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

We write to you further to the recent announcement of Minister Richard Bruton in respect of consultation on the programme of reform of the State's employment rights and industrial relations procedures and institutions. Peninsula Business Services is Ireland's leading provider of employment law and health and safety services. Established in Ireland since 1997, we currently have 2,650 businesses who have already integrated Peninsula to work as part of their HR and Health and Safety departments. In the course of our work we have a significant exposure to the various employment tribunal bodies and in 2010 alone we dealt with in excess of 500 employment dispute cases divided among the 4 employment tribunal bodies; the Labour Relations Commission, the Employment Appeals Tribunal, the Equality Tribunal and the Labour Court. Given our significant exposure to and experience of employment rights and industrial relations procedures and institutions both in Ireland and the United Kingdom we firmly believe that we are ideally placed to offer an expert submission on Minister Bruton's proposed reform in light of our first-hand experience of both the Irish and UK systems.

From the outset I would like to note and recognise the key objectives of the Minister's recently announced reform proposals, namely:

1. Resolution of grievances and disputes as close to the workplace as possible and as early as possible after they arise.
2. A simple and efficient institutional structure offering:
 - high quality customer service, including a single authoritative source of information and a single entry point for claims;
 - minimal scope for "forum shopping" and a system which respects differences between categories/types of cases (e.g. disputes of right and disputes of interest) but not to the point where they are an overriding influence on structure.
3. Minimising the number of cases that present for resolution at formal hearings through active case progression and an increased range of interventions.

I would now address each objective in turn and address the questions arising within Minister Bruton's consultation paper.

1. RESOLUTION OF GRIEVANCES AND DISPUTES AS CLOSE TO THE WORKPLACE AS POSSIBLE AND AS EARLY AS POSSIBLE AFTER THEY ARISE

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

I believe that clear structures should be in place for employers and employees that will detail a formal procedure that encourages disputes to be resolved at workplace level and ensures that disputes cannot be escalated further unless the internal stage of the process has been attempted. The workplace level disputes should follow a clear format and require accurate

records to be kept of the process so it cannot be escalated externally without records that there was an attempt to resolve the issue internally first.

Internally this can be done by way of a formal Grievance hearing or appeal of a Disciplinary Outcome where the employer and employee must participate. The LRC has set out codes of practice for Disciplinary and Grievance procedures which should be formalised in their applicability to ensure there is a clear process that disputes can follow. The provision of specific required forms to be utilised during the local level process may help ensure that this internal process is followed as an initial step such that the employers and employees engage in the process using the forms provided and such forms must then be completed and submitted when looking to progress the matter externally

Also there could be a monetary bond required to escalate claims to an external level which would deter the likelihood of "forum shopping" from employees (this has also been referred to as "compensation shopping"). This monetary bond would be payable on application of the claim and may discourage the "ambulance chasing" legal firms from submitting frivolous claims thereby tying up the system. This bond would be refundable in the event of a successful claim or if the claim was unsuccessful it would be forfeited to the Respondent.

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?*

Yes. It is submitted that if all parties are fully aware of the process required in order to resolve a dispute then this would lead to grievances/claims being dealt with more efficiently. An information guide should be available to employers and employees alike detailing what is the required process for raising a claim and the required process for dealing with a claim. It should also detail the legal requirements of claims such as the length of service qualification for redundancy lump sum payments, or unfair dismissal claims. This may help prevent employees from taking claims when their claim is in fact statute-barred due to being out-of-time.

1.3 *When and how should interventions be available from the state?*

State intervention should only be necessary for cases where the workplace level procedures have been exhausted and at this stage, in order to allow state intervention, there should be a pre-screening process to filter out frivolous claims or allegations. It would be a waste of State resources and tax-payers money to have matters progress to tribunal level when the grievance at issue is entirely unfounded or the grievance lacks any real substance other than petty squabbling. To assist with this, records should be provided of the claim being dealt with internally and provided at the application stage as a record that the employee has exhausted all internal procedures. At this pre-screening process there should be a request for information that will ensure the claim has validity and substance. This may necessitate requesting information from both parties such as meeting or investigation minutes and if successful it would be referred to the next appropriate step with the recommendation or either mediation or possible tribunal from the individual carrying out the pre-screening.

1.4 *How do you think access by employers and employees to a just, fair and efficient adjudication process can be ensured?*

I believe that as mentioned a monetary bond should firstly be introduced to provide a penalty for frivolous claims and also a deterrent for forum shopping. This does not necessarily mean that every unsuccessful claim should result in the forfeit of the bond. It is clear that an employee may be unsuccessful but their claim was valid or taken in good faith. The monetary bond should only be forfeited when the claim is deemed to have been frivolous and/or malicious. Additionally those adjudicating on such matters ought to have the relevant qualifications and experience and they should be appointed in a fair and transparent manner. A final suggestion would be to involve the Taxing Master in the process.

2. A SIMPLE AND EFFICIENT INSTITUTIONAL STRUCTURE AND A HIGH QUALITY CUSTOMER SERVICE WITH A SINGLE AUTHORITATIVE SOURCE OF INFORMATION, A SINGLE ENTRY POINT AND MINIMUM SCOPE FOR FORUM SHOPPING.

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

Yes. Peninsula representatives attended the High Level Conference on the Resolution of Individual Employment Rights Disputes at the School of Law, University College Dublin on the 01st and 02nd July 2011 and indeed Peninsula Director Alan Price was heavily involved in the Round Table Discussion on proposed reform of the institutional structures. During that Round Table Discussion the Peninsula position was clearly outlined by Mr Price as involving a single entry point for all claims and a single appeals entity. It was proposed that the single entry point could be called the '*Employment and Equality Tribunal*' and the appellate body could be referred to as the '*Employment Appeals Tribunal*'. As such Peninsula agrees that an integrated two-tier model ought to be adopted as a guiding principle as this has worked most effectively in other jurisdictions and would represent a move towards an accessible, uncomplicated and speedy system of dispute resolution.

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?

Yes. In Minister Bruton's recent proposals for reform it was outlined that a two-tier model could involve '*different channels within each of the two entities through which different types of cases could be processed. For example, it is conceivable that there could be different channels dealing with (a) disputes of interest (individual IR grievances about pay and conditions) (b) disputes of rights (individual claims relating to statutory entitlements) (c) equality issues.*' It is the Peninsula view that differentiation of channels could be a viable option but it should be narrowed to two channels only:

- a) disputes of rights
- b) equality issues

Given the complete removal of equality issues to the existing Equality Tribunal it may indeed be a viable option to retain this in a separate channel within any future single entry point.

However, it is the Peninsula view that a separate body should handle disputes of interest, thereby leaving the new single entry body of first instance to adjudicate about litigious affairs only.

- The rationale behind this is that industrial disputes can be long drawn out affairs which can be time-consuming both from an operational point of view but also from an administrative point of view. One need only look at the time and resources thrown into the Aer Lingus dispute already since 2006 by both the Labour Court and the Labour Relations Commission. As such, to incorporate disputes of interest into this single entry point will only serve to tie-up vital resources, particularly administrative resources, which would be better diverted to the adjudication of tribunal disputes.
- Furthermore, disputes of interest involve a different level of expertise and experience and it would be better to retain them within one specialist body in order to ensure a professional and speedy resolution.
- A single entry body dealing with disputes of rights and equality may be achieved effectively through amalgamating the Rights Commissioner service with the EAT, Equality Tribunal and the adjudicative branch of the Labour Court in order to form the adjudicative body of first instance
- A stand-alone body may be formed to deal with disputes of interests through an amalgamation of the remaining conciliatory arms of the LRC and Labour Court to handle industrial relations disputes.

It is important to note that a separation of bodies into one dealing with disputes of rights and equality and another body dealing with disputes of interest should be introduced with a minimal level of red tape. The desire amongst the majority of those engaging in the existing tribunal system is to make the entire process as uncomplicated as possible and the adoption of the system proposed above should not be too procedural or bureaucratic. It should simply

be a scenario whereby mediation, conciliation and industrial disputes would be dealt with by one body and then adjudicative claims would be dealt with by another.

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?*

Yes. This question has been addressed indirectly above but in order to clarify it is the Peninsula view that all claims in respect of employment related complaints/claims (including employment related equality matters) should be submitted and dealt with by one body of first instance.

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)?*

Yes. It is the Peninsula view that the right of either side to object to the body of first instance hearing a case should be removed. To allow such an objection would go against the purpose of reforming the institutions in the first place and only serves to undermine the autonomy and expertise of the body of first instance. As such, employment rights cases should only go to the body of second instance on appeal of a decision from the body of first instance.

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 instance and the appeals entity? For example, is there a need to retain some organisational distance / separation between the distinctive roles of:*

- a) *The inspectorate function (i.e. NERA's role in inspection, enforcement and where appropriate prosecution);*
- b) *the conciliation and mediation processes dealing with collective disputes;*
- c) *the advisory / mediation / investigative procedures dealing with individual industrial relations and employment rights claims;*
- d) *any subsequent formal adjudication on such individual cases.*

It is submitted that there is a need to retain some organisational distance between certain distinctive roles.

- a) NERA operate the **inspectorate function** and they may take enforcement actions where appropriate against particular employers. As such, it would be entirely inappropriate for NERA to retain an organisational and/or functional link with either entity in the proposed two-tier structure.
- b) **Conciliation and mediation processes dealing with collective disputes** tend to be protracted and drawn out affairs. One need only look at the time and resources exhausted by the Labour Court and the Labour Relations Commission in the Aer Lingus dispute over the last few years to understand how such matters can spiral out of control when positions become entrenched. As such, in order to avoid congestion, it seems appropriate that some organisational distance should be retained distinct from the two-tier structure
- c) It is submitted that an organisational link ought to be retained between the two-tier structure entities and future **advisory/mediation/investigative procedures** dealing with individual industrial relations and employment rights claims. The rationale behind this will be discussed in more detail below but in short it is suggested that an effective mediation option could act as a filter prior to the adjudicative entry at the body of first instance. Given that mediation may fail to resolve the issue at hand and matters may progress to tribunal anyway it seems entirely logical to retain an organisational link between the mediative stage and the adjudicative stage when individual industrial relations and employment rights claims are at issue.

In the UK, ACAS provides an Advisory, Conciliation and Arbitration Service. This body can get involved in pre-claim conciliation where the intention amongst the disputing parties is to resolve the matter without the need to go to tribunal. They are automatically involved by the Tribunal when a claim is received and there has been a set conciliation period with tribunals not listing a matter for hearing until

after the set period will have expired. The ACAS model could be utilised as a useful template for a similar system in Ireland.

As such, it is submitted that the segregation of these distinctive functions may be best achieved in a tri-partite fashion such that the inspectorate function, the collective dispute conciliatory function and the adjudicative function incorporating mediation of individual disputes would all act independently of one another and with individual autonomy. It may be worth considering putting in place some checks and balances however, similar to the separation of powers principle governing the executive, legislative and judicial branches of this State, whereby the segregated branches retain certain discretions over the other branches which will in turn induce the branches to cooperate with one another.

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?*

There would be the advantage of eased congestion in the new two-tier structure if statutory redundancy appeals were handled on an administrative basis given that statutory redundancy payments are now administered by the Department of Social Protection. However, the disadvantage here would be that the established social welfare appeals structure would not be versed, experienced and trained in certain complicated aspects of employment law that may arise where a redundancy appeals case arises. For example, would the social welfare appeals structure be able to consider the question of whether or not the claimant in question is an employee or a contractor should such an issue arise and, as such, could they then determine whether or not that claimant is entitled to redundancy pay? Similarly, would the social welfare appeals structure be able to consider matters such as reckonable service and could they clearly determine when and where a break in service would constitute reckonable and non-reckonable service for the purposes of calculating redundancy pay entitlements? In essence, it may be best if the redundancy appeals cases are retained within the two-tier structure. However, if an effective administrative function was adopted within the two-tier structure then it may be possible for statutory redundancy appeals to be referred to the established social welfare appeals structure where no additional complicated employment law matters arise other than redundancy pay entitlements.

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?*

Yes. The process of appointing those engaged in tribunals to date has often had a very cloak-and-dagger feel to it. The appointment of tribunal officers has lacked transparency which has left employees, employers and representatives feeling rather vexed when decisions are unclear, lack consistency and have varying ranges of tribunal awards and outcomes. Additionally, the policy of engaging particular tribunal officers at the behest of social partner pressure is not an acceptable practice. There seems to be a practice of engaging tribunal officers such that there are an equal number of "employee friendly" and "employer friendly" individuals occupying the available positions. This is not an acceptable practice and it means that the a particular matter up for hearing could go one way or the other depending on the particular inclination of the tribunal officer they happen to get. This is particularly evident in the Labour Court where this policy of taking officers from both sides of the divide seems to be most prevalent.

The guiding principles should be down to individual qualifications and experience but, like the appointment of a jury, there should be a line of questioning targeted towards identifying whether or not an employee is fiercely employer or employee friendly. If they are one way or the other then they are not suitable.

In the UK, most legally-qualified posts will require five or seven years of post-qualification experience (the relevant legal qualifications for solicitors or barristers), and legal experience gained during that time. However, tribunal judges need not always have been solicitors or barristers with the Tribunals Courts and Enforcement Act, 2007, widening the eligibility for many judicial posts thereby making them open to Fellows of the Institute of Legal Executives

(ILEX), members of the Institute of Trade Mark Attorneys (ITMA) and the Chartered Institute of Patent Attorneys (CIPA). However, it is quite clear that clear guidance is in place for the appointment of such persons to their post and the process is indeed far more open and transparent than what exists in Ireland today.

Once tribunal officers are appointed there should be an evaluation process whereby tribunal officer decisions and hearings are evaluated by their superiors. If decisions are picked at random and there was a poor or incomprehensible decision reached then these issues should be discussed with the individual in question.

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

Yes. This is a definite goal that should be pursued to ensure that employers are aware of their obligations and employees are aware of their rights. It would also provide a useful centralised tool for practitioners, unions etc. to work from.

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?*

No. It is submitted that the provision of advice on employment rights should remain within the remit of NERA and that the first instance body should simply operate as an adjudicative body. This is the purpose of NERA as such in the first place and diverting resources within the first instance body to this purpose would only serve to congest the adjudication of tribunal disputes, something this programme for reform is seeking to rectify. It is further submitted that the provision of advice and information on industrial relations should come under the remit of the separate body dealing with disputes of interest as outlined in 2.2 above.

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

Annual Reports from the tribunal bodies and NERA over the last number of years demonstrate that the volume of claims being taken by employees over the last 5 years and the volume of employment rights related queries over the last 5 years has increased exponentially. As such, it would seem that employees are fully aware of how to access information and advice. The same principle applies to employers. As such the current system seems to be serving its purpose quite well and websites are the best means of providing the information required. A centralised webpage directory containing all relevant websites would really improve access to important information also. One suggestion however would be to forward employers information relevant to them when they are about to receive a NERA inspection. If an employer is being inspected under the National Minimum Wage Act, The Organisation of Working Time Act, Protection of Young Persons Act etc. then they should receive guidance and information along with their notice of inspection letter. This will at least allow for the smooth operation of any inspection/meeting and this will allow employers to identify whether or not they are entirely compliant in advance of the inspection. Such inspections ought not be an exercise in catching employers out once the inspection takes place and instead should be an exercise in bringing employers into compliance in the most user-friendly manner possible.

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. This would be the ideal scenario. It seems that the progression of employment law over the last 20 years has resulted in a scenario where "employment rights" should be rephrased as "employee rights". Employees are receiving advice from the government bodies as to what they would likely win should they take a claim and how to take such claims. Employees shouldn't be told what to do in such scenarios and should simply be informed of the facts and their entitlements.

Another point to make here is that those providing advice should be subject to a performance review to ensure non-directive advice is being provided and to ensure that the advice is

neither pro-employee nor pro-employer. This will ensure that the service is simply doing what it is supposed to be doing; outlining the rules and entitlements in respect of employment rights.

Furthermore, while there is an abundant focus on employee rights there is rarely any comment on employee responsibilities. If we really want to get a fair and effective system working then there should be equal emphasis on proper behaviour by employees. (A prime example of this is the constant problems employers face where an employee refuses or fails to work out their notice when they are resigning or moving to another job.)

2.12 How can a single point of entry for all individual industrial relations and employment rights complaints/claims best be achieved?

By the formation of a single entry body through an amalgamation of the Rights Commissioner service from the LRC with the current Employment Appeals Tribunal and the adjudicative arm of the Labour Court and the Equality Tribunal. It may be best to have a separate industrial relations body whereby the conciliatory and mediative functions of the LRC and Labour Court are amalgamated in order to solely deal with industrial relations disputes.

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

Yes, most definitely. It is submitted that a single application form would be the most logical option upon the formation of a single-entry body. This could be modelled on the uncomplicated, user-friendly ET1 form which is available at the single point of entry Employment Tribunal in the UK:

5 Your claim

5.1* Please tick one or more of the boxes below. In the space provided, describe the event, or series of events, that have caused you to make this claim:

- | | |
|---|--|
| a I was unfairly dismissed (including constructive dismissal) | <input type="checkbox"/> |
| b I was discriminated against on the grounds of | |
| Sex (including equal pay) | <input type="checkbox"/> Race <input type="checkbox"/> |
| Disability | <input type="checkbox"/> Religion or belief <input type="checkbox"/> |
| Sexual orientation | <input type="checkbox"/> Age <input type="checkbox"/> |
| c I am claiming a redundancy payment | <input type="checkbox"/> |
| d I am owed | |
| | notice pay <input type="checkbox"/> |
| | holiday pay <input type="checkbox"/> |
| | arrears of pay <input type="checkbox"/> |
| | other payments <input type="checkbox"/> |
| e Other complaints | <input type="checkbox"/> |

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

Those taking a claim ought to provide as much information in respect of their claim as possible upon submission and appropriate space ought to be included in the application form to ensure this happens. If an applicant doesn't provide sufficient information (e.g. merely stating that they are taking a claim because they have been "unfairly dismissed") then the action should not proceed until they have elaborated upon the reasons behind their claim. If applicants do not provide any background to their claim then the claim should not proceed. The applicant could be given two or three chances to provide the information before the claim is thrown out. This could assist in weeding out frivolous claims also and could work in conjunction with a filtering process which would also weed out claims that are out of time, frivolous etc.

In the UK, claims must be made on the prescribed form and must contain the information setting out each claimant's name, each claimant's address, the name of each person against whom the claim is made (the respondent), each respondent's address, details of the claim and whether or not the claimant is or was an employee of the respondent. There **must** be sufficient detail on the claim form for the nature and basis of the claim to be understood although there is no expectation to set out all the evidence otherwise that would make claims overly long.

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

Yes. There should be a consistent time limit for taking a claim and the most logical option would be to utilise a default three month time limit from the date the matter complained of occurred. This could be extended to six months in "exceptional circumstances". Such a time limit would be ideal as it would:

- Provide for certainty and reasonable diligence in the area of litigation so that the facts of a case are fresh in the minds of those involved;
- Allow employees a reasonable period of time to identify their rights and bring their claims;
- Ensure that employers will not have the threat of claim hovering over their heads indefinitely.

It is suggested that three months is more than enough for claims to be submitted, and a similar system has been entirely effective in the UK where employees have only 3 months to submit their claim. It is therefore submitted that the default time limit should most certainly not be any more than three months in order to ensure better protection of relevant evidential data and also to reduce the likelihood of fading recollections over time.

The criteria for extending the time limit to six months should be where "exceptional circumstances" exist and this should be harmonised across the board, thereby removing the option for employees to have the time limit on the lesser threshold of "reasonable cause". The circumstances as to when time limits may be extended should be uniform and it is suggested that the decisions in *Gaelscoil Thulach na nÓg -v- Joyce Fitzsimons Markey* (REE/02/4, Decision No. 034) and *Byrne -v- P. J. Quigley Limited* [1995] E.L.R. 205 should be considered when seeking uniformity.

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 e.g. trades union official, solicitor, other representatives, etc?*

Yes. An employee's entitlement to representation or to simply take a claim and represent themselves should be clearly defined and set in stone. At a tribunal hearing an employee ought to have the entitlement to appear on their own behalf without representation if they so choose. However they should also have the right to be represented by some competent person be they a trade union official, solicitor or other representative.

An employee's entitlement to representation at the local level however should remain the same in that an employee may be represented by a fellow employee or by a trade union official and that it is wholly undesirable to be accompanied by any other persons, including legal representatives, in internal company dispute scenarios.

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 claimant's parent/guardian?*

No. It is submitted that it would not be appropriate for the power to present/refer a complaint on a claimant's behalf to be extended to the claimant's trade union. As stated previously, it is becoming more and more evident given the ever-increasing volume of claim referrals and NERA query calls that employees are becoming very much aware of their legal entitlements. If an employee wishes to take a claim then they have the ability to do so. If trade unions are

afforded the power to take a claim on a claimant's behalf then it may be result in claims being taken even though the claimant in question may not necessarily wish for that claim to have been taken. If a claimant has a trade union or has sufficient access to information outlining their rights then they are fully capable of taking a claim if they so wish. This is particularly the case if the single application form suggestion is implemented as it will become easier for such claims to be taken. Currently, there is nothing stopping an employee from seeking advice on the preparation of their claim application papers from a trade union official or other representatives. An exception could be made however where the employee is in some incapacitated to such an extent that they can't physically take the claim on their own behalf. This ought to apply only in exceptional circumstances and shouldn't apply in scenarios for example where the claimant happens to be on holidays and neglected to submit their claim in time before they left.

Parents/guardians ought to have the capability of lodging a claim on a claimant's behalf where that claimant is a minor or is in some other way incapacitated to such an extent that they would be unable or incapable of taking a claim at their own behest.

2.18 *Should there be a consistent method of enforcing awards of employment rights bodies and if so what should that be?*

Yes there should be a consistent method. One need only look through the database of EAT decisions on www.eatribunal.ie to identify a vast divergence in the awards granted in different cases where the facts of those cases are quite similar in content. Historically, analyses show that the average value of unfair dismissal awards over the years tends to work out at around 40% of the claimant's average salary/remuneration. However, the value of awards has certainly been rising over the last two years and evidence shows that the average award now appears to be circa 60% of an employee's average salary/remuneration. Is there a justifiable basis for this jump? Or is it the case that tribunal officers feel sorry for those claimants who lost their jobs and will also find it difficult to find a new position in an economic downturn? Additionally, why are tribunals awarding such significantly high unfair dismissal awards in circumstances where a genuine redundancy scenario existed or the employee was in fact guilty of gross misconduct but the employer failed to follow the correct disciplinary or redundancy process? As it stands, it would seem that Tribunal Officers pick numbers out of the air as to what they personally deem to be an acceptable amount without any breakdown as to why they feel this sum to be appropriate.

As such, in respect of the calculation of awards, Tribunal awards should consist of a "basic award" in an unfair dismissal scenario and then the Tribunal may consider applying a "compensatory award" where it is just and equitable to do so. This type of system works quite effectively and fairly in the United Kingdom and can be briefly summarised as follows:

1. **Basic Award:** This is automatically granted where the dismissal is found to be unfair.
 - a. This could be calculated in a similar manner to an employee's statutory redundancy entitlement (i.e. the award is based on gross weekly wage and length of service but is subject to a maximum weekly amount)
 - b. The maximum weekly amount could be set at the current statutory redundancy entitlement of €600. Thus, as per the current statutory redundancy entitlement, if a claimant with exactly two years' service is dismissed unfairly then the maximum basic award they are entitled to would be: $[(€600 \times 2 \text{ weeks}) \times 2 \text{ years}] = €2400$
 - c. It is submitted that if the unfair dismissal arises in a redundancy scenario and the claimant has already received their statutory redundancy entitlement then they would not be entitled to this basic award amount and would only be entitled to be considered for a compensatory award
2. **Compensatory Award:** This is a discretionary award to be afforded by the tribunal in the circumstances where it is just and equitable to do so. This award would be granted where the Tribunal deems it just and equitable to do so and the loss claimed to have been suffered was "as a consequence of the unfair dismissal" and "attributable to the employer".
 - a. The compensatory award should be subject to a maximum amount. In Ireland we operate a system of restricting the maximum unfair dismissal award to two years' service. It is submitted that this should be changed to an actual

maximum figure. For example in the United Kingdom the current maximum compensatory award available is £68,400. This figure is reviewed annually and must be adjusted if the retail prices index (RPI) of the current year is higher or lower than the same point in the previous year. The maximum award figure is adjusted by the same amount as the difference in the RPI. This is a better system, is more straightforward and given that a basic award also applies it is entirely fair on both the employer and employee.

- b. The calculation of the award should take into account the "actual loss" suffered by the employee and any potential "future loss" likely to be suffered.
 - c. "Actual Loss" would take into account any pay or benefits the employee actually lost from the date of dismissal to the date the award is made. This payment would also take into account any notice pay or holiday pay the employee received upon termination of employment and any other severance payment received and make deductions from the actual loss amount accordingly
 - d. "Future Loss" would take into account the chances of the employee obtaining employment in the future or if he or she has already found alternative employment, it would take into account the difference in wages between the old and the new job and estimate how long the losses will continue. This future loss should be limited to a 12 month period after the date of the award and should not be indefinite although a higher sum could be awarded in scenarios where the employee is nearing retirement/pensionable age and may be unlikely to find another position. In calculating this award, however, the tribunal should request evidence that the claimant has been actively seeking work in the same manner that social welfare will assess a claimant's entitlement to State benefit.
3. Generally speaking, an employee may not be entitled to the Compensatory Award, or such an award may be reduced, where that employee is deemed to have contributed in some manner to their dismissal. In cases of gross misconduct where for some reason the tribunal deemed the dismissal to be unfair, for example the employer failed to follow the correct procedure, the basic award may also be reduced. Furthermore, in order to encourage early dispute resolution through mediation or conciliation a tribunal may reduce the Compensatory Award where the employee has refused to engage in mediation.

In respect of the enforcement of awards, there should also be a clearer and unified process whereby a tribunal outcome may be enforced where either party to a dispute has failed to abide by the decision of the employment tribunal. Enforcement actions could be taken by an aggrieved party to the Circuit Court at first instance and this includes situations where a party to a dispute has failed to enforce the decision of the single-entry body (i.e. thereby bypassing the appellate body).

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

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

It has been mentioned above but it is submitted that a mediation, conciliation or arbitration option should be available before a matter is progressed to a formal hearing. This could be done in a manner similar to the current Equality Tribunal system whereby mediation is an option beforehand. Mediation can drastically reduce the time, cost, disruption, negative publicity and the loss of control compared to taking a dispute or action through the formal hearing process. Currently in the Equality Tribunal both parties to a dispute have to declare whether or not they are open to the option of mediation. This should be retained for the majority of dispute claims, if not all, going forward.

The best method may be to establish an "alternative dispute resolution" body to which either the employer or employee may refer a dispute before a claim has been taken. Where the

claim has been taken either the claimant or respondent could also call on this body to intervene if they believe the matter can be resolved. As stated previously, this body ought to work in conjunction with the single entry body and if an employee refuses to engage in mediation then their ultimate compensation, if successful, should be reduced by a certain percentage.

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

In his book, "The Peacemakers: Peace Settlement of Disputes Since 1945" (London: MacMillan, 1992), Hugh Miall writes, "*There are two main phases in conflict when resolution is more likely to be achieved. The first is at an early stage, before attitudes become too fixed and behaviour too hostile. The second is at a later stage when the conflict has become a costly stalemate and the parties are exhausted.*" If a matter proceeds as far as formal adjudication then the employment relationship is probably already completely untenable. If the matter is dealt with through mediation at the early stage then positions will not be as entrenched and the employment relationship may be maintained. Furthermore, by the time a matter actually proceeds to a formal hearing and then by the time a decision is reached the option open to a tribunal to order reinstatement or re-engagement is effectively removed and the tribunal officer can only really award compensation even though the employment relationship could have been redressed.

As mentioned in 3.1 above, the best method may be to establish an "alternative dispute resolution" body to which either the employer or employee may refer a dispute before a claim has been taken. In the UK, ACAS currently offers mediation as one of its services. It is available to both employees and employers who feel that their ongoing dispute would benefit from an impartial intervention. This is, however, voluntary so both parties must agree to its use. Its use can prevent a claim from being made and alleviate the growing burden placed on employment tribunals. Where the claim has been taken either the claimant or respondent could also call on this body to intervene if they believe the matter can be resolved. I do not believe it is feasible for operators within the new system to sift through each claim taken and identify which claims may be resolved through early intervention and as such it should be left to the discretion of the employer or employee to seek the incorporation of alternative dispute resolution into the claim process. In the UK, tribunal papers are passed automatically to ACAS who have the power to offer conciliation between the parties can be attempted, and this usually involves a monetary settlement, with a binding agreement that precludes a tribunal claim from subsequently being made.

For straight-forward disputes of rights then there ought to be some manner in which these may be assessed and decided upon at an early stage. For example, if an employee is claiming that they did not receive sufficient notice pay then surely this can be decided without the need for a formal hearing. Again, the UK provides a useful example where a fast-track system exists for "basic claims" which are normally monetary in nature e.g. notice pay, holiday pay, wages claims. Such "basic claims" are heard by a judge sitting alone, usually only listed for an hour and have a shorter fixed conciliation period. As it isn't a question of reasonableness, such as a dismissal scenario, the lay members aren't needed.

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?*

Information on intervention should be available at both stages (i.e. when the party to a dispute first seeks information prior to them lodging a complaint AND after the complaint has been lodged). As mentioned previously, a specific body should be established whereby both parties to a dispute can seek assistance in a mediatory sense both before and after a complaint has been lodged. Once the complaint has been lodged then both parties to the dispute should be asked whether or not they want this body to intervene and engage in mediation. Whether or not the employer or employee agrees to mediation should be taken into account when assessing compensation at a later stage, if applicable, and this will thereby encourage both parties to resolve the issue at the earliest stage of the process.

3.4 *Is there scope for harnessing the expertise and capacity of personnel within the existing bodies to decide on straightforward issues where purely factual matters are in dispute?*

Yes. As mentioned in 3.2 above there should be scope to harness the expertise and capacity of personnel to decide on straightforward issues where purely factual matters are in dispute.

3.5 *Is there scope for forging positive connections between the public dispute resolution system and external experts in preventive alternative dispute resolution methods at workplace level?*

No. It is submitted that this would not be a necessary connection. The establishment of a properly run, organised and funded body tasked with early intervention and mediation would be ideal for the purposes of alternative dispute resolution. However, where employers and employees have already utilised the services of external experts at a local level then the public dispute resolution system could seek the input of such an external expert at the dispute stage.

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

Yes. It is submitted that all claims should require both parties to set out their case in writing.

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

This would be an idealistic scenario. However, as stated in 3.2 above, I do not believe it is feasible for operators within the new system to sift through each claim taken and identify which claims may be resolved through early intervention and as such it should be left to the discretion of the employer or employee to seek the incorporation of alternative dispute resolution into the claim process. Once a claim has been lodged, the tribunal will process the claim and notify both parties to the dispute of same. This notification should contain the option to attend mediation or conciliation as an initial step and a two-week time limit confirming whether or not they wish to engage in such mediation/conciliation should apply. If one party agrees to mediation and the other does not indicate their intentions either way then efforts should be made to establish whether or not the latter party wishes to engage in alternative dispute resolution.

3.8 *Are there particular kinds of issues, for instance, where mediation is likely to be especially helpful or, alternatively, where it is not likely to be helpful?*

Mediation is unlikely to be helpful in cases involving gross misconduct or redundancy. If an employee is made redundant then their job probably no longer exists. If an employee is dismissed for gross misconduct then there is probably a breach of the trust and confidence upon which the contract of employment was founded and as such mediation is unlikely to resolve the dispute at issue.

Mediation would be helpful in constructive dismissal scenarios where the employer has indicated a wish to retain the employee and has asked them to reconsider their decision to resign. It would also be beneficial in disputes of right where the employee is claiming that they have not received a particular entitlement. A sufficiently qualified and experienced mediator should be able to identify whether or not this claim is valid and can then determine whether or not the employer should make such a payment. As this is done in an informal manner it would prevent the likelihood of the employer becoming aggrieved at being dragged into a formal hearing which could result in feelings of ill-will.

3.9 *Would there be merit in having a “preliminary hearing” process and if so how should it operate?*

Yes. This is something that could be handled by a competent mediation body which is staffed with sufficiently qualified and experienced staff. Such a body should work in conjunction with the single entry body of first instance. To offer mediation, then a preliminary hearing and then a formal hearing would lead to a convoluted process which could result in a worsening of the employment relationship as the process gets dragged out.

In the UK, preliminary hearings (termed Pre-Hearing Reviews) are ordered by (after consideration of the claim) and heard by an Employment Tribunal itself. However, such

preliminary hearings tend to be heard by a single judge rather than a full panel of three. In addition, there are Case Management Discussions held by a judge sitting alone (sometimes by telephone) which are designed to clarify the issues in order to focus proceedings and set down orders to improve effective case management such as dates for disclosure of documents, agreeing a bundle of documents for use at the hearing and a date for exchange of witness statements. This all makes a hearing run more smoothly because all the information and evidence is known which increases the possibility of settlement rather than someone withholding a critical piece of evidence that they wish to spring on someone at the hearing. Because some of the matters that initially need to be established can be based in law and interpretation of law (e.g. employment status, length of service etc), over whether the claim has grounds to continue, it may be necessary for a judge to decide on it, rather than a mediatory body. Although ACAS may identify claims which appear to be invalid on the aforementioned bases, they have no power to vet/reject claims. This position is expected to continue subsequent to the current plans to overhaul the tribunal claim system.

3.10 *Should certain cases be dealt with on the basis of written submissions only?*

Yes. Disputes of right could be dealt with by way of written submission but to act in this manner may bring the system in contravention of the constitutional right to fair procedures in that a tribunal body would be making a decision without the parties of the dispute being afforded the opportunity to state their case in a proper hearing. A written submission cannot cover every eventuality or issue and could lead to unfair or unjust outcomes.

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?*

Yes. As stated previously, it is submitted that the mediation body should act in conjunction with the single body of first instance. The opinion of the mediator should be taken into account at the formal adjudicative stage and if either party refuses to engage in mediation then this should be taken into account when assessing any compensatory award.

The fact of whether or not a party to a dispute engaged in mediation or conciliation currently has no bearing on subsequent tribunal proceedings in the UK as a general rule but it can be taken into account in relation to applications for costs due to unreasonable behaviour in the conduct of proceedings.

3.12 *Should there be a uniform set of procedures regulating the conduct of hearings in all cases heard at first instance?*

Yes. Both the body of first instance and the appellate body should have a uniform set of procedures. The composition of the tribunal, the order of proceedings, the right to cross-examine etc. should all be uniform in both bodies. The body of first instance should not be treated as an informal stage as may have been the case with the Rights Commissioner in the past. This would only serve to undermine the quality and competency of the body of first instance and its standing in the process as compared to the appellate body should be seen in a manner equivalent to the standing of the High Court as compared to the Supreme Court.

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. It is submitted strongly that this programme for reform should consider empowering first instance jurisdictions to dismiss what are adjudged to be frivolous, vexatious or misconceived claims without the need to progress to a formal hearing. Essentially a filtering process should be introduced process whereby illusory or statute-barred claims may be weeded out so as to prevent congestion within the proposed single-point entry forum. Whilst the protection of employee rights must be at the forefront of any reform of the employment rights and industrial relations procedures and institutions, one must be cognisant of the clear practice of employees to forum-shop and take illusory and illegitimate claims simply because it is relatively inexpensive for them to do so, particularly in those claims where they do not require a legal representative, a representative body or a labour inspector to take a case on their behalf. While it may be difficult to weed out illusory claims through a filtering process it would certainly be possible to weed-out those claims that are in fact statute-barred due to the

employees' failure to make their complaint within the required reference period. I can for example refer to a case in which we represented the respondent at the Rights Commissioners; reference numbers r-084298-mp-09, r-084302-pw-09, r-084303-wt-09 and r-084321-te-09. In that case the employee claimed in her complaint application papers that her employment was terminated on the 19th January 2007 when her maternity leave started. In view of maternity leave protection it was clear that the employee's termination date would have been on the 15th October 2007. The employee took a claim to the Rights Commissioners under various pieces of legislation and submitted these claims to the LRC on the 10th September 2009. Despite the doubt surrounding the employee's actual termination date, be it January or October 2007, it was quite clear that the employee's claim was well outside the referral deadline and extended deadline and was in fact statute-barred. Peninsula believed it would be best for all concerned to simply address this to the LRC so that the case need not be heard only to be informed by the LRC that the matter had to progress to hearing for an official Rights Commissioner decision. This meant that while the case was clearly statute-barred, both the employer and ex-employee had to attend a formal hearing along with their respective representatives. Furthermore, as the employer and employee were based in Carlow the LRC held the hearing in the Talbot Hotel in Carlow which no doubt involved considerable expense in terms of accommodating the hearing at the hotel. The case was heard on two separate dates, the 04th March 2010 and the 27th April 2010, and the decision was reached and posted by the Rights Commissioner on the 29th June 2010 in which the Rights Commissioner affirmed our previous assertion that each case was statute-barred due to the employee's failure to take their claim within the required reference period. In essence a case that should never have proceeded as far as a formal hearing wasn't resolved until over nine months after the employee initially submitted their statute-barred claim. It is suggested that a filtering process could take the guise of a required mediation step in advance of any hearing of first instance. Such a step could identify frivolous claims in addition to identifying those claims that are in fact statute-barred. Alternatively, an effective administrative arm could weed out statute-barred claims during the case-management stage and scheduling process. Another option would be to have an optional mediation stage; if mediation goes ahead then the filtering process could be used at this stage and if mediation is declined by either party then the administrative arm could then take over to identify if the claim can be weeded out or should proceed to formal hearing.

In the UK, tribunals have the power, normally through a pre-hearing review, to strike out claims for this reason or where the claim has no reasonable prospect of success. However, notice must be given to the parties for the proposed strike out and offer the parties the opportunity to make representations in relation to the strike out at a hearing. In these circumstances a UK tribunal is still more likely to issue a deposit order and warn the party that if they proceed with the claim and fail then an application for costs from the other side is likely to be looked on more favourably.

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

It is submitted that employment rights disputes/appeals ought to be heard in public. Both parties to the dispute should be afforded the opportunity to have the case heard in a private in camera hearing and this could be granted where there is some pressing need. However, one cannot underestimate the power of normative pressure and the weight of public opinion and to have hearings in public would encourage companies in to engage in fair practises and may also reduce the number of frivolous and vexatious claims.

3.15 *Should there be a uniform period for submitting appeals?*

Yes. It is submitted that a uniform period of 6 or 8 weeks to appeal a decision should apply



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