EMPLOYMENT MATTERS
SPECIALIST SOLICITORS FOR EMPLOYEES

An Employee's guide to bringing a Pregnancy Discrimination claim in the Workplace Relations Commission

ABOUT THE AUTHOR

Seán is the principal of Employment Matters, a boutique employee-focused law firm based in Waterford City but servicing the entire South East as well as Dublin.

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We are a specialty law firm focusing its practice on the areas of employment law, especially in the areas of Unfair Dismissal, Redundancy Matters, Discrimination, Protected Disclosure, Health & Safety at work, Agency work and Fixed and Part term contracts.

Our clients come to us because of our experience, knowledge, expertise, track record in and out of court, and our reputation for integrity and client satisfaction.

We emphasize practical, reasoned advice in an effort to minimize or prevent legal difficulties. When a client is involved in a dispute, our primary concern is to achieve an expeditious and economic result. When formal litigation or other dispute-resolution proceedings are necessary, we provide aggressive, high calibre advocacy.

In particular, we are focused on providing you with employment law advice and consultancy to help employees prevent or resolve employment issues where conflict has arisen or where there has been a breakdown in the employment relationship.

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If you have any specific questions about any legal matter, you should consult your lawyer or other professional legal services provider. You should never delay seeking legal advice, disregard legal advice, or commence or discontinue any legal action because of the information contained here.

Introduction

The Workplace Relations Commission (WRC) is not for the faint-hearted!

We know what we're talking about because last year alone we cost Employers all over Ireland over €1 million in payments to disgruntled employees.

Over the last eight years, we've pretty much seen it all, and we know every trick in the book. We've represented employees in the Employment Appeals Tribunal, the Equality Tribunal, the Rights Commissioner Service, the High Court, the Circuit Court and the Labour Court. We've met judges, barristers (both senior and junior counsel), Tribunal chairs, rights commissioners, equality officers, adjudicating officers, winners, losers, the cook, the baker, the candlestick maker!

> ***We've fought cases under the Unfair Dismissals Acts, Equality legislation, Data Protection Acts, for breach of contract and payment of wages. We've taken injunctions and prevented dismissals negotiated settlements and compromises and achieved significant compensation awards costing employers a lot of money along the way.***

One client of ours was dismissed by his employer, a well-known hotel chain, for allegedly head-butting a work colleague at the staff Christmas party. We took on his case, although after viewing the CCTV footage we weren't particularly confident. However, the following three days of hearing in the EAT our Client was awarded €35,000 for unfair dismissal.

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Best of all for our Client though was how we made the HR Manager look pretty silly in cross-examination. She was ridiculed for not knowing or admitting to knowing the importance of a fair procedure in an employment context. She was humiliated.

To our Client that was pay-back to a degree for how low and small, she made him feel when they decided not to listen to his explanation for what had actually happened.

You see our Client hadn't headbutted anyone. In fact, he'd been sober that night. But he wasn't particularly liked at work and when there was a scuffle with another member of staff, management saw their chance. They could get rid of our Client who had been From his employer's perspective, they've been stung for €35,000 as well as three days of legal fees and the disruption to their business having their HR Director, General Manager, Head of Security and others at the hearing and away from their jobs for three days.

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You see our Client hadn't headbutted anyone. In fact, he'd been sober that night. But he wasn't particularly liked at work and when there was a scuffle with another member of staff, management saw their chance. They could get rid of our Client who had been a thorn in their side. So, it didn't matter what our Client said or did. No-one was going to listen to him, he'd headbutted someone and had to go…until we showed up.

That was under the old system and recent changes to the employment law landscape have made the claims process more complicated. Although the new system was set up to make things more streamlined the effect has been in our experience that fewer claims are successful and the awards made are far lower.

In fact, in 2016, 88% of the awards made by the WRC were for less than €10,000. That's pretty low considering about 25% of cases related to people who had either been unfairly dismissed or discriminated against. The WRC's argument is that these awards are mainly relating to wages, annual leave, and contractual issues. That still means that only 12% of awards are for in excess of €10,000. What that tells me is that unless you know what you're doing the chances are you are not going to maximize your claim.

You see in theory the WRC was supposed to level the playing field, make everything run more smoothly and more efficiently but my strong view is that the process has simply been changed to suit employers.

Employers are still turning up fully armed with legal representation including at times barristers both junior and senior counsel. Of course, because the Claimant can't afford such representation they are often left fighting a losing battle from the outset.

You see, the WRC can't award costs and so a Claimant will often find it difficult to find a lawyer to represent them without paying a large retainer. I know of one couple who used a boutique Dublin firm to process a Gender Discrimination claim for them and the total professional fees charged came to in excess of €125,000. And they paid those bills as they arose.

In another claim under the Protection of Employees (Fixed-Term Work) Act a client was invoiced over €75,000 for a two-day case in the old Rights Commissioner service.

We know of solicitors who won't take on employment cases because of their complexity. We have come across many who aren't so self-aware who have simply lead their clients down a blind avenue, oblivious to the dangers.

In the new regime, you can no longer sit back and wait for the hearing. Written submissions are now required at the front-end. You can no longer "wing it" as many solicitors, Trade Unions or HR representatives have done in the past.

In the last few years, we represented employees in over 80 cases that went to hearing. We achieved awards of over €1 million, that's in awards alone. One million euro! That's not to mention the other costs of defending the case including of course legal fees and the intangible costs associated.

As I mentioned above though the tables are turning against claimants who are unrepresented or badly represented. It seems to me that the Government in introducing the new WRC process succumbed to the lobbying of big business and presumably part of that was to do with trying to make Ireland as attractive a destination as possible to foreign companies. The key to that often is to water down employment rights and make the employment market and in particular hiring and firing less off-putting for employers. And that is what the WRC has done in my view. So how is that you might ask?

Well in my view the following is important in revealing how the system works against Claimants.

Hearings are conducted in the WRC in private. Now you might think that this is a good thing and certainly that's the way it was sold by the Government at the time but in reality, there is no logical explanation for this and in fact, it could be argued to be unconstitutional. You see leaving aside the constitutionality of things (whether justice should be seen to be done) what employers hate more than anything is bad publicity.

Any case in the EAT, the Equality Adjudicator, or the Courts was bad for business. A carmaker doesn't want to alienate half their customers by being accused of discriminating against women.

Under the new system, that threat is now gone. The hearing is held in private and to compound this, the decisions are anonymized. What that means, in reality, is that even the worst offenders can take a chance at the early WRC adjudication stage and damn the consequences if they lose. We are seeing more and more of these cases running where previously they may have settled.

Secondly, while not a change per se, the fact that the WRC doesn't award costs is certainly more advantageous to the Employer than the Claimant. You see the Employer probably has a lawyer on retainer and they are doing lots of other things for which that lawyer is probably getting well rewarded so it's easy for the Employer to get his lawyer into the saddle for a WRC hearing.

Not so much for you, a claimant who may not have had to use a lawyer at any time in the past, how do you choose one? Who do you choose? who will properly represent you? Do they know what they are doing?

It should also be mentioned here that of course, it's generally cheaper for an employer to retain a solicitor than it is for you because of course, the employer gets to claim their VAT back making it about 23% cheaper for them than for you.

Another thing we see frequently is that employers will invariably roll out the big guns in Dublin, magic circle type firms. We've dealt with them all Arthur Cox, William Fry, A&L Goodbody, Matheson, and Mason Hayes & Curran in the last year alone. We have also dealt with the mid-tier boutique firms like Daniel Spring & Co., Beauchamps, and Byrne Wallace. These firms are all excellent, but do they know any more about the WRC than we do?

Some people come in to and tell us that they met a lawyer who balked at the prospect of going up against the big boys and that makes me wonder why? So who do you want on your team? some guy who has never set foot in the Labour Court? or an expert who is well known there and who is respected by the other side?

Unfortunately, litigation is expensive. We're not saying we've got some silver bullet that's going to make all of your problems go away, that there's some magic dust that we'll sprinkle and it'll get the other side to pony up regardless of culpability.
So, if you are bringing a Gender Discrimination case of any type in the WRC, here's some things you need to know as well as some helpful advice and a synopsis of the law and some hints as to what you might face.

THE CLAIMS PROCESS

THE DEADLINE TO SUBMIT YOUR CLAIM

The notification that you are making a claim against your employer or former employer needs to be received by the WRC within six months of the last date of discrimination.

While there are limited circumstances in which you can ask for this deadline to be extended, these exceptions are few and far between and the time can only be extended where something occurred which prevented you from lodging the claim in time.

If your application is not received by the WRC in time, it is very unlikely that you will be able to pursue your claims.

PREPARING YOUR CLAIM

Claims are submitted via the workplace relations commission website www.workplacerelations.ie.

There is an online form and you fill in your details, those of your employer, and set out what claim you intend to make. This is the first step in the process but it is also a crucial one.

We have come across many occasions where this form has been incorrectly completed which has resulted in claims being prejudiced significantly meaning that claimants don't get their fair redress on a technicality. For example, it is crucial that the correct identity of the employer is set out in this form.

Often people don't realise that they were in fact working for some obscure company and not the company they assumed was their employer.

Unless the correct company is identified on the initial form, employers can at times wriggle out of their responsibilities.

In order to properly draft your claim, it is important that you set out all the relevant details and circumstances surrounding your case. It is important that you provide the correct full name and address of your employer and the full address of the place you worked, if different. If you are unsure about the correct name or address of your employer, you should check your payslips and P45 or P60. In addition, when bringing a discrimination claim, you may need to identify individuals at work you believe have been responsible in some way for the discrimination you have suffered. In bringing a claim for discrimination under the Employment Equality Acts you can also serve a questionnaire on the Respondent.

It is important when submitting your form that you reserve your right to supplement the details of your claim with further information for example if there are any questions to which you are awaiting answers from the Respondent or if you are awaiting the response to a Data Protection request.

Having submitted your claim cases are listed by the WRC before an adjudicator usually within about four to six months from the date that they are lodged and that at that stage the matter will be dealt with before an Adjudicator.

This depends, however, particularly in an Equality case on whether the parties have fully set out their cases and the WRC won't list your case until both parties have made full written submissions.

It is important to bear in mind that Discrimination law is extremely complex and written legal submissions will always be required to fully prosecute your claim. It is our view that the appropriate way to do this is by way of full written submission not at the outset when you are lodging your claim (as at that point there is usually some time pressure) but once all of the information has been gathered.

Our written submission often run into the hundreds of pages and set out all of the background and facts of the case as well as the relevant law and in particular any case law of the Labour Court, Equality Adjudicator, or the WRC. For more information on this please see a sample submission on our website or contact us for a sample.

WHAT SHOULD BE INCLUDED IN YOUR WRITTEN SUBMISSIONS

Your written submissions should contain the following by way of an indexed and paginated documents bundle.

- A narrative of the factual background to the case;
- A detailed description of the alleged breaches of the Acts that have occurred;
- An analysis of the relevant legislation and case law applied to the case;
- An index of and copies of all documents that you have that are relevant to the issues in the proceedings and that will be relied upon;
- Any expert reports (if any);
- Details of the financial compensation claimed;
- Any witness statements.

THE OTHER SIDE'S RESPONSE

The WRC will serve your claim form on the Respondent who will in theory then have 21 days to submit their defense, known as a "replying submission", to the WRC.

In reality, Respondents generally don't reply within this timeframe (or sometimes at all) and while the WRC is allowed to make an inference from this it generally doesn't have any effect. The WRC will copy any correspondence and documentation it receives to you or your nominated representative.

In their replying submissions, the Respondents should state the grounds upon which it intends to rely on in resisting your claim, in full or in part, and, provide details of these grounds and the legal basis for their position. Often at this stage, preliminary issues (technicalities) upon which the Respondent intends to rely might be set out such as the claim is statute-barred for being out of time ie that you have lodged your claim outside of the six-month time limit.

Particularly in Discrimination claims, this can be tricky and this is frequently a battleground in these cases.

As mentioned above you must lodge your claim within six months of the last act of discrimination.

There may have been a number of incidents upon which you intend to rely, some of which are within six months of the date you lodged your claim but some of which fall outside that time limit.

It can be argued by the Respondent that anything that falls outside the statutory time frame is barred from being relied upon and often we find that some of the more significant issues complained of fall outside that time limit leaving the adjudicator to decide what gets in and what doesn't.

PREPARATORY STEPS TO THE FULL HEARING

With all the formalities in hand your case will then be listed and an Adjudicator will be allocated to your case who should, in theory, review both Parties' submissions to prepare the case for a full hearing.

In our experience, this may not always be the case as the Adjudicators have very full diaries and for example, an Adjudicator may not receive the submissions in time from the WRC or there may be a change in schedule meaning that the Adjudicator originally allocated to your case does not in fact hear it.

Generally, you will receive the date of the hearing about four weeks in advance and we used at that point recommend that you arrange to spend a morning or afternoon at a adjudicator hearing (with your witnesses, if possible) but that of course is no longer possible.

THE WORKPLACE RELATIONS COMMISSION

The WRC's main office is in Lansdowne House in Ballsbridge in Dublin 4 and this is where many of the cases are listed and heard. The WRC does however hear cases in other parts of the country where they have bases so that the Parties don't have to travel too far. For example cases can be heard in the Ashdown Park hotel in Gorey or the Silversprings hotel in Cork.

The hearings in Dublin take place in meeting rooms and on arrival to Lansdowne House you should introduce yourself to reception and sign in. The receptionist will advise you of who has been allocated to hear your case and where the hearing is due to take place.

In regional locations generally the hearing will take place in a hotel meeting room and the Adjudicator will usually come and find you when he or she is ready to hear your case. You should of course aim to arrive at least half an hour before the hearing is due to commence as there may be the need to exchange documents with the other side or clarify issues such as pay etc.

EVIDENCE

You will provide the main witness evidence in your case. However, you will need to consider whether you should call any other witnesses in support of your claim.
In Discrimination claims the onus of proof is on you in the first instance, which means that you must provide basic facts from which discrimination could be inferred, and then the onus shifts over to the Respondent to rebut your case.

You should also ensure that you keep knowledge of, and discussion about, your case limited to those who have to be involved.

In particular, you do not want information about your claim to get back to the Respondent. It is always difficult of course to ask someone who continues to work with the Respondent to give evidence against them as this causes an understandable conflict for someone and could lead to some retaliatory treatment against them.
Evidence is given in the form of direct evidence and cross-examination.

Direct evidence is your own evidence being led by your own counsel (if any). That means you tell your story. If you have a lawyer they can only ask you open questions giving you a platform to tell the Adjudicator what happened.

Your lawyer cannot put words in your mouth or lead you by asking you open questions that suggest the answer. An example of an open question would be if the lawyer asked you to describe something for example if you saw a getaway car in a robbery you might be asked to describe the getaway car. The purpose of the direct evidence or examination in chief is to get your story in your own words.

The purpose of cross-examination is to test your evidence. Are you telling the truth, have you misunderstood something? What kind of a person are you.

In these circumstances, the other side's lawyer is allowed to put leading questions to you to test to see if you are telling the truth. For example, she might say, "the car you saw was read wasn't it and it had Tony's pizzas written on the side". This is putting something to you that is certain and can be answered with a yes or a no. Of course, in reality, the other lawyer only wants the yes or no but the best way of dealing with these questions is to use them to retell your own story.

Generally, a lot of what will take place in the giving of evidence will be based on the documentary evidence and the Parties will generally try and rely on their preferred documents to make their case.

In doing so these documents will be put to you and you will be asked questions about them, their provenance, where they came from, and what they mean.

There is a duty to disclose all relevant documents, even those that are not helpful to your case however this is rarely adhered to by either side. All the relevant documents should be included in the documents bundle used at the hearing.

You should also be aware that the Respondent may subject your work computer to a forensic examination to see if it reveals any useful information (even material that you may believe has been deleted).

MITIGATION EVIDENCE

In Unfair Dismissal claims in support of your claim for compensation, while you remain unemployed you must take active steps to find suitable new employment. This is known as attempting to "mitigate your loss". For example, you should register with employment agencies, online job sites, and with the Job Centre. You should also regularly search appropriate newspapers and trade press for vacancies and send out applications for jobs.

It is very important that you keep comprehensive documentary evidence to show the steps you have taken to mitigate your loss. For example, you should keep copies of jobs applied for, applications made and responses received, and record the reasons why any apparently suitable positions have not been pursued.

It would also be useful if you kept a diary recording steps taken in your job search, for example, recording details of telephone conversations with recruitment consultants and prospective employers.

It is very important that you obtain and retain mitigation evidence as, if you cannot show that you have taken reasonable steps to mitigate your loss, the adjudicator may award you less financial compensation than it might have.

THE HEARING

At the hearing, both sides have the opportunity to put their case before the Adjudicator and the Adjudicator has to make a determination based on the evidence before him or her. This can be a very informal process and the Adjudicator will write up their decision which will be sent on to the Parties in writing within a period of 8-12 weeks depending on the Adjudicator and the WRC's workload.

While hearings are far less formal than the Civil Courts, (for example, no-one wears wigs or gowns) the overriding objective of the adjudicator is to deal with cases fairly, in good time, and proportionately, minimizing expense while keeping the parties on an equal footing. To deal with the case fairly, particularly in an Equality case, the parties must give evidence. While in the WRC you are not required to give your evidence under oath you are still subjected to direct and cross-examination which we will deal with below.

In the WRC, the parties are known as the "claimant" (the party bringing the claim) and the "respondent" (the party defending the claim).

THE ADJUDICATOR'S DECISION

At the end of the Hearing, the Adjudicator will not tell you there and then the outcome of the case but will "reserve" his or her decision.

How long you will then have to wait for the written decision will depend on the Adjudicator's workload, but it can be several weeks or months before a decision is issued (the WRC usually says 10-12 weeks).

Once the written decision is sent to the parties, the unsuccessful party has six weeks to appeal. Appeals are made to the Labour Court and constitute a de novo hearing for the case.

If you are successful, but the Adjudicator has only dealt with that issue in its decision, it is likely to fix a further hearing to consider how much compensation you should be awarded.

APPEALS

Appeals from the WRC go to the Labour Court. Either Party has 42 days from the date of the decision to appeal the matter to the Labour Court.

This time limit is extremely strict and remember it is from the date of the decision **NOT** from when you received the decision.

THE LABOUR COURT

The Labour Court follows a similar process to the WRC in terms of the documents it requires. In preparation for the Labour Court hearing, you will be required to file written submissions and the other side will file replying submissions.

Again these should set out the background, legal argument and apply the facts to the law. All the relevant documentation which you intend to rely on should once again be appended. You will also be asked to provide statements on behalf of any witnesses you intend to call outlining what evidence they will givbe to the Labour Court.

The Labour Court usually takes a further four to six months to list appeals to be heard. You will receive about four weeks' notice of the hearing date and in advance of the hearing, you should carefully read through the submissions as well as the documents referred to in them. You should ensure that you are familiar with and feel comfortable with the contents of any documents referred to in the submissions as you may be asked to comment on them, either in cross-examination by the Complainant's representative or by the Court.

You should bring any documents you have with you to the hearing. You will not be permitted to take your copy of the submissions or any additional notes that you may have made to the witness stand when you give evidence.

LABOUR COURT HEARINGS

You should probably meet with your witnesses at least an hour before the hearing is scheduled to start. Once you have gathered there, you should let the secretary know and he or she will come to take the names of the people in your group: including any representatives (if any), your witnesses (including yourself), and anyone who is attending as an observer.

The secretary will also ask each witness whether, when they are called to give evidence, they wish to take a religious oath (in which case they will be asked which religious book they wish to use) or give an affirmation. This is entirely a matter for you and the others.

When the secretary knows that Court is ready, they will take you all down to the hearing room. Please remember that, as the Labour Court hearings are technically held in public, there may be members of the public in attendance (although this is extremely unusual). In addition to sitting in the hearing itself, members of the public or even the press may be in the cafe before hearings start. Also, as there are usually only a limited number of places to get something to eat at lunchtime, a member of the press or one of the Claimant's witnesses or advisers may be standing behind you in a queue or sitting at the next table. Wherever you are, it is better not to discuss the case with your colleagues unless you are confident that you can't be overheard.

Please be careful about being overheard, it can happen very easily. If you are approached directly by anyone in relation to the case, you should refer them to your legal advisors.

The three members of the Labour Court may already be in the hearing room when you are shown in. If they are not, you will all be asked to stand when they come in. Thereafter, the practice is to stand whenever the members of the Court either leave or enter the room.

GIVING EVIDENCE

At the outset of the hearing, both parties will be required to read the written submissions and the record. You or your legal representative, if you have one, will do this on your behalf, and while this is quite formulaic it is a necessary part of the procedure and depending on the length of submissions this can take some time.

The matter then proceeds by way of oral submission and oral evidence. That means that each witness will be required to give oral evidence to the Court as to what they say occurred in relation to the case. Each witness will be led through this evidence by their own representatives and then will be subject to cross-examination by the other parties representative. Indirect evidence (where your representative is asking you questions) your representative is only permitted to ask you open questions, thus that being questions which don't suggest the answer.

This is because your representative should only give you a platform from which you can tell your story. The purpose of cross-examination is to try and test the veracity of your evidence or your recollection of events.

The purpose of the cross-examination will be to either prove that what you are saying is untrue or that you are simply confused about it. If all else fails the other side's barrister will try and make you lose your temper in order to discredit you in front of the Court. Which party puts their case first depends on the type of claim. In an Equality claim the Claimant goes first as it is their case to prove. In a UD the Respondent goes first as they must prove that the dismissal was fair.

Before any evidence is heard there may be some preliminary discussion about the order of witnesses or how the Court is going to hear all the evidence in the time allocated to the case. In addition, there may be applications for documents or disputed issues that either party may wish the Court to consider.
When your evidence starts, you will have been told where you are in the running order of witnesses. When you are called to give evidence, you should go to the witness table. You should not take any documents, such as your copy of your notes or witness statement, with you. Once you get to the table, remain standing.

You will normally be invited to take the oath or affirm before sitting down (although as already mentioned this may have already been done). You will then be introduced to the Court and your legal representative or the Court themselves will direct you to the submissions on the table in front of you.

The Court members are likely to have read through the submissions and witness statements prior to the hearing. During your evidence, the barristers may interrupt you and ask you to turn to pages in the submissions. This will enable the Court to read the documents that you refer to in your evidence. You may need to wait while the Court reads certain documents (and perhaps put questions about them to either you or your legal team) before continuing with your evidence.

During cross-examination, when you are giving your answers, the Court will make a note of what is being said.

When being cross-examined it is important for you to:

- Speak slowly and direct your answers to the Court. Try and watch the Chairman's note-taking and pause if he or she needs to catch up.

- Try to relax and keep calm, do not rush. Do not feel that you have to explain your answers, it is better to keep answers short and to the point. If you do not understand a question don't be frightened to say so.

- Don’t just answer a question for the sake of it, or in the manner in which you think the person asking the question wants you to answer. Often, witnesses are so eager to get away from the witness box that they will say whatever they think the person asking the questions wants to hear. This is the only opportunity you will get to tell them your side of the story so make sure that you utilize it. Take a breath, think about what you’re being asked and if possible at all, utilized the question that you’re being asked to retell your story.

If you have a legal representative he will be following the cross-examination and will interrupt if, for example, a question is unfair or doesn't make sense, or you are asked several questions at once. The Chairman may well interrupt, either to ask the barrister the purpose or relevance of a question or to ask you something in consequence of one of your answers.

Once the cross-examination has finished, your own team ask some additional questions of you (in what is referred to as "re-examination"). The members of the Court may also then have some questions for you.

If there is a break in the hearing while you are giving evidence, for example, over a lunch hour, a routine break or between the hearing ending on one day and resuming on another, you will be "on oath" and unable to discuss the case with anyone. It is routine, to avoid any suspicion, that during breaks in their evidence a witness stays away from their colleagues and representatives. For example, over a lunch break they will need to have their lunch on their own and go straight back to the hearing room rather than elsewhere before the hearing resumes.

When the questions are over, the Court will confirm that you can leave the witness table and return to your seat. It should also be confirmed by the Court that you are "released" as a witness. You would then be free to discuss the case.

Like the WRC, the Labour Court will not issue the determination immediately but will reserve judgement and send a written determination in 8 to 12 weeks' time. You will usually though get a reasonable feel for what way the court is leaning.

Labour Court cases are usually heard in public by a panel of three members including a legally qualified Chair and two lay members, one who is drawn from employers' organisations (IBEC) and the other from employees' organisations such as the Unions (although each member of the tribunal is supposed in theory to be impartial). In this way, the lay members' practical expertise is added to the legal expertise of the Chair.

The process is said to be inquisitorial and that means not only do the legal representatives lead evidence and cross-examine witnesses the members of the Court will also explore areas of the evidence in which they are interested ort where they believe further analysis should be carried out. While they are said to be independent in reality the lay members are quire partisan in their approach to the evidence at least in fighting their respective corners.

You will easily identify who is the employer's representative and who represents the employee quite quickly when you see what questions they ask of witnesses.

Like the adjudication process, the decision is reserved and written up and sent out within about 10-12 weeks. The outcome of the Labour Court can only be appealed on a point of law to the High Court.
The Labour Court process, however, is far more strict and structured than the adjudicator's stage. Not only are you required to provide written legal submissions at this stage, but you are now also required to provide witness statements, outlining what it is a witness will say in evidence and you are also required to give evidence under oath.

The members of the Labour Court are very expert in the law and do not tolerate time waters or those who do not obey their procedures and they are not slow to tell you if that is the case either.

LEGAL COSTS

Even if you are successful in your claims, niether the WRC nor the Labour Court can make an order requiring the Respondent to pay your legal costs.

As a result, even where a Claimant has a strong claim, they may not to pursue it because of an inability to fund the costs.

The Adjudicator can only order that one party pay the other party's costs in very limited circumstances, and only where it considers that a claimant or their representative has acted vexatiously, abusively, disruptively, or otherwise unreasonably in bringing of proceedings.

It is extremely rare for an Adjudicator to make any costs order.

SETTLEMENT

In addition to the cost of bringing or defending an employment case, there are a variety of additional factors, such as the time it can take up, the stress it can cause, the risks and uncertainty of litigation and the impact of the publicity, that may make settlement an attractive option for either party.

The vast majority of employment cases do in fact settle before full hearing although less so since the introduction of the new process.

Terms of settlement frequently involve the payment of financial compensation from the employer to employee and, in return, withdrawal of the claim from the WRC and an agreement that both parties will keep the terms of the settlement confidential. A settlement can also include non-financial aspects such as agreeing on the wording of a reference letter.

AWARDS

If successful in a UD or Equality claim the Adjudicator has the entitlement to award a Claimant up to two year's salary in compensation for their loss. In UD cases this would be entirely based on the Claimant's exact loss of earnings and that as such it is important that the Claimant can evidence their loss of earnings but also evidence their efforts to find alternative employment as set out above. The UD Acts place an onus on a claimant to mitigate their loss and that meant demonstrating that they have made extensive efforts to find a new job. This onus cannot be underestimated and hence the reason I repeat it here. It has traditionally been the EAT's view that a claimant was obliged to spend every waking hour looking for work.

In an Equality case, the award differs in that it is compensation rather than loss and is sometimes referred to as "tear money" or compensation for the treatment experienced by the Claimant.

Article 18 of the Recast Gender Directive (Directive 2006/54/EC) provides that Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex in a way which is dissuasive and proportionate to the damage suffered.

Section 82(1)(c) of the Employment Equality Acts provides that the Equality Tribunal may make an order for compensation for the effects of acts of discrimination or victimization. The Appellant submits that where this mode of redress is decided upon, the decision of the European Court of Justice in Von Colson and Kamann - [1984] ECR 1891 - must be followed.

The Court held that the sanction for breach of community rights must be effective, proportionate, and dissuasive. This means that the compensation awarded must fully compensate a Claimant for the economic loss which she has sustained as a result of the breach of her community rights.

It must also contain an element that reflects the gravity of the infringement and act as an incentive against future infractions.

In Citibank v. Ntoko EED045, it was held that an award of compensation for the effects of discrimination must be proportionate, effective, and dissuasive.

It is submitted that, in accordance with this principle, the Court should take into account: the discriminatory ground in the case at hand – pregnancy; the significant size and financial resources of the Respondent; and the particularly serious egregious type of discrimination perpetrated by the Respondent in the case at hand in determining an appropriate award, should the Claimant be successful.

While the Adjudicator or the Labour Court can award up to their full jurisdiction (two years' salary) that is in fact extremely rare. The Adjudicator will reserve such an award only for the most extreme cases. In practice, our experience is that a very strong case is usually compensatable by up to one year's salary and often in our experience an Adjudicator will use one year as the benchmark and will work up or down from that depending on the Claimant's conduct, the Claimant's efforts to find alternative employment, the Claimant's actual loss and the Respondent's conduct in the process.

In an Unfair Dismissal case the award is taxable as income and as such any award made will be subject to taxable deductions. This is why in many circumstances a settlement or compromise can in fact be preferable as the settlement sum can be structured as a severance which may have tax advantages.

In an Equality claim, the compensation is not taxable and that is why often a weak Equality claim is worth more than a good Unfair Dismissal claim.

THE LAW OF DISCRIMINATION

Section 6(1) of the Employment Equality Acts, 1998 – 2008 (the "Acts") provides that: "…discrimination will be taken to have occurred where a person is treated less favourably than another person is, has been or would be treated in a comparable situation of the discriminatory grounds."

The Acts make unlawful discrimination on the grounds of gender, marital status, family status, sexual orientation, religion, age, disability, race or membership of the traveller community. Further, claims brought under the Acts can be categorised as: (i) direct discrimination; (ii) equal pay claim; (iii) indirect discrimination; (iv) harassment and (v) victimisation.

In a nutshell, in order to establish discrimination, it is necessary to prove that, but for the fact that the claimant falls within one of the protected grounds (i.e. his age, her gender, her pregnancy etc.) he or she would have been treated better and not less favourably.

As such, it is necessary to identify an actual or theoretical comparator against whom you can be compared, in a comparable situation who is, has, or would be treated differently to how you were treated. In essence, someone who was doing the same job as you, in similar circumstances but who was being treated differently (more favourably). Where there are actual comparators, the real, as opposed to a hypothetical comparator, is required. A court cannot and should not find in favour of a claimant on the basis of mere speculation.

It is the claimant who must prove that the difference in treatment is due to discrimination on one of the protected (discriminatory) grounds. This is what's called making out a prima facie case and it's what makes these cases so hard for claimants to win.
Once the Claimant has made a prima facie case the burden of proof shifts to the employer to prove otherwise.

So, what the hell does prima facie mean? I find it best if you think of it as "on the face of it". It essentially means that you must prove facts that, on the face of it, or in their normal interpretation, leaving any context aside, would indicate that there had been the discriminatory treatment of you.

The Acts provide that where facts are established by the claimant from which it can be presumed that there has been discrimination it is for the employer to prove the contrary. The Claimant, therefore, must, in the first place, establish facts from which it can be presumed that he was subjected to discriminatory treatment on the grounds of one of the nine characteristics above (called proving a prima facie case). It is only when he has discharged that obligation to the satisfaction of the adjudicator or tribunal that the burden shifts to the Employer to rebut or disprove the inference of discrimination raised.

For example, the fact that a woman was dismissed while she was pregnant is prima facie evidence of discrimination, it is for the employer then to prove that she was not dismissed because of her pregnancy. Similarly a man who is dismissed for reaching the age of retirement is prima facie on the grounds of his age and it is for the employer to show some objective grounds why he was not.

In a case called Dublin Corporation v. Gibney's EE5/1986, a prima facie case was defined as: "evidence which in the absence of any credible contradictory evidence by the employer would lead any reasonable person to conclude that discrimination has probably occurred."

So, the claimant must first establish facts from which discrimination may be inferred. They must be established as facts on credible evidence. Mere speculation, assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn. "In relation to the comparator, it is not sufficient, in my view, to ignore actual comparator workers and assert that a hypothetical Irish employee would not have been treated in the same manner by the respondent."

Thus, you firstly need to prove that you are within a protected group under the Act i.e. that you are female, of a particular race or disabled for example. You then need to prove the treatment to which you say you were subjected i.e. that you were dismissed or bullied or victimized and you need to highlight specific incidents of this such as what was said, where, when and by whom and finally you need to show that this is less favorable treatment than someone else might have experienced. As already shown the difficulty here often arises in demonstrating the type of treatment you suffered.

There will rarely be a recording of discriminatory treatment (one that you can get your hands on anyway) or an email or letter explicitly showing less favorable treatment and as a result, you are often relying on witness evidence. Their word against yours is often what this boils down to.

The connection between the discriminatory ground and the alleged discriminatory acts is not to be established by way of motive or intention, but rather from objective facts that suggest or infer discrimination.

"A person with a disability may suffer discrimination not because they are disabled per se, but because they are perceived, because of their disability, to be less capable or less dependable than a person without a disability.

The Court must always be alert to the possibility of unconscious or inadvertent discrimination and mere denials of a discrimination motive, in the absence of independent corroboration, must be approached with caution."
It is well accepted that there is a broad range of circumstances in which direct discrimination can arise in the conditions of your employment.

DISCRIMINATION ON GROUNDS OF GENDER / FAMILY STATUS

Irish gender equality law has its roots in EU gender equality law. Pursuant to Article 141 of the EU Treaty, Member States are required to ensure men and women receive equal pay for equal work. Further, in the case of Defrenne (No 2) v. Sabena Airlines [1976] ECR 455, the ECJ held that Article 141 enjoys direct effect in Member States and, as such, is directly enforceable.

It is well established that discrimination based on pregnancy comes within the remit of gender based discrimination (and may also come within the remit of family status based discrimination). In the seminal case of Dekker v. Stichting Vormingscentru voor Jonge Volwassen (VJV-Centrum) C177/88 [1990] EUECJ R177/88 the ECJ held that discrimination on the ground of pregnancy was direct discrimination and not indirect discrimination. In upholding the Complainant's complaint that the Respondent had breached the Equal Treatment Directive for refusing to hire the Complainant as she was pregnant, the ECJ stated

> ***"It should be observed that only women can be refused employment on grounds of pregnancy and such refusal, therefore, constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of maternity leave."***

Importantly, Dekker confirms that discriminatory acts relating to pregnancy are directly discriminatory on the gender ground and that a pregnant woman cannot be compared to either a sick man or a non-pregnant woman. Indeed, the Court found that since pregnancy is a uniquely female condition, where a woman experiences unfavorable treatment on grounds of pregnancy, such treatment constitutes direct discrimination on the grounds of gender within the meaning of the Equal Treatment Directive, even though there is no male comparator.

Consequently, discrimination on grounds related to pregnancy is now a form of direct gender discrimination. The Dekker decision is reflected in section 4(b) of the Equality Act 2004 which provides: “Without prejudice to the generality of subsections (1) and (2), discrimination on the gender ground shall be taken to occur where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favorably than another employee is, has or would be treated.”

Directive 92/85/EEC (the Pregnancy Directive) provides a comprehensive legal framework in which special protection is afforded to the safety health and welfare of pregnant women in employment. Article 10 of the Directive is of particular and far-reaching significance. It provides: - “In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. *The Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;*
2. *If a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, the employer must cite duly substantiated grounds for her dismissal in writing;*
3. *The Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.”*

The importance of this latter provision, in deciding cases within the ambit of the Equal Treatment Directive, has been emphasized by the CJEU on a number of occasions.

Most recently in case Danosa v LKB Lizings SIA C-232/09 [2011] CMLR 45, at 60, the Court said: - “It is precisely in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that, pursuant to Article 10 of Directive 92/85, the EU legislature provided for special protection for women, by prohibiting dismissal during the period from the beginning of pregnancy to the end of maternity.”

In Lisa McSherry v. National Cancer Registry Board DEC-E2015-147, the Complainant was successful in her claims of direct discrimination and discriminatory dismissal, on the basis of pregnancy and the protected grounds of gender and family status. Therein, the Complainant was employed by the Respondent on a specified purpose contract as a research project trial co-ordinator. Shortly after announcing her pregnancy, the Complainant was informed by the Respondent that funding for the project had been rejected and that there was a risk of her position being made redundant.

The Complainant raised a complaint in relation to this which was the subject of an internal grievance procedure. In finding for the Complainant, the Equality Officer held that there had been a withdrawal in cordial relations from the Respondent following the disclosure of the Complainant's pregnancy, culminating in an unusual and unfair internal grievance procedure.

Further, the Equality Officer held that there was an opportunity to avoid the Complainant's position being made redundant, albeit that it was a specified purpose contract and that funding had been withdrawn, through the use of the use of internal brinkmanship, but that the Respondent had failed in such, instead of relying on institutionalized practice to roadblock the situation. The Equality Officer found that same amounted to prima facie evidence of less favourable treatment, which the Respondent had failed to rebut, and duly found for the Complainant.

In Teledanmark ALS v Handels org Kontorfunktionoernes Forbund C-109/00[2001] CC-1-2785 and Melgar v Ayuntamento de los Barrios C 438/99 [2001]ECR 1 6910, the European Court of Justice held that non-renewal of a fixed-term contract, when it comes to the end of its stipulated term, cannot be regarded as a dismissal and, as such, non-renewal cannot be contrary to Article 10 of the Pregnancy Directive.

However, in Dekker v. Stichting Vormingsscentrum Voor Jong Volwassenen C-177/88, the ECJ held that a non-renewal of a fixed-term contract can be regarded as a refusal of employment, which, if it is caused by the fact of pregnancy, amounts to direct discrimination which is prohibited by the Equal Treatment Directive. The Court held that whether the non-renewal was caused by the fact of an employee's pregnancy that can be regarded as a refusal of employment and discrimination, is a matter for the national courts.

Harassment and Sexual Harassment

Our Client, BM, was working as a software developer with a well-known international software company. She was a top performer in the company and always had great appraisals and bonuses. She got on well with her colleagues and management and was on the fast-track up the corporate ladder.

All of a sudden, it seemed she couldn't do anything right. She was criticized in team meetings, humiliated in front of work colleagues, and isolated by her line manager. Her once glowing appraisals became subpar.

BM was side-lined. Yet as far as she could see, nothing had changed in her work performance.

What had changed, however, was that BM's former line manager had been promoted and the new manager she was reporting to saw her as a threat. This could have been the result of a perceived slight, possibly even a basic personality clash. BM raised the issue internally, but the company failed to address the problem. BM ended up suffering severe work-related stress and requiring a prolonged period of sick leave. She was eventually diagnosed with depression and resigned her position. That's when she came to us for help.

> ***We initiated a claim for her with the Workplace Relations Commission under the Employment Equality Acts and threatened her employer with an action in the High Court.***
>
> ***We drafted all of the correspondence, pleadings, and submissions, and corresponded with her former employer and their solicitors on her behalf. Our handling of this allowed BM to get on with her life and focus on getting better.***

Her employer initially fought their corner, saying the changes BM experienced were unconnected to her personally and were simply performance and competency-based. They denied there was any inappropriate treatment. This was complete nonsense, of course, and the company eventually conceded and agreed and acknowledged that BM had been wronged. They paid BM compensation and gave her a glowing reference.

> ***"This was really a point of principle for me. Sure I was compensated but money will never make up for what I lost. I just wanted my former employer to know what had happened, they were a good company really and my boss was just a bad egg but they handled it all really badly.***
> ***If it wasn't for Employment Matters I could never have done this. Now I can get on with my life". - BM, 42, Lucan***

Harassment is defined by Section 14A of the Acts as "unwanted conduct relating to any of the discriminatory grounds" and same must have the "purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person".
In the case of Mullen v. BCon Communications Limited (in liquidation) DEC-E/2014/007, the Equality Officer held that a number of comments made by the Respondent relating to the Complainant's maternity leave and prospects of returning to work thereafter amounted to harassment. Importantly, the Equality Officer stated that, even if same did not amount to harassment, it carried probative value in terms of the Respondent's disposition regarding other incidents.

Sexual harassment is defined by Section 14A (7) of the Acts as: 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature', and must have the: 'purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person'. Such unwanted conduct in relation to harassment or sexual harassment may consist of: 'acts, requests, spoken words, gestures or the production, display or circulation of written words, pictures or other materials.'
In Employment Equality Law, Bolger, Bruton and Kimber, note that the Acts requirement that the harassment have the: 'purpose or effect', of violating one's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment, moves the test for harassment or sexual harassment from an objective, reasonable person test to a more subjective test which focuses on the personal response to the conduct without any limitations on the perceived reasonableness of same.

Harassment and sexual harassment are defined as: 'unwanted' conduct which necessarily involves an analysis of the conduct from the subjective point of view of the recipient. The Acts refer to the 'purpose' of violating a person's dignity etc and 'effect' of doing so on the victim. By referring to the 'effect', the purpose or intention of the perpetrator is largely irrelevant, particularly when the conduct in question is defined as unwanted conduct. The result is that conduct which is viewed by the recipient as unwanted and as having the effect of violating their dignity etc, can be deemed harassment or sexual harassment regardless of the intention of the perpetrator or the perceived reasonableness of the victim's subjective views of the conduct or the effect the conduct has had on them.

This is reflected in the Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI 208 / 2012) which sets out that it is up to each employee to decide what behaviour is unwelcome and from whom such behaviour is unwelcome. As such, it is irrelevant that the harasser did not intend to harass the victim or that the harasser believed their behaviour was only banter or done in a joking manner (dicta that have been repeatedly endorsed by Courts and Tribunals: Sheffield City Council v. Norouzi [2011] IRLR 897). While there is absolutely no reasonableness requirement in defining what might amount to harassment or sexual harassment, same being inherently subjective, the Adjudicator or Labour Court will, necessarily, be afforded some discretion in ensuring that the complained-of conduct does come within some broad objective classification of conduct amounting to harassment or sexual harassment, particularly in having regard to the requirement that the conduct complained of creates an intimidating, hostile, degrading, humiliating or offensive environment in analysing same. As aforementioned, the Complainant maintains that the conduct complained of and outlined above amounted to both sexual harassment and harassment.

Section 14A of the Acts clearly sets out that the conduct complained of must be of a sexual nature to amount to sexual harassment. In A Worker v. A Hotel [2010] ELR 72, the Labour Court held that any form of offensive, humiliating or intimidating conduct on the ground of the victim's gender amounts to sexual harassment within the meaning of the Acts.

The aforementioned Code of Practice lists a non-exhaustive list of behaviour that can constitute sexual harassment including physical conduct of a sexual nature such as touching, patting or pinching, verbal conduct of a sexual nature such as unwelcome sexual advances, propositions or pressure for sexual activity or suggestive remarks, non-verbal conduct of a sexual nature such as the display of pornographic or sexually suggestive pictures or leering, whistling, or gender-based conduct such as conduct that denigrates or ridicules or is intimidatory or physically abusive of an employee because of her sex such as derogatory or degrading abuse or insults which are gender-related.

In An Office Worker v. A Security Company DEC-E2010-002, the Equality Tribunal held that dirty jokes, explicit remarks and being asked out amounted to sexual harassment and warranted an award at the top end of the jurisdiction available to the Tribunal. The Complainant maintains that the conduct complained of in the case at hand are very clearly sexual in nature and amount to sexual harassment as well as harassment.

In A Complainant v. A Contract Cleaning Company DEC-E-2004-068, the Equality Tribunal held that the act of an employee slapping the Complainant on her bottom was sufficient to constitute an act of sexual harassment and, indeed, amounted to an assault, again warranting and award on the top end of the Tribunal's jurisdiction. Further, the Tribunal highlighted that the perpetrator's contention that it was an act of intimacy that the Complainant welcomed did absolutely not amount to a defence. In BH v. Named Company Trading as a Cab Company DEC-E2006-026, the Equality Tribunal held that non-physical conduct may also amount to serious acts of harassment and sexual harassment that warrant an award on the top end of the available jurisdiction. Therein, the Respondent, its servants or agents, placed a dead fish on the internal roof of the Complainant's office and placed laxative tablets in her kettle.

In Odion v. Techniform (Waterford) Ltd DEC-E2007-018, the Complainant, a Nigerian national who had been subjected to negative remarks regarding his nationality and colour, made a formal complaint of harassment. The Respondent conducted an investigation which found that no harassment had occurred. The Equality Tribunal found that the Complainant had in fact been subjected to harassment regarding his race and, while the Respondent had acted promptly in conducting an investigation, the procedure was flawed and the outcome was erroneous and inadequate.

In A Worker v An Engineering Company DEC-E2008-38, the Equality Tribunal found that name-calling, laughing, sniggering related to the Complainant's British nationality amounted to harassment. Further, the Tribunal rejected the banter defence asserted by the Respondent. In awarding the Complainant a substantial award, the Tribunal had reference to the blatant and intimidatory nature of the harassment.

Section 15 renders an employer liable for acts of employees done in the course of employment, whether the acts are done with the employer's knowledge or consent or not: "Anything done by a person in the course of his or her employment shall, in any proceedings under this Act, be treated for the purposes of this Act as done also by the person's employer, whether or not it was done with the employer's knowledge or approval."

Further, it is important that fair procedures are applied in any investigation put in place to deal with the complaint and that both victim and perpetrator are entitled to fair procedures and natural justice during the conducting of the investigation. Finally, the investigations should reach a reasonable and adequate outcome that provides recommendations to address the harassment and sexual harassment, should it be found to have occurred and outlines a strategy to remedy and prevent same occurring in the future.

The existence of an anti-harassment policy which has been effectively communicated to employees may contribute to a defence for the employer; however, an employer will not be able to argue that, in the absence of an effectively communicated anti-harassment policy, that an informal procedure or general grievance procedure is sufficient. Even if an employer takes steps to investigate alleged complaints of harassment, the fact that it does not have an effectively communicated anti-harassment policy at the time of the conduct appears to be fatal.

In An Employer v. Worker EDA0916, the court would not allow an employer to rely on the statutory defence where there was no policy in place at the time of the conduct albeit that the employer carried out an investigation into the incidents thereafter. The Labour Court was unequivocal in holding that whilst the putting into place of the harassment policy after the event was commendable, it was insufficient to make out the statutory defence.

Similarly, in A Worker v. An Engineering Company DEC-E2008-038, the Equality Tribunal held that even when there is a policy in place, the employer is obliged to show that it has been effectively communicated to its employees before they can use it to invoke the statutory defence.

In particular, the Tribunal held that the employer must prove that the policy was disseminated to its employees prior to the conduct. In Gabriele Piazza v. The Clarion Hotel DEC-E2004-033, the Equality Tribunal held that a grievance procedure that had been communicated to employees prior to the conduct in question could not be relied on by an employer to avail of the statutory defense in circumstances where the anti-harassment policy had not been communicated to the employees.

In Ms A v. A Contract Cleaning Company DEC-E2004-068, it was emphasised that even where a harassment policy is in place and is invoked by the employee, there is an ongoing obligation on the employer to ensure that the investigation is conducted in a fair and proper manner with fair procedures and constitutional justice being afforded to the victim and perpetrator.

In S v. A Named Organisation DEC-E2006-025, the Equality Tribunal set out a good summary of what the law requires from an employer once a complaint has been made to it: “In terms of a complaint of this nature the respondent organisation should have personnel who are trained in the Employment Equality legislation and in the processes to be followed in carrying out such an investigation. Ideally two persons should conduct the investigation. There should be a formally agreed procedure for the investigation and a timeframe by which the investigation should be completed. Where possible witnesses should be consulted the onus should be on the parties to the complaint to have these witnesses make a written statement and / or be available for questioning by the investigators at an agreed time and venue. This would form part of the agreed process.”

In the Odion decision, the Equality Tribunal held that, not only must a Respondent carry out a fair and impartial investigation, but that the investigation must reach a reasonable and adequate outcome which itself must be acted on in order to avail of the statutory defence. In particular, the Tribunal criticised the Respondent’s investigation outcome in circumstances where it absolved the Respondent of any responsibility or further responsibility, particularly in circumstances where the Respondent failed to offer the Complainant some form of support in his return to the workplace following the harassment.

In A Worker v. A Named Organisation DEC-E2006-006, the Equality Tribunal emphasised the importance of an employer taking remedial action on the basis of the findings made as part of the investigation. The Tribunal commended the Respondent for acting on the findings of the investigation and offering mediation to the parties to improve the relationship.

In A Boys’ Secondary School v. A Female Teacher of Religion EED022, it was emphasised that, in addition to implementing and communicating a policy and carrying out a fair investigation, there is an onus on the employer to act on the findings of the investigation and monitor that actions taken following the outcome are having the necessary effect of appropriately sanctioning the perpetrator and ensuring that no victimisation or further harassment occurs. Indeed, in G v. A Hotel Reservation Company DEC-E2005-053, the Equality Tribunal stated that, even though the perpetrator had left the employment of the Respondent and could not be sanctioned by the Respondent, a defence raised by the Respondent: “The least it could have done was to acknowledge the distress suffered by the complainant and apologise for the behaviour of Mr Z given that it is liable for his actions under the Acts and it was responsible for the delay in the investigation process. It could also have used the situation to heighten staff awareness on the issue of sexual harassment within the organisation and reiterate its policy on the matter. However, it took no action at all, instead deciding that it could not take the matter further as Mr Z had left his employment. In the circumstances, I am not satisfied that the respondent did all that was reasonably practicable to reverse the effects of the treatment on the complainant and it cannot, therefore, rely on the defence”.

In A Complainant v. A Hospital DEE029/2002, the Labour Court outlined, in the circumstances of the case, some proactive measures that the Respondent should have undertaken given the serious allegations of sexual harassment and assault that occurred in that case, these included: interviewing all witnesses; transferring the complainant to another working area and contacting the Gardai. The Court emphasised that the recommended undertakings of this case were caused by the gravity of the complained conduct and that each case and the appropriateness of the response required by an employer would depend on the gravity of the instant conduct.

Victimisation

Section 74 of the Employment Equality Act 1998, as amended, outlines the definition of victimisation under the Acts. Section 74(2) states: “(2) For the purposes of this Part victimisation occurs where dismissal or other adverse treatment of an employee by his or her employer occurs as a reaction to—

(a) a complaint of discrimination made by the employee to the employer,

(b) any proceedings by a complainant,

(c) an employee having represented or otherwise supported a complainant,

(d) the work of an employee having been compared with that of another employee for any of the purposes of this Act or any enactment repealed by this Act,

(e) an employee having been a witness in any proceedings under this Act or the Equal Status Act 2000 or any such repealed enactment,

(f) an employee having opposed by lawful means an act which is unlawful under this Act or the said Act of 2000 or which was unlawful or any such repealed enactment, or

(g) an employee having given notice of an intention to take any of the actions mentioned in the preceding paragraphs.”

DISCRIMINATORY CONSTRUCTIVE DISMISSAL

In An Employer v. A Worker (Mr O)(No. 2) [EED0410], it was confirmed that the tests for constructive dismissal in the context of claims for discrimination are the traditional contract and reasonableness tests.

Therein, it was stated: "This definition is practically the same as that contained at section 1 of the Unfair Dismissals Acts 1977 –2001 and the authorities on its application in cases under that Act are apposite in the instant case. It provides two tests, either or both of which may be invoked by an employee. The first test is generally referred to as the “contract” test where the employee argues “entitlement” to terminate the contract. The second or “reasonableness” test applies where the employees asserts that in the circumstances it was reasonable for him or her to terminate the contract without notice...

...the additional reasonableness test which may be relied upon as either an alternative to the contract test or in combination with that test. This test asks whether the employer conducts him or her affairs in relation to the employee, so unreasonably that the employee cannot fairly be expected to put up with it any longer.

Thus, an employer’s conduct may not amount to a breach of contract but could, none the less, be regarded as so unreasonable as to justify the employee in leaving. Further, the employer may commit a breach of contract which may not be of such a nature as to constitute repudiation, but is so unreasonable as to justify the employee in resigning there and then."

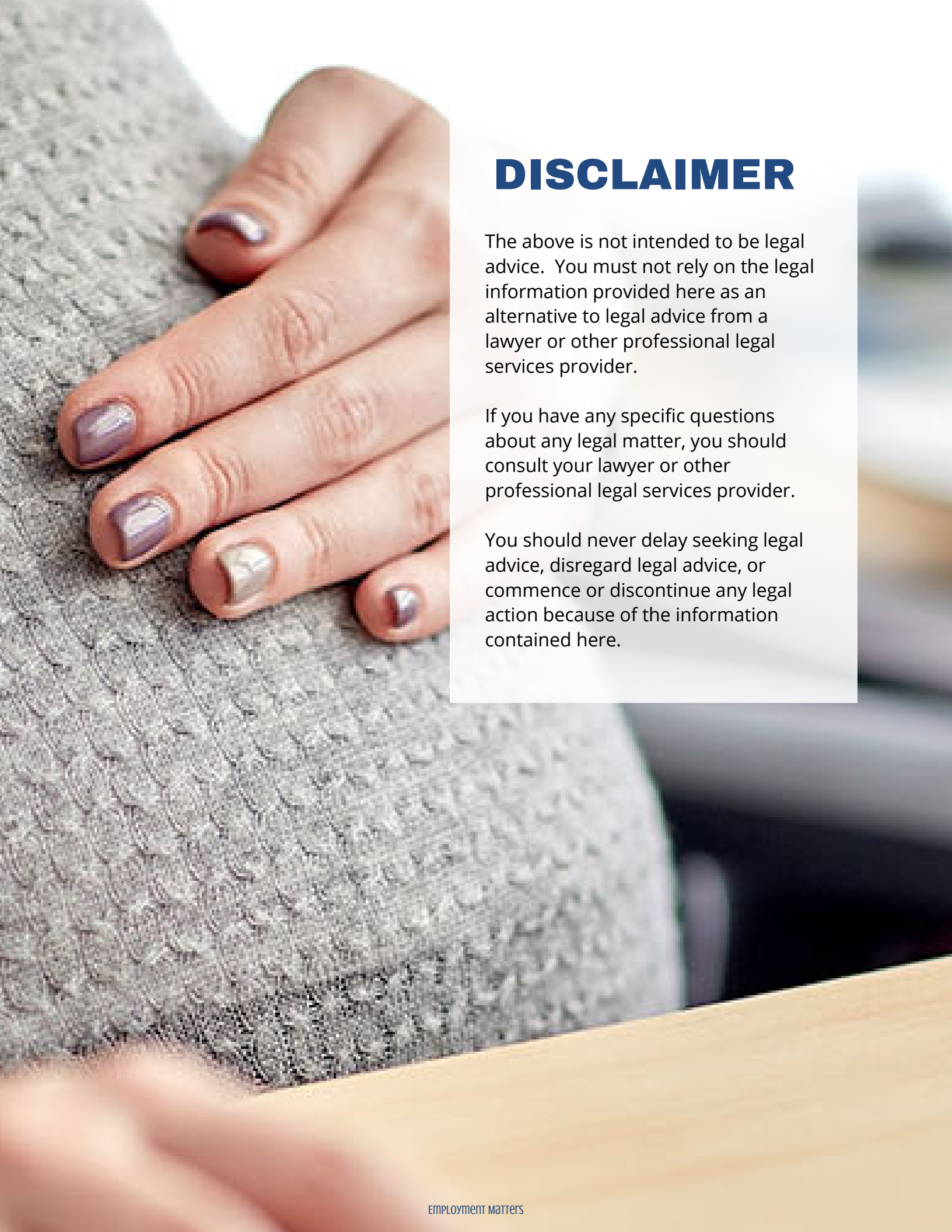
In that case, it was held that a Complainant had been constructively dismissed due to the treatment that he experienced from the Respondent when he returned to work following a period of sick leave due to a disability.

In particular, the Labour Court found that the Respondent had failed to treat the Complainant in a sympathetic manner and was instead intent on making his working life difficult.

Crucial in the decision was the fact that the misconduct had been perpetrated by a person of high rank within the organisation who knew or ought to have known that their behaviour would have a negative effect on the health of the Complainant and this misconduct was perpetrated in a manner likely to destroy the relationship of mutual trust and confidence having regard to the Complainant's emotional and psychological vulnerability.

Interestingly, the Complainant was not penalised for failing to enact the Respondent's grievance procedure.

Similarly, in Fergal Reilly v. United Parcels Service CSTC Ireland Limited DECE2013077, the Equality Tribunal endorsed the Mr O decision in holding that a Complainant had been discriminatorily constructively dismissed on the basis of disability discrimination, a failure to provide reasonable accommodation and a satisfaction of the reasonableness test.



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EMPLOYMENT MATTERS
SPECIALIST SOLICITORS FOR EMPLOYEES

ABOUT US

How do we know what we're talking about? Well, last year alone we cost Employers all over Ireland over €1 million in payments to disgruntled employees.

Over the last eight years, we've pretty much seen it all, and we know every trick in the book. We've represented employees in the Employment Appeals Tribunal, the Equality Tribunal, the Rights Commissioner Service, the High Court, the Circuit Court and the Labour Court. We've met judges, barristers (both senior and junior counsel), Tribunal chairs, rights commissioners, equality officers, adjudicators, winners, losers, the cook, the baker, the candlestick maker!

We've fought cases under the Unfair Dismissals Acts, Equality legislation, Data Protection Acts, for breach of contract and payment of wages. We've taken injunctions and prevented dismissals, negotiated settlements and compromises and achieved significant compensation awards costing employers a lot of money along the way.

One Client of ours was dismissed by his employer, a well-known hotel chain, for allegedly head-butting a work colleague at the staff Christmas party. We took on his case, although after viewing the CCTV footage provided to us under the Data Protection Acts we weren't particularly confident. However, following three days of hearing in the EAT our Client was awarded €35,000 for unfair dismissal. From his employer's perspective, they've been stung for €35,000 as well as three days of legal fees and the disruption to their business having their HR Director, General Manager, Head of Security and others at the hearing and away from their jobs for three days. Best of all for our Client though was how we made the HR Manager look pretty silly in cross-examination. She was ridiculed for not knowing or admitting to know the importance of a fair procedure in an employment context.

She was humiliated.

To our Client that was pay-back to a degree for how low and small she made him feel when they decided not to listen to his explanation for what had actually happened. You see our Client hadn't headbutted anyone. In fact, he'd been sober that night. But he wasn't particularly liked at work and when there was a scuffle with another member of staff, management saw their chance. They could get rid of our Client who had been a thorn in their side. So, it didn't matter what our Client said or did. No-one was going to listen to him, he'd headbutted someone and had to go…until we showed up.

Last year we represented employees in over 80 cases that went to hearing. We achieved awards of over €1 million, that's in awards alone. One million euro! That's not to mention the other costs of defending the case including of course legal fees and the intangible costs associated.

As I mentioned above though the tables are turning against claimants who are unrepresented or badly represented. It seems to me that the Government in introducing the new WRC process succumbed to the lobbying of big business and presumably part of that was to do with trying to make Ireland as attractive a destination as possible to foreign companies. The key to that often is to water down employment rights and make the employment market and in particular hiring and firing less off-putting for employers. And that is what the WRC has done in my view. So how is that you might ask? Well in my view the following is important in revealing how the system works against Claimants.

Hearings are conducted in the WRC in private. Now you might think that this is a good thing and certainly that's the way it was sold by the Government at the time but in reality there is no logical explanation for this and in fact it could be argued to be unconstitutional.

You see leaving aside the constitutionality of things (whether justice should be seen to be done) what employers hate more than anything is bad publicity.

Any case in the EAT, the Equality Tribunal or the Courts was bad for business. A carmaker doesn't want to alienate half their customers by being accused of discriminating against women. Under the new system, that threat is now gone.

The hearing are held in private and to compound this, the decisions are anonymised. What that means in reality is that even the worst offenders can take a chance at the early WRC adjudication stage and damn the consequences if they lose. We are seeing more and more of these cases running where previously they may have settled.

Secondly, while not a change per se, the fact that the WRC doesn't award costs is certainly more advantageous to the Employer than the Claimant. You see the Employer probably has a lawyer on retainer and they are doing lots of other things for which that lawyer is probably getting well rewarded so its easy for the Employer to get his lawyer into the saddle for a WRC hearing. Not so much for you, a claimant who may not have had to use a lawyer at any time in the past, how do you choose one? who do you choose? who will properly represent you?

Do they know what they are doing?

It should also be mentioned here that of course it's generally cheaper for an employer to retain a solicitor than it is for you because of course the employer gets to claim their VAT back making it about 23% cheaper for them than for you.

Another thing we see frequently is that employers will invariably roll out the big guns in Dublin, magic circle type firms. We've dealt with them all Arthur Cox, William Fry, A&L Goodbody, Matheson and Mason Hayes & Curran in the last year alone. We have also dealt with the mid-tier boutique firms like Daniel Spring & Co., Beauchamps and Byrne Wallace. These firms are all excellent, but do they know any more about the WRC than we do?

Some people come into and tell us that they met a lawyer who balked at the prospect of going up against the big boys and that makes me wonder why? So who do you want on your team? some guy who has never set foot in the Labour Court? or an expert who is well known there and who is respected by the other side?

Unfortunately, litigation is expensive. We're not saying we've got some silver bullet that's going to make all of your problems go away, that there's some magic dust that we'll sprinkle and it'll get the other side to pony up regardless of culpability.