifying an employer but that is effectively just before an employee goes out on maternity leave and that is not tied back into the employment Equality Acts As a requirement. It will be an interesting case.

Taxation of Employment Awards and Settlements

When you mention the word “tax” to some Employment Lawyers and Practitioners it sometimes feels as if you have rabbits caught in the headlights of a car - transfixed. For others the fear in their eyes is sometimes thinking you have asked them to jump out of a plane without a parachute.

Let me be clear, tax is law. It is about applying the law to certain facts. It is no different than reading Section 6 of the Unfair Dismissal Acts or Section 15 of the Organisation of Working Time Act. It is about the law. It is not about “mere sums”.

Unlike other areas of law, there is “no equity in tax”. Tax follows the law. As Employment Law practitioners we are used to legislation which like the Terms of Employment (Information) Act sets compensation as is “fair and reasonable” there is no such test in tax. Either something is taxable or it is not. There is no “fair” or “reasonable” test. There is no “equity” in tax.

An employee either receives an exemption or a relief or they do not. There are no “grey” areas. Tax is “black and white”.

A scoundrel may obtain a tax exemption or allowance while a saint may not. To that extent and to that extent only, Practitioners need to amend their thought processes.

THE APPROACH TO TAX

To be fair, most Solicitors and employers and employee representatives are prepared to discuss tax issues. Unfortunately, the majority of Barristers seem to resile on the basis that tax has nothing to do with them.

If your approach in cases is fight everything, never settle, never go into mediation and that when any decision issues you send it to your client with

note to say: “My engagement is finished. I am not accepting any further engagement about this case. You deal with it from here” then possibly you can get away with this approach to not considering tax.

Saying: “Tax is not my area”; or “I know nothing about tax” will not wash. In the UK about 15 years ago their High Court pointed out that if you deal with a particular area of law you are required to know the basics. I have no doubt this would apply here.

Unless you understand the basics you can get a result where your client either pays too much tax, fails to get a relief, or exemption or is caught with a tax liability which would legitimately have been avoided. You cannot wash your hands of tax. Tax is an integral part of any settlement or decision. Get is wrong and you create a tax liability for somebody.

EMPLOYERS AND EMPLOYEES

Tax planning is as important for employers as it is for employees. Some think it is only relevant to employees. It is not. If an award or settlement is subject to tax and employer has employer’s PRSI to pay in addition to the amount payable to the employee. Therefore, the difference an employer has to pay on an award of €15,000 (or settlement) which is subject to tax is €1,612.50 as an additional cost.

MEDIATION - Why you should consider it? -or- Why €15,000 can be worth more than €20,000?

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. Again, this is an issue that some colleagues overlook.

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 taxable. There are exemptions but they are limited and this will be discussed later in the paper. Many believe that if an award is stated to be compensation then it is exempt from tax. In the case of Unfair Dismissal cases, or claims under the Payment of Wages or any issue relating to loss of earnings, for example, an equal pay claim, it most definitely is not exempt from tax.

If you settle for example an Unfair Dismissal claim, 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 advantages for both employers' and employees' representatives. The reality is that an Unfair Dismissal award is taxable. There are certain exemptions. However, the element that is taxable for the employee will be taxed at 40% tax and 8% USC will be deducted from what the employee receives. For employers there is the employer's PRSI of 10.5% on the entire amount.

For the purposes of discussing issues going forward in this paper, I thought it would useful to possibly set out an example. I am going to look at a case which results in an award where an employee received an award of €20,000 in an Unfair Dismissal case and then when the same case is looked at where it is settled for €17,000 and what the position is.

Employer

Award	€20,000
PRSI	€2,100
Cost	€22,100

Employee

Award	€20,000
Tax Exemption	€10,925
Taxable	€9,075
Tax at 48%	(€4,356)
Balance	€4,719
Add Exemption	€10,925
Employee Receives	€15,644
Fees	(€4,000)
Employee Net	€11,644

Let us take a case if the case settles for €17,000 and again the employee only has one-year service.

Employer

Settlement	€17,000
Tax on €2,075	€105
Cost	€17,105

Employee

Settlement	€17,000
Exemption	(€10,925)
Taxable	€6,075
Less Legal Fees	(€4,000)
Balance Taxable	€2,075
Tax at 48%	€996
Balance	€1,075
Add	€10,935
Monies received by employee	€12,010

I am simply setting this out as a simple example of a situation where while the benefit to the employee is relatively small, the benefit to the employer is very high.

It is still however a benefit to the employee.

Both the employer and the employee are better off.

The issue of tax and Unfair Dismissal awards is one that comes as a surprise to most. I have had comments like:

"But it was awarded as compensation".

Yes, it was, but Section 123 TCA 97 applies and the exemption in Section 192A TCA 97 does not apply. The tax under Section 123 TCA 97 is subject to the exemptions in Section 201.

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 non-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 awards is not a "right" as specified in the exemptions.

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 the tax is not just €4,356 but rather closer to €8,700. When you then take penalties and interest you can be talking about another €16,000.

When acting for an employee, you will have a lot of explaining if a cheque comes in for €15,644 and you are looking for your €4,000 when the employee thought that the employee would receive a net sum of €16,000 in their hands because the case settled for €20,000 you are going to have an awful struggle to get your fees.

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 the 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 at least to be able to look and see where the exposures are and to get the appropriate advice.

SETTLING CASES

In settling an Unfair Dismissal claim or 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 which 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*".

I will discuss this later in this paper and while 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 which is exempt if you use these words as there would be no allowance and it would be, if it was an equality dismissal claim it would be treated as a termination payment. If however it was a claim that an individual was discriminated against, other than in relation to a termination situation, then a settlement of €17,000 will actually be fully taxable less any fees so the full amount taxable would be €13,000 assuming the same level of fees. The tax therefore would be €6,240.

What would the effect of that be when it would be that the employee instead of receiving €17,000 (less fees of €4,000) equal €13,000, you would have a situation where the employee has:

€17,000	(less fees €14,000)
Taxable	€13,000
Tax at 48%	€6,240
Net amount received	€6,760

This is a significant reduction for an employee. There is a significant exposure for those representing employees. The same applies to those representing employers. The reason is the €17,000 will be subject to 10.5% employer PRSI. Those acting for employers also have the issue that if the tax is not deducted the Revenue can come back for 6 years against the employer.

CONCLUSION

This is the first part of this seminar note and I thought it was relevant to set out in in broad terms at the start and I can deal with it then in more detail in the rest of the paper.

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.

There are exemptions but I will deal with these later.

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.

Originally, the only "mediation process" provided for under Legislation was 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 exempt, provided if a decision issued, it would be exempt. This is often overlooked by many.

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 WRC 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 WRC 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, and especially Barristers, 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. No such wording is required in the WRC. Mediation Agreement as any exemption will apply automatically.

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. Solicitors and Barristers should instead rely on Non-Disclosure/Confidentiality Agreements. You cannot get the exemption if made "Without Prejudice" or "Without Admission of Liability".

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. In Appendix 1 I have set out Section 10 TCA 97 for those who want the full list. 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 the WRC 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".

These is a saving provision. 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. Therefore, use the WRC. It means you need to consider settlements early. If the case goes to the Labour Court the only way to get the exemption is to get a Decision.

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 way Decisions are written. Written one way taxable. Written a different way not taxable.

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 €1,075 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”.

I have seen WRC Decisions with this wording which would not come under Section 192A. You must check the exemption applies.

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 LRC where there was a 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 WRC 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 employer's 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.

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. There is a 1/3 Exemption (subject to certain restrictions) for paying in a year when the charge occurs.

SCSB - Exemption

In dealing with high net individuals who are members of a company pension scheme, there is a provision for them to take out a sum of up to €200,000 exempt from tax. There is a complicated formula to be applied. I do not intend to go into it here today. However, what I would say is that you need to be very careful in relation to this. It is a lifetime exemption of €200,000. It does mean at times that an employee may not look to take that exemption.

Maybe an example would help. You have an employee who has a settlement of €200,000. The length of service he has in the company is such that he

would be entitled to take out the full €200,000 exempt from tax. Let us assume that he has 30 years service in the company which would mean that he can take under the basic exemption €33,600. To take the basic exemption he cannot take the enhanced exemption of €200,000. It cannot get both. It may therefore appear that of course you would go for the €200,000 but possibly you would not. If the employee was age, say, 63 years of age and would be due to retire and could take monies out of his pension scheme in 2 years time, then in those circumstances taking the €200,000 now would mean that the €200,000 could not be taken in 2 years time and he would lose the benefit of the €33,600. If he takes the €33,600 now, in respect of the €200,000 settlement he would pay tax on a large portion of same but can claim the €200,000 in 2 years time. The issue of SCSB is way outside the issues I believe that any Solicitor is capable of reasonably advising on. If you see a settlement agreement which uses the phrase SCSB or the phrase Standard Capital Superannuation Benefit and that a settlement could be taxed under same, it would be my strong advice that you advise the employee to get clear and definitive tax advice and pension advice before signing up to any agreement with that clause in it.

If a person is not a member of an occupational pension scheme. Where individual is not a member of a occupational pension scheme and the individual has not claimed any relief under Section 201 in the previous 10 years and is not a member of an occupations pension scheme then the employee is entitled to seek an additional payment, being an increased exemption of €10,000 on top of the basic standard exemption of 10 months together with €765 for each completed year of service.

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 1 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 Labour Court. 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 year's 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 or 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 on €7,190 instead of €1,040.

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 Adjudicator, then the sum of €7190 is taxable. Both the employer and the employee have a liability.

I have attached in Appendix 2 an extract from Tax Manual relating to the tax treatment of legal fees.

In the cases and situations, I have been talking about, it has generally been in relation to cases where an action has been taken by either a director or employee to recover compensation for loss of office or employment or breaches of Employment Law by the employer.

The Revenue have updated their Rules relating to the tax treatment of legal fees which is different than the Revenue Briefing documentation which issued a number of years back. This is an issue which the Law Society through the Taxation Committee and the Employment Law Committee are looking at with the Revenue but it is an issue which colleagues need to be aware of.

Legal fees on behalf of a director or employee in connection with an investigation or disciplinary procedure instigated by an employer can be recovered.

Again, legal fees in relation to an action taken by a director or employee to recover compensation for loss of office or employment or for example breaches of Employment Law by the employer are covered. There are certain conditions which must be met.

1. The fee must be what are termed "legal fees" being fees due to a member of the legal profession arising from representing the employee or a director. Therefore, fees payable to non-lawyers being other than Solicitors or Barristers are not exempt.

2. The payment on behalf of the employee or director must represent a full or partial discharge of the legal fees incurred by the employee only in connection with the investigation/disciplinary procedure instigated by his or her employer or the action taken by the employee or director against the employee.

The Revenue are making it clear that legal or other fees incurred on other matters do not qualify for this treatment so let me explain. Let us take an employee who has been transferred from France to Ireland. The employment is being terminated or foot of a disciplinary matter. The employee goes to their Solicitor. The Solicitor arranges a Barrister. There is a settlement put in place and there is a contribution to fees. The employee wants to go back to France. The employer, as part of the settlement to avoid litigation, agrees to pay the conveyancing fees. The conveyancing fees are not part of this process and therefore the exemption for the conveyancing fees do not apply. The element that relates to the conveyancing fees would be subject to benefit in kind.

3. The legal fees must be paid directly by the employer to the employee/director's legal representatives and only having sight of an invoice relating to such fees, issued to either the employee/director or the employer by the employer/director's legal representatives.

4. Where the investigation/disciplinary procedure instigated by the employer or the action taken by the employee against the employer results in a payment being made to the employee/director by the employer under a settlement agreement the payment of the legal fees must form part of a specific term of such agreement.

This would appear to encompass most areas. Unfortunately, it does not.

The Revenue have confirmed that the new Tax Manual which would appear to exclude the exemption for legal fees where there are no proceedings in place, as may happen in a "No fault" termination, was not intended and the old Rules apply. The Manual is to be changed.

Many years ago, myself and a man called Ken O'Brien wrote a book entitled "Payroll and Taxation for Employers". Our working title was "The complete cure for insomnia".

Conclusion

I hope the talk today has not caused you to go to sleep. I do hope that it simply has alerted you to the problems which need to be addressed.

Today I have tried to give a broad outline of issues relating to constructive dismissal, unfair dismissal, redundancy, dismissal by reason of having made a protected disclosure and pregnancy dismissal. I have also looked at the taxation issues. In a course like this it is only possible to give a very broad outline of the issues. For those considering bringing or acting in employment cases I would strongly recommend that you purchase a copy of

Redmond on Dismissal Law by Desmond Ryan which is published by Bloomsbury Professional and also the excellent publication by Alastair Purdy on Equality Law in Ireland.

To those who are specialising in this area of law I hope that my comments on the approach and the issues is of interest. For those who are not specialists in this area of law I hope that it has given you an insight and hopefully an appetite to become a specialist in Employment Law.

For those seeking to keep up to date with developments in Employment Law you are dealing with an area of law where there are some 870 + pieces of legislation, whether Primary Legislation, Directives or Statutory Instruments. That is a significant task.

There are various publications which you can go to which help you keep up to date at minimal cost. All the larger practices regularly issue updates on employment law. Simply following them on LinkedIn will alert you to these. Many also produce Newsletters which you can obtain by simply going to their website and seeking to get a copy. Our firm produces its own Newsletter on a monthly basis. It can run to over 40 pages but that is because of the volume of case law that is going through. You will find other very useful publications by specialists in this area. Again, all the major law firms produce regular updates as do all of those who specialise in employment law. If you are interested in this area of law I would certainly recommend that you look to join the Employment Law Association of Ireland. The cost is only €75 per annum and it is a very easy and cheap way to keep up to date with developments and at the same time obtain some CPD.

Finally, I would like to thank the Cavan Solicitors Bar Association for inviting me down again to speak at your conference. It is a great privilege to be asked.