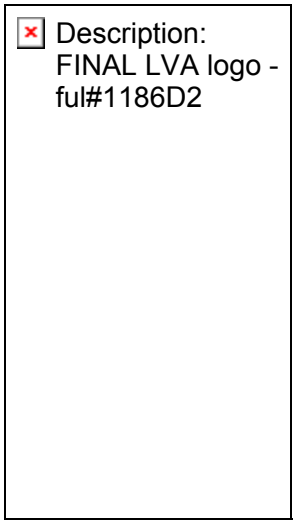

The Licensed Vintners Association

Submission

to the

Department of Jobs, Enterprise and Innovation

on Reform of the State's Employment Rights and Industrial Relations Structures and Procedures

7 September 2011

Licensed Vintners Association (LVA)

The LVA is the representative body for the publicans of Dublin. Established in 1817 we have some 700 members which is over 90% of the publicans in Dublin. Our members employ over 12,000 staff and account for over 25% of total on-trade alcohol sales in Ireland. See www.lva.ie for further information on our association.

LVA Perspective on Reform of the State's Employment Rights and Industrial Relations Structures and Procedures

The broad thrust of the proposals are welcomed by the Association as they offer the possibility of a fair, efficient and user friendly service for small and medium sized businesses.

Key Issue No. 1. Resolution of grievances and disputes as close to the workplace as possible

1.1 How do you think employers and employees can best be supported in resolving disputes at workplace level?

Disputes in the workplace can be very difficult and disruptive in a small or medium sized business. Information and support must be available for employers and employees when it is needed and without delays. This assistance must come from trusted sources and so it is important that the advisory services for employers are separate to develop the expertise and trust required. Employees should have access to their own advisory services. Alternative dispute resolution should be the default option once there is a dispute.

1.2 Can the provision of timely, up-to-date factual information help to facilitate early resolution of grievances / claims and stem the flow of formal cases being submitted?

The incredible and expanding breadth and detail of employment legislation and the demands that it places on an employer are essentially unworkable for SME's. They produce a system where there is virtually a built-in predisposition to employer losses for SME's. We are not suggesting any diminution in the rights of employees, rather we argue that, in fact,

employment conditions would be improved for many employees if employers were given a legislative framework which actually gave some consideration to practical business issues and provided assistance, especially for SME's, as to the practical implications of that legislation. In this regard, we would suggest that an enhanced and properly funded employer's advisory service should form part of the new system and would prove very effective in averting grievances and claims and reducing the requirement for an inspection service. A good example of how this could work is provided by ACAS in the UK (www.acas.co.uk). It is appropriate that the identity of the information and advisory services to employers and employees are separate including the provision of separate websites. They will provide very different services and need to develop their own profile and expertise as well as trust from their respective cohorts. These services would benefit from operating under the auspices of the body of first instance but should have their own identity.

All of the bodies concerned under the new system should establish some kind of users forum to provide periodic feedback to practitioners and participants and to canvass opinion from them.

Key Issue No. 2. Simple and efficient institutional structure

2.1 Do you agree that the integrated two-tier model should be adopted as guiding principle?

We strongly support the proposal for a compulsory single point of entry to the system for individual grievances.

2.2 Do you agree that "differentiation" of processing channels should be minimised to optimise the benefits of the proposed reform and to avoid re-introduction of institutional and procedural rigidities?

2.3 Should all claims in respect of employment related complaints / claims (including employment related equality matters) be submitted and dealt with by one body of first instance?

It makes basic sense that within that single point of entry that there would be separate channels dealing with disputes of interest, disputes of rights and equality issues as this would allow the staff dealing with those areas to develop and / or maintain their expertise in those areas to improve efficiencies and fairness. However, the early interventions including any alternative dispute resolution, should deal with the claims as a whole. As already stated, there is a need for an advisory body specifically for employers which will develop the specific skills and expertise required for these different roles.

2.4 Should employment rights cases only go to the body of second instance on appeal (i.e. should the right of either side to object to the body of first instance hearing a case be removed)?

There should be a full right of appeal as appropriate for both parties once that first stage has completed i.e. it is appropriate that the right to object to the first stage is removed.

2.5 If minimal differentiation within a two-tier structure is to be pursued, what would the optimum streams / chambers be within both the first instances and the appeals entity? For example, is there a need to retain some organisational distance / separation between the distinctive roles of

The inspectorate function (i.e. NERA's role in inspection, enforcement and where appropriate prosecution);

The conciliation and mediation processes dealing with collective disputes;

The advisory / mediation / investigative procedures dealing with individual industrial relations and employment rights claims;

Any subsequent formal adjudication on such individual cases

Although the new system should diminish the need for a labour inspectorate, it is accepted that there will be some requirement for an inspectorate which could continue as part of the body of first instance as there may be an opportunity to utilise the inspectorate to assist in the informal or early intervention stage for example by information gathering, checking facts etc. However it is appropriate that these roles are separate to the advisory bodies as there is a fundamental conflict between the role of advising and the role of enforcing and prosecuting employers. As already stated, the employer and employee advisory services would benefit from operating under the auspices of the body of first instance but should have their own identity.

Rights Commissioners generally provide an excellent informal and simple service to both parties which usually ends in a fair result. However at the moment there are delays in cases being scheduled and long delays in the issuing of written decisions and recommendations. The proposed first stage of informal mediation and or conciliation followed by formal adjudication, including the administrative support, must be resourced properly in order that a single entry system would work. It is imperative that sufficient funding is available to ensure that the reforms are successful and result in services that are available in a timely manner.

Early interventions / alternative dispute resolution and the formal adjudication process for individual disputes can operate under the same body. Collective disputes should continue to be dealt with by the LRC conciliation and mediation services, however they are titled. In addition the role currently served by the Labour Court should still be available if the conciliation / mediation service does not resolve the collective dispute.

It is imperative that the voluntarist nature of industrial relations is maintained.

It is important that those parts of the current system such as conciliation that already work well are not adversely affected by the reform process.

2.6 What would be the advantages and disadvantages of having statutory redundancy appeals handled on an administrative basis, perhaps through the established social welfare appeals structure, given that statutory redundancy payments are now administered by the Department of Social Protection?

Although many statutory redundancy appeals could be handled on an administrative basis as many claims are routine, there is still a need for an adjudicating body to determine that there has been a redundancy if an employer opposes the claim and to discourage employees who have resigned or been dismissed for reasons other than redundancy from taking speculative redundancy claims. The recent pilot scheme by the EAT has shown that an adjudicating body can deal with such cases efficiently.

2.7 Should the arrangements for the appointment and tenure of those working in / appointed to the new streamlined employment rights bodies be changed, and if so, what should be the guiding principles?

In order to promote the idea of informality and accessibility it is appropriate that the first formal adjudication stage is conducted by an individual similar to a rights commissioner. The hearings should be in private. The second or appeal stage should continue to be heard by a combination of industry and trade union representatives. Retaining such "lay" involvement will help to ensure that the second stage does not become overly legalistic as well as reassuring employers and employees alike as to the fairness of the system.

We believe any move to make second stage cases binding on future tribunals would lessen the flexibility of their operation and would undermine efforts to move claimants and employers away from the perception that they require legal representation for all cases.

2.8 Should there be one website covering all employment rights and industrial relations matters?

Although there can be one portal to information on employment rights and industrial relations matters, it is appropriate that the advisory services for employers and employees have their own identity once through the portal.

First stage decisions should be reported anonymously but should be freely available on a website. Although EAT determinations are currently available on their website, it would be useful if a more rigorous search engine could be used that would allow for more targeted searches which analyses the content of the determinations. It would also be most useful if all decisions, first and appeal stage, were available from one search engine with appeals linked to their originating first stage decision so that it is clear which decisions are appealed.

2.9 Do you agree that a more coherent and co-ordinated approach to the provision of advice and information on industrial relations and employment rights issues should form part of the services of the new first instance body?

It is vitally important, as outlined in our submission at 1.2 above, that a properly resourced and expert advisory service is developed for employers.

The EAT and even the Rights Commissioner Service has become more legalistic. Employees are increasingly using legal representation which prompts employers to also appoint legal representation, or visa versa. In many instances legal representation is not essential and only adds to the costs involved for the parties and sometimes makes it more difficult to reach some informal settlement. It also moves the Tribunal away from the informal mechanism originally envisaged for resolving individual disputes. This is not a criticism of the EAT personnel who generally operate in an exemplary manner. The provision of properly resourced advisory services for employers and employees should help to develop confidence for all participants that they do not automatically require legal representation. For that reason also it is important that the position that costs are only awarded in vexatious claims is maintained.

2.10 What is the best method of providing information and advice?

Although the developments of dynamic and accessible websites are important, it is vital that other avenues are used to provide information to both employers and employees. Not everyone has access to the web or is proficient in its use. Some people do not have the literacy skills to use written information. People often want to speak with someone to ask further questions and to be reassured that they have interpreted the written information correctly. Direct contact also opens up the opportunity to explore early interventions which may help in solving the dispute at this early stage.

As regards information for employers, training courses and seminars would be useful as is the development of sample material and business tools (again, for example see www.acas.co.uk).

2.11 Should non-directive advice be provided to employees and employers on what options may be available to them on the basis of the facts provided and where to go for help if required?

Yes, see comments on employer advisory service at 1.2 above.

2.13 Should there be a single application form for all individual first instance industrial relations and employment rights complaints / claims?

Yes with a default being that all cases are referred for early intervention and alternative dispute resolution. However it is important that the form does not result in a "tick all boxes" approach to lodging cases. For example the old paper T1A form was often ticked for an "Organisation of Working Time Act" case as well as an Unfair Dismissals case, but at hearing often no OWT complaint is made. That is why it is important that complainants must substantiate their case when making their applications as well as be obliged to answer any notice of particulars from the employer.

2.14 What measures could be taken to improve information gathering from complainants / applicants at application stage?

All applications should be made in writing and should be followed up if necessary (by phone or email) to clarify and extract as much detail as possible. At the very least, the applicant should be obliged to answer a notice for particulars from the employer within a particular time frame and any failure to provide relevant information should allow the employer to apply to have the case dismissed or at least that failure to respond should be admissible at the formal adjudication stage.

2.15 Should there be a consistent time limit for initiating all complaints / claims / appeals and if so what should it be?

Once the new system is fully operational, it would be appropriate that the time limits for the referral of claims and appeals be shortened and made consistent for all claims.

2.16 Do you agree that more consistent arrangements are required for the representation of claimants so as to enable individuals to nominate a person to represent them at a hearing eg trade union official, solicitor, other representatives, etc?

As is currently the situation, it is appropriate that the chairperson of the formal hearing should have the final say as to the appropriateness of the representative.

2.17 Where the power to present / refer a complaint is currently limited to the claimant, should it be extended to include the claimant's trade union and, where appropriate, the claimants parent / guardian?

If the new system works as efficiently and fairly as it should, it is not appropriate or necessary to extend the power to present a complaint on behalf of any individual to guardians or a trade union.

Key Issue No. 3. Active case progression and increased range of interventions

The LVA strongly welcome the proposals on active case management and progression, early intervention and, a preliminary hearing as the basis for a more efficient and fairer system. The delays reported just last week by the Employment Appeals Tribunal show a wait of at least a year in Dublin for a hearing. This is difficult for SME's as potential losses mount and the stress and pressure from what can be a very difficult occasion for a small business owner are exacerbated by being prolonged over a long period. The Association would ask the Minister to consider that where possible, cases already lodged should be switched into the case management and early intervention system.

3.1 What interventions should be available prior to a formal hearing or inspection to resolve grievances or non-compliance eg telephone contact, informal hearings, more formal mediation, conciliation or arbitration

Early interventions and case management should also address many of the preliminary issues such as time limits which may not warrant a formal hearing and could be disposed of by submission or by phone call or email or in some cases a short preliminary hearing in advance.

3.2 What is the best method of identifying suitable cases for early intervention?

All complaints / claims should be examined for potential interventions.

3.3 At what stage should the intervention take place, for example should it be available when the person first seeks information, prior to them lodging a complaint / claim or after a complaint / claim is lodged?

All opportunities for intervention should be taken.

3.6 Should parties be required to set their case out in writing?

Currently, an employee or ex-employee can register a claim or a case without being asked to provide any detail as to the basis of their claim. For example often the only information given on an unfair dismissals claim form simply states that the claimants consider that they were unfairly dismissed. It is possible that with a more detailed written claim the employer may be able to establish if there is a basis for the claim and possibly resolve the issue without recourse to a formal hearing. Other than that however, we feel that it is fundamentally unfair for the employer to be expected to defend their position without a detailed claim in advance. At the least, there should be some obligation on a claimant to answer a request for particulars from the employer and the failure to respond for such a request should be admissible at the formal adjudication stage.

3.7 Should all complaints / claims be examined for potential interventions and should time-limits apply to the offers of conciliation or mediation support?

It may be appropriate to offer mediation or some other alternative dispute resolution system in advance of any formal hearing, as often happens now in tandem with the formal hearing with Rights Commissioners. In fact it would be appropriate that alternative dispute resolution is the default option. However we would be wary of any compulsory mediation or arbitration steps before recourse to a formal hearing and there must be recourse for all parties to a hearing or appeal if they are not satisfied with the early interventions.

Although very welcome, the attempts at early intervention should be time limited in order that new delays are not developed within the system.

3.11 Should attempts at resolution have any bearing on any subsequent hearing or should the process be confidential and not admissible in any hearing?

Any mediation or conciliation that happens should not be admissible as evidence in any subsequent formal hearing and any failure to engage in alternative dispute resolution should not be used to penalise either party.

3.13 Should first instance jurisdictions be empowered to dismiss what are adjudged to be frivolous, vexatious or misconceived claims without holding a formal hearing?

Yes.

3.14 Should hearings of employment rights disputes /appeals be heard in public or in private?

As at present, the cases under the first stage should be held in private. At appeal stage, either party should be allowed to apply for a private hearing. However, it is important for practitioners and students that some access is allowed for skill development.

3.15 Should there be a uniform period for submitting appeals?

Yes.

Conclusion

We would submit that our proposals support the key objectives of making services available in a timely and accessible way to all, employers and employees, so that disputes are settled as quickly and fairly as possible and with as little disruption as possible to the workplace.