The Workplace Relations Act – a 2016 Revolution

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Brian Morgan reviews the Workplace Relations Act 2015, which was enacted on the 1st October 2015. New procedures and new Courts will mean that the parties, particularly employers, will need to be much better prepared for the Hearing. The days of turning up at, what was then, the Employment Appeals Tribunal, and hoping that everything might work out, are long gone. Required Statements and Submissions will mean that there will be no hiding place for employers who do not have their Contracts and workplace procedures in place.

I have written previously about the new procedures being implemented under the Workplace Relations Act 2015. See my previous BLOGS:

Reform of Employment Hearing System in the Republic of Ireland

http://www.morganmcmanus.com/index.php/2013/02/22/reform-of-employment-hearing-system-in-the-republic-of-ireland/

The Workplace Relations Bill 2014 is published

http://www.morganmcmanus.com/index.php/2014/07/31/the-workplace-relations-bill-2014-is-published/

This new Act will bring about a complete revolution in the procedures for disposal of Employment Law Complaints. The Act was enacted on the 1st October 2015 but a lot of its effect will not be tested until 2016. It is important that both employees and employers are aware of the new procedures which will apply, as otherwise they could be severely prejudiced in their preparation for the Hearing.

New Workplace Relations Commission

The Act has substantially amended the primary Employment and Industrial Relations legislation and formed the office of the *Director General* of the Commission, providing the legal basis for the new Workplace Relations Commission (WRC) and its simplified, more accessible processes. The Act enables the WRC to undertake a full range of functions formerly carried out by the Labour Relations Commission (LRC), including the Rights Commissioner Service, the Equality Tribunal, the

Employment Appeals Tribunal (EAT) and the National Employment Rights Authority (NERA).

The previous system facilitated multiple Complaints to different Courts arising from the same set of facts. The new system will require all Complaints that are based on a single set of facts to be heard at one Hearing before the Adjudication Officer. A new single point portal called the "Workplace Relations Service" has replaced the 5 separate previous entry points for Complaints.

All Employment Law Complaints made on or after the 1st October 2015 will be heard by "Adjudication Officers" at first instance. The Workplace Relations Act also provides for the Labour Court to be the appellate body to determine, among other matters, appeals against decisions of the WRC Adjudication Officers.

No alteration to substantive law

The Act does not alter substantive Employment rights of employees or increase employers` obligations under Employment legislation; other than an amendment under Section 86 of the Act. From the 1st August 2015, employees who have been absent from work due to medically certified illness have been entitled to accrue annual leave in the same manner as if they were at work. Employees who are on long-term sick leave do not accrue annual leave indefinitely. Leave entitlements will expire 15 months from the end of the statutory leave year in which the entitlements accrued. The statutory leave year runs from the 1st April each year until the following 31st March. An employee is not entitled to take annual leave while on sick leave. Annual leave entitlements only crystallise at the end of an employee's period of sick leave, whether the sick leave ends because of the employee returns to work or because the employee's employment terminates for any reason including the death of the employee.

The Old Procedures

Previously a Complaint for Unfair dismissal generally came on for hearing before the Employment Appeals Tribunal. It could often take up to 1½ years before the case came on for Hearing and the case would only then be listed for a half day initially. Generally this was approached by some employees/employers representatives on the basis that the case might settle on the first day and, if it didn't settle, it would be adjourned for Hearing and further work could be done in preparation for the Hearing which would usually be listed for about 6 months later. All of this was very unsatisfactory, both for the employee and the employer.

The newly formed Workplace Relations Commission has promised that all of that will now change!

New Guidelines Document October 2015

The Workplace Relations Commission has issued a new Guidelines document titled *"Procedures in the Investigation and Adjudication of Employment & Equality Complaints*"

The Guidelines document, in summary, confirms the following:

- The employee is required to submit his Complaint within 6 months of Dismissal;
- The employee must provide a clear statement setting out details of his complaint (previously one line would suffice!)
- The employer/respondent will be required to provide a written response statement within 21 days. That response statement must include any legal points which the respondent wishes to make
- The Adjudication Officer (who will hear the case) may draw inferences from the failure of either party to include relevant information in a timely manner Para 5 – see below).
- The information must be submitted in advance of the Hearing
- It is anticipated that cases will be scheduled for Hearing within 6 to 8 weeks of the initial referral
- Adjournments will only be granted in exceptional circumstances
- The final decision as to the conduct of the Hearing rests with the Adjudication Officer, subject to fair procedures and the interests of justice

Statement Contents

The Guidelines record that the Statement "must" contain

- Facts of case leading to dismissal
- Disciplinary Meetings held
- Investigation undertaken
- Hearings conducted
- Internal Appeals Conducted
- Any other relevant information
- Where relevant, any legal points to be relied on

Yet, the relevant section of the Act, Section 41(10), merely records that:

"*an Adjudication Officer may, by giving notice in that behalf in writing to any person, requires such person to attend at such time and place as is specified in the notice to give evidence in proceedings under this section or to produce to the Adjudication Officer any documents in his or her possession, custody or control that relate to any matter to which those proceedings relate*".

It is important to note that Section 41(10) does not give any statutory basis for the Adjudication Officer to compel the employer to furnish the documentation detailed above. More importantly, Section 41(10) refers to the entitlement of the Adjudication Officer to serve notice in writing "*to any person*". That is, under the Statute the Adjudication Officer is entitled to serve notice on either / both the employee and the employer. What however the *Workplace Relations Commission* appears to have done is to have directed the obligation to deliver information / documentation on the employer only in circumstances where the employee, it would appear, preliminary required, in his initial Complaint to the WRC to set out a brief summary of his Complaint. It would appear therefore that the WRC intend to run these cases by way

of scrutiny of the employers procedures and documentation to the extent that, if the employer cannot show on paper that it complied in every respect with the procedures expected under the Statute and custom and practice.

Bearing in mind the anticipated limited opportunity which there will be for cross-examination of the employee, the pressure will now be on employer's to ensure that they have their procedures and documentation in order.

Adjudicator drawing Inferences

In a Presentation given by the recognised Employment Law Barrister Tom Mallon B.L. to the Employment Lawyers Association of Ireland on the 10th February 2016 Mr. Mallon raised issue with a number of the procedural issues detailed in the Guidelines Document but in particular, referring to paragraph 5 of the Procedures titled "*Statements from Persons on whom the Onus of Proof Rests in Employment Equality and Unfair Dismissal Complaints*". This section sets out the requirement for Statements from persons on whom the onus of proof rests in Employment Equality and Unfair Dismissal matters. It provides that parties will be "required" to submit "a clear statement setting out the details of the complaint" within 21 days. The final sentence of that paragraph is in the following terms:

"*An adjudication officer hearing the complaint may draw such inference or inferences as he or she deems appropriate where relevant information is not presented in a timely manner".*

Mr. Mallon points out that Section 41 of the Act sets out, in some considerable detail, the provisions relating to the presentation of Complaints and referral of disputes. He states that there is nothing in that section providing for the drawing of inferences by reason of a failure to meet non-statutory time limit for delivery of a Statement.

The writer wishes also to draw attention to the fact that the Guidelines fail to point out on whom the onus of proof rests in Employment Equality and separately in Unfair Dismissal Complaints. If it is not explained, how can an employee/employer know of their obligations in advance of the Hearing? In Employment Equality cases the Adjudication Officer (formerly the Equality Officer) must be satisfied that the claimant (employee) has established on the balance of probabilities primary facts of sufficient significance to raise a presumption of discrimination. It is only then that the onus falls on the employer to prove that there has been no Discrimination. In Unfair Dismissal Claims, once it is accepted that there is a Dismissal, the onus of proof rests on the employer to prove that the Dismissal was fair. However in Constructive Dismissal Claims where the employee resigns because they claim that the employer was in breach of contract, the onus of proof rests on the employee to prove that it was reasonable for him/her to resign.

Yet none of this is explained in the Guidelines document!

New Winds Blowing!

The days are gone when parties (employer, employee and their representatives) could turn up "*to see how it goes"*. The parties must now be prepared. The writer believes that a certain allowance will be given for employees, bearing in mind that, on most occasions they will be unrepresented. That may however change as employees learn the strict procedures which will now apply.

Employers (who are generally represented) will however not be given any leeway. This may also apply even where they are not represented!

In particular, the Guidelines document (page 5) points to the obligation on the Respondent/Employer to set out the facts of the events leading to the dismissal including, where relevant, disciplinary meeting(s) held, investigation undertaken, disciplinary hearing(s) conducted, internal appeal(s) conducted, any other relevant information and, where appropriate, any legal points the Respondent may wish to make. It is repeated that this statement must be sent in within 21 days of request by the WRC.

Not a Criticism of the Act or its advocates

In analysing difficulties which may arise in the implementation of the provisions of the Act in the future, the writer wants to make it expressly clear that he is generally in favour of the broad aspirations of the Act. There is no doubt that, before the Act, there were far too many Courts in existence dealing with a plethora of different types of Claims, which was frustrating and expensive for both employee and employer. Experience was that it could often take in excess of 2 years for an Unfair Dismissal claim to be resolved before the Employment Appeals Tribunal. This was highly unsatisfactory, where one of the resolutions being sought by the employee could be reinstatement to his original position. Having been away from the workplace for over 2 years the employer could always reasonably argue that it could not take the employee back into the workforce after such a long absence.

Now it is hoped that a similar Unfair Dismissal Claim will be heard by the Adjudication Officer within 8 weeks of the Claim. Only time will tell as to whether Claims are actually resolved that quickly but the aspirations of the law makers have certainly been genuine.

The Hearing before the Adjudication Officer

As stated in the Guidelines document:

- *The final decision as to the conduct of the Hearing rests with the Adjudication Officer, subject to fair procedures and the interests of justice*

While the Act is silent on the format of the Hearing and whether there is a right to cross-examine, the Guidelines document states (page 6):

The Adjudication Officer can ask questions of each party and of any witnesses attending. He or she will give each party the opportunity to give evidence, to call witnesses, to question the other party and any witnesses, to respond to and address

legal points. … The Adjudication Officer will decide what is appropriate, taking into account fair procedures, arrangements which will best support the effective and accurate giving of evidence and the orderly conduct of the Hearing.

The writer would express concern that, while the Guidelines refer to the right of each party to "*question the other party*", nowhere does the word "cross-examine" appear and it is noted that the Adjudication Officer will have final say as to the "*appropriate*" way in which the Hearing will be conducted.

Bearing in mind that many Adjudication Officers are former Rights Commissioners who tended to run their Hearings on an inquisitorial basis, questioning the witnesses / parties after hearing their written Submissions, is there a danger that, under this new Act, the parties will not be allowed to cross-examine as heretofore in the Employment Appeals Tribunal?

When one considers that it is the intention of the WRC to ensure that the list of Hearings is run efficiently and that there will be no delays (as previously in the EAT system) there may also be a temptation on the part of the Adjudication Officer to at least put pressure on the parties to limit their cross-examination. Sometimes it is only by a lengthy cross-examination that the veracity of the opponent`s statement can be truly tested. Is there a danger therefore that in the future cases will be decided on the strength of the documents lodged in advance of the Hearing, rather than on what evidence is given at the Hearing? Only time will tell!

Hearings in Private

Section 41(13) of the Act, with reference to Hearings before the Adjudication Officer, states:

(13) Proceedings under this section before the Adjudication Officer shall be conducted otherwise than in public.

Whereas previously Hearings before the Employment Appeals Tribunal were held in public, and therefore subject to reporting by Journalists (with all consequent unwanted publicity) Hearings before Adjudication Officers will be heard in private. There has been some disquiet about this. Journalists will point to many cases where the reporting of cases led to Employment Law reforms or, at minimum, where adverse findings against employer respondents caused extensive embarrassment to the employer and thus provided warnings to other recalcitrant employers.

Inability of Adjudication Officers to assist in resolution of dispute

Previously the Rights Commissioner could, after the Hearing of a dispute enter into mediation between the employee and the employer. While there was no statutory basis for this, a custom and practice grew where the Rights Commissioner would ask the parties to go into separate rooms and the Rights Commissioner would act as a Mediator (having heard the full facts) in an attempt to get the parties to come to an amicable resolution. On many occasions a satisfactory resolution was reached. This saved time and cost for both the employee and the employer and avoided Appeals.

Under the new Act and Guidelines no provision has been made to enable the Adjudication Officer to commence such mediation, formal or informal. Some Solicitors have however reported that some of the Adjudication Officers, who were former Rights Commissioners, are carrying on the tradition of seeking to mediate a resolution after the formal Hearing. While this could be a welcome development there must be consistency in this approach. One cannot have a situation where one Adjudication Officer mediates and another does not. Clarification on this issue would be welcome from the *WRC*.

Reasoned Written Decisions

The Adjudication Officer will be obliged to issue reasoned written Decisions which will be published on the internet. However the Decisions will be published in a form which will preserve the anonymity of the parties. Again, this has been criticised in some Journalist circles. Whereas previously Decisions of the Employment Appeals Tribunal were published with the names of the parties redacted, the fact that such redaction will now follow a private Hearing will deprive the media of any opportunity to "out" a recalcitrant employer.

Hearing Centres

While Labour Court Hearings will generally be held in Dublin, the WRC has decided that, rather than Hearings being held locally, as occurred before in claims before the Rights Commissioner or the Employment Appeals Tribunal, there should now be 11 designated centres around the country for the Hearing of cases. Previously, when a Complainant filed a Complaint either before the Rights Commissioner or the Employment Appeals Tribunal, the Complainant would be requested to state where he/she would like their case to be heard. In the normal course, the Complainant would get the opportunity to at least have the case heard in the county town and this would save time and cost to both the employee and the employer.

The reader is referred to Appendix 1 of this Article which details the 11 centres around the country (called "Regional Centres") where cases will be held for the relevant counties (called "areas").

While there appears to be some logic in the division of counties into the respective regional centres, in some instances there appears to be no logic whatsoever. For instance, it will be seen that, whereas Cavan is in the Sligo Regional Centre, Monaghan is in the Meath Regional Centre being required to attend for Hearings at the Ardboyne Hotel, Navan. Ironically, an employer from Cavan attending a Regional Hearing will travel north up through Clones to Sligo for a Hearing; whereas a Monaghan employer will travel south through Clones town for a Hearing in Navan. Common sense does not appear to have entered the equation.

Appeals to the Labour Court

While the Labour Court will still maintain many of its original powers to hear and resolve Industrial disputes the Labour Court will now be the sole forum for Appeals from Decisions of the Adjudication Officer. Previously Decisions of the Employment Appeals Tribunal were appealable to a Judge of the Circuit Court. There has been

much criticism from legal quarters over the fact that Appeals will no longer be heard before a Circuit Court Judge, but that subject will be for another Article!

It is anticipated that procedures before the Labour Court will be more formal than those which will be applied by the Adjudication Officers in the first instance. Whereas guidelines, as detailed above, have been issued with regard to procedures before the Adjudication Officer, separate Rules, titled as "*The Labour Court (Employment Rights Enactment Rules) 2015,* have also issued with regard to procedures before the Labour Court. Unlike the Guidelines issued in respect of the Adjudication Officer`s procedures, these Rules have a statutory basis under Section 50 of the Act.

The rules require each party to make two separate sets of Submissions prior to the hearing of the matter. The first must outline each party's case and indicate the number of witnesses the party will call. The second must provide the names of witnesses the party proposes to call, a summary of the evidence each witness will provide, and a copy of any document the party intends to rely upon. The rules imply that any witnesses not notified in advance will not be heard by the Court.

The rules provide that evidence will be given on oath. Cross-examination of witnesses both by the opposing party's representative and by members of the court is expected.

Very importantly, Appeals before the Court will be heard *de novo*. That is, evidence will be given once again in this court. It will not simply be a review of the evidence given before the Adjudication Officer.

Unlike the Hearing before the Adjudication Officer, proceedings before the Labour Court will be in public, except where a party successfully applies for a private hearing on grounds of the "existence of special circumstances". Determinations of the court are published on the WRC website.

Provision for Case Management Conferences

Rule 41 of the Labour Court Rules records that the Labour Court may, at its discretion, require the parties to attend a Case Management Conference before a date for the hearing of the Appeal is fixed. While there are many situations where a case management conference can assist in the resolution of a dispute, there are also many situations where it is not possible to resolve a dispute where one of the parties is determined to have its "day in court". While the Case Management Conference may result in the issues being refined, it will also add to the cost of the resolution dispute bearing in mind that there will now be three effective Hearings:

- The initial Adjudication Officer Hearing;
- The Case Management Conference before the Labour Court;
- The Appeal Hearing before the Labour Court.

This does not take account of adjourned Hearings!

Bearing in mind that no legal costs are granted to the successful party, this will create huge expense for both employee and employer. Realistically, an employee could end up, having achieved an aware of something in the region of €6,000.00 before the Labour Court, find that all of that award has been consumed in costs of pursuing the Claim in the first instance.

Appeals to the High Court

A party may appeal a decision of the Labour Court to the High Court, but only on a point of law. The decision of the High Court shall be final and conclusive.

This provision allowing only Appeals to the High Court on a point of law will not impact on the supervisory role of the superior Courts which may be exercised by way of Judicial Review.

There is no doubt but that there will in due course be Constitutional challenges / Judicial Review Applications to the superior Courts. For instance:

- Whereas the Act states that Hearings before the Adjudication Officer shall be heard in private the Constitution guarantees a right to a public hearing. There is a difference between industrial relations (which are generally heard in private before the Labour Court) and Employment rights. A right is something which someone must be established before a tribunal. Such a tribunal could be a court of law or an entity established under the Constitution. The Hearing before the Adjudication Officer is just such an entity. Bear in mind that the Awards which an Adjudication Officer can make can exceed the jurisdiction of the Circuit Court (€75,000.00). People have a right to a public hearing under Article 47 of the Charter of Fundamental Rights of the European Union and Article 34 of the Constitution. There are many who are of the view that Hearings should take place in public. We are dealing here with people's rights, as distinct from industrial relations matters.
- Section 29 (2) of the Courts (Supplemental Provisions) Act 1961 provides that a person who is for the time being a practising barrister or solicitor of not less than 10 years standing is qualified for appointment as a judge of the District Court. Section 17 (2), as amended by section 30 of the Courts and Court Officers Act 1995, applies the same requirement to prospective Circuit Court judges and also provides that a judge of the District Court is qualified for appointment as a judge of the Circuit Court. Yet, to be appointed as an Adjudication Officer, exercising powers / making Awards which will often exceed those of a Circuit Court Judge, Adjudication Officers will not require any legal qualifications, or indeed any qualifications. Adjudication Officers are appointed by the Minister after competition (Section 40 of the Act), but under Section 40(3) of the Act persons who were previously Rights Commissioners / Equality Officers were not even required to undergo competition.
- Article 6 of the European Convention on Human Rights is a provision of the European Convention which protects the right to a fair trial. In criminal law cases and cases to determine civil rights it protects the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights for those charged in a

criminal case (adequate time and facilities to prepare their defence, access to legal representation, right to examine witnesses against them or have them examined, right to the free assistance of an interpreter). Some provisions of the Workplace Relations Act carry criminal sanction. Is it appropriate therefore that such Hearings are held in private before generally a non-legally qualified Adjudication Officer?

- Section 40(5)(a) of the Act states that the Minister may revoke the appointment of an Adjudication Officer. If an Adjudication Officer operates under fear of revocation of his appointment by the Minister of the day, can he be truly independent?
- Section 41(5)(a) of the Act states that the Adjudication Officer shall give the parties an opportunity "*to be heard* .." and to "*present to the Adjudication Officer any evidence relevant to the complaint or dispute*" but will this entitle the representative to really test the evidence of the other party, as occurred previously in the Employment Appeals Tribunal and the Circuit Court. Bearing in mind the limited time which will be allocated for the Hearings by Adjudicators it is feared that proper cross-examination will not be allowed. Failure to allow proper cross-examination could lead to Judicial Review Applications to the Superior Courts.

These are only some examples of instances which may give rise to Judicial Review.

Mediation

Part 4 of the Act makes provision for Mediation. Courts are now very much in favour of Alternative Dispute Resolution in an effort to save court time and costs. Before a complaint is sent to an Adjudication Officer for investigation, the *Director General* of the WRC may refer the complaint to a Mediation Officer. The Director General may do this only if he believes that Mediation might resolve the complaint and provided that neither party objects to Mediation.

If a complaint is referred to a Mediation Officer he or she may convene a Mediation Conference and attempt to resolve the matter. This is similar to the mediation process that previously operated under Equality legislation.

An alternative model is available. The Mediation Officer may "*employ such other means as he or she considers appropriate for the purposes of resolving the complaint".* These other means are unspecified. They include telephone-based conciliation or something else entirely. More importantly, communications during a mediation process are confidential and, in the event that mediation does not resolve the matter, such communications cannot be referred to in any subsequent hearing before the Adjudication Officer.

Power of Labour Court to direct Inspection of Records

Section 30 of the Act formalises and extends a process which was previously operated by the Labour Court most usually in respect of complaints brought under the *Industrial Relations Act 1946* alleging non-compliance on the part of an employer with the provisions of a Registered Employment Agreement. In dealing with such complaints, particularly when the respondent employer failed to attend before the

Labour Court or failed to produce relevant documentation, it was open to the Labour Court to request the Labour Inspectorate to carry out an inspection of the employers records. The Labour Court, having received the Inspector's report then proceeded to determine the complaint of non-compliance and to make an order accordingly. Section 30 of the new Act provides a firm statutory basis for this use of the Inspectorate by the Labour Court in the context of the Court hearing any appeal under section 44 of the Act.

Sharing of Information

Several provisions have been included in the Act to provide for sharing and/or disclosure of information in specified circumstances. Section 31 contains a number of technical provisions in this regard. For example, this Section amends both the Social *Welfare Consolidation Act 2005* and the *Taxes Consolidation Act 1997* to provide for the sharing of information between the WRC and the *Department of Social Protection / Revenue Commissioners*. The *Department of Jobs Enterprise and Innovation*/*NERA* were empowered to share relevant information with the aforementioned bodies for the compliance purposes. Section 31 also contains detailed arrangements to facilitate the retention, use and disclosure of PPSNs and the Employer Registered Numbers by the WRC.

Section 32 allows the Commission to receive information from any "*official body*" about the suspected commission of an offence under an Employment or Equality enactment. Likewise, the Commission may disclose to any "*official body*" any suspicion it has about the possible commission of any offence by any person. The list of bodies which come within the definition of "*official body*" for the purpose of the Act is included in Section 2 (*Interpretation*). This list is non-exhaustive and includes: the *Garda Siochana*, the *Revenue Commissioners*, a *Government Minister*, the *Director of Corporate Enforcement*, the *Health and Safety Authority*, *HIQA* etc.

Section 33 is intended to facilitate the exchange of information between the WRC and any body which awards a *Public Works Contract*; *namely that a primary contractor or a party to a secondary contract has contravened an employment enactment*. The standard wording of such contracts requires all contractors and subcontractors thereunder to be compliant with Employment legislation. Where a Contractor or Sub-Contractor has not complied with its obligations under Employment legislation, the Awarding Body may withhold payments under the Contract. Difficulties have arisen in the past in enforcing these standard provisions because of the lack of a legislative basis for sharing of certain information between statutory authorities.

Section 35 makes provision for the sharing of information between the Commission and certain foreign statutory bodies subject to certain conditions.

Obligations on the Employer

The Employer should be under no doubt from hereon as to its obligation to ensure that proper internal procedures are applied and, where a legal Claim is anticipated, the employer would be wise to avail of advice from a Solicitor who specialises in Employment Law at the earliest possible date.

Enforcement of Awards of the Adjudication Officer / Labour Court

Previously successful Complainants had difficulty in enforcing Awards. That will now change. Enforcement proceedings generally involve recourse to the civil courts and possibly also to the Sheriff's office. The new enforcement procedures are detailed in sections 43 and 45. They provide for enforcement via the District Court (rather than the Circuit Court) using procedures that are modelled on the provisions of the *Enforcement of Court Orders Act 1940* (as amended). Section 44 provides for a streamlined and effective enforcement procedure for Complainants whose Complaints have been upheld at first instance by an Adjudication Officer of the WRC. If the Decision of the Adjudication Officer in favour of the Complainant is not appealed by either party but remains unimplemented after the period of 56 days the Complainant concerned, a Trade Union or "excepted Body" acting on behalf of the Complainant, or the Commission in certain circumstances, may apply to the District Court for an Order directing the employer to carry out the decision in accordance with its terms.

Similarly, Section 45 makes provision for the enforcement of decisions of the Labour Court that have been upheld on Appeal. If the decision of the Labour Court in favour of the Complainant is not appealed by either party but remains unimplemented after the period of 42 days the Complainant concerned, trade union or "excepted Body" acting on behalf of the Complainant, or the Commission in certain circumstances, may apply to the District Court for an Order directing the employer to carry out the decision in accordance with its terms.

Needless to say, this will add further cost for the employer. What if an employer cannot afford to make payment pursuant to a District Court Enforcement Order? In those circumstances the employer risks Bankruptcy or the Compulsory Liquidation of his company.

Hearing before District Court

Both Sections 43 and 45 of the Act enable the District Court to hear an Application for Enforcement *without hearing the employer or any evidence*. Where the Adjudication Officer / Labour Court ordered reinstatement or reengagement of the employee Section 43(2) states that the District Court may, instead … *make an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all of the circumstances* … not exceeding 104 weeks` remuneration.

The writer suggests that, while Sect 43 of the Act refers to the District Judge making his Decision *without hearing the employer or any evidence*, this does not necessarily prevent the Judge from hearing the evidence of the employer. Does this mean that the employer, having unsuccessfully argued against the reinstatement / reengagement of the employee before the Adjudication Officer and Labour Court on Appeal, gets a third bite at the cherry before the District Court to submit why the employee should not be let back into the workplace? How will the Judge be able to come to a reasonable Decision without hearing at least some of evidence which was presented previously before the Adjudication Officer and Labour Court on Appeal?

It is acknowledged that Section 43(1) states that the District Court "*shall*" make an Order *without hearing the employer or any evidence*. This does suggest that Judge should not hear any *evidence*. Yet, surely if a Judge overturned the Decision of the Adjudication Officer or the Labour Court by directing the payment of compensation rather than directing reinstatement without hearing any evidence, that Decision would be subject to Judicial Review before the High Court?

While not covered under the Act, what if an employee or employer is unhappy with the Decision of the District Court will the aggrieved party be entitled to appeal that Decision to the Circuit Court? After all, the existing Civil Court Rules (outside of the *Workplace Relations Act*) recognize the right of an aggrieved party to appeal any Decision of the District Court to the Circuit Court.

Finally, Section 43(4) of the Act directs that any such Award shall carry interest *on the compensation rate referred to in section 22 of the Act of 1981* (currently 8% per annum) beginning 42 days after the date of the Adjudication Officer / Labour Court.

Offence to fail or refuse to pay Compensation

Section 51(1) of the Act records that:

It shall be an offence for a person to fail to comply with an order under section 43 or 45 directing an employer to pay compensation to an employee.

Although Section 51(2) records that:

It shall be a defence to proceedings for an offence under this section for the defendant to prove on the balance of probabilities that he or she was unable to comply with the order due to his or her financial circumstances.

Section 51(3) records that:

A person guilty of an offence under this section shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both.

What about Advice from a HR Consultancy?

Employers should be aware that, when taking advice from a Solicitor specifically with regard to a potential Unfair Dismissal complaint, any advices given by that Solicitor to the employer are confidential, because of Legal Professional Privilege, and are therefore details of the advices given cannot be released to the employee`s representatives at the Hearing.

Different considerations apply where a HR Consultancy is concerned. In certain limited circumstances, the HR Consultancy can claim the benefit of Litigation Privilege but in many cases, where the employer chooses to retain a HR Consultancy instead of a Solicitor, the employer runs the risk that advices which it obtained from the HR Consultancy, which it believed to be confidential, could be released under

Order of the Adjudication Officer or the Labour Court, to the employee`s representatives.

For more information on this issue, please refer to my article titled "*Litigation Privilege Advice – When is such Advice Confidential?*"

Labour Inspectors

Finally, it should also be clarified that the Act is not limited to the Hearing of Complaints. The Act consolidates measures which were already in existence allowing for the inspection of employers records. Previously, NERA, when it was established on an administrative basis in 2007, brought together three separate sections of the then Department of Enterprise, Trade and Employment: the Labour Inspectorate, the Information Service of the Enforcement/Prosecution Service. The Employment Law Compliance Bill 2008, if it had been enacted, would have placed NERA on a statutory footing and would have consolidated the legislative basis under which the NERA Inspectorate operated. Previously, NERA inspectors carried out inspections of employers records and generally reviewed employers' compliance with Employment Law under several different enactments, including the Industrial Relations Act 1946. Each of those individual Acts contain slightly different powers. In fact the relevant officers empowered to carry out inspections are referred to in some Acts as inspectors and in other Acts as authorised officers of the Minister.

Part 3 of the Work Place Relations Act provides, in similar manner to what had been proposed in the 2008 Bill, for the restatement and consolidation of the individual legislative provisions under which inspectors are authorised. Additionally, inspectors will be authorised to carry out inspections under Equality legislation. This is an extension of what was their previous remit beyond Employment rights and Industrial Relations enactments.

Criminal Offences

Section 7, which deals with the prosecution of offences under the Act, now makes provision for the criminalisation of employer default. A person accused of an Offence under the Act may be prosecuted by the WRC. If found guilty, the accused, if convicted by the District Court, may be fined up to €5,000 per offence and/or be imprisoned for up to 6 months; if convicted by the Circuit Court, the sanctions rise to a maximum fine of €50,000 per offence and/or a prison term of three years.

The offences created by the Act relate to the following five areas:

(i) *Inspection* [Section 27 (5)] - offences here relate to obstructing, interfering or impeding with an inspector or a member of the Garda Siochana who is acting in the course of a power conferred on him/her under the Workplace Relations Act;

(ii) *Compliance Notice* [Section 28 (15)] – failure to comply with the terms of a Compliance Notice which hasn't been appealed (see paragraph below)

(iii) *Labour Court Proceedings* [Section 45] – knowingly giving false or misleading information under oath to the Labour Court; failure to attend and/or to give evidence on foot of a subpoena issued by the Labour Court

(iv) *Forgery/alteration* of a document purported to be given under the Workplace Relations Act [Section 73]

(v) Unlawful disclosure of information received by a person while performing official duties under the Workplace Relations Act [Section 71]

No escape for Company Directors

Section 7(2) of the Act records that where an offence under the Act is committed by a body corporate *and is proved to have been committed with the consent or connivance of any person, being a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in such capacity, that person shall, as well as the body corporate, be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence*.

Under Section 7(3) such Prosecutions may be brought by the WRC. Under Section 7(4) the Court shall order that the convicted person shall pay the costs of the prosecution.

Compliance Notices

Part 3 of the Act also makes provision for two new compliance tools which are now available to inspectors to assist them in achieving compliance with Employment and Equality legislation: the *Compliance Notice* (Section 28) and the *Fixed-Payment Notice* (Section 36).

A *Compliance Notice* may be served by an inspector on an employer where the inspector "*is satisfied that an employer has, in relation to any of his or her employees, contravened a provision to which (Section 28) applies".* The relevant provisions are then listed in Schedule 4 of the Act. These include breaches of the Payment of Wages Act 1991, the Maternity Protection Act 1194, The Terms of Employment (Information) Act 1994 the Organisation of Working Time Act 1997, the Unfair Dismissal Act 1977, the Carer's Leave Act 2001 and the Protection of Employees (Temporary Agency Work) Act 2012.

The Compliance Notice will effectively take the form of a direction from the Inspector to the employer concerned to do or to refrain from doing certain acts. An employer will have a right of appeal to the Labour Court if he/she believes there is no basis for the Compliance Notice, i.e if he/she believes themselves to be compliant with the legislation in question. The Labour Court will hold a Hearing and take evidence from both the Inspector and the employer concerned before making a decision to affirm the Compliance Notice, order that it be withdrawn or withdraw the Notice and require the employer to comply with alternative directions. The employer can further appeal the Labour Court's decision to affirm the Compliance Notice to the Circuit Court. Failure to comply with a Compliance Notice that hasn't been appealed will be a Criminal Offence.

The fact that a Compliance Notice has been served on an employer will not act to prevent an individual worker from pursuing his/her statutory entitlements as against

the employer; nor will it operate to prevent an Inspector from prosecuting the employer under a relevant enactment.

Where an inspector has reasonable grounds for believing that a person has committed a "relevant offence" (defined in the section), the inspector may give the person a notice in writing ("*Fixed Payment Notice*") stating that the person has committed that offence. A fine of up to €2,000 is payable. The fine must be paid within 42 days; otherwise Prosecution. There is no right of Appeal to Labour Court, as in the *Compliance Notice* (Section 28) offence. The only apparent available defence to a Prosecution, under Section 36(3) is *for the defendant to prove that he or she has made the payment*.

This section must be unconstitutional as it empowers an Inspector, who is not a Judge, come to an adjudication of guilt where there has been no Court Hearing as required by the Constitution. This procedure will at some point be challenged by Judicial Revoiew to the High Court.

Participation of Counsel?

The writer would submit that previously there was an over-reliance by Solicitors on Counsel in the running of Employment Law dispute Hearings. This is particularly in view of the complicated nature of the substantive Employment Law legislation, which has not been simplified by the new procedures brought into existence by the Workplace Relations Act. Previously it was possible to simply "turn up on the day" before an Employment Appeals Tribunal with a Barrister in the hope that the matter would be resolved and, if not resolved, that it would be adjourned to enable the more active participation of the Barrister in the adjourned Hearing. That will no longer be possible in view of the obligation of the Parties to submit written Submissions/Statements in a timely manner in advance Hearings.

Now it will be necessary to "frontload" all of the work in advance of the initial Hearing before the Adjudication Officer. If Counsel is to be involved in this process this will add substantially to legal costs. Will Counsel be able to give the time and commitment within the strict time limits required by the Courts? Probably yes, but at cost!

Conclusion

We are now in very different times. A wise employer will not wait until a formal Claim arises before the Employment Courts. Incorrect procedures adopted by an employer in an Employment Law issue within the workplace will now always be subject to scrutiny by both the Adjudication Officer and the Labour Court. There will be no hiding place for an employer who chooses to ignore the law or guidelines in the hope that his representatives will manage to settle the employee`s Claim before it gets to a Hearing. Now, the procedures adopted by an employer within the workplace in an attempt to resolve the workplace issue will be subject to detailed scrutiny in written Submissions before the Court long before the Hearing date. Failure to follow the law or guidelines will be exposed – at severe cost to the employer.

While there will be the possibility of Judicial Review for those not satisfied with the fairness or otherwise of the procedures at the Hearing adopted by the Adjudication Officer, very few parties – employees or employers – will be able to afford a Judicial Review Application to the High Court.

Add to the above the fact that failure to abide by directions of Labour Inspectors and Decisions of the Employment Courts will leave the employer open to Criminal sanctions for the first time!

The writer has already referred to the strict time limits which the Courts will seek to impose on the parties to provide Submissions. Speed will be of the essence. Each party will need to know the relevant law and the "pros and cons" of their case. Will either party have the luxury of being able to instruct Counsel at an early stage of the case for this purpose?

Speed will be of the essence. An Advisor will be required who will be able to provide timely advice at reasonable cost. There will be cases where it will be necessary to instruct Counsel but there will be many cases where such cost will not be justified. There will however be many cases where an employer could run the risk of being reported to the Revenue Commissioners or losing valuable government contracts.

Many dangers lie ahead.

A wise employer will instruct a Solicitor specialising in Employment Law in the first instance. Forewarned is forearmed!

6th April 2016

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APPENDIX 1

Adjudication Services	
Regional Centre	**Area**
Galway	**Galway**, Clare
Sligo	**Sligo**, Mayo, Roscommon, Leitrim, Donegal, Cavan
Longford	**Longford**, Westmeath, Offaly
Limerick	**Limerick**, Kerry-North
Cork	**Cork**, Kerry-South
Tipperary	**Tipperary**, Laois, Kilkenny
Carlow	**Carlow**, Kildare-South
Wexford	**Wexford**, Wicklow, Waterford
Meath	**Meath**, Louth, Kildare-North, Monaghan
Dublin – Tom Johnson House and Lansdowne House	Dublin-North (1,3,5,7,9,11,15,17) This may change depending on room availability
Dublin – Davitt House	Dublin-South (2,4,6,6w,8,10,12,14,16,18,20,22,24) This may change depending on room availability