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RG/LE

Richard Grogan

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

Dear Mr. Gallagher,

I refer to the consultation paper produced by the Minister and would make the follow comments.

1.1 There is an extremely useful Code of Practice on Grievance and Disciplinary Procedures.

1.2 I would accept that where there is timely up to date factual information and there is good faith on both sides that this does result in resolution of grievances / claims.

1.3 Where an employee has sought to use a grievance Procedure and the employer has not facilitated same then the employee should be entitled to refer the matter to a State Agency. I would be of the view that this should be for informal intervention initially and that if this does not result in the matter progressing that it would then go to a more formal procedure.

1.4 Yes. I believe that the LRC current structures are extremely efficient in resolving disputes. The LRC personnel know the law and know industrial procedures. The same cannot be said for NERA.

There are numerous cases which I have where NERA has said the employee has no claim which I have then won and obtain compensation for the employee. The LRC procedures are extremely user friendly for employers and employees. It is conciliatory rather than confrontational. I agree that a two tier model should be adopted as a guiding principal.

2.2 There should be one entry system for all claims that are lodged. There should be no differentiation. The procedures should be the same for every case. Procedural rigidities should be kept to an absolute minimal.

2.3 Yes. In my experience the Rights Commissioner Service is the most efficient in dealing with matters. Its procedures and method of dealing with cases has minimal rigidity with maximum flexibility and a desire by the Rights Commissioners to attempt to facilitate settlements whenever possible. They will attempt at the start in some cases or alternatively in the middle or at the end of a case to see is it possible to get matters resolved without the necessity for a Decision. This is not done by the EAT to the same extent and not by the Equality Tribunal at all.

2.4 There should be a second body on Appeal. Neither party should be able to object to a hearing at the first instance by the first tier. This currently applies in respect of Unfair Dismissal claims and Industrial Relation Act claims. This should be removed. In my experience cases before Rights Commissioners are more likely to settle and be resolved quickly than before an Employment Appeals Tribunal or an Appellate Division. In the case of UD cases for example I understand only 10% of UD cases heard by Rights Commissioners are appealed and only 10% of these are varied on appeal. This is a very high level of efficiency.

2.5 There is no reason to maintain an organisational distance / separation between distinctive roles. The Rights Commissioner Service and the Labour Court had for years been able to juggle the different functions. They had been able to speak effectively off the record or to use legal parlance at "side bar" talking collectively or individually to employers and employees to encourage settlements and resolution of disputes and where that fails then to go on for a formal hearing. The Rights Commissioner Service and the Labour Court are extremely expert in this and there is no reason to differentiate.

If you go for an organisational distance / separation you go back to the situation of different entities seeking to maintain their own position and organisational independence and distinction. It appears that the Minister is trying to have a situation where there is a simple procedure. That means that there are no bars between the different functions being performed and no separate or distinctive divisions of responsibility.

This does not mean that different personnel cannot be involved at different stages. In the LRC there are investigations which are undertaken and in the event that a settlement cannot be reached on conciliation or mediation the matter then goes to the Labour Court. The person however who undertook the conciliation or mediation will give a report to the Labour Court setting out what issues have been agreed as between the parties and what issues are still in issue. Even if there is to be an investigative procedure that is no reason why the body at first instance hearing a dispute or an appeal should not have access to an investigators report so long as the individual involved in inspection, conciliation, mediation, advisory or other functions is not involved in hearing the case then there is no reason why there should be any segregation.

2.6 There would be no advantage to have statutory redundancy appeals dealt with by the Department of Social Protection. The cases involving redundancy which go for hearing are ones where the redundancy documentation has never been given to the employee or there is a dispute over the rates of pay or the length of service. The disadvantage of having the Department of Social Protection deal with matters is that there could be a considerable number of legal issues which would arise.

Take a situation where an employee was employed in the construction industry and was paid less than a statutory rate of pay. The first issue that would need to be dealt with is whether in fact the employer was a construction company and secondly what was the appropriate rate of pay. There would also be then legal issues relation to lay-off and whether or not there was a valid lay-off at any period of time that needed to be discounted or issues relating to breaks of service which need to be discounted or taken into account. There is every reason that these cases should be heard by Rights Commissioners who would deal with the quickly and efficiently. There is no reason why the Rights Commissioners Decisions shouldn't automatically be sent to the Department of Social Protection for implementation. Saying this, on a number of cases these issues will go on for hearing and may not go to the Department ultimately except for the employer contribution rebate.

Many redundancy cases revolve around length of service and breaks in service and rates of pay which can often be resolved by the entity hearing the case itself which are then subsequently accepted by the employer and employee without any Decision having to be made. These often settle because they are before an entity which the employer recognises as having the necessary practical experience to deal with a case speedily.

2.7 The provisions which apply to the Labour Relations Commission and to the Labour Court appear to work extremely well. I do believe that it would be beneficial that there would be an independent body responsible for appointing individuals with set criteria as to their relevant experience in the employment field. In respect of employment law cases, and by this I mean Industrial Relations Disputes also, the most important function is knowledge of how work places work. An Industrial Relations background whether from the employer or employees perspective should be a criteria in appointments. These cases involve applying the law to the facts and the facts are 9 times out of 10 ones which require an IR expertise rather than legal knowledge. The IR expertise is the most important attribute. This is not to say there are not Lawyers with the relevant factual experience also.

2.8 Yes.

2.9 Yes.

2.10 Firstly a good website. Secondly, comprehensive and well researched advice on employment rights and obligations. There is a necessity for employees to know their rights. There is also a necessity for employers to know their obligations. The converse is also true. There is a requirement for employees to know what their obligations to their employers are and for employers to know what their rights are. Let me give just one example. Employees have a right to be given 24 hours' notice of a requirement to work overtime. There are limited exceptions to this to cover emergency type situations. Employers need to know that you cannot have an emergency on a daily basis or on a weekly basis and equally employers need to know that they must give appropriate notifications to employees by a proper roster or proper notification. Employees need to understand that they do not need to work overtime where they have not been given the right notification. Individuals have family lives as well as a working life. At the same time they need to know that if they are given the proper notification there is an obligation to do so. There are rights and obligations on both parties. Many of the publications produced by the various bodies are at best minimal as regards giving advice. In any new entities there needs to be a greater emphasis on the distribution of information in a user friendly format which is definitive rather than having a legal disclaimer. The bodies giving the advice must take responsibility for the advice that they are giving.

2.11 There should be advice provided for employers and employees. Let me give one example where considerable problems arise which could be easily resolved. Most Unfair Dismissal claims are lost by employers because of administrative noncompliance with statutory rules of fair procedures. There is no procedure currently for an employer to put in place a disciplinary policy, submitted to a State Agency for approval and once approved provided the employer complies with same as regards the procedural elements that the dismissal will not be declared unfair simply on procedural matters. It may be declared unfair on the facts but that is a different matter.

Saying this, a procedure that is put in place should only have a limited life span of a year or two so that if there are changes in the law that the policy would have to be updated. It would get State approval as regards the procedures for a period of say two years. This would encourage employers putting in place proper procedures. It would also ensure that if they did that they would have to be notified to employees. For employers and employees there should be a procedure to seek confidential advice as to how to deal with matters. However, if such advice is going to be given employers and employees should be entitled to get same furnished in a way which gives them some comfort. There is no benefit in giving individuals whether employers or employees advice and then putting a disclaimer at the end of it so that if they act on that advice to their detriment that they have no recourse. That only results in advisors who act in a professional capacity having to be utilised because of the fact that there is no come back for negligent or ineffective advice. There is no reason why persons giving advice would not do so on that basis of the facts set out to them and give written advice on that basis. Giving advice without taking responsibility for same is useless. There is no reason why an administrative charge is put in place for giving such advice. Such a charge discourages people abusing such a system. A nominal charge is usually sufficient. It will be less than the cost of professional advice.

2.12 There should be a single administrative function with one claim form to cover every conceivable employment or Industrial Relations claim sent to one place. There should be one administrative body. It should be staffed by individuals who have sufficient knowledge to know where to send the cases to whether they are to go for mediation, conciliation or for a formal hearing.

There would be many employer or employee representatives in the Employment Appeals Tribunal who might be prepared to take on administrative roles in such a body that would have the relevant Industrial Relations experience to be able to give appropriate assistance and advice and streamline the service in an efficient way.

2.13 Yes. There are too many claim forms. There is no reason why there cannot be one claim form.

2.14 It is a very simply matter to give the administrative body an entitlement to seek detailed or more detailed particulars from a complainant / applicant. That should be very flexible. It could be as simple as seeking additional information to seeking a written submission in relation to the complaint. In a grievance situation under the Industrial Relations legislation it could simply be a matter of seeking a detailed statement setting out exactly what the complaints are or it could simply be a matter of obtaining dates or relevant information. Flexibility is what would be required.

2.15 There should be consistent time limits. The current time limit of six months for entering a claim and six weeks for appeal are sufficient. There should be a provision for extending time for making a complaint in certain circumstances as there currently would be but this should apply to all claims.

2.16 The current arrangement would appear to be sufficient. However, it would be beneficial if individuals had to nominate in advance who would be representing them or what entity would be representing them and that the other party would know who the representative on the other side would be. If an employee is to be represented by a Trade Union Official or Solicitor, it is only fair that the employer would know this. Equally if the employer is to be represented by IBEC or some other representative or Solicitor it would equally be fair that the employee would know.

2.17 It would appear fair and reasonable that a complaint can be referred by an individual or by a representative of their choice. In addition, it is only fair that a parent, guardian or in the case of a person suffering from a disability, a person acting under a Power of Attorney or an Enduring Power of Attorney or a committee in the case of a person declared insane that they should be able to be represented by having a complaint issued on their behalf.

2.18 The method of enforcing awards is archaic. The method currently used by the Labour Court is the only one that is cost effective. For the Employment Appeals Tribunal in respect of everything that goes up there such as Unfair Dismissals or Terms of Employment claims there has to be a further hearing date. In the labour Court under the Organisation of Working Time Act a simple form is lodged for non-implementation and it is dealt with without the parties having to attend in Court. The implementation then subsequently has to go to the Circuit Court or to the District Court. There is no reason why all matters should not go automatically to the second tier for implementation without the necessity of the parties attending unless they contend that implementation has actually occurred and that further enforcement through the Courts would be done by way of a very simple procedure by simply lodging the decision of the second tier division with a simply application form for an enforcement. The Payment of Wages procedures currently utilised are effective and have limited costs compared with implementing an Organisation or Working Time award which needs formal application to the Circuit Court.

3.1 I would be against arbitration. It tends to be costly as regards time. Mediation and conciliation is more effective. The Equality Tribunal results show this. While it is relatively formal it is speedy and quick. In addition it is not costly. Either the parties are going to get to a settlement or they are not and this emerges relatively quickly. The issue of informal hearings is that they are really no different than having a formal mediation or conciliation.

If matters are going to get resolved informally they will normally be resolved very quickly once a claim is submitted by the representatives of the parties getting together. Informal hearings are simply an additional tier where a more formal mediation or conciliation is more likely to be effective. The issue of telephone contacts may help in grievances cases but I do not see it applying or being useful in other cases.

3.2 The easiest and most effective method is that both parties are invited to mediation and conciliation. If the parties want to get matters resolved on both sides then both sides will be happy to attend. If not they won't then the matter will then go for formal investigation.

3.3 I would believe that this is very much an option which should be given to the employer and employee but to ensure protections for people making complaints it may well be that it is best that it is after a claim is put in which identifies what the issues are as alternatively you could have significant numbers of staff getting involved in issues where they are not getting the full story from one side or the other.

3.4 The answer to this is no. The issue as regards straight forward issues is that if they are straight forward the parties will usually resolve matters. Alternatively one party will not wish to do so and will have to go for a hearing. Everybody is entitled to have a case presented and to present their case. Having it dealt with by somebody where a person cannot set out their complaint will not be successful. In grievance cases particularly the importance of a person being able to set out a grievance face to face with an employer or with a third party who is seen as independent is often the very basis under which a grievance is resolved. In employment law disputes there is always two sides to a story and it could simply result in delays and in addition it would need an appeal procedure. Where there are disputes individuals believe that they have a legitimate claim and having their case being dealt with without them having an opportunity to present their case will result in individuals feeling aggrieved and will not result in the dispute getting resolved. Employees may equally feel aggrieved.

3.5 The simple answer to this is yes.

3.6 This is preferable; however, we have to take account of the fact that there are many individuals who would not be able to set out their claim fully. This could be in the case of a non-Irish national who may have limited English or an Irish national who has limited writing abilities. Saying this, where an individual is engaging a representative there is every reason for requiring the representative to set out the case in writing in advance.

3.7 Yes.

3.8 Yes. This would be particularly helpful in cases where employees are currently still in employment. Mediation may also be extremely useful in cases of unfair dismissal, redundancy cases and effectively nearly in every form of claim particularly if the mediation can be dealt with like in equality cases on the basis that there is significant level of confidentiality and that confidentiality would apply to everybody.

3.9 There would be merit in having preliminary hearings, as opposed to informal hearings, to clarify facts or issues or to deal with say records. That could possibly be dealt with as part of a conciliation / mediation process where facts that are accepted can be given to the person hearing the case with a list of the issues which are in dispute. Where there are representatives there should be no reason why submissions should not be given in writing in advance and where employers and employees have a right or the personnel processing the claim to seek clarification as to what issues are in dispute and what ones are not in dispute.

3.10 The answer to this must be no for the reason set out at 3.6 above. Saying this, written submissions should be sought particularly where there are representatives and parties should be encourages to give written submissions.

3.11 The answer to this is yes and no. There is no reason where attempts at resolution take place that issues which are not in dispute and which can be agreed cannot be given and used in a subsequent hearing. Saying this, anything that would be said in a resolution meeting should be kept confidential and allowed to be used in another forum save and except to the extent that the person dealing with the resolution meeting being the chairperson would be entitled to set out and agree with the parties facts which are in dispute. There should be limited disclosure of any meeting which is intended to try and resolve matters. For example, in the case of an unfair dismissal claim issues such as rates of pay, start and finishing dates and the procedure that was applied to the dismissal could all be agreed and could be given to the person hearing the case. If there were proposals to settle where there was a difference for example with one party offering compensation and the other seeking reinstatement certainly the issue of the level of compensation being proposed by one or other party should not be disclosed.

3.12 Yes.

3.13 The answer to this should be no. Everybody is entitled to bring a claim. Saying this, to avoid unnecessary expense to an employer it would be possible to have a provision that if there was a concern that the claim was frivolous vexatious or misconceived that the entity at first instance would be power to hold an initial or preliminary meeting with the claimant to seek formal detailed particulars of their claim. For example if an employee brought a claim against a company A and their defence was that the employee was never employed by them but was employed by company B then before the claim against company A would proceed that the employee could be required to attend a meeting to produce whatever documentation or evidence that they would have to show that company A was in fact the employer and only what they produced at least some evidence of same would the case then go on for hearing and if they were not able to do so that the case could then be dismissed.

3.14 They should be in private. The decisions could be made public such as the way the Labour Court performs its duties but there is no reason why a party should not have their case heard without having to run the gauntlet of a photographer outside the place where the hearing is to take place. Factual reporting of the decision is one thing. There is no reason why a case that going on should be subject to comment in the newspapers before a decision is given. This is particularly so as parties may compromise or settle matters and there is no reason why either the employer or the employee in those circumstances should suffer unnecessary publicity when neither party is seeking it.

3.15 Yes

The writer of this letter is from an office that is known for representing employees. We also represent employers. Very few employer cases we get in actually ever come on for hearing nor do many of our employers have claims against them.

I make no bones about that fact that I regard the Rights Commissioners Service as possible the best service that there is. Their procedures and method of operating is both helpful as regards getting cases settled, is transparent and is seen as fair and reasonable. While there are some formalities they do not go through the necessity of having sworn evidence at first instance and it is evident that very few of their cases are overturned on appeal with a very small proportion ever going on appeal. That does show that they are efficient and effective. That particular model is one that I would urge the Minister to utilise going forward. I would agree with the view that improvements in the support services would be beneficial. In the case of Rights Commissioners in particular they run a large number of cases and the benefit of having research facilities and facilities for research would be most helpful. This is because they will often need to act in cases where neither the employer nor the employee has any representative and for the purposes of procedure and fairness and correctness in the law and the application of the law it is important that the Rights Commissioners have that level of support.

It also means that they would need to have appropriate staffing levels to facilitate the people hearing cases at first instance to deal with the cases themselves and that their administrative functions are dealt with by support staff. At present for example Rights Commissioners write up their own Decisions. That time could more usefully be utilised hearing and dealing with cases with the actual physical typing up of Decisions being dealt with by support staff. In addition they should have the services of support services to do legal research. There is also the issue that research should be able to be undertaken by outside agencies on their behalf on the basis of appropriate tendering. By this I would mean specific legal issues where a Rights Commissioner would have the entitlement to get specific legal advice or alternatively Industrial Relations advice. This could be particularly relevant in relation to occupational health and safety issues in the area of equality where there is a significant amount of European case law.

You have raised the issue of an Upper Tier appellate body. I would request that you would consider an expansion of the Labour Court rather than an amalgamation of the Employment Appeals Tribunal. The Labour Court as opposed to the Employment Appeals Tribunal is at a far higher standard. The Labour Court works extremely well. They know their own precedents. They follow their own precedents. They are aware of the case law. They are aware of the European Laws. They are highly motivated, efficient, and, effective. The individuals in the Labour Court combine legal experience with Industrial Relations experience and practice. They know any understand how business and employments work. They apply practical Industrial Relations experience to the law and to the facts.

It is a fantastic mix. In the Employment Appeals Tribunal you get the impression that the Chair who is always a legal individual effectively runs matters with the employer / employee representatives effectively acting as a form of support service to them. In the Labour Court while there is a Chairperson the two representatives' act very much at the same level as the Chairperson and it can often be that it is the Chairperson putting matters of fact to the parties with the employer and employee representatives looking for submissions on the legal issues and teasing these out. The Labour Court is a very impressive body. Its membership is of the highest calibre. They are respected by both employers and employees.

As a representative who appear before all the tribunals I can honestly say that in dealing with representative of employers and employees before the Labour Court there has never been any complaint about the quality of the individuals there. The same cannot unfortunately be said as regards the Employment Appeals Tribunal and the Equality Tribunal. While in the Employment Appeals Tribunal and Equality Tribunal there are individuals of the very highest calibre nowhere is the same mix of experience as there is in the LRC and the Labour Court. I would strongly hold the view that appeals should go to the Labour Court. Even if the Labour Court has to be expanded by bringing in certain individuals from the Employment Appeals Tribunal or from the Equality Tribunal I would have major concerns if any of the appellate functions were taken away from the Labour Court, which it currently has. The reason for saying this is that the Labour Court has a tendency to get cases settled even on appeal more often than the Employment Appeals Tribunal ever has. The Labour Court is particularly useful in the area of Working Time Legislation, the National Minimum Wage Legislation and Equality Legislation and has the experience with their personnel to deal with same. While this was not covered in the area where submissions were sought I would encourage the Minister to consider having an automatic referral of breaches of Taxation legislation to the Revenue and Social Welfare. There are a considerable number of employment cases currently going through where there is a particularly well known tax evasion scheme which is being utilises. Except for Unfair Dismissal claims and claims under the National Minimum Wage there is no provision for automatic reporting of tax evasion to the Revenue and Social Welfare.
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There is every reason for the purposes of ensuring no loss of Revenue to the State that where an issue of tax evasion arises or Social Welfare Fraud whether by an employer or by an employee that there should be automatic reporting to the Revenue.

This office as a matter of course has a procedure for all clients and it is particularly relevant to employees that in the event that they cannot produce appropriate tax documentation or anything appears from the documentation which we receive which would indicate any suspicion of tax evasion or Social Welfare fraud by an employer that this office will not act without the client reporting the issue to the Revenue with that report being submitted on their behalf from this office. There is therefore no reason why the entity hearing cases at first instance or on appeal should not be obliged at law to report matters to the Revenue and Social Welfare. There is also no reason why representatives of the Special Investigation Unit of the Revenue Commissioners which currently we understand includes Revenue, Social Welfare and representatives of NERA should not be attached to the new entity so that any such issues can be reported quickly and speedily to them for investigation.

I would like to comment the Minister on his proposals. A simplified single entry single initial hearing and single appeal procedure for all cases would make a huge amount of sense. It will reduce costs for employers and employees. It will facilitate individuals being able to bring cases themselves or where they seek to use representatives it will keep the cost of representation down significantly. Currently because of the way the system works various claims which often overlap have to be sent to different bodies. This is not forum shopping just covering the claims off. With one claim form to one body this would be resolved.For example currently you might have a case where a woman is dismissed who is pregnant. Is it an Unfair Dismissal, due to pregnancy, an equality claim or is it in fact a redundancy. The time limit for lodging claims is only 6 months. The facts may not be clear so currently you lodge a redundancy claim with the EAT, an Unfair Dismissal claim with the LRC and an equality claim with the Equality Tribunal. Then, when the facts are more fully clarified, often by the employer, two are withdrawn. It is not forum shopping, just being careful. With one claim form, one entity having the case then the costs to employers and employees will fall significantly. The facts surrounding a dismissal are given to a representative. Often we get one side of the story only. When the other side of the story is given the truth may lie somewhere in the middle. One entity for lodging complaints would avoid unnecessary costs and remove any charge of forum shopping and importantly any potential to do so.

I hope this submission is of some benefit. It is submitted by an office which does a considerable amount of employment work and one that is always pleased to see any simplification procedures which reduce costs. The guiding principle in all such cases should be speed, efficiency, transparency and independence. Any system to be effective must command respect and must be seen to do so as people's rights and good names are being adjudicated upon.

Yours sincerely,

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