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Richard Bruton, TD
Minister for Jobs, Enterprise & Innovation,
Kildare Street,
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12th August, 2011

Re: Reform of the Employment Rights Bodies

Dear Minister,

I understand you have launched an initiative aimed at reforming the Employment Rights Bodies in Ireland. I very much welcome this and believe it is very necessary.

I attach a 3 page Proposal for one streamlined and simplified system for individual employment rights disputes that also seeks to retain the positives that have developed from the existing system..

I would be delighted to meet you or your officials for 15/30 minutes to discuss some of the thinking behind this if that would be helpful.

By way of background I have been practising as a Barrister in the employment field since 1992 and I have acted for both trade unions and numerous employers before all of the various bodies. I have also on occasion acted for the EAT and the Labour Court.

Kind regards,

Oisín Quinn.

Proposal on the Employment Rights Bodies Reforms

There is an excellent body of employment legislation in place which provides for important rights that seek to ensure fair play and justice in the workplace but the system needs to be simplified and streamlined while at the same time retaining the advantages of speed, accessibility and lower cost that have been developed.

Introduction

The myriad of types of claims with different legal fora available and different time limits is well known and has been well described by commentators. There is no doubt there is a problem and there is no debate but that reform is needed.

Stepping back and looking at the landscape afresh I believe that there are two genuinely different functions that need to be performed by any reformed system:

1. Industrial Relations Disputes Resolution; and

2. Employment Rights Adjudication.

The first usually involves a collective dispute between a trade union and an employer and rarely concerns any debate over strict legal rights, although there can be an element of legal dispute infused into the backdrop. The outcome is a recommendation or decision by the Labour Relations Commission or the Labour Court that is not considered legally enforceable.

The second involves a claim by an individual employee (albeit that some claims can be test cases or lead cases for large groups of employees) seeking to assert strict legal entitlements provided by statute and with a legally enforceable outcome.

Different skills and different procedures are needed for these two functions. The latter requires the proper application of the rules of evidence and fair procedures. The former is primarily about facilitating the collective industrial relations process finding its own IR solution.

In my view the Labour Relations Commission and the Labour Court should be given the role of continuing to provide the Industrial Disputes Resolution service.

Proposal

All individual employment rights claims should be allocated to *one* streamlined service with the following outline:

(a) One six month time limit for bringing all claims (extendable to 12 months if reasonable cause shown);

(b) All cases listed for an initial hearing before an Employment Rights Adjudicator ("ERA") for a half day;

(c) The ERA hearing date should be used to:
(i) hear the case - if it can be completed in half a day (i.e. a proper inter partes hearing with sworn evidence, rules of evidence etc); or
(ii)attempt a conciliation (ERA's should have extensive experience of and be formally accredited in conciliation & mediation);

(d) If it is clear that the case, perhaps due to its complexity, is not capable of being concluded or resolved in the half day allocated, then the ERA would send it forward to a new revamped Employment Appeals Tribunal with a recommendation as to the length of time to be allocated for the hearing and, if appropriate, with directions as to any further information or documents that should be exchanged between the parties;

(e) If the ERA proceeds to hear the case then there should be a right of full appeal by either side to the EAT within 6 weeks of the ERA's decision, which in the absence of an appeal is legally enforceable;

(f) Either as a result of (d) or (e) above, then there should be a full inter partes hearing before the EAT (listed for half a day if on appeal from a decision of an ERA or listed for longer if based on referral from an ERA);

(g) The EAT to be constituted as currently configured (i.e. tripartite: legal chair and wing persons from the employer and trade union sides) with a particular focus on ensuring that the chairpersons have demonstrated extensive and appropriate experience;

(h) Written determination of the EAT to be legally enforceable;

(i) Appeal on a point of law only to the High Court within 6 weeks (EAT should be a notice party only, with an insulation against legal costs, so that they can appear if they wish, especially where there is an important point of law involved and one of the parties to the dispute does not intend to appear, perhaps for costs reasons, at the High Court – uncontested cases are not ideal ways to set important legal principles);

(j) Legal costs to be borne by the parties themselves at all stages, save that the High Court should have jurisdiction to award costs of a High Court appeal in special circumstances;

(k) High Court decisions to be final and conclusive.

This proposal has the following 10 advantages:

1. *One fora for all individual legal rights claims*
No longer will parties face the dilemma of which type of claim to bring or face multiple claims in different venues arising out of essentially the same dispute

2 *At most, only two full hearings*

One of which is limited to a maximum of half a day (rather than the 4 full hearings that can on occasion arise, for example under the Unfair Dismissals Acts) thereby lifting the oppressive burden of cost and delay faced by parties identified recently by Charleton J in *Power v JVC* unreported High Court 27th July, 2011.

3. *One common time limit*

4. *A point of law appeal only to the High Court*
This ensures that important points of law with perhaps wide application can be set, where necessary by the High Court.

5. *Important points of law do not go unchallenged in the High Court*
Occasionally, important legal issues have arisen in uncontested High Court hearings. This is not desireable, hence the proposal to allow the EAT to appear.

6. *Retention of the separate Industrial Relations role of the LRC and Labour Court*
Let the LRC and Labour Court focus on their IR role and by removing from them the task of having to hear *inter partes* individual legal disputes (as they do under for example equality legislation) and thereby running the risk of applying the wrong legal approach to a hearing where legal rights are at stake.

7. *Retention of the system where each side bears its own legal costs*
Thereby reducing the financial exposure and risk to an employee of losing a case and reducing the cost burden for small employers.

8. *Promoting the early listing of cases*
By listing cases initially for half a day only, it allows ERA's to have many cases listed before them and to take advantage of the phenomenon that claims usually resolve when the parties are brought together.

9. *Encouraging Conciliation & Mediation at the first hearing date*
Even though there would now be a completely separate stream for IR cases conciliation and mediation should still play a role. The above system of half day listing before an ERA and also allowing simple cases to be run and heard within the half day allocated facilitates this.

10. *Improving hearings by allowing Directions on Information and Documents*
This is necessary in complex cases. In some cases, for example some equality, redundancy and transfer of undertakings cases in particular need information and documentation to be exchanged to allow for a more expeditious and fair hearing at trial.

Oisín Quinn, SC
12th August, 2011