

The following submission outlining the approach which should be taken in designing a dispute resolution model has been prepared on TASC's behalf in response to the Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures. The author is Dr Michelle O'Sullivan of the University of Limerick, a member of the TASC Economists' Network.

TASC argues that any reforms in the area of employment rights and industrial relations procedures (including changes to wage floors) should be stringently assessed with regard to their labour market, competitiveness, productivity, public finances, poverty and equality impacts.

In this regard, we refer to [Myths of the Irish Crisis: Wages and Competitiveness](#), a discussion paper by TASC Policy Analyst Tom McDonnell published in April 2011; and TASC's [Submission to the Independent Review of ERO and REA Wage-Setting Mechanisms](#), published in February 2011.

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

**Dr. Michelle O'Sullivan, University of Limerick
September 2011**

Introduction

The suggestions for a dispute resolution model below are not an 'ideal' type and would not necessarily be the model envisaged if one were starting from scratch. As with the Minister for Jobs, Enterprise and Innovation's Consultation paper, they are intended to make some viable improvements within the limits of the current system.

Key Objectives

1. The objective of resolving grievances and disputes as close to the workplace as possible and as early as possible after they arise is clearly sensible. Significant delays in the processing of grievances to the employment rights bodies are currently a major obstacle to achieving this objective. It will be difficult though to reverse the trend of large numbers of cases being referred to the employment rights bodies given the large number of employment laws in existence, the reduction in unionisation which means there are multiple individual cases where they would previously would have been one collective grievance and, as research indicates, the fact that organisations include referral to employment rights and industrial relations bodies as part of their dispute resolution procedures. Parties can view referral to such bodies as a negotiating tactic and some parties never even meet before a claim is referred.

2. 'Forum-Shopping'

There is some scope for preventing so-called 'forum shopping'. Some legislation like the Unfair Dismissals legislation already contains provisions which preclude cases being determined in different forums. These provisions do not prevent the initiation of a case in different forums but in essence say that only one forum can make a decision. Such provisions could be strengthened to prevent initiation of the same case in multiple forums and this could be replicated across legislation.

However, as the legislation currently stand, it is possible to have the same individual refer multiple complaints to different forums or multiple complaints to the same forum because the complaints they make are technically legally separate. For example, an individual's employment is terminated and they believe it is a discriminatory dismissal. They may also now believe that some aspect of their employment was discriminatory. The claimant could refer two claims to two different forums: a complaint for work-related discrimination to the Equality Tribunal and a claim for unfair dismissal to the Rights Commissioners/EAT. Thus, cognisance is needed regarding legally separate claims so that they are allowed to be treated separately.

3. With regard to minimising the number of cases that present for resolution at formal hearings, this is also sensible. This should involve an enhanced role for those disputes resolution processes that currently exist which places emphasis on assisting the parties coming to their own resolution i.e. the LRC conciliation, mediation and advisory services and the mediation service of the Equality Tribunal. These services have proven to be successful.

Body Structure

1. The key issues concerning what bodies deal with cases are the composition of that body, the nature of the claim and the type of outcome that is envisaged. This relates to the cases which the consultation paper refers to as disputes of rights and disputes of interest. Currently, much of the work of the Rights Commissioners, the LRC and Labour Court under the Industrial Relations Acts involves disputes of interest where there is often to 'right' or 'wrong' answer in the legal sense and little by way of legal guidance. These bodies understand that such cases are resolved through negotiation and persuasion and the aims are that the dispute is resolved and, in general, that the parties can live with the outcome. The composition of these bodies can consist of people with HR/industrial relations backgrounds who would have appropriate experience in such disputes though mediation officers in the Equality Tribunal do not come from industrial relations backgrounds but are trained in mediation and that service has proven to be successful.
2. Clearly, disputes of rights processed through individual employment rights legislation and are processed through Rights Commissioners, the EAT or Equality Tribunal are dealt with more legalistically and involve the adjudication of rights. Research shows that the composition of the EAT, the type of cases dealt with and the high level of legal representation contribute to its legalistic nature and is often criticised. The nature of cases means that such legalism cannot be fully diluted.
3. Thus, the key issue is will the objective of the body be the resolution of the dispute (akin to the Labour Court's current objective) or will it be to adjudicate on rights (akin to the EAT's role).

Suggested Dispute Resolution Model

Information and Advice

- A single website should exist for employment rights and industrial relations information. Ideally this would house the information currently available on separate employment rights bodies also including recommendations and decisions archives.
- A single-point of contact for information on employment rights, for entry of cases, and single application form should exist. Current 'secretariat' functions in each body which accept claims could be merged with the information/advice part of NERA regarding this.
- 'Information officers' could be available to offer factual information at any stage to employers and employees by telephone, letter, informal meetings and perhaps clinics around the country. Some synergies could be achieved here with the Citizens Information Services which perform similar information/advice provision functions.
- This single-point entry/information officer role could be under the auspices of the Labour Relations Commission

Claims

- A single complaint form should be used for all cases beyond the information stage.
- There should be no fee for lodging a claim. This is particularly relevant in the current recessionary environment and for those on low incomes. To impose a fee would put the principles of *effectiveness* and *dissuasiveness* into question.
- Applicants and respondents should be required to provide more information of their case in an application form than is currently required. This would benefit the body as much as the parties.
- A checklist of preliminary issues could be provided on the form for applicants to tick e.g. in relation to time limits in dismissals, the form could ask the claimant when the dismissal etc occurred.

Interventions

- All claims should be required to enter some form of mediation/conciliation. The mediation function of the Equality Tribunal could be incorporated into the Labour Relations Commission. The only claims which would not engage with mediation etc would be where the LRC concluded that it would not benefit the dispute and the claim required investigation.
- There should not be time-limits placed on the offer of these services as they could be used by the parties during the period of formal hearings.
- All mediation/conciliation should be conducted in private.
- In claims involving non-industrial relations legislation, signed agreements between the parties should be legally binding.
- If mediation/conciliation fails, the discussions which took place between the parties should not be admissible in subsequent formal hearings. However, either party's failure to engage in mediation/conciliation in good faith, in the opinion of the LRC, should be admissible in subsequent formal hearings.
- Claims would progress to the next stage below if mediation failed to resolve the issue or the LRC decided that it should not be used.
- The LRC would need additional resources to service the expanded role.

Body Structure

- The investigatory functions of the Rights Commissioners, Equality Tribunal and EAT should be merged into one Employment Tribunal.
- Appeals from the Employment Tribunal would go to the High Court.
- Non-industrial relations legislation should be removed from the Labour Court.
- The Labour Court would remain a court of last resort in industrial relations.

Hearings

- While parties should be encouraged to write their case for a hearing, this should not be a requirement as some parties in particular with poor literacy skills would be disadvantaged.
- Separate preliminary hearings would increase the workload of employment rights bodies. Preliminary issues can be dealt with at the 'main hearing' as is currently the situation.
- Hearings of employment rights disputes /appeals should be heard in public. Currently, this provides some incentive for parties to reach agreement prior to a hearing.

- The employer and employee or their representative should be required to attend a hearing. If a party/their representative does not seek an adjournment and does not attend a hearing, then the case should be found in favour of the attending party.
- In employment rights cases where the adjudication of rights is involved, bodies should be required to give the reasons for their decisions. In industrial relations cases, the reasons for recommendations/ decisions need not necessarily be required to allow for the persuasive/negotiating element of the body's work during hearings/meetings.

Representation

- Presently, individuals can be represented by anybody or nobody but often choose a representative based on the norm of the institution e.g. most employees and employers have legal representation in the EAT. Employers and employees should be reminded that they may choose any type of representative.
- Research on the EAT shows that one party can potentially be disadvantaged if they do not have legal representation but the other party does both in terms of success rates and compensation awarded. This is not the case in relation to research on the Equality Tribunal. The composition of the new Employment Tribunal should be varied and there should be efforts to reduce the legalistic nature of the hearings.
- All claimants should be able to nominate someone to refer a complaint. Claimants with poor literacy can have difficulty in filling forms and articulating their case.

Legislation

- There should be uniform time limits on legislation and appeals. Any discretionary additional time periods should be decided based on consistent criteria i.e. either reasonable grounds or exceptional circumstances.
- Monetary award and compensation limits provided in legislation and awarded by bodies should be reviewed. Firstly, guidelines in legislation for compensation amounts do not take in account the length of time a claimant has waited for a case to be heard and decided. Secondly, compensation limits in for example dismissals differ depending on whether or not a claimant gets another job. Why should one successful claimant be penalised for getting a job? Thirdly, compensation awards should not be related to as is currently the case in many instances. A low paid employee should not be awarded less than a high paid employee even though they may have experienced the same level of discrimination for example.

Enforcement

- The inspection, enforcement and prosecution functions of NERA should be separate from the other bodies.
- There should be a consistent method of enforcing awards of employment rights bodies in relation to non-industrial relations legislation.
- There is a debate as to whether recommendations of the Labour Court under industrial relations legislation should be made binding. However, to do so would further dilute the traditional voluntary nature of the Labour Court's role.

DISPUTE RESOLUTION MODEL

