# Presenting Claims in the Workplace Relations Commission

**December 2020**

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## INTRODUCTION

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

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

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

## ACTING FOR EMPLOYEES

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

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

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

"*They had not accepted them".*

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

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

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

a) 1 hour to get instructions.
b) 30 minutes to set out a claim - short version.
c) 1.5 hours to finalise submissions to take account of meeting the client and getting their instructions.
d) 30 minutes to advise on Data Protection and Mediation both of which can be extremely important.
e) 1 hour minimum between lodging a claim to get a hearing date for usual client interaction.
f) 1 hour for a final meeting with the client before the hearing.
g) 1 hour to review the employer's submission and to get your clients responses and to go through them with your client.
h) 2.5 hours for a hearing
i) Travel to and from the hearing.
j) 1 hour to review the decision and to discuss with the client whether there will be an appeal.

**MEDIATION**

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

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

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

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

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

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

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

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

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

"*But it was awarded as compensation".*

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

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

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

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

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

For rhose 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. Unless you can walk to talk when it comes to tax, you have to get advice. You need to be able to build that into the cost. You cannot simply say "*I know nothing about this".* You need to at least be able to look and see where the exposures are and then to get the appropriate advice.

**SETTLING CASES**

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

"*Without admission of liability"*

If acting for the employee, it makes no difference.

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

"*Without admission of liability".*

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

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

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

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

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

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

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

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

**THE IMPORTANCE OF READING LEGISLATION**

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

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

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

The employee lodged the claim for redundancy. The employer did not furnish a counter notice within 7 days. They did furnish one offering 13

weeks full time work to commence within 4 weeks but did so after the 7 day period. They subsequently twice more offered full-time work.

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

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

## ISSUES TO CONSIDER OVER THE COMING MONTHS

In Employment Law cases, Data Protection requests should always be made. They are not always replied to. Going to the Data Protection Commissioner is lengthy at times. GDPR applies. The time limit for responding will now be 30 days. It can be extended on request. Where the employer fails to respond, and without showing any loss, as a current situation would be, the employee can sue. The compensation may be small. However, we believe this would be a Circuit Court case.

Secondly, in many Employment Law cases documents which are out of time are given such as warning letters on a personal file which have elapsed. Because of the 30 day period there is every likelihood that these documents will not be furnished.

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

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

From my experience I can envisage in a majority of cases before the WRC at least one court application and probably two will be the norm. Happy hunting days if you are acting for employees and a lot of explaining if you are acting for employers.

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

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

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

In many cases where we bring these, the Irish Water case being TED161 is often quoted. The counter arguement are the cases of Beechfield Private Homecare Limited TED1919 and Merchants Arch Restaurant Company Limited TED187.

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

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

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

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

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

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

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

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

(g) Is holiday pay paid in advance?

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

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

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

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

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

There are arguments raised by some that these sorts of claims are not ones that the employee never came in and that they are ones that are simply being pursued by the Solicitor. That kind of argument is raised and my usual response is that if somebody comes in into my office having been a

passenger in a car which was rear ended and suffered broken leg that if they come in and ask me:

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

Then my answer is going to be:

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

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

“But of course, I got a contract”.

Does not mean that you cannot say to them:

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

That is what giving legal advice is about.

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

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

This is still a claim for excessive hours of work.

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

**UNFAIR DISMISSALS**

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

There are a number of misconceptions.

(1) The most glaring misconception which those acting for employers or employees fall into, is believing that the employer must prove the guilt of the employee where the employee must prove they are not guilty. The case of Looney & Co Limited -v- Looney UD843/94 was the EAT Decision which importantly pointed out that it was not the function of an [Adjudicator] to establish the guilt or innocence of an employee. Rather it is whether a reasonable employer in the respondent's position and circumstances at the time would have done. This is the standard the employer's actions will be judged against. It is not the role of the Adjudicator to decide whether on the fact they would have dismissed the employee but rather whether a reasonable employer would have dismissed the employee or more properly was within the bounds of what a reasonable employer would do. So therefore, employers depending on how they have their policies written may in certain circumstances be able to dismiss because they have a zero-tolerance policy in respect of certain matters and win an Unfair Dismissal claim because of same whereas if they did not have that policy in place a similar dismissal would be held to be unfair. However, a zero-tolerance policy in respect of certain matters can be completely unreasonable. To some employers mistakenly believe that by dismissing for gross misconduct this is strength in an Unfair Dismissal case. This I disagree with for the following reasons:

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

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

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

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

"While the issue found against you as the employee would possibly warrant being treated as gross misconduct under the company disciplinary policy I have determined that it is certainly misconduct warranting dismissal".

So, the employee is paid their notice you now have a lot more flexibility in defending a claim.

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

"A claimant who finds himself [herself]) out of work should employ a reasonable amount of time each week day in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an application to various companies seeking work…The time that a claimant finds on his [her] hands is not their own, unless he [she] choses it to be, but rather to be profitably employed in seeking to mitigate his [her] loss."

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

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

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

## ACTING IN UNFAIR DISMISSAL CASES

When an employee comes to you to bring an Unfair Dismissal claim we would advise that the employee issues a request under Section 14 (4) Unfair Dismissals Act 1977-1993. When a request is made the employer has 14

days to respond. Failure to respond within 14 days and the employer can only justify dismissal on "substantial grounds". What "substantial grounds" means is as yet unclear as it has never been litigated upon but probably one day will be.

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

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

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

## THE DISCIPLINARY PROCESS

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

employee had moved beyond the issue of gross misconduct and should have been dealt with through the normal staff management process.

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

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

**CONSTRUCTIVE DISMISSAL**

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

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

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

**REDUNDANCY**

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

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

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

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

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

"The best people."

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

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

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

**MAKING A PREGNANT EMPLOYEE REDUNDANT**

There is a recent opinion of the Advocate General on the case C-103/16. This deals with the issue of the notice of dismissal and the issues of social policy on Directive 92/85 EEC and Directive 89/59 EEC. The latter relates to Collective Redundancies. The former refers to the Health and Safety of Pregnant Workers and Workers who have recently given birth or who are breastfeeding. The Advocate General has held, which is subject to the full Court proving it, that for a dismissal of an employee by reason of a Redundancy to apply it must both be in writing and state duly substantial grounds regarding the exceptional case not connected with the pregnancy that permits the dismissal. It is for the national court to determine that. What is clear is that the employer now must set out what the exceptional circumstances are to dismiss a pregnant employee or a person who has recently given birth or who is breastfeeding to make them redundant.

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

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

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

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

**EMPLOYMENT EQUALITY**

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

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

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

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

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

## DATE OF DISMISSAL

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

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

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

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

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

There is a further trap. In Action Health Enterprises Limited and D'Arcy UDD2019 the employee was dismissed. He had less than 12 months notice. With the notice period in his contract it would have brought him over the 12 months. The employer did not pay the notice payment. The employee sought same and it was paid. The Labour Court held that because the employee sought the notice payment they had accepted the termination date or at a minimum that the employment terminated when the payment was made. If the employee had not sought payment the termination date would have been after 12 months service.

**OTHER CLAIMS**

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

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

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

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

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

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

When bringing claims under the Organisation of Working Time Act it is sometimes thought that the burden of proof is on the employee. This is partly rights and partly wrong. Under Section 25 of the Organisation of Working Time Act where there are records in the statutory form and they are set out in the relevant Statutory Instrument then the burden of proof is on the employee. But that means that they have the records which would for example have their start and finishing time and all the breaks specified

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

**TIME LIMIT FOR BRINGING A CLAIM**

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

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

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

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

This issue was considered by the Labour Court in the case of Kepak Group and Valsomiro Augusto Arantes UDD1625. In this case the Labour Court restated their decision on reasonable cause in determination WTC0338 Cementations Skanska –v- Carroll.

In that case the Court said;

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

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

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

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

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

**BURDEN OF PROOF**

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

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

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

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

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

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

"Twice a week I would work up until 10pm and would start the next day at 11 o clock" i.e. no 11-hour break; or "I would work 9-6.30. normally I would

get a lunch break between 1 and 2 pm but sometimes it was between 12 and 1pm about twice a week and I didn't get an extra break", i.e., an additional break after working 4.5 hours.

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

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

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

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

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

Evidence as Parol Evidence cannot be accepted to vary any contractual documentation in the absence of ambiguity.

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

**PROTECTED DISCLOSURES ACT**

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

**ENFORCEMENT**

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

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

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

Where cases go before the District Court colleagues may well be in a situation that, in the case of a company, that a company Director will attend to argue that compensation rather than reinstatement or reengagement would be appropriate. As I have said, Section 43 (1) specifically provides for the District Court to make the decision without hearing the employer. In the case of Declan McDonald and McCaughey Developments Limited and Martin McCaughey [2014] IEHC 455 being a Judgement of Mr. Justice Gilligan is interesting in that effectively it would appear that a company Director has no right of audience in such a case. In the case of an Unfair Dismissal claim, instead of ordering reinstatement or reengagement if an Adjudication Officer had ordered for example 104 weeks remuneration as compensation then there appears to be no right for the employer to go to the District Court and argue in relation to the level of compensation at all. In any decision other than Unfair Dismissal the District Courts only role is to affirm the decision.

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

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

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

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

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

Until the Act came into operation an application previously was to where the employee was employed. Now Section 43 (5) provides it will be to where the employer concerned ordinarily resides or carries out any profession, business or occupation. Now let us take the example of where an employee works in Cork. The business closes in Cork. The remaining business

premises of the employer is in Co. Donegal. The application will now be to a District Court in Donegal. This will be an unnecessary additional cost to an employee having to get representation. It will mean that the instructing Solicitor will have to instruct another firm of Solicitors in Co. Donegal to move the application. This involves significant additional work and costs. If it is a case where reinstatement or reengagement has been awarded it may mean briefing a Counsel in the locality or going yourself before a District Court you are not used to appearing before. Again, this will be dealing with Counsel and Solicitors which colleagues may not normally deal with if using local Solicitors and who will not know your client. I do not know why this provision was put in.

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

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

## THE ROLE OF THE CIRCUIT COURT

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

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

There is an unusual provision in that Section 80 (4) of the Employment Equality Act 1998 does enable a Circuit Court Judge to request the Director General of the WRC to nominate an Adjudication Officer to investigate and prepare a report on any questions specified by the Judge. Where such a

report is prepared it must be furnished to the Plaintiff and the Defendant. It will not be treated as evidence and an Adjudication Officer may be called as a witness to give evidence in the proceedings. At the conclusion of the evidence in a case a Circuit Court Judge may refer any issue relating to the application of the law to the Supreme Court.

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

## APPEALS TO THE HIGH COURT

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

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

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

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

## FAILURE TO PAY COMPENSATION

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

Inspectors. In cases where compensation is not paid I would envisage that complaints will issue to Inspectors and that prosecutions would follow.

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

## INDUSTRIAL RELATIONS (AMENDMENT) ACT 2015

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

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

# APPENDIX 1

## The Taxation of Employment Law Awards and Settlements

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

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

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

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

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

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

## THE RELEVANT TAX LEGISLATION

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

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

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

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

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

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

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

## UNDERSTANDING THE LEGISLATION

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

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

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

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

## THE LEGISLATION

Section 192 A TCA97 can be summarised as follows;

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

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

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

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

## THE SCOPE OF THE LEGISLATION

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

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

A "Relevant Authority" is defined as

A A Rights Commissioner,
B The Director of Equality Investigations,
B (a) An Adjudicator Officer of the Workplace Relations Commission,
B (b) The Workplace Relations Commission,
B (c) The District Court,
C The Employment Appeals Tribunal,

D The Labour Court,
E The Circuit Court, or
F The High Court.

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

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

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

## STRUCTURING SETTLEMENT AGREEMENTS TO BE EXEMPT FROM TAX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 10 TCA 97 defines connected person

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

This looks like a bit of a mouthful.

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

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

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

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

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

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

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

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

This is the concept which is often misunderstood. The misunderstanding is understandable as employment legislation before an Adjudicator and the Labour Court is denominated as regards compensation on the basis of weeks of wages.

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

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

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

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

Let us for example take the following case.

Example

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

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

In such cases because the award under three Section were all dealt with as a global figure the entire determination is subject to tax. This means that the employer pays the €10,000 to the employee less tax submitted to the Revenue and PRSI and USC to Social Welfare. The employer is also responsible for €1075 employers PRSI. The employer must submit and amended P45. The employee then reclaims the tax. The employer has paid an additional €1,075. Let us assume that the Adjudicator deals with the Decision as follows.

The Adjudicators Decision states;

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

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

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

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

**"Redress**

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

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

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

It would be beneficial if the decision added on the words

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

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

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

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

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

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

Before the Rights Commissioner the Rights Commissioner held;

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

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

The matter was appealed to the Labour Court

The Determination of the Labour Court was as follows;

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

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

The issue is what is the tax treatment?

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

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

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

**"Having regard to all the circumstances of this case the Court awards the claimant compensation in the amount of €5000 for the contraventions of the Act which it has found to have occurred. Of this amount €2000 is in respect of arrears of holiday and cessor pay. The remaining €3000 is in the nature of a general compensatory amount".**

The case reference is DWT1223.

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

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

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

**Payments not covered by the exemption.**

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

Payments not covered can be summarised as follows.

1. Actual remuneration of arrears of remuneration.

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

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

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

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

(a) A reduction or possible reduction of future remuneration arising from a reorganisation of the 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.

**Example**

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

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

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

**Wages and Arrears of Wages**

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

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

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

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

Example

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

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

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

Example

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

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

Saying this, let us assume the Adjudicator awards each 1 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 of the Organisation of Working Time Act.

**A settlement must be "bona fide".**

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

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

**The Tax Treatment of Legal Fees**

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

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

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

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

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

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

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

If the settlement had simply been;

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

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

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

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

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

**Overall conclusion**

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

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

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

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

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

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

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

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

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

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

The legislation is not that complex. It is its application where matters proceed without reference to the legislation which causes the problems. Tax follows the law. It is not something to be scared of. The exemption in the legislation is there to be claimed. It is not a tax avoidance scheme. It is an exemption specifically introduced by the Minister for Finance because of an anomaly in the tax legislation. It is no different that claiming the VHI premium against your tax or your pension contribution. If an exemption is there it should be claimed. It should be recognised and it should be applied.

It benefits both employers and employee.

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

**Appendix 2**

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;-

“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 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” Cummingham 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 an Unfair Dismissal 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 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 7 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 in 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 in 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 9 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 Swords and was a 5 minute walk from their place of employment and the employer proposed to move to Blackrock 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 go to a Dart Station and go to Blackrock which would be a substantially increased commute may well be a ground to justify the employee refusing and seeking Redundancy.

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 10 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 11 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.”

A Problem Issue

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 12 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.

An issue then arises in relation to the entitlement for an employee to claim Redundancy. 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 Acts amended specifically provides that an employee must give the notice of intention to claim Redundancy in respect of the layoff 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 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 to 15 employer'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 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. 16 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. Which was the appeal of ADJ 12935 17.

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. 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.