

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

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The case for reform of the current system is unanswerable. However, caution should be exercised, in several areas, against undoing or dispensing with elements of current practice that are distinctive to employment disputes and reflect the specificities of this area of regulation. The economic context, too, whilst obviously a constraint, should not be allowed to dictate the shape of any reform proposals.

1. It is generally accepted that disputes are best resolved, in most cases, as close to the workplace as possible. In this regard, recent developments have not been helpful. Where trade unions are present, or where a demand for union representation exists amongst a workforce and an employer refuses to negotiate with trade unions, legislative change is required to enable effective union representation. This may require an amendment to the *Industrial Relations Acts 2001-2004* to deal with the consequences of the *Ryanair* judgment or new legislation supporting collective bargaining rights.

Where trade unions are not present, an amendment of the *Protection of Employees (Information and Consultation) Act 2006* is required to render the legislation more effective in supporting collective representation rights in non-union workplaces.

Simply put, the significant increase in numbers of *individual* claims before dispute resolution bodies undoubtedly results from, in large part, a significant legal and regulatory swing away from protecting and promoting *collective* employee representation rights and towards a more permissive environment for unilateral employer decision-making. Where employees are unable to collectively engage with employers in a meaningful way, where adequate 'voice' options are not available, an individualised and legalistic response to disputes becomes more prevalent.

2. Notwithstanding the above, individual disputes will continue to arise. In this regard, early intervention to aid the parties in resolving such disputes is vital. The provision of timely, up-to-date and accurate factual information can help facilitate early resolution. In this regard, a designated administrative office, providing impartial information, and which is separate from any investigative, mediation or adjudicative office, should be established. This office should establish a website (perhaps modelled on the www.citizensinformation.ie site) and provide a helpline and a 'drop-in' service. Such an office may also have a role in the very early stages of a claim (perhaps at the point of 'form-filling') by being able to clarify/confirm that some basic, factual requirements for a claim to be taken have been fulfilled.

At present, there is a surfeit of web-based information. There are simply too many different websites providing information on employment rights, which makes the process

of finding accurate information difficult and off-putting. A single website (with appropriate links) would be preferable.

Social partner involvement in the development of this website would be an advantage. An excellent template for this is the development of a site by the European social partners in the Construction Industry (FIEC and the EFBWW) on the rights of posted workers in all Member States (see www.posting-workers.eu). In a number of countries, most certainly including Ireland, this site is recognised as being far superior to official EU/Member State Government sites. The involvement, and funding, of social partners in the development of information provision mechanisms should make the information provided more targeted, relevant and accessible.

3. The two-tier model envisaged in the consultation document appears appropriate.

At first instance, the body should be a tripartite body with a panel of chairs who are qualified and experienced employment lawyers. Ordinary members should have experience in employment law and/or be experienced industrial relations practitioners.

The social partners should retain their existing right to appoint a defined number of ordinary members.

It is appropriate that members of the first instance body should be trained, and allowed to gain experience, in dealing with various types of employment disputes. However, as a matter of practicality, many members (be they existing tribunal members or otherwise) are likely to have extensive knowledge in particular areas (e.g. equality, unfair dismissal). As such, it may be appropriate to establish specialised 'divisions' within a unified first instance body. Of course, this should not be allowed to effectively re-introduce institutional rigidities; rather, it should operate to ensure that, for example, equality claims are always dealt with by a panel containing at least one 'equality specialist'.

Different channels dealing with disputes of interest, on the one hand, and disputes of rights, on the other, should be established.

4. Appeals to the appellate body should be *de novo* appeals. A further appeal to the High Court, on a point of law only, should be permitted.

The appellate body should be a tripartite body with a panel of chairs who are qualified and experienced employment lawyers. Ordinary members should have experience in employment law and/or be experienced industrial relations practitioners.

The social partners should retain their existing right to appoint a defined number of ordinary members.

5. The inspectorate function, as currently carried out by NERA, should remain separate from other functions (advisory/mediation/adjudication).

6. The administrative office (point 2 above) should be the first point of contact in relation to provision of information and should offer assistance and (impartial) advice in relation to 'form-filling'. After this point, the model under the *Employment Equality Acts*, whereby a party must actively opt out of mediation (conciliation should also be a possibility), should apply for all employment disputes. Rights Commissioners and Industrial Relations Officers have a role to play here in managing informal and formal conciliation/mediation processes/meetings. The social partners should also be involved in shaping the operation of the conciliation/mediation process. It may be that social partner conciliation/mediation initiatives should be funded.

At this stage, active intervention (telephone or an informal meeting) should occur to try and establish why a party has chosen to opt out of the mediation/conciliation process.

Any mediation/conciliation process should be confidential and have no bearing on any subsequent hearing.

7. The default position should be that hearings are held in public. Mediation meetings should be held in private. A discretion may also be conferred on the adjudicative bodies to order that particular hearings be private (e.g. in relation to sexual harassment claims).

8. A single application form has superficial attraction, but might result in a temptation on the part of claimants to (unnecessarily) 'tick all the boxes'. Another option might be to allocate a single claim number to each claimant, but then allow the claimant to submit, at the same time, different forms (perhaps broken down to reflect the 'divisions' mentioned in point 3, above; equality issues, unfair dismissal etc- the number of forms, however, should be significantly reduced). Online submission should be encouraged.

9. Time limits should be harmonised (6 months to lodge a claim- 12 in exceptional circumstances; appeals should be lodged within 4 weeks of a first instance decision being communicated to the parties).

10. Trade unions should have the power to present/refer claims on behalf of claimants.

11. There is a real need for research to be commissioned on how effectively the awards of employment bodies are actually enforced in practice. We are operating in something of a vacuum in relation to this issue at present. Again, the social partners should be involved in looking at this issue.

12. Written submissions should be made in all cases. These should be relatively short and a standardised template/example should be provided (a brief description of the subject matter of the claim, the legislation/industrial relations provisions involved, factual information around dates, terms of employment, etc.).

Preliminary issues (e.g. has the claim been brought within the time limit?) should be dealt with on the basis of written submissions only. Parties may object to this, but a penalty as to costs should arise for frivolous or vexatious objections.

Again, a preliminary hearing has superficial attraction. However, a combination of the intervention of the type outlined in point 6, above, and dealing with some preliminary issues by way of written submission is preferable.

13. The adjudicative bodies should retain the existing wide discretion in relation to the conduct of hearings at first instance. The revamped bodies should not come to approximate courts of law, with strict rules of procedure. However, it is important that a lack of consistency in decision-making be addressed. In this respect, a database of decisions should be maintained and made available. Periodic reviews of decided cases should be undertaken, categorised and made publicly available. This should also be utilised by the administrative office, referred to in point 2, above, when providing advice to potential claimants. The social partners should be involved in disseminating this information to their respective constituencies.