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CC:  
Posted Date: 25/08/2011 16:48:06  
Subject: Submission on Reform of Employment Rights and IR Procedures

To Mr Eamonn Gallagher

Dear Mr Gallagher, further to our recent telephone conversation, I am making a brief submission to the discussion on the above.

May I say first of all, that the mapping of current arrangements in Appendix 3 is most enlightening and useful, even as a guide to the workings of the present structures for as long as they last.

As you will appreciate, my primary concern is in the area of Pensions and the application of the Pensions Act to employment rights.

However, I will make some further comments on the various questions raised in the discussion paper, insofar as the experience of this Office might be of any assistance.

The Pensions Act 1990, as amended

The Pensions Act ("the Act") affects employment rights mainly as to Part VII – the requirement for equal treatment – initially, only of men and women, and later, on the various other grounds found in the main body of employment legislation. Uniquely it places the obligation to secure equal treatment, not only on the employer, but upon trustees of occupational pension schemes. It is important that jurisdiction over trustees in this area be maintained.

It is my view that complaints of discriminatory treatment are best handled by those with expertise in this area, and the intention was that the Equality Tribunal would be the point of reference for such complaints. However, I am concerned that access to the Tribunal is available only for six months after a person has left the service of the employer, and a great many of those who bring complaints to my office are either pensioners who have already retired, or deferred members, with preserved benefits not yet in payment (but who may have left service many years previously). In my experience, pension questions may come to the surface only a considerable time after the alleged discrimination has occurred and perhaps a number of years after withdrawal or retirement from service. An allegation of discriminatory treatment may refer to events of which the complaint could only have become aware following the later withdrawal or retirement of a comparator, who is perceived to have been treated differently. If it were feasible, I would recommend that the new structures incorporate something akin to my own temporal jurisdiction under the Act – the later of six years from the date of the event giving rise to the complaint, or three years from the date on which the complainant was first aware, or ought reasonably to have been aware.... etc.

#### Possible Two-tier Model

I like the comparative simplicity of the possible two-tier model that is now proposed. I believe that an easily-accessed single portal first instance body would be useful, given that it would be able to assess and weed out those cases which would be amenable to rapid solution by quick intervention, referral for mediation, rejection on various other grounds; or, indeed, referral to some other appropriate tribunal such as the Pensions Board, Social Welfare Appeals, the Financial Services or Pensions Ombudsmen, or, indeed, the Office of the Ombudsman - such a referral facility being the more desirable where the complainant may have no legal or other professional assistance in formulating his case, and perhaps no clear idea of the true substance of his complaint.

Simplification of the appeals process would be a very good thing.

With regard to the general questions raised in the consultation document, my comments are as follows:

1.1 A simple and very clear code of practice for dealing with disputes as they arise; supported by a regime which will not accept disputes into the

formal resolution process if the procedures have not been engaged with by the employee, and a default in favour of the employee if the employer has failed to comply.

1.2 Yes, Clear and easily accessed explanations of rights and obligations would be a huge help.

1.3 After the resolution processes set out in the code of practice (see 1.1) have been exhausted.

1.4 See 1.1.

2.1 I agree with the two-tier model

2.2 Yes. Many disputes are complex and have disparate elements, which the present system divides and requires additional time and resources to dispose of.

2.3 Yes.

2.4 Yes to both

2.5 I think segregation should be kept to the absolute minimum, but I do think that the supervisory/regulatory role of NERA should be kept apart from the other functions, as its purpose is not the solution of individual disputes but the policing of adherence to the legal requirements at more of a macro level.

2.6 This would make sense if such appeals were “pure” statutory redundancy appeals, but would lose the advantage of the “one stop shop” if the employee had other issues.

2.7 In my view those working in the new bodies should be civil servants in the service of the State, and should be appointed/recruited for their expertise in the different areas of employment law/rights. Those appointed to adjudicate and determine issues in a binding manner should be subject to an independent appointments system through PAS.

2.8 Yes, please!

2.9 Yes.

2.10 Internet and social networking, education of Trade Union officials and regional information meetings on a regular basis, together with the provision of training for staff of Citizens’ information and certain voluntary bodies.

2.11 Yes.

2.12 Retain existing website/information channels and redirect all queries and

applications to a new central website / address.

2.13 Yes

2.14 The most important tool would be a well-designed application form which would not process any page until all necessary information on previous page had been input – everyone is used to these forms if they are booking tickets for almost anything.

2.15 Subject to observations on pension matters, above, yes. I would have thought, six months from date of event complained of.

2.16 Yes. But representation should not be needed at the preliminary stages – usually only if it gets to the appeal stage, unless the complainant is in some way unable to act for himself., in which case, 2.17 applies

2.17 Yes – very important..

2.18 Yes – a simple application to the Circuit Court at the suit of the tribunal which made the initial order or heard the appeal as appropriate.

3.1 Any or all of those list would be appropriate in different circumstances – see 3.2.

3.2 A dedicated unit to examine and analyse each case as it came in, which could decide on the action most likely to achieve a quick resolution – or decide that a quick resolution was not realistic.

3.3 We have found that early intervention can be quite effective even at the initial stages, if the staff handling that process have enough experience to identify cases suitable for a quick fix.

3.4 I believe there is scope for this

3.5 Yes.

3.6 Preferably, but if staff identify the possibility of rapid intervention, this may not always be necessary.

3.7 yes, but subject to a reasonable time-limit, e.g., 30 days

3.8 I think that cases where there have been technical breaches by the employer are probably easiest to handle. If there is any acrimony or sign of a breakdown in relations, other solutions will be required.

3.9 I don't have a view on this. I am just not sure.

3.10 I believe some cases could be dealt with on that basis, but there is a

danger that parties will engage professional (legal) help and matters may become more complicated than they should.

3.11 In general, they should not be admitted, but failure to engage or failure to co-operate with attempts at resolution should be revealed to the tribunal, which can assign it whatever weight it feels appropriate.

3.12 Yes.

3.13 Absolutely. My Office has some experience of such cases and I am in no doubt about this.

3.14 In general, in private, unless they go to appeal. Appeals should be in public.

3.15 21 days, with discretion to extend given to the appellate tribunal.

I hope this is helpful and would be pleased to discuss any point with you if required.

Sincerely

Paul Kenny

Pensions Ombudsman

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An Roinn Coimirce Sóisialaí – Víreas-scanta

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