



Submission to Employment Rights Review

Introduction

In the current discussion about reform of employment rights bodies the overriding issue for parties in dispute is *how soon* it can they get to the point of settlement.

Their priority is to get early, amicable if possible and cheap resolution of the issues between them.

Others take a different view. One experienced employment law Senior Counsel has said that the starting point is that the 'adjudication of legal rights' is involved.

I do not share this view, whatever its academic credentials. If starting from this point of view leads us to where we are today we need to have a different starting point.

Of course the 'legal rights' base is important but in reality many (but not all) of the legal rights involved can be easily vindicated without having to endure the delays and other disadvantages of the current system.

Even in relation to more serious disputes (related to termination of employment mainly, also TUPE) the current legacy of treating them as legal rights does not serve the interests of justice if justice takes two and a half years to resolve a redundancy claim. This is not doing much to vindicate the legal rights of a young breadwinner.

So the correct starting point is what is necessary to achieve speedy and fair resolution of workplace disputes, consistent with recognising that legal rights are involved.

We have evolved techniques, and in the context of proposed legislation on mediation and conciliation in 2012 continue to develop solutions to the resolution of commercial and other disputes which have to a surprising extent passed by the world of employment rights disputes.

I support the creation of a single point of entry for all disputes, with appropriate reform of the forms etc. I agree that many claims (PWA, OWT, etc) could be dealt with without the necessity for a hearing either by the NERA inspectorate, or preferably by documents only arbitration or even Online Dispute resolution (ODR) techniques.

In all cases, (whether employment rights or industrial relations) the option of mediation (or conciliation as currently exists on the IR side) should be required. There should be

an appropriate adverse consequence for unreasonably declining to avail of mediation, or unreasonably obstructing it (although in the absence of costs being awarded it is not immediately obvious what this should be).

However, it is now clear public policy both in political and judicial circles that early and amicable resolution of disputes is an imperative and we should not be over sensitive about acting to enforce this objective. It is also part of driving down business costs as we strive for greater competitiveness in the economy.

For example, the argument that a requirement to mediate somehow infringes the Article 6 rights in the EHCR has been strongly disputed, most recently by eminent UK legal authority in the person of Lord Justice Dyson, judge of the Supreme Court (and author of the judgement in *Halsey v Milton Keynes NHS Trust*, a leading case in the mediation v litigation debate).

There has been some discussion on the necessity for a hearing (at the current EAT level) to be conducted by lawyers because of the principle that legal rights are involved.

There may be some 'lay' adjudicators within the system who have an insufficient grasp of either the relevant law, or the law relating to fair procedure just as there are practising lawyers for whom the average Irish workplace is a distant country.

Knowledge of both should be a requirement for an adjudicator. But there are non-practising lawyers, (or just non lawyers) who may be able to meet this requirement just as there are practising lawyers who cannot (the current Chairman of the Labour Court being a good example of the former as well as many current and former Rights Commissioners).

Arbitrators, for example may be involved in adjudicating sometimes complex disputes under the Arbitration Act 2010 and its predecessors involving millions of euros and while some are lawyers many are not and are no less competent as arbitrators as a result.

No-one would suggest that only a practising lawyer could conduct an arbitration. In this context, a similarly, appropriately qualified person who was not a solicitor or barrister would have little difficulty in spotting an unfair dismissal.

In addition there is no reason why an adjudicator who is not a practising lawyer (equivalent to the Chair of a current EAT division) should not have the option of legal advice if it was considered necessary.

In my view the system would then look like this.

Point of reference; assessment for one of three options

1. Check by NERA for compliance or settlement
2. Option of mediation; panel of mediators to be created from suitably qualified applicants and existing Conciliation (LRC) and Mediation (Equality tribunal) services.

3. Where mediation fails first instance adjudication by a single Adjudicator (drawn from current Rights Commissioners supplemented by panel of Arbitrators)

Appeal to 'new' Labour Court (combined EAT and current Labour Court).

Cases to be assigned to divisions on the basis on known expertise. (One could have a redundancy/unfair dismissal division, general appeals, industrial relations etc.)

In particular one division should be assigned to deal with cases arising in small businesses.

On eligibility for appointment the requirement should be a high level of expertise in employment law, fair procedure and familiarity with workplace discipline and dispute resolution. It should not be a precondition that a person be a practising solicitor or barrister.

There should be appeal to Circuit court ***on a point of law*** only.

I do not favour separation of employment rights and industrial relations disputes. In fact, few disputes are entirely one or the other and this is a deeply conservative view of the needs of users of the system. Appointees should be multi-disciplinary and competent to hear either and should rotate from one division to the other in the interests of their on-going professional development.

The Code of Practice/SI 146/2000

ACAS completed a review of its Code of Practise in June this year. Among its conclusions was that;

'The Code was seen as able to lever a decrease in the number of disciplinary and grievance cases within an organisation by stimulating earlier resolution, before issues reached a formal grievance or disciplinary procedure.'

Of course this should be the overriding objective of such a code and in this writer's view there is a need for a similar review of the Code of Practice/SI 146/2000 to evaluate whether it meets this objective.

In particular, this document needs to be reviewed to take account of the position of small enterprises in three key respects.

First, it is necessary to establish whether the document has any value as a dispute avoidance and resolution tool, or whether it is just a disciplinary guide, or even encourages the pursuit of grievances which might otherwise be settled.

Second, it is grossly unfair to expect the same level of record keeping and administration in a small business as is possible in a large enterprise with a dedicated HR department. Admittedly, the lack of records deprives a party of the certainty they need in their evidence but this should remain a matter for decision by the adjudicator, not an 'offence' in itself.

Third, the requirement to have an appeal layer in a small business is creating havoc. In general, only the business owner can make the decision to dismiss and there is no-one to appeal to. Inviting an outside third party to adjudicate on whether the business wants to dismiss a person is preposterous and legally dubious.

Whether a dismissal is legal is another matter and that is one for the formal employment rights body to settle or decide.

However, the idea that the absence of an appeal renders a disciplinary process unfair per se must be corrected where no reasonable option to hold one exists.

While the Code of Practice refers to mediation it is rare that this finds its way into 'Contracts of Employment' or the statutory statement of Terms of Employment. It is even less frequently availed of.

As a matter of priority NERA should use its persuasive presence in Irish workplaces to encourage the inclusion and use of mediation clauses in dispute resolution frameworks.

Finally, (and while I declare an obvious interest here) there is a growing body of employment law and HR consultants many with good dispute resolution skills, experience and sensitivity to issues arising in workplace disputes. The definition of who may accompany an employee at internal disciplinary proceedings should be extended to include them.

However the current restriction on legal representation should remain for the reasons it was initially introduced, except where this is required by the criterion of 'severe career consequences', or some other exceptional circumstance which seems to be the position at common law.

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