EMPLOYMENT MATTERS

BECAUSE PEOPLE MATTER

The 10 things you should know when taking a claim to the Workplace Relations Commission

Do you want to achieve an above average settlement or award in your WRC case without investing a fortune? What if there was a way to know for sure that you were maximising every Euro of your claim?

Do you know the crucial elements of ensuring you achieve an above average settlement in the WRC?

Below we outline 10 things that we've learned over the years representing clients in all types of employment law case.

1. Hidden challenges

It is not always advisable to present a comprehensive case at the outset in your online application form.

By fully setting out your claim and your case at this stage you give your opponent the opportunity to "mend their hand" as it were and to come up with the appropriate excuse for any alleged wrong-doing. This is particularly true in unfair dismissals as you are automatically deemed by the law to have been dismissed unless and until the Employer proves otherwise.

As such, every UD case starts with the employer setting out why the dismissal is fair and if you've already set out your position to them, you're giving them a leg up as they know now the case they have to meet.

The sad fact is that we have seen employers lie on too many occasions in the EAT, the Rights Commissioner service and the Labour Court and it's even easier now in the Workplace Relations Commission where formal sworn evidence is not taken.

By setting out your case in full, months before any hearing, you are giving the other side the opportunity to prepare their story ("get their ducks in a row") if they haven't fully complied with the law. Given the opportunity to prepare an excuse in advance it is much easier for your employer to carry it off at a hearing than if they are presented with the evidence or allegation of their unfair treatment of you on the day.

Many would say that this is unfair and maybe it is but…it is the law and it is how these cases are run, so use it to your benefit. And you could argue they weren't whinging about being fair when they were treating you in an unfair manner.

2. Gone Fishing...

Know what they know and maybe even what they don't know…And that means, always always, **always** use the benefit of the Data Protection Acts.

You as an individual are entitled under the Data Protection Acts to a copy of any personal information held by the Company about you. This includes all emails, notes (handwritten or otherwise), memos, internal communications, reports, in fact anything which is capable of identifying you as an individual. This is a treasure trove waiting to be discovered, explored and utilised by you against your former employer! All you have to do is ask (in the right way) and so the first thing you should do then is to ask them for it!

To do this simply send them the following in writing;

"I wish to make an access request under the Data Protection Act 2018 and the General Data Protection Regulations 2018 for a copy of any information you keep about me, on computer or in manual form.

Please now provide me, with all information held by you relating to me. You will be aware that this request should be complied within 40 days.

I look forward to hearing from you…"

Your employer now must respond with a copy of all of the information they hold about you within one month. Like Ronseal it does exactly what it says on the tin!! As a data controller they have significant obligations to you under the Acts. Use these to your best advantage. And if they fail to comply you can simply contact the office of the Data Protection Commissioner and make a complaint. How do you like that Mr Former Employer sir?

3. Prepare the Case

This might sound obvious but you will need to prepare your case, know the applicable law, any exceptions to it etc. For example in the Protection of Employment (Fixed Term Work) Act 2003 under section 9 and employer can't have an employee on a series of fixed term contracts over four years in total duration otherwise an employee is entitled to a contract of indefinite duration but, and this is a big BUT, they can overcome this through an objective justification provision in the Act.

You also need to be aware of the Common Law with respect to your case. Employment Law is not only subject to Statute (i.e. legislation like the Unfair Dismissals Acts etc.) but is also affected by Judge or Tribunal made law that is precedent or decisions of the Tribunals or of other Courts which may effect the validity of a claim or an aspect of a claim.

Employment Law is big on procedure. In one famous case, a hotel worker received over €7,500 in compensation under the Unfair Dismissals legislation. The worker was dismissed from his position as a hotel porter at a Killarney hotel. He had accessed someone's hotel room under the instructions of a drunk guest. Unfortunately it was the wrong room!!! And as this wasn't the first time this had happened it was a disciplinary matter. In fact, on two previous occasions he had done this and had been warned that another mistake could lead to his dismissal.

He even admitted in the EAT that he hadn't checked the guest register on the porter's list before accessing the room. When he opened the door of the room, he found that there were guests asleep inside. The employee apologised and left however the guests complained and refused to pay their bill the following morning.

The hotel explained to the employee that they could not risk a fourth incident as understandably this was impacting on their business.

They terminated the employee who was on a work permit and who as such could not be considered for other positions which may have been available. But, employment law is very strict on procedure. The EAT found that the employer had not followed the correct procedure in their disciplinary action and because they had not advised the employee that he was entitled to representation and an appeal, they had dismissed him unfairly.

4. Know what it is you want and support that with evidence.

The main remedy sought in the WRC is compensation or more in Unfair Dismissal cases, damages, reinstatement or re-engagement. There is an important distinction to make between compensation and damages in UD claims as the WRC does not award compensation in unfair dismissal, they award damages for loss of earnings. Thus, they don't just randomly look at or pick a number out of the sky, they must be convinced of what damages have been suffered. These aren't general damages that might be awarded in a personal injury case for general pain and suffering, inconvenience etc. they are specific to what income have you actually lost as a result of the dismissal.

This is always based on your loss of salary.

You are also obliged by the law to mitigate your losses and as such to try and find alternative employment and if you do that and do happen to find alternative employment this essentially diminishes the claim. Applicants must therefore be able to demonstrate to the Tribunal what loss they have suffered with P60's etc. to show in a concrete fashion, exactly what loss they have suffered. They must also show efforts they have made to minimise this loss for example applications for jobs, recruitment ads etc.

We had a claim not long ago where the Applicant was on long term sick leave. Thus because she was certified unfit for work her damages were not running as she was not in a position to earn in any case, even if she had not been unfairly treated!

So know the numbers and be able to demonstrate them and the efforts you've made to minimise them!

In Equality claims you are entitled to compensation for the discriminatory treatment you suffered. To maximise this, you must demonstrate to the Adjudicator the impact that the unfair treatment has had on you. The WRC can award up to twice your annual salary for the effects of discrimination although such awards are rare.

5. Prepare your submissions and papers

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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 caselaw 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.

It is always important that all of the papers upon which you intend to rely are compiled into this booklet.

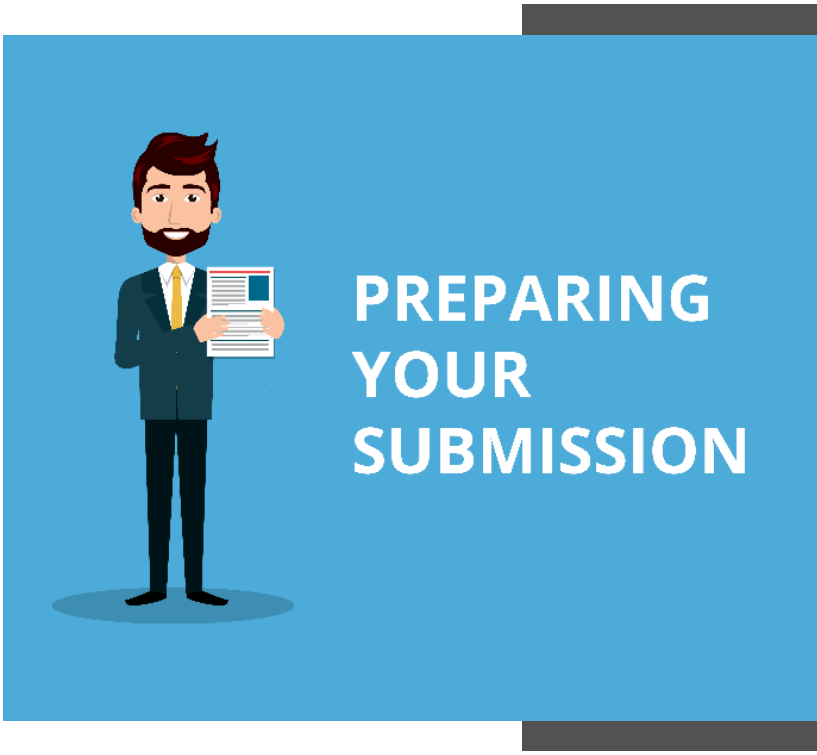
This submission is given to the WRC in advance of the case. On the day of the case you should rely on these documents in this booklet for running your case.

For example, when making your submissions, you can refer to exhibits in this booklet etc. You should bring at least three copies, a spare one for the adjudicator (just in case), one for the other side and one for yourself.

Number the pages, it makes things a whole lot easier and ensures everyone is on the same page!

Make sure they're neat and tidy...nothing will damage your case earlier than handing in sloppy booklets.

Remember, the Adjudicators are human and are effected like all humans by basic human nature and perceptions.



6. Do your homework and be prepared…

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What will they say about you?

Do your homework and be prepared to offer any explanations that might be required, but remember… always tell the truth.

Make sure though that you are prepared to ask the appropriate questions of them.
Don't wing this, you will end up looking like a fool!

7. Make your Case

Finally, you must ask the question, do you really know what experienced practitioners know about maximising your claim in the WRC?

You are no longer required to give direct evidence or illicit evidence from other key witnesses. Neither are you entitled to cross examine the Respondent's witnesses.

You will still need to know the case that you are making, make submissions in relation to that case and be in a position to argue with the representatives on the other side in relation to legal and technical matters.

The Burden of Proof is usually on the Employer and the Applicant will generally get the benefit of the doubt.

Generally under the Unfair Dismissal Acts, the Employer (the Respondent) must prove that the Applicant was not unfairly dismissed, the exception is in Constructive dismissal where it is for the applicant (the employee) to prove that his work-life was made so intolerable as to make his continued employment untenable.

In the Equality Tribunal it's a little bit different, the Applicant must prove a prima facie case that is that there's a case for the Employer to answer and then the Employer (the Respondent) has to show that there was no discrimination.

For example, we were in the Labour Court recently where I was representing an employer who had recently successfully defended a case taken by an ex-employee for discrimination on the grounds of race. The employee claimed he had been unfairly treated because he was a foreign national. He was a painter who had been with my Client for less than a month and a total in fact of just 8 days! My Client offered him a job subject to him demonstrating his capability as a painter and evidence of his qualifications. It became clear very quickly to my Client and his team that the Claimant wasn't as able as he'd led them to believe and because the project for which he was intended wasn't materialising my Client decided against employing the Claimant.

He was then sued by the Claimant. Needless to say my Client was flabbergasted and refused to entertain the Claim. He really felt someone was just trying to shake him down.

Two and a half years later at the Equality Tribunal my Client and two of his ex-employees gave evidence supporting my Client's contention that this man was not discriminated against he was simply not capable to do the work he was asked to do. The evidence confirmed that each of the other staff when they were recruited were expected to fulfil the exact same basic criteria and that in fact this man was not just incapable but regularly arrived late delaying the other staff and on occasion didn't turn up at all!

In fact on the day of the hearing the Claimant turned up an hour and a half late! (Don't do this!!). Never mind the fact that we would say that this man was never in fact employed, the test in law is in effect whether the Claimant was treated differently to another similar employee or a notional comparator. Needless to say the Equality Officer dismissed the Claim. You would think that would be the end of it. However, we all ended up in the Labour Court to face an appeal of that decision! And, wouldn't you know it…the Claimant didn't turn up!

8. Settling a Case

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In many cases the Parties will seek to settle matters rather than risk the uncertainty of a Tribunal hearing.

This essentially boils down to a good old wrangle with the other side.

Like in most negotiations there will be bluffing, drama and pressure, generally discussions will take place on the morning of the hearing and can literally continue right up to "the steps of the Court" or the door of the hotel room involved.

To buy off a claim in this way, a respondent will generally pay a lot less than what the claim is worth. "Nuisance money" as it is termed can be as little as €2,000 - €3,000 and is literally to prevent the nuisance of having to fight the claim. In a clear cut case or case where there has already been a damaging award the money can be a lot higher.

In negotiating it is of course important to understand each party's position. You need to understand why the Respondent might want to settle, is there going to be negative publicity or do they have something to hide or if it's at an early stage is there the risk of a large award which can be settled for significantly less.

Most legal practitioners will be used to this type of discussion and will understand the negotiation process well.

9. The Technicalities

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The WRC is a very procedure driven environment.

Remember it is extremely rare for the WRC to grant an adjournment for any reason, so be prepared. Generally, to get an adjournment an application must be made at a very early stage and the basis for requiring an adjournment must be extremely serious. It is not sufficient that the Applicant is on holidays that week!

10. Time Limits

The legislation and the WRC is as mentioned above extremely procedural and are bound by statute. The Unfair Dismissals Acts lays down a time limit of six months from the date of dismissal to make a claim.

This is a strict time limit.

It can only be extended in exceptional circumstances and such an extension is rare.

The extension is to a maximum of twelve months from the dismissal and at this time the claim is dead and no further extension can be applied for or granted. At this stage your only possibility is to take the claim to the Circuit Court who can only award damages for breach of contractual notice.

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 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 had 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 effectively ridiculed for not knowing (or admitting to know) the importance of a fair procedures in an employment context. She must have felt humiliated.

To our Client that was pay-back for how low and small she made him feel when they decided to ignore his explanation about what had actually happened that night. 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 and settlements of over €1 million. That's not to mention the other costs of defending those cases including of course legal fees and the intangible costs associated.

The tables are turning though, against claimants who are unrepresented or badly represented. The Government in introducing the WRC process seems to have succumbed to the lobbying of big business, presumably trying to make Ireland as attractive a destination as possible for foreign companies to invest in. The WRC appears to be an effort to water down employment rights and make the employment market and in particular hiring and firing easier for employers.

So how is that you might ask?

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. Under the new system, that threat is now gone. The hearings are held in private and to compound this, the decisions are anonymised. That means in reality that even the worst offenders can take a chance at the 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 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? Will it cost a fortune?

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 and their legal fees are tax deductible.

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

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.

We're not interested in wasting your time or ours. If you want a team who believes in your case and is not frightened of the prospect of going up against the big boys give us a call. We're not saying we'll take your case, but we'll certainly telly you if you have one!

To take control you need information and advice from an experienced and trusted advisor which will allow you to understand your rights and make informed decisions about how to proceed.

Our dedicated team was handpicked for their experience working on behalf of people in these situations. We have the legal experience required to give you the best advice and are experienced at resolving these types of claims quickly and effectively. Our aim is to work for you to achieve the best possible outcome so that you can move on with your life.

Our service is confidential, discrete and tailored to each client to fit their individual needs. We will never disclose your information to others.

Don't be silenced. Each month, we offer a selected number of potential clients an opportunity to meet with one of our team for a free no obligation initial consultation to discuss the options available to you.

Due to high demand we can only offer 20 appointments each month and I know that these appointments always fill up very quickly. Choosing the right team to represent you is key to your emotional and financial future so contact us today to see how we can help you chose the outcome you want.

For further information, including a copy of our eBook "Pregnancy and the Workplace – Know your Rights" and to apply for a **FREE CONSULTATION** call or email us today on Lo-call 1890 88 90 90; 051 841 641 or email info@employment-matters.ie.

Warning: if you do have a claim you must act fast and ensure that you adhere to the strict time limits laid down in the legislation. You generally have six months to take your claim from the last date of breach by the employer.

To find out more please contact us on 1890 88 90 90 or email info@employment-matters.ie

Very Important Disclaimer:

"This is not intended to be legal advice. You must not rely on the legal information provided here as an alternative to legal advice from a lawyer or other professional legal services provider. 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."