RECENT DEVELOPMENTS IN UNFAIR DISMISSAL

1. INTRODUCTION

The 1977 Unfair Dismissals Act introduced a revolutionary statutory framework. For the first time the law, in creating a statutory presumption that a dismissal was unfair unless or until the employer proved otherwise, recognised the proprietary interest of an employee in their job. This recognition was taken even further by providing for the possibility of an employee getting their job back if they were found to have been unfairly dismissed. All of these revolutionary rights could now be exercised in a far less formal and less expensive forum than the civil courts, thereby ensuring that legal redress for the loss of employment would no longer be the sole preserve of the well paid.

The political motivation behind the Act was not based purely on employee's rights. In the Dail Debates introducing the bill the Minister for Labour spoke about his hope that industrial disputes would lessen with the introduction of a statutory framework for dealing with dismissal. In 1972-1975 there had been 187 recorded industrial disputes involving dismissals counting for 250,000 days lost in industry. Clearly the intention of the legislation was to provide a framework in such disputes between individual employees and their employers could be resolved without recourse to collective action.

The legislation was designed to provide a cheap and quick remedy for employees. Costs are not awarded, presumably to encourage non-legal representation. However in practice there is legal representation in many cases. Cases now come on within 20
weeks in Dublin and within 51 weeks elsewhere. Procedures are less formal than in court, although the rules of evidence do apply. There is limited paperwork, no pre-trial discovery and, apart from applications for adjournments and witness summons, no preliminary issues before the hearing date.

The Unfair Dismissals Act of 1977 was amended by the Unfair Dismissals (Amendment) Act 1993. This introduced some changes particularly in relation to short-term and fixed term contracts, the importance of fair procedures and permitting a claim where the contract was designed to avoid tax as in the past such a contract was held to be illegal and incapable of enforcement. Where it is established that there has been a contravention of the tax or social welfare code, the Tribunal are obliged to refer the case to the Revenue Commissioners and/or the Department of Social Welfare.

2. UNFAIR GROUNDS FOR DISMISSAL

One of the most crucial sections of the act is section 6(1) which creates the statutory presumption that all dismissal are deemed to unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal, thereby placing the onus of proving the fairness of the dismissal on the employer.

Section 6(2) goes on to provide that a dismissal will be deemed to be unfair if it results wholly or mainly from certain matters including trade union membership or activity, the religious or political views of the employee, civil or criminal proceeding, actual or threatened, in which the employee will be a party or a witness against the employer, the race, colour, sexual orientation, age of the employee or the employee’s membership of the travelling community, pregnancy or breastfeeding or any connected matters or the taking of maternity or adoptive leave.

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2 The only option is to seek a witness summons from the Tribunal directing a named person to bring identified documentation with them to the hearing.
3 Section 8(12) as amended.
If the tribunal is satisfied that a claimant was dismissed on any one of those grounds, they will be deemed to have been unfairly dismissed. These “unfair” grounds rarely arise in practice as it is more common that the employer will argue that the employee was dismissed on one of “fair” grounds. Sometimes an employee may be able to satisfy the Tribunal that this was really a cover for what was, in fact, a dismissal for one of the automatically unfair grounds. An example of this can be seen in the case of Dowling –v- Cityjet Limited\(^4\). In that case the claimant had been dismissed allegedly for reasons of safety. She argued that the real reason for her dismissal was her age. The Tribunal found that the dismissal was unfair and in particular that the dismissal procedures adopted by the Respondent were “blatantly unfair”. They went on to find as follows:

“In light of what actually happened we were fully convinced that the contention made on her behalf that ageism had been a factor in her dismissal was well founded”.

3. POTENTIALLY FAIR GROUNDS FOR DISMISSAL

Section 6(4) provides that a dismissal shall not be unfair if it results wholly or mainly from one or more of the following:

(a) The capability, competence or qualifications of the employee.

(b) The conduct of the employee.

(c) The redundancy of the employee.

(d) The employee being unable to work or to continue to work without contravention of a statutory provision.

\(^4\) [2004] ELR 170.
Having provided for these specific grounds under which a dismissal may be deemed to be fair, section 6(6) then goes on to provide a catch-all ground allowing the employer to show that there were “other substantial grounds justifying the dismissal”.

In practice the most usual justifications that arise for a dismissal are capability, competence and conduct, or more commonly misconduct.

3.1 Capability

This usually applies to a dismissal on grounds of illness.

In principle an employee can be dismissed for not being available to work due to illness, even where they are on certified sick leave. However the employer must be able to show that they acted reasonably and with due regard to fair procedures.

An employee is not entitled to be given light duties and the employer is under no obligation to provide the employee with work suitable for them, although a failure to do so might be relevant in the context of considering the reasonableness of the employer's actions. In Rogers v Dublin Corporation the claimant was a labourer had been injured in a car accident and, after a period of certified sick leave, he was certified as fit to return to work but only to light duties. Judge Groarke in the Circuit Court held that there is no legal obligation on an employer to seek alternative work for an employee who is no longer medically fit to perform the duties for which he was originally employed. However, interesting, the judge did suggest that if he was wrong and there was a right to light work, then employee's injuries must be taken into account in seeking alternative work and once efforts are made by the employer to find alternative duties for him, the employer has fulfilled whatever duty they may have towards the employee. That would suggest that an employer must make some efforts to facilitate an employee in a different capacity before they can be lawfully dismissed for incapability.

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5 [1998] ELR 59
As with any dismissal, a dismissal for incapability must be done with due regard to fair procedures, even where an employee is absent on sick leave. The requirements of a fair dismissal on grounds of capability were outlined by Lardner J. in the High Court decision of Bolger v Showerings Ltd\(^6\):

"In this case it was the ill-health of the plaintiff which the company claimed rendered him incapable of performing his duties as a forklift driver. For the employer to show that the dismissal was fair, he must show that:

1. It was the ill-health which was the reason for the dismissal;
2. That this was the substantial reason.
3. That the employee received fair notice that the question of his dismissal for incapacity was being considered; and
4. That the employee was afforded an opportunity of being heard."

Thus, before an employee could be dismissed for incapability he would have to be informed that his future employment was being considered, that he was entitled to make any representations he wished, presumably including up to date medical assessment, and those representations would have be considered by the employer prior to any decision to dismiss. This applies even where the employee has been on long term sick leave. In McGrath v Irish Distillers Limited\(^7\) the claimant had been employed for twenty years until she was certified unfit for work in August 2004. In October 2005 the company wrote to her warning her that her dismissal was being considered and asking her to respond within seven days. The claimant rang the Chief Executive to set up a meeting and a mere few days later received a letter dismissing her with immediate effect. The Tribunal found that the procedure adopted by the company was unfair by reason of the fact that "undue haste" was used. As there had been no loss of earnings, the Tribunal could only award four weeks wages. However it is also open to the

\(^6\) [1990] ELR 184

\(^7\) UD471/2006.
Tribunal to award the claimant their job back as occurred in Long v Dunnes Stores\(^8\) where a claimant dismissed during sick leave was awarded re-engagement.

### 3.2 Competence

Competence usually relates to performance. As with capability, the employee will have to be informed that their future employment is under consideration and be given the right to make any representations they wish before a decision to dismiss can be made. This will frequently involve giving an employee a warning about their performance. A warning must be clear and unambiguous. It must be clear that it is a warning, why the warning is being given and how the employee is expected to improve. An employer may also be required to provide appropriate support to an employee, such as the provision of reasonable targets, additional training, back-up etc. The warning must also specify the consequences of a failure to improve, i.e. that their future employment will be at risk.

In the case of O'Donoghue v Emerson Electric (Ireland) Ltd\(^9\) the tribunal found that the warning upon which the employer relied in justifying the dismissal was totally inadequate:

"We are satisfied that the respondent, far from giving the claimant any clear warning or proper opportunity to improve the performance of the Irish plant to the satisfaction of the American management, did not express its dissatisfaction to him in clear terms. Isolated, passing comments on some details cannot be construed as warnings, or indeed expressions of dissatisfaction especially against a background of sometimes fulsome praise."

### 3.3 Conduct / Misconduct

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\(^8\) UD573/2007.  
\(^9\) UD, 1986.
A very great number of dismissals are based on an allegation of misconduct by the employee. In deciding whether or not a particular action or inaction justified a dismissal the tribunal will have regard to the reasonableness of the employer's decision to dismiss. That is a fundamentally different approach to tribunal asking whether or not they agree with the decision to dismiss or whether or not they would have dismissed the employee for the conduct in question. The real issue is whether or not the decision to dismiss was within the range of responses reasonably open to the employer in all the circumstances.

In *Hennessy v Read & Write Shop Ltd*<sup>10</sup> the tribunal set out their approach:

"*In deciding whether or not the dismissal of the claimant was unfair we apply a test of reasonableness to

1. the nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant, and

2. the conclusion arrived at by the respondent that, on the basis of the information resulting from such enquiry, the claimant should be dismissed.*"

The case of *The Commissioner of Irish Lights v Sugg*<sup>11</sup> illustrates how an employee's conduct can justify a dismissal. The nature of the claimant's work on a ship made it particularly important that if he was unable to attend at work that he would inform his employer in time to arrange a substitute. As a result of two incidents in 1989 when he failed to report to his ship, the claimant was warned that his behaviour would be monitored over a two year period. During that time he failed to report to his ship due to illness. He was unable to contact his employer in time due to his phone being broken. He was dismissed after a disciplinary hearing. The tribunal upheld his claim and awarded reinstatement. The employer appealed to the Circuit Court where the decision was overturned. On appeal to the High Court Morris J. held that the claimant knew the importance of attendance of the crew to ensure the smooth running of the ship. In

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<sup>10</sup> UD 192/1978

<sup>11</sup> [1994] ELR 97
those circumstances he found that a conscientious or reasonable employee would have made a greater effort to warn his employer that he may be unable to attend for duty. The dismissal was held to be fair.

Even a serious incident of misconduct might not justify dismissal where the context in which it occurred is taken into account. In *Casey v Daughters of Charity* \(^{12}\), the claimant was dismissed following a physical altercation with a fellow employee who was also dismissed in circumstances where the investigation decided it was not possible to determine who had initiated the incident. The respondent accepted that up to that incident, the claimant’s work performance and work history was exemplary. The Tribunal in finding that he had been unfairly dismissed found

"the response of the claimant to the incident in question was completely unacceptable and in the normal course of events would justify a dismissal. However there was a history of the claimant being bullied in his employment generally. Complaints were made and not adequately dealt with and the investigation into the incident completely ignored the circumstances and background to the situation and the respondent’s own bullying and harassment policy.

The claimant was dismissed as a result of the investigation of one incident and the Tribunal found that the dismissal was unfair."

However the level of compensation awarded (€20,000 in circumstances where the actual loss was in the region of €50,000) reflected the significant level of contribution which the claimant was clearly found to have made towards his dismissal.

The importance of permitting an employee a second chance can also be seen in the case of *Horan v Glambia Meats plc* \(^{13}\). The employer was criticised for having failed to warn the claimant of the consequences of his clocking offences of which the employer

\(^{13}\) [2002] ELR 205
had been well aware for some time prior to the dismissal. In those circumstances the
tribunal found that the clocking offence, which had been initially denied by the claimant
and later admitted to, was found not to constitute gross misconduct and the dismissal
was found to be fair. The claimant’s long and unblemished service also appears to have
influenced the tribunal in coming to its decision.

3.3.1 Conduct outside the workplace

Most cases of misconduct relate to conduct in the workplace or a failure to perform work
related duties. Dismissal on grounds of what goes on outside the workplace is more
problematic. It is possible that an employee can be lawfully dismissed because of their
personal conduct outside work but that conduct must be relevant in some way to their
employment and must have some sort of impact in the workplace or effect upon the
employment relationship. The law appears to require that conduct outside work must in
some way breach the duty of trust and confidence between the employer and the
employee in order to justify a dismissal.

The classic example in Irish law of a fair dismissal for conduct outside the workplace
was Flynn v Power\textsuperscript{14}. The claimant was a teacher in a Catholic convent school. She
was having a relationship with a married man and became pregnant. Her employers
asked her to end the relationship and when she refused, she was dismissed on the
ground that her conduct gave a bad example to her pupils. Costello J. held in the High
Court that a religious school were entitled to take into account their aims and objectives,
which differed from those of a secular institution, and to conclude that the claimant’s
behaviour amounted to a rejection of the religious tenets which the school had been
established to promote. In those circumstances the dismissal was held not to be unfair.

There is also British support for the proposition that a persons’ private life can justify
their dismissal, even where the conduct objected to is not carried on during work hours.
In Saunders v Scottish National Camps\textsuperscript{15} the dismissal of a homosexual man was upheld,

\textsuperscript{14} [1985] IR 648
\textsuperscript{15} [1980] IRLR 174
despite evidence that his work did not involve him coming into contact with young children and psychiatric evidence that he was no danger to young children.

3.3.2 Conduct in competition with the employer’s business

Where an employee’s conduct is in conflict or competition with the business of their employer, this may well be conduct relevant to the employer’s business and something that can be relied on by an employer in terminating an employee’s employment. In Mulchrone v Feeney 16 the Tribunal held that it was reasonable to dismiss an employee who insisted on working part-time for her employer’s competition, despite having been warned of the consequences of her behaviour. In Fitzgerald v Regsimm Ltd 17 the claimant had been employed as a printer. His brother, who had been employed in the same business, had left to set up in competition with the claimant’s employer. The employer found out that the claimant was a director of his brother’s business and immediately dismissed him. The claimant argued that he had no active part in the brother’s business and had only become a director at his mother’s insistence. The tribunal held that the dismissal was fair given the breakdown of trust and confidence between the parties and that they were satisfied on the evidence that the claimant had some level of active role in the brother’s company. However they also stated that the employer was not entitled to dismiss the claimant summarily and that he should have received his minimum notice.

A more recent decision suggests a significant onus on proof on the employer to prove that the work being done by their employee was in fact paid employment. In the case of McNamee v Wright Window Systems 18 the claimant was dismissed after he was witnessed working on a bog on a day he had taken unpaid leave to look after his child who had been hospitalised. The Tribunal, in determining the reasonableness of the decision to dismiss, asked if it was fair and reasonable for an employer to be allowed to dictate what an employee can and cannot do in the course of his unpaid leave? They

16 UD 1023/1982
17 [1997]ELR 65
18 UD888/2007
pointed out that the respondent had assumed that the claimant was paid for the work on the bog and held

"that the respondent can only dismiss the claimant in this process if it can establish that not only was the claimant engaged in alternative employment but was also remunerated for same."

The Tribunal decided that the dismissal was unfair and seemed to assume that the work being done was unpaid and placed the burden of proving that it was paid on the employer. That does seem to be a potentially onerous burden to satisfy given the likely financial arrangement that might be expected apply to this type of irregular work.

The general rule is that there must be some connection between the misconduct and the person’s employment. This can be seen in cases where an employee is dismissed as a result of criminal charges where the offence may or may not be connected to their employment.. In Noon v Dunnes Stores (Mullingar) Ltd19 the claimant had been convicted of assaulting a garda and being drunk and a danger to traffic. She had not informed her employer of the impending court case and had sought a day's holiday to attend at court. When the employer found out about her conviction she was dismissed for having failed to inform them and for her conduct that gave rise to the conviction. In finding that the dismissal was unfair and directing the employer to re-engage the claimant, the tribunal held:

"We do not think that the offences were sufficiently serious to warrant her dismissal. It was argued .. that the publicity in the local papers in relation to one of its employees would adversely affect the image and therefore the trade of the company. We are not convinced of that argument. While the publicity might not have done the company any good, we cannot see that it did any harm. Accordingly we find that the dismissal was unfair in all the circumstances."

19 UD, 1988
On the other hand in *Martin v Dunnes Stores (Enniscorthy) Ltd*\(^{20}\) the claimant was dismissed having being convicted of breaking, entering and theft. In upholding the dismissal the tribunal drew attention to the nature of the claimant’s employment:

"It is of great significance that the claimant was working for a retail store. Trust is an essential ingredient of any employee/employer relationship. In a retail store it is of paramount importance. The claimant’s involvement in the burglary of a neighbouring premises breached that bond of trust. Following the burglary, the employer was entitled to review his attitude to the claimant and, if, in his judgement he could no longer repose any trust in the claimant, he would be entitled to dismiss."

3.3.3 The Importance of Fair Procedures

Prior to the 1993 Amendment Act the Tribunal had developed a clear requirement of procedural fairness, i.e. that as well as a substantive reason for a dismissal, the process whereby a decision was made to dismiss must have been carried out fairly and with due regard to the rights of the employee.

This practice was put on a statutory footing by section 2(7), inserted by the 1993 Act, which provides that the reasonableness of the conduct of the employer in relation to the dismissal and the extent of compliance or failure to comply by the employer with agreed procedures will be considered in deciding upon the fairness of the dismissal.

In the case of *Pacelli –v- Irish Distillers Limited* [2004] ELR 25, the Tribunal placed the right to fair procedures in the context of each citizen’s Constitutional right to work. The Tribunal stated as follows:

\(^{20}\) UD, 1988
"The right to work is among the unspecified personal rights in the Constitution. In (State) Gleeson –v- Minister for Defence and Attorney General [1976] IR 210, Walsh J. stated that “to the right to work may be added the right to continue to earn a livelihood which can be taken away or forfeited only if the procedure followed is clearly lawful. Hence lawfulness of procedures are basic fairness of procedures is due and it may be argued, to all employees under the Constitution.”

The Tribunal went on to state as follows:

"The concept of fairness of procedures is judged by the objective test. “Fairness” cannot be stretched to facilitate or support a proposition which, having regard to the circumstances, warrants a certain sympathy on a moralistic front but legalistically must fail when one considers the merits of the case. The Tribunal must be impartial and this impartiality must be real and beyond question. The Tribunal’s function is to determine the issue on the basis of what it believes a reasonable, prudent and wise employer would have done having regard to the nature of the case”.

In that particular case the Tribunal found that the evidence established that the employer had carried out a thorough investigation, that the company had a reasonable belief and suspicion that the claimant was involved in wrongdoing and that the grounds existed to support their honest belief in the absence of an adequate explanation from the claimant. In those circumstances the Tribunal found that the dismissal was not unfair.

In practice the tribunal will tend to consider:

1. whether the matter was fully and properly investigated without undue delay;
2. whether the employee was made aware of all allegations and complaints that form the basis of the proposed dismissal;
3. whether the employee had adequate opportunity to deny the allegations or explain the circumstances before the decision to dismiss was taken, which includes the right to be offered representation and possibly even to call witnesses;

4. whether the employer believed the employee had conducted themselves as alleged;

5. whether the employer had reasonable grounds to sustain that belief.

An example of where a dismissal was found to be procedurally unfair can be seen in Preston v Standard Piping Ltd21. The claimant had been employed as a foreman installing copper pipes on a site. In October of 1997 two employees brought to the employer's attention that copper had been stolen from the site the previous Christmas. The employer carried out a stock audit and found a discrepancy in the level of stock. The container where the copper was kept was generally open during the day. The employer spoke to the two employees from whom the allegation had originally emanated who said they had seen the claimant with copper piping in his van. The claimant was summonees to a meeting. He was not informed of the agenda but assumed the meeting related to the next job. At that meeting the allegation of theft was put to the claimant with no details as to who had made the allegations or when the theft was alleged to have occurred. He was not given any opportunity to investigate the allegation himself. He was given the option of being dismissed or resigning. The claimant did not contact the employer after that meeting and claimed unfair dismissal.

The tribunal held that the respondent had failed to carry out a full and fair investigation in that they only spoke to the two employees and to no-one else nor did they carry out any investigative steps. The tribunal also found that the respondent failed to comply with the appropriate requirements of natural and constitutional justice. Compensation for unfair summary dismissal was awarded.

21 [1999] ELR 233
For an investigation to be full and fair, it must be heard by someone who has not predetermined the issue. That in itself does not necessarily require an employer to conduct an external investigation but it must be an investigation that is free of bias and of course that includes perceived bias. In the case of McNamee v Wright Window Systems the Tribunal found

"that the process to which the claimant was subjected was fundamentally flawed insofar as the appeal was ultimately heard by two parties one of whom had clearly made up his mind at the disciplinary stage and therefore should never have put himself forward as being a suitable party to hear the appeal."

If the Tribunal are satisfied that fair procedures were applied in relation to the investigation of the allegations grounding the dismissal, they will then consider whether the penalty of dismissal was appropriate. They will examine whether it was proportionate to the alleged misconduct, consistent with other punishments in the organisation and took into account any relevant mitigating circumstances. An example of what would otherwise have been a fair dismissal is the case of Bergin v Bus Atha Cliath22. The claimant was dismissed for having assaulted a fellow employee. The tribunal found that on the day of the incident the claimant had complained of being ill and had asked on five separate occasions if he could be relieved from duty. After the incident he produced a medical certificate showing that he had been taking a considerable amount of medication on the day in question. The tribunal found that these constituted mitigating circumstances showing that his problem was a medical one, and not one of conduct. The claimant was re-instated.

22 UD, 1987
Redundancy and the Law

For reasons beyond the scope of this paper, the High Court’s role in dealing with redundancy has been severely restricted and redundancy now lies primarily within the remit of the Employment Appeals Tribunal pursuant to claims of unfair dismissal.
A redundancy is a fair dismissal unless the employee can show that it was a sham redundancy or that they were unfairly selected for redundancy or that the dismissal was found to be in breach of fair procedures. Issues of compliance also arise in relation to collective redundancies.

1. The Genuineness of the Redundancy

In considering whether or not a redundancy is genuine the key test is that that it is the job that should have become redundant and not the person.

The definition of redundancy is found in Section 7(2) of the Redundancy Payments Act 1967 as amended:

"[A]n employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or

(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee has been employed (or had been doing before his dismissal) - to be done by other employees or otherwise, or

(d) the fact that his employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) - should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or

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23 Section 6(4)(c).
24 Section 6(3).
(e) the fact that his employer has decided that the work for which the employee has been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained."

Each of these five potential redundancy situations encompasses change. This was emphasised by the Tribunal in its decision in *St. Ledger v Front Line Distribution Limited*25.

"This means change in the workplace. The most dramatic change of all is a complete close down. Change may also mean a reduction in need for employees or a reduction in number. Definitions (d) and (e) involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions change in the job must be qualitative change. Definition (a) must involve, partly at least, work of a different kind, and that is the only meaning we can put on the words 'other work'. More work or less work of the same kind does not mean 'other work' and is only quantitative change. In any event the quantitative change in this case is the wrong direction. A downward change in the volume of work might imply redundancy under another definition, (b) but an upward change would not”.

The most obvious way of challenging a redundancy is to show that another person has been taken on to replace the supposedly redundant employee. An example is *McElroy v Floraville Nurseries Ltd*26 where the claimant worked in a branch of the respondent company that ceased trading and she was made redundant. However her job had also involved working in other areas of the respondent company. After she was made redundant the company recruited

25 [1995] ELR 160. This decision has been expressly followed in a number of determinations since including *Les Fever v The Trustees of Irish Wheelchair Association* ED 492/1995 and *Horley v Cork Yacht Club* [1997] ELR 225
26 [1994] ELR 91
other staff for positions that she could have filled. The tribunal held that a genuine redundancy situation did not exist as the other areas of work where she was employed and for which other employees were recruited continued.

There is an onus on the employer to establish redeployment options for the person who is to be made redundant rests on the employer. In the case of Gammell v Pall Ireland 27 the Tribunal found that no legitimate redundancy existed in circumstances where the employer was

"a progressive company that was restructuring and apparently expanding both its product line and its turnover and new personnel were being brought in to fill certain roles".

The Tribunal pointed out that the onus was on the employer to put proposals forward for the redeployment of the claimant and they completely failed to do this. Therefore the claimant had been unfairly dismissed.

Even where there is evidence of a downturn that would suggest the existence of a genuine redundancy, evidence of interpersonal difficulties can persuade the Tribunal to find that a person who is being made redundant has in fact been unfairly dismissed. In O’Connell v Salmon and Others 28 the claimant had been employed as an architect since 1996. In May 2007 he was made redundant due to a significant downturn in turnover. He maintained there was plenty of work going on at the time of his redundancy. Various difficulties existed between the claimant and the respondent and ultimately, although not by a unanimous decision, the Tribunal determined that the claimant was unfairly dismissed. In particular the Tribunal found there had been a lack of communication between the claimant and the respondent over a protracted period up to the date of his dismissal which they found “had a severe impact on the claimant’s relationship with the partners”. Whilst the reasoning behind the finding of unfair dismissal is

27 UD1057/2007
28 UD1151/2007
not at all clear from the determination, this does seem to be a cause and effect type of decision, i.e. whether or not a genuine redundancy situation was in place, was it that or the difficulties which gave rise to the decision to terminate the claimant’s employment.

A clear example of where a company failed the cause and effect test occurred in Edwards v Aerials and Electronics (Ireland) Limited. The claimant was the managing director of an Irish subsidiary of a company based in Belfast. It was established that the Dublin company was experiencing losses. The company claimed that this is what justified the dismissal of the claimant as a redundancy as the company was now to be run from Belfast. However the claimant gave evidence of his various difficulties including disagreements at board level and issues regarding attitude and disregard of his authority. The Tribunal were satisfied that there were “major doubts” as to whether the redundancy was genuine in spite of the evidence of the Dublin office losing money. In applying a clear cause and effect type test, the Tribunal said:

"We recognise that the function of a full time managing director no longer exists and we must direct our minds to the cause and effect relationship between redundancy and dismissal... In other words, was the reorganisation a cause or a consequence? On balance, we are inclined to the latter view”.

A similar situation where a senior employee was made redundant as a result of taking out an entire layer of management arose in O’Brien v Smurfit (Ireland) Ltd. The employer attempted to justify the redundancy on the basis that the position in question was a layer of management that could be eliminated without affecting the trading of the company. The claimant argued that there had been

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30 [1997] ELR 74
a campaign against him and that there was a position which he could have been offered. The tribunal concluded there was no genuine redundancy situation and that the employer had failed to investigate the claimant’s suitability for another available position. If any training was required for that position the Tribunal determined it would not have been too onerous for the company to have provided it. Compensation of £40,000 was awarded.

2. Fair selection for Redundancy

Section 2(3) of the 1977 Act provides that a claimant who has been unfairly selected for redundancy has been unfairly dismissed. In order to prove an unfair selection it must be shown firstly that the circumstances constituting the redundancy applied equally to one or more employees in similar employment with the claimant who were not made redundant and secondly that the reason for the redundancy was for one of the prima facie unfair reasons outlined in Section 2(2) or was unjustifiably in contravention of an agreed procedure relating to redundancy.

The claimant was held to have been fairly selected for redundancy in Murphy v MPGWU\textsuperscript{31} where the practice of LIFO (last in first out) was upheld as a proper procedure for choosing redundancies. The claimant unsuccessfully argued that the real reason for his redundancy was the fact he had previously litigated against his employer, which would have satisfied the prima facie unfair grounds of Section 2(2) but was held not to have been the real reason for the redundancy where the employer had applied a fair procedure for selection.

\textsuperscript{31} [1994] ELR 15
The Tribunal appear to take a wide approach to the concept of proper procedures for choosing candidates for redundancy. In a number of decisions in the recent past they appear to have imposed an obligation of fair procedures on how this selection is carried out, even there is no express reference to that requirement in the legislation. An example of this can be seen in the case of Robert Power where the Tribunal found as follows:

"The Tribunal considered that the claimant was unfairly dismissed as although it is satisfied that a genuine redundancy situation existed, the Tribunal unanimously determines that the procedure for selection for redundancy was wholly unfair..... Whilst the Tribunal accepts that a company is entitled to select candidates for redundancy, a company must act fairly and conscientiously in dealing with those candidates regarding selection."

3. **Fair Procedures in Redundancy**

There are two components to a fair procedures argument in challenging a redundancy as an unfair dismissal. Firstly the governing principle of Act is set out in Section 6 (1) which determines that a dismissal is unfair.

"*Unless having regard to all these circumstances, there were substantial grounds justifying dismissal*".

Section 6 (4) which justifies a redundancy as a fair dismissal is expressly subject to sub-section 1.

The Tribunal will also actively have regard to Section 6 (7) of the Act which entitles the Tribunal to take account of the reasonableness of the employer’s conduct in relation to the dismissal.
The Tribunal expressly relied on Section 6 (1) of the Act in terms of requiring substantial grounds justifying dismissal in the case of Phillips v International Health Benefits (Ireland) Limited\(^{32}\). The redundancy pursuant to which the claimant was dismissed was found to have been genuine and therefore was a substantial ground justifying the dismissal, in spite of alleged lack of consultation with the claimant.

Since that earlier approach to justifying a dismissal on grounds of redundancy, Section 6(7) of the Act has been far more relevant in cases where a respondent has been found not to have discharged the burden of proving that the dismissal was fair in all the circumstances.

Section 6(7) was highly relevant in the Tribunal’s decision in Barton v Newsfast Freight Limited\(^{33}\) where the Tribunal expressly stated that the claimant would have failed had it not been for it. Whilst the Tribunal accepted that the company was experiencing trading difficulties, they found the dismissal to have been unfair given the manner in which the employer had kept the claimant in the dark and had handled the dismissal badly.

The importance of fair procedures in selecting an employee for redundancy is very apparent in the recent decision of Sheehan and O’Brien v Vintners Federation of Ireland Limited\(^{34}\). The claimants had been employed by the respondent as regional representatives for twelve years. Due to falling membership and concerns about work practices of regional representatives, the respondent decided to re-organise its work practices and make the claimants’ positions redundant. The claimants had put forward proposals which involved rationalisation and savings to the respondent but would have allowed them to be

\(^{32}\) UD 331/1993
\(^{33}\) UD 169/2005
\(^{34}\) UD787 and 788/2007, Determination of 13 June 2008
retained as employees. However the respondent instead decided to create a new position but declined to consider the claimants as candidates for it. The Tribunal stated very clearly that they were critical of

"the manner in which the respondent dealt with the redundancy situation in these cases having regard to the ages of the claimants and their length of service. The Tribunal ultimately also regrets that the respondent did not give any genuine consideration to the proposals put forward by one of the claimants (after consultation with the other claimant and another employee) to resolve difficulties that the respondent was encountering."

In deciding why these deficiencies made the process unfair, the Tribunal had particular regard to the provisions of Section 6(7) of the Act which entitles the Tribunal to take account of the reasonableness of the employer’s conduct in relation to the dismissal. The Tribunal concluded:

"The respondent acted unfairly in failing to consider earnestly the claimant’s proposals regarding the re-organisation of the work which would have realised significant savings. Furthermore, the respondent’s failure to properly consider either of the claimants for the new Organisation Development Officer role was also unreasonable. Accordingly, the Tribunal believes that the dismissals were unfair."

The consequences of a finding that a respondent employer has failed to act fairly and reasonably in relation to redundancy can be seen in the decision of the determination in O’Kelly v Exsil Limited35 where a remedy of reinstatement was awarded. The respondent claimed to have suffered a downturn in business. This in itself was not disputed by the claimant although in making his case, he emphasised the manner in which he was told of his redundancy. He had been very busy up to the day on which he was told he was to be made redundant.

35 UD 1086/2007
which he said came totally out of the blue. He said the selection criteria was not discussed and there was no discussion on alternative positions in the company. The company accepted that there had been no meetings with the claimant, no prior indication of the financial difficulty in which the company found itself, no discussion in relation to the criteria used for selecting the claimant or any discussion with the claimant about his suitability for an alternative position. In those circumstances the Tribunal stated it was not satisfied that the respondent had “acted fairly and reasonably when addressing the need to reduce the number of employees”. Significantly, whilst the claimant had in fact obtained alternative employment albeit at a lower salary, the Tribunal awarded the claimant his preferred remedy of reinstatement. Whilst the determination is unclear on the scope of the remedy awarded, one would assume that reinstatement involved payments to the claimant of his full salary during the period since the termination even though he had been in receipt of other albeit reduced income during that period of time.

The prospect of an employer being compelled to take an employee back and pay back salary having purported to make them redundant in circumstances where it is accepted there was a need to cut costs, is going to cause particular concern for many employers particularly those who chose to make their employees redundant with scant regard to the employee’s right to fair procedures, consultation and consideration of potential alternative positions.

4. Collective Redundancies

Very specific obligations are imposed on the employers where a collective redundancy takes place. The Protection of Employment Act 1977\(^{36}\) requires an

employer to observe certain procedures in particular an obligation to engage in consultation, where a certain number of workers are dismissed within a certain period of time.

The Act defines collective redundancies as occurring where in any period of thirty consecutive days, the number of such dismissals is

   a. At least 5 in an establishment normally employing more than 20 and less than 50 employees;
   b. At least in 10 in an establishment normally employing at least 50 but less than 100 employees;
   c. At least 10% of the number of employees in an establishment normally employing at least 100 but less than 300 employees; and
   d. At least 30 in an establishment normally employing 300 or more employees.

An obligation on an employer in relation to a collective dismissal is to engage in consultation at the earliest opportunity and in any event at least thirty days before the first dismissal takes effect. Section 9 (1) requires an employer to initiate consultation with the employee’s representative. Consultations are deemed to include the following matters pursuant to Section 9(2)

   "(2) Consultations under this section shall include the following matters –

   (a) the possibility of avoiding the proposed redundancies, reducing the number of employees affected by them or mitigating their consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or re-training employees made redundant
   (b) the basis on which it will be decided which particular employees will be made redundant."
(2) Consultations under this section shall be initiated at the earliest opportunity and in any event at least thirty days before the first dismissal takes effect”.

Section 10 requires the employer to supply the employee’s representatives with “all relevant information relating to the proposed redundancy”. The information to be supplied “shall” include the following to be given in writing pursuant to Section 10(2)

(2) Without prejudice to the generality of the subsection (1), information supplied under this Section shall include the following, of which details shall be given in writing –

(a) The reasons for the proposed redundancies.
(b) The number, and description of categories, of employees whom it is proposed to make redundant,
(c) The number of employees and description of categories, normally employed, and
(d) The period during which it is proposed to effect the proposed redundancies,
(e) The criteria proposed for the selection of the workers to be made redundant, and
(f) The method of calculation any redundancy payments other than those methods set out in the Redundancy Payments Acts 1967 – 2003 or any other relevant enactment for the time being in force or, subject thereto, in practice.

The employer is also required under Section 10 (3) to supply the Minister with copies of all information supplied in writing under sub-section 2.
The Act repeatedly refers to consultation and does not mention negotiation. However very significantly, the European Court of Justice now seem to be of the view that an obligation to engage in consultation also obliges the employer to negotiate. In its decision in Junk v Kuhne37 the Court came to that conclusion because the Directive (pursuant to which the 1997 Act was implemented) refers to consultation "with a view to reaching agreement". Therefore it would appear that the statutory requirement to consult is a lot more than a requirement to inform the employees or the employees’ representative what is happening but involves a proactive requirements to reach agreement by way of negotiations with the employees and other representatives not only about the conditions under which the redundancies will take place, but also the actual decision to make them redundant.

The position is also significant in confirming that a contract of employment can only be terminated by reason of redundancy after the conclusion of the consultation/negotiation procedure. Any notice to which an individual employee is entitled can only begin to run after the thirty day consultation period pursuant to the 1977 Act has expired.

Thus it would appear that it is simply not open to an employer, at least in a collective redundancy situation, to inform its employees that they have been made redundant. The consultation requirement means that they must be advised that redundancies are contemplated, or something similar, and that consultation is now being entered into with a view to deciding what is to happen in relation to the employee’s future employment.

In practice, this can mean confused employees complaining of a lack of clarity as to their employer’s intentions. However in reality, this represents at least some

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37 Case C-188/03  Case [2005] IRLR 210
attempts now being made by employers, particularly those embarking on collective redundancies, to be seen to engage in genuine negotiation and to have due regard to their employee’s rights to fair procedures, before a final decision is made to terminate the employment by reason of redundancy.

6. Redundancy and Equality

A redundancy may also be challenged as a discriminatory dismissal under the Employment Equality Acts 1998-2004. Issues are increasingly emerging of a protected group such as non-national employees, or employees recently returned from maternity leave being unfairly selected for redundancy in a manner that could constitute unlawful discrimination. Awards of compensation in excess of actual loss of earnings can be made by the Tribunal to include compensation for the distress of having been dismissed in a discriminatory manner.
Employment Equality Litigation

I. Legislation

• Employment Equality Act 1998-2004
• Part-time Workers Act 2001
• Fixed Term Workers Act 2003
• Agency Workers- Draft Legislation
• Maternity Protection Acts 1994-2004
• Pensions Act 1990 Part VII

II. Fora

• Equality Tribunal

The Equality Tribunal (also known as the Office of the Director of Equality Investigations) is an impartial body set up by law to decide or mediate complaints under equality legislation. The head of the Tribunal is Melanie Pine, the Director of Equality Investigations. The staff of the Tribunal also includes Equality Officers, who consider and decide cases brought under equality legislation, and trained mediators.

The Equality Tribunal deals with complaints arising under the Employment Equality Acts 1998-2004. It is situated on Clonmel Street, and the bulk of the hearings are here, although it does also sit at various locations around country.

Its functions are quasi-judicial. It hears or mediates claims of unlawful discrimination under the equality legislation. A Tribunal mediator will facilitate parties to reach a mediated agreement which is legally binding. Where parties object to mediation, a case will be heard by a Tribunal Equality Officer, who will hear evidence from both parties before issuing a legally binding decision. Where the Tribunal upholds a claim of discrimination, it awards redress and it can direct a person to take a specific action.

• Rights Commissioner
With regard to employment equality litigation, the Rights Commissioner has jurisdiction to deal with complaints under the Fixed Term Workers and Part-Time Workers Acts, as well as the Maternity Protection Acts. The Rights Commissioner also has other jurisdictions in relation to other employment legislation, which will not be dealt with tonight. The Rights Commissioner is part of the Labour Relations Commission and is situated in Haddington Road. As with the Equality Tribunal, hearings are frequently held around the country...

- **Circuit Court**

The Circuit has jurisdiction of first instance solely with regard to gender equality claims. A person who believes that he or she has been discriminated against on grounds of gender can therefore elect whether to bring a claim to the Equality Tribunal or straight to the Circuit Court in first instance.

The Circuit Court has the jurisdiction to enforce decisions of the Equality Tribunal or Labour Court if a Respondent fails to comply with any order made.

- **Labour Court on Appeal**

The Labour Court deals with appeals from decisions of the Equality Tribunal and Rights Commissioner under the Fixed Term Workers Act, the Part-time Workers Act and the Maternity Protection Acts, and with the enforcement of decisions of the Rights Commissioner.

- **High Court on Point of Law**

Following on from appeal to the Labour Court, there is an appeal to the High Court on a point of law.

The High Court also has jurisdiction to hear appeals from the Circuit Court if it has operated as a Court of First Instance in relation to gender discrimination.

- **Supreme Court on a Point of Law**

There is an appeal from any decision of the High Court on a point of law to the Supreme Court.

III. Anatomy of a Complaint – Equality Tribunal

- **Jurisdiction**

The Equality Tribunal has jurisdiction to investigate complaints under the Employment Equality Act, 1998-2004 which, covers employees in both the public and private sectors as well as applicants for employment and training. In addition the Equality Tribunal has jurisdiction to investigate complaints under the Equal Status Act 2000-2004. However, this Act is concerned with the provision of goods and services to the general public, rather than employment law issues, and thus will not be considered in this paper.
The Act outlaws discrimination in work related areas such as pay, vocational training, access to employment, work experience and promotion and dismissal. Cases involving harassment and Victimisation at work are also covered by the Act. The publication of discriminatory advertisements and discrimination by employment agencies, vocational training bodies and employment agencies, e.g. trades unions and employer associations, is outlawed. Collective agreements may be referred to the Director of Equality Investigations for mediation or investigation.

The nine grounds on which discrimination are as follows:

- Gender
- Marital status
- Family status
- Sexual orientation
- Religious belief
- Age
- Disability
- Race colour, nationality, ethnic or national origins
- Membership of the Traveller community

The Employment Equality Act, 1998 protects a person against being penalised in any way because they have:

- Made a complaint to the Tribunal about possible discrimination
- Given evidence in someone else's complaint
- Lawfully opposed unlawful discrimination

Penalising a person in any of these ways is called victimisation and this in itself is a prohibited form of discrimination under the Act.

Prior to the Equality Act 2004 complaints of discriminatory dismissal or victimisatory dismissal made could only be referred to the Labour Court. However, from 18th July 2004, all new complaints of discriminatory dismissal or victimisatory dismissal under equality legislation had to be referred to the Equality Tribunal. Regarding dismissal complaints referred to the Labour Court before 18th July 2004, where the Labour Court had begun investigating the complaint on 18th July 2004, the complaint will be completed by the Labour Court. Where the Labour Court had not begun the investigation on the 18th July 2004, the Equality Act 2004 provides that the Labour Court transfer the complaint to the Equality Tribunal. Although most cases referred to the Labour Court prior to 18th July 2004 are probably now dealt with, there may be some cases still to be completed. In such a situation the Labour Court will be hearing the complaint as a complaint of first instance.

- Time Limits
A Complainant who feels they have been discriminated against may refer a complaint to The Equality Tribunal within 6 months of the occurrence of the act of discrimination, except where the complaint is one of equal pay. The Director of the Tribunal may extend this to a maximum of 12 months, if the complainant shows that there is reasonable cause to do so. It is the date of receipt, not the date of posting which is the date of referral of the claim. From April 2006, the Equality Tribunal has permitted claim forms to be sent in online.

The issue of what is a reasonable cause for extension of time was considered in Department of Finance v. Irish Municipal, Public and Civil Trade Union (IMPACT); Civil and Public Service Union (CPSU); and Public Service Executive Union (PSEU) [2005] 16 E.L.R. 6. Laffoy, J, in setting aside a decision of the Labour Court to extend time, set out the applicable principles as follows:-

“In an application to extend time for bringing a claim it is for the applicants to show that there are reasons which both explain the delay in bringing a complaint under the Act and which afford an excuse for the delay.

The Court must be satisfied that the explanation offered is reasonable, that is to say, it must be agreeable to reason and not be irrational or absurd. This is essentially a question of fact and degree to be decided by applying common sense and normally accepted standards of reasonableness. The standard is an objective one, but must be applied to the facts known to the applicants at the material time.

Where reasonable cause is shown the Court should go on to consider if there are any countervailing factors which would make it unjust to enlarge the time-limit. Factors to be taken into account include the degree of prejudice which may have been suffered by the respondent in consequence of the delay, the length of the delay, whether the applicant has been guilty of culpable delay and whether the applicant has a good arguable case on its merits.”

Pleadings

A complaint is originated by lodging a Form EE 1 to the Equality Tribunal. This will then be copied to the Respondent by the Equality Tribunal. It is also important to note that a Complainant may also send in a Form EE 2 directly to the Respondent, which is a request for more information. The Equality Tribunal has a good website www.equalitytribunal.ie from which forms can be downloaded or sent in.

The Employment Equality Acts 1998 to 2004 provide at section 76 that:

- where a person thinks they may have been discriminated against, or treated in any other way which is unlawful under the Employment Equality Acts,
- that person (the “complainant”) may, if they so wish,
- write to the person or organisation whom they think may have treated them
unlawfully, (the “respondent”)

• asking for relevant information to help them in deciding whether they should refer a case to the Equality Tribunal or to help them in formulating and presenting their case.

Form EE.2 contains the form for a complainant to use in asking for this information. Some types of information are excluded. According to Section 76, information is “relevant” if it is:

• information about the respondent’s reasons for doing, or omitting to do, anything relevant
• information about any relevant practices or procedures of the respondent
• information (other than confidential information, or information about the scale or financial resources of the employer’s business) about the remuneration or treatment of other persons who are in a comparable position to the complainant,
• any other information which is not confidential, and which it is reasonable for the complainant to ask for in the circumstances.

Confidential information means “any information which relates to a particular individual, which can be identified as so relating, and to the disclosure of which that individual does not agree.”

The respondent can reply using Form EE.3. While the respondent is not obliged to reply, Section 81 of the Acts provides that if they do not reply, or if their replies are false or misleading, this may be taken into account in deciding the matter.

Once a complaint has been accepted for a hearing the Tribunal will copy the complaint form and any other information received from either party, to the other side. The option of mediation of the complaint is then automatically put to both sides. If either party objects then mediation will not take place. If mediation is accepted, the matter will be referred the matter to an Equality Mediation Officer). Otherwise it is referred to an Equality Officer for a formal hearing.

In my experience, the biggest mistake made by employers in dealing with employment claims before the Equality Tribunal, is to send in a letter by way of reply offering some initial excuse for the treatment complained of. Employers will often also do this if they get a letter from the Equality Authority. The reason that this is a mistake, is that this initial letter is often sent in a panic, without thinking the matter through and getting proper advices. The initial reply may set something out which will later have to be denied, or stepped back from, and this can lead the Tribunal ultimately to conclude that the employer is not fully credible. The best approach is to send nothing in until proper legal advice has been sought and until the matter has been investigated in the workplace.

• Submissions and Replies

Written submissions are sought from both sides before a hearing takes place. Great emphasis is placed on the written submission and they tend to be reasonably long,
setting out the case and legal arguments in full and referring to case law. Relevant documentation is attached. It is worth taking the time to draft a good set of submissions. In practice these are very thoroughly read by the Equality Officer and a good submission can go some way to winning the case.

Once the Complainant’s submission are received, they are copied to the other side and response sought within a time limit of 42 days. In practice extensions to this time limit is sought and obtained. Submissions are required to be in well in advance. Bringing in documentation on the day of the hearing risks being exposed to the wrath of the Equality Officer, and objections to the other side. On occasion, a further hearing day will be granted to the other side if extensive documentation is brought in at that stage.

- Format of Oral Hearing

The oral hearing is reasonably formal with both sides place a room on opposing sides. Hearings are in private. The conduct of the hearing is up to the Equality Officer. An inquisitorial approach is adopted. The Equality Officer will therefore come with a detailed set of questions of their own to put to the parties. It is only when they have finished with their own questions that the parties, Complainant or Respondent, will be allowed to give any additional evidence which they wish, or put questions to the other side.

The stated ‘policy’ of the Equality Tribunal is not to permit cross-examination. This means that aggressive questioning of the complainant or witnesses will not be allowed. The extent to which questions can be put to the other side vary with each equality officer, but generally the Equality Officer will allow questions to be put, but may stop these if he or she feels that it is turning into a cross-examination. The Equality Tribunal is not bound by ordinary rules of evidence. Thus matters which, strictly speaking, are hearsay will often be heard, with the Equality Officer taking his or own view of the reliability of the evidence.

It is common to conclude with closing legal submissions, particular in complex cases. Legal representatives will usually make these submissions, which can involve complex legal argument on EU law.

The conduct of the hearing can be quite fluid, and it can be difficult for those without experience to get used to, as the opportunity to put forward your client’s evidence is not automatically presented to you, and has to be taken when the opportunity presents.

- Representation

Legal representation is not required, but it is unusual for a complainant or respondent not to have some form of representation, whether that is by way of union, solicitor or counsel. Representation is to be highly recommended as the legislation is complex and requires a person with some knowledge in the field to make the best case or defence. Sparing on the representation can be a false economy unless the claim is really a low value one, as the awards can be quite high.
• Appeal

Decisions may be appealed to the Labour Court within 42 days from the date of the Decision. The Appeal is a full re-hearing. Separate submissions must be filed with the Labour Court.

If a Decision or Mediated Agreement is not complied with, it may be enforced through the Circuit Court.

• Level of Awards

Where the Tribunal finds that there has been discrimination s/he may require that a particular course of action be undertaken and/or award:

In an equal pay case, it can award equal pay and up to three years' arrears of pay from the date of the claim.

In other cases equal treatment and compensation of up to a maximum of two years pay (or €12,697 where the person was not in receipt of remuneration at the time of referral of the claim).

In gender equality cases the Tribunal may award interest on any compensation awarded.

In practice awards are not commonly made of two years pay. Awards can be high, and it is important to realise that awards are not linked to loss of wages, as with the EAT, but can taken into account distress suffered. In its jurisprudence the ECJ has repeatedly stated that the remedy decided upon by a Member States to penalise discrimination between men and women, where it is compensation, that compensation must be such as to guarantee real and effective judicial protection, have a real deterrent effect on the employer and must in any event be adequate to the damage claimed. By implication, these principles apply to other forms of discrimination as well.

The levels of awards tend to be in the following range

- on average €3,000 - €5,000 for discrimination in access to employment or promotion, sometimes accompanied by appointment to the position or promotion to the position
- for discrimination, €15,000- €20,000,
- for more serious cases of discrimination €30,000 upwards
- discriminatory dismissal – in the range of €7,000-€60,000 depending on salary
- where victimisation is involved, awards are higher, between €40,000 and €120,000 as this is seen as a deliberate attempt by employers to prevent the operation of the equality legislation.

One of the highest awards ever was made in McGinn v Board of Management of St Anthony’s School, DEC E-2004/32 €10,000 for discrimination and €117,000 plus interest
was awarded for victimisation. The Equality Officer stated that it was the worst case of victimisation she had seen. On appeal to the Labour Court, it was agreed that the total award should be varied to about €27,000. DEC E-2004/32

Amounts for discriminatory dismissal can be based on loss of salary, but not necessarily so. This is apparent from Kavanagh v Aviance UK Limited DEC E-2007-039. In that case, which involved both discrimination and discriminatory dismissal the Equality Tribunal decided as follows:

“In the circumstances of the above and in accordance with Section 82 of the Employment Equality Acts, 1998-2004 I hereby order that

- Aviance Limited pay Mr. Kavanagh the sum of €65,000 in respect of loss of earnings due to the discriminatory dismissal. Mr. Kavanagh's annual salary (including shift pay) was in excess of €33,000.

- Aviance Limited pay Mr. Kavanagh the sum of €60,000 by way of compensation for the stress suffered as a result of the discrimination and the failure to provide reasonable accommodation. The amount of this award is to reflect the fact that Mr. Kavanagh had every expectation of continuing in this employment and the difficulty he has since encountered in obtaining alternative employment. It is also in accordance with Article 17 of the Framework Directive, which states "sanctions must be effective, proportionate and dissuasive".”

On the other hand, discriminatory dismissal can be awarded as little as €7,000 in Wynne v Irish Crane and Lifting Ltd DEC E-2007/42 in an award which seems to have little relation to loss of earnings. The Complainant was laid off due to a downturn in business, which appears to have been genuine on the part of the employer, but was done on a discriminatory basis due to the age of the Complainant in circumstances where a complainant has only been working a short time. The Complainant was on a wage of €15.50 per hour. The Employment Appeals Tribunal, which is much more clearly linked to loss of earnings, may well have made a higher award in relation to what was effectively a salary of approximately €30,000 per year.

It is important to realise that the Equality Tribunal can make separate awards for discriminatory dismissal and discrimination, even where this arises out of the same set of fact. Thus in Kavanagh, the Complainant got the maximum of two years salary for both heads of complaint.

IV. Anatomy of a Complaint – Rights Commissioner

• Jurisdiction
As stated above, the Rights Commissioner has a wide jurisdiction in relation to a wide variety of employment legislation. What this paper is concerned with is the equality jurisdiction. This is exercised by the Rights Commissioner in relation to contraventions of the Fixed Term Workers Act, Part-Time Workers Act and the Maternity Protection Act.

- **Time Limits**

A complaint must be lodged within 6 months of the alleged contravention of the Act. This can be extended to 12 months for reasonable cause. The principles applicable to the power to extend the time were considered in the Labour Court in Cementation Skanska v Carroll DWT38/2003. In that case the Labour Court made it clear that what it meant by ‘reasonable cause’ was that what was reasonable in the ordinary meaning of the word

“The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd.”

The burden of proof was on the claimant to show that there were reasons to explain the delay and excuse it.

This language of the Labour Court mirrors that of Laffoy J in Department of Finance v Impact, and indeed it would be strange if there were two separate interpretations of the phrase ‘reasonable cause’. For that reason, decisions on what is reasonable cause under the Employment Equality legislation should be applicable to what is reasonable cause under the Fixed Term and Part-time Workers Acts.

- **Pleadings**

A complaint is initiated by lodging the relevant form with the Rights Commissioner Service which is available to download from the website of the Labour Relations Commission at [www.lrc.ie](http://www.lrc.ie). The initial form is simple enough but care must be taken to ensure that the correct employer address is listed. The Respondent is notified by the Rights Commissioner of the fact of a complaint made and then the date of hearing. Unlike litigation under the Unfair Dismissals legislation, the jurisdiction of the Rights Commissioner is compulsory.

- **Submissions and Replies**

In the normal course of events it is not usual to make written submissions to the Rights Commissioner. However, with complaints under the Fixed Term Workers or Part-Time Workers legislation, the factual and legal positions can be more complex, therefore it is more common to make written submissions. The Rights Commissioner service itself states that written submissions are not needed but that they are helpful to the participants and the Rights Commissioners in order to focus on the relevant points. The Service states that a submission helps the Rights Commissioners to have a record of the statements made at the hearing when considering his/her recommendation or decision following the hearing.
In practice, with complaints under the 2001 and 2003 Acts, it is common is to make at least a short submission setting out the main points and appending relevant documentation. Depending on the complexity of the case and on whether the Complainant is represented, submissions can on occasion be quite detailed. Clearly it assists the ultimate presentation and winning of one's case to have the legal arguments set out in writing, particular as the Rights Commissioner will not usually make a decision on the day. Again, best practice would suggest putting these submissions in advance. If the submission is complex, or there is a good deal of documentation to be considered, the Complainant or Respondent risks having the matter put down for another day to give the other side an opportunity to deal with the submissions and documentation and make any reply. If submissions from a complaint are received by a Respondent, again it is advisable to put in a written response, also in advance if possible.

- **Format of Oral Hearing**

Hearings before a Rights Commissioner take place in private - except where the dispute has been referred under the Payment of Wages Act, 1991. Hearings under that Act are generally held in public.

The hearings are stated by the Rights Commissioner to formal but not adversarial, with each side is given the chance to fully present their case. However, in practice a hearing before the Rights Commissioner can take almost any term. In my experience it is entirely a matter for the Rights Commissioner to decide how to conduct a hearing. The basic approach of the Rights Commissioner is to attempt to arrive at a resolution of the dispute, if that is possible between the parties, and in whatever form that resolution might take. It can be quite common for the Rights Commissioner to attempt to reach a settlement of the dispute between the parties, and even to break up the parties to perform a mediatory role. On the other hand, the Rights Commissioner can let the hearing run in more traditional manner.

Commissioner will not be bound by rules of evidence although will have regard thereto and cross-examination of witness does not generally take place. Parties appearing before the Rights Commissioner should therefore be prepared for almost any eventuality.

- **Representation**

As with any employment tribunal, there is no requirement to be represented before the Rights Commissioner. This is due to the fact that the purpose of this service was to enable the ordinary litigant to bring their complaint without being required to engage legal representation. While legal representation by counsel has been unusual in the past in this forum, this is changing. The complexity of law governing the rights of fixed-term and part-time workers has lead most litigants to brief solicitor and counsel in these matters.

- **Appeal**
A decision of a Rights Commissioner can be appealed to the Labour Court within six weeks of the date on which the decision was communicated to the parties. There is a further right of appeal on a point of law only to the High Court.

- **Level of Awards**

The Rights Commissioner has the power under section 14(2) of the Fixed Term Work Act to make the following awards:

(a) declare whether the complaint was or was not well founded;

(b) require the employer to comply with the relevant provision;

(c) require the employer to re-instate or re-engage the employee (including on a contract of indefinite duration);

(d) require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 2 years remuneration in respect of the employee's employment;"

Section 16 of the Part-time Workers Act provides for similar powers, apart from the power to order reinstatement or reengagement.

The Rights Commissioner therefore has extensive powers to award compensation and/or reinstatement or reengagement. With regard to fixed term workers, the most significant power is to provide a temporary employee with a contract of indefinite duration. The effect of a finding that employees are entitled to a contract of indefinite duration can have huge implications for an employer is the finding applies to a number of employees. This is particularly the case where the employer is the state, a university or other public sector employer where it is difficult if it not impossible to terminate the contract of a permanent employee.

For example, in Impact v Minister for Agriculture and Food and others, 91 members of IMPACT brought a claim against six government departments by workers on fixed term contracts claiming equal employment conditions with comparable permanent employees and/or contracts of indefinite duration. The claimants succeed before the Rights Commissioner, and appealed to the Labour Court. The Rights Commissioner alone took 5 days to hear the matter and issued a written decision of 70 pages in length. Such was the significance of the questions at issue, which involved the direct effects of Community Legislation, that the Labour Court in fact referred such questions to the ECJ.

The decision of the Rights Commissioner in Department of Foreign Affairs v. A Group of Workers [2007] E.L.R. 332 is also significant. The claimants consisted of 15 of the most senior temporary clerical officers with the Department of Foreign Affairs working in the Passport Office. Issues arose when the claimants claimed they became entitled to a contract of indefinite duration by operation of the Fixed Term Workers Act 2003. It was also contended that they suffered less favourable treatment than their comparable employees in not being paid over the Christmas break. The claimants' contract of
employment with the respondent began in March or June of 2001. Further contracts for the following years were given and eventually they had completed the third year of successive but not continuous employment with the respondent, when they were offered further contracts.

The respondent claimed there were objective grounds for renewal of the claimants' contracts in order to deal with seasonal needs like the automated passport system and the transfer of proposed parts of the Passport Office. The Rights Commissioner found that the employees were entitled to contracts of indefinite duration and to the relevant pay over the Christmas break.

The matter is currently under appeal to the High Court, having been affirmed by the Labour Court.

Decisions of the Rights Commissioner are not made public. The most recent statistics of the Rights Commissioner Service (only available to 2005) show that there were 296 references under the Fixed Term Workers Act, 75 under the Part-time Workers Act 2001 and 26 under the Maternity Protection Acts 1994-2004 and a previous analysis of referrals to the Commission has shown that in general a majority of cases that are referred to the service are upheld. Depending on the legislation under which cases are referred, Rights Commissioners have found in favour of claimants in up to two-thirds of cases.

V. Anatomy of a Complaint – Circuit Court

- Jurisdiction

As stated above, a claim for gender discrimination can be commenced directly in the Circuit Court. No other claim for discrimination can be commenced in that forum. This anomaly follows on from the jurisprudence of the ECJ which has held that in relation to the remedy provided for in national law for a breach of gender discrimination, legislation must also enable that breach to be penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of domestic law. At the time at these judgments of the ECJ, the only form of discrimination which was
prohibited at EU level was gender discrimination. Thus the judgments of the ECJ had no application in relation to other grounds of discrimination.

As a result of this jurisprudence of the ECJ, the national employment equality legislation provided for direct access to the Circuit Court for gender discrimination claims. It is open to question whether the fact that direct access to the Circuit Court is permitted only for gender discrimination is contrary to present EU law, which now outlaws discrimination on all of the grounds of discrimination. In the future, in an appropriate case, this may be challenged.

The Circuit Court also has jurisdiction to enforce determinations of the Labour Court and Equality Tribunal or mediated settlements concluded by the Equality Tribunal, if these are not complied with by any party bound by the terms thereof. Where the Circuit Court makes an order for enforcement, it has the power to award Courts Act interest on sums awarded.

- **Time Limits**

The same time limit applies to actions commenced in the Circuit Court as those commenced in the Equality Tribunal.

- **Pleadings**

Claims for redress are brought to the Circuit Court by way of Employment Law Civil Bill (See Circuit Court Rules (Employment Equality Act 1998) S.I No 880 of 2004.) The practice and procedure is then governed by the Circuit Court rules as with any other matter being litigated in the Circuit Court.

Applications for enforcement are made by way of originating Motion on Notice as set out in S.I. No 880 of 2004.

- **Submissions and Replies**

Legal submissions are not made in cases commenced in the Circuit Court, unless same are specifically requested by the Court.

- **Format of Oral Hearing**

The matter will be heard in the same manner as any other matter litigated in the Circuit Court. This means that cross-examination of witnesses is permitted and the normal rules of evidence apply.

- **Representation**

Plaintiffs will normally be represented by Solicitor and Counsel in the ordinary way.

- **Appeal**
An appeal can be made to the High Court on a point of law. This should be made by way of Notice of Appeal within 21 days of the determination of the Circuit Court.

- **Level of Awards**

When a gender equality case is commenced in the Circuit Court, that Court is not constrained by the normal jurisdictional limits, and may order any of the forms of address set out above in relation to the Equality Tribunal. The only limitation is a six year limit on backdating of compensation or arrears of remuneration.

In practice the Circuit Court has not been shy of making high awards. In Atkinson v Carty, [2005] ELR 1, for example, a serious case of sexual harassment, Delahunt J made an award of €137,000 less 25% for contributory negligence. It is understood that this matter was appealed and settled for a smaller sum on appeal.

VI. **Anatomy of a Complaint – Appeal to the Labour Court**

- **Jurisdiction**

In employment equality litigation, the Labour Court’s only jurisdiction is by way of appeal, either from decisions of the Rights Commissioner or the Equality Tribunal. The only exception is matters of discriminatory dismissal which were referred to the Labour Court prior to 18 July 2004.

The Labour Court is the body to which a complaint of non compliance with an award of the Rights Commissioner must be made.

- **Time Limits**

With regard to appeals from the Equality Tribunal, the time limit for appealing expires 42 days from the date of decision, not the date of a party receiving the decision. The Labour Court has no discretion to extend the time limit.

An appeal from a decision of the Rights Commissioner must be lodged **within 6 weeks** of the date on which the Decision was communicated to the party.

- **Pleadings**

Appeals to the Labour Court are made by way of notice of appeal on specialised forms which are available from the website of the Labour Court [www.labourcourt.ie](http://www.labourcourt.ie).

- **Submissions and Replies**

Submissions are made in writing to the Labour Court and replies are put in by the Respondent. Written submissions setting out the parties’ case are emphasised by the Labour Court and sample submissions are available at the website.
It is important to put in separate submissions to the Labour Court. The Labour Court will not be happy with submissions which are simply copied to it from the Equality Tribunal or Rights Commissioner.

- Format of Oral Hearing

The procedure before the Labour Court is more formal than that before the Equality Tribunal. A three person Court hears any appeal. The hearing commences with the Appellant who stands to read its submissions in full, and the Respondent does likewise. Witnesses are then sworn in. The matter proceeds is the same way as in the ordinary courts, that is, the Appellant presents its case and adduces its evidence, and the Respondent then presents its case. The Labour Court policy is that any questions of witnesses must be asked through the chair. In practice vigorous questioning is permitted. The Labour Court does not come in with its own set of questions as does the Equality Tribunal, and does not adopt an inquisitorial approach, although it does ask questions. The hearing is conducted in private.

The manner in which the Labour Court conducts its hearings and takes evidence was subjected to examination by the Supreme Court in Ryanair v Labour Court. The background to this case was whether a trade dispute in Ryanair had fulfilled the preconditions set out in section 2(1) of the 2001 Industrial Relations Act which established the jurisdiction of the Labour Court to adjudicate on a dispute between Ryanair and various pilots. Ryanair then sought by way judicial review, an order quashing of the decision of the Labour Court, on the basis, inter alia, that the Labour Court had not adopted fair procedures in determining one of the central issues as the Labour Court came to that decision on the basis of submissions of the representatives of the pilots without hearing any evidence of the pilot parties to the dispute. Ryanair took the view that it should be allowed to cross-examine the pilots as to the evidence at issue.

It is therefore interesting to see that the Supreme Court, on appeal, allowing the appeal and quashing the decision of the Labour Court, showed no deference to the Labour Court. The Supreme Court did not see it as purely an industrial relations forum which could decided its own procedures, and instead required the Labour Court to be strictly fair and robust in its application of fair procedures and correct in its interpretation of the law. It is submitted that this approach is needed given the position of the modern Labour Court, which now makes serious legally binding decisions on matters of legal rights and obligations and interpretations of legislation.

The Supreme Court determined that the Labour Court had erred inter alia, in its procedures for determining the issues before it on the basis of union submissions alone rather than requiring the actual employees of the company to give evidence on the point in question. The Supreme Court stated as follows:

"The Labour Court did not adopt fair procedures by permitting complete non-disclosure of the identity of the persons on whose behalf the union was purporting to be acting. There was a second and equally important element of unfair procedure. Two senior management figures in Ryanair appeared at the hearing
and made submissions which were in effect unsworn evidence and accepted as such by the Labour Court. It would appear that they maintained at all stages that appropriate procedures were in place. That may or may not be true but the Labour Court was not entitled to disbelieve that evidence in the absence of hearing evidence from at least one relevant pilot who was an employee of Ryanair. Otherwise it was impossible to challenge the views put forward by the union which could only be characterised as opinion. The Labour Court decided the issue against Ryanair to a large extent on foot of omissions in Ryanair documentation and on foot of a view put forward by the union that the ERCs were consultative bodies only. This was not a fair procedure.”

- Representation

It is usual for a party appearing before the Labour Court to be represented, whether by a union representative or by solicitor and/or counsel.

- Appeal to High Court on a point of law

Where a determination is made by the Labour Court on an appeal, either of the parties may appeal to the High Court on a point of law. This must be done within 21 days of the date on which the determination of the Labour Court was given.


The Rules of the Superior Courts do not expressly provide for any procedure for appeal from the Labour Court to the High Court under the 2001 and 2003 Acts. Any such appeal should therefore be commenced by way of originating notice of motion further to Order 84C Rule 2. That rule sets out a time limit for such appeal of 21 days following the giving of the decision to the attending applicant. The High Court may only extend such time where there is good and sufficient reason for doing so and where there would be no prejudice to the other side. The Notice of Motion must be grounded by an Affidavit (Rule 3) and the Respondent intending to oppose the appeal must file and serve a Statement of Opposition with a verifying Affidavit before the return date of the Notice of Motion. (Rule 5). Naturally, the Applicant may file such replying Affidavits it wishes. On the return date, the High Court will then give such directions as it sees fit as to the conduct of proceedings.

The High Court will not easily overturn a decision of the Labour Court unless it is satisfied that the body based its decision on an identifiable error of law or an unsustainable finding of fact. The proper approach to be adopted by in determining an appeal on a point of law was set out by Laffoy J in Minister for Finance (appellant) v. Civil and Public Service Union [2007] E.L.R. 36; she stated that the principles were
well settled. In *Henry Denny & Sons (Ireland) Limited v Minister for Social Welfare* [1998] 1 I.R. 34, which involved an appeal to the High Court from a decision of a Chief Appeals Officer on a question of law, the Supreme Court applied the principles which had been stated by the Supreme Court in *Mara (Inspector of Taxes) v Hummingbird Limited* [1982] 2 I.L.R.M. 421 in relation to the approach to be adopted on a case stated by an appeals commissioner under the *Income Tax Act 1967* and, in particular, the following passage from the judgment of Kenny J. (at 426):

“A case stated consists in part of findings and questions of primary fact ... these findings and primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as the commissioner. If the conclusions from primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If, however, they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from primary facts were ones that no reasonable commissioner could draw.”

In National University of Ireland, Cork v Ahern, the Supreme Court held that although findings of fact must be accepted by the High Court on Appeal, that Court could still examine the basis on which the facts were found. The relevance or admissibility of the matters relied upon in determining the facts were questions of law.

The questions raised in that case, which was an equal pay case, concerned the examination of the justification for difference in pay between two groups of switchboard operators. The Supreme Court determined that this question involved totally different considerations from those relevant to a comparison of like work. It held that the Labour Court ought to have looked at the position of the comparators, not only in isolation, but also in the context of the remaining switchboard operators.

It held that the facilitating of family responsibilities might be a ground for discrimination in remuneration. The comparators were paid the same rate as other switchboard operators although they had fewer duties, on the grounds of facilitating the family obligations of the comparators. The Labour Court ought to have considered the question whether the difference in remuneration between the respondents and comparators might have the same basis.
The Labour Court also has the power to refer to the High Court a point of law which arises in the course of such an appeal. It also has the power to refer a point of law directly to the European Court of Justice. This occurred in Department of Finance v IMPACT and Ors, referred to above.

- Level of Awards

The Labour Court, on appeal, has the power to vary the determination of the Equality Officer as to the level of award. The Labour Court has also confirmed that in measuring the quantum of damages, regard must be had to all of the effects of discrimination, and not just for financial loss but for distress and indignity suffered.

In Massinde Ntoko (claimant) v. Citibank [2004] ELR 116, a case of race discrimination and dismissal, in considering the level of award, the Labour Court stated;

“The Court is satisfied that the appropriate redress is an award of compensation. The Court notes that the complainant was employed in a temporary capacity at approximately €270 per week. The Court estimates that the economic loss suffered by the complainant is unlikely to have exceeded €2,000. However, it is now well settled that an award of compensation for the effects of discrimination must be proportionate, effective and dissuasive. Apart from economic loss the complainant was humiliated, deprived of his fundamental right to equal treatment and freedom from racial prejudice. In all the circumstances the Court determines that an award which is fair and equitable should be measured at €15,000, €2,000 of which should be regarded as compensation for loss of earnings. The respondent herein is ordered to pay compensation to the complainant in that amount.”

VII. Parallel Claims

(i) Employment Equality Act v Part Time or Fixed Term Acts

A litigant may not obtain relief in respect of discrimination under both the Employment Equality Act and the Part Time Workers Act 2001 or Fixed Term Workers Act 2003. (see section 101A of the Employment Equality Act 1998 as amended.) There does not however appear to be anything, however, to prevent two claims separate claims being processed. As a result, the interaction between both is not clear and is likely to lead to litigation in the future.

(ii) Fixed Term Work Act v Unfair Dismissals Act

Section 18 of the Fixed Term Workers 2003 Act has a similar provision in relation to the question of parallel claims between that Act and the Unfair Dismissals Acts. It provides that in the event of a dismissal amounting to penalisation of the employee, relief may not be granted under both the Unfair Dismissals and the Fixed Term work legislation. As
with the Employment Equality Act, there does not however appear to be anything to prevent two claims separate claims being processed.

Section 18 provides as follows:

“(1) If penalisation of an employee, in contravention of section 13(1), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to [2007], relief may not be granted to the employee in respect of that penalisation both under Part 3 and under those Acts.

(2) An individual who is a fixed-term employee under this Act and a part-time employee under the Act of 2001 may obtain relief arising from the same circumstances under either, but not both, this Act or under Part 2 of the Act of 2001.”

Anthony Kerr in commenting on this provision notes that

“this section, unlike s.15 of the Unfair Dismissals Act 1977, does not limit an employee’s right of access to the High Court to enforce his or her common law rights. … This section provides that a party may not obtain “double relief”. Consequently, where an application under the unfair dismissals or the employment equality legislation has been unsuccessful, a claimant is not estopped by this section from pursuing a claim under this Act” (Irish Employment Legislation, September 2007)

It is interesting to note that there is a corresponding exclusion in section 15(3) of the Part-time Workers Act with relation to the Unfair Dismissals Act.

The section must of course be read in light of the time limits applicable to the actions. It would not be open to a litigant to commence a claim in the Equality Tribunal, fail, and then commence a claim before the Rights Commissioner, as the time for submission would have elapsed. However, there is nothing to stop two claims being commenced simultaneously.

The Labour Court confirmed the permissibility of parallel claims in the case of Galway County Council v Mackey SDC/06/5 determination No. 065, June 22nd 2006. The Claimant had taken proceedings under the Unfair Dismissals Acts 1977 – 2001 in respect of the non-renewal of his fixed-term contract with the Respondent. This claim was considered by a Rights Commissioner who held that the Claimant had not been unfairly dismissed. The Claimant also claimed, inter alia, that the termination of his employment with the Respondent constituted Victimisation within the meaning of Section 13(1) (d) of the Protection of Employees (Fixed-Term Work) Act 2003 (the Act). This claim was also dismissed by the Rights Commissioner.

By way of a preliminary issue before the Labour Court the Respondent submitted that the Claimant was estopped from pursuing his claim under the 2003 Act by virtue of Section 18(1)
The Labour Court took the view this submission was misconceived. It determined that Section 18(1) provided in plain language that a party may not obtain double relief under the two statutes mentioned, but that it did not mean that a party who takes an unsuccessful claim under one of the Acts referred to cannot then proceed to seek relief under the other Act. In this case the Claimant was unsuccessful in his claim under the Unfair Dismissals Acts 1977 – 2001 and was not granted relief under that Act. The Labour Court took the view that on the plain and ordinary meaning of the words used in the Section there was nothing to prevent him from now seeking relief under the Protection of Employees (Fixed-Term Work) Act 2003.

The effect of its interpretation is to allow an employee two chances to litigate the same issue. The employer has to suffer the cost of having to defend itself on the same matter twice.

A more complicated issue arises with regard to whether the Employment Appeals Tribunal is bound to have regard to the 2003 Act in any case which comes before it on unfair dismissal. In other words can the Employment Appeals Tribunal determine that there has been an unfair dismissal due to termination of a contract of employment at the end of a fixed term or at the arrival of the end of a fixed purpose if this takes place after the four year time limit has expired? If so, what is the appropriate remedy? In other words can the EAT award a contract of indefinite duration. In my view this is a very difficult question. The grounds on which the EAT can find that there has been an unfair dismissal would appear to be very clearly set out in statute. It would seem to me therefore to be inappropriate for the EAT to be applying rights granted by the Fixed Term Workers Act 2003 to situations which come before it. Yet the EAT in *University College Cork v Jarvis* UD 623/2003 made determinations the 2003 Act gave rise to a contract of indefinite duration in claim which arose under the Unfair Dismissals legislation. This matter was appealed to the Circuit Court which decided the matter purely on the basis of the application of the Unfair Dismissals legislation, so the point was not decided.

(iv) Employment Equality v EAT and/or Common Law

The question of parallel claims before the Equality Tribunal and in the ordinary courts for the same matter is dealt with in section 101 of the Employment Equality Act 1998, as amended. The section provides as follows:

“(1) If an individual has instituted proceedings for damages at common law in respect of a failure, by an employer or any other person, to comply with an equal remuneration term or an equality clause, then, if the hearing of the case has begun, the individual may not seek redress (or exercise any other power) under this Part in respect of the failure to comply with the equal remuneration term or the equality clause, as the case may be.

[(2) Where an individual has referred a case to the Director under section 77(1) and either a settlement has been reached by mediation or the Director has begun an investigation under section 79 , the individual—]
(a) shall not be entitled to recover damages at common law in respect of the case, and

(b) if he or she was dismissed before so referring the case, shall not be entitled to seek redress (or to exercise, or continue to exercise, any other power) under the Unfair Dismissals Acts 1977 to [2005] in respect of the dismissal, unless the Director, having completed the investigation and in an appropriate case, directs otherwise and so notifies the complainant and respondent.]

(3) If an individual has referred a case to the Circuit Court under section 77(3) in respect of such a failure as is mentioned in subsection (1), the individual shall not be entitled to recover damages at common law in respect of that failure.

(4) [An employee who has been dismissed shall not be entitled to seek redress under this Part if]—

(a) the employee has instituted proceedings for damages at common law for wrongful dismissal and the hearing of the case has begun,

(b) in the exercise of powers under the Unfair Dismissals Acts 1977 to [2005], a rights commissioner has issued a recommendation in respect of the dismissal, or

(c) the Employment Appeals Tribunal has begun a hearing into the matter of the dismissal."

The effect of these provisions is that, while a litigant would not appear to be prevented from commencing claims at both common law and before the tribunal, once a hearing has commenced in one, any action to seek relief in the other must come to a halt, and relief cannot be granted in the other. It is open to question what the position would be where an employee seeks to obtain damages for personal injuries arising out of a breach of an equality provision in a contract of employment. Breach of contract is increasingly pleaded in personal injuries action either in addition to or instead of negligence.

The position is similar where the employee has been dismissed for a discriminatory reason which might also constitute an unfair dismissal. There is a discretionary power to permit the claimant to proceed under the unfair dismissals legislation even though the Tribunal investigation has been completed. This may be to allow for the situation where the Tribunal is of the opinion that the respondent may have unfairly dismissed a complainant but has not been found to have dismissed the claimant for a discriminatory reason.

An employee would not appear to be prevented from referring a complaint of discriminatory treatment in respect of pregnancy or maternity related to the Equality Tribunal.

Finally, it is important to note that an employee is not required to proceed under the Maternity Protection Acts 1994 and 2004 even if the issues in question might be
appropriate to that legislation. This was made clear by the Equality Officer in *Gardiner v Mercer Human Resource Consulting* DEC-E2006–007.

(iv) Fixed Term Work Act and the Common Law

Further difficulties are raised by the interaction of the 2003 Act and the common law, as can be seen from the case of *Ahmed v HSE*, unreported, Laffoy J. 6th July 2006. The 2003 Act does not contain a provision similar to section 15 of the Unfair Dismissals Act 1977 which puts an employee on election as to whether to pursue the statutory remedy provided for in the Act of a common law remedy. In *Ahmed*, the Rights Commissioner determined that a hospital consultant was entitled a contract of indefinite duration by virtue of section 9 of the 2003 Act. The consultant proceeded to litigate in the High Court following that determination, in particular seeking an injunction compelling the HSE to implement his contract, an action which involved a consideration of what the terms of that contract actually were. This was in circumstances where the HSE had appealed the finding of the Rights Commissioner that the consultant was entitled to an indefinite contract.