

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

Introduction by the Minister for Jobs, Enterprise and Innovation

We should have, and can have, a world-class workplace relations service and employment rights framework. That is the goal I am working towards. I have commenced a programme of reform of the State's employment rights and industrial relations procedures and institutions. I have proposed that the current complex and confusing array of industrial relations and employment rights bodies be rationalised into an integrated two-tier structure. The key features of this new approach will be to encourage early resolution of disputes, the vindication of employee's rights and minimisation of the costs involved for all parties – employers, employees and Government – in terms of money, time and workplace productivity.

The challenge in streamlining the existing mechanisms will be to establish a simpler structure while building upon the recognised strengths of the first instance functions currently performed by the Labour Relations Commission, Rights Commissioners, NERA, the Equality Tribunal and the Employment Appeals Tribunal. Similarly the centralisation of all functions of an appellate or interpretative character in a single upper tier body will represent a significant improvement by bringing together within the same body the different functions currently discharged by the Labour Court and the Employment Appeals Tribunal. The purpose of this consultation is to seek the views of all stakeholders on how change can be achieved while ensuring that the best practice of the existing employment dispute resolution mechanisms is maintained and mainstreamed within the new integrated two-tier structure.

I outlined my proposals for reform at the UCD Employment Law Conference on July 1st 2011 [see <http://www.djei.ie/press/2011/20110702.htm>]. My proposals are driven by the need to:

- improve customer service, in light of the acknowledged complexity, backlogs and delays in the resolution of grievances and disputes;
- provide greater value for taxpayers' money, in light of current fiscal constraints;
- rationalise institutions in light of the Government's public service reform agenda

I envisage a relatively short consultation phase, during which preparatory work will continue, with a view to implementation of changes commencing in the Autumn. I would like to see as much progress as possible being made on an interim and administrative basis, with any legislative measures following. I look forward to the support and contribution of all interested parties and stakeholders.

Richard Bruton, T.D.
Minister for Jobs, Enterprise and Innovation
15 August 2011

1. Background

The entire system of employment rights compliance comprises an extensive body of legislation¹, the provision of information, dialogue between employers and workers, inspection, adjudication, redress, appeal and enforcement. The current system has evolved over a long period of time in a piecemeal fashion in response to EU and domestic legislation and the changing nature of employment. A strong case can be made that a system that was intended to be informal, accessible and speedy has become extremely complex and protracted. For many employers and employees the system is now too complex and onerous, takes too long to navigate and costs too much. Individual employees as well as many owners of small businesses increasingly believe they cannot navigate the system without professional help.

The system of employment rights compliance has been the subject of much analysis and a number of reports in recent years². Improvements to the system of compliance and of case management across the employment dispute resolution bodies have included:

- Establishment of NERA (National Employment Rights Authority)
- Improving the provision of employment rights information
- The development of mediation services by the Equality Tribunal
- Enhanced/rationalised role of Labour Inspectors
- Emphasis on resolution of breaches in the workplace
- Emphasis on redress rather than prosecution
- Clarity regarding employer responsibility for maintenance of statutory records
- Exchange of information with other regulatory bodies (e.g. Revenue and the Department of Social Protection) to assist compliance

¹ See Appendix 2 for a listing of employment rights legislation comprising over thirty statutes and/or regulations

² These reports include:

- Report of the Review Group on the Functions of the Employment Rights Bodies, DETE, April 2004
- Mandate and Resourcing of the Labour Inspectorate: A Discussion Document Arising from the Mid- Term Review of Part Two of Sustaining Progress, DETE, January 2005
- Outcome of Consultations regarding the Employment Rights Bodies Group Report, K Bonner, January 2005
- Report of the Employment Rights Compliance Group, DETE, February 2006
- Report of the Working Group on Compliance, March 2006

[See Appendix 4 for a summary of critical assessments of the current mechanisms drawn from the 2004 Report of the Review Group on the Functions of the Employment Rights Bodies]

- Recent improvements in processing of claims and the recourse by the Rights Commissioner service and EAT to NERA support services
- Development of E-Forms and rationalisation of application process.

A recent business process re-engineering project³ involving the Rights Commissioner Service of the Labour Relations Commission and the Employment Appeals Tribunal, with the co-operation of NERA, has highlighted the scope for re-shaping existing case management operations around certain generic functions that could be more efficiently and effectively handled by means of either restructured teams within the existing bodies or a separately constituted and slimmed-down shared service administration for all first instance functions (but also embracing NERA's information queries and complaint reception services). The project confirmed that the foundations exist for developing a unitary, simplified, streamlined and integrated customer facing system to front the existing employment dispute resolution bodies.

Given the considerable volume of written material on the matter including reports, academic papers, proceedings of conferences and submissions made to the Department, the purpose of this consultation is not to cover old ground but to move forward on the basis of an emerging consensus that the existing structures and procedures can and should be improved. Rather than a re-statement of positions and arguments, the Minister for Jobs, Enterprise and Innovation considers that it would be more valuable at this stage to gather stakeholder views on the key objectives that should guide the changes that need to be made.

2. Key Objectives

The key objectives of the Minister's recently announced reform proposals can be summarised as follows:

1. Resolution of grievances and disputes as close to the workplace as possible and as early as possible after they arise.
2. A simple and efficient institutional structure offering
 - high quality customer service, including a single authoritative source of information and a single entry point for claims;

³ Undertaken for Department of Jobs, Enterprise and Innovation by BearingPoint, Ireland, 2011

- minimal scope for “forum shopping” and a system which respects differences between categories/types of cases (e.g. disputes of right and disputes of interest) but not to the point where they are an overriding influence on structure.
3. Minimising the number of cases that present for resolution at formal hearings through active case progression and an increased range of interventions.

3. The Consultation Process

Views are now invited on the best way to achieve the above objectives. The intention is to maximise gains through interim /administrative arrangements as far as possible and to front-end those actions that will yield the maximum improvement for the users of the State’s employment dispute services as soon as possible. While legislative change will undoubtedly be required, this will be done in parallel and the focus, in the short term, will be on effecting as much change as possible based on the existing legislation or by means of simple amending legislation. The intention is to make maximum progress within existing arrangements by drawing on similarities in processes, corporate knowledge, goodwill and cooperation between the institutions concerned.

This consultation paper invites responses on how the objectives above can be achieved in a manner that best serves the users of the State’s employment rights and industrial relations services. To assist those interested in putting forward views each of the objectives and the key issues relating to achieving them are set out in more detail below. This is not necessarily exhaustive and those putting forward views are invited to be as innovative as possible in putting forward solutions and ideas.

4. Key Issues for Consideration

1. Resolution of grievances and disputes as close to the workplace as possible and as early as possible after they arise.

A new compliance model should be established whereby grievances and disputes should be resolved as close to the workplace as possible and as early as possible after they arise. A grievance or problem solved in the workplace - through for example, the availability of good quality up to date objective information, is far better than having to resort to an inspection or adjudication hearing. Failing that, early settlement through an administrative /executive intervention (telephone call, early meeting of

the parties etc) is preferable to allowing cases that might otherwise be resolved to progress to a formal hearing as the only default option.

Both the Labour Relations Commission (LRC) and the National Employment Rights Authority (NERA) currently provide complementary services designed to sustain a strong culture of compliance with employment relations law and to promote the development and improvement of industrial relations at all levels. The strategies pursued by both agencies are geared to encourage problem-solving at workplace level and to forestall any need to have such issues develop to a degree that warrants pursuing them in a more formal arena⁴.

A diverse suite of dispute resolution services will need to be maintained and developed in tandem with the streamlining of the investigation of individual employment rights complaints. Consequently, there should be a marked and measurable improvement in the quality of services provided to users of the State's employment rights and industrial relations dispute resolution services including better and faster vindication of employee's rights and entitlements delivered through a modern, user-friendly service.

QUESTIONS ARISING HERE INCLUDE:

Maintaining good employment relations and resolving workplace conflict

1.1 How do you think employers and employees can best be supported in resolving disputes at workplace level?

1.2 Can the provision of timely, up-to-date factual information help to facilitate early resolution of grievances/ claims and stem the flow of formal cases being submitted?

1.3 When and how should interventions be available from the State?

1.4 How do you think access by employers and employees to a just, fair and efficient adjudication process can be ensured?

2. A simple and efficient institutional structure and a high quality customer service with a single authoritative source of information, a single entry point and minimum scope for forum shopping.

The aim should be to have the simplest and most efficient institutional structure possible. The simplest structure organisationally would be to

⁴ Labour Relations Commission Annual Report for 2010: Challenges in 2011, April 2011; NERA Code of Practice, August 2010

have a single first instance entity and a single appeals entity [See the possible outline of a single integrated two-tier structure at Appendix 1]. This would maximise the potential for synergies, economies of scale and reduction of overlap and duplication.

There could be different channels within each of the two entities through which different types of cases could be processed. For example, it is conceivable that there could be different channels dealing with (a) disputes of interest (*individual IR grievances about pay and conditions*) (b) disputes of rights (*individual claims relating to statutory entitlements*) (c) equality issues. It would be necessary to ensure that any approach to handling different types of claims avoids the risk of re-creating institutional and procedural rigidities.

In addition to reforming the structures, the principles of good customer service and natural justice demand that we must improve the quality of the service provided to those who use the State's employment redress/enforcement machinery. Clear, up-to-date and accessible information and advice is essential to promoting harmonious relationships in the workplace, reducing grievances and improving compliance with employment law. There should be a single authoritative source of information and advice to facilitate disputes being resolved at workplace level to the greatest extent possible. There should also be a single entry point for claims, ideally on a single application form, with standardised processes and case numbering/tracking.

The scope for forum shopping should be reduced and if possible eliminated. Having a single point of entry and a single body of first instance with a unique identifier for each employer and employee should remove both the need and opportunity to submit different elements of the same claim to different bodies.

QUESTIONS ARISING HERE INCLUDE:

Integrated structure

2.1 Do you agree that the integrated two-tier model should be adopted as guiding principle?

2.2. Do you agree that "differentiation" of processing channels should be minimised to optimise the benefits of the proposed reform and to avoid re-introduction of institutional and procedural rigidities?

2.3 Should all claims in respect of employment related complaints/claims (including employment related equality matters) be submitted and dealt with by one body of first instance?

2.4 Should employment rights cases only go to the body of second instance on appeal (i.e. should the right of either side to object to the body of first instance hearing a case be removed)?

2.5 If minimal differentiation within a two-tier structure is to be pursued, what would the optimum streams / chambers be within both the first instance and the appeals entity? For example, is there a need to retain some organisational distance / separation between the distinctive roles of

- The **inspectorate function** (i.e. NERA's role in inspection, enforcement and where appropriate prosecution);
- the **conciliation and mediation processes dealing with collective disputes**;
- the **advisory / mediation / investigative procedures** dealing with individual industrial relations and employment rights claims;
- any subsequent **formal adjudication** on such individual cases.

How might a satisfactory segregation of these distinctive functions be best achieved?

2.6 What would be the advantages and disadvantages of having statutory redundancy appeals handled on an administrative basis, perhaps through the established social welfare appeals structure, given that statutory redundancy payments are now administered by the Department of Social Protection?

Appointment, tenure, etc, arrangements in new streamlined employment rights bodies

2.7 Should the arrangements for the appointment and tenure of those working in/ appointed to the new streamlined employment rights bodies be changed, and if so, what should be the guiding principles?

Information and Advice

2.8 Should there be one website covering all employment rights and industrial relations matters?

2.9 Do you agree that a more coherent and co-ordinated approach to the provision of advice and information on industrial relations and employment rights issues should form part of the services of the new first instance body?

2.10 What is the best method of providing information and advice?

2.11 Should non-directive advice be provided to employees and employers on what options may be available to them on the basis of the facts provided and where to go for help if required?

Single Point of Entry /Submitting Individual Industrial Relations and Employment Rights Claims

2.12 How can a single point of entry for all individual industrial relations and employment rights complaints/claims best be achieved?

2.13 Should there be a single application form for all individual first instance industrial relations and employment rights complaints/claims?

2.14 What measures could be taken to improve information gathering from complainants /applicants at application stage?

2.15 Should there be a consistent time limit for initiating all complaints/claims/appeals and if so what should it be?

2.16 Do you agree that more consistent arrangements are required for the representation of claimants so as to enable individuals to nominate a person to represent them at a hearing e.g. trades union official, solicitor, other representatives, etc?

2.17 Where the power to present/refer a complaint is currently limited to the claimant, should it be extended to include the claimant's trade union and, where appropriate, the claimant's parent/guardian?

Enforcement

2.18 Should there be a consistent method of enforcing awards of employment rights bodies and if so what should that be?

3. Minimum number of cases presenting for resolution at formal hearings through active case progression and an increased range of interventions.

The aim should be to minimise the number of cases that present for resolution at formal hearings. There should be active case progression providing an increased range of interventions for resolution of cases including timely information, advice, and early contact with parties with appropriate interventions available including mediation, conciliation and arbitration. These should be aimed at achieving a resolution to a dispute or compliance with employment law in the most efficient and effective manner while maintaining the employment relationship where relevant and possible. The State should only intervene by way of inspection and adjudication hearings when absolutely necessary.

There is scope for achieving greater consistency of procedure across the streamlined jurisdictions. Currently the powers of the different existing fora [Rights Commissioner service, Equality Tribunal and the EAT] vary as between them in terms of how each may regulate a hearing. In some cases, hearings are required to be held in public, others in private. Procedures also vary as regards both the presentation of complaints and appeals and the obligations on respondents. The redress that may be awarded also varies, depending on the forum and the legislation under which a particular complaint is presented.

QUESTIONS ARISING HERE INCLUDE:

Facilitating early interventions and alternative dispute resolution methods

3.1 What interventions should be available prior to a formal hearing or inspection to resolve grievances or non-compliance e.g. telephone contact, informal hearings, more formal mediation, conciliation or arbitration?

3.2 What is the best method of identifying suitable cases for early intervention?

3.3 At what stage should the intervention take place, for example should it be available when the person first seeks information, prior to them lodging a complaint/claim or after a complaint/claim is lodged?

3.4 Is there scope for harnessing the expertise and capacity of personnel within the existing bodies to decide on straightforward issues where purely factual matters are in dispute?

3.5 Is there scope for forging positive connections between the public dispute resolution system and external experts in preventive alternative dispute resolution methods at workplace level?

3.6 Should parties be required to set their case out in writing?

3.7 Should all complaints/claims be examined for potential interventions and should time-limits apply to the offers of conciliation or mediation support?

3.8 Are there particular kinds of issues, for instance, where mediation is likely to be especially helpful or, alternatively, where it is not likely to be helpful?

3.9 Would there be merit in having a “preliminary hearing” process and if so how should it operate?

3.10 Should certain cases be dealt with on the basis of written submissions only?

3.11 Should attempts at resolution have any bearing on any subsequent hearing or should the process be confidential and not admissible in any hearing?

Conduct of Proceedings

3.12 Should there be a uniform set of procedures regulating the conduct of hearings in all cases heard at first instance?

3.13 Should first instance jurisdictions be empowered to dismiss what are adjudged to be frivolous, vexatious or misconceived claims without holding a formal hearing?

3.14 Should hearings of employment rights disputes /appeals be heard in public or in private?

3.15 Should there be a uniform period for submitting appeals?

5. How to Submit Your Views

Views are requested by **16th September 2011**

Submissions may be sent

- by email to employmentreform@djei.ie
- by post to Mr Eamonn Gallagher, Department of Jobs, Enterprise and Innovation, Davitt House, 65a Adelaide Road, Dublin 2.

Appendix 1 - A possible new two tier model

First Instance Body

Under the new arrangements, all claims would be lodged with the new first instance body and appeals would be heard by an amalgamated body formed from the Labour Court and EAT. Cases heard at both first and second instance could include all associated claims. New arrangements could include the following:

Individuals would always be able to take their own case and would not have to rely on a legal representative, a representative body or a labour inspector to take a case on their behalf.

The Equality Tribunal could be integrated within the first instance body to deal with proceedings under the Employment Equality Acts 1998 to 2008.

The new first instance body (comprising services currently provided through the Rights Commissioner service, Equality Tribunal, EAT and NERA) would be the single entry portal for all employment rights cases.

Improvements in the support services for the first instance body through online research facilities to check legal database, precedence and case histories, etc, should ensure consistency of approach in decisions. It should also contribute to the development of members' expertise in different areas of employment law, e.g. unfair dismissals, transfer of undertakings, working time, occupational health and safety, equality, etc.

Upper Tier Appellate Body

All appeals would be heard by a single appeals body formed by integrating some of the functions of the EAT into the Labour Court. The upper tier body would assume responsibility for all legal and appellate functions currently exercised by the Labour Court and the Employment Appeals Tribunal. It would act as a court of final appeal against the recommendations from the lower tier comprising the functions currently discharged by the Rights Commissioner Service, the Employment Appeals Tribunal and the Equality Tribunal.

Under the new arrangements, it could be envisaged that:

- Consideration would be given to reserving employment rights appeals to a separate Division of the new appellate body.
- As all cases would have the option of having an appeal heard by the appellate body, the only further appeal that would be required would be to the High Court on a point of law.

It is not envisaged that the proposed streamlining of individual industrial relations and employment rights redress mechanisms will alter or affect the well-established, and well-trusted, statutory mediation and conciliation processes that deal with collective disputes under the remit of the Labour Relations Commission and the Labour Court under the Industrial Relations Acts, 1946 to 2004.

Compared with current arrangements, significant benefits for claimants and respondents could flow from the reforms proposed by the Minister in that:

- The development of shared services and integration of back office operational support and professional expertise will ensure greater synergies and value for money
- The linkages with support to encourage the parties to secure a speedy and satisfactory resolution for grievances at workplace level;
- All related cases would be taken at the same hearing, both at first and second instance
- The conduct of first hearing cases would be more or less formal as required by the customers.
- The system would have only one entry point and one locus for appeals.
- The system would be simple to understand and use.
- The system will promote empowerment of workers and employers.
- The system will promote consistency in the conduct of cases, both at first instance and at appeal.
- The avenue of appeal to an appellate body will be made available, if required, under all employment rights statutes.

Appendix 2

For the purpose of this Paper, employment rights legislation comprises over thirty statutes or regulations, including:

Adoptive Leave Acts, 1995 and 2005
Carer's Leave Act, 2001
Chemicals Act, 2008
Competition Act, 2002 - 2006
Consumer Protection Act, 2007
Employees (Provision of Information and Consultation) Act, 2006
Employment Equality Acts, 1998-2004
Employment Permits Act, 2006
European Communities (Protection of Employment) Regulations, 2000
European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003
European Communities (European Public Limited-Liability Company (Employee Involvement) Regulations, 2006 (S.I. No. 623 of 2006), regulation 19
European Communities (European Co-operative Society) (Employee Involvement) Regulations, 2007 (S.I. No. 259 of 2007), regulation 20
European Communities (Cross-Border Mergers) Regulations, 2008 (S.I. No. 157 of 2008), regulation 39
European Communities (Organisation of Working Time) (Mobile Staff in Civil Aviation) Regulations, 2006
European Communities (Working Conditions of Mobile Workers engaged in Inter-Operable Cross-Border Services in the Railway Sector) Regulations, 2009 (S.I. No. 377 of 2009).
Health Act, 2007
Industrial Relations Acts, 1946-2004
Maternity Protection Act, 1994
Minimum Notice and Terms of Employment Acts, 1973-2001
National Minimum Wage Act, 2000
Organisation of Working Time Act, 1997
Parental Leave Acts, 1998 and 2006,
Payment of Wages Act, 1991
Pensions Act, 1990
Protection of Employees (Employers' Insolvency) Acts, 1984-2004
Protection of Employees (Fixed-Term Work) Act, 2003
Protection of Employees (Part-Time Work) Act, 2001
Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act, 2007
Protection of Young Persons (Employment) Act, 1996
Protections for Persons Reporting Child Abuse Act, 1998
Redundancy Payments Acts, 1967-2007
Safety, Health and Welfare at Work Act, 2005
Terms of Employment (Information) Act, 1994-2001
Unfair Dismissals Acts, 1977-2007.

Appendix 3

Current arrangements regarding the functions of the employment rights bodies

As shown in the following table, the current arrangements are complex and confusing.

Employment Rights Legislation	First Instance Bodies			ER Appeal Bodies	
	Rights Commissioner	EAT	Eq Tr	Appeal to EAT	Appeal to Labour Court
Adoptive Leave Acts	•			•	
Carer's Leave Act	•			•	
Chemicals Act 2008, Section 26	•			•	
Competition Act, 2002 -2006	•			•	
Employees (Provision of Information and Consultation) Act 2006	•				•
Employment Equality Acts, 1998 –2004			•		•
Employment Permits Act 2006	•				•
European Communities (Protection of Employment) Regulations	•			•	
European Communities (Protection of Employees on Transfer of Undertakings) Regulations	•			•	
European Communities (Organisation of Working Time) (Mobile Staff in Civil Aviation) Regulations 2006	•				•
Health Act 2007	•				•
Industrial Relations Acts 1946-2004 ^a	•				•
Maternity Protection Act	•			•	
Minimum Notice and Terms of Employment Acts		•		None	
National Minimum Wage Act ^a	•				•
Organisation of Working Time Act ^a	•	• ^b			•
Parental Leave Acts	•			•	
Payment of Wages Act	•			•	
Pensions Act 1990			•		•
Protection of Employees (Employers' Insolvency) Acts		•		None	
Protection of Employees (Fixed-Term Work) Act	•				•
Protection of Employees (Part-Time Work) Act ^a	•				•
Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007	Redundancy Panel			• ^c	• ^c
Protection of Young Persons (Employment) Act	•			•	
Protections for Persons Reporting Child Abuse Act	•			•	
Redundancy Payments Acts		•		None	
Safety, Health and Welfare at Work Act	•				•
Terms of Employment (Information) Act	•			•	
Unfair Dismissals Acts	•	•		•	

^a Certain cases under these statutes are referred directly to the Labour Court, where there is a collective dimension or a failure to engage with the LRC.

^b Claims under the OWT Act may be brought at first instance to the EAT only where the EAT is already hearing a case at first instance under the Redundancy Payments, Unfair Dismissals or Minimum Notice Acts and only for holiday pay entitlement under the OWT Act

^c Under this Act, the Labour Court hears cases about prospective exceptional redundancies (ex ante) and the EAT hears cases under the Unfair Dismissals Act after the redundancies have occurred (ex post).

Appendix 4

Criticisms of the current functions of the employment rights bodies reflected in earlier reviews⁵

- 1) There is little consistency between the bodies regarding the degree of formality of hearings, rules of evidence and the extent of use of adversarial vs. inquisitorial procedures
- 2) Delays are excessive and stem from an exclusive procedural focus on the conduct of a formal hearing
- 3) Case management is deficient and the scheduling of cases can be problematic
- 4) Frequently, a set of circumstances can give rise to a multiplicity of claims, which must be processed through different fora to obtain redress
- 5) Many claimants feel the need to incur legal expenses in different fora
- 6) There is no statutory provision, other than under the Equality Acts, for mediation in employment rights legislation
- 7) Employment rights cases should not be allowed to bypass the Rights Commissioner service
- 8) Rights Commissioner recommendations should be explained and accessible
- 9) Rights Commissioner and Labour Court services should be promoted to non-unionised employments
- 10) Prior exchange of submissions by parties should be the norm
- 11) The EAT is viewed as having become overly legalistic
- 12) The EAT should have some full-time Divisions
- 13) There is some inconsistency in EAT procedures between Divisions
- 14) In dismissal cases, the array of fora and legislation is particularly challenging and redress can be quite different depending on which legislation/forum is used
- 15) Facilities for hearings could be improved
- 16) The system is now so complex that even experienced practitioners find it difficult to comprehend
- 17) Existing dispute resolution mechanisms lack any user councils
- 18) Services have been fragmented and under-resourced
- 19) Claims are often referred to the wrong forum or under the wrong statute: they sometimes become statute barred before the error is discovered
- 20) Duplication of functions between the bodies results in “forum shopping”
- 21) Where there is a multiplicity of claims several forms may be needed from different bodies
- 22) There is no obvious reason why some cases can be appealed to the EAT and others to the Labour Court
- 23) Irrational and inequitable variations apply in how compensation is calculated and in remedies available
- 24) The system contains no appeal mechanism for certain legislation (you must go to the courts)
- 25) The independence and impartiality of appointments, tenure, etc, arrangements needs to be re-considered in the light of meaning of Article 6 of the European Convention on Human Rights.

⁵ See Report of the Review Group on the Functions of the Employment Rights Bodies, Volume 2 – Submissions, April 2004