



Law Society of Ireland

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Private and confidential

Mr Richard Bruton, TD
Minister for Jobs, Enterprise and Innovation
Department of Jobs, Enterprise and Innovation
23 Kildare Street
Dublin 2

12th August, 2011

Our ref: MK/EJW

Re: Restructuring of the current system of employment law enforcement

Dear Minister,

I enclose a Law Society submission in connection with your decision to restructure the current system of employment law enforcement.

The Law Society welcomes this opportunity to submit its views on how best to reform the law in relation to employment law enforcement. The Society is concerned to ensure that an appropriate system, which deals with the many complex issues that arise within this area of law, is introduced. The Society, in this submission, presents a number of practical recommendations and the Society would welcome the opportunity to explore these issues further with your Department.

If the Society can be of any further assistance to you or to your officials in this process, please do not hesitate to contact the undersigned or the Society's Employment & Equality Law Committee, via its Secretary, Mr Rory O'Boyle.

Yours sincerely,


Mary Keane
Deputy Director General

Encl.

c.c. Mr Michael Kennedy, Chairman, Employment & Equality Law Committee
Mr Rory O'Boyle, Secretary, Employment & Equality Law Committee

**RESTRUCTURING OF THE CURRENT SYSTEM OF
EMPLOYMENT LAW ENFORCEMENT**

**SUBMISSION OF THE
THE LAW SOCIETY OF IRELAND**

August 2011



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Submission by the Law Society of Ireland to the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton TD, in relation to the restructuring of the current system of employment law enforcement

The Society welcomes the Minister's decision and intention to restructure the current system.

For too long, the system has failed all parties involved in it. Complainants have found it difficult to access, employers have found that there is a lack of reasoned decision making, and administrators have found the system difficult to implement. It is the Society's considered view that there is little or no point in retaining any of the existing structures. All of them should be amalgamated and a new Employment Rights Division of the Department should be established, incorporating all that is best from the old, but ensuring that the administration of enforcement procedures is more streamlined, efficient, cost effective and user-friendly.

The Society submits that it is at the commencement of the system that most of the cost savings can be made and that user access can be made more straightforward.

In this regard, it is suggested that the functions of the Employment Appeals Tribunal, the Rights Commissioner Service, the Equality Tribunal, the Labour Relations Commission, the Labour Court and possibly NERA and the Equality Authority all be subsumed into this Division. In addition, the Division should be given responsibility for dealing with all aspects of legislation giving protection to whistleblowers.

If all the Government agencies charged with promoting, resolving and enforcing employment and equality rights are joined under a single authority, this will allow parties with employment rights issues to have access to one single source and enable them to obtain all the necessary information in order that they can resolve any outstanding issues.

Preliminary issues to be addressed

Training

The success of the proposed new Division will depend on the calibre of personnel called upon to implement the system. For the reasons given below, the Society believes that the secretariat should have basic training in the principles of employment law, sufficient to differentiate between those cases which are straightforward and those requiring specialised knowledge and/or expertise. All those exercising an adjudicative function should have training in the conduct of hearings and the drafting of decisions. In addition, there should be specialised adjudicators with an excellent knowledge of the principles of employment and equality law.

Website

Assuming that a single body is established to deal with all employment and equality issues, then it should have a dedicated website with substantial explanatory material in a number of languages. Obviously, all forms necessary to bring a complaint should be available on the website. Most of this material is already available on the websites of the various bodies charged with promoting or enforcing employment and equality rights. In addition, all relevant legislation should be available on the site.

Secretariat

One of the major causes of delay in the current system is that a very substantial number of complainants, beyond stating that they have a claim under a particular statute or statutes, do not go into any detail about the complaint. This makes it impossible for employers to identify the exact cause of the complaint and thus resolve the issue at the earliest possible opportunity. It is important that the people deputed to deal with claims at first instance have a high level of knowledge and understanding of the area. It would also greatly streamline the process if the parties making complaints and the parties responding to them were in a position, at the relevant time, to set out in detail the elements of the complaint and the response.

Obviously, a number of complainants may have difficulty in setting out in detail their complaint, especially if they are not legally advised, and it is suggested that a specific section of the new body should be given responsibility for interacting with complainants, much as the District Court staff do with family law applicants. The Society believes that a system such as that which exists in the Family Law District Court where the Court Clerks render assistance to unrepresented parties to enable them to formulate their complaint and set out the issues involved would be of considerable assistance in streamlining the entire process. The secretariat would not act as a representative, but would merely assist the complainant in setting out the complaint and, if necessary, assist the respondent in formulating a response. The staff of NERA could have a significant input in this regard.

The Application Forms

Obviously, all application forms should be in as simple a format as possible, consistent with establishing the issues involved. In this regard the model form T1A used by the Employment Appeals Tribunal is probably the most appropriate example. The Society considered whether a 'one size fits all' form could be developed but, given the complexity of the relevant legislation, and the different issues that may have to be resolved in complaints by the same person under different statutes, the Society believes that, despite the initial work involved in completing a number of different forms, the system will be more streamlined when the issues involved in each complaint are separately identified.

Processing of complaints

After the mediation process outlined below, the Society believes that all complaint forms should then be considered by members of the secretariat who have a knowledge of the relevant area of employment rights and should be graded according to their complexity. The legal advisors to the various bodies could also be available to assist in determining the complexity of any particular case. While it is not expected that the grading system could be completely accurate, nevertheless it would represent an 'early warning system' by which those cases which involve complicated issues of law or are likely to require a substantial amount of time at hearing are identified at an early stage and are managed accordingly.

The Adjudicative Process

Mediation

The Society is strongly of the view that mediation should immediately be offered to all parties and that its use should be recommended. The Society believes that mediation should not be made mandatory, as a number of complainants and respondents will simply refuse to engage with it. A number of the Rights Commissioners already indulge in an ad hoc form of mediation and the staff of the Labour Relations Commission have extensive experience in mediating industrial relations disputes. It may be that mediators will also be sourced from outside the service, depending on the level of demand, but that would be a matter for the Minister to decide. What is essential is that the delays which now occur in both the Employment Appeals Tribunal and the Equality Tribunal should be eliminated.

If mediation is refused, the case should, as suggested above, be assessed by a member of staff who would be proficient enough to decide whether or not it involves complex areas of law or a lengthy hearing and, if so, it should be assigned to a member of the Adjudication Panel with knowledge of the relevant areas to enable them to manage the case successfully and to reach a decision.

The Adjudication Panel

The Society submits that all complaints at first instance should be heard by a single Adjudication Officer. The Adjudication Panel should consist both of lay persons with experience in this area, such as the current Rights Commissioners, and persons with sufficient legal experience to deal with the complex issues of European and domestic law which employment rights disputes can raise. The Equality Officers would obviously have a role on this Panel. The first instance adjudicators should also be trained in their judicial role. In addition, they should give reasoned decisions and make findings of fact which would enable the Appellate Court to identify the issues which were at the kernel of any dispute. The Minister might also consider whether there should be a Presiding Officer charged with the assignment and management of cases.

Case Management

While less complex cases would be referred for hearing immediately, more complex cases should be case managed. The Adjudication Officer assigned to the case should meet with the parties to identify the legal issues involved, the factual evidence, whether these can be agreed, and to set a date for submissions on the issues. There should be a sanction for failing to comply with the directions set down by the Officer. Where one of the parties, for reasons of cost, is unable to have legal representation, and the issues involved are both important and novel, the Adjudication Officer should have the authority to refer them to an outside party, perhaps the Equality Authority, the Legal Aid Board or a panel of solicitors established to assist complainants in those circumstances for a specific fee.

Legal Advice

The various legal officers currently attached to the separate employment and equality rights bodies should be consolidated into a single office where they would be available to give advice to the new Division.

The Hearing

Sufficient time should be given for complex cases. One of the principal sources of complaint amongst current users of the system is that cases are either not reached on the day of hearing or, having only just started, they are adjourned for nine months. Where cases are properly managed, it should be possible to accurately identify and allocate sufficient time for hearings in advance.

Costs

The Society submits that, while there are instances where impecunious complainants put the respondents to a very considerable amount of trouble and expense in defending cases which have little or no merit, nevertheless the public good justifies the current system whereby each party must bear their own costs - with one proviso. Where the Adjudication Officer makes a decision that a complaint or response is frivolous, vexatious and entirely without merit he should be enabled to award costs not exceeding €750 to the other party. Such a sanction would hopefully have the effect of making both parties consider the merits of their position at an early stage and thus assist in a speedy resolution of the case.

The Decision

The Decision should make clear findings of fact, identify the legal issues involved and make a determination in relation to each of them. The writing of legal judgments is a particular skill and the Adjudication Officer should be given appropriate training in this regard.

The Appellate Court

The Society is of the view that the Appellate Court should proceed along the lines of the current Labour Court/EAT, i.e. it should have a Chair and two lay members. At this moment in time, approximately 10% to 15% of all complaints are appealed. If this were to continue, and if the procedures outlined above were followed, it should not be necessary to have a hugely expanded Appellate Division.

Two additional full-time Chairs, at least one a lawyer with extensive experience in employment law, might be necessary to ensure that at any time three divisions of the Court were sitting, together with two full-time ordinary members. This would, in the view of the Society, be sufficient to enable all appeals to be disposed of efficiently. This Appellate Court could also continue the functions of the Labour Court. In the event that the number of judges proved to be insufficient to deal with the appeals, part-time members could be assigned to clear any backlog.

In addition, there should be case management of the appellate procedure. A single Chair would meet the parties, identify the issues involved by agreement and identify the length of time which it would take to hear the action. This would have the effect of ensuring that cases were heard in an efficient manner and were not kept waiting and/or forced to have piecemeal hearings.

As with most of the Employment Rights legislation, there would be an appeal from this court to the High Court/Circuit Court only on a point of law.

The Society is of the view that the system outlined would result in much reduced overall costs, and would enable both employees and employers to have a speedy and efficient procedure for the resolution of disputes between them. The Society has attached a flow chart to this submission which outlines the process.

The Society would be anxious to meet with the Minister and/or the officials who are given the task of ensuring that this reform proceeds and would be anxious to assist in any way possible in ensuring that it does so.

If the Society's Employment & Equality Law Committee can assist further in relation to any aspect of this submission or otherwise, please do not hesitate to contact the Committee Secretary, Rory O'Boyle, at r.oboye@lawsociety.ie or by telephone at 01-6724800.

Employment & Equality Law Committee
Law Society of Ireland
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FLOW CHART

