An Roinn Post, Fiontar agus Nuálaíochta
Department of Jobs, Enterprise and Innovation

Blueprint Consultation

Responses

June 2012

This document comprises a compilation of the submissions received in response to the publication by Minister Richard Bruton TD of the Blueprint to **Deliver a World-Class Workplace Relations Service** in April 2012.

Contents

Introduction

The Minister for Jobs, Enterprise and Innovation, Richard Bruton TD published the *Blueprint to Deliver a World-Class Workplace Relations Service* in April this year. That document set out, in considerable detail, how reform of the workplace relations structures and processes will be achieved. The Minister published the Blueprint in order to provide a further opportunity for consultation. He stated in that document that he was open to constructive suggestions and advice from all interested parties. He also indicated in that document that he would publish the responses received. The responses received have been compiled into this one document for ease of publication and reference.

The Minister received 32 written responses from interested parties during the consultation period that followed the publication of the *Blueprint*. The submissions, for the most part, were extremely constructive and welcomed the proposals for reform set out in the *Blueprint*. There was consensus in the responses around the need for reform and the shape that reform should take. A certain number of issues elicited a particularly high level of commentary by respondents representative of very diverse viewpoints.

The Minister has considered each of the submissions in some detail. The feedback received has informed the drafting of a Policy Document entitled *Legislating for a World-Class Workplace Relations Service.* This has been prepared to assist the Minister to engage in a constructive dialogue with the Joint Committee on Jobs, Social Protection and Education prior to going to Government for approval to draft the Heads of Bill.

Legislating for a World-Class Workplace Relations Service sets out in detailed narrative format the core principles that the Minister believes should be incorporated into the proposed new legislation. It also summarises the feedback received from the interested parties who made submissions in response to the *Blueprint* and provides a detailed outline of the reforms the Minister is now proposing as informed by the feedback received from the public consultation processes.

The Minister has expressed his gratitude to all those who have contributed to the process so far, in particular those who have taken the time and effort to make submissions. Their contributions are appreciated. When he has received and considered the views of the Joint Oireachtas Committee he will then seek a Government decision for the priority drafting of the Workplace Relations Bill.

Department of Jobs, Enterprise and Innovation
June 2012

1. Barry Sheehan Solicitors Consultation Response

Dear Sirs

I read with interest your recent proposals for workplace relations reform.

I am pleased to note you intend to implement many of the suggestions I myself made during your initial consultation process last year. As you plan to retain the Labour Court, would it not be more appropriate to call the Workplace Relations Commission the Labour Commission or Labour Tribunal?

I have three observations on the operation of the proposed Workplace Relations Commission:

1. As a solicitor practising in the area of employment law, I find the aim of obtaining a hearing date within 3 months of the complaint being lodged as very aspirational. Unless there are a raft of appointments to the Adjudication Service of the Commission, I cannot see how this can be achieved in practice, especially in the current climate.

Accordingly, there is an urgent need to confer upon the proposed Commission statutory injunctive powers so that interim relief can be granted pending the hearing. The Commission could arrange to hear interlocutory applications once the complaint form has been processed by the Registration Service. Provision could also be made for the complainant seeking injunctive relief to provide an undertaking as to damages and lodge some or all of the money with the Commission.

At present, employers who wish to discriminate in relation to access to employment can do so safe in the knowledge that by the time the Equality Tribunal actually hears the complaint the only practical remedy is compensation, and even then that compensation is capped at a low level relative to the salary that could have been earned by the complainant during the intervening years. Indeed, there is a strong argument that Ireland has not properly transposed Article 5(2) of Directive

2002/73/EC, amending Council Directive 76/207/EEC, into Irish law because of this arbitrary cap on liability.

2. Consideration should be given to conferring a statutory power on the Commission to award legal costs. At a minimum, the power to award costs should be available to the Commission in respect of indigent complainants and also as a penal sanction where either the employee's complaint was frivolous and vexatious or the employer's conduct generally warrants censure. A power to order a contribution towards the costs of Commission should also be available. Compliance with orders of the Commission could be facilitated by requiring parties to furnish bank account details at the Registration Service stage and these details could inform subsequent enforcement proceedings.

3. The Registration Service should filter and divert the more legally complex and technical complaints to the solicitor/barrister adjudicator members of the Commission, as distinct from civil service members, so as to reduce the potential workload of the Labour Court in correcting errors of law.

Finally, as a citizen I am very impressed at the speed and efficiency of this consultation process into a substantial area of the law. The individuals involved deserve credit for their diligence and I would commend this model of reform of the other areas of the public service.

Regards

Barry Sheehan
BARRY SHEEHAN SOLICITOR

ENDS//

2. Sophie Crosbie Consultation Response

Dear all

Congratulations on an excellent proposal. A number of suggestions:

1. the single common test for extension of claims to 12 months. This needs to be somewhere between the existing exceptional circumstances and reasonable cause test. No-one ever succeeds on the exceptional circumstances ground and there are very good reasons why an employee might not take a claim within the first six months of its arising (e.g. fear of consequences). In some cases this will reduce the maximum time limit which is currently 18 months for fixed term and organisation of working time claims. The possibility of standardising **when** the time limit is applied in legislation (ie actual or continuing breach) should be examined.

2. The new website for decisions, should if possible, adopt common standards in search terms and Boolean operators for all new decisions going forward, regardless of the existing parent legislation. A separate piece of work could then be addressed to retag all previous databases. Such an approach would greatly improve practitioners ability to provide accurate advice as decisions are readily searchable (not currently the case)

3. The role of registrar and the provision of decisions on complaints management, based on written submissions only, at first instance and again on appeal. It might be legally necessary give the Court the power to hold an oral hearing if the facts, as they relate to the preliminary issue, are in dispute.

Alternatively, you could make it clear that the registrar would only have the power to dismiss the complaint, where the facts as stated by the claimant, do not set out a valid complaint. You might also want to clarify whether a claimant can resubmit her/his claim if the dismissal is due to a misstatement of the grounds, and what if any, impact this will have on time limits.

4. WRC hearings:
In most instances, there is no barrier to a single hearing of all the relevant issues in dispute.

However, it may be difficult to have a single hearing where the matters are legally complex or require specialist approach (e.g. a combined equality plus Fixed term case). Or is a Rights Commissioner supposed to become 'expert' in equality as well as Unfair Dismissal/Payment of Wages ? The danger is that if you make the jurisdiction too broad, you will reduce the potential quality of the decisions. Some Rights Commissioners struggle with existing legislation, not to mind adding equality to the mix.

If the 'power' to select the relevant adjudicator is in the hands of the Registrar, is the registrar not opening itself to challenge in that by assigning the case to an adjudicator with particular expertise, it is potentially opening itself to allegations of prejudging' the other claims?

Alternatively, where an individual may have multiple claims for the same set of facts e.g. discriminatory dismissal and unfair dismissal, could you not give greater effect to principle of 'no dual compensation for the same set of facts'. It might be possible to do this by requiring the claimant to 'elect' to proceed with 1 of 2 competing claims within 28 days of being advised of this by the Registrar.

5. Legal status of prior precedent. The proposal effectively does away with the employment appeals tribunal. To what extent, if any, will the Labour Court be required to follow the EAT's prior decisions in relation to unfair dismissal?

Further where there is clear departure in existing precedent between the Labour Court and the EAT in certain areas, to what extent will the Labour Court have full discretion to determine its own jurisprudence and what impact if any, will that have on the manner in which the Workplace Relations infrastructure is viewed by the multinational sector ?

For example, the EAT has been very clear in setting out a clear obligation to consult

on redundancies and requiring some form of transparent selection criteria using a selection matrix to be adopted by companies seeking to implement fair redundancy selection processes.

The Labour Court by contrast, has a very clear (and contrasting approach) of voluntary redundancies first and thereafter LIFO for all of its IR decisions and has consistently declined to move away from this, even where the situation clearly requires a more flexible approach. In the situation where the Labour Court becomes the sole appellant body, conflating a traditional voluntary IR jurisprudence into existing unfair dismissals case law could damage the reputation of the new system before it ever gets established.

The simplest way around this would be to require the Labour Court to have regard, in reaching its decisions for unfair dismissals etc., for the prior precedent of the EAT.

Kind regards
Sophie Crosbie

ENDS//

3. Legal-Island Consultation Response

Blueprint to Deliver a World-Class Workplace Relations Service: Response by Legal-Island

Firstly, we would like to congratulate the Minister and officials for the speed and comprehensive nature of this review. It is a fantastic achievement, as are the other reforms already implemented.

It may be the case that the budget deficit is driving the agenda for change but the main thrust of the changes is sensible and we agree with most of the proposals.

Bearing this in mind, what follows is a series of comments/questions on the few matters upon which we at Legal-Island either don't agree or are uncertain about. We will not comment on the vast majority of areas on which we agree with the proposals.

1. The Two-Tier Structure (page 10)

We have some reservations about the range of functions of the WRC and its closeness to the Labour Court. You state that, *"There is no doubt that some of the functions of the WRC will require some organisational distance from each other. This will be achieved through clear and appropriate delineation between the functions and the implementation of strict protocols in relation to access and use of data."*

We fear that creating these 'Chinese walls' may not be enough to dispel the perception with employers in particular that the WRC is an employee-friendly organisation rather than neutral, in relation to conciliation and adjudication.

The one organisation is not only due to register everything but will provide guidance to both employers and employees; will conciliate in (some) disputes between them; will adjudicate in (some) non-settled disputes; and will inspect in (some) disputes. On top of that it will provide assistance to the appeal body.

We are not convinced that employers will seek advice from the organisation that will inspect complaints against them. We are not convinced that employers will trust a conciliation officer who works in the same building or for the same employer that inspects complaints against them.

The enforcement role of current NERA inspectors is pro-employee (quite rightly) but we fear it may tarnish the perceived necessary independence required in the advisory and dispute resolution sections, regardless of the protocols etc that there may be in place. The LRC has a great reputation in relation to collective disputes but conciliators may not be known to as many smaller employers or their legal representatives who appear before rights commissioners and the EAT etc. They need to build trust in the new service. We don't think that will be made easier if they work in the same organisation as inspectors and others who currently have NERA-related powers and enforce matters against employers.

Some of the other services, such as the provision of written particulars of employment, also come under enforcement. Might some employers be afraid to download templates from the organisation that might also come after them for not having written particulars or some OWT matters properly sorted? Might some employers be afraid that ERS staff will be compelled to report them to inspectors if something comes out during conciliation discussions? We like the concept and simplicity of 'two-tiers' but fear it might backfire – one size might not fit all for pre-appeal processes.

2. Information (page 13)

We are pleased that standard written particulars etc will be available free online. It may not initially please all solicitors but it is good that employers and employees can get free information that should help everyone in the workplace. However, it is not clear how, if at all, these written documents may be checked by the WRC. In Northern Ireland, the LRA runs workshops. Is it the case that employers will have to take the template documents and amend them before taking legal advice? Will you

run workshops? What will the *'assistance in developing other policies and procedures'* consist of?

Template grievance letters for employees may be useful, particularly in non-unionised workplaces, but they may lead to more formal disputes, rather than employees informally raising issues with their employers in the first instance, which ought to be encouraged.

Maybe a caveat such as the following might be helpful: 'Have you already raised your complaint informally with your colleague or employer? If not, you may wish to do so before sending a formal letter or grievance based on the following templates. If you wish to discuss your employment problems with someone you may wish to contact the helpline on XXX.'

We see no cross-reference with thrust of the Mediation Bill 2012 or any indication that informal means and early resolution of employment matters is the best option in most cases. Perhaps you could consider emphasising the alternative options available before making a formal complaint to an employer or WRC.

3. Complaints Management (page 15)

The mention of the early resolution service (ERS) and how you envisage it referring unresolved matters to adjudication or inspection does not accord with the diagram at appendix 2. You might also indicate how this might work in appendix 3 (see below).

There will have to be some mechanism for allowing appeals against registration decisions (where the registrar rejects claims or responses etc) under EU and administrative law. This might cause a backlog if you get one or two soon after the change but we can see no way around this and it seems sensible to allow the appeal to a Labour Court Chair or deputy sitting alone to hear 'administrative' appeals. We are not convinced, however, that a decision based on written evidence only will assist the parties, their representatives or registration staff, particularly at the beginning of the cross-over to the new system when everyone will need to learn and

teething problems will occur. Perhaps you could consider making it an option rather than standard procedure for a pilot period?

4. Early Resolution Service (ERS) (page 16)

   We understand that budgetary restraints mean that ERS cannot be offered in all cases and welcome the fact that the parties can request same where it is not actively offered. It would be helpful to clarify what is meant by *"Parties availing of the Early Resolution Service will not lose the right to have their issues in dispute dealt with by means of inspection or a hearing as appropriate to their case. Nor will they be disadvantaged in relation to their "place in the queue" for inspection or a hearing."* Does this mean that parties will be given a hearing date at registration or that any hearing date issued before or during ERS will remain 'live' until settlement is reached?

   We like the fact *that "Agreements arrived at will be binding on both parties and enforceable by the parties through the civil courts."* However, you may find that the insolvency provisions encourage employers to agree all sorts of amounts to rid themselves of claims where they know, but do not inform anyone, of their impending insolvency: *"Where the employee does not receive an amount of money due on foot of a binding agreement resulting from his or her employer's insolvency, that employee will have access to the Insolvency Fund on the same basis as if the amount was due on foot of a hearing."* It may also lead to increase strain on the Insolvency Fund.

5. Fee for making a complaint (page 17)

   We are not convinced that a fee is necessary or economical to collect at the level of €50. Given the limited offer of ERS, it may be deemed unfair: *"For example there may be no fee for Early Resolution with the fee only being charged when a case progresses to a hearing."* We prefer, where a fee or deposit is to be charged, that it is done so on the basis of the appeal suggestion (page 27) i.e. it is returned unless the claim (or defence) is vexatious or misconceived.

6. Conduct of Hearings (page 18)

   We are not in favour of hearings normally being held in private. We believe that, as the main forum for adjudicating on employment disputes, these hearings should be public, not just so that justice can be seen to be done, but also because it will encourage parties to use the (rightly) private ERS.

   Public hearings will also encourage the highest standard of behaviour and impartiality of adjudicators and provide a means of training for parties and representatives.

   Therefore, we believe that the default position should be public hearings and the adjudicator should rule on exceptional requests for privacy.

7. Decisions (page 19)

   We warmly welcome that decisions will be published and set out in accordance with a template and would recommend only one additional heading – the method of calculation of any award is also set out.

   It is not good law (nor is it good for industrial relations) if parties and the public do not know how a monetary award has been arrived at. How can a representative properly advise a client on likely gains or losses if award figures are arbitrary or calculations not set out? How can a party know if there are grounds for appeal on the size of the award? How can the department know whether certain adjudicators show bias?

8. Appeal from a WRC Hearing (page 19)

   We welcome the intention that*, "A party who fails to attend (or be represented at) a WRC hearing, without reasonable cause, shall forfeit the right to appeal to the Labour Court."*

Too many parties currently fail to engage in the adjudication process or treat it with the respect it deserves. We are not entirely convinced of the lawfulness of such a move but welcome it in the hope that it is lawful.

9. Fixed Charge Notices (page 21)

We are not convinced that fixed charge notices are in the interests of resolution, compliance, or good industrial relations. Nor do we think they will assist in creating a positive perception of the WRC as an impartial broker in dispute resolution.

The problem can be solved by making the non-compliance issues mentioned on page 21 employment rights for which an adjudicator can make an award, as happens in the UK.

Creating penalties enforceable in the District Court, rather than awards enforceable after an adjudication hearing or any ERS settlement, dilutes the message of 'two-tiers' for adjudication and appeal. The equivalent examples, such as littering and driving offences, set out on page 22 are not amenable to resolution or an ERS. They are not comparable examples.

10. Hearing or Inspection (page 23)

We welcome the fact that you will attempt to provide clarity on whether a particular complaint would normally proceed to adjudication or inspection.

However, the fact that the 'hybrid' scenarios outlined on pages 24-26 are so complex backs up our belief that the inspection and adjudication should be completely separated. There is no particular reason why an adjudicator could not be empowered to refer any 'inspection' matters to the relevant inspection body should they come out at a hearing, in the same way that courts might currently refer tax or benefit matters to the appropriate authorities. To have the WRC registrar make these decisions at the start and to give the adjudicator powers at certain times but not others because, for example, a complainant prefers one route over another, does not strike us as a simplification of the process.

11. The Legislative Programme (page 38)

    We welcome the speed of reform, although the target of autumn 1012 does not leave much time for consultation and education/training. It might also lead to legal challenges which, in our experience, create a hiatus as the authorities await the outcome of the legal process. We wish you luck.

12. Appendix 3 – How complaints are dealt with

    We welcome the table – it gives some clarification on how complaints might proceed to adjudication or inspection (or hybrid). However, it does not indicate which rights are likely to be offered ERS or which claims the parties may request ERS. We think some clarification of this, given there will be no automatic referral to conciliation (as occurs in the UK), would be welcome.

    We hope you find our opinions helpful. We have asked our customers (mainly HR professionals and employment representatives) to read and comment on the Blueprint document. Hopefully some of them will provide you with more food for thought.

    If you need clarification on any of the above please contact me.

    Scott Alexander
    Head of Training and Development
    Legal-Island
    April 2012

    ENDS//

4. Letterkenny General Hospital Consultation Response

I welcome the reform of the existing IR structures as outlined in the proposals, and believe that the two tier structure identified will ensure greater clarity and certainty for all concerned, in addition to a more focused and responsive service.

In particular I would welcome the Complaint management element, which "will ensure complaints are directed in the most effective and efficient way through the system. They will check complaints on receipt and reject or redirect incomplete complaints, complaints which are out of time or which are incorrectly grounded."

At present, there is no barrier to entry or any filter mechanism to ensure that referrals to third parties are legitimate, appropriate and/or well founded. This can on occasion lead to spurious complaints being made, which require time and resources from all parties, and is not identified as inappropriate until an actual hearing date. This can have the effect of redirecting scarce resources from LRC or Rights Commissioners, which might be more usefully engaged in resolving legitimate cases. In that context, I would advocate and strongly support a fee being levied on applicants, even if this were nominal in nature, to focus their thinking and decision making in submitting a claim. At present there is no deterrent or downside for applicants making claims. Indeed a fee of €50 or €100 might be legitimate, where a mechanism existed to refund fee as part of a settlement arrangement for successful claims.

Regards,

Patrick Murray

Human Resources Manager

Letterkenny General Hospital

Letterkenny

Co. Donegal

ENDS//

5. Michael McNamara T.D. Consultation Response

SUBMISSION BY MICHAEL McNAMARA T.D.

TO THE MINISTER FOR JOBS, ENTERPRISE AND INNOVATION, MR. RICHARD BRUTON TD, ON

REFORM OF THE STATE'S EMPLOYMENT RIGHTS AND INDUSTRIAL RELATIONS STRUCTURES AND PROCEDURES

Introduction:

Mr. Richard Bruton, T.D., Minister for Jobs, Enterprise and Innovation, has outlined detailed proposals for reform of the workplace relations structures and processes and provided an opportunity for interested parties to contribute comments and feedback on the future design of the State's workplace relations structures by April 30th 2012. Both of these measures are welcomed.

It is proposed to replace the current complex and outdated system with a simpler more efficient and user-friendly two-tier structure with simplified procedures. A single body will adjudicate on all complaints at first instance, with a single route to appeal, together with common time limits for lodging complaints and appeals. The only further appeal will be to the High Court on a point of law only, thereby removing the Courts and the procedural safeguards they provide, from the adjudication of employment rights and industrial relations disputes. The new structure will comprise two statutorily independent bodies namely:

The Workplace Relations Commission (WRC) and

The Labour Court

According to *Blueprint to Deliver a World-Class Workplace Relations Service*, published by Minister Bruton:

“A common standard of practice, compatible with the intended objective of providing a speedy, inexpensive and relatively informal means for dispute resolution will be adopted for WRC hearings.

While an appropriate level of independence and accountability of decision-makers will be provided for, parties have a right to have uniformity in interpretation of the law. In addition all hearings must comply with the principles of natural and constitutional justice. Therefore, while hearings of the WRC will not follow strict rules similar to courts of law, fair procedures should be followed.

Broad, simple but flexible guidelines and an appropriate management structure will be put in place. The aim will be to deliver a high standard in adjudication while ensuring that the statutory independence of WRC Adjudicators in their decision-making, regarding complaints presented to them for decision is not compromised. The legislation will make provision for the Minister to make regulations to provide for certain matters in relation to the conduct of hearings. Subject to these regulations, WRC Adjudicators will have a level of discretion to determine their own procedures in the conduct of hearings.

Hearings of the Workplace Relations Commission will be held in private unless the WRC Adjudicator decides at the request of either party to the complaint to hear the complaint in public. Parties wishing their case to be heard in public will be required to submit their request for a hearing in public, and the reasons therefor, in writing and in advance of the hearing. Where such a request is received in writing and in advance the WRC Adjudicator shall consult the other party. Having considered the request and sought the views of the other party it shall be for the WRC Adjudicator to decide in advance whether all or part of a hearing is to be held in private or in public. Parties will be notified prior to the hearing of the decision as to whether all or any part of the hearing will be in public.”

Effective Remedy:

The Minister’s proposals appear to have taken insufficient account of the requirements of the Charter of Fundamental Rights of the European Union. Article 47

of the Charter of Fundamental Rights of the European Union provides for the right to an effective remedy. It provides that:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The Charter applies to the member states only when they when they are implementing EU law.

The Workplace Relations Commission, and the Labour Court upon appeal will be required to adjudicate upon complaint relating to alleged breaches of the following statutes, all of which engage EU Law:

The Organisation of Working Time Act 1997;

The Employment Equality Acts 1998 to 2011;

The Protection of Employees (Part-Time Work) Act 2001;

The Protection of Employees (Fixed-Term Work) Act 2003;

The Pensions Acts 1990 to 2008;

The Safety, Health and Welfare at Work Act 2005 (Section 29);

European Communities (Organisation of Working Time) (Mobile Workers in Civil Aviation) Regulations 2006;

Also the Protection of Employees (Temporary Agency Work) Bill, 2011 makes provision for an appeal to the Labour Court from a decision of a Rights Commissioner – which it is proposed to replace with a Workplace Relations Commission hearing.

It is not clear how the right to a public hearing, and to be advised, defended and represented, all of which are required by Article 47 of the Charter of Fundamental Rights, will be facilitated, if at all, by the Minister's proposals for a Workplace Relations Commission. Neither is it clear how the right to right to a public hearing or the right to legal aid where it is necessary to ensure effective access to justice will be vindicated at the Labour Court, which will function as an appellate tribunal. At present, the Labour Court sits in private, there is no right to legal aid for those who appear before it and there are no proposals for change in this regard.

Independent and Impartial Tribunal:

Furthermore, the mechanism by which the right to be have a complaint adjudicated upon by an independent and impartial tribunal, also required by Article 47 of the Charter of Fundamental Rights, will be ensured in the system envisaged by Minister Bruton is unclear. The *Blueprint to Deliver a World-Class Workplace Relations Service* states:

"As is currently the case suitably experienced and trained civil servants recruited and assigned in the normal way, will provide the vast majority of the workplace relations services including the early resolution, conciliation and adjudication services.

…

On establishment of the Workplace Relations Commission, its Adjudicators will be drawn from the existing serving officers within the workplace relations services. The skills and experience of the Equality Mediation Officers and of the existing panel of Rights Commissioners will be utilised. This will provide a mixture of civil servants and external appointments with a broad range of experience and expertise.

As the reform will bring about significant change in how adjudications are undertaken and how decisions are delivered intensive training will be provided to all existing personnel engaged in this function and any newly appointed WRC Adjudicators.

In future appointments to the post of WRC Adjudicator will either be civil servants recruited/assigned in the normal way or from an external panel formed through an open and transparent system.

Workplace Relations Commission Adjudicators will be appointed for fixed periods by the Minister with the possibility of subsequent periods depending on participation in on-going training and development and satisfactory performance.

This will require certain standards and targets to be met. This appraisal process will respect the independence of the decision making function of Adjudicators.

Future appointments to the posts of Chairman and Deputy Chair of the Labour Court will be through an open and transparent system in keeping with recognised best practice in public appointments. In order to keep the employer/employee balance in the tripartite divisions of the Court, Ordinary Members will be selected through a selection process based on merit from a panel of candidates put forward by representatives of employer representative groups and trade unions. The current arrangements will continue to apply in respect of existing Members.

Currently, the Chairman and the two Deputy Chairmen are appointed by the Minister for Jobs, Enterprise and Innovation. The employers' members are nominated by the Irish Business and Employers' Confederation(IBEC) and the workers' members are nominated by Irish Congress of Trade Unions (ICTU). The Labour Court also has a legal adviser, the Registrar, appointed by the Minister.

The Blueprint envisages that legal services to the Court will continue to be provided through the Labour Court Registrar.

Conclusion:

The Minister's proposals for reform in this area to provide for a cheaper, more efficient and speedy resolution of individual employment rights disputes are to be welcomed. However, greater consideration of how the safeguards provided for in the Charter of Fundamental Rights will be respected in the new structures proposed is required.

ENDS//

6. O'Shea Russell Solicitors & EAT Member Consultation Response

Re: BLUEPRINT TO DELIVER A WORLD-CLASS WORKPLACE

RELATIONS SERVICE

Dear Mr Kiernan,
I have read and considered the Blueprint as published this month and consider it to be a well-balanced document addressing those issues that arise with the current service and introducing a significant level of streamlining which is to be welcomed.

Having made a detailed Submission previously on this matter I would now simply like to highlight a few areas within the Blueprint as follows:-

TRANSITION
The transitional arrangements provided for in the blueprint will need to be carefully considered so as to tackle the existing backlog. I believe that the backlog will need to be addressed within the current system as to 'switch' such cases to the WRC might well lead to subsequent legal challenge.

MEDIATION
I would strongly recommend that the Adjudicators in the WRC be given the power to direct parties at hearing to consider referring their dispute to Mediation where the Adjudicator recognises a role for such intervention.

HEARING
Where openness and transparency are to be bye-words of the new service, I would have reservations about the proposals that WRC hearings be held private. This is a change from the existing situation and might well be seen as biased towards certain interest. I would suggest that there ¡s no legal or practical reason for anonymity. With reasoned decisions of the WRC to be published there ¡s an inherent contradiction

between these policies.

GROUND

In so far as the Blueprint provides that the Labour Court be entitled to make a preliminary finding as to whether there are grounds of Appeal it might be worth considering a provision for brief Preliminary Hearing before the WRC to establish if an action has “prima facia” merit before being allowed to proceed to full hearing. Where the power to award costs is not available as a deterrent, such procedure might enable the WRC to “weed out” situations where the process is being engaged in simply to delay compliance or frustrate the rights of a party.

FIXED CHARGE NOTICES

This is an excellent idea and consideration should be given to the addition of further categories e.g. failure to provide P45 or RP5O in a timely fashion.

ADMINISTRATIVE SUPPORT

This area of reform is vital. If the administration support of staff provided with a complete technology suite (dictatyping/recording etc.) is not available it will be extremely difficult to achieve meaningful movement’. I would recommend that a small Technological Sub-Committee be appointed now to identify suitable technologies and to prepare the appropriate training plans.

ENFORCEMENT

The reform of this area is crucial and I would recommend a separate enforcement unit with wide powers to include an entitlement to issue a wide variety of “Attachment Orders”.

Thank you for your consideration.
Yours sincerely
Nicholas Russell

ENDS//

7. NERA Advisory Board Consultation Response

Re: Blueprint to deliver a World-class Workplace Relations Service

Dear Minister,

The Advisory Board to the National Employment Rights Authority (NERA) recently held a special meeting to consider your *Blueprint to deliver a world-class Workplace Relations Service.*

The Board welcomes and endorses the Blueprint document.

We would however make the following observations:

The Role of the Registrar

While the proposed system may work for complaints grounded on a particular piece of legislation- basic employment rights, it may not be suitable for dealing with more general industrial relations issues.

The proposal to introduce a fee for making a complaint

Members of our Board expressed the view that while the introduction of a fee may avoid vexatious complaints, it may also penalise genuine complainants and may stop some people from using the system. Questions were also raised about whether the fee would be an upfront payment or otherwise.

Early Resolution Service

There was concern that this service would allow parties to settle for less than their legal entitlements, effectively not complying fully with the basic rights as set out in legislation. Early Resolution Officers should ensure that any settlement complied with the law and be aware that any agreement not compliant with legal rights would be unenforceable.

It was also felt by the Board that the service should not try to intervene where an employee wishes to remain anonymous or where the employment rights issues complained of appear to be company-wide. These cases should be dealt with by an inspection.

Fixed charge notices

Questions were raised about the how this penalty would be applied. Clarification is needed on whether it would per breach, per employee, etc.

The Board believe that €150 was not high enough as to prove a deterrent and would like the see the introduction of a stronger and cumulative fine.

The imposition of a fixed charge notice should not rule out the possibility of prosecution.

Enforcement & Redress

The document proposes developing a new and more effective method of enforcing awards. The Board agreed that there had to be a strong deterrent for non-compliance.

The Board reiterated the need to retain prosecution as a deterrent in the proposed new legislation.

Progress to date

The Board has seen at first hand the work undertaken by the Workplace Relations Customer Service and would like to compliment all the staff involved in the various bodies on the progress made to date.

Finally the Board wishes you and all of the staff involved every success, as you move forward with these necessary and essential reforms.

_____

John Dennehy

Chairman

Advisory Board

National Employment Rights Authority
O'Brien Road

Carlow

ENDS//

8. Richard Grogan & Associates Consultation Response

Re: Blueprint to deliver a World-Class Workplace Relations Service

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Dear Mr. Kiernan,

I note that the Minister has given the opportunity for a submission to be made in relation to the documents produced by him in April 2012.

Overview.

I would firstly like to congratulate the Minister, his Department and staff in relation to what is clearly a comprehensive, well thought out and well argued document which sets out reasons for the matters under consideration.

A Two Tier System.

The Minister is correct as regards a two tier system being the most beneficial.

In relation to the personnel that will be involved I do believe, that the current method of appointing Rights Commissioners who come from an industry and union background is particularly beneficial. Being able to apply both the Law and the practice in industry is important in such areas as Unfair Dismissals, the Organisation of Working Time Act and the Terms of Employment (Information) Act just as examples. This is fair to both employers and employees. Practical experience as to how business works is relevant in determining matters. The current system as regards Rights Commissioners and their appointment has worked extremely well and

I would ask the Minister to consider continuing with same as far as is reasonable practicable. Equality Officers have extensive legal expertise and practical experience of Equality Law where expertise in the Law is highly relevant more so than practice in industry. As the Equal Status Act cases are not workplace issues they might be “red circled” in the process.

Resolving Disputes at Workplace Level.

I am fully supportive of this. As an office which is involved in a considerable volume of cases involving employees we are consistently finding that a significant proportions of issues arise because of the lack of documentation given to employees and in particular, in many cases the complete lack of employment documentation.

I would ask the Minister to consider putting in place, for employers, a detailed template which can be customised for their particular circumstances which would include all information to be included under the Terms of Employment (Information) Act and Grievance and Disciplinary procedures. In addition I would ask the Minister to include in that template documentation which advises employees and employers as to the entitlements to rest and break periods under Sections 11, 12 and 13 of the Organisation of Working Time Act. The number of contracts which I come across which do not include these provisions are significant.

The issue of encouraging employers to provide contractual documentation is one which will minimise disputes going outside the workplace.

I would therefore ask the Minister to consider, as part of any new legislation that in the event that an employer does not produce documentation, to the employee, which complies with the legislation that an employee can elect to deem those rights to be contractual rights and to rely upon same. This will facilitate employees making a grievance and requiring the employer to deal with it and equally requiring an employee to require an employer to comply with a Code of Practice and Disciplinary procedures.

I believe that it is important that the rights of employers and employees as regards their entitlements in the workplace should be on an easily accessible website and that same should be in various languages to facilitate comprehension.

Adjudication Service.

The Minister has raised the issue of a fee for making a complaint.

I would ask the Minister to consider the following matters.

1. Where a complaint is resolved as part of the early resolution procedures that the fee would be refunded.

2. Where a complaint is upheld that the fee would be refunded.

3. Where a complaint is partly upheld that there would be a refund.

4. Where the dispute relates to such items, as for example, a complaint under the Organisation of Working Time Act where the employee claims that they were working excessive hours and has requested records from the employer which the employer has refused to give or in cases where the employee has issued a complaint where the employer has failed to furnish full or appropriate documentation in advance that the employee, in those circumstances, should not be penalised by having to pay a fee to vindicate a his/her rights if the person adjudicating determines the employee could reasonably have believed they had a legitimate complaint.

5. Where an employee makes a complaint, and the employer does not cooperate with the process whatsoever including not turning up for a hearing, in those circumstances I would ask the Minister to consider that it would be appropriate that the employee would be refunded their fee.

6. Where an employee is refunded their fee that the person adjudicating can direct the employer to discharge same directly to the Workplace Relations Commission.

I am involved in a large number of cases where employers do not appear at first instance. The employee receives a decision and the matter is then appealed currently to either the Employment Appeals Tribunal or to the Labour Court. I would ask the Minister to consider that where a party fails to appear at first instance and is not in a position to produce clear and definitive evidence which excused their non appearance there would be a significantly increased cost for lodging an appeal. There are many cases which go to the Labour Court currently under, for example, the Organisation of Working Time Act where the employer contends that they did not receive the notification of the hearing but did receive the decision or an employee simply did not turn up. These simply involve the employee or employer in significant additional costs. It is a cost to the State in having a second hearing. In those sort of cases there should be a fee for an appeal which will encourage parties to take part in the process. I do not believe that if a party is dissatisfied with the decision at first instance that there should be any fee other than a nominal fee for an appeal.

Conduct of Hearings.

It is my experience that a number of hearing have to be adjourned because one or the other party does not bring with them appropriate documentation. I would ask the Minister to consider as part of any hearing process to provide that only in exceptional circumstances will matters be adjourned and that parties will be advised in advance that any documentation that they wish to rely upon must be produced. To facilitate early resolution and to reduce costs parties could be requested to furnish written submissions in advance with all relevant backup documentation. This could be exchanged. Written comments could be then further exchanged on a once off basis and copies of the documentation in its final format could be given to the decision maker.

This will often enable hearing times to be significantly reduced, create efficiencies, ensure that time spent is on issues which are in dispute rather than issues which are not in dispute. It may also facilitate resolution at that stage.

If I can give just a simple example if an employee claims that they did not receive a proper contract of employment, that they worked excessive hours and that they did

not get appropriate rest and break periods. These are all effectively matters of fact where there should be records and documents. By the exchange of documentation and the furnishing of documentation to the representatives if necessary on both sides and to the person making the decision they will have the documentation in advance. Either a document complies with the provisions of the legislation as regards a contract of employment or is does not. In respect of a person working and not receiving their proper breaks again the records will show whether they did or did not receive same. The same applies to complaints relating to non payment of wages for hours worked or claims under the National Minimum Wage. Records being furnished in advance would enable the parties themselves or through their representatives to make more appropriate and concise submissions. It will enable the person hearing the case to have had an opportunity to review the issues in dispute and to have a much focused hearing relating to the complaints. This will reduce time and costs.

It will also mean that employees will have the opportunity of withdrawing complaints if it is shown to them that appropriate rights or payments have been made or for employers to settle on the basis of non compliance.

There will be cases where for one reason or another an employer is not in a position to produce relevant documentation but saying this if that is the position then the employer in advance should advise as to what documentation they are in a position to produce and to produce same. From the employees perspective by submitting a detailed written submission in relation to their claim it will facilitate the employer being in a position to respond in advance.

Decisions.

I fully support the Ministers proposal that decisions would be public. I would ask the Minister to consider that only in exceptional circumstances would anonymosity be granted. Even then it may be not appropriate to grant to both parties.

Appeals from Workplace Relations Commission hearing.

I have a concern in relation to the Ministers proposal that a party who fails to attend or be represented at a WRC hearing, without reasonable cause, shall forfeit the right to appeal to the Labour Court. I would ask the Minister to consider instead in the case of an employee possibly a substantial fee for example €500 and in the case of an employer a similar figure and a percentage example 30% of any award made to be lodged for payment to the employee if the appeal is not processed or is unsuccessful. I believe there may be a constitutional right to a hearing.

Compliance.

At the present time the issue of an employee enforcing compliance, against an employer is extremely expensive. I would ask the Minister to consider that a decision of the Labour Court whether on appeal or for implementation would have the status of a Court Order and that the employee would be entitled to lodge same with a Sherriff for collection with it having the same status as an Execution Order, that they could apply to Register a Judgment against an employer by simply lodging a Certificate of the Registry of a Judgment in the High Court.

Where an employee receives an award there is still the issue of having the award paid.

For a world-class service to be fully functional the implementation of awards is an important criteria.

While it is outside the scope of the current review it is one that I would ask the Minister to consider as an urgent project. A simple review of the Labour Court website will show the number of decisions that have to go for implementation. This is only the start of the process and if a process is to get full buy in from all customers enforcement of decisions is important. While I proposed certain issues relating to the implementation of matters where an employer refuses to carry out a notice I would ask the Minister to consider allowing a representative of an employee where a decision has been made and has not been implemented to also be heard.

Significant penalties on an employer who fails to implement a decision in favour of an employee are matters that the Minister may wish to consider. There is the issue

where there would be non compliance with a compliance notice as to whether an employer in such circumstances should be debarred from State of Public Body contracts, be debarred from obtaining grants in particular employment related grants or from receiving refunds of Tax, VAT or PRSI over payments.

Fixed Charge Notices.

I believe that the Ministers proposals in respect of fixed charge notices are very timely.

I would also encourage the Minister to consider that if in a case that proceeds before a Workplace Relations Commission hearing that it appears to the person hearing the case that the employer has failed or refused to provide appropriate documentation as set out by the Minister in the document that in those circumstances that in addition to providing any compensation to the employee that the person hearing the case would be entitled to serve a fixed charge notice themselves without the necessity of going to a Compliance Officer.

Accepting inspection records as evidence.

I believe that this is a very useful procedure. Saying this there are cases where employees may have different documentation than that which is produced to an inspector. For example I have a number of cases where an employee receives one type of payslip yet where there has been inspections different payslips have been produced or the payslips which the employee has do not match up with the P35 return or the P60 document that the employee subsequently receives. I do believe that it is useful that the Workplace Relations Commission should be empowered to request copies of reports and/or request an inspection to be undertaken. I would ask the Minister to consider that where it appears that a case is going to revolve around records and that such records are not being produced, in advance of a hearing date, that rather than parties having to go to an expense of a hearing date that the Workplace Relations Commission would have the right in advance of a hearing to request a workplace inspection. This would be particularly relevant in relation to

claims relating to Payment of Wages, the National Minimum Wage Act of the Organisation of Working Time Act. These cases invariably revolve around documentation.

Promoting Voluntary Compliance.

I would ask the Minister to consider that where a Workplace Relations Commission or the Court make a finding against an employer that unless the employer has at the time of the hearing or the appeal produced evidence that they are now in compliance that the Workplace Relations Commission or the Court will automatically refer matters to a Compliance Officer the fact that there is a breach and that it appears to be ongoing and in addition to make orders directing an employer to comply with the legislation going forward. The Labour Court can already do this, for example in relation to the Organisation of Working Time Act under Section 28. I would also ask the Minister to consider where it is necessary to issue a notice requiring an employer to rectify matters that a Register of same would be kept and that that Register would be admissible in any future cases against the employer where a similar breach is claimed against the employer and that it would be taken into account in assessing any future award of compensation to an employee.

Hearing or Inspection.

I note the Ministers proposals in respect of this. In particular I note the Ministers proposal is respect of the National Minimum Wage. Cases involving the National Minimum Wage are inherently complex. Many of these cases involve significant tax evasion schemes. The most common is where portion of a person's salary is described as "expenses". In addition in many of these cases there is a dispute between the parties relating to the hours worked and/or what was actually working time. There are a number of cases currently going through the system where the employer, in the case of Drivers, may contend and have contended that only the time actually driving is working time where as the employees contending that other time was working time.

Where an employer and an employee both agree what the working time was what the wage was then an inspection process will work. In cases which I am involved in it invariably arises that there is a dispute relating to the hours actually worked. The issue of having a situation where a person whether an employer or an employee is not entitled to have their case heard and determined by an independent adjudicator at a hearing where they are entitled to represented if they so wish or to make submissions themselves creates constitutional issues in my respectful submission. I may however be wrong in relation to this. Saying this where there are complaints which issue which relate to matters where records will be of significant importance in proving or disproving a claim it seems appropriate to me that there should be a situation where the Registrar can request documentation to be furnished, and this would be from both parties, and/or determine that a preliminary investigation would be undertaken to review the documentation available and to give a report to the independent person, adjudicating on the matter, their preliminary findings.

I note there is the issue in relation to the issue of seeking compensation. The issue of compensation for example was given under the OWTA which derives from an EU Directive. The same would apply as regards the Terms of Employment (Information) Act which again derives from an EU Directive.

In relation to the matters set out in Table 2 I would be of the view that claims under the National Minimum Wage, a Registered Employment Agreement where they relate to what is a Payment of Wages claim, claims under ERO's or unlawful deductions should be ones where the Minister might consider the legislation being changed to allow for compensation.

Let me explain my reasoning.

The position as matters currently stand is that an employer can decide for whatever reason to simply underpay the National Minimum Wage or under pay an REA or ERO rate of pay. There is no penalty on the employer for failing to do so. The employee has to bring a claim. They then have to actually go through the process of seeking to collect the monies.

There is an argument for a Compliance Officer to deal with these matters initially but as part of an investigation and the matter then going to the Workplace Relations if

matters are not resolved at that stage between the employer and the employee to consider whether in all the circumstances it is appropriate to award compensation to the employee. There has to be a differential however between a situation where an employer makes a genuine mistake for example in applying an incorrect rate of tax or making a deduction, on a weekly basis for a uniform at €3 a week which the employer believed that that employee had consented to where other employees had equally consented to as opposed to a situation where an employer has over a period of time underpaid rates of pay. There is also the issue as to what is appropriate in all the circumstances in the particular circumstances of particular cases. There are some dreadful situations reported in Labour Court decisions where there has been significant underpayment of the National Minimum Wage to vulnerable individuals over lengthily periods of time. There is also the issue of providing for compensation for non payment of appropriate rates of pay. Employers who pay below the appropriate rate whether it is in an REA, an ERO or the National Minimum Wage gain an unfair competitive advantage. They put jobs at risk with employers who are compliant. The vast majority of employers are compliant with REA's, ERO's and the National Minimum Wage. Where employers fail to comply I would respectfully contend that the issue of a penalty as compensation to the employee is one that should be considered to be persuasive of an employer going forward to comply and dissuasive of employers to breach the legislation.

In respect of the other matters which are set out I believe that the issue of matters going to a Compliance Officer are absolutely appropriate, other than in respect of the provisions of Section 3 of the Terms of Employment (Information) Act which is covered by an EU Directive. In respect of the matters set out in Table 3 these are ones where, following EU decisions an individual is entitled to compensation and where in setting compensation the European Court of Justice has held that the awarded compensation must not only compensate the employee for the economic loss but must be persuasive and dissuasive of an employer going forward.

Workplace Relations Website.

I believe that this is a fantastic proposal. Everything should be in one place.

The Labour Court.

In principle I agree with all of the proposals in relation to the Labour Court but would make some small comments.

Appeals of WRC Hearings.

The Minister might consider a provision that where an appeal is lodged the Labour Court can, in advance of scheduling a case for hearing require a detailed written submission prior to a case management hearing.

That the Labour Court could direct case management meetings for the purposes of confirming what issues are in agreement from the documentation furnished and to determine what is actually under appeal. In some case it will be the facts. In other cases it will be the Law and in other cases it will be a combination. It may make sense to allow the Labour Court provision for directing the format of further submissions to be put in after a case management meeting with the parties being requested to address specific issues and/or to provide specific documentation and the format in which it is to be provided and by when.

Fee or Deposit for making an appeal.

I believe that there is an issue which I have raised previously in respect of any fee or deposit for making an appeal. I believe that there will need to be a differential between a case where an individual did not prosecute their claim or defend same and one where a person is genuinely concerned. In respect of the level of any fee there is also the issue of it prohibitive where both parties have appeared at an initial hearing.

I also believe that the Minister might consider that there would be no fee where the appeal is only on a point of Law i.e. the facts are accepted it was just the application of the Law by the Workplace Relations Commission which is in dispute. In such cases the Labour Court could determine that the appeal would be on the basis of

written submissions with both parties having a right to a comment, in writing in the others submissions with the hearing being only scheduled after the Labour Court have determined that all the appropriate legal arguments have been put forward.

There are also cases where a genuine mistake is made by the person initially hearing the case where a particular fact is accepted from one party or the other with the aggrieved party believing that their version of events being accepted on the basis of the evidence that they provided.

The Minister might consider a situation that where an appeal is lodged and the person lodging the appeal can put forward a genuine and coherent reason which is limited to particular facts or a particular fact that is an issue and which is not simply another run of the case that in those circumstances there would be the potential for waving any fee such a decision to be made by the Labour Court after hearing matters.

I would also ask the Minister to consider that in genuine hardship cases whether for the employer or the employer that there would be a potential to waive the fee.

Saying this, if the fee is not in excess of say €150 then it will still defer people bringing cases simply to give them another run. There is then an issue which is that the Court should be able to impose a fine if they believe that an appeal is vexatious.

I do believe that it is possible that a Officer of the Labour Court sitting alone on cases would be able to advise parties because they would not be sitting hearing the case as to whether on the documentation produced there was an issue that the appeal is misconceived and to advise the parties that if they proceed with same that there is a risk that they would be subject to a Court fine for bringing an appeal that was unnecessary improper vexatious or misconceived.

Expansion of the Court

I believe that the proposed expansion of the Court by the Minister is an enlightened proposal.

Operational Efficiencies.

There may an argument to state that in relation to issues such as management conferences for adjournment applications or routine applications that an ordinary member of the Court and not necessarily the Chair or the Deputy Chair could sit. I accept that as regards the examination of the merits of certain appeals that there is a benefit in having the Chairman or a Deputy Chairman deal with same.

My experience of the Labour Court is that the ordinary members are highly experienced and competent individuals and there is no reason to believe that they could not deal with those forms of applications where the need arises. While it may be beneficial to have a Chairman or Deputy Chairman sit, there can be occasions where it would be beneficial to give the Chairman of the Labour Court the potential to nominate an ordinary member if it was necessary such as in the case of sickness or illness.

Dual role of the Court.

I completely agree with the Ministers evaluation of the dual role on the Labour Court.

The evidence supports the proposition that the Labour Court is more than capable in dealing with employment rights issues and industrial relations issues. Anybody who regularly practices before the Court will be conversant with their immense knowledge of both the Law and Industrial Relations practice. I fully support the Ministers view that there should be no distinct elements within the Court and that all cases should be capable of being by whatever division in whatever format the Chairman of the Court considers appropriate.

Enforcement of Awards.

There is a need for a robust method of enforcement of awards. I have commented on this previously. The basis of having a world-class Workplace Relations Service is not only that the decisions are world-class, which there is every reason to believe they will continue to be as regards the methodology that is adopted by the Labour Court in setting out their decisions which is evidenced by the fact that very few of their decisions of ever overturned on a point of law. The real test however will be to ensure that decisions are actually implemented. The methodology being proposed by the Minister appears to me, to be that settlement of disputes at an early stage is the desired effect for the purposes of creating harmonious workplaces, to avoid

disputes going to hearing, and by reducing the number of disputes going to hearing to reduce the costs to the State. All of that is undermined if a recalcient employer believes that by simply ignoring the process or taking part in the process knows that or believes that it is going to be difficult for the employee to enforce any decision. Where a recalcient employer knows that any decision can easily be enforced against them it will encourage compliance with the legislation in the first place and in the second place where a claim is made encourage early resolution.

The current method of enforcing decisions is cumbersome and expensive.

Enforcement is an inherent part of the process. Real, effective and cost efficient enforcement for employees is important. This is not only for the employee who brings a claim against a recalcient employer. It is also important for those employers who are compliant with employment law and apply the Law and best practice in the workplace. We are in challenging economic times. An employer who is compliant with the Law should not see himself or herself in a situation where they are put at a competitive disadvantage because a recalcient employer, who is a competitor of theirs, operates contrary to the Law knowing currently that it will take an employee considerable amount of time and money to enforce a decision then that puts the compliant employer at a significant disadvantage.

The basis of any world-class Workplace Relations Service having respect from both employers and employees is that both know and understand that decisions as regards their enforcement will be enforced quickly, efficiently and in a cost effective method for an employee whose claim is upheld. This goes hand in glove with the Ministers approach to avoid unnecessary cases going for hearing and unnecessary appeals which are without merit.

Employees will accept, and it will reduce claims which are unmeritorious where there is a deposit, no matter how small that they know that they will lose if it is held that there claim did not an arguable case. Similarly for employers the enforcement of awards by a system which is seen to be effective will encourage early resolution.

I am delighted to note that the Minister will introduce a new and more effective method of enforcing awards. It is a challenge. There are various methods which

have been proposed. It is however an inherent element of this process and without it being addressed there is a danger that early resolution will not work.

Governance of the Workplace Relations Commission and the Labour Court.

I believe that the Minister has set out very fair, reasonable, and, appropriate methodologies in respect of same.

Appointment and Staffing.

I fully appreciate that it is appropriate at the present time to provide that the adjudicators will be drawn from the existing offices within the Workplace Relations Service and that the skill and experience of the Equality Mediation Officers and the existing panel of Rights Commissioners will be utilised.

In relation to future appointments I would ask the Minister to consider that in relation to the post of a WRC Adjudicator that this would be through an open and transparent system from an external panel. The reasoning for same is that it would be seen that the WRC Adjudicator is completely independent. Appointments on the basis of merit alone from persons who apply for the position and are independently assessed will enforce the independence of such individuals.

This is not to say that civil servants who are recruited or assigned would not have that same level of independence but it is the issue of perception. The inherent jurisdiction of a Rights Commissioner currently in effectively as regards the level of compensation which can be awarded in excess, of the jurisdiction of a Circuit Court Judge. Even an individual who is a National Minimum Wage worker who works 40 hours a week who brings a claim for a breach of the Organisation of Working Time Act potentially has a case whose maximum value is €36,000. At the present time Equality Officers have very significant jurisdiction. Their independence has not been questioned. However if we are to have a world-class Workplace Relations Service in the future there is a strong argument, in my opinion, that the individuals hearing these cases should be seen as completely independent of the State. That does not mean that civil servants should not be able to apply for the positions. What I am

saying is that they should be, but on the basis that they take effectively a leave of absence from the civil service if they are successful.

I am asking the Minister to consider that all appointments as WRC Adjudicators should be through an open and transparent system in keeping with recognised best practices in Public Appointments. This means that everybody can apply but that a civil servant is applying that they will go on leave of absence for the period of their appointment. Their appointment would therefore be on the same terms and conditions as regards pay, pension, sick leave payments and holidays as any other appointee. As currently my understanding of matters is that Rights Commissioners do not receive paid holidays, pension, sick pay, payment during sickness and are only paid for the days that they actually sit and hear matters that Workplace Relations Commission Adjudicators who are on different terms and conditions performing the same duties could be seen as undermining the independence of one particular group. However having all Workplace Relations Commissioner Adjudicators on the same terms and conditions and applying for the position on a level playing pitch in line would recognise best practices in Public Appointment will create confidence in the independence, ability and commitment of those persons in executing their duties. Equally having persons appointed independently would mean that where workloads increase or decrease there would be flexibilities for the service and the number of adjudicators would be decreased if necessary with no cost to the State having to redeploy individuals.

As regards the appointment of ordinary members of the Labour Court there is a strong argument for remaining with the current system which is working extremely well.

Title of Adjudicators

I would ask the Minister to refrain from using the title “Adjudicator” and instead use a title “Workplace Relations Commissioner”. While titles may not be relevant they do provide a degree of gravitas just as District Justices used be called “Justice” and now are called “Judge”. Both employers and employees are all going to have very significant issues for them determined and confidence in the status of the person hearing the case is important. The title Workplace Relations Commissioner would more readily associate them as being at the next level of the process and be seen as

the fined arbitrator except where there are real issues to appeal. The perceived status of the person hearing a case will often encourage parties to accept their decision even if they do not agree with it. This may seem strange but it is a fact that persons perception of the authority and status of an adjudicator is important.

Appointments under Industrial Relations Acts.

I would ask the Minister to continue the matter of appointing Rights Commissioners as regards the new adjudicators, whatever called.

The reason for this is that they are empowered to assist in resolving disputes. A high percentage of cases listed before Rights Commissioners settle just before, during or after the case because of the role of a Rights Commissioner they can effectively offer to speak to both parties. Often this is the catalyst for a resolution.

The best result for employees and employers is that cases settle. The earlier the better but even at the 11th hour it is beneficial. Sometimes just explaining the issues gets both parties to agree to resolve matters. Rights Commissioners are very well skilled at this.

In equality cases I believe Equality Officers when cases are set down for hearing are assessed on the number of cases they deliver judgments in.

I believe that any new adjudicator, whatever the title, should be assessed also on cases that they settled. Giving parties on the day of the hearing a time to settle between their representatives or recognising a willingness of both employers/employees to do so, at the hearing, and facilitating same results in a resolution. A resolution is always better than a decision. It helps employers and employees. It encourages and supports harmonious workplaces and reduces conflicts going forward. Confidential settlements between parties are always more conductive to re-establishing good relations than a published decision. Yes there has to be cases where decisions issue but resolution should be the primary focus at all stages. The Labour Court in appeal cases currently often give indications which results on the parties resolving disputes.

I would ask the Minister to consider that at all stages during the process that resolution rather than decisions should be encouraged. It has the added advantage of reducing costs to the State in freeing up time which has to be utilised to deliver a decision to be used in dealing with other cases and thoroughly making the process more effective. At all stages mediation should be an option.

Data Protection.

I would ask the Minister to consider allowing the Workplace Relations Service share data with the Revenue Commissioners/Social Protection in particular in cases where tax evasion and social welfare fraud is identified.

Having embedded Officers of the Revenue Commissioners/Social Protection Officers in place.

As a Solicitor who deals with a considerable amount of employee claims we are regularly coming across cases where there is significant issues of tax evasion where payslips do not match P60 documentation numerous other tax and social welfare fraud schemes are operated by employers. Claims by employees under various pieces of legislation often bring to light the schemes. By having embedded personnel. More experienced in tax and Social Welfare legislation they would have the ability to assist Compliance Officers and Workplace Relation adjudicators on the interpretation of documentation and in appropriate cases to undertake investigations or to prepare documentation for sending to the Revenue Commissioners or to Social Protection for the purposes of instigating investigations or prosecutions by them. Where there is Social Welfare fraud or tax evasion this is a real cost to the State. Equally it undermines compliant employers as regards giving a competitive advantage to an employer who puts in place a tax Evasion and Social Welfare fraud.

An alternative to this is to provide in Employment legislation that if a Workplace Relations Commission adjudicator or the Labour Court identify same having occurred that there would be an automatic legal requirement for same to be reported.

Again I would be of the view that the very fact that such a position can be in place will act as a deterrent.

There would also be the issue of reporting all matters to the Revenue in Payment of Wages claims so as to ensure that where an award is made that not only is the award paid, but that the appropriate tax, PRSI and USC is accounted for. This would be particularly relevant in cases of Payment of Wages claims and National Minimum Wage claims. It is my strong belief taking in account of the evidence that I am seeing before me in cases that are coming to this office that a limited number of highly qualified dedicated staff from the Revenue and the Department of Social Protection while it may appear at first sight to be a cost to the state would in fact be self financing. It would also mean that as regards the transmission of Data to the appropriate regulatory authorities that there would be a methodology in place with dedicated individuals to ensure in association with other individuals working within the service that only appropriate information relevant to an investigation would be furnished to the Revenue/Social Protection.

Mediators

I would ask the Minister to particularly consider current Mediation Offices in the Equality Tribunal for roles as Mediators. They are very skilled in this. I would ask the Minister, however, to also expand the role to that of facilitator/conciliator.

Often employment cases can be more easily resolved where a facilitator can speak openly on even the merits of the claim or defence especially where parties are represented. Straight talking often resolves matters. While this is an expansion as of what “Mediation” is legally defined as, it is my view that resolution of disputes is more important than anything else. It reduces costs to the State, employers, and employees. It minimises disruption of the workplace and enhances the potential for the parties moving forward harmoniously or at least parting ways on better terms.

The hallmark of any process is that matters are resolved as early as possible but in any event resolved without a decision. Resolution means the parties agree and agreement to resolve disputes assists the State, employees and employers.

Conclusion.

I must commend the Minister and the staff who have been working with him on the blueprint. The blueprint exceeds my expectation as to what the process was to achieve. The comments which I have made are minor points.

Since the process commenced I have seen a significant improvement in the manner in which claims are being dealt with. The Workplace Relations Customer Service is working very efficiently and above my expectations and hopes.

I believe that we are very close to the Minister actually delivering a world-class service. I am particularly pleased to note that the Minister has set the high goal of delivering a world-class service. The Minister has not sought to produce simply a better service, a more effective service or a more efficient service. The Minister and his staff in this blueprint are effectively and in a real way seeking to deliver a world-class service.

I must commend the Minister on the work that has been done to date. It is impressive. It is clear that the Minister has taken on board the best of the proposals put forward as part of the initial consultation and is seeking to apply matters in an integrated, modern and effective methodology to provide this world-class service. The concept of providing an integrated service has been discussed for as long as I have been involved in Employment Law. We now have a situation where we will within two years of the Minister taking office have had an in-depth review, consultation process and legislation in place. This is staggering in its effectiveness and speedy resolution of the process. I do believe that when this process is completed it will make employment disputes cheaper, more effective, more efficient and speedier for both employers and employees. I also believe that it will make matters far more effective and efficient and therefore more cost effective for representatives of employers and employees whether they be Unions, employer bodies, legal representatives or professional HR representatives therefore by extension reduced costs to employers, employees and the State which must be welcomed.

I commend the Minister on his blueprint and on setting the high goal which he has set. I have made the comments I have made as a customer of the Service and hope they can be accepted as being constructive comments.

Kind Regards,

Yours sincerely

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ENDS//

9. Michael O'Toole, Consultation Response

Subject: The Right to procedural Fairness and to be treated with respect as an equal, capable and responsible human Being in the Workplace and in the Environment.

Greetings! Thank you for this opportunity to have some input in the drafting of The New Blueprint To Deliver A World-Class Workplace Relations Service. April 2012. A Chara, Yes! There is an urgent need to have better communications and clarity of purpose in the workplace so that we become more effective and relevant in the reality of Advancing Technology and the Global Economy.

First! We Must start with our Strengths! What are we good at??? We are good at Law! We are good at farming, Fishing! And we are Good in Education. In my experience working as a caretaker in a Secondary School. The structure of management and authority should be looked at!

Who is going to be responsible for what and identify the areas that are resisting change and offering value as a fundamental pillar of society.

The Curriculum should be updated! The Hierarchy and structure of management should be looked at, and made more relevant and efficient.

In Matthew25:14. The Parables of The Talents we are advised to invest in our talents and resources wisely, and not to conform to outdated thinking and work practices that are not working in our Economy and 21century Ireland. Change is coming whether we like it are not, are we preparing for it?.

Here are some of the areas that can be improved on in order to make Ireland a better place to work and do business in. Reforms is needed in the area of Finance: The revenue and tax system must be made affordable and Transparent and easily understood.

Reforms: in the legal service. Reforms: in Government legislation and how business in done to make it all cost effective. We are good at technology, however it is a fast changing industry and it is very difficult to control. Not like the transportation Industry of the past like Railroads and canals with their watercourse for barges and boats. In the Business Section of the Sunday Independent today April 29, 2012. In page tree; Candle-maker's 500-year Journey from Flicker to everlasting flame. The oldest trading company in the World is in Blanchardstown.

The article goes on to explain that 'With five firms closing down every day in Ireland.' We must focus on long-term business and Industries.

How long will a business last? Will it be in operation in 5, 10, 20, 50 are a 100 years? Take farming example it has been there for a long time it will be there in the Future. And so will the Food and Health business and Industries. We must take a long-term view and invest our time and resources in what is relevant and giving value and will not be easily replaced by competition from other countries and from over-seas. Well that is all for now, I hope that this on-going discussion will continue and that it will be of value to those who are responsible for planning a better business environment for Ireland. God Bless!

Michael O'Toole.

ENDS//

10. Kilkenny Council of Trade Unions, Consultation Response

Re:Workplace Relations Document — Observations

A Chara

We refer to the above and list hereunder our observations regarding the "Blueprint to Deliver a Work-Class Workplace Relations Service" document dated April 2012.

As has already been stated the concept of simplification of claim forms and the structure through which claims proceed is a welcome one provided it is not done at the expense of inhibiting employee's rights in anyway.

OUR CONCERNS:

1. The document fails to detail the penalties for employers who break Labour Law. Penalties have to be sufficiently high so as to act as a deterrent thereby reducing breaches of the law and the need to access the services of the state which the document tells us, costs €20 million euro per year.

2. **ENFORCEMENT** of Awards needs to be a simple procedure enacted by the relevant government department without any additional costs for the employee.

TIME LIMITS: Time limits for the submission of claims should be set at least at one year with an extension to two years where reasonable cause (not exceptional circumstances) can be shown. Six months is now the shortest period with two years for redundancy and six for notice. Why set the time limit at the lowest level?

4.**CODE OF PRACTICE:** Grievance and Disciplinary Procedures, S.I. No 146 of

2000 should not be revised or changed for "small owner-managed business. The size of the enterprise should not be a determining factor in deciding on employee's rights.

5. **REGISTRAR:** Registrar must not be given the power to reject claims. Certainly it is a fundamental tenet of natural justice that the person with a grievance has a right to be heard. To give a person or persons the power to reject a claim which the Registrar believed to be incorrectly grounded could lead to a complete lack of confidence in the entire system. An appeal system does not correct this problem. In short, a claim submitted must be heard. Certainly the Early Resolution Service would have a role here in advising the parties about the claim but the claimant must not be denied a hearing if they so wish.

6. We welcome retention of the Collective Concilliation Service.

7, **FEES FOR MAKING A COMPLAINT:** This must not be introduced. The cost of the system can be reduced by proper penalties which serve as a deterrent and therefore reduce the number of cases going forward.

8. **PUBLICATION OF DECISIONS:** We would be greatly concerned if the employees name appeared as an employee who pursued their legal entitlements could then be "blacklisted" when going for another job.

9. We welcome the time for a decision to be issued at 28 days and also the fact that a party who fails to attend a WRC Hearing would forfeit their right to appeal.

10. We totally reject the idea that an appeal could be dismissed by the Labour Court without a right to a hearing.

11. The section on page 21 under the title "Fixed Charge Notices" needs to be removed. The matters of employment conditions and pay slips are a matter of law, why are we merely asking employers to comply and if they do so in 14 days all is forgotten? We would certainly welcome that same approach for other laws, such as, car tax. Just tell the Guard stopping you I'll pay it within 14 days and then nothing happens!!

12. **COMPLIANCE OFFICERS:** We are very concerned as to how this system would

operate in practise, The paragraph (3rd/ On page 24) seems to imply that if the OWTA is not complied with the Compliance Officer would ask the employer to comply but there is no mention of the back money due to the employee or any penalty. As you are aware, if an employee takes holiday money from the employer they can be dismissed, yet are we saying that if an employer takes holiday money from an employee, we'll just ask him to give it back!!
Also an employee should have the right to appeal the finding of a Compliance Officer.

13. Where a law is broken an employee must have an option for a hearing — just having an inspection (paragraph 5, page 24) would not suffice.

14. **LABOUR COURT:** The Labour Court must not dismiss an appeal without a hearing and again no fee should apply.

15. **ENFORCEMENT OF AWARDS:** Enforcement should be through one body, penalties should act a real deterrent. Non-compliant employers should have to return grant aid.

16. ANNUAL APPRAISAL OF STAFF: We would be concerned that this could impede the objectivity of decision makers.

In addition to the above points we note that there is no mention of the right to trade union representation and the obligation on employers to respect the fundamental right of workers to be represented by the union and to have the union negotiate collectively for them. This is the opportunity to have this long outstanding matter dealt with now in the Workplace Relations (Law Reform) Bill 2012.

We trust the above is of assistance to you and thank you for taking the time to read/study our document.

Yours sincerely

_____ _____

Phil Funchion **Paddy Kavanagh**
Secretary **Chairperson**
ENDS//

11. American Chamber of Commerce Ireland, Consultation Response

RE: Reform of Ireland's Employment and Industrial Relations Structures

Dear Minister

This submission is made by the American Chamber of Commerce Ireland on behalf of its members in response to the Department of Jobs, Enterprise and Innovation's Blueprint document regarding the reform of the State's Employment and Industrial Relations bodies.

Following a consolation process with our members, we have established that there is significant consensus amongst them that structural reform is necessary to streamline and improve the mechanisms necessary to develop harmonious and productive workplaces and to assist employers and employees to avoid disputes.

We would like to congratulate the Minister and officials for the speed and comprehensive nature of this document and we support and commend the significant progress which has already occurred through practical and meaningful changes to processes and procedures such as the Workplace Relations Customer Service, the amalgamation of the previous 30 complaints form into one Single Complaint Form and the introduction of the workplace relations website.

Our members welcome the introduction of the pilot Early Resolution Service and await the evaluation and final design of this service. We also commend the proposed next major step to establish a two-tier Workplace Relations structure to replace the existing five. We believe that this new streamlined approach will allow for a more effective and efficient complaints process and look forward to its implementation at the end of the year.

We note from the Blueprint document that while feedback is welcomed, it is not intended to cover old ground. For this reason we limit our input to the following observations in relation to the proposed new structures:

1. Single Complaint Form

Our members welcome the introduction of a single point of entry through the' Shigte Complaint Form and are of the opinion that it is an important part of improving the complaints process. We believe, however, that the guidance note attached to this complaint form must clearly state the importance of sufficient detail; the complainant must set out clearly the facts on which the complaint is based and the reasons for the complaint. The complainant must also be clearly advised that a claim will not be processed until correctly completed with sufficient detail. The guidance note should set out that the form is to be completed to a standard that communicates the necessary information to the other side and if not, it shall be rejected. It is a basic requirement of fair procedure that a respondent is in a position to know the complaint against it.

We also welcome the introduction of the Registration service and suggest that the form should specifically state that an element of the role of the Registrar is to check complaints on receipt and reject or redirect incomplete complaints, complaints which are out of time or which are incorrectly grounded.

Consideration should also be given to whether penalties should be introduced for any person who gives or dishonestly causes to be given, information, which is known to be false or misleading in any material respect.

2. Fee

Our member companies are strongly of the view that a fee for making a complaint should be introduced as well as a mechanism to deter vexatious or nuisance complaints. Our members acknowledge and understand that the complaints procedure should be accessible to all but it is of deep concern to our members that there is an emerging trend of frivolous and vexatious claims.

There must be a deterrent to the filing of vexatious claims. One way to achieve this is to provide that costs may be awarded against vexatious parties or those who fail to turn up without good reason. Our members believe that an element of burden sharing should be introduced to ensure fairness of procedures. Just as any claimant before the courts must expend some money in embarking on litigation, we suggest the same apply to claims under employment rights legislation. We recommend an initial administration fee in the range of €100-€200 as a contribution towards the service.

The Employment Appeals Tribunal may not award costs against any party unless, in its opinion, a party to proceedings has acted frivolously or vexatiously. We recognise that this is rarely used and is subject to limitation with regard to the costs imposed. We suggest that this mechanism be further enhanced and extended to all complaints filed to the new First Instance Body with a provision for no limitation on costs as a meaningful deterrent to vexatious complaints.

3. Early Resolution Process

Our members are committed at all times to the resolution of disputes wit in - the workplace. Accordingly, we support an enhanced role for new structures which promote early resolution of disputes within the workplace. This would include a requirement that before the state's dispute mechanisms can be utilised, claimants must exhaust internal dispute resolution procedures and/or alternative dispute resolution mechanisms, including mediation or conciliation. This will encourage those employers who either have no such procedures, or those with insufficient ones to put in place appropriate internal structures. The workplace relations website should set out clear guidance for both employers and employees in this regard. Progression to the use of the workplace relation's formal complaints process should be subject to evidence of exhausting such internal processes.

4.Conduct of Hearings

We acknowledge that the Blueprint identifies inconsistencies in procedures of hearings. Our members believe that it is necessary for uniform procedures to be introduced to ensure all hearings comply with the principles of natural and constitutional justice. We believe that it is necessary to formalise the

hearing procedure to ensure that all stakeholders understand the seriousness of taking such claims, to ensure consistency and fairness and to maintain good order and to aid effective conduct of hearings. The procedures currently used by the Employment Appeals Tribunal in unfair dismissal cases require all evidence to be given under oath. We recommend that the procedures to be applied in the new two-tier structure require similarly that evidence in all complaints be given on oath. This would ensure consistency in the proceedings and quality of evidence in all adjudicated matters.

5. Appointment of Adjudicators

The Chamber commends the commitment outlined in the Blueprint document to establish clear criteria with regard to knowledge, experience, qualifications and suitability for adjudicators. We agree that structured, intensive and specialised induction training must be given and regular ongoing training provided to ensure that all decision makers are capable of handling the variety and complexity of cases before them. This ongoing training should cover legislation, the key aspects of fair procedures and relevant laws of evidence.

Our members agree that a just, fair and efficient adjudication process can best be achieved by ensuring that the adjudication process is provided by independent, professional and impartial decision-makers, selected on merit through an open and transparent method. We also recommend a more meaningful performance management system with effective oversight and continuous monitoring of decisions issued.

6. Database of decisions

We are of the view that the introduction of the new workplace relations website positive step in providing clear and comprehensive employment, equality and industrial relations (employment related) information to assist in the resolution of disputes at workplace levels.

We welcome the introduction of a database of previous decisions and suggest that in order for it to be beneficial it must provide up-to-date, accessible and searchable information with regard to specific types of complaints to all stakeholders.

We believe that this development would serve to expedite the hearing of cases before the dispute resolution bodies and could ultimately result in more settlements being achieved through the predictability of outcomes based upon a database of precedent decisions.

7. Feedback

Our members are concerned with the need for the introduction of a mechanism for feedback for all participants to voice any concerns on the new bodies and procedures. Both complainants and respondents should have an opportunity to have their concerns addressed and included in any ongoing analysis of the effectiveness of the new structures and individual adjudicators. We suggest that this could further enhance and improve the service and be utilised as an element of the performance management mechanism.

Minister, we value our on-going interaction with you and your officials at the Department of Jobs, Enterprise and Innovation. Please be aware of the full support of the American Chamber of Commerce Ireland in relation to the retention and growth of foreign direct investment in Ireland.

Sincerely,

Brian Cotter, **Commercial** & **Public Affairs Director**

Joanne Hyde, Eversheds Ireland, **Chair Employment Law Group**

American Chamber of Commerce in Ireland

ENDS//

12. Equality and Rights Alliance, Consultation Response

Response to the "Blueprint to Deliver A World-Class Workplace Relations Service" April 2012

Introduction

Equality and Rights Alliance (ERA) welcomes the opportunity to respond to the proposals set out in the "Blueprint to Deliver a World-Class Workplace Relations Service". For the purposes of this submission, ERA has a particular focus on the proposal to integrate the Equality Tribunal with the first instance body.

About Equality and Rights Alliance

ERA is a coalition of 171 civil society groups (NGOs, and trade unions), academics and individual activists working together to protect and strengthen the statutory equality and human rights infrastructure[1].

Response to Blueprint

ERA supports Minister Bruton's ambition for reform of this area and his goal of developing a "world class" work place relations service and employments rights framework.

There are some welcome proposals outlined in the Blueprint such as a focus on reducing delays by setting targets to schedule hearings within three months of complaints being lodged. Also, the Blueprint usefully recognizes the need for a new and more effective method of enforcing awards. Across Europe equality tribunal type bodies have faced this issue and follow-up has been prioritized in a number of instances. Unfortunately the Blueprint is silent on how this is to be done.

[1] For a list of our member organisations : http://www.eracampaign.org/about-us

There are, however, a number of worrying proposals set out where, it would seem, insufficient consideration has been given to the unique nature of equality complaints and to the need for an accessible infrastructure for people seeking redress under the Employment Equality Act 1998-2008 and the Equal Status Act 2000- 2008[2].

From an equality perspective, the starting point for any consideration of the proposals for the Workplace Relations Service should be the issues of under-reporting and accessibility. There are remarkably high levels of under-reporting of incidents of discrimination. Research data from the CSO, analysed by the ESRI and the Equality Authority, indicates high levels of perceived discrimination and low levels of reporting discrimination. The groups most likely to experience discrimination are the least likely to report it[3].

Accessibility is central to ensuring the new body does not further aggravate the current situation of under-reporting. The Equality Tribunal has a valuable and strong commitment to accessibility and it is important that this should be mainstreamed into the new structures.

<u>Key issues of concern regarding the Blueprint proposals from an equality perspective:</u>

- Some of the proposals in the Blueprint may be in breach of EU anti-discrimination Directives and the EU Charter of Fundamental Rights:

  - There is no guarantee of an independent hearing of a claim at the first tier. The Blueprint allows the state to decide through legislation the most appropriate method of resolving disputes.

  - The proposals regarding the striking out of claims without a hearing and the need for claimants to send written submissions setting out why their claim should not be

[2] ERA has sent out the key issues in regard to the unique features of the Equality Tribunal that should be preserved within the new structures in our previous submission to the Department: **http://tinyurl.com/6bfsmx5**

[3] Overall 12.5 per cent of the Irish population aged 18 years and over said that they had been discriminated against in the preceding two years. 9% reported discrimination accessing services and 7% reported Work-related discrimination. In 71% of cases discrimination was experienced on more than one occasion. 60% of those who experienced discrimination did nothing about it. Only 6% of those who experienced discrimination took any formal action including taking a case under equality legislation (Russell et al 2008 "The Experience of Discrimination in Ireland-Analysis of the QNJIS Equality Module" the ESRI and the Equality Authority)

struck off, do not appear to take account of issues of accessibility for groups under equality legislation. Not every potential claimant will have the requisite literary capacity to deal with written submissions or the resources to access to legal advice for this purpose. The current investigative model of the Equality Tribunal is of assistance in this regard.

- There is a requirement under the EU Directives to shift the burden of proof in cases of discrimination once the complainant has established different treatment. This procedure has been important in enabling people to bring forward cases of discrimination. It is necessary and important that it should continue but no reference is made to it in the Blueprint.

- The introduction of a €50 fee for making a complaint will act as a barrier to those without means and will serve as a disincentive to those already concerned about the risk of taking a case. This is particularly problematic in cases of discrimination relating to access to employment, dismissal and access to goods and services. The claimant may, for example, be a migrant worker who has not had their wages paid, or a person with a disability who has been denied access to employment and has no income other than social welfare. We strongly recommend that this fee would not be imposed.

- The Blueprint does not appear to have regard to the fact that the majority of potential claimants do not have access to legal advice or union support. This is particularly true of potential claimants under the equality legislation who may not even be employees but have complaints concerning access to employment.

- The Blueprint is lacking in clarity as to whether an adversarial or investigative approach will apply to the hearing of cases. In one instance the Blueprint notes that the *'officers role will be to hold a hearing where both parties are given the opportunity to be heard and to decide on the matter*[4]*'* which indicates a more adversarial approach, yet in another section the Blueprint notes that *'hearings of the WRC will not follow strict rules similar to courts of law'* and *'adjudicators will have a level of*

[4] Pg17

discretion to determine their own procedures in the conduct of hearings[5]*'.* It is critical that the investigative approach to equality cases is maintained. Equality Officers currently have a unique role in seeking the facts, investigating the facts, applying the relevant law and determining the issues. This investigative role is the cornerstone of the legislation.

- There is no reference in Table 3 'Complaints to be dealt with by inspection' to equal pay cases and the powers of the Equality Tribunal to inspect workplaces in hearing these cases. Such cases are difficult to prove and receive considerable and specific mention in the equality legislation.

- While the Blueprint very usefully underscores the need to develop a culture of compliance among employers, this stated commitment is not reflected in the detail. Also there is no reference to the equally critical requirements of effective and dissuasive remedies. European anti-discrimination law explicitly states the right of victims to effective, proportionate and dissuasive remedies. The proposed penalty of €150 for failure to provide for example a payslip or failing or refusing to record deductions would not appear to be an effective, proportionate or dissuasive remedy.

- The Blueprint makes no provision for any type of *Amicus curiae* intervention (which currently exists in the equality legislation). It is also regrettable that the opportunity has not been taken to make explicit provision a case to be taken as a test cases or group or class actions. These would represent a far more efficient use of limited resources than requiring every individual to lodge separate claims.

- The Blueprint allows the registrar to strike out claims 'which are not properly grounded'. This also favours parties with greater resources, capacity and access to legal advice. A claim should not be struck out simply on the basis of a time limit or a view that it is not properly grounded without an independent hearing of the matter. A proper case management system would allow for the proper but considered disposal of matters that are in the incorrect forum.

[5] Pg 18

- The conciliation and early resolution service suggested appear to be a diminution of the mediation service currently offered by the Equality Tribunal. The Blueprint notes that a "*range of intervention tools will be used including email and telephone communication and, only in exceptional cases meeting directly with the parties".* This would not appear to be sufficient or appropriate for the mediation of equality claims.

- While uniformity of time limits is to be welcomed, the Blueprint proposes that time may only be extended to twelve months "in exceptional circumstances". This is a considerable diminution on the current provisions, for example, the Employment Equality Act allows time to be extended for up to twelve months for "reasonable cause". Overly strict time limits may lead people to lodge claims simply to comply with time limits and may inhibit resolution of claims.

Equal Status Complaints

A significant gap in the Blueprint is the absence of any mention of what is proposed regarding the equal status function of the Equality Tribunal. ERA believe that the equal status function of the Equality Tribunal should move to the new body.
ERA strongly recommend that equal status cases would not be transferred to the District Court. In 2003, cases under the Equal Status Act 200-2008 involving licensed premises were moved to the District Court under the Intoxicating Liquor Act 2003. Research on the impact of this transfer found that *"the changes in Jurisdiction has resulted in an almost complete reduction in complaints taken under the law in relation to prohibited acts of discrimination*"[6] .Between September 2004 and February 2005 only nine claims of such discrimination were lodged[7] compared to an average of 514 claims annually taken with the Equality Tribunal between 2000 to 2003[8].

[6] Gogan, S (2005) "From the Equality Tribunal to the District Court" research for the Clondalkin Travellers development group. Pg 5.

[7] Sunday Tribune, Travellers pub claims fall to nine by Michael Clifford 19th June 2005.

[8] Gogan op cit pg 6

The hearing of equal status cases in the District Court would result in a number of significant barriers of access and outcome for claimants:

- The adversarial nature of the District Court is in direct contrast to the more informal investigative model applied in the Equality Tribunal. This will act as a significant barrier to claimants seeking redress under the Equal Status Acts. In the Tribunal, unlike the District Court, neither the complainant nor the respondent has to mobilize or present legal arguments. They merely have to present the facts of the case and the equality officer then investigates these facts, applies the relevant law and makes a finding. This is key to the accessibility of the Equality Tribunal.

- The adversarial nature of the District Court lends itself to both respondents and claimants requiring legal representation. There is no broad right of representation before the District Court as there is before the Equality Tribunal. There is also no provision for granting civil legal aid to enable claimants to meet the costs incurred in taking such cases.

- Claimants and respondents before the District Court may be liable for the costs incurred by the other party. This is not the case for parties seeking redress to the Equality Tribunal.

- The lack of data on cases taken to the District Court would have a significant impact on building a body of case law in regard to equal status cases. The body of case law produced by the Equality Tribunal is extremely important in informing policy, practice and legislative development in the area of equality and anti-discrimination.

ENDS//

13. GLEN – Gay and Lesbian Equality Network, Consultation Response

GLEN Observations on the *Blueprint to Deliver a World Class Workplace Relations Service*

GLEN - Gay and Lesbian Equality Network - welcomes the call for observations by the Department of Jobs, Enterprise and Innovation on the Blueprint document on the proposed shape of new workplace relations structures –"Blueprint to Deliver a World Class Workplace Relations Service"

We very much welcome the objectives set out in the Blueprint to streamline the various workplace structures to ensure greater effectiveness and accessibility. The reforms have very significant implications for equality in Ireland given the proposal to include some of the functions of the Equality Tribunal within the two new bodies. Two issues of particular concern to GLEN in this respect are:

1. The close connections and inter-linkages between workplace equality and equality in the provision of goods and services, and the importance of the Equality Tribunal in advancing equality in both areas.
   The difficulties that may arise for lesbian, gay and bisexual people to take cases to the Equality Tribunal, as identified, for example in the Equality Authority/Equality Commission of Northern Ireland report *Enabling Lesbian, Gay and Bisexual Individuals to Access their Rights Under Equality Law.* This report noted that access to equality and the Equality Tribunal has been impeded for complex reasons that lie in the status and visibility of lesbian, gay and bisexual people within society, as well as in more specific matters associated with the legal framework.

On these points GLEN strongly supports the recommendation of the Working Group on the Irish Human Rights and Equality Commission (April 2012) that: "**the equal status expertise of, informality and ease of access to the Equality Tribunal be**

preserved in the proposed re-organisation of the state's employment protection agencies".

All the powers and functions of the Equality Tribunal should therefore be transferred to the new body.

The new body should ensure that there is a strong focus on preserving public access to equality rights in both employment and in goods and services, for example through communications strategies, strategies that promote ease of access and process, and through proactive engagement with the public and with organisations representing the different equality grounds.

2. In the light of the current economic downturn, it is important to explicitly acknowledge the importance of equality to the achievement of economic as well as social objectives. Equality across the nine grounds, both in the workplace and in Irish society more generally, are now being seen as important factors in Ireland's capacity to nurture, attract and retain investment The inclusion of the full scope of the powers and functions of the Equality Tribunal in the proposed new workplace structures is an important acknowledgement of these links between equality, diversity and economic competitiveness.

Links between Employment Equality and Equal Status Issues and the Role of the Equality Tribunal

Creating a culture of valuing equality and diversity in the "workplace" is now seen by many companies and organizations as embracing both employees and customers. Employee and customer equality rights are closely related, each supporting one another.

Equally, the capacity of employees to participate on an equal footing in the workplace depends not just on conditions within the workplace, but also on the wider environment in which the workplace is located. It is interesting in this respect that many employers who have located in Ireland (for example, Microsoft, Google, IBM and Facebook) have cited openness to diversity in Irish society more generally (but particularly in the places they located) as important factors in their capacity to attract and retain the diverse workers they need.

The Equality Tribunal has been a key part of the equality infrastructure, and has made a major contribution to advancing equality across all the domains that connect to the workplace, including equal status cases that relate to the provision of goods and services.

Given the strong connections between employment equality and equal status issues in the workplace, and the effectiveness of the Equality Tribunal and "fitness for purpose of its powers in addressing discrimination across these domains there is a considerable logic for carrying over the full scope of the Tribunals functions to the Workplace Relations commission.

Links between Equality and Economic Competiveness

In 2011, Dublin City Council in partnership with GLEN produced a report documenting evidence of increasingly strong links between equality across the nine grounds of the equality legislation and economic competiveness. This indicates the importance for the achievement of economic as well as social goals, of ensuring that a strong equality focus is included in the new workplace relations structures.
In particular, the report found that Ireland"s progress on valuing equality and diversity had a strongly positive role in:

1. Attracting and retaining direct foreign direct investment and in developing the knowledge economy.
2. Nurturing and attracting skills.
3. Creating the conditions for innovation and entrepreneurship;
4. Enhancing the capacity of Ireland to attract and retain tourist and business traveler's.
5. Developing Ireland as a location for foreign students

According to IBM, the report notes:

"All employees should have the opportunity to perform at their best – meaning that they must feel comfortable in their environment. This is done through creating a diverse and inclusive workforce. We can take best advantage of our differences- for innovation. Our diversity is a competitive advantage and consciously building diverse teams helps drive the best results for clients" Peter O'Neill, Country General Manager IBM

The report outlines the results of a survey by the OECD which found that Ireland was in the top six countries in the world in terms of 'tolerance' along with Canada and the Netherlands (OECD, Statistics at a Glance, 2010). Tolerance in this respect was defined in relation to acceptance of ethnic minorities, migrants and lesbian and gay people, which relate to the protections under Irish equality legislation.

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ENDS//

14. Penninsula Business Services, Consultation Response

PENINSULA BUSINESS SERVICES (IRELAND) LTD.

Peninsula Business Services (Ireland) Ltd. is Ireland's leading provider of employment law and health and safety services. Established in Ireland since 1997, we currently have 2,650 businesses who have already integrated Peninsula to work as part of their HR and Health and Safety departments. In the course of our work we have a significant exposure to the various employment tribunal bodies and in 2011 alone we dealt with in excess of 500 employment dispute cases divided among the 4 employment dispute resolution bodies; the Labour Relations Commission, the Employment Appeals Tribunal, the Equality Tribunal and the Labour Court.

ADJUDICATION DECISIONS

- Blueprint: Page 19 of the Blueprint addresses the matter of the decisions issued by a Workplace Relations Commission (WRC) Adjudicator who has adjudicated on dispute between an employer and an employee. In essence the Blueprint states a template will be provided for producing decisions and that this template will require that the written decision issued by the WRC Adjudicator must include:

    - The issues identified as being relevant to the claim
    - An explanation as to why any of the above issues were not determined
    - Findings of fact relevant to the issues which were determined
    - Details of how the applicable law was applied to the findings of fact
    - The decision, including any award

- Comment: One issue that we have identified in the course of our dealings in employment disputes is that there is a significant level of inconsistency in terms of decisions emanating from the existing dispute resolution bodies. A certain level of inconsistency may be expected where a decision is reached

by a first instance body but a differing conclusion is reached by an appellate body. However, it is the case that individual bodies consistently contradict their own decisions through vastly differing outcomes in extremely similar factual circumstances. Thus, *we deem it extremely important that dispute resolution bodies be bound by precedent in respect of previous decisions made by that body in similar circumstances or by a higher authority.* This will resolve the inconsistencies that currently exist and will have the more important benefit of allowing employers identify what exactly is expected of them in a given circumstance. In this respect we would endeavour to provide some succinct examples which will assist in identifying the nature of our suggestion:

- Disciplinary: The first issue concerns the disciplinary process and the significant levels of inconsistency in terms of what constitutes a fair hearing. In that respect 1 would refer two cases heard in the same year involving the same company: *Heffernan -v- Dunnes Stores* (UD1355/2009) and *O'Halloran* -v- *Dunnes Stores* (UD150312009). The facts of these cases were extremely similar in that the two respective employees involved both had ten years' service with clean disciplinary records. Both employees worked on till machines but had not received training on till handling and privilege/loyalty card procedures for quite a while. The two employees were being disciplined for largely similar issues, namely abuse of the privilege card scheme and abuse of the loyalty card scheme respectively. In both cases the employer became aware of potential misconduct but rather than addressing it to the employee they then engaged in a period of covert surveillance to monitor their behaviour. In the *Heffernan* case the EAT held that the employee was unfairly dismissed and awarded €24,000 in compensation and they clearly attached a significant degree of their findings on this covert behaviour alone as it was deemed to be wholly unfair. In the O'Halloran case, however, it was held that the dismissal was fair and this type of covert behaviour wasn't discussed at all by the EAT in the context of their decision.
- Redundancy: in the decision of the EAT in *Griffin -v- John Spicer &* Co. (UD 1938/2009) the EAT awarded an employee €45,000 for unfair dismissal, notwithstanding the fact that the employer had a genuine

reason for making the employee redundant, on the basis that their redundancy procedure was completely flawed. In essence, there was no serious or worthwhile consultation with the employee prior to making her redundant, the employee was not given any prior indication of the very serious financial difficulty in which the employer found himself and there was no discussion on possible alternative solutions to redundancy. A similar decision was reached in a plethora of other cases such as *Barton -v- Newsfast Freight Ltd.* (UD 1269/2005). However, in the case of *Saul & Others -v- Mahony Manufactured Signs* (UD 37/2003) the EAT stated that there was some obligation on the employer to notify and discuss a possible redundancy situation but that such an obligation does not exist where such consultation would be futile. This decision in *Saul* completely contradicts the majority of decisions on this matter and it leaves the employer and practitioners completely at a loss as to what process a company should adopt.

- Conclusion: In conclusion it is our considered belief that there is an excellent opportunity here to set in place rules and procedures for WRC Adjudicators in respect of recognising and complying with what would be deemed "binding precedent". Indeed, an Adjudicator may well depart from existing precedent if they so wish but in doing so it is suggested that they clearly outline a sound legal basis for doing so. Thus if an employee or employer submits case law precedent to support their argument and this argument appears to absolve them of liability then the Adjudicator would need to provide sound legal reasoning in their decision as to why they are departing from that precedent. As practitioners we would like to be in a position where we can confirm for our clients what the best practices are when dealing with a workplace matter but as it stands we are unable to do so as what constitutes "best practice" varies from one Adjudicator to another and from one dispute resolution forum to another.

SMALL OWNER MANAGED BUSINESSES

- Blueprint: Page 13 of the Blueprint states that *"the Code of Practice: Grievance and Disciplinary Procedures, S.I. No. 146 of 2000, (under the Industrial Relations Act 1990) will be revised to take into consideration the small owner-managed business."*

- Comment: It is suggested that this is a fantastic proposal because as it stands the small owner-managed business is being taken to task on foot of their disciplinary and grievance procedures on the basis that they are expected to follow a multi-layered process that is more reflective of a corporate giant. A prime example of this is the onus placed on such businesses by dispute resolution bodies to have a multi-layered disciplinary system whereby one individual conducts an initial investigation. another individual conducts the disciplinary and then a third separate individual should conduct any appeal of the disciplinary hearing outcome. This is completely unrealistic where there is one owner who deals directly with his limited number of employees directly and does not have additional layers of management to conduct the differing elements of the process.

RESOLVING DISPUTES AT WORKPLACE LEVEL

- Blueprint: Page 13 of the Blueprint states that *the Code of Practice: Grievance and Disciplinary Procedures, S.I. No. 146 of 2000, (under the Industrial Relations Act 1990) will be revised ...."*
- Comment: It is considered that although the reform of *S.I. No. 146 of 2000* is a welcome step towards improving the current system, at the moment the code of practice is too open to interpretation and too vague on the matter of procedural steps for misconduct issues in the workplace. *We* would suggest that the new Code of Practice, and any revisions, set out definitive procedural steps for misconduct issues. The substantive issues to be addressed should fall within the set steps and the employer, be they a small owner managed business, or a large corporate entity is left in little doubt as to what is expected of them when dealing with such matters. As a result employees will also be fully aware of what to expect as a result of such clear unambiguous guidelines.

INTERNAL APPEALS PROCEDURE

- Notwithstanding the fact that there appears to be no legislative requirement on an employer to afford a right to appeal, in addition to it not being referenced in any applicable Code of Practice, it seems that the dispute resolution bodies, with limited exceptions, expect an employer to offer an employee a right to appeal. It is therefore suggested that any future Code of Practice on Grievance and

Disciplinary Procedures in particular sets out clear guidance as to whether or not an employer is required to offer a right of appeal.

- If there is no requirement then an employer should not be punished for their failure to offer a discretionary appeals process.
- If there is a requirement to offer an appeal then clear guidance ought to be laid down as to how this appeal process should be conducted, similar to the guidance set out on how a disciplinary or grievance process should be conducted. I would also suggest that any such appeal procedure must endeavour to set out special provisions for the small owner-managed business. The reason for this is that it is generally the case that the appeals officer cannot be subordinate to the disciplinary officer [as per *Jameson -v- Harris Calorific Ltd.* (UD 1155/1992)] and the appeals person ought not to be a member of the disciplinary officer's family [as per *Shiraz -v- Frank J Murphy Insurance Brokers Ltd* (UD 94/2007)]. It is suggested that the small owner managed business would therefore struggle to find an appropriate appeals person under current requirements set out by dispute resolution bodies on an appeals process and whether or not it is required or expected when it comes to internal work-related matters.

WRC ADJUDICATOR AWARDS

In this section I will be outlining some suggestions on the award system that is currently adopted in Ireland and on that basis make suggestions on how this may be reformed under the incoming system.

A. WRC Adjudicator Awards Ought to be "Degree-Based" and Not "Salary-Based"

As a general point, it is strongly suggested that the current reform process takes a long look at the current system of awarding compensation. The issue of the breakdown of awards is discussed below but as a general observation is submitted that in future, Adjudicator awards, particularly in discrimination cases, should be calculated on the "degree" of the ill-treatment suffered by the employee. This would represent a departure from the present system which is

largely based on the salary of the respective employee taking the claim. *We* will take the hypothetical scenario of a pregnant employee who works on the Reception in a hotel earning €30,000 a year. If they are unfairly dismissed by an employer on the basis of their pregnancy then they have a potential maximum compensation of €60,000. If you take the pregnant General Manager of the same hotel, who earns €100,000 a year, and who is also unfairly dismissed on the basis of their pregnancy then their potential compensation is €200,000. It is suggested that this is entirely unfair because the level of the injustice suffered by both individuals is entirely the same. Therefore, is it not entirely unfair on the lower paid employee to automatically have a much lower expected level of compensation? Indeed, the General Manager could walk straight into another job and still potentially earn €200,000 in compensation whereas the Receptionist may be out of work for some time and only earn a max of €60,000. This makes no sense and does not reflect a system that is actually trying to promote equality. Thus, it is submitted that a system similar to that adopted in the UK be introduced under future reform in Ireland. The details of this system are outlined in Section 0 below,

B. Breakdown of WRC Adjudicator Awards

It is suggested that now is an excellent opportunity for the vital issue of compensatory awards to be addressed. If one were to ask any practitioner who has engaged in the current system they will no doubt inform you that the present system of awarding compensation is far from satisfactory as it provides no breakdown as to how that award was calculated. One need only look through the database of EAT decisions on www.eatribunalle to identify a vast divergence in the awards granted in different cases where the facts of those cases are quite similar in content.

- Historically, analyses show that the average value of unfair dismissal awards over the years tends to work out at around 40% of the claimant's average salary/remuneration. However, the value of awards has certainly been rising over the last two years and evidence shows that the average award now appears to be circa 60% of an employee's average salary/remuneration. Is there a justifiable basis for this jump? Or is it the case that tribunal officers feel sorry

for those claimants who lost their jobs and will also find it difficult to find a new position in an economic downturn?

- Additionally, why are tribunals awarding such significantly high unfair dismissal awards in circumstances where a genuine redundancy scenario existed or the employee was in fact guilty of gross misconduct but the employer failed to follow the perceived correct disciplinary or redundancy process?

As it stands, it would seem that Tribunal Officers pick compensatory award figures out of the air on the basis of what they personally deem to be an acceptable amount without providing any breakdown as to why they feel this sum to be appropriate.

As such, in respect of the calculation of awards, Tribunal awards should consist of a "basic award" in an unfair dismissal scenario and then the Tribunal may consider applying a "compensatory award" where it is just and equitable to do so. This type of system works quite effectively and fairly in the United Kingdom and can be briefly summarised as follows:

1.Basic Award: This is automatically granted where the dismissal is found to be unfair.

a. This could be calculated in a similar manner to an employee's statutory redundancy entitlement (i.e. the award is based on gross weekly wage and length of service but is subject to a maximum weekly amount)
b. The maximum weekly amount could be set at the current statutory redundancy entitlement of 000. Thus, as per the current statutory redundancy entitlement, if a claimant with exactly two years' service is dismissed unfairly then the maximum basic award they are entitled to would be: [(€600 x 2 weeks) x 2 years] = €2,400
c. It is submitted that if the unfair dismissal arises in a redundancy scenario and the claimant has already received their statutory redundancy entitlement then they would not be entitled to this basic award amount and would only be entitled to be considered for a compensatory award

2. Compensatory Award: This is a discretionary award to be afforded by the tribunal in the circumstances where it is just and equitable to do so. This award would be

granted where the Tribunal deems it just and equitable to do so and the loss claimed to have been suffered was as a consequence of the unfair dismissal" and attributable to the employee.

a. The compensatory award should be subject to a maximum amount. In Ireland we operate a system of restricting the maximum unfair dismissal award to two years' service. It is submitted that this should be changed to an actual maximum figure. For example in the United Kingdom the current maximum compensatory award available is £68,400. This figure is reviewed annually and must be adjusted if the retail prices index (SRI) of the current year is higher or lower than the same point in the previous year. The maximum award figure is adjusted by the same amount as the difference in the RPI. This is a better system, is more straightforward and given that a basic award also applies it is entirely fair on both the employer and employee.
b. The calculation of the award should take into account the actual loss" suffered by the employee and any potential "future loss" likely to be suffered.
c. "Actual Loss" would take into account any pay or benefits the employee actually lost from the date of dismissal to the date the award is made. This payment would also take into account any notice pay or holiday pay the employee received upon termination of employment and any other severance payment received and make deductions from the actual loss amount accordingly
d. "Future Loss" would take into account the chances of the employee obtaining employment in the future or if he or she has already found alternative employment, it would take into account the difference in wages between the old and the new job and estimate how long the losses will continue. This future loss should be limited to a 12 month period after the date of the award and should not be indefinite although a higher sum could be awarded in scenarios where the employee is nearing retirement/pensionable age and may be unlikely to find another position. In calculating this award, however, the tribunal should request evidence that the claimant has been actively seeking work in the same manner that social welfare will assess a claimant's entitlement to State benefit.

- Generally speaking, an employee may not be entitled to the Compensatory Award, or such an award may be reduced, where that employee is deemed to have contributed in some manner to their dismissal. In cases of gross misconduct where for some reason the tribunal deemed the dismissal to be unfair, for example the employer failed to follow the correct procedure, the basic award may also be reduced. Furthermore, in order to encourage early dispute resolution through mediation or conciliation a tribunal may reduce the Compensatory Award where the employee has refused to engage in mediation.
- It is also recommended that as with the current system in the UK, any awards issued to claimants should be less any social welfare entitlements that the claimant may be in receipt of.
- It is suggested that the above system is entirely reasonable as it ensures that employees receive a basic level of compensation, irrespective of their own personal salary. The actual loss suffered by the employee is then recognised which therefore allows for individual circumstances to be evaluated and the compensation cap militates against the decision to award that outlandish compensatory sums.
- It is also noted that the above system would allow for both the employee and employer to clearly identify the rationale behind the decision. if the employee deems the award to be too little or the employer deems it to be too high then they will also be able to clearly identify why they believe so and allow a basis upon which to lodge an appeal rather than the current system of "hit and hope".

PREPARATION FOR A DISPUTE HEARING

It is suggested that future reform considers making changes to the following issues:

A. Employees Seeking To Claim Must Ensure They Provide Sufficient Detail Of Their Claim On Their Application Form

A significant issue which ought to be addressed is the requirement that an employee must provide sufficient detail on their application claim before they are permitted to have their complaint heard by a WRC Adjudicator. In the course of our activities we regularly deal with employers who receive papers from dispute resolution bodies where the claim simply states *"I have been unfairly dismissed"* or

"I have been discriminated against". It is suggested that this is a practice that must be wiped out and that the employee should not be permitted to take their claim until they provide a factual background to their case. If, for example, an employer had invited an employee into a disciplinary hearing without making them aware of the allegations against them then the employer would be deemed to be in breach of fair procedures on the conduct of disciplinary hearings. Notwithstanding this, the employer is then forced to suffer the same fate prior to the any EAT hearing in that they are completely unaware of the allegations against them. Surely the current system ought to be construed as a breach of fair procedures and the employer's constitutional right to natural justice?

B. **Both Employees And Employers Should Be Required To Make Full Disclosure Of Any Documents They Have Pertaining To The Claim Prior To Hearing**

It is common practice in virtually every legal dispute that the plaintiff and the respondent must make full disclosure of all documents in their possession to the other side in advance of any hearing taking place. It is submitted that this should be introduced into the current system and it should apply to the extent that both sides must disclose documents even where they are damaging to their own case. I would again refer to the EAT stance on fair procedures" when it comes to disciplinary hearings where they held in C *-v- Mid Western Health Board* [2000j ELR 38 and *Maughan -v- Janssen Pharrnaceutica BV* (LID 1127/1984) that the employer was liable for unfair dismissal on the basis that that the employee did not receive all evidence in respect of the allegations against them in advance of the disciplinary hearing taking place. Again it seems only logical that if a dispute resolution forum is to issue decisions on what constitutes fair procedures that they be required to ensure fair procedures are observed at the dispute hearing as well.

SETTLEMENT AGREEMENTS

It is suggested that future reform seek to provide guidance on the resolution of employment disputes through settlement agreements. Our experience is that dispute resolution bodies are happy for employment disputes to be resolved by

way of a settlement agreement. However, there is no Government guidance in the employment law sphere as to how these are to be drafted. Accordingly, it is suggested that the reform process should look at creating a standard settlement agreement template to encourage employers to use them and feel confident that they meet the minimum requirements. In addition, rules and guidance could be provided along with a template agreement which would make the composition and ratification of settlement agreements less complicated.

WRC DETERMINATIONS AND THE BURDEN OF PROOF

It is suggested that future reform seeks to provide significantly more guidance on how a WRC Adjudicator is to rationalise their determinations. It is frequently the case that a claim will be taken by an employee and both the employee and employer will present vastly differing version of events lead to the basis of the dispute and often the two versions will be completely contradictory. In these scenarios it is usually the case that a deciding officer will specify in their determination that they "prefer *the evidence of the clairnant/respondenr* without giving any additional information as to *how* they reached this conclusion. It is suggested that this is an unsatisfactory system as there often appears to be no factual basis for such a decision and simply stating that you prefer one party's evidence over another does not clarify why that burden of proof has been met. I did note above that there has been a significant overhaul announced in respect of WRC Adjudicator decisions and the legal basis for their decisions. However, such legal basis can only be applied to the facts of a case and if the facts of the case are in dispute between employer and employee then the WRC Adjudicator ought to be required to specify why the burden of proof has been passed before they apply the law to the preferred facts.

A further issue in this respect is that there have been a number of decisions from the EAT where they have applied a "reasonable man" test to unfair dismissal disputes such that the deciding officer will consider whether the 'reasonable man' would have dismissed in the circumstances. It is submitted that this is a dangerous avenue to go down and it would set a bad precedent for the resolution of future disputes. The reasonable man test is not suited to employment disputes and instead the dispute resolution bodies ought to be considering whether or

not it was reasonable for the "specific employer in the case at hand" to have dismissed in the circumstances. Different industries have different cultures and practices and indeed culture and practices may differ from one company to another in different industries or within the same industry. It is submitted that a test similar to that followed in the UK (i.e. the *Burchell* test) be formally adopted. This test requires employers to (a) show that they have a genuine belief that misconduct took place and (b) that this belief is held on reasonable grounds and (c) that these reasonable grounds are based on the employer having conducted a reasonable investigation. (d) It then must be considered whether or not the decision to dismiss was in the band of reasonable responses open to that specific employer. Thus, it is submitted that it is irrelevant whether or not the reasonable man would dismiss or whether or not the deciding officer themselves would have dismissed; the pertinent question should be whether or not it was reasonable for the employer in question to have dismissed in the circumstances bearing in mind their own working practices, rules and procedures.

ADMINISTRATIVE FEES

- Blueprint: Page 17 of the Blueprint considers the option of imposing a fee on those individuals who wish to utilise the workplace resolution service. The Blueprint states as follows: The *issue of whether* a *fee for making a complaint should be introduced is under consideration. The provision of workplace relations services has considerable cost implications for the state. It would seem logical that users of the service would be asked to contribute in some way towards the service. Any fee introduced would be a modest administration fee somewhere in the region of €50. It would be configured in such a way as to encourage early resolution. For example there may be no fee for Early Resolution with the fee only being charged when a case progresses to a hearing. In addition any fee would likely take into account the considerable additional cost incurred by the state associated with the processing of paper based complaint forms. Therefore the fee may only apply to paper based complaints with a lesser or no fee applying to complaints submitted and processed online."*
- Comment: It is submitted that the issue of a base fee for utilising the services is definitely a worthwhile consideration and one that ought to be

explored. However, while a general fee might *be* worthwhile it is noted that if an employee is taking a claim then they are a taxpayer and they have already contributed to the funding of this service. Thus, Peninsula Business Services would be more concerned with a system whereby a fee would be imposed on those employees who lodge malicious or vexatious claims or those employees who are simply fishing to see what they can get. The following system is suggested:

- If an employer believes a claim is malicious or vexatious then they could call a preliminary review to evaluate the bona fide nature of that claim. Once the preliminary has concluded and the claim has been assessed then there would 3 possible outcomes:

i. The claim could be struck out as malicious;
ii. The employee may be required to pay a deposit if they still wish the claim to proceed;
or
iii. If the employer called the review in bad faith then they would be required to pay a deposit and the case then proceeds as normal.

- An alternative system could be that all employees are required to pay a fee if they wish to take a claim:

i. If the employee is successful in their claim then they will recoup that money; or
ii. If the employee is unsuccessful they forfeit that sum of money.

EARLY RESOLUTION OF WORKPLACE DISPUTES

- Blueprint: Pages 15 and 16 of the blueprint address the issue of Early Resolution and it states therein that The *WRC will offer an Early Resolution Service in certain cases where complaints are lodged. It will also be open to the parties to request this service. Participation in the service will be voluntary for both the complainant and the respondent."* The Blueprint specifically highlights that the early resolution of disputes will be cost-effective and will yield positive results.

- Comment: It is submitted that the Early Resolution is a fantastic concept and is entirely in line with significant research and studies carried out by a plethora of national and international bodies on the value and success of early resolution services. However, it is with a slight bit of concern that the system still relies on the employee to have at first lodged a complaint before the system will be invoked. it is suggested that employees ought to be required to provide a notice letter to their employer 14 days before lodging papers in order to truly reflect and embrace the true spirit of early resolution. This will allow the employer to deal with this workplace dispute at an early stage as still under the new reformed system the proposal suggest that the first the employer will hear of a dispute is after the claim papers have been lodged. In this sense, before the employee's claim can proceed and before the Government led early resolution service is offered the employee must be able to evidence when lodging their claim that:

    - They notified their employer of the complaint: and
    - If the employer sought to invoke internal procedures to resolve the dispute then the employee must be able to evidence that they have actually engaged in that workplace procedure before they lodged their claim.

PROVISION OF TEMPLATES

- Blueprint: Page 14 of the blueprint highlights that template letters/forms will be made available through www.workplacerelations.ie which employees can use. It also specifies that generic policies and procedures capable of customisation for particular circumstances will also be available to employers from the website.
- Comment: it is suggested that whilst the provision of templates for employers and employees alike will assist in ensuring that clear procedures are in place and standard practices observed, the provision of generic templates may give rise to misadministration of these documents. Clear guidance will need to be provided to all parties in the 'customisation' of documents and specific conditions as to when certain letters should be used, set down to avoid parties

using/receiving documentation that may not be appropriate or necessary.

FIXED CHARGE NOTICES

- Blueprint: on page 21 of the blueprint it is envisaged that there are a number of areas where a fixed charge notice scheme could yield compliance in a more efficient and effective manner. The scheme lays out a number of offences that would incur a fixed charge fee of €150 and the Company provided with 14 days by a compliance officer to pay this.
- Comment: the scheme itself is worth consideration as it may encourage compliance amongst employers and reduce the need for prosecution. However it is submitted that by giving 14 days to rectify the matter it may be too onerous and perhaps place smaller owner managed businesses at a disadvantage in terms of compliance. We feel that a 30 day timeframe be placed on fixed charge notices in order to provide employers enough time to ensure compliance with the Compliance Officers recommendations. The Minister has stated that the code of practice for Disciplinary and Grievance procedures will be rewritten to take account of small owner managed businesses, and it is worthwhile ensuring that compliance officers also take account of such circumstances.

INTRODUCTION OF A FEE OR DEPOSIT FOR APPEALS

- Blueprint: as per page 27, section 4.0 *'the issue of whether a fee or deposit (or both) for lodging an appeal should be introduced is under consideration. There is cost to the state of providing an appeal* service."
- Comment: the provision of an appeals process is surely a matter of a person's constitutional right of appeal and any such constitutional right should not carry with it a cost to the person. It is submitted that any proposed fee for an appeal be waived. We do however agree to the concept that in order to prevent vexatious, or improper claims that a deposit be held by the Court and where a claim is found to be vexatious or improper that the court retain all or part of this deposit.

INTRODUCTION OF THE WORKPLACE RELATIONS COMMISSION

The Blueprint has stated that the new *Workplace Relations (Law Reform) Bill 2012* will look to be enacted by autumn 2012; however there is little detail as to the

proposed enactment of this bill. There are some concerns that arise following this that we feel would need to be addressed, such as;

- At what point will the new legislation have effect? Will it be effective from the date of passing or will there be a proposed date for implementation?
- How will the "old" claims be integrated in to the new WRC?
- Will there be a phased winding down of the EAT and other such bodies? Will they run for the next 2 years until the current list of claims are exhausted or will these claims pass to the new WRC?

FOLLOW UP

Peninsula Business Services (Ireland) Ltd. would be willing to meet with Minister Bruton to discuss our submission and where necessary elaborate or clarify certain points made in the proposal, or to offer our expert view on any proposals or that may be made by the Minister.

ENDS//

15. SIPTU Consultation Response

BLUEPRINT TO DELIVER A

WORLD-CLASS WORKPLACE RELATIONS SERVICE

SIPTU RESPONSE

Minister Bruton invites parties to avail of further opportunities to submit further feedback and suggestions on his blueprint document which was published in April 2012. SIPTU does not cover old ground in this submission but we reply instead to the new details and proposals that have come to light in the blueprint document. This submission should therefore be read as supplementary to our response to the original consultation document. We will be making further submissions on the Workplace Relations Bill when published.

We make the following observations and suggestions in the order in which they appear in the document:

1. Revision of S.I. 146 - Page 13.

At page 13 it states that:" The Code of Practice Grievance and Disciplinary Procedures, S.I. no 146 of 2000 (under the Industrial Relations Act 1990) will be revised to take into consideration the small owner-managed business. Its use will be promoted and further strengthened". We welcome the proposal to promote and further strengthen this Code of Practice and would suggest that the code will extend also to ensure representation for the employee at the early resolution stage and to ensure greater compliance with its existing provisions. (See below)

We are to submit that any revision of the Code would continue to recognise the trade union official as a valid nominated representative in disciplinary and grievance procedures.

The Minister has said that we must have efficient and effective mechanisms in order to develop harmonious and productive workplaces so as to assist employers and employees to avoid disputes. The promulgation of S.I. 146 of 2000 was part of a package of measures recommended by the Report of the High Level Group established under Partnership 2000. It is clear that the intention of the Oireachtas in enacting this Code of Practice was to give effect to this shared objective of harmonious relationships in the workplace.

The Trade Union official is more likely to be in a better position to offer an employee independent advice and a more robust and determined representation/defence than a work colleague simply because they are by nature external to the employment and independent of it. The work colleague may be restricted by fear that there may be a negative reaction him/her from the employer in any representation given... The imbalance in the power relationship at the workplace level, where it is very much tilted in favour of the employer, can only be balanced to some degree by offering the employee effective external representation within the confines of Si. 146 of 2000.

2. Conciliation and Early Resolution Service — Page 15.

The early resolution service initiative is to be welcomed. However, putting emphasis on telephone and email contact and facilitating direct meetings with the parties, only an exceptional basis may not be an effective solution. The proven success rate of the mediation initiative at the Equality Tribunal as well as the proven track record of conciliation by the Labour Relations Commission, has shown that direct meetings facilitated by experienced staff is an efficient and cost effective alternative to full hearings. Telephone and email contact, without doubt, would be better than nothing but these tools have a limited value for mediators and conciliation officers. The almost unanimous

view in responses to the consultation process was that early intervention in employment disputes yields positive results. This considered response would have, in the main, been forged from the experience of mediation/direct meetings at a physical place as distinct from solely relying on "virtual early resolution" by telephone and email alone.

It is acknowledged that matters raised at the early resolution phase will remain confidential to the parties and the Case Resolution Officer; however the suggested use of email will be deterrence to any frank and constructive exchanges. Such communications could be produced at a further hearing in a prejudicial manner. The confidentiality of the process should be copper fastened with the provision that any issue raised at this stage cannot be used in evidence at the adjudicating level or at appeal.

A claimant should also have access to proper representation under S.I. 146 of 2000 at the early resolution stage even when he/she may not have originally nominated a representative on the Single Complaint Form. If a claimant is invited to partake in the process then he/she may feel that they might require advice and representation at this level. There should be no impediment to allowing a claimant such representation. Employers are invariably resourced to take legal and other specialist advice from both within and outside their organisational structures. Allowing the employee representation at the early resolution phase redresses the "inequality in arms" in the employee relationship to some extent.

3. Introduction of a filtering system – Registrar and Registration – Page 15

The proposal to give the power to a Registration Service/Registrar to deny a hearing to claims which may appear to be out of time or not properly grounded raises the serious issue of denial of access to justice and may well be in breach of the Charter of Fundamental Rights of the European Union.

The area of jurisdiction on time limits is quite litigious. The following are just some examples of the contentious issues:

- The date of postage or receipt of a claim or appeal.
- The date of dismissal in unfair dismissal cases.
- The issue of an on-going breach of an employment right with no determinate date for calculating the time limit.
- The arguments surrounding the circumstances which can lead to extension of time limits where there are exceptional circumstances or where there is reasonable cause.

If a registrar is given the power to deny a hearing on the pretext that a claim is not properly grounded then the exercise of this power is liable to lead to constant challenge by Judicial Review. In general it could also constitute a denial of the right of the individual citizen employee to vindicate the right through due process. An example would be whether a claimant is self-employed or an employee. This jurisdictional issue is a very complex area and it is difficult to see how it can be resolved fairly without the presence of the parties to give evidence.

In Employment Equality legislation the claimant must show a prima facie case of discrimination at the hearing proper. It could be interpreted that the decision as to whether such a claim is properly grounded may now to be allocated to a registrar at the initial filtering stage.

Striking out claims without a hearing and the need for claimants to send written submissions setting out why their claim should not be struck out does not appear to take account of issues of accessibility for groups under equality legislation – particularly workers for whom completing written documents will be a barrier e.g. Those with low literacy skills and where English may not be a first language.

In disputes of interest, the question as to time limit or whether a case is properly grounded cannot be determined by looking at statute or the common law. The issue could have an organic link to an industrial relations dispute. By what criteria does the Registrar determine whether a dispute of interest is not sufficiently grounded given that it is planned that he/she will be an

experienced and qualified lawyer? Previously, disputes of interest in individual cases were pursued to the Rights Commissioner service under the Industrial Relations Acts if they remained unresolved at workplace level. In some cases, where the employer refused to avail of the Rights Commissioner Service, the case was progressed to the Labour Court under section 20 of the Industrial Relations Act, 1969. If cases like these are denied passage through the system by a Registrar then the goal of promoting and supporting harmonious relationships in the workplace will not be reached. Please note in particular section 9(2) of the Industrial Relations Act, 1990 in relation to industrial action where one individual worker is involved. The relative early exhaustion of procedures by striking out an individual case of right or interest case may hasten the likelihood of industrial action. Employees have a right to litigate under various pieces of legislation and contingent with this is the right to an adequate opportunity to establish a case. The setting up of a filtering service under the auspices of a Registrar has the potential to seriously hinder this right.

Article 47 of the Charter of Fundamental Rights of the European Union states:

"Every one whose rights and freedoms guaranteed by law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented".

As well as this, employees as citizens of an EU state have to right to vindicate employment rights which are theirs by virtue either of EU directives transposed into domestic law or through direct effect.

There may well be a need for a registration service/registrar to operate a proper case management system. Extending the role beyond this with the conferral of wide legal powers at the point of entry will lead to more, rather than less, legal wrangling.

4. Time Limit for making complaints — page 17.

Making a consistent time limit of six months for initiating all complaints requiring adjudication will mean that the time limit for making a complaint under the Redundancy Payment Acts is reduced from twelve months and a claim of Minimum Notice, presently 6 years, to six months. Such claims are common in recessionary times and a reduction in time limits allows little time for negotiation with employers, liquidators and receivers. The actual true identity and proper name of the employer/company does not become a relevant factor until employment ceases. Employees increasingly have to rely on forensic searches through the CRO etc. to establish the correct legal name of the employer. The reduction of a time limit not only dilutes a statutory right but more claims will be lodged immediately on termination as a safeguard. Previously time and space was allowed for discussion and resolution. The reduced time limit will put pressure on the system especially when medium to large enterprises close down.

There are no time limits set down for disputes of interest for practical reasons. If a time limit of six months is enforced then the affected employee may well choose a more fractious resolution route.

Furthermore, the proposal to introduce consistent criteria for "exceptional circumstances" in extending time limits creates a row back from the "reasonable cause" circumstance which is contained in some statutes; Equality legislation would be a case in point.

5. Introduction of Fees – Page 17:

The introduction of fees for often low paid and usually unemployed workers, will impose a very harsh burden on would be claimants. (Most claims to the employment rights bodies are submitted post – employment)

The suggested €50 for the initial application and subsequent €50 for an appeal is a considerable sum for workers who have lost their jobs. It will serve as a barrier to potential claimants without means and will serve

as a disincentive to those already concerned about the risk of taking a case. This is particularly difficult for those taking cases of discrimination relating to access to employment and discriminatory and unfair dismissal. The claimant may, for example, be a migrant worker who has not had their wages paid, or a person with a disability who has been denied access to employment and has no income other than social welfare.

Research from the CSO, which was interpreted by the ESRI, tells us that there are very high levels of under-reporting in cases of discrimination. Groups of workers most vulnerable to workplace discrimination face structural barriers to pursuing a case against an employer. Equality of access to the new body is critical. The introduction of fees further aggravates the problem of access.

The imposition of a fee for a service that was traditionally cost free is a major departure which will inevitably lead to increases in fees over a period of time. Such a progression would be a serious deterrence to workers with genuine claims in this period of severe austerity.

6. Hearings held in private — Page 18.

In our earlier submission we stated that conciliation and mediation should be held in private but that hearings at first instance and appellate stage should be held in public except in certain circumstances. The proposal whereby the decision on public or private hearings will be made by the Adjudicator after submissions from the parties, not only creates an extra step of adjudication in a system which is claims to be simplified but contravenes Article 47 of the Charter of Fundamental Rights of the European Union on the issue of a public hearing.

Furthermore, the threat of a public hearing at the EAT was in itself a deterrent to delinquent employers and has facilitated the early settlement of claims. There is no doubt that the resulting publicity may not be desirable also for some employees but on balance such public hearings would have a dissuasive effect for unacceptable behaviour and encourage early resolution.

Likewise, for the same reasons, anonymity should be not be allowed in the publication of decisions save in exceptional circumstances.

7. Compliance and Enforcement Service — page 20.

The new language of compliance as distinct from inspection indicates a softer approach to employers who breach the legislation. This is evident in the statement that "To further assist in achieving this, a number of more proportionate and less costly enforcements measures will be introduced. These will ensure that it will only be necessary to resort to costly and time consuming prosecutions in unresolved cases." The enforcement role of NERA is naturally in favour of the employee. The compliant employer and economic society generally benefit from the levelling up of the playing pitch. No other position makes sense because it is never the employer who calls in the NERA inspector. This softer attitude, coupled with low on the spot fines and the attempt to switch to compliance as distinct from hearings, points to a more sympathetic approach to the perpetrator than to the victim at a time when there are a record number of complaints submitted to employment rights bodies. The indisputable fact is that breaches of employment law are on the rise. A softer approach therefore, is not dissuasive nor a deterrence to breaking the law. Lack of regulation generally has brought our economy to the brink and any attempt to treat breaches of employee's rights in a similar manner is unacceptable.

8. Appeal from a WRC Hearing – page 20.

It is proposed that the Labour Court would be allowed to examine whether a claim is sufficiently "meritorious" to proceed to an appeal hearing. This could amount to a denial of natural justice and lead to unrealistic outcomes. The question of access to justice also arises (see para 3 above)

If a claim has validly entered the system, then there is an inference that it is not frivolous or vexatious. How then can a subsequent appeal from this valid and non-vexatious claim transform into an appeal that lacks merit?

Furthermore, the actual process by which the Labour Court determines whether a claim lacks merit or not could be classed as an appeal in itself and could in fact contain the ingredients of some predetermination.

To avoid litigation and further confusion it is submitted that it would be prudent to retain the system whereby an automatic right of appeal would exist to the Labour Court. The question of merit should be decided at the appeal hearing proper in the normal manner.

9. Breach of a Registered Employment Agreement (REA) page 21 and Appendix 3 Table 2.

It is proposed that a Compliance Officer may now be the sole person to pursue a claim of breach of a registered employment agreement. This is contrary to section 32(1) of the Industrial Relations Act, 1946 where a trade union representative of workers affected by the agreement is allowed to bring a case directly to the Labour Court and where the Court shall hear all persons appearing to the Court to be interested and desiring to be heard. It now seems that this direct access to the Court will be denied and the decision as to whether a claim will be taken will be purely the prerogative of the compliance officer.

The trade unions, as representatives of workers affected by REA's, were ideally placed to detect such breaches as a result of having members employed in the affected workplaces. Trade Unions have a distinct advantage over a Compliance Officer in that familiarity with a particular workplace allows a more effective and incisive prosecution of a case on behalf of an employee. Trade Unions also have expressed access to the Dispute Resolution procedures under the REA (see below). It is the employee, and not the employer, who reports a breach of the REA and the proposed denial of an avenue of redress through the employees' chosen representative, will be a disadvantage to the employee.

REA's have built in dispute procedures with eventual binding arbitration for the parties. For example section 11 of the Construction Industry REA provides for issues in dispute to be referred to the Construction Industry Disputes Tribunal which has served all parties extremely well in preventing and resolving disputes... Section 11 is intended to provide for the orderly resolution of disputes which arise between workers and employers and, in the view of the Labour Court, is an appropriate mechanism to invoke prior to any referral to the Court. These procedures are replicated in other REA's. The document is unclear as to the ultimate fate of these procedures with the entry of a Compliance Officer nor does the role sit well within the procedures. Harmonious industrial relations would be threatened if the parties become side-lined in disputes of interpretation.

Furthermore, the present system operated has operated efficiently to date in a cost-effective and workable manner. The extra cost of Compliance Officers taking on board these added duties, which were previously carried out at no cost to the state, flies in the face of the Minister's stated intention to affect significant savings.

This is a deeply concerning proposal which also raises the issue of access to justice (see para 3 above) and also restricts the right of those affected by a breach to be heard. We would submit that the system for REA compliance as it presently exists is not broken, and serves all parties well.

10. Fixed Charge Notices – Page 21.

The introduction of a fixed charge of €150 for certain offences is worrying. Offences covered by this fixed penalty are:

- Failing to maintain or produce employment records as prescribed by law.
- Failing or refusing to provide an employee with written terms and conditions of employment as prescribed by law.
- Failing or refusing to provide an employee with a payslip as prescribed by law
- Failing or refusing to record deductions on a payslip as prescribed by law

These areas can hide the very important necessity of having proper records. How can a worker properly prosecute a claim if he/she has no wage slips, written terms or proper employment records? The following is an extract from NERA's Annual Review of 2009 on the importance of keeping proper records:

"Records play a key role in ensuring that employees' safety is protected, that they get paid for the hours that they work and receive their minimum holiday entitlement. Keeping proper records protects employees from being exploited and employers from mischievous or vexatious claims. (Page 4)....

Poor or false records are sometimes used in an attempt to mask the underpayment of statutory minimum rates of pay and other statutory entitlements.

The maintenance of proper records is a key element of ensuring compliance with employment law and protecting employees from being exploited. Lack of statutory records can also have very serious consequences for employees in terms of pension, social welfare and redundancy entitlements. It can also result in loss of revenue to the State. The failure to comply with the statutory requirements in relation to record keeping is a common breach detected by NERA. Some of the breaches detected can be minor and sometimes inadvertent. However, these infringements when brought to the employer's attention are generally rectified with no further action necessary. In a small number of cases the lack of records is of a much more serious nature.

Poor or false records are sometimes used in an attempt to mask the underpayment of statutory minimum rates of pay and other statutory entitlements. "(Page 7).

These are extremely importance areas of evidence and must not be treated as if they were minor infringements with no substantial aftereffects. The employer can simply take the hit of paying a ludicrously low sum of €150 and avoid the responsibility of producing what could be damning evidence for a hearing or inspection.

Analogies are made with littering, penalty points and parking. There is no equivalence whatsoever between the denial of employment rights and relatively minor infractions of the law such as dropping a crisp bag or overstaying your allotted time in a parking space by twenty minutes. Each of these areas treat recidivism harshly in that an accumulation of penalty points can lead to disqualification and persistent offences can lead to severe penalties including loss of licence and even imprisonment. The analogy is not carried further when it comes to employment infringements and it seems that the repeat offender pays nothing more than €150 each time.

The area of employment rights is now firmly enshrined in Human Rights legislation. Compliance is important but equally so is the imposition of a corollary message of deterrence. Remedies should be effective, proportionate and dissuasive. A low fine for infringements by an employer which can have a serious effect on the capacity of a claimant to take claims has no deterrent effect and exacerbates the disparity in the power relationship between the employer and employee. Fundamentally, it runs the risk of completely undermining confidence in the employment rights resolution system.

The Adjudicator should have the power to compel a party to produce the relevant records if needed for a hearing and impose sanctions or make the appropriate inferences as is presently conferred, for example, to the Equality Officer and the Labour Court under sections 95 and 96 of the Employment Equality Act, 1998.

11. Hearing or Inspection — Page 23

It is slightly condescending to suggest that "...an individual making a complaint is not necessarily best placed to know what the most effective redress mechanism is" and then conclude that based on its knowledge and experience of the operation of adjudication and inspection processes, the State, and not the claimant, should decide the most appropriate method of resolving disputes i.e. a hearing or inspection. Moreover, it is a concept which is unlikely to be found in other major areas of dispute resolution in

society. Most employees understand the basic concept in justice of the right to have a case heard. Further, the avowed intention to remove complexity and to introduce more effective information systems should eliminate any difficulty for employees, employer's and their representatives in the understanding and vindication of employment rights. The draconian power shift from individual to the state on who decides what is best for the individual conflicts with that approach. The submission at paragraph 3 above with regard to access to justice under the Charter of Fundamental Rights of the European Union is also even more applicable in this instance.

The decision to draft legislation prescribing that the State will determine whether a claimant has a right to be heard is a retrograde step. Denying an appeal on the decision adds fuel to the fire. Such a step will encourage rather than dissuade legalism in the system.

Inspection in itself does not solve disputes but as admitted in the document, the Compliance Officer would merely require employers to provide employees with that to which they are legally entitled to, for example under the OWTA. The requirement to have compensation paid will be denied. If the Registrar decides that inspection is deemed appropriate, as distinct from a hearing, then the remedy of compensation will not be available to the claimant.

12. Enforeement of Awards – page 30.

In our earlier submission we emphasised the increasing difficulty of enforcing awards. The document itself does not elaborate beyond the statement that a new and effective method of enforcing awards will be developed. There is little value in winning compensatory awards if the worker has to engage solicitors to seek enforcement at the Circuit Court and then proceed on a tortuous, legal path in seeking redress for any judgement given. Preferential treatment must be afforded by statute to employment rights awards.

Re-instatement and re-engagement are extremely difficult to enforce. There is a severe injustice inflicted upon an employee who is granted such an award and subsequently discovers that it may not be enforceable, even against a fully solvent employer. This failing in enforcement must be addressed.

The loophole of informal insolvency whereby employers become elusive economic fugitives by simply ceasing trading must be plugged. In these situations employees find themselves in a limbo with no recourse to the Insolvency Fund.

Conclusion;

Thank you for giving us the opportunity to submit on these very important proposals. There is no doubt that reform is needed in this area. There have been palpable improvements in services and timelines to date since the reform was flagged nearly twelve months ago. We hope you will consider the points we make and look forward to further opportunities to submit when the Workplace Relations Bill is published,

SI PTU

Liberty Hall

Dublin 1.

April 2012

ENDS//

16. IBEC Consultation Response

1. The Workplace Relations Service Blueprint, April 2012

IBEC has welcomed the many positive elements emerging as part of the new Workplace Relations Service and the important progress being made as a result of the reform agenda initiated by the Minister for Jobs Enterprise and Innovation, Richard Bruton TD in July 2011. IBEC acknowledges some of the reforms already in place, which have resulted in earlier notification of claims and the establishment of a single online source of information in the form of www.workplacerelations.ie. IBEC also welcomes the opportunity to participate in the consultation process following the publication of the "Blueprint to Deliver a World-class Workplace Relations Service" earlier this month.

IBEC notes the Minister's commitment to making Ireland "the best small country in the world in which to do business", and we believe that in this respect our objectives are very much aligned. We, too, are keen to promote and support harmonious relationships in the workplace as a means of creating and sustaining jobs. IBEC believes that careful consideration should be given to measures which will help to deliver the reform proposal's stated aims to facilitate the resolution of grievances and workplace disputes as close to the level of enterprise as possible, to ensure early notification of grievances and disincentivise litigation. It is essential that further detailed consultations now take place on a number of important design issues and the governance of these revised structures, to ensure that these objectives are fully realised.

2. The Two Tier Structure

IBEC notes the progress being made in relation to the aim to consolidate the five main employment rights bodies into a two tier structure. We note the proposal to establish two statutorily independent bodies, which are stated to be entirely separate and independent in their decision making , and will share some common features and joint services. IBEC welcomes this proposal to realise of one of the

early reform aims – to streamline previous case management operations to ensure that maximum efficiencies are achieved in the administration of the functions of the employment rights bodies.

IBEC welcomes the proposal to streamline the employment rights bodies in the manner proposed, but remains concerned at the inclusion of the National Employment Rights Authority in the new Workplace Relations Commission. In particular, we are concerned that the possible the blurring of the separate functions of inspection and adjudication will undermine the trust of employers in the services provided by the Workplace Relations Commission, including conciliation and early resolution. We acknowledge the commitments referred to in the Blueprint to strict protocols to achieve "organisational distance"[9]. However, the concern remains among employers that the independence of NERA inspectors will be eroded. IBEC respectfully submits that the delineation between these roles needs to visible to all users of the services if the new Workplace Relations Commission is to gain the confidence and trust held by its predecessor in the exercise of its functions. The proposal for inspectors to issue compliance notices and fixed payment notices serves only to compound this concern[10].

IBEC notes the proposal to divide the Workplace Relations Commission into six separate high level functional areas and will comment separately on each proposed area below.

With regard to the second, appellate structure, we note the proposal to add a further division to the Labour Court, supported by Court secretaries. While IBEC has no objection in principle to the two tier body being structured in this way, we have some concerns as to whether the new second tier body will be adequately resourced to deal with the volume of cases which may progress to the newly expanded Labour Court. We note that this concern is acknowledged in the Blueprint document[11], referring to a possible 56% increase in cases presenting to the Labour Court. We address the proposed suggestions in the Blueprint to reduce that number later in this submission.

[9] Page 10 of the Blueprint document
[10] See further concerns re fixed payment notices at page xx
[11] Page 27

3. Workplace Relations Commission Services

(i) Advisory and Information Service

IBEC welcomes the Reform Agenda's stated aim to establish a single authoritative source of information for both employers and employees. The recently established Workplace Relations website was an important milestone in reaching this goal. We appreciate that the website is a work in progress, but are concerned at some of the information made available, ostensibly as a resource for employers and employees.

In particular, we note that some of the guidelines go beyond what could be described as basic employment rights information[12]. Some of the Guides and Explanatory Booklets made available as part of the website attempt to summarise very complex elements of employment rights legislation. Attempting to summarise highly technical legislation such as the Transfer of Undertakings Regulations is misconceived, in IBEC's view. Guidelines and summaries should be restricted to basic employment rights legislation which is clear and unambiguous in the obligations and rights it imposes, such as the National Minimum Wage Act 2000.

We are also concerned to note that querists are encouraged to contact NERA for further information on matters relating to unfair dismissal and transfers of undertakings. It is a significant departure for NERA to provide information or advice on any matters over and above basic employment rights legislation which already provides a role for NERA inspectors, such as working time issues and payment of statutory minimum rates. Parties with anything beyond the most basic queries on the Transfer of Undertakings Regulations are in need of specialist advice, and should be informed of this fact.

The capacity of the service to support queries in relation to maternity and parental leave legislation which is currently within the remit of the Equality Authority also needs to be clarified.

We note the statement in the Blueprint that "such *information or advice* will not extend to the merits or otherwise of individual complaints or cases"[13], but believe that this will be a difficult position to maintain in practice, unless the information

[12] See EC Protection of Employees on Transfer of Undertakings Regulations, Explanatory Booklet for Employers
[13] Page 12 of Blueprint

provided by the proposed Advisory and Information Service is limited to basic employment rights information, to include the legislation within the remit of NERA prior to the reform process. In any case, we believe that the service should be limited to "information" only, if the proposal is to provide "non-directive" information, as suggested by the Blueprint. IBEC understands the desire to provide assistance to service users in the form of an explanation or summary of employment rights legislation. However, we are concerned that summarising complex employment legislation may lead to oversimplification of the obligations and entitlements imposed by the legislation in question, and may lead to users believing that they have entitlements when in fact no such entitlement exists, which may only become clear in the context of a hearing before a third party. Alternatively, it may lead employers to believe that certain requirements are more onerous than as stated in the legislation or that they are in compliance when in fact they are not.

We note the comments in the Blueprint in relation to access to files by staff of the Advisory and Information Service,[14] in particular, the statement that these staff will not have access to information which would be considered relevant only to a WRC adjudicator. We appreciate the point made, but believe that it highlights the concern among employers that what should be separate functions (provision of information/advice and adjudication) are now uncomfortably close.

(ii) Assistance to employers and employees, and codes of practice

IBEC welcomes the support which the service will continue to provide to employers and employees, assisting them in building and maintaining positive working relationships. This has long been the hallmark of the Labour Relations Commission Advisory Service, and we look forward to the continuation of this very valuable resource. We are further pleased to note the role of the new Advisory and Information Service in drafting Codes of Practice on its own initiative or at the request of the Minister. In particular, IBEC is pleased that this will come within the remit of the single body. This will likely reduce the number of Codes issued, purporting to regulate certain aspects of employment rights, but overlapping with

[14] Page 13 of Blueprint

Codes issued by other bodies with similar remits,[15] which has resulted in a complex regulatory framework on key employment issues.

We note in particular the proposal to revise S.I.146/2000, the Code of Practice on Grievance and Disciplinary Procedures,[16] and welcome the plan to make special

provision for small, owner-managed employers, who are unlikely to have the resources to address workplace issues in the same manner as larger employers. We look forward to future engagement on this particular issue.

We also welcome the aim for what are described as "simple" codes of practice to deal with disputes as they arise, as some codes are lengthy and overly prescriptive, leaving the parties locked in to a convoluted process which is not necessarily helpful to resolve the issue in dispute.

(iii) Resolving disputes at workplace level

IBEC welcomes the emphasis placed on resolution of grievances and disputes as close to the level of enterprise as possible. This must be a core founding principle of the new services. The establishment of a single authoritative source of employment rights information will be of considerable assistance in achieving that aim, provided the information available is accurate and will be kept updated. IBEC further respectfully submits that the information provided must not suggest additional obligations or entitlements beyond the rights and obligations provided by current employment rights legislation.

We note and welcome the acknowledgement[17] in the Blueprint that for employers to be unaware of a dispute until documentation was received from the relevant employment rights body was unacceptable. We are pleased to note the plan to notify employers within five days of the lodgement of any complaint against them, and acknowledge the progress already made in this area, with evidence of greater efficiency in the notification of claims.

[15] Workplace bullying is regulated by three codes of practice, issued by the Labour Relations Commission, Equality Authority and Health and Safety Authority respectively
[16] Page 13 of Blueprint
[17] Page 14 of Blueprint

The Blueprint refers to employees being encouraged to seek to resolve complaints directly with their employer in the first instance, including notification of their intention to pursue a complaint before the Workplace Relations Commission **before** the complaint is lodged. IBEC welcomes the plan to make template letters available on the workplace relations website to enable employees to communicate with their employers in this respect. We respectfully urge the Reform Project Office to consider making such letters mandatory, with a lead in time of 14 days in advance of lodging a claim to the Workplace Relations Commission, and believe that this measure would operate to disincentivise litigation an opportunity to make good any deficiency without the employee being required to have recourse to litigation[18]. This, in turn, would foster a more positive working environment, and limit the number of cases presenting to the Workplace Relations Commission – which is in everyone's interest.

IBEC notes the summary of specific functions of the Advisory and Information Service (AIS), which covers some of the points addressed above. We also noted the reference to the carrying out of "Industrial Relations Audits". Given the voluntarist approach to industrial relations which exists in Ireland, such audits as may be proposed in any particular case could only be conducted with the voluntary participation and agreement of the parties at enterprise level on a similar basis to that which might be conducted currently by the Advisory Service of the LRC. For the avoidance of doubt, IBEC has serious concerns at expanding the remit of the proposed AIS in the context of industrial relations beyond the functions already provided by the current Labour Relations Commission.

IBEC also notes the reference to establishing "Joint Working Parties" and "Frequent User Initiatives", and would like further information as to whether this envisages a remit beyond that operated by the current Advisory Service of the LRC before responding further.

4. Registration Service

(i) Registrar

[18] This proposal is consistent with the terms of section 23 of the National Minimum Wage Act 2000, which requires an employee to request from his or her employer a statement identifying the employer's compliance with the Act before the employee may lodge a claim. This gives the employer an opportunity to make good any deficiency without the employee being required to have recourse to litigation.

IBEC welcomes the plan to support the Workplace Relations Commission with a Registrar who will be a qualified and experienced lawyer. We note the role envisaged for the Registration Service, and welcome the coordination and management of claims in an efficient and effective manner. Principally this should involve the management of risk in relation to the processing of claims and ensuring there is consistency of approach to the determination of employment rights cases and their outcomes, rather than for example in respect of disputes of interests cases. This points to the need for greater clarity as to the precise nature of the functions to be carried out which should be subject to variation and executive oversight by the Chief Executive of the WRC with governance oversight by the Board of the Commission.

(ii) Complaints management

IBEC welcomes the proposal to check complaints on receipt, and raise issues such as whether a claim is statute barred or incorrectly grounded. We believe that this will add considerable value to the new Workplace Relations Commission, weeding out claims which would otherwise be listed for full hearing in the usual way and increasing the efficiency with which claims are managed. We are, however, somewhat concerned that the Registrar may elect to refer a matter for hearing *or inspection*.[19] We believe that the use of inspection in this way may serve to undermine compliant employers who may be the subject of a random inspection by a NERA inspector (soon to be compliance officer), as well as undermining the perception of inspectors as operating independently, rather than as advocates for employees.

Employees who note the fact that their employer is the subject of an inspection may inadvertently be led to believe that their employer is being punished in some way, or that they are the subject of a claim. Such an approach is not conducive to a harmonious workplace environment, nor does it build the trust of employers in the newly constituted Workplace Relations Service. We respectfully submit that the remit of the Registrar should be to dismiss a case in circumstances where a claim is clearly statute barred, frivolous or vexatious or otherwise ill-founded. However,

[19] Page 15 of Blueprint

we are concerned that the decision may be made in the absence of a full hearing, which may give rise to challenge.

We note that such decisions may be appealed to the Labour Court. We respectfully suggest that the decision of the Labour Court should only be made following a short hearing, at which the relevant parties be given the opportunity to be heard. Without the convening of a hearing at which the relevant parties may be heard, we are concerned that such an approach may lead to an increase in applications for judicial review. Following such a hearing, we respectfully suggest that the case may be dismissed, or in the alternative, referred to either the Early Resolution Service or to a full hearing by an adjudicator.

IBEC notes the role to be played by the Registration Service in relation to the maintenance of records and statistics on the progress of cases, and believe that this information will be useful in ensuring the smooth progression of cases and the removal of "blockages" in the system – another of the functions of the Registration Service.

5. Conciliation and Early Resolution Service

(i) Early Resolution Service

IBEC agrees that early intervention is critical in yielding positive results in the resolution of disputes. We agree with the proposal that the Early Resolution Service should be offered after a claim has been lodged, and also note that parties may request the service. IBEC is pleased to note that the service is voluntary for both parties, as there is little to be gained by engaging in such a process if one or both of the parties is unwilling to participate in a meaningful way. We welcome the confidentiality of the process, and trust that this confidentiality will extend to whether or not a party has agreed to participate in the Early Resolution Service. There should be no negative consequences for a party wishing to proceed directly to a full hearing.

IBEC is struck by the proposal to make payments on foot of agreements executed as part of the Early Resolution Service recoverable from the State Insolvency Fund where the employer subsequently becomes insolvent. IBEC is concerned that making such a provision may be open to abuse with a soon to be insolvent employer

engaging with the ERS, and perhaps settling on terms disproportionately favourable to the employee in the context of the individual claim, knowing that the employer will not be footing the bill, but rather the agreement will fall to be discharged by the State. Whilst such an event might arise infrequently, IBEC is not aware of other circumstances in which an agreement between two private entities may be required to be funded by the State and believe that it creates an unhelpful precedent, and may be open to abuse.

(ii) Collective Conciliation Service

IBEC has been concerned that the balance of the current reform process has placed too much emphasis on the employment rights agenda and has failed to place sufficient emphasis on the importance of core workplace relations principles and practice and the encouragement of progressive forms of dispute resolution concerning disputes of interest. IBEC is pleased to note the continuation of the conciliation service currently undertaken by the Labour Relations Commission. From a practitioner's perspective, the conciliation service of the Commission has a robust and excellent track record of pragmatic and incisive interventions in trade disputes. Industrial Relations Officers bring a dispassionate perspective to parties who may have become entrenched in positions with a narrow view of the world. The open nature of the process lends itself to measured reconsideration and the contemplation of alternative outcomes. The judicious deployment of options for resolution and imaginative possibilities, as well as the IRO's assessment in relation to the likely outcome of a referral to the Labour Court, can serve to unlock intractable protagonists and inject realism into negotiations which may have previously stalled with no prospect of resolution. We see this well-established and very successful service as an essential feature of the reform process and remaining at the core of the proposed new Workplace Relations Service

6. Adjudication Service

(i) Time limits and fees

IBEC welcomes the harmonisation of time limits for claims, and the refinement of consistent criteria for the extension of the timeframe provided for the initiation of

claims. We are also pleased to note that the issue of whether a fee for making a complaint should be introduced is under consideration. We agree that it is logical that users of the service[20] should be asked to contribute in a modest way towards the running of the service, in the same way that litigants before the civil courts, including the small claims court, are required to do.

Litigation in Ireland generally attracts a fee from the litigant in the form of stamp duty to be paid when lodging documents in Court. In the High Court, where the jurisdiction is over €38,000 approximately, the fee is in the region of €125 per claim.

Employment rights claims often have a potential value which is in the jurisdiction of the High Court, and yet no fee whatsoever is charged in the current process. Even in the Small Claims Court, where claims to the value of less than €2,000 are processed, a fee is charged. There is no reason why litigation in an employment law context should be exempted from the charging of a reasonable fee. For some, the option to issue multiple sets of legal proceedings under a variety of legislation arising from the one set of facts has become an industry with no cost consequences for the claimant, leading to lengthy litigation. A litigant's objective in such cases is to elicit an offer of settlement even where the employer knows that no liability should arise. This is an abuse of process which needs to be urgently addressed.

In the interests of dissuading the practice of multiple claims arising from the one set of facts, IBEC proposes that a fee per claim be charged. We also believe that charging a fee indicates to applicants that they are engaged in a significant legal process, which has potentially serious consequences both for themselves and for the respondents to the claim. The introduction of a fee may also reduce the likelihood of multiple claims arising from the same set of facts, often issued to "strong arm" an employer into some form of settlement.

For these reasons, we are concerned that the proposed charging of a fee may be limited to paper based claims, and not charged at all for those claims submitted online. Given the emphasis being place on the submission of claims online, we believe that such an approach would not have the intended effect, as outlined above and propose that this be reassessed to include fees for all claims submitted.

[20] Page 17 of the Blueprint

(ii) Workplace Relations Hearings

We are pleased to note the proposal to establish an induction period and on-going training for adjudicators in the new Workplace Resolution Service. We also look forward to the introduction of the proposed Operations Manual, which will be a useful guide to practitioners as to what may be expected from the new service in the conduct of hearings. We welcome the introduction of service level targets, to ensure quality, consistency and timeliness of hearings and determinations, provided that such targets do not override the need to give certain cases, particularly those with complex sets of facts, or where there may be a complicated point of law in issue, due time and consideration before issuing a decision. We note the commitment to the principles of natural justice, and are pleased to note that hearings will be held in private unless the adjudicator decides at the request of either party to the complaint to hear the complaint in public. We would very much welcome the publication of the criteria on which such decisions will be based as part of the Operations Manual referred to above.

We note the proposal to use reports issued by NERA inspectors/compliance officers[21] in the course of cases before Workplace Relations Adjudicators. While we have no issue with inspection reports being adduced as evidence where the claim before the Adjudicator relates to issues arising from the report, we would be very concerned at the prejudicial nature of a general practice of requesting inspection reports where the inspection was not in any way connected with the facts of the case or the issue in dispute. This should be clarified as a matter of urgency.

(iii) Decisions of adjudicators

IBEC welcomes the provision of a template for the production of decisions, particularly the requirement to include a statement of the applicable law and details of how that law was applied to the findings of fact. We note the proposed timescale for the issue of decisions, being, in most cases of 28 days. IBEC appreciates the aim of achieving greater efficiency, provided cases are given the careful consideration which may be needed in certain cases of complexity.

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IBEC notes that parties will be required to request anonymity before the case is published on the Workplace Relations database of decisions online. In light of the fact that the default position for the hearing of claims is that they will be held in private, we respectfully consider that it may be appropriate to adopt a similar default position for the publication of the names of the parties to claims. In other words, parties should only be named following a request to the adjudicator by one or both parties, with the adjudicator then making the decision as to whether to divulge the information or not.

IBEC welcomes the maintenance of a database of decisions, which will be a useful guide to practitioners and employers as to how the legislation is applied by the adjudicators, particularly in cases where there is some ambiguity in the relevant legislation.

(iv) Appeal from a Workplace Relations Commission Hearing

IBEC notes the proposed time limit for appeals and welcomes the move to harmonise time limits and processes for appeal. We note the prospect of a party who fails to attend without reasonable cause forfeiting the right to appeal. However, it should be acknowledged that such an approach is likely to result in an increase in judicial review applications, and raises concerns as to adherence to the principles of natural justice.

IBEC has no difficulty with the introduction of a general requirement to be placed on parties to provide grounds of appeal, but is concerned at the prospect of the Labour Court being required to assess whether a claim is "sufficiently meritorious" [22]to allow an appeal to proceed to a hearing. The ability to appeal a decision is a cornerstone of the principles of natural justice and fair procedures, and should not be restricted in this way. We are particularly concerned that the newly expanded remit of the Labour Court will mean that the workload is increased to a level that may induce the Court to endeavour to limit its case load, resulting in appeals being dismissed without convening a hearing more readily than might otherwise be the case. The only recourse for a party whose appeal is adjudged to be

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insufficiently meritorious would be to the High Court, possibly in judicial review proceedings. The new mechanisms should avoid creating circumstances where parties may be pushed towards such proceedings.

7. Compliance and Enforcement Service

IBEC agrees that non-compliant employers must be tackled, and wholeheartedly supports the fostering of a culture of compliance. We submit that the NERA inspectorate as currently configured is well resourced and performs the function of inspection effectively.

(i) Role of Inspection

We note the proposal to introduce what are described as "more proportionate and less costly enforcement mechanisms" to secure compliance with employment rights legislation. These measures include the introduction of compliance notices and fixed payment notices. [23]While no further details are available in relation to the proposed measures at this time, IBEC is gravely concerned that these proposals will create a danger of usurpation of the judicial function by the inspectorate/Workplace Relations Commission. We have a number of concerns in this regard.

(i) Fixed Charge Notice Scheme

IBEC is unreservedly opposed to the proposal to introduce a "fixed charge notice scheme". This appears to envisage on-the-spot fines in cases where there may have been a breach of employment rights legislation. Fixed payment notices are constitutionally permissible in very limited circumstances, usually relating to situations where the facts giving rise to the offence are clear-cut and objectively established. In relation to most offences, fixed payment notices are not appropriate because a more subjective analysis is often required. While there are no further details at this time as to how this proposal might operate, it is likely to involve the administration of justice in a criminal matter by the inspectorate. This is likely to be considered a usurpation of the judicial function and is unlikely to be constitutionally permissible.

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At a more practical level, we note the reference in the Blueprint to the fact that such schemes are commonplace in Ireland today. However, we note the kinds of offences for which they are generally used, and the examples provided in the Blueprint – littering, driving in excess of the speed limit and parking illegally. These are offences which are generally clear-cut, and objectively determinable. We respectfully submit that this is unlikely to be the case in an employment law context.

We acknowledge that, on the face of it, some breaches might appear to be "black and white" in nature, such as whether an employee has been provided with a written statement of employment pursuant to section 3 of the *Terms of Employment (Information) Acts 1994* (as amended), which requires that certain minimum terms of employment be reduced to writing. However, it is not unusual for the precise details of some of those minimum terms, such as the employee's job title or the nature of work for which they are employed, to be in dispute, particularly where the employee has been in employment for a period of time.

It might appear to be a straightforward requirement on the part of the inspector to suggest that a statement of minimum terms be given pending agreement with the employee in question, but in reality, the very act by the employer of giving a job title or work description which differs from how the employee views the arrangement, even if required to do so by law, can create serious discord within the workplace – the opposite effect of the Minister's aim to develop harmonious and productive workplaces. Put simply, these proposed measures are not suitable for the workplace. They are divisive, duplicate redress mechanisms which already exist for the workers affected and they are constitutionally questionable in this context.

(ii) Compliance Notices

IBEC has serious reservations about the proposal that individual inspectors be given a power to serve a "compliance notice" on an employer where an inspector has have formed an opinion that any person has not received any amount of money owing to the person under employment legislation.

This is, in effect, to propose that, in some circumstances, the inspector can form a legally binding view that the employer has committed an offence. If the employer acquiesces to such a notice, he or she has effectively admitted an offence. This

usurpation of the judicial function would raise significant constitutional issues. All of the situations in which compliance notices are likely to be utilised relate to statutory rights for which civil redress mechanisms already exist. Contrary to the stated aim of the Reform Agenda to simplify the employment rights system, such measures are superfluous and are likely to cause significant administrative burdens. We also note that such an approach would appear to be directly at odds with the first consultation document issued by the Department in August 2011 which favoured an emphasis on redress rather than prosecution.

If the core idea of a compliance notice is to give an employer notice of an inspector's concerns about compliance prior to the commencement of a formal process, then there are modifications which might be made to the idea to reduce the concerns around the idea while enhancing its effectiveness. The first modification would be in the title. Such a document could be called a "Reasoned Opinion", or some other expression which indicates that it contains the inspector's belief or concern (rather purporting to be a proven fact) that non-compliance may have occurred. Second, express provision could be made that an action by an employer to enhance compliance further to a Reasoned Opinion shall not in itself be taken (in any court or tribunal) as evidence of non-compliance prior to such action. IBEC is willing to engage further to develop this proposal in a way which achieves the common goal of working towards maximum compliance without creating contention of litigation.

(iii) Use of inspections as a form of enforcement

We are extremely concerned at the prospect of the State[24] making the determination as to whether a hearing or inspection is the best remedy following a complaint from an individual employee. We repeat that we do not believe that it is helpful to workplace relations for inspections to be viewed, in and of themselves, as a form of punishment.

We have no difficulty with the prospect of claims arising from the same set of facts to be heard together, e.g. where a person suing for unfair dismissal also has a claim that they did not receive the statutory minimum rate of pay. IBEC has previously argued that in relation to the 'Adjudication' function that apart from dealing with

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disputes of interest under the industrial relations legislation, claimants should be required to indicate their primary source of complaint, which will usually have arisen out of the one set of facts such that employment rights cases can be streamed across particular channels to include (i) employment equality and protective leave, (ii) unfair dismissals, redundancy and transfer of undertakings (iii) minimum wage, payment of wages and terms of employment, and (iv) part time work and fixed term work claims among others.

However, we are concerned that it will be for the proposed Registrar function to determine which is the appropriate redress mechanism, and that neither the employee nor the employer will have any say in the matter. We are particularly concerned that, in some cases, employees may elect to make a complaint to a compliance officer or seek a hearing before an adjudicator, and believe that this will blur the lines between the separate functions of inspection, representation and adjudication. Notwithstanding the reforms proposed, it still seems possible that out of the same set of facts that an employer could be the subject of an inspection by the 'compliance and enforcement service', a hearing by an 'adjudicator' under the 'Workplace Resolution Service' and depending on the facts, if related to redundancy may be the subject of a complaint to the Department of Social Protection (see page 43 of the Blueprint).

We note that there are more than 100 complaints which may be made under existing employment rights legislation which provide for either a hearing and/or inspection, and note the proposal to determine through legislation which of these would provide the best form of redress. The Blueprint correctly identifies that eliminating redress from legislation may be a difficulty where the rights are derived from EU Directive. Depriving a party of a hearing, particularly in that context, is likely to raise questions as to whether the proposed legislation will be compliant with the European Convention on Human Rights, which provides for a right to a fair hearing in determination of civil rights or obligations as well as those in a criminal context.

Fundamentally, we believe that using inspections as a form of punishment will damage the integrity of the inspectorate, at a time when NERA had established a level of trust and confidence with employers and employees alike. We understand and welcome the bid to move away from awards of damages for relatively minor

transgressions of employment rights legislation, but believe that a high price will be paid for that change if inspectors are no longer viewed as “honest brokers” in the campaign to secure better compliance with employment law.

8. Workplace Relations Commission Corporate and Strategic Services

IBEC welcomes the emphasis in the Blueprint on the coordination of corporate governance and the efficiencies which will be achieved through the central provision of services. IBEC believes that the process of reform requires that we preserve the effectiveness of the system, including those governance structures which have served this country well, while embracing necessary change. In particular, we note the intention to establish joint services management for the Workplace Relations Commission and Labour Court in this respect. As previously stated, we strongly endorse the establishment of a single authoritative source of employment rights information, and welcome the launch of www.workplacerelations.ie. We accept that this has been established on an interim basis, but are keen to ensure that the guiding principles for information posted on this website should be that:

- *the information available must be accurate and kept updated*
- *the information must not suggest additional obligations or entitlements beyond the rights and obligations provided by current employment rights legislation.*
- *a clear distinction needs to be made between statutory employment rights and industrial relations issues.*
- *the separate nature of the roles and functions of inspection, mediation, adjudication and enforcement needs to be respected and maintained.*

9. The Labour Court

IBEC welcomes the expansion of the current Labour Court to include four divisions supported by Court secretaries. We believe the level of required expansion may be required to be kept under review for a period of time, as a true picture of the number of cases which are appealed from the body of first instance emerges. We welcome the fact that the statutory remit of the Labour Court pursuant to the Industrial Relations Acts will not be altered, as, to date; this is a system which has worked well and is not in need of change.

We note [25]that the Court will continue to comprise the Chairman, Deputy Chairs and Ordinary Members, and that future appointments will be made in a more transparent manner. IBEC agrees that clear criteria, with due regard to qualifications, knowledge, experience and skills, are critical to ensure that the best candidates can be selected for these important roles. IBEC would welcome the refinement of the set of competencies in areas of human resources, industrial relations and employment law as are required to be demonstrated for consideration for future appointments

(*see further detailed comment on 'Appointments and Staffing' below).*

(i) *Appeals of WRC Hearings*

We note that the Labour Court will hear all appeals from the WRC, and that appeals will take the form of *de novo* hearings held in public with decisions published on the workplace relations website. However, we have serious concerns at what appear to be some fundamental legal limitations and practical barriers which are proposed to be placed on the right to appeal.

We note the proposed requirement for the notice of appeal from the WRC to provide grounds of appeal, and have no difficulty with this proposal. However, we have a concern about the plan to allow the Labour Court to examine whether there are sufficient grounds for an appeal to progress to a full hearing. We note that, in furtherance of this aspect of their role, the Labour Court will have "appropriate levels of access" to the case management system to assist them in dealing with the appeal.

It is not immediately clear as to what is intended by "appropriate levels of access".[26] It is difficult to see how it could ever be justified. It should never be the case that the members of the Court would have access to matters which formed art of the deliberations of the first instance body, or that any consideration or discussion of a case should occur between the Court and the first instance body in the absence of the parties.

Our immediate reaction is that the new Labour Court may face a considerably increased workload, due to the addition of unfair dismissals and other cases which are to be added to the Court's appellate function. This increased volume may mean

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that they have a practical interest in reducing the cases before them, and may do so by removing the right to an appeal hearing in certain cases.

We respectfully submit that there is a constitutional right of appeal, and that this right must be a meaningful one. We submit that there will be a real incentive for Labour Court, faced with its newly expanded remit, to dismiss appeals without holding a full hearing. We note the remarks in the Blueprint that an appeal service should be available only where "there is a genuine belief by one of the parties that the Workplace Relations Commission Adjudicator should have exercised his or her judgment differently and in a manner that would have delivered a different outcome to the case and not simply to give the case another run".

In IBEC's experience presenting cases in the existing employment rights framework, the concept of "giving the case another run" is rarely indulged by the parties themselves or their representatives. As things stand, every day of a hearing is a cost to an employer, even where they are unrepresented. Time spent preparing the hearing, as well as releasing employees who may be required as witnesses, all adds to the commercial cost of running a case. Appealing a negative outcome is not a decision taken lightly, and generally only takes place where it is believed that the adjudicator erred in law or in fact, or where a grossly disproportionate award or other form of redress was made.

With regard to the proposal to charge a fee in order to progress an appeal, IBEC is in favour of the charging of a modest fee for the processing of all claims, not limited to appeals only.

In light of our observations above, we are seriously concerned at what is described as "a far greater emphasis on achieving the settlement of cases... this should reduce the number of cases going forward for hearing and consequently for appeal"[27]. While we agree that the reformed employment rights system should facilitate the early resolution of claims in every possible way, we cannot endorse legal or practical pressures being placed on parties to settle employment rights issues. We acknowledge that such an approach might achieve a reduction in the number of cases being heard and decisions issued, but IBEC is concerned that it will

[27] Page 27 of Blueprint

undermine the legitimacy of the entire institutional framework and raise serious concerns, including with regard to the Constitution and Ireland's international human rights obligations.

The removal of the avenue of appeal to the Circuit Court in unfair dismissals cases adds to our concerns. If anything, the avenue of appeal to the Circuit Court should be expanded across the full range of employment rights legislation. An appeal on a point of law to the High Court, as proposed in the Blueprint, effectively amounts to no appeal for most companies, who will baulk at the legal costs involved in High Court litigation relative to the award they may be required to pay on foot of a decision of the newly expanded Labour Court.

Unfair dismissal cases in particular can be complex and the facts may be subjective, which is why an avenue of appeal to the Circuit Court, as currently exists, is invaluable. We are also concerned that claimants who have been unsuccessful at the Labour Court will launch a strategic appeal on 'a point of law' to the High Court as an attempt to force an employer into settlement discussions, knowing that it will cost the employer thousands of euros to defend the matter again at High Court level. We note the comment in the Blueprint about the relative infrequency of appeals from the decisions of the Labour Court, but would emphasise that we believe that the cost of appeals to the High Court are such that most employers are not in a position to avail of that option, which accounts, at least in part, for the current low level of High Court appeals.

We would propose that in the event of a policy decision being taken (to which IBEC is opposed) to remove the right of a full appeal to the Circuit Court in the case of unfair dismissal cases, the Department should at least provide for the legislative option, in clearly defined circumstances such as in unfair dismissal for these cases to be heard by three person tribunals in the first instance under the WRC. This would arise on review of the effectiveness and work load of the 'Adjudication Service' and an assessment of the capacity of single adjudicators to adequately cope with the complexity of such cases as may arise.

IBEC understands that one of the aims is to reduce the number of claims which present for full hearing, and support that aim, provided that it does not result in a

system which favours “speed over substance” and glosses over complex disputes of fact or law.

IBEC already receives regular feedback from employers, particularly those who have establishments in other jurisdictions and have experience of other justice systems, that they do not always feel that they receive a full and fair hearing in employment rights matters in Ireland, and frequently come under pressure to settle claims, sometimes following a direction to do so from an adjudicator. Severely restricting avenues of appeal, or making them so costly as to be unviable is, with respect, not the way to build the confidence of users in the reformed employment rights system, nor to develop an environment which will result in the best small country in the world in which to do business, as is the Minister’s stated aim.

We note the proposal in the Blueprint to assign members with particular experience or expertise, where appropriate, to particular cases. We welcome that initiative, given the specialised nature of some aspects of employment rights legislation. We are also in favour of an effective method of enforcing awards, provided it is at the appropriate level.

(ii) *Introduction of a cap on awards and guidance on the levels of awards.*

IBEC is disappointed that the Blueprint contains no proposal to address this issue which arises particularly where there are multiple claims arising from the one set of facts: We believe that it would be appropriate to introduce a cap on the overall redress which may be awarded in employment rights claims (already adopted in the UK), whether in the course of a single claim or multiple claims arising from the one set of facts, being a maximum of two year’s remuneration (where that redress is already provided for under the relevant statute) or €100,000, whichever is the lower .

The legislation should address a practice which has crept in to decisions of the Equality Tribunal, whereby that Tribunal has undermined the statutory limitations on its jurisdiction by making separate awards under different heads of the same claim, such that the total award exceeds the jurisdiction of the Tribunal. This practice is not consistent with the practice of the civil courts or with the intention of the Oireachtas.

One of the issues of concern to employers is the inconsistency in the calculation of compensation among the various employment rights bodies. To avoid such

anomalies, IBEC has proposed the idea of a Code of Practice should be introduced for the guidance of employment rights bodies, to ensure consistency of approach to claims, and consistency in the decisions and awards made.

The Code should outline the main employment/industrial relations issues of strategic importance, including the maximisation of sustainable employment, and the consideration of the economic, commercial, employment and competitiveness circumstances of employers. The main principles underpinning this Code when providing guidance to employment rights bodies should be the protection of Irish jobs, and factors which may pertain among our competitors, both within the EU and in any other relevant jurisdiction. The Code should inform the decisions and determinations made by third parties in proceedings before them, including the level of damages awarded by way of redress, or determinations made in relation to terms and conditions of employment.

10. Governance of Workplace Relations Commission and the Labour Court *(i) Appointments and Staffing*

We note the proposal to deliver the services of the Workplace Relations Commission and the Labour Court through a combination of civil servants of the Department of Jobs, Enterprise and Innovation, officers appointed on contract to the Labour Court and people drawn from an external panel of adjudicators.

We note in particular that on the establishment of the Workplace Relations Commission, its adjudicators will be drawn from existing serving officers within the workplace relations services, and that the skills of existing rights commissioners and equality officers will continue to be utilised. We are pleased to note that intensive training will be provided to all existing personnel and any newly appointed WRC adjudicators.

IBEC regards it as essential that further detailed consultations now take place on the on a number of important design issues and the governance of these revised structures.

IBEC welcomes the intention to establish a *'statutory tripartite board'* to oversee the work and service delivery of the Workplace Relations Commission. It is crucial that employers as primary users of the service remain centrally involved in contributing to the oversight and performance of these services. Part of such engagement through the work of a statutory board must also relate to the exercise and oversight of decisions about the undertaking of strategic initiatives with service users, the promotion of good practice, dissemination and decisions in relation to research priorities which requires the exercise of independent decisions and the management of an annual budget in accordance with any budgetary framework as may be prescribed, subject of course to ensuring value for money with appropriate accountability.

With regard to the appointment of *adjudicators,* a range of issues must be further considered during the consultation process. The importance of the practical, industry experience brought by employer and employee nominees to the decision making process has been critical to the success of the Rights Commissioner Service to date. We believe that it is vital that a place be made for this expertise in the new Workplace Relations Commission, and that the selection criteria for any

appointments made reflects these conditions. IBEC emphasises the importance of harnessing the richness of practitioner led experience brought by employer and employee nominees to the decision making process. This is invaluable to ensuring support for the work undertaken by the bodies and must remain a key feature of our institutional arrangements in the future subject to the need for greater transparency and clarity of competencies. The Blueprint proposes that in future Adjudicator appointments will either be civil servants recruited/assigned in the normal way or from an external panel formed through an open and transparent system. IBEC makes the following observations:

- This should not be designed to produce a result where over time such 'Adjudicator' roles are filled by civil servants. In order to ensure the confidence of employers, workers and trade unions the balance of such appointments to be made by the Minister should be drawn from an external panel.
- There should be a role for the Board of the WRC in deciding on how to formulate an external panel and for determining the criteria for the

assessment of candidates as regards knowledge, experience, qualifications and skills.

- The formulation of the panel should be through a selection process based on merit from a panel of candidates put forward by IBEC and ICTU as the designated representatives of employer and union organisations.

In relation to the Labour Court the 'Blueprint' proposes that new appointees as *ordinary members* will be selected through a selection process based on merit from a panel of candidates put forward by representatives of employer representative groups and trade unions. IBEC is supportive of this principle but the selection process requires clarification and we would propose that any such process include representatives of the recognised nominating bodies. We note that the current arrangements will continue to apply in respect of existing Members.

In relation to the appointment of *Deputy Chairman* of the Labour Court it is proposed that this *"will be through an open and transparent system in keeping with best practice in public appointments".* Such appointments should remain the sole prerogative of the Minister but on the basis that the designated representatives of employer and union organisations would be asked to suggest suitable nominees for consideration for appointment as Deputy Chair, subject to such nominees possessing the necessary qualifications and experience for the post. A suitable candidate for appointment from amongst those nominated would be determined by a selection process from these nominees.

Similarly, it must be stressed that in relation to a candidate for appointment by the Minister as *Chairman of the Labour Court,* apart from his/her own competencies and suitability for the post such a person must, in keeping with current practice, be of a sufficient standing and experience who on appointment will have the support of both sides of industry in the exercise of his/her functions.

We are pleased to note the emphasis in the Blueprint on continued training of all officers and those included on the panel of adjudicators. We also welcome the provision of a Code of Conduct, to assist in the provision of a professional and effective service, and to promote good practice.

The Blueprint states at Appendix 3 that the Department of Social Protection will have a role in relation to redundancy claims which are currently dealt with by the EAT. This needs to be clarified along with the competencies, expertise and function of those officials from the Department who are to be involved. It would seem to be a more pragmatic approach for such matters relating to the determination of employment rights issues arising from redundancy to be dealt with by the WRC.

11. Joint Services

As stated above, IBEC recognises and welcomes the efficiencies that will be secured by sharing common features and joint services within the new two tier system. One issue of concern remains with regard to the separation of functions which will be housed in the new two tier body, with many shared services, is in relation to shared access to information and records. We note the stated intentions to have protocols in place[28] to limit access to files as appropriate, and cannot emphasise enough the importance of this issue. We believe that the integrity of the new system depends on visible and credible distance being maintained between the separate functions.

Subject to that concern, we welcome other initiatives as part of the Reform Agenda which are designed to secure a saving for the tax payer while maintaining accessible services for users. We welcome in particular the sharing of venues, subject to retention of appropriate levels of separation between functions, and the use of public buildings in regional centres which will be accessible by public transport. We also look forward to the establishment of a Customer Relationship Management/Case Management ICT system to support the future processes of the Workplace Relations Commission and the Labour Court.

12. Conclusion

IBEC recognises the significant progress already made in the Reform Agenda since its commencement last July. In particular, we appreciate the emphasis on efficiency and value for money, as well as the aim to establish a more streamlined employment rights system which aims to resolve grievances and disputes as close to the level of enterprise as possible. We now look forward to further engagement on a number of key issues of concern, including:

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the need for further measures to avoid multiple claims and to encourage early resolution as close as possible to the level of the enterprise.

the issue of compliance notices and fixed payment notices, and the use of inspections as a form of punishment,

the separation of the roles and functions of inspection, mediation, adjudication and enforcement, and how the distinction between them will be maintained, the need for a cap on awards and guidance to the employment rights bodies on the formulation of awards,

the proposed governance arrangements for the new structures and the manner in which appointments to the new bodies will be progressed, the erosion of the right to appeal, and

the use of the State Insolvency Fund to fund settlements in certain cases.

IBEC looks forward to future consultation and engagement with the Department of Jobs, Enterprise and Innovation and Reform Project Office in advance of the drafting of the proposed Workplace Relations Bill.

ENDS//

17. Immigration Control Platform Consultation Response

Dear Sir,

Re the Blueprint for WR and most especially the interim website,it is a matter of regret to ICP that you still do not seem to have seriously addressed the matter of reporting those working without a permit and their employers.

The single complaint form appears to serve only an employee who wishes to report a matter relating to their own employment and is not suitable for someone wanting to report suspected or known illegal working by another. Neither does it allow for anonymity.
We remind you of what we said about the model used by the Dept.of Social Protection.

It seems very strange that no email address is given in the contact information.

Gerard Kinneavy
Secretary
Immigration Control Platform

ENDS//

18. Mercy Law Resource Centre Consultation Response

Submission to Minister Bruton on "Blueprint to Deliver a World-Class Workplace Relations Service" on behalf of Mercy Law Resource Centre (MLRC).

MLRC is an independent law centre established in 2009 to provide free legal advice and representation, in an accessible way, to people who are homeless or at risk of homelessness in the areas of Social Housing and Social Welfare Law (www.mercylaw.ie). To date MLRC has provided free legal advice, assistance and befriending to almost 1,000 clients.

MLRC welcomes the opportunity to have its views and those of its clients considered by Minister Bruton. This is particularly so in the circumstances where the clients of the law centre are amongst the most vulnerable sections of society and therefore most in need of effective and accessible dispute resolution services.

MLRC endorses and adopts in full the submission made by the Equal Rights Alliance (ERA) of which it is a member. We do not propose to repeat those submissions here but wish to highlight the particular needs of homeless people and the danger of further marginalising them if the new dispute resolution structures are not accessible to them.

The Equal Status Acts 2000-2011 prohibit discrimination in the provision of goods and services including housing. Many homeless people who are assisted by MLRC have characteristics which bring them within the scope of those Acts. This would include disability issues, both physical and mental, as well as language, ethnicity and family and civil status. The Equality Tribunal has heretofore been an accessible forum for mediating and adjudicating on disputes between homeless people and providers of housing and other services. It is therefore of great concern to MLRC that

there is no reference in the Blueprint to an equivalent accessible forum for resolution of those disputes in the proposed structure.

We are very concerned that claims under the Acts could be transferred to the District Court as occurred previously in respect of licensing matters. Research has shown that the change in jurisdiction of complaints under the Intoxicating Liquor Acts in 2003 from the Equality Tribunal to the District Court resulted in a very significant reduction in the number of complaints referred. The procedures and rules of the District Court are a barrier to access for vulnerable people who experience discrimination. The standard of proof applied is different and the rules of evidence and procedures more formal than in the Equality Tribunal. Legal representation is effectively necessary and there is exposure to costs awards against unsuccessful litigants. The District Court does not provide a mediation service, which would often be the most effective and efficient method of resolving disputes, nor does the District Court furnish detailed reasons for its decisions which can be recorded and published.

The Equality Authority is shortly to be merged with the Human Rights Commission and it is uncertain what degree of representation will be available to complainants in individual cases. The majority of complainants under in equality cases will not have access to representation from any other source and a voluntary law centre such as MLRC with only one employed solicitor can only skim the surface of the need. It is vital therefore that the forum hearing the complaints employs procedures that safeguard the rights of individuals, including a full mediation service and inquisitorial rather than adversarial hearings. The EU equality directives require member states to establish and maintain bodies to provide "independent assistance to victims of discrimination in pursuing their complaints about discrimination". *(see e.g. Article 13 Directive 2000/43EC).*

ENDS//

19. Arra HRD Ltd Consultation Response

Views on Blueprint to Deliver a World Class Workplace Relations Service

Introduction

I set out in this document the views of Arra HRD Ltd on the Blueprint which was published in April 2012 by the Department of Jobs, Enterprise and Innovation. I fully support the Blueprint document as outlined and I make comments on particular aspects that are proposed rather than dealing with all of the elements that are presented.

Early Resolution Service

I note that it is proposed that the WRC will offer an Early Resolution Service and these it is stated will be "in certain cases". Furthermore it is proposed that this service would be open to the parties to request its use. It is my opinion that the Early Resolution Service should ideally be more strongly encouraged with regard to all complaints by providing a facility for each complainant to make it known that they are prepared to avail of such a service in the first instance.

Fee for Making a Complaint

I would support the proposal in the Blueprint document of having a fee to be forwarded with any complaint. I propose that in all instances a mandatory fee of €50 (to be reduced to €25 for online submission of complaints) should be introduced with effect from 01 January 2013.

Appeals from Workplace Relations Commission Hearings

I agree with the proposal to have a consistent time limit of 42 days from the date of a decision in which either party may appeal that decision to the Labour Court. I would further suggest that the appellant would be required to submit a fee of €100 to the Court as part of this process. I feel such a fee would eliminate the prospects of unnecessary or meaningless and time wasting type appeals and would be an important aspect of insuring that appeals are specific, relevant and worth the time element that has to be put into them by all parties concerned.

Introduction of the New Service

I suggest that as part of the process of the drafting of legislation and the implementation of the Blueprint document that a time frame for the establishment and operation of the two tier structure should be identified. I believe that it would be appropriate to work towards a full implementation of the two tier structure from the 01 January 2013. To support and assist this process I feel that all complaints currently being made to the five different forums that currently exist should cease with effect from 30 November 2012 and that from the 1 December 2012 all further complaints should operate within the context of the proposed two tier structure. I believe it is important also in this context that claims currently before the various existing fora would be prioritised to be completed and decisions should in as far as possible be issued within a time frame of first three months of 2013.

Conclusion

It is my view that the Blueprint to deliver a world class Workplace Relations Service is a document that covers the broad consensus for reform and streamlining of the current approaches to Employment Legislation Compliance and Industrial Relations Management. I believe this service has potential to enhance further the ability of the employment compliance process to be delivered in a largely voluntarily capacity within the context of the existing legislation which is to be re-focused and amended in the context of the new two tier structure that is now emerging.

Yours Sincerely

_____

Michael O'Sullivan
Director of Arra HRD Ltd
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20. Citizens Information Board Consultation Response

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

A Submission by the Citizens Information Board

Introduction

The Citizens Information Board (CIB) welcomes the Blueprint Document on the Workplace Relations Service. Indeed, the Board notes that many of the points raised in its previous submission are reflected in the proposed new structures. The establishment of two statutorily independent bodies to replace the current five is welcome. The role of the Workplace Relations Commission (WRC) in taking on the functions of the Labour Relations Commission, the National Employment Rights Authority, the Equality Tribunal, the Rights Commissioner Services and the first instance functions of the Employment Appeals Tribunal (EAT) should make it easier for both employees and employers seeking redress. The Labour Court as the single appeal body for all workplace relations appeals, including those currently heard by the EAT, should also facilitate easier access. A key challenge remains, however, as to how to ensure that all employees have sufficient support to enable them to use the new mechanisms to enforce their rights. A major difficulty with the existing structures is the gap between the entitlements and rights set out in employment protection legislation and workers being able to enforce these rights in practice.[29] While the emphasis in the Blueprint document on encouraging compliance is a very important one, such an approach requires the active co-operation of employers which may not always be forthcoming. It is also noted that the role of the Health and Safety Authority in monitoring the Safety, Health and Welfare at Work legislation does not

[29] http://www.citizensinformationboard.ie/downloads/Emp_rights_aug_06.pdf

appear to be incorporated into the revised integrated structures.

The CIB assists and supports people in identifying their needs and options and in accessing their entitlements to social services. This role is carried out primarily through its four delivery partners.[30] An important part of this support is advising, supporting and sometimes representing clients in taking cases to the Rights Commissioner Service and to the Employment Appeals Tribunal and/or negotiating with an employer on a client's behalf. The CIB website, www.citizensinformation.ie and its related microsites, *losingyourjob.ie* and *selfemployedsupports.ie* are important sources of information for both employees and employers. CISs and CIPS dealt with one million queries on all aspects of social service provision and citizens' rights in 2011. There were 99,073 employment-related queries to CISs (9% of total). Employment rights and conditions accounted for almost half of the employment-related queries followed by unemployment and redundancy (22%). As stated in our previous submission, queries on employment rights to CISs and CIPS indicate that people who seek information and advice in relation to employment protection matters experience substantial difficulties in seeking to assert their employment rights, particularly in terms of identifying the appropriate redress pathway and negotiating their way through it.

It remains the case that, despite enhanced information provision mechanisms in recent years, a recurring theme across all of the employment rights issues identified by CISs and CIPS is an absence of clear information about entitlements and rights. Some workers rely on their employers for their information and the latter may not always have the right information. Great care is, therefore, required to ensure that access to clear information is an integral part of the new structures. In this regard, CISs have an important role in providing face-to-face information and advice and this role should be highlighted by the WRC.

The availability of a single complaint form to replace a plethora of forms is very welcome. However, the fact that this single complaint form can only be completed

[30] Citizens Information Services (CISs) (of which there are 42 nationwide), the Citizens Information Phone Service (CIPS), the Money Advice and Budgeting Service (MABS) (there are 51 MABS companies) and the National Advocacy Service (NAS).

online and is complicated with numerous drop-down menus may present serious difficulties for some people.

Comments on Specific Aspects of the New Structure

Advisory and Information Service (3.1)

Resolving Disputes at Workplace Level

The online tool to assist employers fulfil their obligations under the law is welcome as is the assistance available to employers to develop other policies and procedures. It is also very important that employees have the support and assistance they require to file complaints and negotiate their way through the redress protocols. The potential role of CISs in providing advice and assistance to both employees and employers should be emphasised. This is particularly important for people who are unable to self-negotiate because of literacy, computer, or language difficulties.

The previous CIB submission referred to the need to promote an ethos of compliance, especially among smaller employers where the compliance deficit is likely to be most pronounced. However, it is not clear what the proposed revision of S.I. No. 146 2000 (under the Industrial Relations Act 1990) for small owner managed businesses entails and/or how such revision will improve compliance among such businesses.

While there is merit in encouraging employees to seek to resolve complaints directly with their employer, care must be taken not to put too much responsibility on an employee to resolve a dispute where an employer is unwilling to engage in meaningful negotiation and adopts a ‘take it or leave it’ stance. A key question is how employers can be encouraged to deal fully with legitimate complaints and to resolve the issue locally.

Registration Service (3.2)

Complaints Management

A question arises as to what supports will be available for employees who have their complaints rejected because, for example, the claim is not made under the appropriate legislation or is out of time. In such instances, it may be appropriate to

refer people to their local Citizens Information Centre for assistance in establishing exceptional circumstances and/or reasonable cause for a delay and in re-submitting complaints accordingly.

Conciliation & Early Resolution Service (3.3)

It is noted that participation is voluntary and there does not appear to be any clear incentive to employers to use this service. A question arises as to whether it should be mandatory for both employers and employees to use this service except in exceptional circumstances or in particular cases where it may not be appropriate, e.g., sexual harassment, bullying.

While agreements arrived at by using Early Resolution Service will be enforceable through the Civil Courts, it is not clear what support, if any, will be available to the employee from the WRC to enforce these agreements. Previously, there was an enforcement section in the EAT that provided such support to employees.

The fact that resolution is to be attempted by using email and telephone communication and that only in exceptional circumstances will there be meetings directly with the parties involved is a cause for some concern. Such an approach may not be conducive to early resolution or efficiency.

Adjudication Service (3.4)

<u>Time Limit for making complaints</u>

Currently, under the Redundancy Payments Act there is a period of 12 months for a person to file a complaint to the EAT and this can be extended by the EAT to 24 months if the complainant can show the delay occurred through *reasonable cause*. In the Organisation of Working Time Act 1997, a complainant has six months to bring complaint or 12 months if s/he can show *reasonable cause* (complaints regarding non-payment of annual leave and public holidays come under this Act). Under the proposed changes, the term
'reasonable cause' is being replaced by 'exceptional circumstances' and a time limit of six months for initiating all complaints is being introduced. This in effect means a reduction in the time period for initiating complaints under the Redundancy Payments Act and stricter criteria for extensions to the time limit.

Fee for making complaint

The implication that complainants who submit paper forms would have to pay a fee and that those whose complaints are submitted and processed online would pay a lesser or no fee assumes that computer literacy is universal. There are questions here that need to be addressed relating to not only people with little or no computer literacy but also to people with general literacy or language difficulties and those with intellectual disabilities.

Conduct of Hearings

There needs to be clear criteria available for the WRC Adjudicator regarding the decision to hold or not to hold the hearing in public. A question also arises as to whether such decisions are open to appeal or review.

Decisions

It is not clear on what basis the WRC Adjudicator would agree to anonymity in published decisions and whether or not one party (e.g. employee) can appeal this decision where only one party (e.g., employer) has been granted anonymity. This is an important consideration given that anonymity will not serve as a deterrent to non-compliant employers.

Appeal from a Workplace Relations Commission Hearing

It is noted that *reasonable cause* for a failure to attend or be represented at a hearing is acceptable as a valid reason for not having to forfeit the right to appeal the outcome of a WRC hearing. There is a strong case to be made for the non-forfeiture only to apply in *exceptional circumstances.* Anecdotal evidence indicates that generally it is employers rather than employees who do not attend hearings and the *reasonable cause* clause may contribute to delays and backlogs in the system.

Compliance and Enforcement Service (3.5)

Complaint/ Appeal to the Labour Court

The procedures for enforcing compliance, as set out, appear somewhat cumbersome and would place a high level of responsibility on employees to initiate

the procedures for enforcement. In particular, the protocols for referral by the Compliance Officer of complaints to the Labour Court, hearings by the Labour Court and enforcement in the District Court similar to the current provision in Section 32(4) of the Industrial Relations Act 1946) may be difficult for some workers to comprehend. A question arises as to why a complaint that has been adjudicated on and not appealed has to go to the Labour Court for enforcement rather than being referred directly to the courts with the support of an enforcement section. Also, it is not at all clear what the implications are for employers of non-compliance and it is unlikely that the proposed fixed charge notice scheme (with a €150 charge) would enhance compliance. Indeed, it may be the case that a fixed charge notice may be regarded by some employers as cheaper than full compliance and, therefore, have little deterrent effect.

The examples given where fixed charged notices have been used to good effect (parking, driving and litter offences) do not equate with failure by employers to provide an employee with payslips, terms and conditions of employment or maintain employment records – the latter would appear to be of quite a different order of importance.

Most Appropriate Intervention (3.6)

Inspection

It is accepted that an inspection can be an effective intervention in many instances, e.g., discovering what rates are paid and whether there is compliance with the National Minimum Wage. However, the fact is that a hearing will still be necessary in many instances as the Compliance Officer cannot require an employer to pay compensation/arrears to an employee
arising out of underpayment of National Minimum Wage, Registered Employment Agreements (REA) or Employment Regulation Orders (EROs).

Enforcement of Awards (Section 5)

There is no elaboration in the Blueprint Document on the whole area of enforcement of determinations of employment rights bodies.

A fundamental question is whether the WRC and Labour Court will have an enforcement section that supports complainants to pursue awards. In its previous submission, the CIB called for the establishment of a Specialist Enforcement of Awards Unit to assist employees, especially those of modest means, to follow through on awards granted by redress bodies.

Governance of the Workplace Relations Commission and the Labour Court (Section 7)

WRC Board

It would be good practice to have representation on the Board by independent information, advice and advocacy services who are at the forefront of engagement with workers whose employment rights are infringed.

Appointments and Staffing (Section 8)

It is important that compliance officers have relevant skills and professional qualifications in mediation and dispute resolution.

Joint Services (Section 9)

The Blueprint document refers to a 'concentration of locations'. In this regard, it will be important that hearings be accessible to all workers, including those living in remote rural areas.

Collaboration between the Workplace Relations Commission and the Citizens Information Board

The CIB has liaised with the Department and with NERA over the years and would be very happy to continue to work with the Workplace Relations Commission in the following areas:

(i) Maximising the information, advice and advocacy role of CISs and CIPS in respect of employment rights and ensuring efficient referral pathways to the relevant agencies

(ii) Integrating information production at a national level to ensure that there is no unnecessary duplication of publications and that there are fully effective website linkages

(iii) Ensuring that all employers are fully informed about employment protection legislation and their responsibilities accordingly

(iv) Highlighting areas where there is an ongoing issue of lack of compliance

(v) Targeting smaller employers through their representative organisations - the Small Firms Association (SFA) and the Irish Small and Medium Enterprises Association (ISME) to ensure that they are fully informed on all employment rights legislation

(vi) Exploring how the CIB website www.citizensinformation.ie and related micro-sites can play an enhanced role in developing a fully integrated information system to complement the new structures.

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21. NCLC and BCLC Consultation Response

Blue Print to deliver a World-Class Workplace Relations Service

Introduction

Northside Community Law Centre and Ballymun Community Law Centre together with other interested parties (the group) wish to make the following submission in response to the proposals set out in the Blue Print document dated April 2012.

We welcome the proposals from the Minister for Jobs, Enterprise and Innovation in respect to the reform and streamlining of the various employment bodies and the comprehensive nature of the review process. We support the aims of the Minister which are to provide "a simple, independent, effective, impartial, cost effective and workable means of redress and enforcement within a reasonable period of time". We also agree with the need for reform given the complexities of the existing system which for legal practitioners and employees and employers alike is complex, inaccessible and costly.

However we would submit that the need to deliver reform and establish new structures must be balanced with the need to ensure accessibility for all service users particularly those from marginalised groups and to protect the rights of individuals to a fair hearing as provided for under the Constitution and under the European Convention on Human Rights (ECHR) incorporated into Irish Law by the European Convention on Human Rights Act 2003.

We wish to highlight an issue not addressed in the Blue Print document or in earlier consultation documents which we believe is fundamental to facilitating access for all to the new Workplace Relations Commission (WRC) which is the lack of provision for

legal aid representation before employment bodies under the Civil Legal Aid Act 1995. We are of the view that notwithstanding the various measures to provide information through the Advisory and Information Service, that given the complexities of employment law, that legal representation is needed to provide access to justice for all in particular more marginalised groups such as low income workers or migrant workers who would not have the means to access legal services. This issue is dealt with in Section 3.

We also wish to highlight the decision to remove the Equal Status Acts 2000-2011 (the Acts) from the new complaint form and the fact that it is now unclear given the transfer of functions from the Equality Tribunal to the WRC where claims under the Acts will be heard.

We agree with various proposals set out in the Blueprint except in the following areas or areas where we feel further clarification is required.

2. The Two –Tier Structure

It is stated that the functions of the new Workplace Relations Commission will comprise those functions currently undertaken by the LRC, NERA, the Equality Tribunal and the first instance functions of the EAT and Labour Court in addition to an early resolution service for individual complaints. In view of the fact that the Minister intends to transfer all functions of the Equality Tribunal to the two–tier structure it is unclear where claims under the Equal Status Acts will be heard. As of the end of March 2012 the new complaint form was amended to remove the Acts from it's remit and from the jurisdiction of the Workplace Relations Commission.

The two-tier structure may not be the ideal forum to hear such complaints given it's remit as an employment dispute body however in the absence of a more appropriate body we would submit that the claims should come under the remit of the two–tier structure given the transfer of functions from the Equality Tribunal. When the new complaint form was launched in January 2012 the Equal Status Acts were included. Therefore the intention of the Minister at that time was to transfer all the functions of the Equality Tribunal to the new two–tier body.

We would submit that this should be reconsidered as a matter of urgency and that the Minister should clarify where such claims are to be heard. We are very concerned that claims under the Acts could be transferred to the District Court as occurred previously in respect of licensing matters. Research has shown that the change in jurisdiction of complaints under the Intoxicating Liquor Acts in 2003 from the Equality Tribunal to the District Court resulted in a very significant reduction in the number of complaints referred. The procedures and rules of the District Court are a barrier to access for people who experience discrimination. The standard of proof applied is different and the rules of evidence and procedures more formal than in the Equality Tribunal. Legal representation is effectively necessary and there is exposure to costs awards against unsuccessful litigants. The District Court does not provide a mediation service, which would often be the most effective and efficient method of resolving disputes, nor does the District Court furnish detailed reasons for its decisions which can be recorded and published.

The Equality Authority is shortly to be merged with the Human Rights Commission and it is uncertain what degree of representation will be available to complainants in individual cases. The majority of complainants in equality cases will not have access to representation from any other source (see legal reviews of Equality Tribunal for statistics). It is vital therefore that the forum hearing the complaints employs procedures that safeguard the rights of individuals, including a full mediation service and has inquisitorial rather than adversarial hearings. The EU equality directives require member states to establish and maintain bodies to provide "independent assistance to victims of discrimination in pursuing their complaints about discrimination". *(see eg Article 13.Directive 2000/43EC)*

3.1 Advisory and Information Service

It is agreed that providing information to both employers and employees is an essential element in both informing employees and employers of their rights and responsibilities and in facilitating early resolution of disputes. However we note that such information or advice "will not extend to the merits or otherwise of individual complaints or cases". While that is not an appropriate function for an information

service it is submitted that the provision of legal advice and representation before the two-tier structure is necessary given the complexity of many employment disputes involving issues of domestic and European law and the importance of the rights at issue. Currently the scheme of legal aid as provided for under the Civil Legal Aid Act 1995 does not provide representation before administrative tribunals which would include the Workplace Relations Commission and the Labour Court.

The workplace model is being designed to deliver a just fair and efficient adjudication service. The Constitution requires natural justice as Denham J. writes in the case of Dellway Investments & Ors v NAMA & Ors [2011] IESC 14: "The right to be heard, *audi alteram partem*, is a fundamental right at common law, being one of the principles which were known as natural justice. Another principle, that no one could be a judge in his own cause, *nemo index in causa sua*, was also considered to be part of natural justice. These two fundamental principles were at the root of natural justice. In Ireland these principles have been subsumed into constitutional justice."

The European Convention on Human rights requires a fair hearing as provided for at Article 6; "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." An implied right established under Article 6 in the case of *Airey v Ireland* (1979) was the right of access to a state funded system of legal aid given the importance of the issue at stake and the complexity of the matters before the Court. It was determined that without legal aid the applicant's access to court was effectively rendered ineffective.

Undoubtedly the model should as the Minister writes provide a simple, independent, effective, impartial, cost effective and workable means of redress and enforcement within a reasonable period of time.

But Labour Law is complex and streamlining the procedure may assist the administration but will not lessen the complexity of the legal issues to be decided also it involves real disputes and grievances which will not be resolved by phone calls and need to be properly heard.

Worthwhile resolution must be based on just solutions and in order to have justice the parties have to be advised as to the law, their rights and entitlements. Cases that are half or partially settled will only return to trouble the parties and often the whole enterprise.

The concept of equality of arms has been held by the European Court of Human Rights (ECtHR) to be a fundamental element of the right to fair procedures as protected under Article 6. This concept provides that both sides have a fair and equal opportunity to present their case before the relevant body. In *Steel and Morris v UK (2005)* the Court decided that whether legal aid was necessary for a fair hearing had to be determined on the facts of the case, the importance of the issues for the applicants, the complexity of the law, and the capacity of the applicants to effectively represent themselves.

This concept is particularly relevant to the area of employment law where in certain cases sometimes involving large companies or multinational corporations both sides would not have an equal right to present their case on the basis that such an employer would have much greater resources at their disposal, who in all likelihood would be represented by both solicitor and Counsel in comparison to an employee on a low income who could not afford to pay for legal services and thus must represent him/herself. Article 47 of the EU Charter of Fundamental Rights also provides a right to legal aid for those exercising an EU right and who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Therefore it is essential that legal aid is available for the parties who cannot afford to pay for their own legal advice which can be done by extending the scope of the Civil Legal Aid Act 1995 to cover representation at the Workplace Relations Commission and the Labour Court.

3.2 Registration Service

It is stated that the function of the registration service will include the processing of all employment related complaints and co-ordination and management and referral

of cases to hearing, inspection and Early Resolution services. It is submitted that in view of the fact that previously a complainant chose to refer the complaint to an inspector, or to the appropriate body for hearing or for mediation if available that this is a significant new function and one that has serious implications for a complainant. It is submitted that in the exercise of this function there should be clear and transparent criteria / guidelines to underpin the selection process which should be provided for in legislation.

All service users should be aware of the criteria used to select a case for early resolution over adjudication. We are of the view that in the absence of clear and transparent guidelines the selection process will appear inconsistent and lead to arbitrary decisions which could ultimately undermine the effectiveness of the new two-tier structure. It is stated that "suitable cases" will be referred to the Early Resolution Service. It is unclear from the Blueprint document what is meant by "suitable cases" and it is submitted that clear and transparent criteria must underpin this selection process.

It is also proposed that the Registration Service will have the power to dismiss claims which are for example deemed to be out of time. It is submitted that any appeals in this regard should be on the basis of an oral hearing before the Labour Court given the implications for a complainant in accordance with the constitutional rights of fair procedures and those set out under Article 6 of the ECHR.

3.3 Conciliation and Early Resolution Service

Early Resolution Service

We welcome the proposal to try and resolve disputes at the earliest opportunity which is the best possible outcome and most cost effective method for all the parties including the State. However there should be clear and transparent criteria/guidelines to clarify why cases have been selected for referral to the Early Resolution Service. In this regard we would refer to the practice of the Equality Tribunal which is clear and transparent for all users whereby all claims are

automatically referred to mediation at which stage either of the parties can opt out of the process.

We agree and support the recommendation that any agreements reached through early resolution will be binding and enforceable. In respect to the recommendation that "a range of intervention tools will be used including e-mail and telephone communication and that only in exceptional cases would the parties meet directly" we would have concerns as to whether any meaningful mediation process could be carried out through the use of e-mail and telephone communication.

It is submitted that an aspect of mediation allows parties to raise grievances which exercise can of itself assist parties to resolve their dispute by having had the opportunity to discuss same. It is submitted that only minor technical breaches of employment legislation would be suitable to be resolved by way of email or telephone and these cases could be provided for in the legislation.

We are of the view that the use of e-mail and phone is not an appropriate method to conduct a meaningful mediation in respect to the majority of employment disputes and that face to face meetings should be the norm for all disputes with email and phone used only in exceptional cases. It is submitted that if service users are not provided with a meaningful method in terms of the mediation process, service users will not agree to mediation as an option which will lead to many more cases being referred for adjudication thus undermining the Minister's overall aim of facilitating early resolution of grievances.

Fee for Making a Complaint

It is submitted that it is not unreasonable to require those who use the services of the WRC to make a small contribution by means of a small fee towards the cost of such a service. We are mindful that if it is intended to introduce a fee that same should not act in any way as a barrier to those who wish to access the services of the WRC particularly groups who would find it more difficult to discharge a fee such as low income unskilled or semi skilled workers or migrant workers. It is submitted that such workers would have greater difficulty particularly in the present recessionary climate

to find alternative work and are likely to be dependent on social welfare payments. The suggested fee is in the region of €50 which is more than 25% of the current rate of payment for Jobseekers Allowance which stands at €188 per week. Accordingly we suggest that the fee should be a sum in the region of €20.00 or for those unemployed and on social welfare payments could be calculated at a percentage (5%) of the rate of payment.

It is submitted that it should be payable by all and not just those whose claims will proceed to a hearing. We disagree with the recommendation that the fee would only be payable in respect of paper based complaints with a lesser or no fee applying to complaints submitted and processed on line. In this regard it is submitted that it is those employees who do not have on line access or who have literacy problems and are not computer literate who are most in need of an accessible and user friendly system. Therefore to impose a fee only on paper based complaints in essence amounts to a penalty on those who are unable to process their claim on line. It is recommended that the fee should apply to both paper based and on line processed complaints.

Accessibility of Complaint Form

It is noted by the group that though the new complaint form was launched on line in January 2012, no printed version is available in manuscript form to date despite the fact that the form was to be published in a printed format by February 2012. It is submitted that this form should have been available at the same time and there would appear to be a clear preference to facilitate online processing of applications and to discourage the use of printed forms. While it may be more efficient from an administrative point of view to process claims on line many service users do not have access to computers nor are computer literate. By failing to make the printed version available and encouraging the use of same the Minister is placing those who do not have online access and are not computer literate at a clear disadvantage and rendering the system less accessible for an already marginalised group.

3.4 Conduct of Hearings

In relation to the various statements set out in the blueprint document regarding the conduct of hearings it is difficult to formulate a view given the lack of clarity. No specific guidelines are set out. We welcome the intended objective of "providing a speedy, inexpensive and relatively informal means for dispute resolution" however any procedures must safeguard the parties rights to fair procedures as provided for under the Constitution and the ECHR.

We are of the view that the procedures to govern the conduct of hearings should be provided for in legislation and should not be dealt with by way of regulation by the Minister. It is stated that it will be up to the Minister "to make regulations to provide for certain matters in relation to the conduct of hearings. Subject to these regulations, WRC adjudicators will have a level of discretion to determine their own procedures and the conduct of hearings". Accordingly it is difficult to formulate a view in respect to procedures which have not been detailed nor is it clear whether an adversarial or investigative approach will apply to hearings. In this regard we refer to the model of the Equality Tribunal which adopts an investigative approach to equality claims. It is submitted that given the importance of fair procedures which are a fundamental right as provided for under the Constitution, the ECHR and at Article 47 of the EU Charter of Fundamental Rights that the type of procedure ie. investigative or adversarial should be provided for in the primary legislation.

It is submitted that such procedures should be set out in the forthcoming Workplace Relations (Law Reform) Bill 2012 thus allowing this matter to be subject to the scrutiny of the Oireachtas. We are of the view that the WRC hearings should be relatively informal given the nature of the hearings thus ensuring accessibility for all parties including marginalised groups and therefore there should be a degree of flexibility in respect to the hearings. While bearing this principle in mind this must be balanced with the fact that all hearings must comply with the principals of natural and constitutional justice and the legislation should expressly state that the hearings will be conducted in a manner compatible with these rights.

The Right to Fair Procedures

The right to fair procedures is provided for under the Constitution as a fundamental human right and has been the subject of many decisions of the Superior Courts. In view of the fact that the Workplace Relations Commission and Labour Court shall be exercising a quasi-judicial function they will be obliged to comply with the case law in this regard. It has been stated by the Supreme Court in *Kiely –v- Minister for Social Welfare (1977) IR267* that "Tribunals exercising quasi-judicial functions are frequently allowed to act informally…. but they may not act in a way as to impair a fair hearing or a fair result".

The right to fair procedures is also provided for under Article 6 of the ECHR. The ECtHR has through it's caselaw defined various elements that are necessary to ensure that a quasi judicial body is compliant with Article 6. For instance the Court will look at the way members of such bodies are appointed in relation to the duration of any term in office, to guarantees of immunity from outside pressure and to the independence of the Tribunal. The Court has also stated that all parties should have a right to an oral hearing, a reasonable opportunity to present a case, to comment on all the evidence provided before the court or tribunal, to call any witnesses, to reply to written submissions, to receive reasons for the courts or tribunals findings and that there should be equality of arms between the parties. However the ECtHR has stated that it does not require the initial hearing to be fully compliant with all of the elements of Article 6 and that as long as there is a further right of appeal which is complaint that is sufficient for the purposes of Article 6.

It should be noted that Article 47 of the EU Charter of Fundamental Rights also enshrines a right to fair procedures concerning a matter of EU Law. Article 47 is based upon the right to fair procedures provided for under Article 6 (1) in addition to providing a right to legal aid. Many employment statutes have emanated from EU law in particular all discrimination legislation is derived from EU Directives thus Article 47 would apply to a substantial number of cases before the WRC and Labour Court.

It is proposed that hearings before the WRC will be held in private unless the adjudicator decides at the request of either party that the complaint should be held in public. It is noted that appeals before the Labour Court shall be held in public. We

would support the recommendation that hearings before the WRC be held in private particularly in respect of discrimination cases which frequently involve sensitive issues for the complainant. We would suggest that guidelines should be provided in primary legislation to clarify under what circumstances a party can request a hearing in public.

We note from the Blueprint that in respect to various issues under the remit of the Registration Service that in the case of complaints that are out of time or are deemed to be incorrectly grounded that no oral hearing is provided for. We recommend that in accordance with the principles set out above that an oral hearing should be provided for.

We very much welcome and support the proposal that once a hearing has been conducted that the WRC adjudicator will issue a written and reasoned decision within a reasonable time.

Appeal from a Workplace Relations Commission Hearing

The Blueprint states that either party will have a right to appeal a decision of the WRC to the Labour Court within 42 days of the date of the decision. It is submitted that the recommendation that the party who fails to attend a hearing without reasonable cause shall forfeit the right to appeal to the Labour Court should be reviewed and that all parties should have a right to appeal even those who did not attend at the initial hearing given the fundamental importance of this right.

It is submitted that the Blueprint document contains various contradictory statements in respect to the right of appeal. It is stated on page 19 that either party has a right to appeal to the Labour Court however this would appear to be undermined by the following statement “the notice of appeal will require applicants to provide effective grounds of appeal. This will allow the Labour Court to examine whether a claim is sufficiently meritorious to proceed to an appeal hearing”. It would appear from this statement that the right to appeal is subject to an examination by the Labour Court to ascertain whether “sufficiently meritorious” grounds exist to proceed to an appeal

hearing. In reality it would appear that all parties do not have a right to appeal as that right is qualified by a screening process to be carried out by the Labour Court.

This view appears to be reinforced by a further statement in regard to operational efficiencies where it is stated that provision will be made to allow a Chair or Deputy Chairs to sit alone in matters such as “examining the merits of certain appeals”. Also it is stated under the heading of Appeals of WRC hearings that in relation to the notice of appeal specific grounds of appeal shall be required and that this will allow the “Labour Court to examine whether there are grounds on which the appeal can proceed to an appeal hearing”.

It is submitted that this matter should be clarified. In the event that the proposal is in effect a qualified right to appeal where either party can appeal but only those with “sufficiently meritorious” grounds can proceed to an actual hearing before the Labour Court we submit that the proposal should be reviewed and that it may constitute a breach of the right to fair procedures as outlined previously. We appreciate that all applicants wishing to appeal a decision of the WRC are obliged to provide grounds of appeal however this should not be subject to a merits test in respect of the relevant grounds.

Furthermore given that only those who meet the relevant criteria can proceed to an appeal hearing this raises the question as to whether all rights of fair procedures as provided for under Article 6 of the ECHR should be complied with at the first tier hearing.

It is submitted that there should not be any fee or deposit payable on the basis of lodging an appeal in view of the fact that a fee was payable at the initial WRC hearing. It is submitted that in the event a fee is introduced that this will act as a barrier to those seeking to appeal and in all likelihood will have the greatest impact on those marginalised groups most in need of an accessible appeals mechanism.

Fixed Charge Notices

It is suggested that in a number of areas a fixed charge notice scheme could be put in place to effect compliance in a more efficient and effective manner. While we welcome and support any measures to encourage compliance we are unsure whether the issuing of fixed charge notices is the most appropriate method given the particular nature of the employment relationship between an employer and employee. It is suggested that when a compliance officer detects non compliance in one of the four areas suggested that a notice would be served to an employer which he or she is obliged to rectify within fourteen days. Failure to rectify the matter could result in a charge of €150 being levied and in the event the employer fails to pay the charge the matter can proceed to the District Court with a full hearing. The examples given of other fixed charge notices which have been used to good effect include parking illegally, littering and driving at an excessive speed limit.

While the group welcomes any efforts to encourage compliance by employers it is submitted that the particular relationship between an employer and employee which is an ongoing relationship must be taken into account when devising any scheme of compliance. In this regard we are of the view that given the personal nature of the relationship that in the event a compliance notice is served and a charge of €150 levied that this could inadvertently damage the relationship between the employer and the employee and result in further detriment to the employee which could ultimately result in an employee being bullied harassed or dismissed.

It is submitted that given the very personal nature of the employment relationship that it is not comparable with the other suggested scenarios such as a littering offence or speeding which are all once off occurrences. We support the intention to encourage compliance among employers however we are unsure whether introducing a fixed charge scheme is the most appropriate method.

Hearing or Inspection

It is recommended that the option to choose between adjudication or inspection is a decision that the State should make and that this will be provided for in legislation. While we acknowledge the role and experience that the State plays in the adjudication and inspection process we would question whether the State is best

placed to decide on the most appropriate method of resolving disputes bearing in mind the pressure to reduce costs in this area. Furthermore it is stated that the complainant or respondent employer will not have the right to object to the proposed/prescribed redress mechanism other than for certain trade disputes. In accordance with the rights of fair procedures it is submitted that parties should have a right to choose their preferred redress mechanism in particular if they wish the matter to proceed to a hearing. For various reasons an employee may be reluctant to refer a case which is dealt with by a compliance officer.

It is noted that in the exercise of certain EU rights that sanctions in order to comply with EU Law must be effective proportionate and dissuasive. It is welcomed that in the table set out at Annex 3 that all discrimination cases shall be dealt with by way of a WRC hearing.

However it is suggested at the table in Annex 3 that all claims under the Organisation of Working Time Act (OWTA) could be dealt with by way of a compliance officer. In this regard we refer to Article 13 of the ECHR which provides for a right to an effective remedy. It is also noted that Article 47 of the EU Charter of Fundamental Rights mirrors the language of Article 13 and therefore those who are exercising a right under EU Law for instance under the OWTA would be entitled to an effective remedy before a Tribunal. It is submitted that in certain cases for example in cases involving the rights of migrant workers under the OWTA that very serious breaches have occurred over a considerable period of time and in such cases employees should have a right to a hearing before an independent tribunal where an effective remedy is available.

5. Enforcement of Awards

We agree and welcome the proposal that in respect to enforcement of awards that a faster more robust and cheaper method of enforcement is needed. We wish to highlight the difficulties encountered by employees who without the benefit of legal representation have obtained a determination from a Rights Commissioner or the Employment Appeals Tribunal and are then faced with a cumbersome legalistic Circuit Court procedure which they are unable to pursue. It is submitted that unless a

more user friendly and accessible method of enforcement is devised that the lack of enforcement of decisions from the WRC could ultimately undermine it's overall effectiveness. It is welcomed that a new and more effective method of enforcing awards will be developed. These measures should be outlined and enforcement models in other jurisdictions should be examined for their effectiveness.

8. Appointments and Staffing

It is noted that in relation to future appointments to the post of WRC adjudicator that it is stated that they will be either civil servants recruited or assigned in the normal way or assigned from an external panel formed from an open and transparent system. It is submitted that recruitment to the post of WRC adjudicator should only be through an open and transparent system in accordance with the right to an independent and impartial tribunal. It is also submitted that the appointment to the role of a workplace commission adjudicator should be for a substantive period in order to ensure impartiality and compliance with Article 6 of the ECHR. We welcome the proposal that clear criteria will be established as regards to knowledge, experience qualifications and skills.

10. The Legislative Programme

It is submitted that the consultation period which covered one month was a short period to provide consultation to all interested parties on such a major piece of reform. It is also noted that the Minister will shortly seek a decision from government in relation to the drafting of the Workplace Relations (Law Reform) Bill 2012 which the Blueprint states is due for enactment in Autumn 2012. While it is welcomed that the issue of reform is a priority for the Minister we would suggest that such a major programme for reform needs adequate time to allow for proper consultation with all interested parties. Accordingly we would suggest that adequate time is given to the Bill to allow all an opportunity to provide their input into such a major piece of reform.

We welcome this programme of reform and support many of the proposals set out.

We hope this submission is of assistance and we also look forward to clarification in respect of the issues raised herein.

Northside Community Law Centre
Civic Building
Bunratty Road
Coolock
Dublin 17

Ballymun Community Law Centre
165-166 Balbutcher Lane
Ballymun
Dublin 11

ENDS//

22. Cathy Maguire Consultation Response

Submission on 'Blueprint to Deliver a World-Class Workplace Relations Service'

Cathy Maguire B.C.L., LL.M., BL.

Introduction

This document makes submissions on the document entitled 'Blueprint to Deliver a World-Class Workplace Relations Service' dated April 2012 published by the Minister for Jobs, Enterprise and Innovation. This submission is supplemental to that entitled 'Submission on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures' dated 16 September 2011.

This document focuses upon the principal concerns arising from the proposals contained in the Minister's document, hereafter referred to as 'the blueprint'.

The blueprint states that further feedback and suggestions are invited from interested parties but that it is not intended to cover old ground but to welcome any observations or suggestions that might contribute in a positive way to the detailed design of the new two-tier structure.

The submissions in this document do seek to cover old ground; they seek a re-thinking of the proposed structure because the structure now proposed has deeply embedded flaws which will imperil a fair adjudication upon employment rights.

The core submissions are in bold type.

One body discharging more than one function: potential bias

The blueprint acknowledges the view expressed during the consultation process that there is a need for a clear and visible separation between some of the functions the new Workplace Relations Commission ('WRC') will deliver. However, the blueprint

does not propose that these functions be delivered by separate bodies. Instead, it speaks of a “clear and appropriate delineation between the functions and the implementation of strict protocols in relation to access and use of data”.

It is far from clear how this delineation is to take effect.

It may well be that the same officers will discharge more than one function, for example, the industrial relations function and the adjudicative function. This will mean that the relationships forged by the officers in discharging their industrial relations function may affect – or be perceived to affect – the decisions which they make when discharging their adjudicative function.

Even if the same officers do not discharge more than one function, the fact that more than one function is discharged by the same institution may lead to bias. For example, if an employee challenges his dismissal on the redundancy ground and the employer claims in his defence that he obtained advice from the advisory service of the WRC on the manner in which he or she should effect a number of redundancies and followed that advice, WRC Adjudicator may be reluctant to find for the employee and say that the advice given by his or her colleague, the WRC Advisor, was wrong.

Similarly, it is proposed that the WRC Adjudicator may accept a WRC Inspector’s report as evidence. However, it is not described as conclusive evidence and is therefore presumably open to rebuttal by either party. However, a party may find it difficult to persuade a WRC Adjudicator that his colleague, the WRC Inspector, was wrong in his or her findings.

It is submitted that the various functions should be given to separate bodies and should not be given to one body.

The blueprint proposes that the Labour Court will continue to discharge both industrial relations and adjudicative functions. The blueprint rejects the proposition that the Labour Court is impaired in dealing with employment rights matters by its concomitant remit in relation to industrial relations issues.

It is submitted that the relationships necessarily forged by the Labour Court in discharging its industrial relations function may affect – or may be perceived to affect - the decisions it makes in discharging its adjudicative function.

It is submitted that, at the least, the industrial relations function and the adjudicative function should be assigned to different divisions of the Labour Court.

Expertise of WRC Adjudicators: lack of legal expertise?

The blueprint states that adjudicators will be appointed through an open and transparent system. Later, the document states that on establishment the Adjudicators will be drawn from the existing serving officers within the workplace relations service. This is then explained as meaning that Equality Mediation Officers and the existing panel of Rights Commissioners will be utilized. The document then goes on to state that in future appointments to the post of Adjudicator will be either civil servants recruited/assigned in the normal way or from an external panel formed through an open and transparent system. The guiding principle for all appointments/assignments will be openness, transparency, ability and merit. Clear criteria will be established as regards knowledge, experience, qualifications and skills against which all candidates will be assessed.

Two concerns arise.

First, it is clear that the expertise of those employer and employee representatives and deputy chairpersons of the Employment Appeals Tribunal is not to be retained. This is to be regretted. It is submitted that a panel of those who currently sit on the Employment Appeals Tribunal should be formed and assigned adjudications, just as it is proposed to form a panel of existing Rights Commissioners to be assigned adjudications. It is submitted that this would present no extra expenditure and would give the WRC additional expertise and flexibility in arranging adjudications.

Second, it is far from clear that legal expertise is to be required. The fact that deputy chairpersons of the Employment Appeals Tribunal are not to be retained as adjudicators suggests that legal expertise is not a priority. It is submitted that legal expertise of Adjudicators must be a priority, particularly given that it appears that

parties are to be encouraged to appear before Adjudicators without legal representation.

Performance management for Adjudicators: potential bias

The blueprint states that Adjudicators are to be appointed for fixed periods by the Minister with the possibility of subsequent periods depending on participation in on-going training and development and satisfactory performance. This will require certain standards and targets to be met. This appraisal process will respect the independence of the decision making function of Adjudicators.

It is submitted that notwithstanding the assurance that the appraisal process will respect the independence of the decision making function of Adjudicators, it is impossible to see how certain 'standards and targets' can be set for an Adjudicator without impacting upon their decisions.

To take the simplest and apparently most neutral of targets, the number of hearings and/or adjudications per annum may in fact affect how an Adjudicator determines an application for an adjournment. Instead of weighing up the arguments of the parties, the Adjudicator may instead allow his or her decision to be determined by the fact that he or she is to be assessed for a new contract in three weeks' time and that he or she needs to reach the target for the number of hearings in one year. Similarly, the requirement to complete a certain number of hearings may affect the way in which the Adjudicator runs the hearing, compelling him or her to cut short cross examination or submissions. This is manifestly unfair.

It is submitted that Adjudicators should not be subjected to a performance management process since it is impossible to conceive of 'standards and targets' which will not impinge upon the way in which he or she conducts hearings or the decisions he or she makes.

Furthermore, even if the decision whether or not to renew an Adjudicator's appointment is meant to respect the independence of the Adjudicator, how can the Adjudicator be sure? Take this example. The Adjudicator is to be assessed for a new contract in three weeks' time. The Adjudicator has heard a claim by a civil servant

against the Minister under the Employment Equality Acts. The Adjudicator is to deliver his or her determination before the new contract is awarded. How can the Adjudicator ignore his or her own pecuniary interest in securing re-appointment when making the determination under the Employment Equality Acts? Perhaps he or she will find against the Minister, but will be unlikely to make a record award against the Minister in all the circumstances. It is quite clear that the decision will be tainted by bias.

It is submitted that the decision to appoint or re-appoint Adjudicators should be made not by the Minister but by an independent body such as the Judicial Appointments Commission.

Hearings to be in private unless the WRC Adjudicator decides at the request of either party to hear the complaint in public: lack of transparency

There is no possible justification for this proposal. Furthermore, it is at odds with the proposal to publish all Adjudicators' decisions which will identify the parties unless one or other of the parties request anonymity and the Adjudicator decides to grant anonymity. It is submitted that, at most, the hearings should be in public unless the WRC Adjudicator decides at the request of either party to hear the complaint in private and that such a decision should be made only where criteria provided for by law have been met.

Cathy Maguire B.C.L., LL.M., B.L.

ENDS//

23. INMO, Consultation Response

OBSERVATIONS ON BLUEPRINT TO DELIVER A WORLD CLASS WORKPLACE RELATIONS SERVICE

Dear Sir/Madam,

The INMO welcomes the publication of the Blueprint to deliver world class workplace relations service published in April 2012.

The INMO made submissions via the Irish Congress of Trade Unions general submission at the end of 2011. The ICTU response to this document is supported by the Irish Nurses and Midwives Organisation and in addition we make the following observations on the document as it is:-

Page 13 – Resolving Disputes at Workplace Level (paragraph 4)
"The Code of Practice……."
We welcome that this Code of Practice, which the Irish Nurses and Midwives Organisation rely on in disputes in Private Nursing Homes, GP Practices and other such single employee/employer establishments, is to be strengthened and further promoted. We would welcome the opportunity of submitting further ideas in respect of how this should happen if the Department were in agreement to same.

Page 15 – Complaints Management
The INMO seeks clarification as to the intent of this process. We would have a concern that a decision to dismiss a hearing based entirely on written submissions would not afford an individual complainant full due process or fair procedure. Therefore the right to a hearing should be protected within the management of complaints.

Page 17 – 3.4 Adjudication Service – Fee for making a complaint

The INMO would have concerns about introducing a fee to have matters progress between employees and their employers. However if a fee is to be introduced, the INMO would strongly recommend that an annual retention fee facility, would be available to Trade Unions to allow them pay an annual retention fee that would cover all costs involving their members to any third party process. This fee could be agreed between the ICTU and government department.

Page 19 – Decisions – Appeal from a Workplace Relations Commission Hearing

The INMO would have a minor concern relating to a stipulation that*: "A party who fails to attend (or be represented at) a WRC hearing, without a reasonable cause shall forfeit the right to appeal to the Labour Court"*. We believe it is important that some clarification/definition of reasonable cause is provided to ensure that matters such as

- change of address;
- non receipt of correspondence; and
- change of representative;

are catered for and taken into account.

Page 20 – Continuation of Appeal from a Workplace Relations Commission Hearing

It is the INMO's opinion that all appeals should have a hearing and that the appeal can stand or fall on its own merit but that it should not be decided in advance as is proposed in point 3.4.

Page 23 – Hearing or Inspections

The INMO would have concerns in respect of the manner in which it would appear that individuals, even those that are advised by professional bodies, Trade Unions or other parties can have their decision regarding a hearing or inspection being appropriate, overturned. We refer to Appendix 3, page 46 & 47 and it is our experience that claims referring to unlawful deduction from salary have under the

Payment of Wages Legislation, required full hearings as the fact of a deduction becomes the issue.

We do not believe that these cases are simply resolved or indeed that the employer and employee will agree on the fact of whether or not a deduction took place at all. Therefore we believe it is important that the right to a full hearing remains. We believe the same principle should apply in respect of rest breaks, max. hours, notification of starting & finishing times/additional hours, annual leave and particularly public holidays which again can be treated differently depending on rosters and/or contracts of employment.

We strongly propose that if an employee wishes to have a full hearing in respect of these matters that this is catered for as the matter in itself may not be easily recognised as a dispute.

Page 26 – Appeals of Workplace Relations Commission Hearing

The INMO would submit the same points regarding appeals as previously outlined (referencing page 17) and likewise relating to fee or deposit for making an appeal, the INMO would submit the same points as previously outlined and would also raise concerns that introducing a fee, or a system which is currently confined to the legal courts will raise the possibility of arguments on costs being introduced to this arena which heretofore have not been in place, and will also place a burden on individual employees and their representatives of making arguments relating to matters other than the business of the claim which, in our opinion, is unnecessary.

Thank you for consideration of these points and we are happy to submit further if required.

Is Mise,

PHIL Ni SHEAGHDHA

INMO

Director of Industrial Relations.

ENDS//

24. Kate O'Mahony, Chairman of the EAT, Consultation Response

The Blueprint

Introductory Comments

"An Bord Snip" recommended the amalgamation of the LRC and the Labour Court and that the statutory employment and occupational benefits remit of the Equality Tribunal be subsumed into the EAT. This recommendation has been turned on its head and a decision has been taken to do the exact opposite. This decision is incomprehensible given the low workload and high cost of both the Labour Court and the Equality Tribunal as compared to the high workload and low cost of the EAT. The cost to the State in terms of the fees of the three members of each division, when measured against the number of cases disposed of, was € 198.00 per case in 2011. (See tables below)

Yes, the Tribunal has a serious backlog problem which is due to the trebling of the number of cases referred to it with the advent of the recession. While the Tribunal has the membership to hear more cases per day it, unfortunately, it is not an autonomous body and is dependent on the Department for its administrative resources. The number of Secretaries is key to the number of hearings that can be facilitated. Any reduction in the number of staff assigned to the EAT impacts on the ability of the EAT to address the backlog.

The Tribunal welcomes and is supportive of any plan to develop harmonious relationships and productive workplaces.

The Blueprint – Concerns

No consideration is given to or provision made for the acknowledged special nature of unfair dismissal cases which involves more complex issues, longer hearings, effect on claimant or respondent, one of life's traumas. The need for special consideration was acknowledged by the heads of the three employment bodies under the aegis of **this Department. The worker whose rights are most seriously diminished by the proposal and new system are the rights of the unfairly dismissed, the most vulnerable of all employees, who hitherto had the right to a hearing at first instance before a tripartite body.

Most comments hereunder, apart from the more general ones, refer to the problems in respect of unfair dismissal cases.
The reform of the employment rights structures being proposed by the Minister may not meet the requirements of the EU's Charter of Fundamental Rights. Article 47 of the Charter of Fundamental Rights provides for the right to an effective remedy, including a right to a "fair and public hearing by an independent and impartial tribunal previously established by law." The constitutional requirement to administer justice in public (art. 34.1) is ignored. This requirement requires that the public have access to see and hear how justice is administered. The fact that some bodies may operate in a manner that violates this principle, does not render the principle constitutional - repetition of a bad practice does not cure it of its defects.

The requirement in article 6 of the European Convention on Human Rights to have hearings for determinations of rights in public is ignored. From an administrative viewpoint, having hearings in private will simply lead to an increased number of queries from journalists leading to unproductive time being spent by administrative staff dealing with these queries, which do not arise when hearings are in public.

Where rights are contested there is a right to an oral hearing and a right to cross-examine your opponents.

Can a quasi-judicial body be answerable to a CEO and subject to performance targets and annual appraisals? Surely this is repugnant to the required independence of quasi-judicial bodies. Justice does not come on a conveyor belt. There are three appeals to the Labour Court:

(i) from the decision of the Registrar to dismiss a claim without a hearing,
(ii) an appeal in the ordinary way, from an adjudicator's decision/determination, and
(iii) where the Chairman/Deputy Chairman of the Labour Court sitting alone decides whether there are grounds of appeal.

Requiring specific grounds of appeal to be identified with a risk of failure of the appeal at the preliminary scrutiny , by the Chairman/Deputy Chairman of the Labour Court, will encourage many, if not all appellants, to engage the services of lawyers.

If the appeal notice has to state specific grounds of appeal and pass the scrutiny of the Chairman/deputy Chairman of the Labour Court in order to allow it to proceed to a hearing, why is there a full de novo hearing required.

There is no legal input to the quasi-judicial function throughout the entire process. The first access to a legal input is where a case is appealed to the High Court (on a point of law) - the high cost of this will be prohibitive for many, denying them the opportunity to vindicate their rights.

Ironically, this will create a fertile ground for lawyers. In the current climate the objective should be to reduce the scope for appeals against the state.

Having no appeal to the Circuit Court will lead to an increase in costly judicial reviews for the Department and the State.

First Tier Level:

There is a serious lack of balance at first tier level:

The first-tier body lacks the balance of a division of the Tribunal which is made up of three members coming from three distinct perspectives, each having specific experience as well as expertise and knowledge built up over several years in their respective employments/careers which they bring to bear on their decision-making function. In the new structure, this decision-making process is being devolved, for the most part, on lone civil servants who have no experience in industry or law. This imposes a significant responsibility on the lone adjudicator to make a decision involving complex legislation while at the same time interpreting legal submissions and arguments. Will six weeks in training equip them for their roles and render them competent for a task which affects peoples' rights and obligations? The level of satisfaction with the outcome of Tribunal hearings is seen in the consistently and extraordinarily low level of appeals from it to the courts.

It is acknowledged by the Minister that adjudicating on individual employment rights and collective interests requires different skill sets and procedures. Yet, extraordinarily, the process went on to ignore this. It is also widely recognised that where bodies have a dual jurisdiction that there is a real risk of contamination of the procedures required for both functions The only research carried out in Ireland, which was presented at the DCU conference in July 2011, confirmed this.

Can you call a recruitment process "open" where only civil servants may apply?

There is no indications of the numbers of civil servants that will be required in the Workplace Relations Commission (both adjudicators and administrative staff).

The effect of the reform is to extend the function of the civil servants into a new field, which is totally contrary to stated Government policy of decreasing the numbers in the Public and Civil Service.

The workload of the Labour Court is underestimated. ****See Tables below.

Complaints Management;

It is unclear what legislative grounds the Registration Service will have to reject complaints that are incorrectly grounded?

Early Resolution Service:

It is unclear what legislation is required to make agreements binding on both parties and enforceable through the Courts.

Kate T. O'Mahony
Chairman
Employment Appeals Tribunal

Comparative Statistics **Appendix 1**

Body	**No of Cases in 2010**	**2011 Budget**
Employment Appeals Tribunal	8,778	€3.1m
Labour Court	971*	€2.29m

It is believed that only one extra division of the Labour Court is required to deal with appeals in the new structure. Taking the comparative statistics of the various bodies and the high level of unfair dismissal cases into account that would seem overly optimistic.

Comparative Statistics

B**ody**	**No of Cases in 2010**	**2011 Budget**
Employment Appeals Tribunal	8,778	€3.1m
Labour Court	971*	€2.29m
Equality Tribunal	809	€2.455m

* Taken from the Reform Project Office's document. A figure in another document says the number of cases is 1,452.

First Instance Jurisdiction of the EAT.

The EAT has first instance jurisdiction in all claims arising on the termination of employment. The deliberations of a tripartite body have always been deemed necessary where a worker has lost his job. The first instance jurisdiction of the EAT forms a significant proportion of its entire workload.

	2007	2008	2009	2010	2011
All Claims	3,173	5,457	9,458	8,778	8,458
First Instance	**2,927**	**4,901**	**8,650**	**7,866**	**6,194**
Unfair Dismissals	**1,127**	**1,538**	**2,489**	**2,157**	**2,107**

ENDS//

25. MRCI, Consultation Response

Overall comments

MRCI welcomes the opportunity to respond to the “Blueprint to Deliver a World-Class Workplace Relations Service”. This submission identifies some of the key issues for Migrant workers that arise from the document and outlines proposals to strengthen the proposals.

MRCI welcomes the Minister’s proposals focusing on the reduction in delays and the recognition of the need for a new type of method of enforcing awards.

The Role of the Equality Tribunal

In our original submission we highlighted the unique role of the Equality Tribunal.The Equality Tribunal’s role is very specific, responding to issue of discrimination and inequality as per the Equality Acts. The Tribunal has built up very specific skills and knowledge on equality issues which needs to be preserved in the new structures such as specialist trained Equality Officers continuing to deal with cases concerning anti-discrimination. We recommend that these and other proposals are built in to the new structures.

Proposals to strengthen the operation of the Proposed System

- There is no guarantee of an independent hearing of a claim at the first tier. The Blueprint allows the state to decide through legislation the most appropriate method of resolving disputes. This issue needs to be addressed to ensure that the right to a fair hearing is guaranteed.
- The proposals regarding the striking out of claims without a hearing and the need for claimants to send written submissions setting out why their claim should not be struck off is problematic. For many vulnerable workers attempting to seek redress for workplace exploitation is an extremely difficult process. For migrant workers not familiar with the basic avenues for accessing advice, who are not in a trade union, or who cannot speak English, it is extremely difficult. It is our experience

that vulnerable workers will not take cases without support and this support involves the worker being enabled to recognise that he/she has the "right to take a stand against their exploitation". This provision in the blueprint will have the unintended effect of preventing workers from pursuing their claims.

- The introduction of a €50 fee for making a complaint will prevent those without means taking a case. For example, a migrant worker who has not had their wages paid and may have no access to social welfare will be unable to pay the €50. We strongly recommend that this fee proposed will not be imposed.
- The Blueprint allows the registrar to strike out claims 'which are not properly grounded'. This favours parties with greater resources, capacity and access to legal advice. Responding to cases appropriately should be built in to the system and referrals made.
- The conciliation and early resolution service set out in the Blueprint proposes a *"range of intervention tools will be used including email and telephone communication and, only in exceptional cases meeting directly with the parties".* In our view, particularly in cases of extreme exploitation it is not a sufficient service and need to be developed.
- Where a migrant worker has little or no spoken English the process of making and proceeding with a complaint can be further complicated. An interpreter is essential whether at consultation stage or at the hearing itself. An interpreter service needs to be put in place.
- While there are written and Internet sources of information on rights and entitlements, there remains an over reliance on oral methods of accessing information. It is also common for migrant workers to be told at recruitment stage or by employers that Irish labour law does not apply to them. This lack of information impacts on a person's ability to question, to challenge or to take the ultimate step of making a formal complaint. It is important to have a place in which you can find information". While information on its own does not address the situation in which the person finds themselves, it can be an important first step in that person's journey towards justice. Information should be provided by the government on employer's responsibilities and rights to

employees. This would go some way in ensuring that workers have access to information about their rights and as such will know where they are being exploited.

- Through no fault of their own, a worker can thus lose any legal right to live in Ireland, resulting in much associated difficulty. The workers who find themselves in such a situation will be under great stress and anxiety as they feel they have no formal right to remain in the country and have in the process been criminalised despite being the one who has experienced ill treatment. In a growing number of cases where an employee has become undocumented and is therefore not legally resident in the country, employers have sought to rely on the defence of illegality of contract. This stems from the traditional position that where the employee is not legally entitled to work, their contract of work is illegal and therefore unenforceable. This presents obvious difficulties for an employee who has become undocumented through the negligence of their employer. There has been case law which seeks to put some onus on the employer in such situations and allow a complainant to seek statutory protection, namely enforcing their employment rights. It is important that undocumented worker's employment rights are protected and that the inspectorate and the legal redress mechanisms follow through on it. To date, however, the inspectorate and redress bodies have indicated that they cannot or will not seek monies owed to undocumented workers. A bar to recovery of lost wages by an undocumented worker would lessen an unscrupulous employer's potential liability to undocumented workers and make it more financially attractive to hire them. Workers, regardless of their legal status, should have the right to exercise their employment rights, and ensure there are no barriers to legal redress.
- In the document there is no mention of what is proposed regarding the equal status function of the Equality Tribunal. The equal status function of the Equality Tribunal should move to the new body.

Conclusion

A number of the proposals in the Blueprint may be in breach of EU anti-discrimination Directives and the EU Charter of Fundamental Rights. In this regard the final proposals should be proofed against the Directives and the Charter to ensure compliance.

ENDS//

26. Sinn Féin, Consultation Response

Submission on behalf of the Sinn Féin Party

On the Government Blueprint to Deliver A World-Class Workplace Relations Service

By Senator David Cullinane

Party Spokesperson on Worker's Rights

Introduction:

The Government blueprint provides for a much needed opportunity to reform employment rights legislation and employment rights bodies. I welcome the Ministers commitment in the Blueprint to building a world-class workplace relations service.

Sinn Féin will support progressive proposals aimed at strengthening worker's rights, streamlining and simplifying employment rights bodies and procedures, ensure early and satisfactory resolution of work place disputes and robust and fair enforcement and compliance with employment rights legislation.

The Blueprint acknowledges the need to support and promote harmonious relationships in the workplace as an important element in achieving lasting economic growth and creating and sustaining jobs.

The best way to achieve this is through mutual recognition, respect and the creation of a level playing field. It is critical that in enhancing workers' rights that the issue of trade union recognition and the right to collective bargaining is addressed.

It is also critical that employment rights are defended and upheld. This valuable consultation process is taking place against a backdrop of flagrant breaches of

employment rights and several sit-in protests by workers demanding to be treated fairly.

It is important that in the context of seeking to bring about institutional change that the Government conversely seek to enhance employment rights legislation in a number of areas most notably;

- Trade Union Recognition and the Right to Collective Bargaining
- Anti- Victimisation in the workplace legislation
- Redundancies
- Pensions
- Compliance and Enforcement

Sinn Féin welcomes the opportunity provided by the Minister to make a submission and we offer genuine and constructive proposals aimed at providing world-class, effective, fair, impartial and cost effective means of redress and enforcement of employment rights.

Sinn Féin Response to the Blueprint:

Sinn Féin welcomes proposals aimed at structurally reforming the existing employment rights bodies and delivering a simpler more efficient, fair and user-friendly system.

However the corner stone of employment rights must be the right to take a case, have it heard and adjudicated upon by a third party (employment rights body) and the right to an appeal.

Registrar function:

We oppose the introduction of a registrar function to essentially filter complaints. An important element of the existing system is the right of an employee to due process and to have a complaint adjudicated upon by an Independent third party. We

therefore question the logic and the need for the registrar function. The right of a worker to advance a case to the newly proposed Workers Relations Commission must not be conditional upon the decision of a registrar.

Appeals system:

The right of an employee to appeal a decision of an employment rights body is being eroded in certain areas. Sinn Féin rejects the proposal in the document (Page 20) to allow the Labour Court to examine whether a 'claim is sufficiently meritorious to proceed to an appeal hearing'. The right to an appeal must be an absolute entitlement and an integral part of due process and fair and impartial third party adjudication.

Trade Union Recognition:

It is important that at all conciliation, medication, and early resolution service arrangements that workers are entitled to have trade union representation. While there is obviously value in having more informal settings for conciliation and mediation services it is also important that workers be represented by their trade union.

As part of reform proposals Sinn Féin is advocating that the Government put on a statutory basis the right to trade union recognition and collective bargaining. Dialogue is the best way to resolve work place disputes and the refusal of certain employers to recognise trade unions is damaging and counter productive. The Government should also commit to introducing strong, robust and effective anti-victimisation in the workplace legislation to protect vulnerable workers.

To this end we are concerned that in the Blueprint Appendix it provides for no role for trade unions in the policing of REA's section 32. The Blueprint also commits to reviewing the Code of Practice; Grievance and Disiplinary Procedures, S.I. No 146 of 200, to 'take into consideration the small owner-managed business'. Both are clearly designed to undermine trade union representation and we strongly reject these

changes. The role of trade unions must be central and integral to reforming the employment rights bodies and their roles and functions.

Fees and Time Limits:

We are concerned about the introduction of fees to making a claim. The blueprint provides for the charging of €50 for a first claim and a further €50 for an appeal. It is important that costs are not an impediment to a worker making a just claim and as such we oppose the introduction of fees and charges.

We are also concerned about the time limit for making complaints. The blueprint provides for a consistent time limit of six months for initiating all complaints. Presently the time limit for redundancy cases is twelve months. A reduction in the time period allowed to take a case is not what is required.

The blueprint does state that in 'exceptional circumstances' the time limit may be extended to twelve months. Currently under the Organisation of Working Time Act the language commonly used is 'reasonable cause'. Sinn Féin believes that the time limit provided for in the blueprint is too short and we propose that it be at least two years and that in seeking to extend the date further that regard is given to reasonable cause.

Enforcement and Compliance:

The issue of enforcement and compliance must also be an integral part of reform in this area. The blueprint states in page 9 that 'A new compliance model with more appropriate, efficient and less expensive mechanisms such as Compliance Notices, Labour Court Orders and Fixed Charge Notices will be introduced to reduce the need to resort to prosecution'.

While it important that employers who are generally compliant with employment rights law are not unfairly punished for unintentional breaches it is also important that employers who flagrantly and consistently breach employment rights laws are suitably punished. A balance needs to be stuck and clear and robust sanctions and

penalties must be in place to serve as a genuine deterrent to serious breaches of employment rights legislation.

The issue of enforcement of awards is also important. Presently there are backlogs to having a case heard, a decision or determination made and the payment of an award. The blueprint refers to the need to develop a new and more effective method of enforcing awards. This is hugely important and Sinn Féin advocates that all cases should be heard not later than 60 days upon a worker(s) formally application to an employment rights body and that payment should be made as quickly as is possible. Also a strong and effective penalty system for non payment of awards must also be introduced.

ENDS//

27. The Equality Authority, Consultation Response

Response by The Equality Authority to be Reform of the State's Employment Rights and IR Structures and Procedures

The Equality Authority welcomes the Report on unifying the different Employment' rights fora into one single first instance entity and single appeals' entity**.** The adoption of the 'Equality Tribunal' model of hearings is practical as are the key commitments around an early hearing process, a uniform 42 days time limit for appeal and the commitment of issuing findings within 28 days are identified as welcome core reforms which the Equality Authority fully endorses.
The latter will enhance customer service and will be a significant reform in a process that has seen long and unacceptable delays in issuing decisions and is most welcome.

It is very important that mediation is completely separate and distinct from adjudication and there is no cross over between dispute resolution and adjudication unlike the conciliation model used by the Rights Commissioner Service.

The Equality Tribunal mediation model could be further improved by:
(a) Ensuring that the mediation officer is fully informed about the complaint and in a better position to try to assist in resolving the dispute.
(b) In order to have a proper chance to resolve the matter through mediation it is imperative that decision makers are present at mediation
(c) Ensuring that the parties are aware of who will be attending the mediation in advance.

The mediation process should be completely separate and distinct from the adjudication process **(Point 3.11)**

In adopting the single adjudicator system it is essential that the skills necessary to identify and hear equality and discrimination cases be rolled out across all adjudicating and mediating officers of the WRS. For example, there is a cross over between redress offered to women under the Maternity Protection Acts and women who may be victims of pregnancy discrimination under the Employment Equality Acts. A uniform test and thorough training in equality must be delivered to all officers, in order to ensure that claims are heard under the correct legislation, especially in cases where the lay litigant may not be au fait with the different protections provided for under these separate and distinct Acts.

Equal Status Cases:

The lack of clarity in the existing document as to where Equal Status Act complaints will be heard is a cause for concern. Though not directly referred to in the initial proposal, the Equality Authority remains convinced that all equality claims both under the Employment Equality Acts and the Equal Status Acts should be dealt with through this new forum. Furthermore, the moving away from the Equality Tribunal of discrimination cases involving licensed premises has undermined the effectiveness of this protection and it is essential that all elements of discrimination in the provision of services be rationalised under this new adjudication forum.

As the new body will have expertise in understanding, mediating and investigating inequality – the expectation that the Courts should duplicate this service is not as appropriate as the placing these matter under the remit of a new body. This would ensure the full reform and rationalisation of the State's adjudication services in the area of equality legislation.

The experience of the Equality Tribunal in hearing such complaints is valuable. There is a direct link with workplace activity and how this affects customer service. If the workplace is equality compliant, then it is more likely that its customer service will reflect the rights and responsibilities as set out under the Equal Status Acts.

Under equality legislation the principles of employment equality and equality in customer service are interlinked and inter dependent. The availability of expertise in one location, to resolve workplace disputes is an easily transferable skill which

supports the resolution of the difficulties experienced by customers of these workplaces, as they endeavour to access goods, facilities and services without discrimination or harassment. It is recommended that all forms of discrimination in service provision be heard by the WRC.

The Equality Authority is anxious that the learning and expertise developed by the Equality Tribunal in adjudicating and mediating Equal Status Act cases is not lost in this new employment rights focussed body. It is a valuable resource that can be rolled out across the WRS. Organisationally, it is preferable, if a distinct equality customer service unit is established in the new body, so that the WRC is the sole redress body which hears and mediates such complaints that arise in all areas of the Equal Status Acts.

The Equality Authority provides information and advice to potential claimants under the Equal Status Acts. It is preferable that a distinct complaint form be available for Equal Status complaints and the Equality Authority will support this new body by being the source for the correct specific form for such complaints, if this is helpful.

Provision of Information: It is also essential that there is separation between the provision of information/advice services and subsequently resolution and/or adjudication. The provision of information by equality experts on the Employment Equality Acts and the Equal Status Acts, as required by EU directives, will remain under the remit of the proposed Human Rights and Equality Commission. This is in line with the commitments given by the Minister for Justice and Equality and the recommendations of the Working Group on the merger of the Equality Authority and the Irish Human Rights Commission. The impact of non-directive information on those who contact the WRC AIS needs to be monitored by an MOU between the two bodies to ensure legitimate claimants are not being disadvantaged by the non-directive nature of the service being provided by the AIS on equality issues. The Equality Authority recognises the supportive potential that exists in the AIS in the provision of low level information on equality legislation and will cooperate with the AIS in ensuring quality service provision to service users through the AIS.

With this in mind, and to ensure the distinct identity of an information service (AIS) and an advice driven information service (EA), it is advised that in order to achieve the goal of a 'one-stop shop' on employment rights, it is recommended that the Family Leave Acts (Maternity, Parental and Adoptive Leave), where the Equality Authority has no right to offer advice to the public, now be properly placed under The AIS.

The Equality Authority currently provides an information only service as a legacy from its previous body which was under the former Department of Labour. It does not and can not provide advice on these Acts. It would appear that if the 'one stop shop' goal is to be achieved, the information function on Family Leave Acts, should now be transferred from the Equality Authority to the WRC AIS, which may require amending legislation.

Under equality legislation, the Equality Authority provides information and advice on the Employment Equality and Equal Status Acts. As the WRC is prohibited from offering advice, the Equality Authority and the new AIS should draw up a Memorandum of Agreement to ensure that people in need of advice are not in anyway discouraged by contacting an information only, service. Clearly people with equality queries may be given initial, non directive, information, which will be supplied by the Equality Authority to the WRC, but rights based queries must be referred onto the Equality Authority for advice and support.

The Authority will also wish to co-operate on a protocol to access data about the numbers of calls received on equality matters and the actions taken. The Equality Authority's publications will be made freely available to the AIS. Any information being given out by the AIS on equality matters must be agreed in advance with the Equality Authority. As a result the establishment and promotion of the AIS may be a welcome addition and a valued shared service for the Equality Authority.

Accessibility is vital if the new one stop shop service is to work effectively. The Equality Authority has some concerns under the new proposals. The EU Directives, from which the equality legislation is drawn, guarantee easy access to redress. The Equality Tribunal structure is compatible with the Directives in that it is a free service.

The Equality Authority recommends strongly that this principle of free access to justice be maintained. The proposal to charge a fee to access redress is a further disincentive to workers who are already economically distressed, by virtue of maltreatment in the workplace, without adding a further financial burden at a crucial and stressful time.

Secondly, there is a fundamental right to seek redress. Frequently, even in cases which are not upheld, the prima facia case is established and therefore it is proper and correct that these matters are brought for adjudication or mediation. An imposed fee, in a culture where costs are not awarded, would penalise this proper approach to resolving workplace conflict. If the WRS decides to no longer accede to the principles of easy access to redress as set out in the Directives, it is essential that any fee charged would be refunded a) if the case succeeds and b) if a prima facia case is established in order for the hearing to proceed – the same principles could be applied to the proposed Appeals fee.

It is important that the fixed charge notices are not based at too low a level to encourage lack of compliance with workplace entitlements, or at a minimum could be continually applied on each instance of non-compliance.

The principle of a **single complaint form** is also commendable but is it practical under the accessibility test? The Authority is happy to assist in the testing of any form. If a person has an employment equality complaint, the handing over of a 20 page form, where only 6 pages might be relevant to the equality complaint, is not ideally conducive to accessibility, clarity or reduced risk of error. The Equality Authority recommends that the goal of a ‘single complaint form’ be re-examined in the context of the goal of a ‘single accessible format’ – with a standardisation of information and proofs. It might yet prove more efficient to have a very small number of separate forms directly relevant to the distinct Acts that the cases are being brought under. This will improve accessibility and reduce error.

The Equality Authority recommends that a distinct and separate form continues to be used for Equal Status Acts complaints and is willing to be the source of such a form for distribution and access by the general public.

Codes of Practice: The information provision of the Equality Authority also has an inbuilt advisory expertise which understands how discrimination can be constructed and can provide a range of advice, supports, and responses to address the issues raised. This feeds in directly into our work on developing Codes of Practice. The Equality Authority has a specific legislative remit in drawing up Codes of Practice relevant to the workplace and to service provision. There are areas which will cross over with the remit of the WRC and the Equality Authority is willing to co-operate in the drawing up of such Codes. This streamlining of such practices offers further scope for cooperation, such as including a remit for bullying in the workplace, currently under the remit of the Health and Safety Authority, in the scope of the Equality Authority as it proceeds to merge with the new Irish Human Rights and Equality Commission.

Bullying is essentially an imbalance and abuse of the power structure. It is closely related to the imbalances and abuse that give rise to discrimination and harassment. In the context of a review, it would be appropriate to consider transferring the current responsibility for bullying to the body that already has the expertise and powers to combat discrimination, harassment and sexual harassment. The issue of bullying is one of the abuse of an unequal power relationship in the workplace. The characteristics of bullying and harassment are very similar. **Harassment** is often distinguished from bullying purely on the ground specific nature of the unwelcome behaviour, rather than the distinct actions of the perpetrator.

In the review of the remit of the WRS, it may be timely to look at placing bullying and harassment in the same locus and we recommend that the Equality Authority is well placed to deal with both issues of unwelcome workplace behaviour based on the inequality of status and abuse of power.

Enforcement of awards. The Equality Authority shares the concern about the enforcement of awards and has explored the potential of seeking assistance from the CRO, especially in cases where companies are to be struck off or wound up, when a case is pending. The Authority would welcome an opportunity to make an

input into the development of a more effective method of enforcing awards as recommended in the Report.

Conclusion: Overall, the Equality Authority welcomes the reforms being introduced and the commitments to quality customer service. A test of the effectiveness of these reforms will be their capacity to deliver the time frames envisaged. The Equality Authority wishes to be a resource to the WRS in its ambition to achieve these goals. The clear and simplified procedures will ensure that in a time of economic challenge, unfair treatment will be speedily addressed and that remedies will be offered to ensure the maximisation of productivity through equal and fair treatment being available to all workers and workplaces, in a recovering economy.

ENDS//

28. Prof Paul Teague and Liam Doherty PhD. Consultation Response

Reforming Ireland's Employment Dispute Resolution Machinery: A Response to the "Blueprint to Deliver A World-Class Workplace Relations Service"

Prepared by Paul Teague and Liam Doherty

Introduction

Government's rarely act decisively to overhaul established public policy regimes. By far the preferred strategy is to introduce incremental reforms here and there that leave the existing policy architecture intact. This cannot be said of the Minister's proposals to radically change the country's employment dispute resolution machinery contained in the recently published Blueprint. The thrust of the reforms is to make root-and-branch changes to public dispute resolution bodies so that employment disputes, whether they be individual or collective in character, are addressed in a more efficient and effective manner.

The proposals are timely, as a wide consensus exists that the current public dispute resolution machinery is defective in several important respects. First of all, there are too many bodies with overlapping responsibilities and competencies that have not only led to policy duplication, but also to regime shopping, involving the same employment dispute being heard by different dispute resolution bodies. Secondly, the machinery is plighted with inefficiencies, with some employment disputes taking years to settle properly. Thirdly, many parts of the machinery have become too formal and legalistic, operating more like a court of law than an informal body to address employment disputes fairly and speedily.

In our view, the vast majority of the proposed reforms set out in the Blueprint, many of which are consistent with the suggestions we made in an IRN article back in

2008, are to be welcomed as they help remedy a range of problems with the present system. The proposed reforms will streamline the public dispute resolution machinery by reducing the number of workplace dispute resolution bodies from 5 to 2. But we have a nagging concern that the proposals run the danger of creating a new complexity in the resolution of employment dispute resolution by putting in place up to 4 points of contact for redress of rights-based complaints: (1) Registrar (2) Early Resolution Service (ERS) (3) Compliance Officers /inspectors (4) Adjudication; In particular, we worry that these alternative options risk triggering a new form of confusion and claim shopping, especially in cases involving multiple claims. In our view, this risk could be easily avoided by simply stipulating that all rights-based complaints to be referred to the Rights Commissioner Service with a strong voluntary mediation option to be available to the parties.

Actually, to make the role of the Rights Commissioners consistent with the envisaged 4 contact point redress system, the Blueprint makes a number of proposals that we consider retrogressive. At present, the Rights Commissioners provide in the main a very efficient form of Med/Arb service: it is this service that makes the Rights Commissioners a highly successful dispute resolution body. Yet the Blueprint would appear to strip out the Mediation aspect of the Right Commissioners' role. As far as we can see, the Blueprint proposes to transfer mediation to an Early Resolution Service (ERS), who appear to be largely desk based claims administrators, largely seeking to mediate between parties over the phone and via e-mail. We find this proposal astonishing. We know of no reliable evidence that suggests that administrative/desk based mediation is successful; it certainly falls considerably short of the espoused principle of delivering 'A World Class Workplace Relations Service' What we need is a strong voluntary mediation option staffed by appropriately qualified personnel (eg Industrial Relations Officers from the Conciliation Service or) who can meet the parties directly to endeavour to resolve a case. If the parties decline the mediation option or fail to settle their case then the case should proceed to a Rights Commissioner. (Incidentally what is wrong with the term Rights Commissioner or Employment Rights Commissioner?)

However the problem is exacerbated as under the proposed new dispute resolution architecture, the role of a Rights Commissioner would appear to be confined to that of an Adjudicator ('hear both sides and makes a determination' p23): their Med/Arb role, which can genuinely be considered a form of international best practice, is neutered. Moreover, question-marks hang over how Rights Commissioners and ERS Officials providing desk-based mediation will interact with one another. Consider the matter of unfair dismissal cases. In the future, the proposal is for these cases to go to the Rights Commissioner/Adjudicator in the first instance, but will the ERS attempt to conduct an administrative /desk based mediation between the parties? Thus, the Blueprint is dismantling a highly effective service that combines mediation and adjudication and replacing it with arrangements that are disjointed.

Ensuring we have The "Right" Commissioners

The priority must be to have the "Right" Commissioners hearing cases who possess a strong track record of experience as IR/HR practitioners, excellent interpersonal and problem solving skills with an appropriate understanding of the law and it's application rather than implement a selection process that delivers Commissioners with a strong legal background providing a pure Adjudication process. Some years ago The EAT was described by the ICTU as "a cold place for employees" due to the procedures adopted and the overly legalistic approach – we now run the risk of creating another cold place for employees at the point of first instance which would be regrettable.

Given the complexity of Employment Law it seems sensible to allocate the Rights Commissioners to at least three specialist areas

1/ Equality

2/ General Employment Rights Legislation

3/ Industrial Relations Cases *

*In relation to the latter area in particular, a list system, as proposed for Members of the Labour Court would appear to be appropriate.

The Blueprint also lacks detail on a number of other matters that some may consider small-scale, but which are nevertheless contentious. Although not exhaustive, here is a list of issues on which there needs to be further clarification.

There is no detailed consideration of the future positioning of Rights Commissioner hearings conducted under the IR Act 1969.

- Will the ERS offer its services to employers and Trade Unions in such cases?
- Will a publicly appointed Adjudicator (rather than a person who enjoys the support of the Employer and Trade Union Community) hear the case;
- What competencies do we require of a person conducting an Adjudication hearing of a Rights based case compared to a typical IR case;
- Will fees be levied on the parties;
- Do the parties to an IR dispute need the opportunity to have such hearings held in public?
- Do we need to publish decisions of Rights Commissioners under the IR Act 1969?
- Will the Labour Court have to satisfy itself that the IR case is 'sufficiently meritorious' to proceed to an appeal hearing;
- Will the Labour Court be conducting a "de novo" hearing.

Another area of concern we have is the role of the newly constituted Labour Court. A core distinction made in the industrial relations literature is between 'interest-based disputes' – cases that arise due to the playing out of industrial relations processes – and 'rights-based disputes' – cases that are based on a piece of employment legislation. When the Labour Court was first established by the 1946 Industrial Relations Act, it was envisaged that it would be addressing mostly disputes of interests. For the following four decades this was mostly the case: the Labour Court was used by the parties in difficult industrial relations disputes to map out a pathway to a settlement. However, over the last two decades the Labour Court has had to deal with more and more rights-based disputes with the continuous growth of employment legislation on individual employment rights. Thus, The Labour Court now has to address both interest-based disputes and rights-based disputes.

We worry that the DJEI Blueprint places too much emphasis on the Labour Court resolving rights-based cases. For example, the document suggests that the Labour Court should become the single point of appeal for all Rights based cases, appeals from the Rights Commissioner (industrial relations cases), Conciliation or Advisory Service. Although we welcome the placing of the new Labour Court on permanent footing with full time three-person divisions, we would question the merits of locating all appeals within a single Labour Court structure with the same Divisions hearing all cases. In our view, this proposal does not give due to weight to the very different competencies required to hear complex rights-based cases and complex industrial relations cases. One way round this problem would two have separate divisions within the newly constituted Labour Court, one to deal with traditional IR type voluntary appeals and the other to deal with rights-based appeals.

More concretely, we would propose the following:

Full Time Labour Court (IR Divisions) would deal primarily with IR cases on appeal from the LRC namely:

Rights Commissioner – Industrial Relations
Conciliation Service
LRC Advisory Service Cases

Full time Labour Court (Rights Divisions) would deal primarily with individual rights cases on appeal from Rights Commissioners/Adjudicators

Rights Commissioner – Equality/OHS
Rights Commissioner - Industrial Relations
Rights Commissioner – Other Employment Rights

Our suggestion probably requires further consideration to ensure that the right people are in place to consider the right cases on appeal. To be clear, we are not advocating a new structure for the Labour Court– our concern can be accommodated via an internal division of responsibilities, appropriate recruitment arrangements and appropriate scheduling of Court members to cases.

The need to encourage the resolution of disputes as close as possible to their point of origin

The Blueprint refers on a number of occasions to the need to encourage the resolution of disputes as close as possible to their point of origin. Yet there is no reference to the need to **utilise and exhaust internal procedures** before a complaint can be considered by a third party. Promoting the use of internal dispute resolution mechanisms was envisaged in the *Employment Law Compliance Bill 2008* (Section 33) which did not pass through all stages of the Oireachtas before the last Dail was dissolved.

We would argue that a stipulation by made in the new public dispute resolution machinery that requires employers to have clearly documented internal procedures, that obliges all parties to utilise and exhaust these procedures and for third parties to take the behaviour of the parties into account in determining redress and in requiring a possible contribution by either or both parties to the costs of the proceedings.

We would suggest the following wording be adopted:

"Employers and employees (and their representatives) shall endeavour as far as possible to resolve at workplace level, in accordance with any arrangements in place for resolution of disputes or differences between them, any disputes or differences relating to the application of any employment legislation.

Before a case is referred to a third party employers and employees shall exhaust any established internal procedures that are consistent with the Code of Practice S.I.No. 146 of 2000 or otherwise agreed. In arriving at a determination or recommendation, Statutory third party bodies will take into consideration the availability of documented procedures for the resolution of disputes in the organisation and the adherence (or non adherence) to these procedures by either party in determining redress including a possible contribution to the costs of the proceedings."

Fees should be in the case of frivolous or vexatious claims or where a party does not appear at a hearing without good cause .Repeat players could also be penalised via additional fees levied on them and the possibility of mandatory inspections. A single referral form within a single database requiring employer registered number/employee social insurance number and representative details would also assist in identifying frequent users.

Changes to the Blueprint along these lines would give a real impetus to developing and exhausting internal procedures, place a greater responsibility on the parties to seek to resolve problems internally and would, in our opinion, ultimately reduce the volume of cases being referred to the State system.

Finally, we believe that a number of more technical matters set out in the blueprint need further discussion.

Why should Rights Commissioners/Adjudication hearings be held in public? We are introducing an unnecessary additional dynamic into the dispute resolution process at a stage that should be characterised by informality. In our view, it should be only in very exceptional circumstances that such cases be held in public. Otherwise we run the risk of an informal dispute resolution service turning into a media circus and indeed we may find decisions of Rights Commissioners/Adjudicators appealed on this point alone.

In relation to the processing and scheduling of hearings the employer could be requested to identify whether there are any legal points at issue in their response to the claim form eg are they disputing whether the Rights Commissioners has the necessary jurisdiction to hear the case, or whether the claimant come within the scope of the Act etc and this information could also permit a more efficient management of cases.

Is it consistent for the Labour Court to satisfy itself that a rights based case is “sufficiently meritorious“ to proceed to an appeal hearing and then conduct a “de novo” hearing ?

Will the WRC or the Labour Court determine whether an IR case should proceed from the

conciliation service to a Labour Court Hearing?

Can the Court apply an investigation style approach to their hearings and only apply the rules of evidence by exception ?

We consider that a single Code of practice on Bullying and Harassment in the Workplace is needed rather than the existing three separate codes of practice on Bullying and Harassment in the Workplace produced by the Labour Relations Commission (2002), Equality Authority (2002) and Health and Safety Authority (2005) respectively.

We need a revised Code of practice on Grievance and Disciplinary Procedures that clarifies that they are in fact two separate and distinct procedures. They are currently subsumed into one text in a manner that creates confusion.

In conclusion we welcome the vast majority of the proposed reforms set out in the Blueprint and look forward to reviewing the detailed legislative proposals that will emerge later this year and trust that the matters identified above will receive appropriate consideration in any final deliberations by the Minister and his Officials.

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ENDS//

29. ICTU Consultation Response

CONGRESS REPONSE TO "BLUEPRINT TO DELIVER A WORLD- CLASS WORKPLACE RELATIONS SERVICE"

Introduction

Congress welcomes the general approach as outlined in this Blueprint. In particular we welcome the two-tier Workplace Relations structure and the proposal to devolve the appellate functions of the E.A.T. into a reconfigured Labour Court. Congress has participated in all the consultation processes to date and while we would have preferred to have been involved in a more structured way on this occasion we accept that many of our concerns and suggestions have been addressed. In the nature of responses such as this we will concentrate on those aspects of the Blueprint which still cause us concern and on those aspects which require further clarification. We will deal with the issues in the order in which they appear in the Blueprint.

Fee for making a Complaint (P.17)

Congress is opposed to a fee for making a complaint as workers can often be in serious financial hardship at a time when they feel they have a legitimate complaint. A fee might act as a disincentive to workers seeking to vindicate their rights.

If our objection to a fee is dismissed we would argue that trade unions should be allowed to pay a reasonable yearly fee which will cover all the complaints they take on behalf of members.

Complaint/Appeal to the Labour Court

The suggestion that Compliance Officers should be empowered to take complaints to the Labour Court as an alternative to prosecutions needs to be fully thought out. This suggestion might have the unintended consequence of increasing the likelihood of employers bringing legal representatives into the Labour Court. This could in turn result in a spate of injunctions, judicial reviews and constitutional challenges to Labour Court procedures and decisions. At the very least we would need to be sure

that REA's and JLC's have been made constitutionally robust before making this change.

Fixed Charge Notices (P.21)

Would the introduction of such a system affect the compensation due to a worker who has been wronged?

Fee Deposit for making an appeal (P.27)

A fee deposit would unjustly impact on the worker and give a major advantage to the party with deeper pockets.

Appointments and Staffing (P.33)

The existing procedure for appointing Rights Commissioners has ensured that the service is staffed by very experienced people who have vast experience of Industrial and Workplace Relations. It is reasonable in the immediate future that public servants who have gained experience as Equality Mediation Officers should be utilised in the new role of Adjudicators. However any further recruitment of Adjudicators should be on the basis selection on merit from a panel nominated by Congress and IBEC having regard to proportionality.

Appointments to Labour Court (p.34)

Congress accepts the proposed procedure for appointment of Chair of the Labour Court as outlined in the Blueprint. However Congress and IBEC must be involved in setting the criteria for assessing the suitability of candidates for these posts.

However we believe that the current procedure for the appointment of Deputy Chairs should continue unaltered

Congress accepts the proposed arrangement for appointing ordinary members of the Court on the understanding that when such appointments come up for renewal the incumbent can be re-nominated on the same basis as at present.

Appendix 3 (P.42)

The final decision regarding the role of Compliance officers and Adjudicators with any particular Act or legislation should only be made after consultation with the current practitioners.

BLUEPRINT TO DELIVER A WORLD- CLASS WORKPLACE RELATIONS SERVICE:

Congress response on Equality related issues:

On the issue of **fees**, Congress is of the view that the EU anti-discrimination Directives guarantee easy access to redress. The Equality Tribunal structure is compatible with the Directives in that it is a free service. Congress recommends strongly that this principle of free access to justice be maintained.

Cross pollination of skills: Public servants who have gained experience as Equality Officers have a key role to play in helping to roll out the skills necessary to identify and hear equality and discrimination cases across all adjudicating and mediating officers of the WRS.

Importance of **separating adjudication and mediation** process, as is currently the process at the Equality Tribunal.

Provision of Information: It is essential that there is separation between the provision of information services and subsequently resolution and/or adjudication. The provision of information by equality experts on the Employment Equality Acts and the Equal Status Acts, as required by EU directives, will remain under the remit of the proposed Human Rights and Equality Commission. Congress recommends that the Family Leave Acts (Maternity, Parental and Adoptive Leave), information function should now be transferred from the Equality Authority to the WRS.

Under equality legislation, the Equality Authority provides information and advice on the Employment Equality and Equal Status Acts. As the WRC is prohibited from offering advice, a mechanism must be found to ensure that people in need of advice are not in any way discouraged by contacting an information only service. Clearly

people with equality queries may be given initial non directive information, but must be referred onto the Equality Authority or their trade union for advice and support.

Equal Status cases: A significant gap in the Blueprint is the absence of any mention of what is proposed regarding the equal status function of the Equality Tribunal. This lack of clarity as to where Equal Status Act complaints will be heard is a serious cause for concern. Congress is of the view that all equality claims both employment Equality and Equal Status should be dealt with through this new forum. The moving away from the Equality Tribunal of discrimination cases involving licensed premises has undermined the effectiveness of this protection.

It is our view that Employment and Equal status cases are integrally related and so very difficult to separate. They are all based on EU anti-discrimination directives and so the skills built up apply equally to both areas. The learning and expertise developed by the Equality Tribunal in adjudicating and mediating Equal Status Act cases must not be lost in the changeover to a new employment rights focussed body.

Possible breach of EU anti-discrimination Directives and the EU Charter of Fundamental Rights:

There appears to be no guarantee of an independent hearing of a claim at the first tier. The Blueprint allows the state to decide through legislation the most appropriate method of resolving disputes. The proposals regarding the striking out of claims without a hearing and the need for claimants to send written submissions setting out why their claim should not be struck off, do not appear to take account of issues of accessibility for groups under equality legislation. Congress fears that some vulnerable groups such as migrants and those with literacy difficulties may have problems submitting and interpreting documents and indeed deciding what piece of legislation their case may best matched e.g. Maternity protection or an Equality case? Additionally, not every potential claimant will have the resources to access legal advice for this purpose. The current investigative model of the Equality Tribunal is of assistance in this regard.

ENDS//

30. Irish Council for Civil Liberties Consultation Response

Dear Minister,

I am writing to you in response to your call for submissions on the ***Blueprint to Deliver a World Class Workplace Relations Service*** (hereafter the 'Blueprint') published in April 2012. Having previously[31] set out its views in relation to the role and functions of the new body, the ICCL wishes to make to make the following supplementary observations.

The ICCL welcomes the commitment outlined in the 'Blueprint' to deliver a workplace relations service 'in the most efficient, effective and professional manner, to the highest standards.' To meet this commitment, the ICCL considers that the new body should be fully independent, endowed with an effective governance structure and granted the resources necessary to fulfil its mandate.

The publication of the 'Blueprint' coincides with the recent publication by the Department of Justice and Equality of a Working Group report on the merger of the Equality Authority (EA) and The Irish Human Rights Commission (IHRC) into a new Irish Human Rights and Equality Commission (1HREC).

In its report, the Working Group indicated that detailed provisions in equality legislation for support of individuals to take cases to the Equality Tribunal and related functions of the Equality Authority will continue as functions of the new IHREC and that the functions of the Equality Authority in relation to Equality Tribunal cases will continue as is and will transfer to IHREC. The Working Group also indicated its understanding that the functions of the Equality Tribunal will be transferred to the WRC. This view is supported in

[31] See *Preliminary Submission on the Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures* (ICCL, September 2011), available at www.iccLie/publications

the 'Blueprint' which indicates that provision will be made for the orderly wind down of the Equality Tribunal and for the transfer of services, including mediation officers and the information function, to the new Workplace Relations Commission.

However, the Working Group proposals provide little clarity on the extent to which the new IHREC will retain the functions of the Equality Authority, particularly with regard to support for claimants wishing to take cases before the WRC. The ICCL also notes that the 'Blueprint' published by your Department contains sparse information on the terms of the transfer of the express functions of the Equality Tribunal to the WRC. From the perspective of a person whose equality rights may not be respected in practice, it remains far from clear to what extent they will in future be assisted to access their rights.

The ICCL wishes to recall, in this connection, that both the EU Race Directive (Directive 2000/43/EC at Article 13) and the EU Gender Goods and Services Directive (Directive 2004/113/EC at Article 12) oblige Member States to establish a specialised body to promote equal treatment on the grounds covered by those instruments. At a minimum, such bodies should be in a position to furnish independent advice and assistance to people who believe their equality rights have not been respected, either in the workplace or in accessing goods and services.

Consequently, in advance of the formal establishment of the IHREC and the WRC, the ICCL would like to receive further and better particulars regarding the mechanisms under which that assistance (including the provision of information and mediation) will be provided and concerning the means through which equality cases will be processed by these new structures.

However, the ICCL notes that the suggested structure and nomenclature of the WRC strongly suggests that its primary focus will be on employment issues. It is also particularly striking that your Department's 47-page Blueprint contains not a single reference to the Equal Status Acts 2000 — 2011. This would suggest that particular efforts may be required to ensure that the WRC will accord

appropriate priority to cases previously determined by the Equality Tribunal which fall under the Equal Status Acts.

More generally, given that these two different equality-related merger processes are currently happening in parallel, under the auspices of two different Government departments, there is a clear need for "joined up thinking" about the future inter-relationship between the IHREC and the WRC.

I hope that these observations will be of some assistance and look forward to establishing a constructive working relationship between the Irish Council for Civil Liberties and the ,elations Commission.

Yours sincerely

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Mark Kelly, Director

ENDS//

31. Employment Bar Association of Ireland Consultation Response

Re: "Blueprint to Deliver a World Class Workplace Relations Service – April 2012"

Dear Mr. Kiernan

I write on behalf of the Employment Bar Association (EBA) in response to the publication of the "Blueprint to Deliver a World Class Workplace Relations Service – April 2012".

The Employment Bar Association has engaged positively and comprehensively since the very outset with the process of reform of the employment rights bodies initiated by the Minister. The Employment Bar Association furnished a comprehensive submission on reform of employment rights bodies dated the 13th September 2011. That document sets out the collective views of barristers who act for both employees and employers before all employment rights adjudication bodies. Further to our written submission we held detailed discussions with Mr. Ger Deering during which that submission was supplemented in detail.

We have engaged in this process to date in good faith from the position of persons who appear daily before the bodies it is proposed to reform. We have set out in our submission what we believe to be the fundamental legal principles which *must* underpin a legally sound unified adjudication process which would adhere to the principles long established by the Irish Constitution, the law of the European Union and the European Convention of Human Rights and Fundamental Freedom. We attempted in our submission to explain the vital importance of separating industrial relations disputes from those that are legal rights based. We also attempted to explain the fundamental necessity of having experienced and independent lawyers presiding over the adjudication of vitally important individual legal rights.

It is clear from the so called "blueprint" that the proposals set out in our submission have been dismissed in their entirety.

We note the injunction contained at the end of this document that "while further feedback and suggestions are invited from interested parties, *it is not intended to cover old ground…"*. We do not therefore intend to reiterate the very important and fundamental principles which we have set out in our submission. Lest there be any doubt on the matter, we stand over and repeat the entirety of our submission of September 2011.

It is a source of deep dismay and disappointment to discover that it is proposed to implement reforms which would constitute a fundamental undermining of the rights of employees and employers in this country. Our members will appear on behalf of both employees and employers in whatever new bodies are established or reconstituted. It was our fervent wish that this opportunity could be grasped to provide an adjudication process of the highest quality that would afford parties who appear before it a fair, public, independent, impartial and speedy adjudication of their disputes where necessary.

Instead it is proposed that unqualified civil servants shall adjudicate at the first tier and that the sole appellate body shall be the Labour Court comprising solely of the nominees of the trade unions and the employer bodies. The blueprint details proposals to have claims and appeals dismissed without hearings; provides for private hearings; and for potential anonymity in published decisions. To describe the proposed new system as "world class" is wholly wrong. What is proposed is unique in European terms. The countries of the European Union typically deal with individual employment disputes either through the normal civil courts or through a model based on a tribunal consisting of an independent professional legally qualified judge sitting with lay judges who typically have experience as either employers or workers. The system proposed in the blueprint cannot be found elsewhere. It represents a fundamentally retrograde step which seeks to confine the adjudication of employment rights disputes to private hearings held behind closed doors conducted either by public servants or by nominees of the executives of the social partners whose purported "ownership" of the entire area of employment law appears to be conceded.

It is employees and employers who will appear before the new bodies however reconstituted. Those parties will have a right to be legally represented. A system

that fails to address the legal rights of those who will appear before it and whose rights are fundamentally engaged in the process is a system that is itself designed ultimately to fail. It will presage a multiplicity of appeals, High Court challenges by way of Judicial Review, appeals on points of law, references to the European Court of Justice and resultant dissatisfaction, delay and disrespect for the entire process.

The parties have important and valuable legal rights at stake. These legal rights were hard won over many years of legal and legislative battles. They cannot be set at nought – even if these proposals find expression in Irish legislation. This cannot be dismissed as “old ground” – it is the long established legal ground upon which these legal rights disputes must be adjudicated. The Employment Bar Association remains committed to contributing to positive and overdue reform of this area.

Yours sincerely

TOM MALLON

Chairman

Employment Bar Association of Ireland

ENDS//

32. EAT ad hoc committee Consultation Response

STRENGTHENING THE BLUEPRINT FOR A

NEW WORKPLACE RELATIONS SERVICE

This paper has been prepared on behalf of Vice-Chairpersons and Members of the Employment Appeals Tribunal as mandated by them at their 2012 AGM for dissemination to the Minister, other interested legislators – in particular the Oireachtas Select Sub Committee on Jobs, Enterprise and Innovation - and relevant nominating bodies

The new structure proposed by the Minister in his Blueprint to Deliver a World-Class Workplace Relations Service has much to recommend it such as:-

- One unified body dealing with all complaints.
- One single complaint form.
- One central receiving port.
- The same limitation period for all complaints.
- Early Resolution Service.
- Decision within 28 days.

There may however be some serious deficiencies in the proposed approach which could have adverse impacts on employment rights and the vindication of them. This document seeks to highlight these and present alternative approaches with a view to overcoming any shortcomings. This document has been prepared by a representative grouping of existing Employment Appeals Tribunals Vice-Chairs and Members and draws on the extensive expertise and experience which exists at present and which is in real danger of being lost completely in the proposed new arrangements.

This document is limited to our own area of expertise and specifically focuses on aspects of which we have direct knowledge and experience.

REDUNDANCIES

Redundancy cases fall into two broad categories. Firstly, those dealing with redundancies per se which include situations where the employer has failed to pay the statutory redundancy lump sum, where the lump sum has been incorrectly calculated say because the employee may have been on short-time but claims the redundancy lump sum should be calculated on a full-time working week or where the service period is being challenged. There is no doubt but these cases can be easily dealt with by an administrative/office situation procedure. However, in this category there will be cases where the employee is claiming a redundancy lump sum and the employer is saying there is no redundancy. This latter category can be more problematic.

Those redundancies that are in fact UD cases generally include situations where the employee is challenging the fact of redundancy itself or his/her selection for same and in effect these are Unfair Dismissal (UD) cases. These cases will be problematic for the new structure as proposed. A clear distinction needs to be drawn between these two distinct types of "redundancy" claims to ensure that the UD cases are dealt with appropriately.

UNFAIR DISMISSAL CASES

The major area of concern surrounds dismissal. Unfair Dismissal is the most significant and important grievance which workers can have as it deprives them of their livelihood. UD claims rank among the most serious matters that individuals will ever litigate and therefore require special consideration over and above other grievances.

The financial and social consequences of UD can be much worse for an individual than a custodial sentence which might be imposed in other circumstances. Would it ever be argued that the handling of the latter types of cases is "too legalistic"? In this regard the Tribunal has an excellent record. Its 2010 statistics show that of the 6,064 cases disposed of in that year, there was not one judicial review, only one appeal to the High Court on a point of law (to interpret a statutory provision) and of the very low percentage of cases appealed to the Circuit Court (from the information returned to the Tribunal) not one decision of the Tribunal had been overturned.

The current proposals are defective and will, if proceeded with, operate to the detriment of workers seeking to redress their grievances. It will also, in the medium to longer term, adversely affect employers. The Tribunal is made up of three members coming from three distinct perspectives, each having specific experience as well as expertise and knowledge which they bring to bear on their decision-making function. In the new structure, this decision-making process is being devolved, for the most part on lone civil servants with no experience in industry or law - and we are dealing with a major legal right. It is wrongly assumed that rudimentary training will equip them for this function. This is an impossible task for them as the required qualifications, skills and knowledge are developed by a process of learning and osmosis. This decision will bring the whole reform process into disrepute and disorder and give rise to a major increase in judicial reviews and resulting costs in terms of time and money.

Most importantly, the proposed change to have UD cases heard by a single person in the first instance is flawed and has the potential to be unfair. For such a complex and emotive issue where facts are often contested one person's possibly subjective view is inappropriate. It will impose a very onerous burden in many cases on a lone decision-maker and in particular where that lone decision maker is conscientious in, and, fully aware of, the extent of their duties. This will arise frequently where the lone decision maker has to decide on matters raised by opposing expert lawyers. Experience of I.R. issues from both sides of industry should be present at the hearing. This would bring objectivity and inspire confidence amongst the parties and it will also decrease the likelihood of appeals. The process should have a legal input as it is usually the case that claimants and respondents are legally represented. A legal person can ensure that such representations are dealt with on an equal footing. It should further ensure inter alia that procedural issues are eliminated as a basis for appeal.

UD cases by definition involve the sundering of relationships between employers and employees, leading to a breakdown in communications and to acrimony between the parties, circumstances which unfortunately do not lend themselves to early resolution. Accordingly, the vast majority of claims will proceed to a hearing.

Unless the Parties agree to a hearing by a single Adjudicator we recommend that UD cases (and other post employment related claims) be heard by a tripartite body comprised of a worker's representative, an employer's representative and a legally qualified chairperson.

Towards this end the current EAT structure can provide a ready-made component which can easily be slotted into the proposed new structure as the Adjudication structure in the WRC.

This will provide a large cohort of experienced and knowledgeable chairs and members to deal with, for example, UD cases at first instance and if the volume of appeals is greater than anticipated this component is ready and available to deal with them rather than let another backlog develop. By slotting in the EAT network to the proposed new structure it gives the Minister a safety-net whilst seeing how the new system is panning out as regards volume of claims and volume of appeals.

COSTS AND "SAVINGS"

In his Foreword to the Blueprint the Minister states that "we must ensure that we are getting the best possible value for money" and that his aim "is to effect significant savings in future years". Will the proposed new process result in increased costs? In the absence of any costing of the new proposals it is not possible to compare them with the current competitive costs of the EAT.

The benefit to the new system of adopting the suggested approach set out here is that the Minister will have available to the system a range of expertise to be drawn on only on an "as required" basis. No "standing" costs will arise as payment for their services only arises where these members are utilised, offering a more flexible and less costly option than a permanent staffed-up approach.

The EAT has low budget requirements, despite its high caseload. Members are only paid on a "per diem" basis and do not have pension, holiday or sickness entitlements. Payment is only made on a work done basis. The costs to the State in terms of members' fees, was €198 per case in 2011.

In this regard also, it is unjust that a worker seeking to secure his rights should be charged a fee by the State. This would be particularly so in the case of dismissal and redundancy when they most likely will be in straitened circumstances.

VOLUME OF CASES AND BACKLOGS

The EAT caseload has trebled in recent years from 3,173 in 2007 to 9,458 in 2009. However, there has been a distinct lack of administrative resources provided to deal with the increase. The delay in hearing cases therefore is absolutely not a reflection of any fault in the current structures, rather it is due directly to the failure to provide the EAT with adequate administrative resources.

Despite this the Tribunal increased its throughput of cases by 30% in 2010 and by a further 11% increase in 2011.

The suggestion that all of the work currently undertaken by the EAT can be absorbed into the Labour Court by the establishment of, in essence, one additional division to the present three is questionable. In 2010, the Labour Court received a total of 1,452 referrals. It completed 1,086 cases in that year. The EAT in 2010 had a total of 8,778 cases referred to it and it disposed of 6,064. It is impossible to envisage the Labour Court, even with an additional division, dealing with the EAT volume in addition to all its other work.

It is acknowledged that there are aspects of the current EAT operations which could be improved. As stated at the outset we can offer our experience of these matters to assist in providing a more streamlined service. The experience in other European jurisdictions can provide valuable insights into what has been successful, or not, for them.

CONFLICT WITH INDIVIDUAL RIGHTS

Every employee has the right to have their case heard at first instance and also on appeal if they should so choose and the new Blueprint should not interfere with these basic entitlements. The constitutionality of the proposal that the Labour Court might examine whether a claim is “sufficiently meritorious” to proceed to an appeals hearing must be questionable, for example.

Under the new proposals an employee who loses their job or an employer who is accused of discriminating against an employee will not have their dispute determined or reviewed by any judge or legally qualified person other than during a final appeal in the High Court.

Article 47 of the Charter of Fundamental Rights of the E.U. states that: “Individuals have the right to an effective remedy and to a fair trial”. It goes on to say that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Everyone shall have the possibility of being advised, defended and represented and legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. The new proposals do not fulfil the terms of this Article which acquired legal effect in Member States when the Lisbon Treaty entered into force in December 2009.

Finally, UD hearings should be held in public, not in private as is proposed - save where there is good and sufficient reason for the case to be held in camera. A public hearing is required under the European Charter of Fundamental rights. Equally public hearings are often an incentive to the parties to “settle” their cases in advance of hearings to avoid ‘washing dirty linen in public’.

There are other important considerations which should not be lost in introducing any new procedures. The current tripartite approach provides significant advantages to the parties in that where a Tribunal decides on the rights of an individual its determination is binding on them. Similarly where evidence is taken “on oath” and the rules of evidence are applied full legal privilege is given.

The overall situation has been summed up as follows: “Irish citizens are entitled to have disputes concerning one of the most significant relationships, that of employer and employee, determined by an appropriately qualified and independent tribunal. Altering the entire structure of the Labour Court will not only not deliver the necessary reforms but could also have a significant adverse effect on the success of that body in its industrial relations role”.

Noel Dowling, Chairman EAT ad hoc Committee

ENDS//