

ARTHUR COX

Our Reference: SG/FE

16 September 2011

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

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

Submission of Arthur Cox

Dear Mr Gallagher,

We refer to the Minister's Consultation Paper on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures (the "**Consultation Paper**").

The Employment Law Group in Arthur Cox is one of the leading employment law practices in the country. We have 12 employment lawyers all of whom who practise exclusively in the area of employment law and industrial relations. This experience is supplemented by a separate team of four lawyers who practise in the area of pensions law. We represent a wide variety of corporate clients, predominantly employers, from both the public and private sector. Our Employment Law Group has practised in this area for over 35 years, since the emergence of employment law as a distinct practice area in the mid 1970's.

Based on our experience in this area, we have set out our observations and comments below. We have also addressed the specific queries raised in the Consultation Paper in the **Appendix** to this letter. We welcome the Minister's initiative, his Consultation Paper, its general direction and the opportunity to comment on same. We agree on the following headline points:

1. The current system should be integrated into a two tier structure, with a single point of entry and single appellate body; and
2. The early resolution of all work place disputes, as close as possible to the work place (where the employment relationship continues), without third party involvement wherever possible, should be encouraged and fostered throughout the new process.

Eugene McCague, Donogh Crowley, John S Walsh, Michael Meghen, William Johnston, Nicholas G Moore, Declan Hayes, David O'Donohoe, Colm Duggan, Carl O'Sullivan, Isabel Foley, John Meade, Conor McDonnell, Patrick McGovern, Grainne Hennessy, Séamus Given, Colin Byrne, Caroline Devlin, Ciarán Bolger, Gregory Glynn, David Foley, Stephen Hegarty, Declan Drislane, Sarah Cunniff, Kathleen Garrett, Pádraig Ó Ríordáin, Elizabeth Bothwell, William Day, Andrew Lenny, John Menton, Patrick O'Brien, Orla O'Connor, Brian O'Gorman, Mark Saunders, Mark Barr, John Matson, Deborah Spence, Kevin Murphy, Cormac Kissane, Raymond Hurley, Kevin Langford, Eve Mulconry, Philip Smith, Kenneth Egan, Bryan J Strahan, Conor Hurley, Alex McLean, Glenn Butt, Níav O'Higgins, Fintan Clancy, Rob Corbet, Rachel Patrell, Siobhán Hayes, Pearse Ryan, Ultan Shannon, Dr Thomas B Courtney, Orla Keane, Aaron Boyle, Rachel Hussey, Colin Kavanagh, Kevin Lynch, Garrett Monaghan, Geoff Moore, Fiona McKeever, Chris McLaughlin, Maura McLaughlin, Joanelle O'Cleirigh, Paul Robinson, Richard Willis, Tim Kinney, Deirdre Barrett, Cian Beecher, Ailish Finnerty, Louise Gallagher, Conor O'Dwyer, Jenny Fisher, Robert Cain, Brendan Cooney, Alan Heuston, Connor Manning, Gary McSharry, Keith Smith, John Donald, Dara Harrington, David Molloy, Stephen Ranalow, Roland Shaw, Jonathan Sheehan, Brendan Slattery, Gavin Woods

Consultants: James O'Dwyer, Daniel E O'Connor, John V O'Dwyer, John Glackin, Dr Mary Redmond, Dr Yvonne Scannell, Dr Robert Clark

We confirm our agreement with the three key objectives as outlined by the Minister in the Consultation Paper.

We agree that the State must become more “hands-off” in dispute resolution and should encourage self-regulation and self-help at work place level between employers and employees, where the employment relationship continues.

We believe that the culture of “victimology”, which is centered on the assertion of “rights” and demands for compensation for breaches of same should be thoroughly discouraged, this mentality does not serve Ireland’s best interests, above all at the present time.

We do not believe that this means the State should withdraw completely from employment protection and industrial relations disputes, rather we think the State’s efforts should be expended proportionately more on supporting a new culture of self-regulation and self-help. Prevention, intervention and resolution at the enterprise level, wherever possible without third party involvement, should be the desired goal. Interventions should be designed to bring this about.

In our view, State intervention is desirable under three primary headings:

1. **Providing information and neutral factual evaluation;**
2. **Encouraging alternative dispute resolution/mediation at enterprise level AND as an intrinsic (potentially compulsory) path before any formal adjudication; and**
3. **Ensuring formal claims/complaints are a last resort BUT, once initiated are processed expeditiously with stringent case management.**

These themes are reflected in our answers which are set out in the **Appendix**, however we have made some more general observations as to what we believe these headings entail below.

In our view, the question of the employment law High Court interlocutory injunction restraining dismissal should be re-considered. This is an extremely costly and disruptive process for business. There is no equivalent in the UK. The High Court, in a number of recent judgments, has sought to limit or restrict the availability of such reliefs in employment disputes. We note that statutory restrictions on employment injunctions have also been implemented in connection with the banking crisis. See Section 19(5) of the Anglo Irish Bank Corporation Act 2009 and Section 23(3) of the Credit Institutions (Stabilisation) Act 2010. We believe this should be built upon and a legislative framework that closes off the prospect of employment law injunctions, save perhaps in the most extreme cases, should be considered. Furthermore, we believe that consideration should be given to the designation of an Employment Judge/Division in the High Court so as to mirror the arrangements in place for competition law cases.

We believe that the industrial relations expertise built up within the Labour Relations Commission and the Labour Court should be retained. As such, the majority of our replies are focused on the new first and second tier decision making bodies, which we suggest should deal with employment law disputes to the exclusion of industrial relations disputes.

Throughout our submission we repeatedly endorse alternative dispute resolution (“ADR”) methodologies. By ADR, we refer predominantly to mediation and/or conciliation but not arbitration. We contemplate mediation that is facilitative, based on information and understanding, not evaluative, concerning the legal rights of the parties rather than their respective needs and interests.

As we see it, appropriate/relevant interventions under the three headings may be:

1. **Providing information and neutral factual evaluation:**
 - 1.1 The provision of neutral factual and legal information on rights and interests;

- 1.2 The neutral evaluation of disputes and ADR avenues available through interactive technology; and
 - 1.3 The provision of information about ADR and encouraging the parties to utilise the ADR avenues available to them.
2. **Encouraging ADR at enterprise level AND as an intrinsic (potentially compulsory) path before any formal adjudication:**
- 2.1 Terms of employment for all employees should contain relevant provisions dealing with dispute/grievance resolution including references to ADR. The Terms of Employment (Information) Act might be suitably amended so as to so provide.

We anticipate that this will require the drafting and inclusion of ADR clauses in employees' terms and conditions of employment. For the purposes of clarity, we are suggesting that an ADR clause by which the employer and employee agree to undertake mediation or conciliation would be inserted into employment contracts. In such circumstances the ADR remains voluntary in the sense that the parties consent to the inclusion of the clause in the agreement, and thus the process, at the outset of their relationship. We recognise that successful ADR demands the willing participation of the parties concerned and participation in the process to conclusion cannot be compulsory, the parties should be free to withdraw at any stage.
 - 2.2 Updated clear, simple, guidance, in the form of a statutory instrument on grievance procedures, discipline and dismissal in the workplace, should be issued incorporating and encouraging ADR.
 - 2.3 Employer and employee bodies should commit to promote and implement early ADR procedures.
 - 2.4 Government could undertake an "ADR pledge" by which Government Departments and State bodies would, where possible, undertake ADR before initiating any formal employment process such as disciplinary or legal proceedings.
 - 2.5 Complaints should be lodged online, at which stage both the employee and employer (in responding/acknowledging the complaint) should be reminded of ADR avenues available and obliged to confirm that they have considered ADR.
 - 2.6 The decision making body/any of the parties should be empowered to request that ADR be considered/reconsidered at any stage. The decision making body should be empowered to stay proceedings where:
 - (a) an ADR clause has been disregarded;
 - (b) the parties agree to undertake ADR;
 - (c) it seems to the decision making body that the parties should at least, be counselled on the merits of ADR and encouraged to engage in same.
 - 2.7 The decision making body should be empowered to take the disposition of the parties to ADR and whether ADR was attempted in good faith by a party in determining redress.

3. **Ensuring formal claims/complaints are a last resort BUT, once initiated, are processed expeditiously with stringent case management:**
- 3.1 Fast track system for determination of claims. There are unacceptable delays in getting hearing dates at present in the Employment Appeals Tribunal and the Equality Tribunal.
 - 3.2 Mandatory notification of employers by claimants of claims filed. There is currently no obligation on a claimant to notify the employer and some of the decision making bodies currently take a very long time before they notify the employer of the existence of the claim.
 - 3.3 Early/preliminary case management hearings/meetings to filter claims and ongoing case management to hearing date (where a hearing is necessary). Among other things, this would shorten the number of days at hearing.
 - 3.4 Proactive “triaging” of claims, with short and long claims distinguished early and ultimately listed for hearing appropriately. Consideration should be given to continuing the hearing of a claim on days immediately following the first day’s hearing instead of the current process of adjourning cases for resumed hearing weeks or months later.
 - 3.5 Proactive case management of claims from date of notification to hearing including:
 - (a) references of disputes to ADR where appropriate;
 - (b) identification of issues at stake/narrowing of issues in dispute;
 - (c) pre-hearing exchange of claim details/submissions by claimant and reply by respondent; and
 - (d) pre-hearing exchange of witness statements, where considered necessary or appropriate by decision making body during case management.

Outside of the foregoing, we see a pressing need for consolidation of employment/industrial relations statutes and for the business interests of employers of all sizes to be considered in relation to defending claims. As the Consultation Paper identifies, there are more than two dozen employment rights statutes and statutory instruments. These are replete with differences of definition e.g. “employee”, “employer”, “contract of employment” and “collective agreement”. Early and urgent consideration needs to be given to:

- consolidation of employment rights/industrial relations legislation;
- standardisation of definitions; and
- confirmation of the Minister for Jobs, Enterprise and Innovation as “the Minister” for all employment protection legislation (currently the Minister for Justice, Equality and Law Reform is responsible for employment equality, maternity, parental leave and adoptive rights).

The magnitude of such a consolidation should not be underestimated. It is easier to take a “green field” approach when drafting reforming legislation, but because of time and other factors, this option is not available to the Minister in the current circumstances. Extensive consultation with stakeholders should occur and expert assistance (possibly from the private sector) sought where necessary so as to prepare an Employment Rights Consolidation Bill.

We hope the above commentary and the detailed replies that we have set out in the **Appendix** to this letter are informative and of assistance to the review process.

Should the Minister wish, we confirm that any or all of the Partners in our Employment Law Group and Dr Mary Redmond (the author of the leading textbook on Unfair Dismissal), who is a Consultant to the firm, would be available to discuss this matter further and assist in the process in any way we can.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Seamus Given', written in a cursive style.

SEAMUS GIVEN
ARTHUR COX

APPENDIXRESPONSES TO SPECIFIC QUESTIONS RAISED IN THE CONSULTATION PAPER

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

Maintaining good employment relations and resolving workplace conflict

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

Ensuring that from day one there are procedures for resolution of grievances and disputes mapped out in writing between the parties. Every employee should have a document containing his/her terms of employment, at its simplest containing threshold rights and these procedures. Sample policies/terms should be provided on the internet for downloading and use as good drafting and clarity is essential.

Timely and up to date factual and legal information should be available online for employers and employees in relation to:

- Industrial relations/Employment rights; and
- Alternative Dispute Resolution (“ADR”) and in particular mediation/conciliation in an employment context, not arbitration. ADR should be proactively promoted as the first avenue for resolving all disputes. Details about the avenues available and the process itself should be freely available.

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

Yes.

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

The “success test” for any State intervention should be whether it facilitates the objective of minimising formal proceedings. Such intervention can therefore arise:

- **Pre-dispute:** encouraging employers (including the State), employees and the social partners to use ADR, providing accurate information and online training about ADR, ensuring a clause detailing dispute resolution procedures and ADR is required between all employers and employees, providing accurate online information about employment and industrial relations rights, using interactive IT resources where neutral evaluative information on disputes can be sought and received; and
- **In the run up to and during a dispute:** an information-giving, interactive website as above, online information on ADR as the preferred method of resolving disputes, provision of free ADR where disputing parties cannot avail of it in the workplace, scope for decision making body to facilitate referral to ADR, potential implications on redress for those who refuse ADR or engage in bad faith in an ADR process.

Where appropriate, legislation should back up these interventions.

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

- Minimising cost of dispute resolution through minimising formal hearings.
- Providing information and neutral evaluation.
- Uniformity (i.e. consolidation) of legislation.
- Consistency of decision-making/quality of decisions.
- Appointment of appropriately qualified/experienced personnel.
- Publication of all decisions online.
- Ongoing training of personnel.
- Proactive case management.
- Chairman's role broadened to include overseeing the foregoing and to enable him/her to sit alone in certain cases e.g. for case management/identification and narrowing of issues in dispute.

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

Integrated structure.

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

Yes.

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

Yes.

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

Yes.

However, in addition to the body of first instance, the Chairperson might be appointed as a Deciding Officer either for or following a preliminary case management meeting to deal with claims which are easily identifiable on the facts as net breaches (e.g. holiday pay disputes, unlawful deductions/payment of wages, redundancy payments) and to identify preliminary issues which require rulings, dictate the exchange of submissions/witness statements, narrow issues in dispute (e.g. whether the complainant is an employee/works under a "contract of employment"), identify claims that are statute barred or outside the scope of the legislation and to identify and eliminate vexatious and frivolous claims.

The body of first instance would be bound by the Deciding Officer's decisions from which an appeal would lie to the second instance/appellate body.

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

Yes.

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

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

There is a need to retain some organisational distance/separation between these roles. On analysis they are quite distinct:

- The **inspectorate** involves State detection of breaches and compliance functions, not initiated by employer or employee;
- **ADR/conciliation and mediation** processes dealing with industrial relations/collective disputes, advisory services, mediation and similar ADR procedures dealing with individual or collective industrial relations and employment rights complaints are entirely different from formal adjudications; and
- **Formal adjudication** should be a last resort.

It would be entirely appropriate to maintain clear differentiation between the three pillars in whatever amending legislation is introduced. Everything possible will need to be done to help change the prevailing "culture" of industrial relations and employment rights resolution. In this regard the new legislation might expressly segregate inspection, ADR (conciliation, mediation, advisory), pure industrial relations matters (to be retained within the Labour Relations Commission and Labour Court where considerable expertise resides) and the first and second tier formal adjudication bodies for employment rights disputes.

ADR should be encouraged by requiring the adjudicator to take into account the parties' good faith attempts to resolve their dispute by ADR, for purposes of any remedy. Extensive use of ADR is already contemplated in industrial relations law, employment (equality) law and Civil Court procedures. As with the new Order 56A of the Superior Court Rules (Mediation and Conciliation) (S.I. No. 502 of 2010) the decision making body should have a discretion to advocate ADR.

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

It is inefficient to have a three-person tribunal and secretariat adjudicating on redundancy appeals when this could be done by a Deciding Officer. The statutory criteria are straightforward. An appeal could lie to the proposed new appeals body.

Where other employment rights are also involved in conjunction with a redundancy claim, e.g. transfer of undertakings or unfair dismissals (unfair selection for redundancy) this would not be appropriate.

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

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

In the envisaged scenario where the first instance body would deal with all breaches of the law at the same hearing, the most important principle is that those appointed should be, and be seen to be, well qualified for the job and/or have relevant experience. As in any system of appointment, a person should have demonstrable qualifications and experience, they should be willing to undergo ongoing training, be interested in the use of technology and so on. They should not be appointed because of political affiliation or other irrelevant reason.

Appointment by the Minister should be replaced by an appointing body. Oversight of the new process and its operation should be vested in a suitable body to ensure quality of service and efficiency (perhaps broadly comparable to the role of the Courts Service).

The *de facto* appointment of tribunal/decision makers by the social partners should be ended. Vacancies should be openly advertised by way of public competition.

We suggest that persons working in/appointed under the new streamlined system should be placed on panels comprising of people with diverse relevant skills and experience. A level of legal qualification should be mandatory for Chairpersons given that a decision-making body appointed from the panel may well be ultimately required to adjudicate on legislative rights and to apply legal principles. We have also suggested that it should be possible for a Chairperson to sit alone in appropriate cases.

The quality of all decision makers must be carefully vetted if all claims are to be filtered into a two tier system with an appeal from the two tier system on a point of law only. High quality decision makers should also guarantee a consistency of decisions and the development of a consistent and high quality jurisprudence – which in itself facilitates certainty and encourages the resolution of disputes.

Information and Advice

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

Yes, ideally this would be an interactive portal so that employers and employees can input specific questions for neutral evaluation.

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

It would seem better to keep this function separate and distinct. If a key objective is to reduce the number of cases admitted to formal hearings, perhaps a clear distinction would assist in this objective.

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

Online. Advice given by someone on a telephone helpline runs the risk of being wrong e.g. because the full facts are not disclosed, personal interpretation, or simple human error. This should be avoided.

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

No. As we have suggested above, advising on the basis of facts provided is fraught with difficulties. It should be possible for an employer/employee to deduce from an interactive website what the options and avenues are. Above all they should be informed as to the ADR avenues and that they should be tried first.

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

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

Primary legislation, setting up one body overall.

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

Yes. It should be accessible online, should advise on ADR alternatives and should extract some form of declaration/acknowledgement regarding ADR having been considered or pursued.

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

Complainants/applicants as well as respondents should be asked to provide as much detail as possible.

The first instance body at a preliminary meeting should be empowered to require information where it is not provided and should, if a case is proceeding, dictate the pre-exchange of submissions and witness statements as may be necessary, depending on the case.

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

Yes, three months in the first instance with the possibility of extension for another three in the event of exceptional circumstances arising during the initial three month period. For appeals the period should be six weeks with discretion for a further six weeks. There should also be a consistent test for admitting claims outside of the main time limit. At present different there are two different tests in different employment

statutes namely, "exceptional circumstances" and "reasonable cause". We suggest there should only be one test and this should be "exceptional circumstances".

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

Yes. Natural justice requires that either party should be free to nominate a representative whether a solicitor, trade union official or whatever.

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

No. All sorts of issues could arise if the person to whom the power were extended failed to exercise it appropriately. What duty of care would s/he be under? Might undue influence be exercised? Representation is an entirely different matter and allowing for representation by a person of the claimant's choice should take care of any perceived difficulties in this regard.

Enforcement

- 2.18 *Should there be a consistent method of enforcing awards of employment rights bodies?*

Yes.

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

Facilitating early interventions and alternative dispute resolution methods

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

See paragraph 1.3 above.

Where a claimant has been unable to avail of ADR, it would be worth considering that the State offer ADR before a claim is lodged/processed for hearing, particularly if the dispute seems amenable to ADR.

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

By introducing a robust system of case management.

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

Ideally ADR options will have been exhausted locally by the time a complaint/claim is lodged, however where they have not, ADR should remain available and the decision making body should have the discretion to recommend ADR where it sees same as relevant during case management.

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

Yes, as decision making body panel members, Chairpersons/Deciding Officers. See for example paragraph 2.3 above.

Furthermore, we believe current Industrial Relations Officers and the Rights Commissioners have particular skills in mediating/facilitating the resolution of disputes. These skills and expertise should be recognised and those resource and skills might be well deployed, to very good effect, in such a capacity.

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

Yes, external experts may be necessary if ADR procedures are to work speedily and efficiently. The current mediation process for equality claims, for example, while often effective, frustrates one of the core principles of mediation (speedy resolution) with current waiting times.

Regional and local panels of external experts could be assembled following a tender process.

A public-private arrangement could be considered. Training should be provided for in-house ADR.

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

Yes, both at the initial complaint stage and on appeal. While this can be burdensome (particularly for small employers and some vulnerable employees) exceptions might be provided for – this could be addressed through the proactive case management process. If ADR fails and a case must proceed, this would mean the case to be met is clear, the matters in issue might be capable of being narrowed and only necessary witnesses arranged to attend, etc. Again, this would work effectively with a robust case management process.

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

Yes, and yes. Conciliation and mediation should, however, be more than an “offer”.

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

Mediation will be especially helpful where multiple claims have been made, where claimants are still in employment or where the claim is sensitive e.g. involving sexual harassment, sexual identity or disability.

It is unlikely to be helpful if mediation has already been tried and failed or in some legally complex cases such as those involving transfer of undertakings.

In general, mediation always has the potential to be helpful. It is always cheaper and quicker than formal adjudication. It is not of course a panacea for all disputes.

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

Yes, e.g. to determine the issues or pathway of the claim, to see whether sufficient information has been provided, whether written submissions would be useful, whether a Deciding Officer/Chairperson sitting alone would be appropriate and to eliminate “red herring” claims. In reality, the first hearing day for many Employment Appeals Tribunal cases is used as an ad hoc preliminary hearing, however the matter should be formalised and married to robust case management.

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

Subject to what is stated below, not in substitution for a hearing. Natural justice demands the right to be heard, which for most people (whether employee or employer) means an oral hearing. Written submissions should become part of the fabric of proceedings particularly if the matter is likely to proceed to a hearing, legal points are likely to be raised or the case is complex. In practice parties are often asked to produce written submissions and where this is so a more structured approach is warranted.

Written submissions without an oral hearing might be adequate in the type of cases suggested in paragraph 2.3 for decision by a Chairman/Deciding Officer sitting alone.

Written submissions should be exchanged in advance, which should speed up hearings and help prevent “trial by ambush”.

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

The early resolution (ADR) process should always be confidential and not admissible in any subsequent hearing. However, if the decision making body has referred the matters to ADR or recommended it, the disposition of the parties to that process or in that process might be used to inform/influence redress.

Conduct of Proceedings

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

Yes.

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

Yes. We suggest that this arises at the preliminary hearing referred to above. A filtering mechanism should be applied to all claims to ensure they are validly taken. If an employee appeals such a decision which is a right they should have, there should be a fee for doing so.

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

In public.

- 3.15 *Should there be a uniform period for submitting appeals?*

Yes, six weeks.