



**An Roinn Fiontar,
Trádála agus Fostaíochta**
Department of Enterprise,
Trade and Employment

Post Enactment Report

Workplace Relations (Miscellaneous Provisions) Act 2021

27 July 2022



Workplace Relations (Miscellaneous Provisions) Act 2021

1. Background

The Workplace Relations (Miscellaneous Provisions) Act 2021 was signed into law on 22 July 2021 by President Michael D. Higgins and came into effect on 29 July 2021.

This legislation came about because the majority judgment of the Supreme Court on 6 April 2021 in the *Zalewski Case* overturned the judgment of the High Court which had found that the Workplace Relations Commission's ('WRC') adjudication service was not administering justice within the meaning of Article 34 of the Constitution.

The seven judges of the Supreme Court agreed that the WRC's adjudication service is the administration of justice, traditionally a matter exclusively for the Courts.

However, the majority decision saved the 2015 Act from being constitutionally repugnant because it found that the administration of justice was limited and therefore permissible under Article 37.

The limited nature was due to the fact that: the WRC deals with workplaces; has statutory limits on the awards it can make; enforcement of its decisions is required through the courts; its decisions are subject to an appeal; and the decisions and procedures of the adjudication services are subject to a judicial review before the High Court.

2. Purpose of the Bill

The purpose of this Bill was to ensure that the matters of concern identified by the Supreme Court in its majority decision in the *Zalewski* case were remedied in statute. These remedies related to the necessity to ensure that administration of justice is capable of being conducted in public; and the provision of statutory authority to administer oaths/affirmations in circumstances where there is a material dispute of fact.

3. Objective of Legislation

The aim of this legislation was to amend the Workplace Relations Act 2015 to address concerns raised by the Supreme Court in *Zalweski v An Adjudication Officer and Others* about the manner in which the Workplace Relations Commission operates.

4. Functioning of the Act

The standard now associated with adjudication was summarised by Chief Justice O’Donnell in his majority judgment as follows – O’Donnell CJ, *Zalewski* [2021] 32 E.L.R. 213:

“The function being performed, and the power being exercised must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness, and, above all, fairness, which are understood to be the essence of the administration of justice. ... The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34”.

As such, the WRC Adjudication Service is now effectively a court following the Supreme Court judgment in *Zalewski v Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24.

Adjudication Officers are deemed to be administering justice, that is exercising limited functions and powers of a judicial nature within the meaning of Article 37 of the Constitution.

This judgment has changed the adjudicative model from that in existence in 2015 to the date of the judgment, from one where – in line with the founding legislation – a degree of informality and discretion was afforded to the service with regard to the processing, hearing and disposal of complaints to one where the service must act consistent with the full standards expected of a court, i.e., in full adherence with proper administration of justice.

To ensure compliance with the judgment, alike amendments were carried to all acts where the WRC has jurisdiction to investigate. In addition to the WRC Act 2015, Redundancy Payments Act 1967, Unfair Dismissals Act 1977, Protection of Employees (Employers Insolvency) Act 1984/1998, Employment Equality Acts and Equal Status Act 2000 have been effected.

In preparation of this Report, the WRC have consulted with a number of appointed Adjudication Officers to seek observations on: the functioning of the administration of the oath/affirmation; hearings in public/private and decision publishing/anonymisation. This data was then collated to provide the observations of the WRC below.

For completeness, two reports prepared by the WRC are referenced and included in the Appendices. Appendix 1 details media and public access requests to remote adjudication hearings - Jan 2022 to April 2022. Appendix 2 sets out known reasons why cases have been withdrawn from mediation/adjudication in 2021.

(a) The Administration of Oaths or Affirmations by Adjudication Officers

In *Zalewski v An Adjudication Officer, the Workplace Relations Commission & Others* [2021] IESC 24, delivered on 6th April 2021, the Supreme Court unanimously held that the absence of a provision for an Adjudication Officer to administer an oath or affirmation and the absence of a possibility of punishment for giving false evidence, were both inconsistent with the Constitution of Ireland.

The Workplace Relations (Miscellaneous Provisions) Act 2021 was subsequently introduced on 29th July 2021 to address these shortcomings and from this date an Adjudication Officer may require evidence to be provided on oath or affirmation, particularly if there is a serious and direct conflict of evidence between parties, with a possibility of prosecution for giving false evidence. The fact that the parties may express a view that there is no necessity for an oath/affirmation to be administered is not determinative of the matter. The decision rests with the Adjudication Officer as to whether he/she considers the oath/affirmation to be a requirement.

In July 2022, the WRC issued *Guidelines on Oaths and Affirmations – July 2021*¹ in 10 languages, which include the text of the oath and affirmation. This document is available for all parties to read in advance of a hearing. These guidelines apply to Adjudications involving the administration of justice and not to disputes referred to the WRC under the Industrial Relations Act 1969.

Sacred books were provided to Adjudication Officers at each of the WRC offices² for use at in-person hearings and training was provided to Adjudication Officers on

¹ www.workplacelrelations.ie/en/complaints_disputes/adjudication/wrc-witness-guidelines/wrc-witness-guidelines.pdf

² Parties are also invited to inform the WRC if they wish to use their own holy book, and this is facilitated by the Adjudication Officer.

administering the oath/affirmation and on the appropriate handling and storage of sacred books related to different faiths.

Where a hearing is held remotely, witnesses are advised to have their own sacred book ready in the place they are connecting from, or alternatively, they can refer to an appropriate e-book.

Where the Adjudication Officer hears evidence on oath or by affirmation via an interpreter, the interpreter is directed to swear the interpreter's oath or make an interpreter's affirmation.

Adjudications Officers report that in practice:

1. Administering the oath or affirmation has presented no difficulties at adjudication hearings, other than the additional time required to administer same and to explain to witnesses the implications of giving false evidence. Depending on the number of witnesses in a case and where an interpreter is required, the practice of administering the oath/affirmation does add additional time to the duration of hearings. This, together with cross examination, has extended the time it is taking to complete hearings quite significantly and a resumed hearing which may not have been required in the past is now common especially in complex cases such as an unfair dismissal, discrimination/equality, protected disclosures, and transfer of undertaking complaints.
2. It has been beneficial to adopt the practice of administering the oath or affirmation to all witnesses at the beginning of the hearing, as it is often not apparent at the outset if there will be a conflict of evidence. This practice works well and removes the risk of unsworn evidence which subsequently transpires to conflict with the evidence of the other party.

3. Those attending the WRC appear to be familiar with the WRC *Guidelines on Oaths and Affirmations – July 2021*.
4. There has been an overwhelming positive acceptance and respect by witnesses of the requirement for and the role of the oath and/or affirmation.
5. Parties have welcomed the choice allowed between taking an oath or an affirmation.

(b) The Conduct of Proceedings in Public & Parties Named in Decisions

In *Zalewski v An Adjudication Officer, the Workplace Relations Commission & Others* [2021] IESC 24, the Supreme Court ruled that it is incompatible with the administration of justice for there to be a blanket prohibition on hearings in public. Accordingly, pursuant to the *Workplace Relations (Miscellaneous Provisions) Act 2021*, all WRC hearings involving the administration of justice (that is all WRC cases save for those for disputes under Section 13 Industrial Relations Act 1969), will be conducted in public. In addition, the names of parties are published unless the relevant Adjudication Officer decides, of his or her own motion or upon application by or on behalf of the employee or employer, determines that, due to the existence of *special circumstances*, the proceedings (or part thereof) should be conducted in private and/or the decision anonymised.

The *WRC Guideline Procedures in the Adjudication and Investigation of All employment and Equality Complaints and Disputes*³ provides a non-exhaustive list of examples of “special circumstances”. These include cases involving a minor; circumstances where a

³https://www.workplacerelations.ie/en/publications_forms/procedures_employment_and_equality_complaints.pdf#

party has a disability or a medical condition which they do not wish to be revealed; cases involving issues of a sensitive nature, such as sexual harassment; cases involving a protected disclosure where there is an issue of the disclosure being made in confidence; or cases which could result in a real risk of harm to a party if the hearing is held in public or the parties are named in a decision.

It should be noted that the fact that the parties both consider that there are '*special circumstances*' or that an individual's reputation might be impacted by having an employment or equality complaint ventilated in public does not automatically constitute a reason for the hearing to be heard in private. Ultimately, it is a matter for the Adjudication Officer to decide based on the facts of the case in accordance with the law and fair procedure. Such decisions will generally be made by the Adjudication Officer at the hearing though parties may indicate their views in advance of the hearing.

Once it has been decided that a case is to proceed in public, members of the public, including members of the media, may be admitted into the hearing.

WRC hearing/case lists continue to be published weekly with case reference details only, to facilitate applications by the parties at the hearing. Where the Adjudication Officer decides that the hearing should be held in private, members of the public are not admitted. In this regard, the WRC does not have powers to impose reporting restrictions as the Courts do. It is a quasi-judicial matter for the AO to decide if "special circumstances" exist that require the hearing to proceed in private. The WRC has due regard to the fundamental freedoms of the press and access to information pursuant to Article 10 ECHR at all times, but this qualified right must be balanced against its other legal obligations including, *inter alia*, the Workplace Relations (Miscellaneous Provisions) Act 2021, Equality Acts, Equal Status Act 2000, International Protection Act 2015, Protected Disclosures Act 2014.

Therefore, in order to protect vulnerable parties, this approach is necessary and proportionate.

No recording of the hearing is permitted. Refusal to adhere to this rule may result in the hearing being terminated.

Following the hearing, the Adjudication Officer prepares a written decision on the case which is issued to the parties. The WRC is also required to publish on its website every decision, identifying the parties to the proceedings. Previously, most decisions were anonymised. An anonymised version of the decision may be uploaded where the Adjudication Officer decides at the hearing, of their own motion, or following an application from a party to the proceedings, that due to the existence of '*special circumstances*', the decision should be anonymised.

It has become quite common for WRC hearings and/decisions to be reported on in the media on a weekly, if not daily, basis. This is a positive development as facilitates transparency.

Adjudication Officers report that in practice:

1. Public hearings bring important transparency to adjudications and highlight issues arising in employment law.
2. Most hearings are conducted in public as required by the Act. However, the discretion to move to a private hearing is an important one as some complaints before the WRC concern highly sensitive matters such sexual harassment or a disability that a complainant is very concerned to keep private.
3. Parts of a hearing may need to be conducted in private (such as a request for a private hearing and/or an anonymised decision) and a decision must then be made whether to proceed in public or private.
4. It would be preferable if adjudication officers could direct that the name of a person is not disclosed i.e., where the circumstances are not such to make the hearing otherwise

than in public, it would be helpful if directions could be made by the Adjudication Officer regarding disclosure of a person's name. This is most often someone not in attendance at the hearing but whose name will feature in the evidence for example.

5. The volume of correspondence for each complaint has increased significantly and it is not uncommon to have at least 100 items of correspondence for each complaint file. This presents an additional challenge for Adjudication Officers in reading this material and preparing for the hearing in advance.

The requirement to conduct hearings in public has added to the administrative burden of the WRC, particularly when hearings were being conducted primarily on a remote basis. For example, in the first four months of 2022 the WRC received 927 requests for access to hearings from the media and the public.

Details of all media and public access requests from January to April 2022 are set out in Appendix 1. WRC data shows a high access rate to adjudication hearings which is consistent with the requirement on the WRC to administer justice in public. Overall, 68% of all requests to access a remote hearing were granted. Of those remaining, half could not be facilitated (because either the hearing was postponed/cancelled, the complaint/s were withdrawn before hearing, or the request to attend the hearing was incomplete) and half related to requests from the media/public to attend hearings being refused, mainly because the request related to a hearing of a dispute under the Industrial Relations Act, 1969. As these disputes do not involve the administration of justice, hearings remain in private with anonymised decisions. Accordingly, the media and public are not permitted access to the hearing.

Only 1.6% of the total requests received for access to an adjudication hearing were refused on the basis that the Adjudication Officer, of his or her own motion or following an application from one or both parties, determined that "special circumstances existed", thereby permitting proceedings to be conducted in private.

Of all requests (927) to attend hearings, 766 or 83% came from the media and the remainder from the public.

While the WRC is not in a position yet to compare complaint withdrawal figures pre and post the enactment of the Workplace Relations (Miscellaneous Provisions) Act 2021, only two Adjudications Officers report the withdrawal of a complaint by a complainant because s/he would be named in the decision.

The WRC recently reviewed a sample of 100 specific complaints which were withdrawn during 2021 to examine if the judgment of the Supreme Court in the case of *Zalewski v An Adjudication Officer, the Workplace Relations Commission & others* [2021] IESC 24 and/or the Workplace Relations (Miscellaneous Provisions) Act 2021 were contributory factors in the decision to withdraw the complaint.

As can be seen in the Report (Appendix II), there was nothing to suggest from the data available that the *Zalewski* decision and/or the Act had a material bearing on the decision to withdraw a complaint in 2021. In fact, the most frequently cited reason for a withdrawal of a specific complaint was due to the matter being resolved internally, followed by the matter being settled between the parties.

5. Conclusion

Generally, the administration of an oath/affirmation, the conduct of hearings in public and the publishing of non-anonymised decisions has been largely non-problematic.

Most WRC hearings are now being conducted in public. Adjudication Officers note that the discretion to move to a private hearing is an important one as some complaints before the WRC concern highly sensitive matters such sexual harassment, mental health issues or a disability that a complainant is very concerned to keep private. Recent

analysis of access requests by the WRC to remote hearings shows that only 1.6% of remote hearings were conducted in private due to special circumstances.

Concern has been expressed that a public hearing and named decisions may deter complainants in proceeding with a complaint. However, complaints submitted from January to April 2022 show a +22% increase in the number of complaints submitted in comparison to the same period last year. This is a crude analysis and a further elapse of time is required to determine if a longer-term impact is being felt but, on the face of it, this would not seem to indicate that parties are hesitant to submit complaints because of public hearings. This is an issue that the WRC will continue to monitor.

Given the short time since commencement of the Act, it would be prudent to allow further time for the system to establish itself, and for additional evidence regarding how the operation of the Act is proceeding to be gathered and assessed.

APPENDIX 1

WRC Report on Media & Public Access Requests to Remote Adjudication Hearings - Jan 2022 to April 2022

Executive Summary

This document reports on the number of requests for access to *remote* adjudication hearings since January 2022 and provides a breakdown of the number of requests received by the media and the public, the percentage granted and the reasons why some requests were refused or could not be facilitated.

Over the last four months, the WRC received **927** requests for access to hearings from the media and the public. This presents a significant administrative challenge for the staff of Adjudication Services in dealing with and responding to these. Overall, **68%** of all requests to access a remote hearing were granted. **32%** (294) of requests could not be facilitated (16%) or were refused (16%). The high access rate to adjudication hearings is consistent with the requirement on the WRC to administer justice in public.

The most common reason (**13%**) for **refusing** access to an adjudication hearing was because the request related to a hearing of a *dispute* under the Industrial Relations Act, 1969. As these disputes do not involve the administration of justice, hearings remain in private with anonymised decisions. Accordingly, the media and public are not permitted access to the hearing. A further **1%** of requests for access were refused because the hearing involved a combination of employment rights and industrial relations issues⁴.

Only **1.6%** of the total requests received for access to an adjudication hearing were refused on the basis that the Adjudication Officer, of his or her own motion or following an application

⁴ On occasion the employment rights issue and the dispute are intertwined and cannot be heard separately.

from one or both parties, determined that “special circumstances existed”, thereby permitting proceedings to be conducted in private.

The remaining 16% of total requests to attend a remote hearing by the media or public **could not be facilitated** because either the hearing was postponed/cancelled, the complaint/s were withdrawn before hearing, the hearing was in-person, or the request to attend the hearing was incomplete.

Of all requests (927) to attend hearings, 766 or **83%** came from the media and the remainder from the public.

In line with legislative requirements, the main reason for refusal to hearings was because the matter concerned a dispute within the meaning of the Industrial Relations Act, 1969 and accordingly, the public/media are not permitted access to those hearings.

Conclusion

From January 2022 to April 2022 inclusive, the WRC received 927 requests for access to hearings from the media and the public. Overall, 68% of all requests to access a remote hearing were granted. 32% (294) of requests could not be facilitated (16%) or a request was refused (16%). The high access rate to adjudication hearings is consistent with the requirement on the WRC to administer justice in public.

The most common reason for refusing access to an adjudication hearing was because the request related to a hearing of a *dispute* under the Industrial Relations Act, 1969.

Only 1.6% of requests were refused on the basis that the Adjudication Officer, of his or her own motion or following an application from one or both parties, determined that “special circumstances existed”, thereby permitting proceedings to be conducted in private.

Of all requests (927) to attend hearings, 766 or **83%** came from the media and the remainder from the public. **99%** of all media requests came from one journalist.

APPENDIX 2

WRC Report on Known reasons for the Withdrawal of Specific Complaints *Before* Adjudication/Mediation in 2021

Executive Summary

The purpose of this report is to examine the reasons for complaint withdrawals for a sample number of specific complaints withdrawn in 2021 and to consider if the judgment of the Supreme Court in the case of *Zalewski v An Adjudication Officer, the Workplace Relations Commission & others* [2021] IESC 24 and/or the Workplace Relations (Miscellaneous Provisions) Act 2021 were contributory factors in the decision to withdraw the complaint.

Following a review of a **sample of 100 specific complaints** which were withdrawn during 2021, there is nothing to suggest from the data available that the Zalewski decision and/or the Act has had a material bearing on the decision to withdraw a complaint in 2021. The **most frequently cited reason for a withdrawal of a specific complaint was due to the matter being resolved internally**⁵, followed by the matter being settled⁶ between the parties. Unfortunately, the available data gives no information as to the motivation to internally resolve or settle these complaints and specifically whether the Zalewski decision and/or the Act had any material bearing on that decision.

In almost a third of the sample, no reason was given for the withdrawal. It is acknowledged that many of these complaints may too have settled or have been internally resolved, or the complainant may simply have decided not to pursue the matter further. Again, the impetus for such action cannot be established from the available data.

⁵ The complaint was resolved directly between the complainant and the respondent (in a small number of cases this included the assistance of a union official).

⁶ In all the cases where a settlement was the reason given for the withdrawal, one or both parties were legally represented or represented by a professional body.

Of the 100 sample cases reviewed, other reasons given for withdrawal included ill-health (1%), duplicate application (1%) and incorrect employer named (2%). These cited reasons represent an insignificant cause for withdrawals, totalling only 4% of the total number of the sample withdrawn complaints reviewed.

Finally, while it is less than one year since the Zalewski decision and the passing of the Act, it is worth mentioning that there has been an **increase of 1.2%** in the number of specific complaints withdrawn *before* adjudication/mediation in 2021 when contrasted to comparative data for 2020. However, it is too early to say if the Zalewski decision and/or the Act was a contributory factor in that marginal increase.

Background

The judgment of the Supreme Court in the case of *Zalewski v An Adjudication Officer, the Workplace Relations Commission & others* [2021] IESC 24, delivered on 6th April 2021 and the enactment of the Workplace Relations (Miscellaneous Provisions) Act 2021 (“the Act”) on 29th July 2021 triggered significant changes to the procedures for hearings before the WRC.

WRC hearings are now open to the public, the parties to the proceedings and decisions are no longer anonymised⁷ and evidence may be given under oath. In addition, due to the Covid pandemic, most hearings continued to be heard remotely in 2021.

These very significant changes to how hearings are held and conducted may give rise to an increase in settlements and a preference for mediation and accordingly increase the number of complaint withdrawals.

Purpose of this Report

The purpose of this report is to examine the reasons for complaint withdrawals for a sample number of specific complaints withdrawn in 2021 and to consider if the judgment of the

⁷ Save some exceptions.

Supreme Court in the case of *Zalewski v An Adjudication Officer, the Workplace Relations Commission & others* [2021] IESC 24 and/or the Workplace Relations (Miscellaneous Provisions) Act 2021 were contributory factors in the decision to withdraw the complaint.

It is worthwhile reviewing the reasons cited for such withdrawals to determine if the Zalewski decision and/or the Act influenced one or both parties to withdraw the complaint or to settle or otherwise resolve the complaint given that the parties may not want a public hearing and/or their name published in the decision. Alternatively, a party may simply reach an agreement/settlement between themselves and accordingly withdraw the complaint with the Zalewski decision or the Act having no bearing on that decision. Finally, a consideration of what, if any, other factors may have led to the withdrawal of the complaint will be examined for the sample number of withdrawn complaints selected.

It is acknowledged that this exercise is merely a snapshot of the some of the reasons for the withdrawal of specific complaints in 2021. The randomly selected sample of 100 cases represents only 8.7% of the total number of Closed Specific Complaints Withdrawn Before Adjudication/Mediation in 2021.

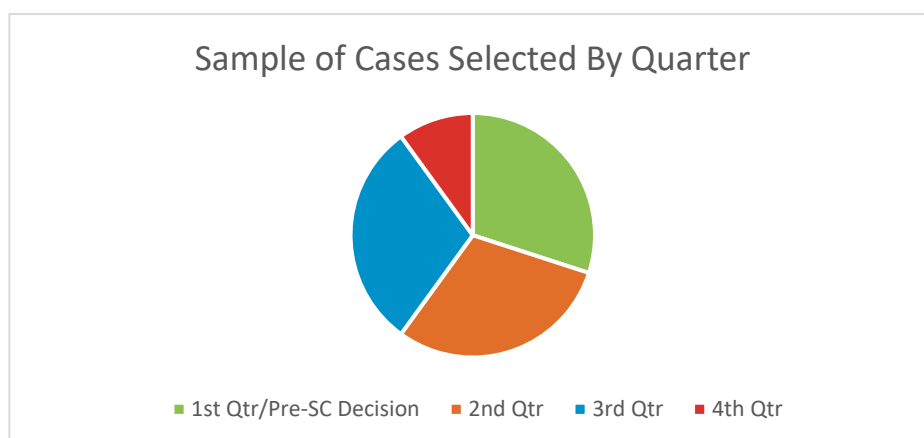


Figure 1

One hundred cases were randomly sampled – all were received by the WRC in 2021. Almost all (97%) were closed in the same calendar year.

Of the 100 sample cases, the complaint type can be broken down as follows (figure 2):

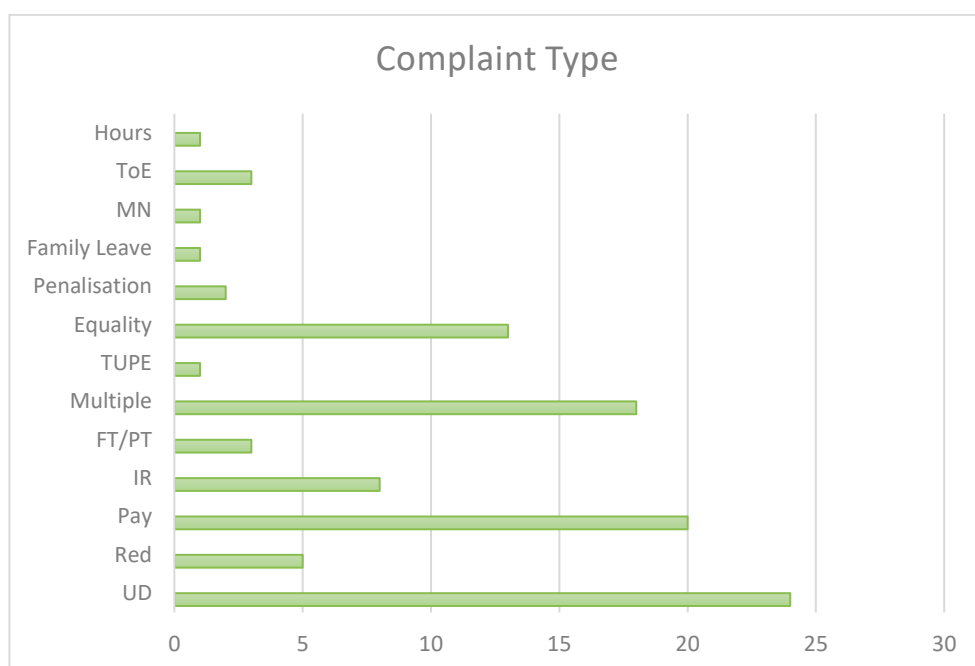


Figure 2

Analysis

Separately, an analysis of **Closed Specific Complaints by Outcome in 2021** at Figure 3 below shows inter alia, that a total of 1,145 specific complaints were withdrawn *before* Adjudication/Mediation. This represents **9.5%** of the Total Number of Specific Complaints (12,014) in 2021.

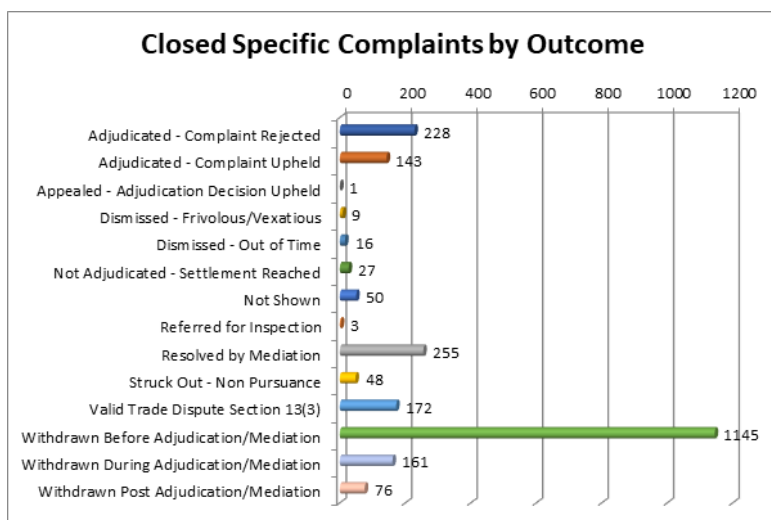


Figure 3: 2021

An analysis of **Closed Specific Complaints by Outcome in 2020** at Figure 4 below shows that a total of 1,573 cases were withdrawn *before* Adjudication/Mediation. This represented **8.3%** of the Total Number of Specific Complaints (18,969) in 2020.

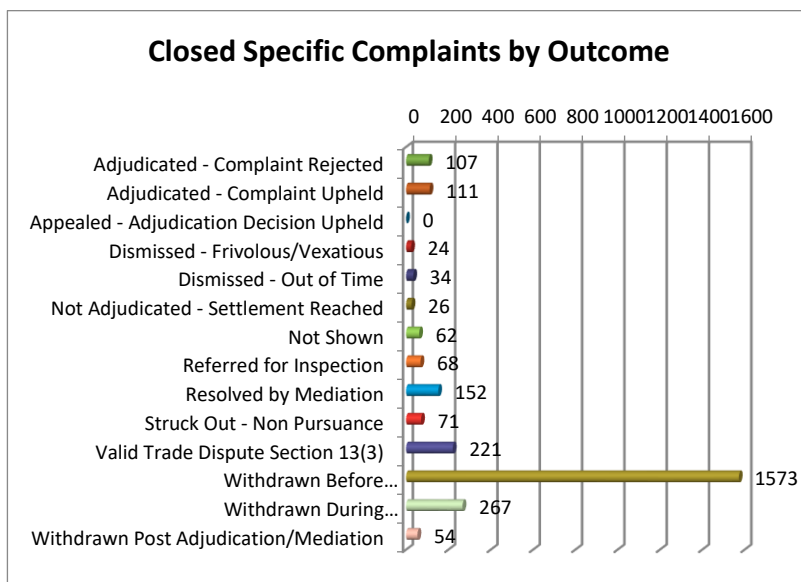


Figure 4: 2020

While these figures show that there was an increase (1.2%) in the percentage number of specific complaint withdrawals in 2021 compared to 2020 they are not enough to indicate yet a marked change year-on-year.

Reasons Cited for the Withdrawal of Specific Complaints Before Adjudication/Mediation in 2021

Figure 6 shows a breakdown of the reasons given for the withdrawal of specific complaints in 2021.

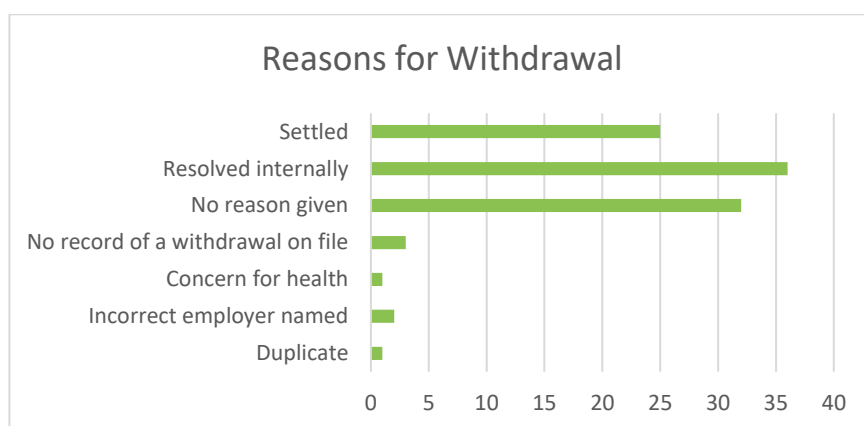


Figure 6

From the analysis of the 100 sample complaints mentioned earlier reasons for withdrawal were identified as follows:

- In **36%** of the sample of withdrawn complaints, the matter was resolved internally.
- In **32%** of the sample of withdrawn complaints, no reason was given for the withdrawal.
- In **25%** of the sample withdrawn complaints, the matter was “settled” (an agreement reached (with the assistance of a professional representative in all cases).
- In **4%** of the sample of withdrawn complaints, reasons given for withdrawal included ill-health (1%), duplicate application (1%) and incorrect employer named (2%).
- In the remaining **3%** of the sample of withdrawn complaints, no record of the withdrawal was on file.

None of the complaint withdrawal notifications reviewed refer to the Zalewski decision and/or the Act as being a contributory factor in the decision to internally resolve, settle or withdraw

the complaint. While it may have been a factor there is no way to substantiate this from the data available.

Conclusion

There is nothing to suggest from the data available that the Zalewski decision and/or the Act has had a material bearing on the decision to withdraw a complaint in 2021.

None of the complaint withdrawal notifications reviewed refer to the Zalewski decision and/or the Act as being a contributory factor in the decision to internally resolve, settle or withdraw the complaint.

Equally, it is acknowledged that the available data gives no information as to the motivation to internally resolve or settle these complaints and specifically whether the Zalewski decision and/or the Act had any material bearing on that decision

The most frequently cited reason for a withdrawal of a specific complaint in 2021 was due to the matter being resolved internally.

Where no reason is given for a complaint withdrawal (32%), it is acknowledged that many of these complaints may also have settled or have been internally resolved or the complainant may simply have decided not to pursue the matter further. Again, the motivation for such action cannot be established from the available data.

Of the 100 sample cases reviewed, other reasons given for withdrawal included ill-health (1%), duplicate application (1%) and incorrect employer named (2%).

Finally, while there was a 1.2% increase in the number of specific complaints withdrawn *before* adjudication/mediation in 2021 compared to 2020, it is very difficult to say if the Zalewski decision and/or the Act was a contributory factor in that marginal increase.