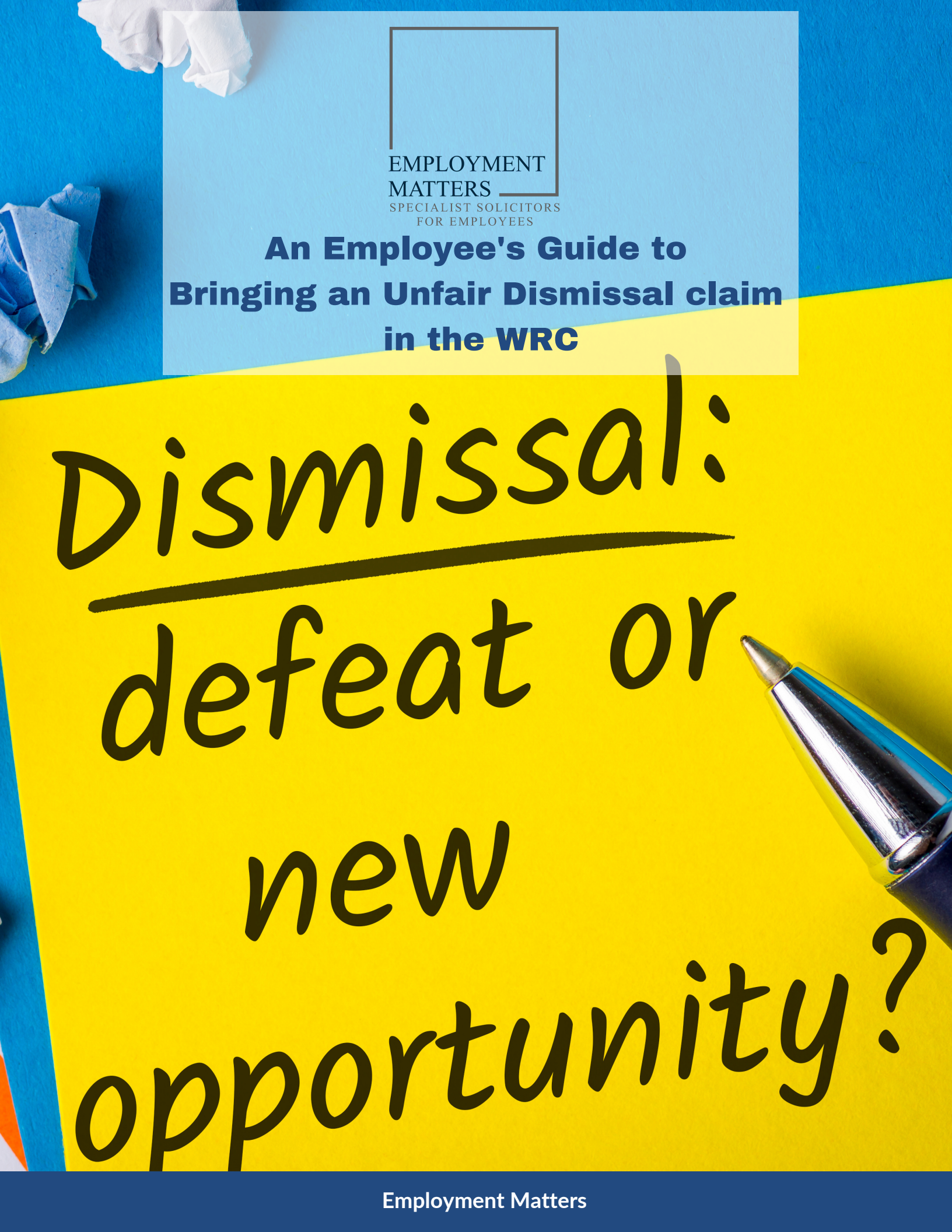
EMPLOYMENT MATTERS
SPECIALIST SOLICITORS FOR EMPLOYEES

An Employee's Guide to Bringing an Unfair Dismissal claim in the WRC



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.

Seán is a qualified solicitor with a Masters Degree in Marketing from the UCD graduate school. Seán also holds a Diploma in Commercial Law from the Law Society and a Diploma in the Law of eCommerce.

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.

DISCLAIMER

This book has been written to give you accurate and authoritative information about the subject covers. You accept it with the understanding that neither the publisher nor the author is engaged in giving you legal or any other professional services. 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.

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 WRC 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 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.

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 Unfair Dismissal.

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 an Unfair Dismissal 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 Unfair Dismissal 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 the 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. 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 red 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, 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 give 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 party's representative. Indirect evidence (where your representative is asking you questions) your representative is only permitted to ask you open questions, thus that being questions that 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 its case first depends on the type of claim. In an Unfair Dismissal case, 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/she 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 quite 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 claim, neither 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 decide 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

In a successful unfair dismissal case, the award is entirely based on the Claimant's exact loss of earnings. 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 Unfair Dismissals Acts place an onus on the 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 WRC's view that a claimant was obliged to spend every waking hour looking for work.

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.

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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 Workplace Relations Commission, 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.

So call us today and together we will make your voice heard!

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DO YOU STILL HAVE A QUESTIONS?

GET IN CONTACT WITH US THROUGH THE FOLLOWING WAY'S

Our dedicated team of Employment Law Specialists are waiting to help you with your query.

The first consultation is of no obligation so call us today on:

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