



**SMALL FIRMS  
ASSOCIATION**

**Submission to the**

**Department of Jobs, Enterprise &  
Innovation**

**on the consultation on the**

**reform of the State's Employment  
Rights and Industrial Relations  
Structures and Procedures**

**September 2011**

## **Introduction**

The Small Firms Association (SFA) is the largest small business organisation in Ireland representing over 7,500 companies and 6 affiliated organisations. Our response has been drawn together following consultations with member firms, who are owner-managers employing less than 50 people.

The SFA welcomes the opportunity to make a submission to the consultation on the reform of the State's Employment Rights and Industrial Relations Structures and Procedures.

The SFA has a very active role in giving advice and information to member companies in the area of employment law and industrial relations, taking over 51,775 calls in 2010 and with millions of image references registered on our website for information on this issue. We do not however represent individual companies at third-party hearings, but our members do from time to time engage with the IR machinery, most often representing themselves.

At the outset, it is important to state that the SFA places substantial value on the "voluntary" system of industrial relations that operates in Ireland, and views the contribution of all bodies as being very significant to the development of the harmonious Irish work environment.

The development of a more efficient and user-friendly system is an essential part of institutional reform. The plan set out by the Minister for Jobs, Enterprise and Innovation is welcome, but will require careful design in its detail. Preserving the effectiveness of the system, while at the same time making necessary reforms is crucial. Change must be delivered in a way that has the support of employers, workers and trade unions alike. The reforms must also reduce administrative burden/red tape, cut costs on compliant employers and encourage best practice.

The SFA believes that the key principles to underpin the approach to reform should include:

- The promotion of good employment relations practice, the safeguarding of employment rights and a culture of prevention and compliance through information and awareness.
- The recognition of the importance of dispute resolution which remains as close as possible to the level of the business (with due consideration to the small business environment), and promotion of non-adversarial dispute resolution mechanisms. This should also encourage the use of voluntary mediation services.
- The streamlining of the avenues for redress, the introduction of measures to avoid multiple claims arising from the same set of facts and the introduction of greater coherence, consistency and effectiveness. The Government should introduce a fee per employment claim, which would be subject to an upper limit to discourage 'dispute shopping' and frivolous claims. This practice is already used in other district courts including the small claims court.

- The introduction of greater synergies and value for money through shared services and integration of back office operational support and professional expertise across the existing employment rights bodies. The establishment of a common claim format and a web portal for access to the system would be welcomed.
- The need to distinguish between industrial relations matters arising from grievances resulting in disputes of interest or rights arising in the course of the ongoing employment relationship, as opposed to the determination of employment rights on termination of employment. This will be key in the design of the model and assigning functions within the proposed two tier system, given the existing responsibilities of the Labour Court, the Labour Relations Commission and the Employment Appeals Tribunal (EAT).
- Greater consideration of the small business environment and the impact that decisions can have on them which impact on administrative burden/red tape, costs and encourage best practice.

### **Resolution of grievances and disputes close to the level of the workplace**

The SFA support the resolution of grievances and disputes at the workplace level and to reduce or eliminate any necessity to have such matters escalate to a degree that would warrant either party pursuing the matter in a more formal arena.

A recent SFA survey showed that 76% of small businesses do not have a dedicated HR resource to assist them in dealing with the complexities of employment law. There is a concern among small firms that the small business environment is not fully understood within the various IR structures, how it differs from a large organisation with a HR department and how it often lacks industrial relations/HR knowledge and expertise.

An example of this would be SI 146/2000 which is the benchmark document for the operation of fair procedures at workplace level. While the broad principles are fine, this is a document that does not take into consideration the small owner-managed business. For example section 13 reads:

*'Procedures should set out clearly the different levels in the enterprise or organisation at which the various stages of the procedures will be applied'*

The overall tone and expectations of this document are those of large enterprises and Government departments. Most small businesses only have one level! It envisages a level of administration impracticable in a small business. Also the requirement for an appeal layer is impossible to implement in most small firms.

While the basic principles in this and other similar documents are unlikely to be changed, as a result of this consultation process, at the very least the implementation of those principles in a small business environment need to be clarified. At a minimum there should be explicit recognition that due regard should be had to the

small business context including proximity of relationships and other factors in assessing compliance with an SI.

A recent SFA survey highlighted that 58% of small businesses viewed compliance with employment law to be a significant regulatory burden, whilst 56% were of the opinion that employment law acts as a disincentive to employing staff. It is essential that the law and compliance with that law is made as easy as possible for small firms. The SFA has called for the codification of employment law into a single act, and exemptions for small businesses from complying with overly burdensome regulations. The SFA accept that this is a major project and would take a significant period of time.

To allow resolution at the workplace level, greater use of the grievance procedures must occur. The SFA would propose that the employment rights bodies must legally take into account the failure by a claimant to use the internal grievance procedures before bringing a claim, and this should be reflected in any award made to a claimant.

### **A simple and efficient institutional structure**

The SFA would support the proposed integrated two tier model however, it is essential that there are different channels for dealing with disputes of interest and disputes of rights. It is essential that the distinction between these two very different types of claims is made in the design of the new institutions.

One of the essential features of the current structures is the calibre of the IR professionals from both the employer/management and union sides. It is in the interest of all parties involved with the institutions that the highest quality of professionals are in place and this is reflected in the nominations put forward by both employers and union representative bodies.

It is also vital that there is a balance within the IR professionals with extensive knowledge of employment legislation, but even more importantly is an understanding of the workplace, the working environment and the impact that decisions can have on a business. This practical experience brought by the employer and employee nominees in the current employment rights structure is invaluable and should remain.

One major concern raised by small businesses is the increasing trend for legal professionals to be active in representing employees before the various bodies. In particular the approach of the EAT which currently requires barristers who are representing claimants to be attended by a solicitor. This practice is eroding a small employer's ability to have a fair hearing, in a cost effective manner, without the need for legal professionals on either side. The attendance of legal representation should be a matter for individual parties.

With regard to the appointment and tenure of those appointed to the new employment bodies, SFA would propose that greater transparency be introduced in relation to the criteria for appointment. The SFA would propose that any private consultancy work on employment law matters conducted by Rights Commissioners or any other adjudicators of statutory employment rights matters, should be prohibited by statute.

The Government should introduce a fee per employment claim, which would be subject to an upper limit to discourage 'dispute shopping' and frivolous claims. This practice would not be uncommon as it is already used in the district courts including the small claims court.

Many firms concur with the consultation paper identifying the inconsistencies in the calculation of compensation as one of the criticisms of the employment rights bodies. To avoid such anomalies, a Code of Practice should be introduced to ensure consistency of approach to claims and consistency of the decision and awards made. This Code should also allow for the consideration to protect Irish jobs and factors which may influence the competitiveness of Irish firms.

### **Information and Advice / Single Point of Entry**

A single point of entry would support a coherent and user friendly interaction with the employment bodies. The SFA would support any proposal that would reduce the administrative burden and red tape in submitting individual industrial relations and employment rights claims.

The telephone information service provided for by NERA is an invaluable source for employers and employees in providing information and advice on employment legislation and should be maintained in its current form. Both the telephone and website services are the most accessible and suitable forms of information and advice for small employers.

There is a risk that the introduction of non directive advice being provided to employers and employees could lead to conflicts of interest arising from personnel from state bodies enforcing employment rights and providing information which is then adjudicated on by the same body.

It would be preferential for one website to be designed, which would cover all employment legislation, case law, current trends and other related matters. This site should provide extensive search facilities to allow parties easily obtain information on awards and decisions taken as well as providing access to all the necessary forms.

The various forms that must be completed when submitting or defending a claim are substantial and it would be vital that this burden of red tape is reduced. The SFA would be supportive of an on line claim form provided the requirement to print off, sign and lodge the claim in the usual way remains.

However, while the introduction of a single application form would reduce administration there is a concern that various claims would be made from one set of facts or that claimants will "tick all boxes" to ensure that they do not rule themselves out of redress to which they may be potentially entitled. Some additional documentation could be sought along with the single application form to prevent frivolous claims.

If applications are to be lodged on line, additional documents should be required to show that advance notice of the application was provided to the employer. This could be achieved by the employee being obliged to provide a minimum of 14 days written

notice to their employer that they will be lodging a case and therefore allow time for action to resolve the concerns or mediate a solution.

Often employers receive documentation and they are unsure as to why a case is being taken. At the application stage more information could be sought from the complainant. This could be provided for in a one page outline of the complaint and the reasons for taking the claim in the first instance.

### **Integrated Structure**

In the consultation document (Appendix 1) reference is made to the new first instance body as currently comprising of the Rights Commissioners Service, Equality Tribunal, EAT and NERA. It would appear that the proposal is to formally consolidate these bodies into one single portal (page 11 Appendix 1). The SFA are concerned about this proposal, if it is the case, as the function of NERA inspectors is very different from the other bodies. NERA is an inspection service, not an adjudicating body, and should remain so.

Currently NERA may raise issues that result in a claim before a Rights Commissioner, EAT or the Labour Court. In the view of the SFA, it would be unhelpful if inspectors were to take on the role of adjudicators, or be seen to influence the adjudicating process in any way. To have inspectors, carry out the inspection, raise the breach, and then adjudicate on the breach would undermine the notion that NERA is an independent body for employers and employees.

Inspection and enforcement facilities should remain separate to ensure that there is a clear independence and fairness of the roles being performed from inspection, adjudication, enforcement, mediation, conciliation and employment rights determination functions.

The SFA support the proposal for an integrated two tier model to be a guiding principle. However, some cases are of such complexity in terms of the facts or the law that they benefit from being heard by a panel of three adjudicators in the first instance rather than an individual hearing the case alone.

The SFA welcomes the proposal that the upper tier appellate body would be an integrated version of the EAT and Labour Court. We note that the intention is to make this the court of “final appeal” against recommendations of the lower tier. This includes a proposal to reduce the current avenues of appeal to one of appeal to the High Court on a point of law only. We are concerned at the proposal to remove appeal to the Circuit Court. If anything, SFA views that appeals to the Circuit Court from the EAT and Labour Court should be extended across the range of employment legislation, as appeals to the High Court on a point of law are overly restrictive and the cost is prohibitive.

If the integrity of the functions (as outlined in question 2.5) is to be maintained, and if confidence of the users is to be fostered, the inspectorate, conciliation/mediation services and formal adjudication services must be kept separate. Employers must feel that any questions or clarification sought through one body cannot be used against them in a mediation or adjudication forum.

While there is merit in having statutory redundancy appeals handled on an administrative basis through the current social welfare appeals structure, often cases taken regarding redundancy payments would also incur claims under other pieces of legislation including Payment of Wages or Minimum Notice and Terms of Employment Acts. This could result in parties having to deal with two separate appeal bodies, when working towards resolving a claim. For many small firms this will only increase their administrative burden, costs and time.

The power of referring a claim should remain with the claimant, as the contractual relationship was between the employer and the employee.

### **Administration**

For many small businesses that do not have extensive experience or knowledge about the employment rights bodies, having a case pending can be a worrying time for them. This is compounded by the delay in cases being processed, waiting for a hearing date and then waiting for a decision.

For example, a member company recently sought clarification on the application process of an EAT claim. They were advised that *“due to the large amount of claims there is a delay in opening files and sending out acknowledgements/copies of claims. Please note that claims are processed in date order..... We are currently opening appeals lodged in September 2010.”* The email was dated 24<sup>th</sup> February 2011. This is simply unacceptable.

While we are all aware of the administrative pressures placed on organisations, all-round efficiency and effectiveness is paramount. The introduction of greater synergies and value for money through shared services and integration of back office operational support and professional expertise across the existing employment rights bodies is required.

### **Facilitating Early Interventions and Alternative Dispute Resolutions**

Many employers are often unaware of an employee's dispute regarding an employment rights claim/s, often the first time an employer will be made aware of the employee's concerns is when documentation is received from the relevant employment rights body.

There should be an obligation on employees to provide employers with a minimum of 14 days notice of their intention to forward a case to an employment rights body before a claim is lodged. This will allow the employer time to resolve the issue or mediate a solution, if possible prior to it entering the system in the first instance.

The SFA view that mediation should be available as an option for all rights based complaints i.e. complaints associated with employment rights legislation. Trade disputes would also have an option of mediation. Mediation, as an alternative dispute resolution, would be voluntary, informal and a confidential process that would aim to provide a practical solution to the parties.

It must be borne in mind that certain types of cases will lend themselves to mediation; however other cases such as cases relating to dismissal for gross misconduct are less likely to be suitable for mediation. If a new system of statutory mediation is to be introduced, it should be the parties who should jointly decide to participate.

When attempts have been made to resolve an employment dispute, these should have a bearing on and should be admissible in a hearing, as it shows that the parties have exhausted all other avenues to have the issue/grievance resolved. However, in order for such resolve approaches to become admissible it must be very clear that the specific issues being referred to the employment rights body were the focus of the discussions.

The SFA believe that parties should be required to provide certain information in writing in advance of any hearing; however, parties should also be allowed to provide further reasonable evidence at the hearing, if required.

It is difficult to see how cases could be dealt with on the basis of written submissions only. There are very few cases that could be dealt with in this manner without hearing all the facts, as most cases have disputed facts which require the body to examine witnesses in order to form a view as to those issues of fact and credibility.

Time limits for claims should be harmonised, and limited to three months following the date of the contravention to which the complaint refers, with an extended time frame of six months for exceptional circumstances. Appeals should be brought within six weeks of the date of the communication of a decision. This is consistent with the time limit for initiating similar claims in the UK.

### **Conduct of Proceedings**

The SFA would strongly support the proposal that first instance jurisdictions be empowered to dismiss what is adjudged to be frivolous, vexatious or misconceived claims without holding a formal hearing.

Claims at the first instance should be heard in private and claims at the second tier should be held in public, with the exception of equality claims or those which involve circumstances which justify the matter being heard in camera.

There is merit in having a preliminary hearing process, as rather than cases being listed for full hearings and raising a preliminary issue on the day of the hearing, either party should be able to request a preliminary hearing to address issues such as time limits and other similar issues.



## **Conclusion**

The development of a more efficient and user-friendly system is an essential part of institutional reform. However, we must ensure that this reform does not disadvantage employers, those who are established here or who may chose to establish themselves here by creating legislation measures and industrial relations structures and procedures that are cumbersome and less favourable than our nearest competitors.

Any proposals will have the SFA's support if, as promised, it reduces red tape, cuts costs on compliant employers and encourages best practice.