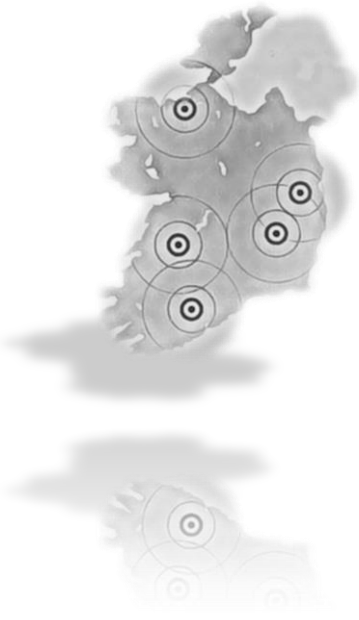
# Workplace Relations Commission

## Progress Report and Commentary

## 1 October 2015 to 30 September 2016

WRC

An Coimisiún um Chaidreamh san Áit Oibre
Workplace Relations Commission



## Introduction

This Commentary and Progress Report sets out the work undertaken by the Workplace Relations Commission in its first full year of operation. It outlines our achievements to date, charts the progress made against our longer-term targets and points to issues that, perhaps, have not run as smoothly as we would have hoped. It also identifies trends emerging in dispute resolution, adjudication, labour inspection, and enforcement.

The Workplace Relations Commission came into being some 14 months ago on 1 October 2015 and its establishment represented perhaps the most far-reaching institutional legislative reform in the area of employment and industrial relations since the Labour Court was established in 1946.

In the decades leading to the establishment of the Workplace Relations Commission, the employment rights and industrial relations institutional framework had evolved in a piecemeal fashion in response to EU and domestic legislation and the changing nature of employment. Rather than reflecting the policy objective of being an informal and accessible system, noticeable for its speed of outcome, it had instead become extremely complex and lengthy.

In such light, the bringing together of the functions formerly delivered separately by the Labour Relations Commission, the Rights Commissioners Service, the Equality Tribunal, the Employment Appeals Tribunal and the National Employment Rights Authority was overdue.

The collective and specialist services of the Commission play a vital role in contributing towards industrial peace, public service reform, maintaining and sustaining enterprise efficiency and productivity and engaging with employers and trade unions on issues of employee pay and rewards. In addition to delivering an impartial and effective employment rights adjudication services, achieving appropriate and essential employment standards compliance and enforcement is also central to the strategic operations of the Commission.

From a corporate perspective, corporate governance structures have been established and are fully functioning. The Commission's three year Statement of Strategy was published earlier this year as was the Work Programme 2016, the Business Plan 2016, the Annual Report 2015, and a six month progress report similar in lay out and purpose to this report. In addition, over a period of weeks in October the two offices in Dublin were relocated to a single premises in Dublin with no disruption in service occurring. This was a singular achievement and an important milestone in the overall shaping of the WRC into the future.

The Adjudication Service, while managing the difficulties in operational areas associated with start-ups, received over 13,451 specific complaints in the first year of operation. Decisions in respect of these complaints now issue within 6 months of the complaint being submitted as opposed to taking two to three years as happened in many instances prior to establishment of the WRC.

In terms of Inspection and Enforcement, in the first twelve months some 5,221 inspections were completed. With regard to improving compliance generally, almost 20 Fixed Payments notices have issued to date and most employers have opted to pay the fine. Almost all Compliance Notices issued have been uncontested. While it is early days, it would appear that this new approach can be effective in resolving problems early and close to the workplace.

On the industrial relations front, the Conciliation and Mediation Service chaired 1814 conciliation conferences and mediations between October 2015 and September 2016. The outcomes of these conferences have involved the preservation of jobs, the restructuring of organisations, the variation of employee terms and conditions, pay increases, greater flexibility in terms rosters and other operational changes. These interventions have been critical in maintaining a high level of industrial peace in a challenging industrial relations landscape.

I and my officials met with a range of our key stakeholders over the course of the Summer. It is fair to say that many expressed concerns around certain administrative and operational approaches adopted by the WRC in its first year of operation albeit that many had been addressed within the first few months of operations. Having said that, I was very pleased

with the feedback received in connection with how the WRC has managed the transition to the new structure, and wish to acknowledge the strong support for the WRC expressed at those meetings. Our challenge is to continue the process of engagement with stakeholders and to continue to improve all aspects of our operations.

The goodwill shown to, and the positive feedback, about the WRC is a tribute to the work of my predecessor, Kieran Mulvey, who served the State so well, firstly in his capacity as the Chief Executive of the Labour Relations Commission and, most recently, as the Director General of the Workplace Relations Commission.

I joined the Commission in July this year and was immediately impressed by the expertise and dedication of the staff across all our Divisions. It is clear that our activities have the potential to touch on the working lives, and beyond, of all adults and children who live in Ireland.

Our guiding policy and our activities are primarily concerned with accommodating competing interests in facilitating and assisting workplace change, and creating an environment of equity and fairness in employment and beyond.

To my mind the WRC plays a key role in contributing to the overall architecture of economic and social investment, and very much having a positive influence in what I call “minding the world of work”.

**Oonagh Buckley**
**Director General**

## Workplace Relations Commission

## Functions of the Commission

The primary functions assigned to the WRC comprise:

- Promoting the improvement of workplace relations, and the maintenance of good workplace relations,
- Promoting and encouraging compliance with relevant employment legislation,
- Providing guidance in relation to compliance with Codes of Practice,
- Conducting reviews of, and monitor developments, in workplace relations generally,
- Conducting or commissioning relevant research and provide advice, information and the findings of research to Joint Labour Committees and Joint Industrial Councils,
- Advising the Minister for Jobs, Enterprise and Innovation in relation to the application of, and compliance with, relevant legislation, and
- Providing information to the public in relation to employment legislation (other than the Employment Equality Act)[1].

With a workforce of almost 200 staff with different specialisms and with offices in Dublin, Carlow, Shannon, Cork and Sligo, and operational bases for hearing meetings in many other counties, the WRC mission is to deliver a quality customer service throughout Ireland, which;

- is speedy, user-friendly, independent, effective, impartial and cost-effective,
- provides variable means of dispute resolution, redress and effective enforcement, and
- improves workplace relations generally.

## WRC Board

The Commission has an advisory board responsible for the WRC's strategy and annual work programme. The Board comprises a chairperson and 8 ordinary members appointed by the Minister for Jobs, Enterprise and Innovation. They are:

Dr Paul Duffy (Chair),

Ms Deirdre O Brien,

[1]EEA information provided by the Irish Human Rights and Equality Commission

Ms Maeve Mc Elwee,

Mr Liam Berney,

Mr Shay Cody,

Ms Geraldine Hynes,

Ms Audrey Cahill,

Mr Richard Devereux,

Dr Michelle O' Sullivan.

The key functions of the Board are:

- Assisting the Commission in devising appropriate strategies through the regular production (i.e. every three years) of a Statement of Strategy to be approved by the Minister and laid before the Houses of the Oireachtas. In preparing such a statement the Board is required to seek and obtain the advice of the Director General.
- Preparing and submitting to the Minister a "Work Programme" of the work that the Commission intends to carry out over the course of the relevant year.

The Board has met on 6 occasions since the establishment of the Commission. The work of the Board undertaken to date is outlined below under the Strategic and Operational Framework.

## Director General

The Director General, Oonagh Buckley, is responsible for the management, and control generally, of the administration and business of the WRC, and such quasi-judicial other functions as are conferred on her by the Workplace Relations Act 2015, and is accountable to the Minister for the efficient and effective management of the Commission in this regard.

## Strategic and Operational Framework

Quick progress was made in setting up the corporate governance structures of the Commission. By end-2015 the Board was in place, key appointments had been made to the management team, the Work Programme for 2016 had been approved by the Board and

submitted to the Minister (who approved the Programme subsequently), and a comprehensive cross-Divisional *Business Plan 2016* had been agreed by the Board which, together with the Work Programme, forms the basis for the WRC activities over the year.

Shortly thereafter, the Board prepared and submitted to the Minister a comprehensive Statement of Strategy "*Workplace Relations Commission 2016-2018: Assisting the Recovery in a Changing and Challenging Environment"*. The then Minister, Richard Bruton T.D., approved the Strategy and launched it formally in April. In addition, around the same time, the Director General submitted to the Minister his Report on the activities of the WRC for the three months to end-December as required by the Workplace Relations Act 2015, i.e. from 1 October (Establishment Day) to end-year 2015.

A comprehensive Stakeholder Framework was agreed by the Board and was followed by a series of meetings with key stakeholders over the course of which valuable feedback was obtained on how the processes of the WRC are operating and, in some cases, can be improved. This process will be an ongoing feature of the WRC's corporate governance structure and will be augmented by an annual customer survey.

This survey will be carried out over the coming weeks and engagement by all stakeholders contacted would be much appreciated. This feedback is vital for the ongoing improvement and development of our services the better to meet our customer needs. In this regard, the WRC customer charter is available on the WRC as is the bespoke WRC Freedom of Information Scheme.

In recent weeks the WRC Dublin has moved from Davitt House and Tom Johnson House to new offices in Lansdowne House, Lansdowne Road, Dublin 4. The new office will bring about greater synergies and efficiency to our service delivery by providing a number of services at one location and by locating most of the WRC Dublin staff in one building.

## Divisional Activity Report and Commentary

**Information and Customer Service**

Information on rights and entitlements under employment legislation is provided by the WRC Information and Customer Service Unit.

This information is supplied through:

- the provision of information relating to employment rights, equality and industrial relations matters by means of a telephone service manned by experienced Information Officers,
- the design and production of informational booklets, leaflets and other literature relating to employment rights, industrial relations and equality,
- management of the Workplace Relations website, and
- the provision of information to relevant parties regarding the status of complaint and dispute referrals.

### Activity Report

In the first twelve months of operation the Service logged over 62,000 calls ranging from queries related to work permits, working hours, payment of wages etc. Further detail is set out below.

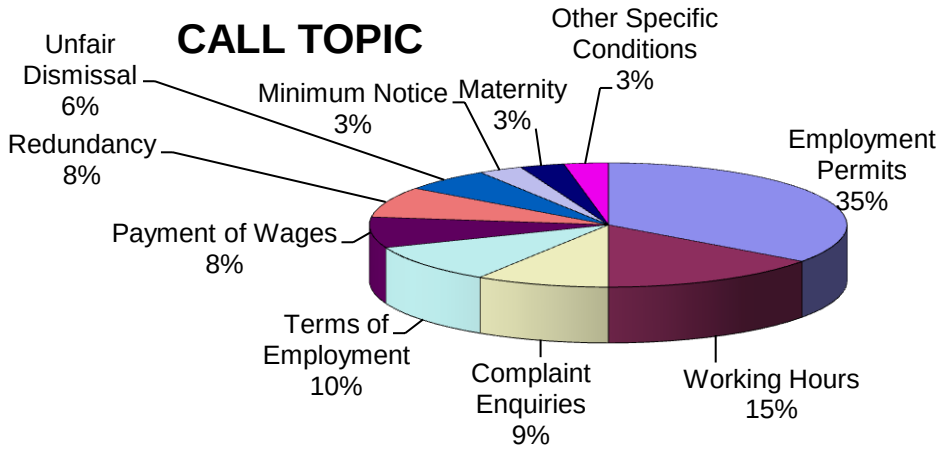
Given the sensitivity of the nature of the queries in many cases added to the fact that callers are trying to get to grips with issues that they have not previously encountered means that these calls often take some time to process satisfactorily.

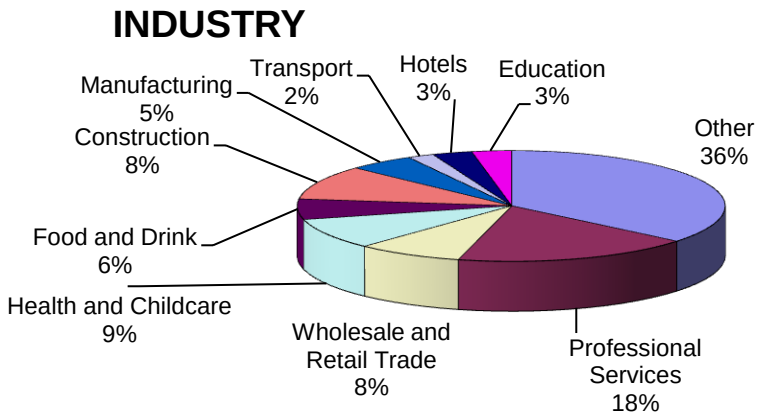
**Activity Report**

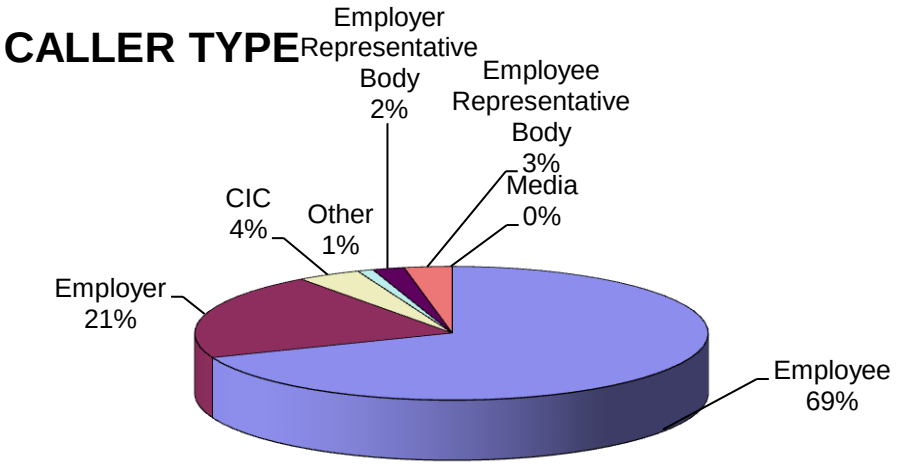
| Information Services | |
|---|---|
| Calls Dealt with | 62,257 |
| Web Visits | 1,481,286 |
| E-forms Received | 5,821 |

Table 1

The following three charts provide a breakdown of the type of calls received, the Sectors represented and the type of caller.


CALL TOPIC
Unfair Dismissal 6%
Redundancy 8%
Payment of Wages 8%
Terms of Employment 10%
Complaint Enquiries 9%
Working Hours 15%
Employment Permits 35%
Other Specific Conditions 3%
Maternity 3%
Minimum Notice 3%


INDUSTRY
Manufacturing 5%
Construction 8%
Food and Drink 6%
Health and Childcare 9%
Wholesale and Retail Trade 8%
Professional Services 18%
Other 36%
Education 3%
Hotels 3%
Transport 2%


CALLER TYPE
Employer 21%
Employee 69%
CIC 4%
Other 1%
Employer Representative Body 2%
Employee Representative Body 3%
Media 0%

**Advisory Service**

The Advisory Service promotes good practice in the workplace by assisting and advising organisations in all aspects of industrial relations in the workplace. It engages with employers, employees and their representatives to help them to develop effective industrial relations practices, procedures and structures. Such assistance could include reviewing or developing effective workplace procedures in areas such as grievance, discipline, communications and consultation.

The Advisory Service has extensive experience in engaging on disputes around breakdowns in the workplace relationship. These disputes could be collective involving many staff, or individual. Irrespective of the number of people involved these disputes typically have a serious and pervasive impact on the organisation in terms of cohesion, adversarialism and morale. The Service has worked right across the public and private sectors, in small and large organisations, in both union and non-unionised employments. Every intervention is customised to the context of the dispute, so for example an intervention could range from facilitating a joint representative working party to providing in-depth individual and collective mediation.

An example of such intervention in 2016 can be found in the Service's interactions with Luas. The Luas dispute was typified by strong adversarial positions on pay. A series of WRC interventions at Conciliation level were carried out, very much in the public eye. Ultimately the dispute was settled by means of an extensive Labour Court Recommendation which dealt with the totality of the issues. The formulation of the Court Recommendation was greatly assisted by a narrowing of the agenda achieved at WRC Conciliation.

The Court recommended that a number of matters be engaged on again in the WRC Conciliation process and that the WRC Advisory Service carry out a review of workplace and industrial relations in the Company. This review is currently ongoing and the Advisory Service, in consultation with the parties, is in the process of formulating, and will ultimately facilitate, the introduction of measures to improve industrial and workplace relationship practice in the company.

In addition, the Service provided good practice training workshops on a variety of aspects of the employment relationship including the operation of workplace procedures and, through a facilitative process, has assisted organisations to implement them.

The Service has also been involved in helping management and employee representatives to resolve disputes in situations where negotiating arrangements are not in place and where collective bargaining fails to take place - the so called "collective bargaining" element of the Industrial Relations Act 2015.

In practice, in situations where a union has membership in a workplace but is not recognised for the purposes of collective bargaining by the employer, the Advisory service will facilitate an engagement process on issues other than collective bargaining, for example terms and conditions of employment including pay. Engagement takes place of foot of a union request and employer agreement to participate.

Members of the Advisory Service team are independent, impartial and experienced in industrial relations practice and theory. In discussion with the parties concerned, a designated member of the Advisory team will tailor assistance to fit the requirements of individual organisations or firms, whether large or small. This assistance is confidential to the parties and is provided free of charge.

**Activity October 2015-September 2016**

| Project Type | Total |
|---|---|
| SI 76 ("Collective Bargaining") | 10 |
| Facilitation/Joint Working Parties | 19 |
| Company-level industrial relations reviews | 11 |
| Training | 9 |
| Workplace Mediation | 15 |

Table 2

As indicated in the *Statement of Strategy 2016-2018,* the Service has initiated work on the Adjudication Division Frequent User Initiative to identify if systemic issues underlie the referral of particular complaints to that Division. The operational aspect of this initiative will be rolled out in 2017.

**Training**

The Advisory Service offers training on a variety of aspects of the employment relationship. It works closely with employers and employees to develop and deliver training that is tailored to meet the individual needs of each organisation.

Training is free of charge and delivered on-site where requested. Training can be stand alone or as a module of a broader training course.

Examples of generic training include training of front-line managers whose role demands excellent people management skills and a good understanding of workplace conflict prevention and dispute resolution mechanisms, or of employees and employee representatives whose role demands a good understanding of workplace conflict prevention and dispute resolution mechanisms. The Advisory Service has provided specific training over the past year in the areas of:

- Workplace procedures,
- Communications
- Dignity in the workplace
- Support in the management of workplace change
- Grievance/disciplinary/dispute arrangements

Examples of training delivered since October 2015 include:

*Information and Consultation:*

The Service developed and delivered training to staff and management of non-union organisations on best practice and implementation of the 2008 Information and Consultation Directive.

*Dignity at Work:*

The Advisory Service recently developed and delivered Dignity at Work training for an education body. The outline for this course included education on Bullying/Harassment/Sexual Harassment, and the implementation of appropriate policies and procedures. The training also outlined the benefits of a mediated approach to conflict resolution, using the model developed by the Advisory Service.

*Conflict in the Workplace:*

The Service designed a three day training programme in relation to Conflict in the Workplace during the year and will roll out a tailored version to a large not-for-profit institution later this year.

**Conciliation Service**

The Conciliation Service helps employers and their employees to resolve disputes when they have failed to reach agreement during their own previous negotiations.

The purpose and mission of the service is to provide an impartial, fast and effective conciliation service operating to a uniformly high standard in both the public and private sectors. Conciliation is a voluntary process in which the parties to a dispute agree to avail of a neutral and impartial third party to assist them in resolving their industrial relations differences. Participation in the conciliation process is voluntary, and so too are the outcomes. Solutions are reached only by consensus, whether by negotiation and agreements facilitated between the parties themselves, or by the parties agreeing to settlement terms proposed by the Conciliation Officer.

The Service is staffed by a cadre of persons who collectively have many years of experience in the resolution of both public and private sector disputes. The substantial majority of cases referred to conciliation are settled. If no agreement is reached then, if the parties wish, the dispute may be referred to the Labour Court.

Conciliation Activity October 2015 to September 2016

During the first twelve months of operation in the new organisation, the service has proven itself capable of resolving the most intractable of industrial disputes. It retained the professional respect of its clients and service users (both new and existing) on all sides of the employment spectrum.

The industrial relations climate in the past year has witnessed a noteworthy shift in focus from the issues that were prominent in discussions during and immediately after the recent recession. Pay discussions came to the fore again in the private sector where a trend in pay

agreements reflected a tick upwards in pay settlements, while at the same time a number of 'Public Service Agreement' issues arose across a broad spectrum of public sector employments. In semi-State and private sector organisations, the Conciliation Service continued to assist in resolving many issues, most critically around company restructuring against an increasingly competitive and improving economy.

In this regard, the Conciliation Service assisted in the resolution of disputes and/or facilitated the parties in discussions with a variety of employment organisations. Prominent cases involved a broad spectrum of employments: Childminding Ireland, ERVIA, Irish Life, Irish Rail, Kerry Ingredients, Liebherr, Tesco, Central Mental Hospital, Irish Water, Hoyer, AIB, several education and health related organisations/institutions.

In addition, the Conciliation Service assisted in a broad spectrum of Health Service Executive (HSE) industrial relations disputes (both regional and national). Many of these specific disputes involved a high degree of intense engagement over long and protracted periods. Over the year, a large number of engagements took place involving the spectrum of companies within the transport sector e.g. aviation, bus, train and tram services.

The Conciliation Service's handling of industrial relations disputes was and has continued to be very much in the spotlight over this period of time while there is clear evidence that industrial action or threatened industrial action at an early stage in the process is becoming more and more prevalent, particularly in public and State sector employments.

The number of referrals to the Conciliation Service was 1124 over the year. There was also an additional 319 facilitative processes chaired and accommodated by the Divisional staff. This work involved chairing Oversight Groups within the Public Service Agreement Framework, chairing Joint Labour Committees (Contract Cleaning, Security, Hairdressing) as well as several Joint Industrial Councils (Construction, Electrical, State industrial). In addition, staff of the Service also act as Appeals Officers for Education and Training Boards (ETBs) Procedures Appeals in respect of the ETBs ' Grievance and Disciplinary Procedures; the Bulling and Harassment Procedures (a total of 16 such appeal procedures were heard within the last year). A total of 163 disputes were referred to the Labour Court and in many

of these referrals to the Court, significant progress was made at conciliation in terms of narrowing the differences between the parties thereby refining and reducing issues requiring a definitive Labour Court Recommendation. The total number of engagements and meetings was 1853.

The increasing trend of the requirement for multiple conciliation sessions to deal with a number of disputes is reflective of the growing multifaceted nature of cases being referred to the Commission.

**Employment Rights Mediation**

Employment rights mediation is provided where both parties have agreed to mediation and where the circumstances allow for the provision of the service. Cases are selected for mediation by the Commission and this service is provided by either face to face or via a phone based service. In certain instances, complainants may be offered the assistance of the Early Resolution Service (ERS) which is predominately a phone based service by a Case Resolution Officer.

In the WRC's first year of operation the ERS offered its services in 1119 cases which resulted in acceptance by both parties in 598 cases. The overall number cases withdrawn or resolved following ERS intervention was 345.

Officers of the Mediation Service offer efficient, neutral and impartial third-party assistance to help resolve cases through mediation without the need for a formal adjudication hearing. If a complainant or respondent does not wish to use the service, or if the issue is not resolved by the service, the complaint is returned without any delay to the Adjudication Service.

Over the first twelve months the take-up of mediation has not been at the level expected. In terms of the ERS and Mediation generally an unexpected consequence of the enhanced speed of the adjudication process is that parties may feel that in the time allowed for mediation may not add any value. Initially, also the ERS did not make contact with the parties where a complaint was received unless both parties agreed to being approached.

However, in light of feedback received the ERS does offer mediation as a rule, but only in cases where, in its judgment, there is a reasonable prospect of a settlement. This triaging is to ensure that resources are used effectively and efficiently. There is also some evidence that representatives, particularly those representing complainants, are reluctant to utilise the telephone-based mediation.

The Commission has identified the mediation service as a key tool in resolving disputes and will endeavour to increase its usage during 2017.

**Workplace Dispute Mediation**

The Workplace Mediation Service provides a tailored response to particular types of issues and disputes emerging in workplaces. This service is particularly suited to resolving workplace individual or small group disputes around workplace conflict and difficulties of employees working together. The service is delivered by a team of mediators drawn from the Conciliation and Advisory Services and is managed by the Conciliation Service. Typical issues dealt with over the period included interpersonal workplace relationships, equality mediations, and grievance and disciplinary procedural matters generally. There were 52 requests for this service, 41 of which have been resolved or withdrawn with the balance continuing to be active.

This confidential service gives employees and employers in dispute an opportunity to work with a mediator to find a mutually agreed solution to the problem. Workplace mediation is a voluntary process which requires the agreement of both sides to participate in the service and to work towards a solution to the problem.

The aim of the process is to allow each person involved in the dispute the opportunity to be heard and to work with the other party to reach a solution. It is a flexible process which may involve joint meetings or meetings with the mediator alone, depending on the particular situation.

Typically, the types of situations that are dealt with by the Mediation Service include:

- a working relationship that has broken down,
- issues having arisen from a grievance and disciplinary procedure,

- industrial relations issues exist that may better be dealt with outside the statutory dispute resolution processes.

If no agreed solution is reached the mediator assists the participants decide how best to proceed.

**Adjudication Service**

The establishment of the WRC created a "one-stop-shop" streamlined structure for the submission of complaints. All first instance complaints are now submitted to the WRC, whereas before they could be submitted to the Rights Commissioner Service in the LRC, the Equality Tribunal and the Employment Appeals Tribunal.

The WRC also has responsibility to process all "Legacy" adjudication complaints that had previously submitted to the Rights Commissioner Service of the Labour Relations Commission and to the Equality Tribunal that had not been dealt with prior to the establishment of the Commission.

The Adjudication Service investigates disputes, grievances and claims that individuals or small groups of workers make under the employment legislation listed in *Schedule 5* of the Workplace Relations Act 2015 and the equality legislation as provided in the Employment Equality Acts.

The period since establishment day has seen many challenges in terms of the Service; some have been addressed while others are ongoing:

- The WRC Adjudication Service is well-established as the first-instance complaint body.
- A standard decision template has been agreed and the quality of decisions has been to a high standard. To assist in this regard, a Quality Assurance Group reviews a cross section of decisions with a view to achieving consistency and improvement, where required, while still maintaining the independence of the Adjudicators.
- Over 80% of complaints are submitted "on-line". This facilitates scheduling hearings as quickly and efficiently as possible.

- The WRC *Procedures for the Investigation and Adjudication of Complaints* were introduced. Following stakeholder engagement, these are being reviewed and, where practicable, will reflect the feedback received.

**Activity October 2015-September 2016**

| **Complaints Received Post-30 September 2015** | |
|---|---|
| Number of Complaint Applications Received | 7070 |
| Number of Specific Complaints Received | 13450 |
| Number of Decisions Issued | 1949 |

Table 3

| **"Legacy" Cases** | | |
|---|---|---|
| Awaiting Hearing: | 1 Oct 2015 | 30 Sep 2016 |
| Rights Commissioners | 2397 | 949 |
| Equality Tribunal | 1298 | 892 |

Table 4

In contrast with the situation prior to the establishment of the WRC where it was not unusual for parties to have to wait for two years to have a hearing and sometimes a further year for a decision to issue, it is now taking on average between three and four months from submission of complaint to initial hearing date[2] and an average of 6-8 weeks for a decision to issue. A key early target is to halve the latter period. In terms of "legacy" cases it is anticipated that these will be dealt with within a year.

**Decisions of Note**

**Relevant Judgements in the Courts**

There were a number of High Court and Supreme Court judgements given during the first year of operation of the Workplace Relations Commission. These judgements dealt directly with the powers, functions and discretion of adjudication officers.

In *Adigun v The Equality Tribunal* the Supreme Court gave an important judgement on the powers of Equality Officers/ Adjudication Officers in a hearing.

[2] Over the course of the first year of operations, this period has been elongated by numerous requests for postponements subsequent to initial hearing date offering. Procedural changes recently introduced are designed to reduce the number of such request and restrict the grounds for granting them.

A dispute arose between Mr Adigun, a playwright, and the Abbey Theatre relating to a production of "The Playboy of the Western World". He lodged a complaint with the Equality Tribunal alleging discrimination under the Employment Equality Acts. The Equality Officer held a preliminary hearing on whether Mr Adigun was an employee. He subsequently issued a decision the complainant was not an employee and, therefore, the Equality Officer lacked jurisdiction to hear the substantive complaint. The complainant judicially reviewed that decision and Mr Justice Sheehan dismissed his claims in the High Court. He then appealed to the Supreme Court.

Mr Adigun argued it was contrary to fair procedure, guaranteed by the Constitution, and incompatible with Article 6 of the ECHR to hold preliminary hearing, in his circumstances, "when the substance of the case related to victimisation and discrimination". Mr Justice Charleton, who delivered the Judgment of the Supreme Court[3], stated

> *"While it is correct to argue that a unitary trial is the normal and most satisfactory method of proceeding with a case in court, there are also many circumstances where the trial of a preliminary issue may resolve the substance of a legal dispute."*[1] *…….Even apart from the subsection quoted above,* ***it is within the scope of fair procedures before any judicial or quasi-judicial body for an issue to be isolated and tried in advance of the main hearing provided that can be done fairly.*** *Hence, even apart from legislative provisions, it would make sense that once the issue was raised, it should be determined in advance of what was likely to be a substantial hearing. The resources of courts and tribunals are limited. It is a pointless exercise to engage in a trial of fact over several days when whether or not the resolution of such facts may yield any redress to the claimant looms is clearly the first hurdle that he or she must cross. "*

This judgement is an important one for the Adjudication Officers of the Workplace Relations Commission in that it clearly allows them to have discretion in dealing with preliminary issues such as jurisdictional matters such as the status of the complainant, time limits and other matters even where there are no specific powers in the legislation, once it is done fairly.

[3] [2015] IESC 91

A judgement in a similar case was given by the Supreme Court in July 2016. In *County Louth VEC v The Equality Tribunal*[4] the complainant alleged discrimination and harassment on the sexual orientation ground. The respondents objected to evidence introduced which dealt with matters going back over a number of years. The High Court held a complaint could be expanded upon provided the general complaint remained the same. The Supreme Court broadly concurred with the judgement of the High Court in that it confirmed that equality officers(now adjudication officers) could allow evidence on matters and then decide on its probative value.

McKechnie J held:

> *"……however, I would be quite satisfied that, subject to overall fair procedures, an equality officer has a sizeable degree of latitude in deciding how the hearing before her should be conducted. This conclusion is supported also by the decision in the case of Aer Lingus Teoranta v. Labour Court [1990] I.L.R.M. 485 where it was held, albeit in the context of the Labour Court, that such a body could decide whether the complaints were made within time or not, either by way of a preliminary inquiry or as part of a unitary hearing involving also the merits of the case."*

He went on to state:

> *"……. in accordance with long established principle, there is a presumption that both the process of making the decision and the decision itself will have due regard to natural and constitutional justice and, furthermore, will be made in accordance with law and therefore within the jurisdiction conferred on her under the 1998 Act. Accordingly, there could be no basis for this Court to intervene and in some way anticipate or infer that she will act unlawfully*. "

McMenamin J held

> *"It is well established that the purpose of a deciding body or tribunal, such as the respondent Tribunal, is to provide speedy and effective redress in cases of alleged discrimination. It is not in dispute the procedures employed may be both informal*

[4] Louth VEC V The Equality Tribunal[2016] IESC 40

*and flexible. It is true, as Mr. Gerard Durcan, S.C., counsel for the Tribunal, submits, that the range of claimants before such a Tribunal do not fit into any one category. They may or may not be legally represented and, therefore, flexibility is both warranted and necessary."*

This judgement, together with the Adigun judgement, confirms that adjudication officers, once they adhere to fair procedures, may act with flexibility and informality.

The High Court in *Sam Dennigan Ltd V O'Connell and the Workplace Relations Commission* [5] refused leave to apply for Judicial Review. The Applicants looked for leave to quash a decision of the adjudication officer when he re-scheduled a case for hearing after he became aware the complaint was not on notice of the hearing date. No decision had been made on the substantive issue. Again the High Court referred to the informal and relatively flexible procedures allowed to a quasi- judicial body although again re-iterating the importance of fair procedures.

Humphries J held

*"The notice party has due process rights, which would be simply extinguished by the extreme and unacceptable legal doctrine being advanced by the applicant."*

He went on to state that the discretion of an adjudication officer to relist matter was reasonable and fair in the circumstances.

*"Not only was the decision not irrational but it was a perfectly reasonable and indeed humane, sympathetic and fair response to the situation and completely in accordance with the stated policy of the respondents to permit matters to be re-listed if an explanation for non-attendance was provided before the formal dismissal of the claim."*

**Sample Adjudication Officer Decisions**

In contrast to previous system where complaints at first instance could be heard in various fora, all complaints by an individual under employment, equality and industrial relations

[5] 2015 688 JR

legislation are heard by a single adjudication officer. This is a sample of the types of cases, the issues arising and the decisions issued under the WRC Adjudication Service.

**Complaints relating to the same incidents**

In ADJ-00000493 the adjudication officer investigated complaints of discrimination, harassment, discriminatory dismissal and victimisation under the Employment Equality Act 1998 and two unfair dismissal complaint under the Industrial Relations Act 1969. She was satisfied that, taking the complainant's evidence at its height, there was no prima facie case of discrimination or harassment.

She found the first time the complainant raised the issue of discrimination was in the complaint to the WRC. Using the test set out by the Labour Court in *Department of Defence v Barrett* EDA1017 she found, as the respondent was not made aware of any potential complaint of discrimination prior to the claim of victimisation, the complainant was not victimised. The complaints of unfair dismissal under the Industrial Relations Acts 1969 were based on the same facts relied on to ground the discrimination complaint.

The adjudication officer was not satisfied there were any breaches of fair procedures, nor was she satisfied his suspension was in any way connected to any complaint made to the WRC. She was of the view the complainant should have used the internal grievance procedures and so did not make a recommendation. Prior to October 2015 these complaints would have gone to the Equality Tribunal and to the Rights Commissioners and the complainant would have had to adduce the same set of facts and the respondent defend before both fora separately.

**The appropriate forum**

A legacy case of the Equality Tribunal, DEC-E2016-130 dealt with the jurisdiction of an Irish-based forum to hear a case. While the case was lodged in the Equality Tribunal it has implications for the WRC in that the jurisdictional issue applies to all employment and equality legislation. As the jurisdictional issue was very complex and dealt with the matters of European law, in particular, Brussels 1, Rome 1, Brussels Recast and the Lugano of European law (in particular, Council Regulation (EC) 44/2001 (Brussels I), Council Regulation (EC) No. 593/2008 (Rome I), Council Regulation (EU) No. 1215/2012 (Brussels recast)and

Council Regulation (EC) 712/2007 (Lugano)) as well as CJEU, UK, German and Irish case-law, the adjudication officer decided to hear the preliminary issue of the *forum conveniens*.

The complainant worked on a ship travelling between Ireland and Wales. The respondents argued that, where an employee is peripatetic as in this case, then jurisdiction is governed by the flag state of the ship or the location of the head office; both of which were Cyprus. The contract of employment also stated a dispute would the subject to the jurisdiction of the Republic of Cyprus. The Complainant argued the issue of jurisdiction was an attempt by the respondent to exclude employees from enforcing their legal rights as only 11 of the 772 employees were based in Cyprus. He relied on Brussels 1 in arguing the place where the contract was performed was determinative of where matters could be litigated and, on the facts of the case, this was Ireland. Complex submissions were made on the law. The adjudication officer and the parties agreed there were no European cases which involved the interpretation of Article 19.2 (b) of Brussels 1 where the employment is on board a vessel travelling from one Member State to another.

The adjudication officer found, on the construction of the wording of Article 19.2 (b) and the contract of employment of the complainant, the place where the employee was engaged to work was Ireland as the Port of Engagement was identified as Waterford and the place where the contract was signed was Dublin.

**Unilateral withdrawal of Christmas bonus**

A case under the Payment of Wages Act 1991 was heard in ADJ-00003012, Two Retail Assistants v A Retailer. The facts in each case were more or less identical in that both claimed an entitlement to a Christmas bonus in cash. They gave evidence that in 2004 the company made a unilateral change to the bonus system and replaced it with vouchers. The company stated it was entitled to vary the bonus scheme and the vast majority of the employees had accepted the change.

The adjudication officer found the fact the majority of employees accepted the change did not of itself mean the contract had been varied as a result of custom and practice. It was clear the change to the bonus scheme was not the result of a collective agreement and the clear the change to the bonus scheme was not the result of a collective agreement and the

two complainants had never accepted a variation in their contracts. He found the cash payment clearly fell within the definition of wages under the Payment of Wages Act. He went on to state that this matter involving the same employees had been before the Rights Commissioners on numerous occasions and those decisions had consistently been in favour of the complainants. He also referred to the appeals to the Employment Appeals Tribunal which upheld the decisions of the Rights Commissioners.

He stated it was disrespectful to the Rights Commissioner Service and the Employment Appeals Tribunal that the respondents would persist against the complainants. He went on to state the legal position of the complainants is well settled and it behoves the respondent to respect, accept and apply it on a continuing basis. He ordered the payment of the bonus to be paid in conformity with section 2 of the Payment of Wages Act 1991.

**Multiple Complaints**

In ADJ-00000991, the complainant made a total of nine complaints, five under the Organisation of Working Time Act 1997 and one each under the Payment of Wages Act 1991, the Terms of Employment (Information) Act 1994, the Unfair Dismissals Act 1977 and the Minimum Notice and Terms of Employment Act 1973. The employer argued the Organisation of Working Time Act 1997 did not apply to the employee as he determined his own time as per section 3(2)( c) of the Act.

The adjudication officer found the complainant did not determine his working hours. On hearing the evidence, she went on to find as follows; in relation to Sunday working, while the complainant may have substituted some Sundays for days lost during the week, she accepted his evidence he was required to work some Sundays and ordered the respondent to pay €500 compensation; in relation to annual leave, she found a shortfall in the amount given to the complainant and awarded a further €904 to the complainant; she found the provisions of the Act were not applied in regard to public holidays and awarded him €500 compensation; the other two complaints she found were a repetition of the annual leave and public holiday complaints.

Under the Terms of Employment (Information) Act the employer submitted a document which purported to be a written contract given to the employee who professed no

knowledge of the document. She preferred his evidence and awarded €1,400 compensation.

There was conflicting evidence given in relation to the circumstances in which the employment of the complainant ended. The complainant stated that, when he told the respondent he could not work the next day (Saturday) as he had a domestic illness to attend to, the respondent told him he would get no more work from him. The respondent stated that, after he was approached by the complainant and his brother, who was also an employee, looking for money/holiday pay, and after he refused, the two gave verbal notice and finished up the following Friday.

The adjudication officer noted that,even if the complainant employee resigned "in the heat of the moment", there was a responsibility on the employer to resolve the issue or at least give the employee an opportunity to let matters cool down. She noted that there was no written resignation and accepted the evidence of the complainant he was told he was no longer required. She did not find it credible that an employee of some 15 years' service would walk out of his employment over a dispute regarding holiday pay. She ordered the respondent to pay the sum of €12,000 compensation.

In deciding this redress, she took into account the fact re-instatement or re-engagement was not appropriate as the respondent was sub-contracting the work. She also took into account the efforts made by the complainant to mitigate his loss. The final complaints regarding the Payment of Wages Act and Minimum Notice and Terms of Employment Act were duplicated and the amount was covered in the total amount awarded under the Unfair Dismissals Act. The total amount awarded was €15, 304.

**Employment Status**

The adjudication officer dealt with the preliminary issue of the status of the employee in ADJ-00004297. The union had asked that, as a number of complainants were involved, the matter be heard as a collective basis. The company objected on the basis the union did not represent all employees affected. The adjudication officer decided to hear the case on the day as it had already been delayed to allow the parties to resolve the claims. The complaints

were lodged under the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act 1997 and the Industrial Relations Act 1969.

The adjudication officer dealt in detail with the evidence of the complainant and the respondent concerning the status of the complainant as an independent contractor. She looked extensively at the case-law in the area including The Minister for Agriculture and Food v Barry[6], Henry Denny & Sons Ltd v Minister for Social Welfare[7], and a recent Labour Court case of St James' Hospital v O'Flynn[8]. She also looked at English case-law, the Code of Practice for determining employed and self-employed status and the ILO definition of "disguised employment relationships".

Based on her analysis of the facts and circumstances of this particular case, the adjudication officer found the label on the position commenced by the complainant in March 2015 differed markedly from its core substance and function in everyday reality. It was her opinion that the complainant was involved in the role and function of an employee from the beginning of her employment. On the substantive complaints she ordered the respondent to give the employee a written statement as per section 7(2)( c) of the 1994 Act.

She found the Organisation of Working Time 1997 complaint out of time. She recommended the payment of €3,000 under the Industrial Relations Act 1969 for the unfair and inequitable treatment of the complainant (albeit mitigated by the offer of a fixed term-contract) and recommended the respondent re-issue its offer of a permanent contract.

**Discriminatory treatment under the Equal Status Acts**

The Adjudication Service of the WRC hears complaints at first instance under all equality legislation including discrimination under the Equal Status Acts 2000 to 2015 which apply to the provision of goods and services, accommodation and education.

In ADJ- 00001248 the complainant alleged discrimination on the Traveller ground when she was asked to leave the respondent shop by a security guard. She had already purchased some items and was waiting for her sisters–in–law to finish shopping. She asked for an

[6] [2009] 1 IR 215
[7] [1998] 1 IR 34
[8] PTD 162

explanation and was informed only that if she did not leave the Gardai would be called. She explanation and this was refused. She was informed that if she did not leave the Gardai would be called. She told the staff she would wait and while she was waiting the security guard asked her children if they were frightened the Gardai were coming for them. The complainant felt this was further intimidation and when she asked for a name he refused. The respondent did not attend the hearing.

The adjudication officer was satisfied there was a prima facie case of discriminatory treatment and that the complainant was asked to leave the shop because the security guard recognised her as a Traveller. The complainant was awarded €1,000. She also ordered the respondent to provide staff training on the Equal Status Acts.

**Inspection and Enforcement Services**

Inspection and Investigation

The Inspection Services and Enforcement Services monitor employment conditions to ensure compliance with and, where necessary, the enforcement of employment rights legislation. This includes redress for the employees concerned and payment of any unpaid wages arising from breaches of employment rights.

The Inspection Services have the power to carry out employment rights compliance inspections in relation to the following legislation:

- Organisation of Working Time Act 1997
- Payment of Wages Act 1991
- Protection of Young Persons (Employment) Act 1996
- National Minimum Wage Act 2000
- Parental Leave Acts 1998 and 2006
- Redundancy Payments Acts 1967–2012
- Employment Agency Act 1971
- Protection of Employment Act 1977–2007
- Protection of Employees (Employers' Insolvency) Acts 1984–2003
- Carer's Leave Act 2001
- Employees (Provision of Information and Consultation) Act 2006

- Employment Permits Acts 2003–2014

Inspectors visit places of employment and carry out investigations on behalf of the Commission in order to ensure compliance with employment-related legislation. In certain circumstances, the Labour Court may request that an inspector carry out investigations on its behalf. Such investigations involve, but are not confined to, examining books, records and documents related to the employment, and conducting interviews with current and former employees and employers.

If necessary, inspectors may be accompanied by other inspectors or the Gardaí. Inspectors are also empowered to work in Joint Investigation Units with the Department of Social Protection and the Revenue Commissioners, and to exchange information with these bodies. In addition, where appropriate, the WRC carries out inspections in tandem with bodies such as the Garda Siochana and others.

The recent Judicial Review case *of Deirdre Foley and D2 Private Ltd v Workplace Relations Commission, James Kelly and Pat Phelan* examined some of the powers of inspectors used in the course on an investigation. The investigation is ongoing.

Where breaches of legislation have been found, an Inspector may, depending on the section of legislation involved, issue either a Compliance Notice or a Fixed Payment Notice to an employer, or, if the matters are offences under legislation, to recommend prosecution of the employer by the WRC. A person who receives a Fixed Payment Notice may, within 42 days of the date of the Notice, make a payment to the Commission of the amount specified in the Notice. If the payment is made within that period, no prosecution will be instituted against such a person. However, failure to make payment against a Fixed Payment Notice will cause a prosecution to be instituted by the WRC in the Courts. In the first twelve months of operation 13 such Fixed Payments Notices issued – all in relation to failure by the employer to provide a written statement of wages.

The WRC is empowered under certain employment legislation to bring summary prosecutions against employers who are alleged to be in breach of that legislation.

- The recording of complaints, referrals and risk initiated inspections,
- Facilitating case research,
- Arranging inspections,
- Recording contraventions.

Inspectors are also empowered to work in Joint Investigation Units with the Department of Social Protection and the Revenue Commissioners, and to exchange information with these bodies.

There is a growing emphasis on collaborative work between government agencies. This approach enables a more comprehensive focus on employers and sectors most at risk of being non-compliant in the areas of employment rights, social protection and taxation. In the period under review, a total of 420 joint investigation visits were carried out by Inspectors from the WRC with their counterparts in the Revenue Commissioners and/or the Department of Social Protection. Inspectors were also accompanied by Gardaí during inspections where appropriate. In March 2016, a Memorandum of Understanding was agreed between Inspection and Enforcement Services and the Gangmasters Licensing Authority in the United Kingdom. More recently, memoranda were concluded with both the Private Security and Road Safety Authorities.

In the course of the year, a Fishing Vessel Compliance Team was established. A total of 94 inspections of vessels which come within the aegis of the Atypical Worker Permission Scheme launched by the Irish National Immigration Service (INIS) were carried out. This work is assisted by way of a multi-agency Memorandum of Understanding which provides, among other matters, for coordination and cooperation, and effective communication and exchange of relevant information, between the enforcement agencies and other bodies. This has led to agreed supportive and information sharing arrangements with the relevant Departments and Agencies. The WRC maintains a database of vessels coming within the aegis of the Atypical Permission Scheme and this now incorporates a risk profiling of all vessels.

The WRC also works closely with the Garda National Immigration Bureau (GNIB) and the Garda National Protective Services Unit in terms of the reporting of potential immigration and human trafficking issues encountered during inspections. In this regard, the WRC took part in the multi-agency enforcement operation ("Operation Egg Shell") undertaken on 5th October, 2016.

The maintenance of good working relations at an international level is an important element of the work of the WRC. There is an ongoing involvement in the training of inspectors from other EU countries and this has been reciprocal arrangements in the training of our own Inspectors. This year inspectors also availed of an opportunity in Belgium to carry out inspections in other countries under the Posted Workers arrangements. Foreign inspectors, most recently from Romania, have also worked with our inspectors in Ireland.

The aim of the WRC is to achieve a culture of compliance with employment law, by informing employers and employees of their respective responsibilities and entitlements, and by working in close cooperation with them and their representatives. Working with individual employers through the inspection process is a key element of checking and ensuring compliance.

Prosecutions & Enforcement

There are occasions where it is necessary and appropriate to invoke legal sanctions against non-compliant employers. This can arise in respect of offences that arise when an employer fails to comply with a Compliance or Fixed Penalty notice. The majority of Compliance Notices have been issued under the Organisation of Working Time Act 1997 and they relate to the provisions concerning annual leave, public holiday entitlement, and payment in respect of work carried out on a Sunday. The Workplace Relations Act provides for a six week period following the service of such notices in which the employer can lodge an appeal which is ultimately heard by the Labour Court we are not in a position to provide details of the number of appeals received by the Labour Court in this regard.

There are also separate offences which may be prosecuted in their own right before the courts. These include, for example, a failure to pay the minimum hourly rate of pay under the National Minimum Wage Act.

Decisions regarding the prosecution of employers are based on a consistent, proportionate and fair assessment of the seriousness of the alleged offence. Mitigating factors such as the level of cooperation received, employers previous history of compliance, whether the employer has rectified the non-compliance, whether employees have received redress in the form of unpaid wages or other entitlements, are also taken into account in arriving at a decision.

The new provisions contained in the Workplace Relations Act 2015 came into effect on 1 October 2015 and relate to cases commenced on or after that date. Cases which were commenced before that date continue to be dealt with under the old provisions and are included in Appendix.

The provisions in the Act, as they relate to the enforcement of decisions of Adjudication Officers, and the Labour Court following an appeal from a decision of an Adjudication Officer, represent a significant change from that which applied previously. In the past, decisions which were legally capable of being enforced were processed through the civil courts. The new provisions have made the failure to comply with such decisions a criminal offence with significant fines, and the possibility of a prison term. Similar to the Compliance and Fixed Penalty notices, it is perhaps too short a period to discern any significant trends in this regard.

| **Inspection Services** | |
|---|---|
| Cases Concluded | 5,221 |
| Employers in Breach | 2,050 |
| Complaints Received | 1,025 |
| Unpaid Wages Recovered | €1,569,751 |

Table 5

**Appendix**

# Summary Twelve Month Activity Report for WRC 1 October 2105-30 September 2016

**Adjudication Service**

*New Cases*

| | |
|---|---|
| Number of Complaint Applications Received: | 7070 |
| Number of Specific Complaints Received: | 13450 |
| Number of Decisions Issued: | 1949 |

*Legacy Cases*

| Awaiting Hearing | 1 Oct 2015 | 30 Sept 2016 |
|---|---|---|
| Rights Commissioners | 2397 | 949 |
| Equality Tribunal | 1298 | 892 |
| | 3695 | 1841 |

**Conciliation/Mediation Service**

| | |
|---|---|
| Industrial Relations Referrals: | 1124 |
| Conciliation Conferences: | 1534 |
| Other Meetings (Mediation/Facilitation, etc.) | 319 |

**Advisory Service**

| | |
|---|---|
| New Referrals: | 64 |

**Employment Rights/Equality Mediation**

| | |
|---|---|
| No of complaints selected and offered: | 1119 |
| Number where both parties agreed to mediation: | 580 |

**Inspection Services**

| | |
|---|---|
| Cases Concluded: | 5221 |
| Employers in Breach: | 2050 |
| Complaints Received: | 1025 |
| Unpaid Wages Recovered: | €1,569,751 |