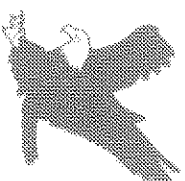


O'Shea Russell SOLICITORS



COMMISSIONER FOR RATHS

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• For Logan Street, Thomastown Office
Telephone: 056 7724850

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

Our Ref:

Your Ref:

NR/BK

8th September 2011

Re: Consultation : Reform of State's Employment Rights and Industrial Relations Structures & Procedures.

Dear Minister,

Firstly, I would like to commend you on the steps you are taking to achieve employment rights reform in this Country, a reform which is long overdue. Your pro-active approach is to be welcomed.

Secondly, I am grateful for the opportunity to make a written Submission which I now attach. I have made my submission by reference to the Key Issues raised in your Consultation Paper and by way of response to the specific questions raises therein.

I believe that I am well placed to make a meaningful contribution to this process. I am Qualified as a Solicitor, Mediator and Tax Consultant and worked originally in Law in Toronto, Canada before returning to Private Practice in Ireland and to the eventual opening of my own Law Firm in 1990. The Canadian Model with an emphasis on Mediation and the use of the adversarial process for meaningful, genuine and often deep-rooted conflict only has always recommended itself to me.

As a Private Practitioner, I tended to be critical of delays with the Employment Appeals Tribunal and, indeed, with the Courts System. My appointment as a Vice Chair of the Employment Appeals Tribunal, a position which I still hold, has given me a fresh insight into the workings of the Tribunal and, indeed, the areas where reform would be most effective.

Inevitably, many who make Submissions to you might be considered to have a vested interest. I do hope that you will consider my views and not dismiss them simply because they come from the Vice Chair of a Tribunal which may



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Mary R O'Shea S.A.U.B. Nicholas Russell S.C.I.A.T.U. Barrister

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itself be under review. I believe that my views are balanced and draw on personal experience and training.

I would welcome the opportunity to meet and discuss these issues with you or to contribute to any consultation group formed for the purpose of driving reform forward.

Thank you for your kind consideration

Yours sincerely


Nicholas Russell

**SUBMISSION
ON
PROPOSED REFORM OF THE STATE'S
EMPLOYMENT RIGHTS AND INDUSTRIAL RELATIONS
STRUCTURES & PROCEDURES**

BY

Nicholas Russell B.C.L., A.I.T.I., B.A.
Graignamanagh
Co Kilkenny

- Solicitor/Mediator
- Vice Chair Employment Appeal Tribunal.

I am fully supportive of the proposed Two Tier system with a single Entry Point drawing on the strengths of the existing bodies and the talents within each. The cosmetics of change dictate that the various designations of "Rights Commissioner", Employment Appeals Tribunal" and "Equality Tribunal" be changed with a single, new re-branded identity for the new First Tier. The new body of First Instance must enjoy a new unique identity and name with an Appellate Second Tier similar to the current Employment Appeals Tribunal.

My recommendation is that the body of First Instance be staffed with those currently acting as Rights Commissioners and those of the Tribunal Vice Chairs interested in transferring with the comparable individuals from the Equality Tribunal. A core of Vice Chairs in the EAT will need to be retained in that capacity for Appellate purposes. As the level of Appeals is likely to be modest, the EAT will be a smaller and more mobile unit.

Within the body of First Instance there needs to be a division of duties. It is my recommendation that the re-deployed Vice Chairs and Employment Equality Officials be assigned to deal primarily with Unfair Dismissals, disputed Redundancies and Equality issues. Those with a Rights Commissioner background are best to deal with all other matters.

The determination of Unfair Dismissals claims, Disputed Redundancies and Equality cases are quasi-judicial by their nature and The High Court has already emphasised the need in such cases for fully reasoned decisions with clear enunciation and

application of existing laws where appropriate. It is for this reason that the suggested individuals to be assigned to this sub-division of the body for First Instance need a strong establish legal background.

An unjustifiable criticism which has been made of the existing Employment Appeals Tribunal is that it is 'overly legalistic'. This is unjustifiable and ignores the reality of existing statutory obligations. A failure to adhere to legal principles will see an increased volume of Appeals to the Circuit Court and of Judicial Review Applications before the High Court.

There is a distinct difference between being "legalistic" and applying the Laws that Tribunals are obliged to adhere to. This is not the principal difficulty with the existing EAT model. The problem instead is the volume of matter coming before the Tribunal that might be better handled at an administrative level.

The challenge that faces the Minister is to ensure that there is adequate secretarial and administrative support for both the body of First Instance and Appellate body. In this regard, it is no longer justifiable for parties to have access to these bodies without paying a fee which would help defray costs, not dissimilar to the stamp duties payable on the institution of Court proceedings.

I would further recommend that the Appellate body be entitled to award costs as this will discourage spurious appeals to include the lodging of appeals with the sole objective of achieving delay.

The Minister should also give consideration to the establishment of semi- permanent divisions of the body of First Instance in the various existing regions in the County.

With specific reference to the Key issues raised by the Minister's Consultation Paper and to the questions raised in the Paper, I would like to make the following submissions:-

1. Resolutions of Grievances and disputes as close to the workplace as possible and as early as possible after they arise.

1.1. Mediation is clearly the answer. Mediators must during the course of Mediations be able to advise parties as to their rights and obligations. There can be unjustified suspicion around certain Regulatory Bodies and a perspective of bias. I would recommend therefore that the existing Labour Court Mediation Service be bolstered by a list of approved Private Mediators to provide parties in conflict with choice of venue and Mediator for the conciliatory process.

1.2. While the provision of information is essential, I am not convinced that, of itself, it would achieve the objective of reducing conflict. What would assist would be a situation where in one to one meetings, acting Mediators would have this information at hand and can use this information to educate the parties during the course of the process.

1.3 While a difficult issue, the Minister should consider

"Compulsory Mediation" requiring parties in conflict to submit to the process before being allowed access to the body of First Instance.

Internationally there are different views on the advisability and effectiveness of Compulsory Mediation. However, I believe such a procedure would overcome the reticence of a party to a conflict to be the one to propose Mediation to the other for fear that there may be a perception that such proposal might be interpreted as a "sign of weakness". I am unconvinced that the provision of the option of voluntary submission of disputes to Mediation would see a significant take up. I would confine the requirement for Compulsory Mediation to Unfair Dismissals, disputed Redundancies and Equality cases.

1.4 The new processes will need to be marketed to all. A simple

user friendly booklet of information might be prepared and sent automatically to all individuals in respect of whom a P45 is issued and filed. This will ensure that these individuals are aware of their rights on termination. This will need to be coupled with a provision providing for an extension of time to make a claim where there is a delay on the part of an Employer in filing the copy of the P45.

2. **Simple and Efficient Institutional Structure and High Quality Customer Service with a Single Authoritative Source of Information, a single Entry Point and a minimum scope for forum shopping.**

- 2.1 Yes, I support the adoption of the Two Tier Model.
- 2.2 It is inevitable that this differentiation of processing channels must be minimized.

2.3 All claims should be submitted to the body of the First Instance.

Within the body of First Instance there needs to be a sub-division of duties as indicated at the commencement of this Submission

2.4 The right to object to the body of First Instance hearing a case should be removed with all cases going to the re-sized EAT on Appeal only.

2.5 I believe that the Mediation Service needs to have a distinct and independent identity if trust and confidence in same is to be fostered and maximised.

The Inspectorate/ Advisory functions should be separately conducted

2.6 I would recommend that Statutory Redundancy be handled

by a distinct division of the body of First Instance with disputed Redundancies dealt with by the same Sub-division dealing with Unfair Dismissals and Equality issues.

2.7 To draw on and maximise the expertise and knowledge built up by those appointed to the body of First Instance and the Appellate body, these appointments should have tenure similar to that of a District Court Judge. It simply cannot be beneficial to the process to have short tenure and continuous turnover. Any such turnover would simply constitute a waste of talent and accumulated knowledge.

2.8 There should be one web-site only

2.9 Yes, the body of First Instance should be the sole source of all information and advice

2.10 I would recommend a Web based approach with downloadable Apps to reach the younger generation. A

comprehensive booklet should issue automatically to any

Employee who is registered for PRSI

2.11 I would recommend that an Advice chapter be included in the foregoing booklet or possibly an informative Question and Answer section.

2.12 I believe the centre of administration for the body of First Instance should be Davitt House which already has a recognised profile. Clearly, the staff in Davitt House and those in the Equality Tribunal are best placed themselves to advise as to a workable arrangement

2.13 A single Application Form with "prompts" should be used.

2.14 I believe it is essential that a detailed checklist based on the experiences of those at the "coal face" should be included in a revamped Application Form used for all Applications to the body of First Instance.

The proposed checklist would enable the Party submitting the Application to check it carefully before doing so and, indeed, would also assist Administrative staff members in dealing with same. It is simply unacceptable for an individual to arrive before the body of First Instance and, because of a genuine error or omission in the Application form, find that the claim cannot proceed or must be adjourned. All parties involved in the process, including administrative staff, must commit to the process of ensuring that applications move smoothly.

- 2.15 Yes, I would suggest a set period of six months extendable only where the body of First Instance (when a preliminary application is made to it in advance of a hearing date) decides that the period should be extended because of omission, delay or misconduct on the part of the Employer. This might apply for instance where an employer makes various representations to an employee, fails to fulfil his

promises and the employee is left with a situation where the period for a claim has expired.

2.16 Any individual must be entitled to represent himself or herself before the body of First Instance or, for that matter, to be represented by the individual of his or her choice. This is a basic Constitutional Right.

2.17 I believe that claims must be submitted by the Complainant personally. Only in exceptional cases where an individual has a certified medical condition or disability that prohibits him from doing so or is under the age of 18 years should an Application on his behalf be accepted from another party. In the case of a minor such application could be submitted by a parent or Guardian.

2.18 All determinations must have the status of Court Orders and be instantly referable to the Sheriff or to the Courts for Committal Proceedings. It is essential that all individuals

involved in the process give the Orders made the status intended to be attributed to them. Where an award is against a Company, there must be circumstances where the award is enforceable against the individual Directors where the latter's actions seek to frustrate collection. This is a difficult area and will need due consideration.

3. **MINIMUM NUMBER OF CASES PRESENTING FOR
RESOLUTION AT FORMAL HEARINGS THROUGH
ACTIVE CASE PROGRESSION AND AN INCREASED**

RANGE OF INTERVENTIONS.

3.1 As previously indicated, I believe that consideration needs to be given to "Compulsory Mediation".

3.2 The request to submit to Compulsory Mediation should be made in response to the Application filed with the Administration Section. It is my firm belief that if Compulsory Mediation is introduced this will result in a significant

reduction in cases coming before the body of First Instance. My own experience as a Tribunal Member has shown me that a conciliatory approach by the members of the Tribunal in hearing case will often see parties in conflict come to an accommodation quite quickly or, certainly, to an understanding of each other's perspective.

3.3. As above.

3.4 Unfortunately, in Unfair Dismissals cases, Disputed Redundancies and Equality issues there are few situations where the perceptions of the parties are the same or where any meaningful agreement can be reached on what constitutes "facts" for the purposes of such disputes. In other situations, however, it should be possible at an Administrative level to have certain facts agreed so as, at least, to narrow down the issues.

3.5 There is certainly scope to forge positive connections between the Public Dispute Resolution System and External Experts. Indeed, I believe that this is essential to the effectiveness of the Mediation Model.

3.6 It is simply not feasible for lay persons to be required to present written submissions in advance of their cases. This would significantly prejudice against the lay person wishing to represent himself/herself.

3.7 I have already stated my views on the introduction of Compulsory Mediation and, if adopted, this would lead to intervention in all Unfair Dismissal cases, Disputed Redundancies and Equality issues as soon as the applications to the body of First Instance are lodged.

Clearly, this does not in any way preclude the parties from embracing Mediation voluntarily prior to the filing of claims,

however, I am of the view that there will be a low up take of this option.

3.8 It is my belief that all conflict would benefit from Mediation by individuals capable of guiding both parties on legal obligations and rights and providing clarification and assistance in repairing relations in fostering an understanding of each other's perspectives and in seeking to move matters forward. Very often, the worst scenario would be a situation where agreement could be reached on many ancillary issues leaving the core issue(s) for the body of First Instance.

3.9 I can see no merit in a preliminary hearing. This simply introduces another level of engagement to the process that would be better addressed through the Mediation process.

3.10 No cases should be dealt with on the basis of written submissions only.

3.11 The Mediation process must be confidential with provision for the imposition of strict penalties by the body of First Instance and Appellate body on a party who looks to breach the bond of confidentiality with a view to achieving an advantage.

3.12 Ideally, there should be a uniform set of procedures regulating the conduct of hearings. It would be a simple enough matter to adopt a "softened" version of the existing rules of the District Court/ Circuit Court.

3.13 I believe that the power to dismiss a case for frivolity should only rest with the body of First Instance. In reality, a claim that might appear frivolous on first consideration could take on a different shape during the course of evidence etc. The body of First Instance should, however, have the power to award costs against a party deemed to have brought a frivolous claim.

3.14 All hearings must be in public for the sake of transparency.

Where, however, evidence relates to the financial performance of an employer or, indeed, the financial circumstances of a claimant this evidence should be held "in Camera" on the Application of either party.

3.15 I would provide for an appeal period of two months from the date of receipt of the decision of the body of First Instance.

Dated this 8th day of September 2011.

Signed: _____


Nicholas Russell.

RESUME

NICHOLAS RUSSELL B.C.L., A.I.T.I.,
BA(Fine Arts)

Solicitor

Fairmount House
Convent Lane
Graignamanagh
County Kilkenny
Tel: 059 9724106/9724642
nicholas@oshearrussell.ie

QUALIFICATIONS AND MEMBERSHIPS

Degrees	Year
• BCL (HONS) University College Cork	1982
• Admitted as a Solicitor by The Law Society of Ireland	1984
• Associate of the Institute of Taxation	1990
• Commissioner for Oaths	1991

EMPLOYMENT HISTORY

ASSISTANT SOLICITOR (December 1984-December 1985)

Brian Horgan & Co., Solicitors, Toronto, Canada.

With a view to getting international experience, a post as an Assistant Solicitor was taken in the offices of Brian Horgan & Co. Solicitors Toronto in December 1984. The Firm had an emphasis on the provision of Commercial Services to a number of USA based Companies and Concerns.

Responsibilities included:

- Drafting of Commercial Agreements.
- Attendance at Corporate Negotiations particularly on the area of Franchising.
- Dealing with Business Clients on a day to day basis.
- Dealing with relevant Statutory Bodies in the context of compliance.

Achievements:

Received a very positive reception to the introduction of a number of procedures and precedents used and perfected in the Irish Legal System.

ASSISTANT SOLICITOR

W.B. Glynn & Co., Galway (1986-1988)

Returning from Canada in December 1985, a position as an assistant Solicitor in the offices of W.B. Glynn & Co., Galway was taken up at the beginning of 1986. The Firm was a three partner Firm providing general legal services and possessing a strong Litigation Department.

Relevant Skills and Experience:

My main role was to take over and run the District Court Section of the Litigation Department representing private individuals, corporate interests and State Bodies. I was responsible for conducting Health Board prosecutions under the Food Hygiene Regulations throughout County Galway and parts of County Mayo. I provided representation to a number of Corporate Groups and, specifically, to a National Carrier on issues pertaining to compliance.

ASSISTANT SOLICITOR:

Arthur E McMahon Solicitors (1988-1990)

Marriage necessitated relocation to Naas to the firm of Arthur E McMahon Solicitors.

Relevant Skills and Experience:-

I was retained primarily to deal with Conveyancing and Estate Management within the Firm. I also maintained my interest in Corporate/Commercial matters by representing employees in Unfair Dismissal negotiations and actions.

PRINCIPAL AND PARTNER (1990-to date)

Firm O'Shea Russell Solicitors, Main Street, Graignamanagh, County Kilkenny

In 1990 I, along with my partner purchased and developed a practice in Graignamanagh, County Kilkenny and I am currently trading as a partner in the Firm O'Shea Russell Solicitors.

Throughout my time in the practice I have continuously sought to develop the Firm as a recognised representative for both employer and

employee interests. During its tenure in Carrick-on-Suir, I was retained as outside advisor to a US multinational Company with the specific role of offering support to the HR Department with advices and practical solutions on issues of conflict and discipline within the Company. During the course of that time I conducted mediation within the Company pertaining to a conflict between Senior Management and workforce leading to a successful conclusion.

I continue to advise a number of smaller business interests in Kilkenny and to represent the needs of disgruntled employees.

My 25 years in Legal practice have given me a broad legal background with experience in a wide range of legal areas and hands on conflict resolution capabilities.

I consider myself to be a persuasive individual possessing strong negotiation skills, oral and written communication skills as well as a willingness to avail of the opportunities that new IT solutions offer.

I have advised corporations and individuals on Risk Management measures and have been resourceful in offering solutions with the ability to assess all issues, to protect Clients and complete projects, producing professional results while adhering to rigid guidelines.

I have developed an interest in Business succession over the years and I have represented individuals not only on the acquisition of businesses but also on the production of sound succession plans.

OTHER ACHIEVEMENTS

Year	
• IPAVI Diploma in Auctioneer and Estate Management	2001
• BA(Hons) Fine Arts	2006
• Institute of Public Administration Mediation Modules completed in 2009	

PERSONAL INTERESTS

- Avid Reader
- The development of Management and Marketing concepts

- Sports:-

Personal background in athletics. This has been invaluable in roles in the training of underage teams in Graignamanagh since 2006 culminating in the winning of hurling and football County Championship medals in 2008/2009