

**EMPLOYMENT APPEALS TRIBUNAL PROCEDURES
REVISION GROUP**

**REPORT TO THE
MINISTER FOR LABOUR AFFAIRS**

May 2007

Table of Contents

INTRODUCTION	1
1. TERMS OF REFERENCE OF WORKING GROUP	1
2. MEMBERSHIP OF WORKING GROUP	1
3. WORKING METHODOLOGY	2
BACKGROUND.....	2
THE CENTRAL ISSUE.....	2
WORKING GROUP APPROACH	4
WORKING GROUP RECOMMENDATIONS	5
1. OBJECTIVE.....	5
2. SUBMISSION OF CLAIM/APPEAL AND RESPONSE.....	6
3. PRELIMINARY PROCESS	6
4. SUBSTANTIVE HEARING	7
5. SETTLEMENTS AND CONSENT DETERMINATIONS.....	7
6. TRIBUNAL DETERMINATIONS	7
7. ADDITIONAL CHANGES TO EXISTING STATUTORY INSTRUMENTS	8
8. PERIODIC REVIEW	8
COLLATERAL ISSUES	8
1. COMPENSATION	9
2. TRIBUNAL ORGANISATION	9
3. TIME LIMITS	10
4. OTHER	10
CONCLUSION.....	10
NEXT STEPS.....	10
GROUP SECRETARIAT	10
PERSONAL APPRECIATION	11

Appendix I	Summary Information on the EAT
Appendix II	Current Tribunal Procedures
Appendix III	Extract from UK Employment Tribunal Procedures
Appendix IV	Parties which made submissions to the Employment Rights Group
Appendix V	Employment Appeals Tribunal Forms
Appendix VI	Additional Changes to Existing Statutory Instruments
Appendix VII	Time Limits for Claims and Appeals

EMPLOYMENT APPEALS TRIBUNAL PROCEDURES REVISION GROUP

REPORT TO THE MINISTER FOR LABOUR AFFAIRS

INTRODUCTION

The EAT Procedures Revision Working Group was set up by the Minister for Labour Affairs, Mr Tony Killeen, T.D. in February, 2007 with the objective of developing the Employment Appeals Tribunal procedures and improving customer service outcomes.

The Terms of Reference, Membership and Working Methodology of the Working Group are as follows:

1. Terms of Reference of Working Group

With the objective of developing the EAT's procedures and improving customer service outcomes the Working Group should:

- Draft a new Statutory Instrument which will represent the Working Group's recommendations to the Minister for Labour Affairs to update the procedures of the Employment Appeals Tribunal and replace existing statutory instruments governing EAT procedures [S.I. Nos. 24 of 1968, 286 of 1977 (unfair dismissals) and 114 of 1979 (redundancy)].
- Consider whether a periodic review of procedures against best practice should be provided for.
- Submit a Draft Statutory Instrument to the Minister for Labour Affairs by the end of May 2007.

2. Membership of Working Group

Chair:

Mr Sean O Riordain, General Secretary, Association of Higher Civil and Public Servants

Members:

Peter O'Leary, Vice Chair, EAT

Tony Halpin, Vice Chair, EAT¹

Seamus O'Donnell, Member, EAT

Declan Winston, Member, EAT

Dominic McBride, Secretary to the EAT

Martin Lynch, Principal Officer, DETE

Alan Haugh, IBEC

Fergus Whelan, ICTU

Liam Berney, ICTU (Alternate)

Working Group Secretariat:

Anne-Marie Finlay, Assistant Principal, DETE, Secretary to Group

Aisling O'Reilly, Executive Officer, DETE

¹ Resigned on appointment to judicial office on 3 May 2007.

3. Working Methodology

The Working Group should

- establish a timetable to permit full EAT attendance and delivery within the timeframe;
- draw on existing reviews and reports; and
- meet with interested parties as it thinks appropriate.

BACKGROUND

The Group was established against the background of recent broader official consideration of overall employment rights and functions.²

The Tribunal sits in part-time Divisions comprising, de facto, a legally qualified Vice Chair, and two ordinary members, one nominated by IBEC and other employer bodies and the other by ICTU. It has jurisdiction in the determination of legal rights under sixteen statutes. Unfair dismissal cases, either at first instance or on appeal from recommendations of Rights Commissioners, account for 36% of the annual total number of cases disposed of by the Tribunal, but account for approximately 95% of the annual workload of the Tribunal in terms of time spent at Hearings. Summary information on the composition and jurisdiction of the Tribunal is set out in Appendix I, together with some background statistics.

The legal procedures followed by the Tribunal are set out in the Redundancy (Redundancy Appeals Tribunal) Regulations, 1968 (S.I. No. 24 of 1968), in the Unfair Dismissals (Claim and Appeals) Regulations, 1977 (S.I. No. 286 of 1977) and in the Redundancy (Employment Appeals Tribunal) Regulations, 1979, (S.I. No. 114 of 1979). There is a Guide for Members of the Tribunal and Guidelines for Employees, Employers and Practitioners appearing before the Employment Appeals Tribunal published by the EAT Secretariat, which explain the procedures. The EAT Secretariat produced, for the information of the working group, a very helpful summary of the process followed by the Tribunal. Copies of the relevant Statutory Instruments and of the summary of the process followed by the EAT are included in Appendix II.

THE CENTRAL ISSUE

The central issue is the extent to which the Tribunal meets the core value of providing a process for employees and employers which is fair, speedy, inexpensive and as informal as possible and the extent to which the EAT procedures might require to be changed to better achieve this core value which will improve customer service.

2

- (i). Report of Review Group on the Functions of the Employment Rights Bodies [Volumes I and II]
- (ii). Outcome of Consultations regarding the Employment Rights Bodies Group Report - Kevin Bonner
- (iii). Report of the Working Group of the Employment Appeals Tribunal
- (iv). Towards 2016

The two differing perspectives are well set out in the Report of Review Group on the Functions of the Employment Rights Bodies and may be briefly summarised as follows:

The first perspective is that the Tribunal has moved very substantially from the more informal inquisitorial model to a more long drawn out, over legalistic, adversarial, costly and, especially from the perspective of employees and unions, intimidating environment. This transition has occurred over the period during which the Tribunal operated as the Redundancy Appeals Tribunal, established in 1967, and then as the Employment Appeals Tribunal, when, in 1977, it was given what is now its core business and principal jurisdiction in respect of unfair dismissals. The case advanced under this perspective is that it was never envisaged when the Tribunal was established that participation in what was supposed to be a relatively informal tribunal would frequently involve delays and adjournments and legal representation (counsel and solicitor) on both sides with court-like procedures (evidence on oath, examination, cross examination, re-examination and the adoption of rules of evidence) becoming the norm. The view was expressed that this might readily suit the legally qualified Vice Chairs of the three member Tribunal but it puts employees, especially those without union representation, and smaller firms which cannot afford legal representation, at a distinct disadvantage. The frequent delays in Hearings and the cost of legal representation mean that the redress options of reinstatement or reengagement become less practicable and the maximum permissible award of two years' salary (subject to mitigation of loss) is eaten up in legal fees. It is a concern that over 70% of successful claimants, according to EAT Annual Report data, feel the need to have legal representation, the cost of which they must pay for from their own resources. This is a serious problem when the cost must be met from a relatively low award. With the best will in the world and with impeccable fairness by the individual Tribunal Divisions, the court-like procedures and practices are diametrically opposed to what was originally envisaged. There is a need for urgent reform.

The second perspective draws a distinction between industrial relations and employment rights cases. Industrial relations cases are about disputes, about "splitting the baby" and settlement between the parties, and lend themselves to be dealt with through the more informal processes of the Rights Commissioner Service of the Labour Relations Commission and the Labour Court, both of whose recommendations/determinations in industrial relations matters are normally not binding in law. Employment Rights are about legal rights, where there is no capacity to "split the baby": There is or there is not a legal entitlement to a redundancy payment; an employee was or was not unfairly dismissed. The Tribunal has jurisdiction under several pieces of legislation and that legislation has become increasingly more complex, thus partly explaining, perhaps, the greater involvement of legal representation and, therefore, the perception of an emphasis on formal legal process. In addition, there is, in recent times, a greater societal consciousness of legal rights, which is reflected in increased legal representation at the Tribunal.

The Tribunal is not bound to fully adopt court procedures or to strictly follow the rules of evidence in all cases. Parties summoned to attend a Hearing of the Tribunal may appear and be heard in person or may be represented by counsel or solicitor or by a representative of a trade union or of an employers' association or, with the leave of the Tribunal, by any other person. The procedures as set out in the Statutory Instruments are formal but, in practice, the Tribunal is much less formalised than a court and is

helpful to all parties and all the members of the Tribunal are fully committed to fairness in process and outcome. For example, the Tribunal is especially careful to ensure that unrepresented parties are dealt with fairly and it adopts a more proactive and inquisitorial role in this situation. Tribunal proceedings are, however, frequently ones at which personal or professional character and reputation are at risk and the natural and constitutional rights of parties to vindicate their good names are reflected in S.I. No. 24 of 1968 which provides for legal representation and cross-examination. The Labour Court is also obliged to respect these natural and constitutional rights in discharging its statutory jurisdiction.

While the Tribunal has no mediation role under its procedures, it does encourage settlement between the parties where it sees that it might be achieved.³

Tribunal Determinations are binding in law and, in addition to its procedures being subject to review by the High Court, all its Determinations may be appealed either to the Circuit Court or to the High Court on a point of law (depending on the particular legislation under which the claim has been brought). Determinations, which are usually agreed by the three members, are fundamentally fair and this is reflected in the very small number of appeals of any form taken.

It is accepted that there are delays but this is a function of the lack of sufficient secretariat staff. A survey of its clients carried out in late 2004 by the EAT revealed a high level of satisfaction in relation to the services provided by the Tribunal. Overall, the Tribunal functions well within the strictures under which in law it must operate.

WORKING GROUP APPROACH

The Group met on eight occasions and was addressed by the Minister for Labour Affairs at its first meeting. It decided, after initial consideration of the terms of reference, that the objective of producing a final draft Statutory Instrument by the end of May could not be achieved, as it would require significant legal and technical inputs that would not be available within this timeframe. The Group agreed that the most productive approach would be to draw up an interim report, which would be an expansive descriptive text of revised procedures, based on the procedures relating to unfair dismissals cases which comprise the bulk of the caseload of the Tribunal, which could later form the basis of a new Statutory Instrument.

This approach had the perceived advantage that the descriptive text could be completed by the end May deadline and that the submission of an interim report to the Minister for Labour Affairs at that time would allow the focus of ministerial attention on any overall policy aspects of the proposed new procedures before their translation into a Statutory Instrument. The Group was also conscious of current parallel consideration of legislation in relation to employment rights and compliance matters following the adoption of “Towards 2016”. It was, therefore, imperative that proposed changes to EAT procedures would be consistent with the overall legislative framework.

³ The formal mediation function is one exercised by the Rights Commissioner Service. It should be noted that very many claimants and respondents [55% of cases] exercise the right not to go that route, opting instead for a direct application to the Tribunal

The Group, in addition to the expertise of its members, has drawn heavily on the detailed submissions made by all parties⁴ to the Employment Rights Group, on the ERG Report and on the subsequent EAT and Bonner Reports. The Group also had particular regard to the revised procedures which were adopted by the Employment Rights Tribunals in the UK (The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004) (SI 2004 No 1861) following the 1999 *Woolf* reforms intended to improve the efficiency of the civil courts, reduce costs, speed up the process and encourage parties to use alternative dispute resolution where possible. A relevant extract from the UK Regulations [which are voluminous] is included in Appendix III.

The Group decided that the core objective of the EAT should be incorporated in drawing up new expanded procedures. This core objective should inform the Group in its stage-by-stage consideration of the EAT procedures. The Group also considered that it was very important that the “best practice” of the Tribunal is reflected in the new procedures. The more descriptive text now proposed should enable this best practice of the Tribunal to be emphasised in a way that the current short Statutory Instruments do not allow. There are, finally, some recommendations on collateral issues that, while not necessarily for inclusion in a revised Statutory Instrument, are deemed by the Group to be of sufficient importance to the effective operation of the Tribunal to be included in this interim report.

The outcome of the Group’s substantive considerations in these matters is now set out in the following Recommendations.

WORKING GROUP RECOMMENDATIONS

The Group recommends that revised procedures incorporating an amalgam of the existing procedures (as set out in S.I. Nos. 24 of 1968, 286 of 1977, and 114 of 1979) and the proposals for change now recommended (which include best current practice) should be set out in greater detail in a comprehensive new Statutory Instrument.

1. Objective

There was general consensus on the idea of setting out, in writing, the overriding objective that would underpin the procedures of the EAT. The Group recommends in this regard that the procedures should be speedy, inexpensive, fair and, as far as possible, informal in the perception of any reasonable employee or employer and that this might be given effect to in a revised Statutory Instrument.

The UK Regulations include provisions for an overriding objective to enable Tribunals and Chairmen to deal with cases justly. These include, so far as practicable

- Ensuring that the parties are on an equal footing;
- Dealing with the case in ways which are proportionate to the complexity or importance of the issues;
- Ensuring that it is dealt with expeditiously and fairly; and

⁴ See Appendix IV for List of Parties.

Saving expense.

The Group recommends that this should inform the drafting of the revised Statutory Instrument covering EAT procedures.

2. Submission of Claim/Appeal and Response

It was agreed that the information being submitted to the EAT at the outset should be maximised. The Group, therefore, recommends that the EAT application and response forms should be expanded to facilitate the provision of greater detail on the facts and on the core issues between the parties.

The manner in which the Claim/Appeal and Response forms should be expanded was considered in the first instance by a Sub Group and subsequently endorsed by the full Working Group. A copy of the revised forms T1 and T2 is attached as Appendix V.

The Group recommends that appropriate technical assistance in filling in the required forms/statements should be officially provided on request of either party.

3. Preliminary Process

The Group recommends that an interim process between the exchange of initial documentation and the substantive Hearing be established. This preliminary process, which should be held in camera, would be chaired by an experienced member of the Tribunal [Vice Chair or Ordinary Member] and its purpose would be to confirm basic factual information, to seek to identify the core issues between the parties, to outline the practice, procedures and approach adopted at substantive Tribunal Hearings and, in so far as it is the wish of the parties, to facilitate a resolution by way of settlement between them.

The Vice Chair or Ordinary Member of the Tribunal chairing the preliminary process would, in the event that settlement was not reached, prepare a brief report for the substantive Hearing setting out the core issues of fact that appeared to be agreed or still at issue between the parties and, in exceptional circumstances, would request the parties to make written submissions in advance of the substantive Hearing. Any report from the preliminary process should be agreed between the parties and should be made available to them and to the Tribunal members in advance of the substantive Hearing. The Vice Chair or Ordinary Member who chaired the preliminary process would be excluded from later involvement in any substantive Hearing. A party may raise an issue at a substantive Hearing that was not raised during the preliminary process.

The Group regards this recommendation as of the utmost importance in that it would address three central problems. Firstly, it would enable cases to be addressed within a short time frame after the exchange of initial documentation. At present, there is a delay of about six months for Hearings to be held in Dublin and twelve months outside of Dublin. Secondly, it would focus the minds of the parties on the issues and would potentially facilitate an early resolution and settlement of cases between the parties. At present, approximately two thirds of unfair dismissals cases are withdrawn [assumed settled] either just before or during the Hearing. Thirdly, it would facilitate, in cases

where settlement is not possible, the identification of the core issues of fact at issue between the parties in advance of a substantive Hearing. This should ensure that the Hearing before a three person Tribunal would be more likely to deal with cases where the parties actually want a full Hearing.

It was also considered by the Working Group that some disadvantages might accrue from this proposal. Firstly, it may add to the costs of the parties. Secondly, it may not lead to a settlement. Thirdly, the parties without legal or trade union representation not having the benefit of a knowledge of the law may be disadvantaged by this proposal. The considered view of the Group, however, is that there are likely advantages to a preliminary process as set out in the earlier paragraphs and that, overall, the potential to facilitate a speedy settlement and, even where cases proceed to substantive Hearing, the advance identification of core issues should be beneficial in reducing delays, avoiding adjournments and reducing costs.

4. Substantive Hearing

It was agreed that the procedure for a substantive Hearing could be less formal, and more focused, particularly in the light of the agreed arrangement for a preliminary process which should help identify core issues.

The Group recommends that, in accordance with current informal practice in the EAT, the secretary of the Hearing would, immediately prior to the Hearing, inform the parties that they may request time from the Tribunal to bilaterally reconcile their differences. A reasonable amount of time may be allowed before the commencement of the Hearing to facilitate settlement.

The Group recommends that the Hearing would begin with the Chair explaining the process followed by opening statements by or on behalf of both sides. The purpose of these statements would be to identify the core issues of law and fact, to the extent it was not already clear from the preliminary process stage. It should then be possible for the Tribunal and the parties to agree the range of issues in dispute and to confine the taking of evidence on oath to relevant issues of fact that were in dispute. The evidence given would be tested in the normal way, by both parties and by the Tribunal, and the final stage would involve a closing statement by or on behalf of both sides.

5. Settlements and Consent Determinations

The Group recommends that the Tribunal be given the power to issue consent Determinations on application by the parties to a settlement which has been reached leading to the withdrawal of an application, either at the preliminary process or substantive Hearing stages. This would give legal force to the terms of the settlement.

6. Tribunal Determinations

Three matters were raised in relation to Tribunal Determinations; firstly, the need for the early issuing of Determinations (there are often delays at present), secondly, the desirability of Determinations being publicly available and, thirdly, the consistency of Determinations from a legal perspective.

The Group recommends that the written Determinations of the Tribunal should, unless there are special circumstances preventing it, be issued within four to six weeks of the Hearing.

The Group also recommends that the Determinations of the Tribunal should be publicly available on the EAT website. This may on occasion require some limited editing of Determinations having regard to the law on privilege. The implementation of this recommendation should be facilitated by on-going IT work in the EAT.

The legal consistency of Determinations is addressed in this interim report in the section dealing with collateral issues.

7. Additional Changes to Existing Statutory Instruments

It will be necessary, in consequence both of the recommendations made by the Working Group and of further technical issues identified by the EAT in the operation of current procedures under Statutory Instrument Nos. 24 of 1968, 286 of 1977 and 114 of 1979, to incorporate some additional technical amendments in the revised procedures.

The Group recommends that provision should be made to enable the Tribunal, to facilitate the expansion of claims in appropriate circumstances, e.g. where a remedy under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, could ordinarily have been sought in an unfair dismissal case. This would give effect to what is already an informal and helpful practice of the Tribunal.

The Group further recommends that the new Statutory Instrument would incorporate the best of the provisions in the present Statutory Instruments, as set out in Appendix VI, any amendments necessitated by the changes in this report, and any other best practice of the Tribunal.

8. Periodic Review

The Group recommends the establishment by the EAT of a rules review group comprising representatives of the EAT, the Department, and the Social Partners, to meet at least three times per annum and as otherwise necessary.

The Group further recommends that the operation of the Tribunal should be reviewed in consultation with the Social Partners after its first year of operation under a revised Statutory Instrument and at not more than five yearly intervals thereafter.

COLLATERAL ISSUES

Consideration by the Working Group of the operation of the EAT for the purpose of revising its procedures was not carried out in a vacuum. It was and had to be informed by the underlying policy set out in the principal legislation from which the Statutory Instruments and procedures draw their authority.

While the Group has no mandate in respect of policy matters and its terms of reference relate to the revision of procedures, the Group considers it appropriate to make certain recommendations and to raise certain issues for consideration which may be outside the strict procedures to be incorporated in a new Statutory Instrument, but which may have a fundamental impact on the overriding objective of speed, inexpensiveness, fairness and, so far as possible, informality. These are as follows:

1. Compensation

The Group wishes to draw attention to the fact that the current statutory provision which limits compensation for unfair dismissal to actual financial loss is perceived to be especially unfair in circumstances where there has been gross breach of the employee's rights under the unfair dismissals legislation, but no great financial loss suffered.

The Group, accordingly, recommends that consideration should be given to the desirability of amending the law to remove the actual loss provision and by giving the Tribunal discretion to make an award within the current two-year remuneration limit.

The IBEC representative dissents from this recommendation.

2. Tribunal Organisation

(i) Term of Office of Members of Tribunal

EAT Members are at present all appointed in a part-time capacity for the same three year term of office and this can give rise to difficulties in that, coming up to the last three months' of the three year term, there is no certainty that members will be reappointed. This leads to uncertainty in the listing and hearing of cases and in relation to the issuing of Determinations.

The Group recommends that consideration be given to legal provisions which will address the difficulties created by the concurrent three year appointments of members to the Tribunal.

The Group further recommends that consideration be given to the desirability of the appointment of members on a full-time basis.

(ii) Training

The Group recommends that the Hearing process should be underpinned with a formal programme of training in procedures for EAT vice-chairs and members. This may require the drawing up of a programme of continuous professional development which will focus on developments in employment rights law and practice, in workplace industrial relations and in best practice in the conducting of Tribunal Hearings and in the issuing of legally consistent Determinations

(iii) Administration

The Group regards it as essential that sufficient administrative and support staff resources be made available to the EAT to enable it to effectively discharge its responsibilities in an increasingly difficult and complex environment. The Group, therefore, recommends

that consideration be given to the appointment of a full time Registrar, in line with administrative arrangements in similar Bodies.

3. Time Limits

There is considerable confusion among employers and employees with regard to the different time limits applying for making an application to the Tribunal. See Appendix VII for the different time limits. The Group considers that an effort should be made to harmonise the time limits.

4. Other

There are other collateral matters that will require attention, based on the experience of the Tribunal in operating the legislation. Examples include the degree of discretion given to the Tribunal and other Bodies under the various primary legislation, the calculation of compensation, enforcement of orders, notices, and gaps in the scope of application of the legislation.

CONCLUSION

The Group believes that the outline of changes now proposed to EAT procedures, if brought into effect, are more in line with the core objective of the Tribunal and present a real opportunity for an improved customer service outcome.

Next Steps

The Group envisages that, as signalled earlier in this interim report, a policy decision will need to be taken at Ministerial level before proceeding to the drafting of a new Statutory Instrument. It may also be appropriate to have some prior contact with the EAT Consultative Committee before proceeding. Legal advice and technical expertise will, of course, be necessary in relation to the incorporation of the recommendations in legal format.

The Group envisages that, if these Recommendations would be accepted, the necessary legal work would be organised by the Department in the ordinary course. Appropriate members of the Group might be nominated to work closely on the legal aspects. It might also be appropriate to reconvene the full Group before the finalisation of a revised Statutory Instrument.

Group Secretariat

The Group wishes to record its appreciation of the professional assistance given to it by Ms Anne-Marie Finlay, Group Secretary and by Ms Aisling O'Reilly of the Group Secretariat. This greatly facilitated the work of the Group and the drawing up of this interim report.

Personal Appreciation

I would like, finally, to record my very great personal appreciation of the help and support given to me by all the members of the group and secretariat especially against a background in which I had no previous experience in the workings of the EAT. More importantly, I would like to thank the members for the approach which they adopted to the task of reviewing the EAT procedures. Notwithstanding the sensitivities and differing backgrounds and perspectives, the members, having agreed the core objectives for the EAT, worked together in a positive and constructive manner to identify and agree the suite of recommendations which we all believe are in the interests of the effective operation of the EAT and of improving customer service outcomes.

Sean O Riordáin
Chairman
EAT Procedures Revision Group
23 May 2007