



CIPD Ireland
Marine House
Clanwilliam Place
Dublin 2
Tel: +353 (0) 1 653 0400
Fax: +353 (0) 1 653 0500
Email: info@cipd.ie

Private & Confidential

Mr Eamonn Gallagher
Department of Jobs, Enterprise and Innovation
Davitt House
65A Adelaide Road
Dublin 2

14 September 2011

Dear Mr Gallagher

I enclose for Minister Bruton's consideration the Chartered Institute of Personnel and Development Ireland (CIPD), submission in response to the invitation for consultation with respect to proposed reform of the State's Employment Rights and Industrial Relations structures and procedures.

The submission has been prepared in consultation with Ian Moore of A&L Goodbody and we are available to meet at your convenience should you require further elaboration.

Yours sincerely

A handwritten signature in blue ink, which appears to read 'Mike McDonnell'. The signature is written in a cursive, flowing style.

Michael McDonnell
Managing Director, CIPD Ireland



CIPD Ireland
Marine House
Clanwilliam Place
Dublin 2
Tel: +353 (0) 1 653 0400
Fax: +353 (0) 1 653 0500
Email: info@cipd.ie

CIPD

**Submission by CIPD Ireland to Richard Bruton TD, Minister for Jobs,
Enterprise and Innovation in response to invitation for consultation with
respect to proposed reform of the State's Employment Rights and Industrial
Relations Structures and Procedures.**

September 2011

About CIPD Ireland

The Chartered Institute of Personnel and Development (CIPD) has almost 6,000 members in Ireland and has existed here for some 75 years. It is the leading professional body for those involved in people management and development.

CIPD aims to advance the management and development of people to the benefit of individuals, employers and the community at large and be recognised as the leading authority and influence in the field. To this end it is focused on setting standards, and assessing those standards of qualification for human resource professionals. CIPD members work in a variety of roles under the umbrella of human resource management, and are at the forefront of handling workplace issues.

CIPD welcomes the Minister's proposal to reform the State's Employment Rights and Industrial Relations structures and procedures and the opportunity to contribute to the consultation phase.

CIPD supports the underpinning principle of the proposed reforms - as outlined in the consultation paper - of building on existing arrangements by streamlining the processes and creating a culture for early resolution of cases, and the establishment of a new first instance body and a revamped upper-tier appellate body.

Resolution of disputes within the workplace

CIPD and its members recognise that disputes occur in the workplace, both relating to what might be described as "**disputes of right**" and separately "**disputes of interest**". **Where disputes arise, of whatever type, the commitment of CIPD members is at all times to endeavour to resolve them within the workplace.**

Accordingly, CIPD will support new structures that promote early resolution of disputes within *the workplace*. This would include a requirement that before the state's dispute resolution machinery can be utilised, claimants are bound to exhaust internal disputes resolution procedures and/or alternative dispute resolution ("ADR") 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 either internal structures - or in their absence - external structures for dispute resolution. This might include mandatory appeal processes, and/or resort to suitable external personnel with expertise in dispute resolution or in investigating and making appropriate findings on claims.

Progress to use of the state's machinery should be subject to evidence of and the claimant party's certification of the exhausting of such processes. A penalty, such as imposition of an award of nominal costs at the conclusion of an unsuccessful claim, might be considered as a means of ensuring prior utilisation of workplace mechanisms.

Disputes

CIPD appreciates that notwithstanding efforts at workplace level, and ADR, disputes can and do arise, that on occasions require intervention or assistance from the state's dispute resolution machinery. It is accepted that such machinery is particularly important in order to address and vindicate employees' legal rights, but also to provide a mechanism for assisting employers and employees, either individually or collectively, resolve an issue relating not to their rights, but to their respective interests. This would for example encompass claims for improved terms and conditions of employment.

CIPD would support the proposal of a single point of entry for the handling of all such disputes. It is however CIPD's recommendation that clear lines of demarcation be put in place and maintained as between the range of potential functions performed and provided by that single point of entry. Specifically, there must be a clear separation both in fact and optically between those who undertake the different functions. This applies to:

- providing information and guidance on employment rights and legislation
- making decisions to prosecute and pursue prosecutions
- providing a conciliation / mediation service
- determining unresolved disputes / claims.

We recognise that this is perhaps the most delicate of the issues that will require addressing in arriving at the new structures. It is nevertheless the one aspect that CIPD would submit is essential in order to address the perceptions of the past (and present) and in order to achieve the necessary confidence in and credibility of the new structures.

Provision of information/guidance

There is no good reason why the various information-provision and guidance functions provided by such bodies as NERA, the Equality Authority, the LRC and Labour Court cannot be brought together and provided in one coherent **Employment Rights Information Service**. Furthermore, it must be made clear that the service is there to be utilised by employees and employers alike.

Apart from enabling navigation through the myriad of employment rights legislation, providing access to a single database of decisions made under all the legislation should assist both employees and employers to make better assessment of the correctness or otherwise of their actions or proposed actions.

Based on better information it *may* be possible for the respective parties to a dispute, or fermenting dispute, to assess or re-assess their respective positions, and possibly reach a resolution independent of the dispute resolution structures.

At all times, however, providing information and advice should be non-directive. Financial constraints might in fact dictate that information be provided via extensive FAQs (Frequently Asked Questions) available to all, on a single website. Whilst it may be impossible to cover everything,

there is no reason why the state should be taking it upon itself to address every possible scenario. There already exist many other sources of information and advice. For employees there are the services of trade unions, citizens information, solicitors, HR consultants, and others. For employers assistance can be obtained via IBEC, employers' organisations, solicitors, HR consultants, CIPD and others.

Prosecutions

CIPD would submit that NERA's future role should be focused solely on pursuing prosecutions where breaches arise. Responsibility for making the initiating complaint should, however, solely rest with the complainant or their representatives. In order to preserve the integrity of the above referred to Information Service it is important that new legislation clarify that it is not the role of such a service to report a wrong or perceived wrong to the prosecuting body.

Conciliation/Mediation

CIPD recognises that the LRC currently provides a valuable conciliation service. This is particularly so in relation to what might be described as disputes of interest.

CIPD members have however expressed a concern about situations where those vested with decision-making powers (**Rights Commissioners**) cross a line and engage in a conciliation process, and yet maintain authority to revert into the role of decision-maker. This practice undermines confidence in the service, is contrary to justice, and requires divorcing the roles of conciliator from that of decision-maker.

Just as is the case with claims under the **Equality Acts**, CIPD would submit that following assessment at the initial point of entry parties to all employment rights disputes be given the option to engage in either "mediation" or "conciliation" as these are defined in the draft **Mediation and Conciliation Bill** prepared by the **Law Reform Commission** in its report on "**Alternative Dispute Resolution: Mediation and Conciliation**" [LRC 98–2010] of November 2010. It is worth recording here the respective definitions set out:

*"For the purposes of this Act "**mediation**" means a facilitative and confidential structured process in which the parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable agreement to resolve their dispute with the assistance of an independent third party, called a mediator"*

*"For the purposes of this Act "**conciliation**" means a facilitative and confidential structured process in which an independent third party, called a conciliator, actively assists the parties in their attempt to reach, on a voluntary basis, a mutually acceptable agreement to resolve their dispute."*

Given the frequently emotional aspect of employment disputes (both for employee and employer) and notwithstanding the voluntary basis of their engagement in ADR, the parties possibly require a greater degree of assistance in reaching a mutually acceptable agreement. Accordingly, conciliation might be the more appropriate mechanism.

An attraction of whatever form of ADR is provided, is the creation of a platform where the parties can engage meaningfully, with the prospect of reaching a solution, at considerably less cost in terms of the involvement of advisors, time, and strain on the individuals. Where employees may still be in employment, as would

particularly be the case in cases relating to inter alia discrimination, bullying , and harassment , it is vital that a mechanism is put in place potentially enabling the parties move beyond the dispute and possible irretrievable breakdown to resuming constructive relations.

The first-tier decision-making body

The first decision-making tier should be separate to the above Information Service, prosecution of offences service, and conciliation/mediation service.

CIPD recognises that a major flaw of the current system is that it can leave all matters, including significant jurisdictional issues, to the hearing. In adopting what might be a “clearing house” model, there are certain initial issues which in CIPD’s opinion it should be possible to consider and determine at an early stage. These would include:

- Whether the claimant is or is not an “employee” and therefore benefiting from the protection of the legislation. This would address such situations as those where there may be an argument that an individual is not an employee, and perhaps self-employed, and accordingly not eligible to protection under the legislation.
- Whether the claim has been brought within the time limits set out under the relevant legislation.
- Determining any dispute as to whether the dispute might already have been settled by an appropriate waiver/discharge/compromise agreement.
- Whether the employee might be within a category of employment excluded from protection under the relevant legislation.
- Whether, in the case of employees who ordinarily work outside the State, the criteria provided by Section 2 (3) of the Unfair Dismissals Act apply.

A process that speeds up access to employment rights assessment and adjudication not only meets the justice of a situation, but can reduce time and cost for all parties--including those engaged in the State’s decision-making machinery. It would certainly reduce the number of claims going forward for decision-making.

The proposed single application form solely covering employment rights issues is one with which CIPD would agree. Disputes as to interest should be addressed on separate documentation, and follow a wholly distinct course.

While being careful not to introduce what might in effect become expensive lawyer-led processes, proactive case management conferences or meetings might take place at an early stage addressing such issues as:

- The length of time a case might possibly take to be heard.
- Disclosure by the parties of the number of witnesses required.
- Issuing witness summonses.

Consideration *might* also be given to requiring the furnishing of Witnesses Statements by the parties within a particular time-scale in advance of a hearing, and also the disclosure of documents. There is a risk, however,

that making specific provision for such processes adds a layer of formality that might not be in keeping with the overall objectives here, and will undoubtedly add to the costs of the parties.

It is submitted that it may also be possible to deal with some preliminary issues via correspondence. Insofar as such an approach may lead to determinations as to individual rights, care would need to be taken to ensure justice is done, and seen to be done, and by appropriately qualified persons (see below).

Such a filter or “clearing-house” approach might equally identify cases requiring specialist attention by for example an Equality “Division” of the first-tier body. Equally, and subject to the concerns already expressed as regards keeping clear lines of demarcation between the different functions, this first-tier body might instigate the obligation on the parties to engage in conciliation or mediation.

The present entitlement of a party to object to the first-tier decision maker (i.e. Rights Commissioner in Unfair Dismissal cases) should be removed. Parties should not have what is in effect a right to object to the judge. Except in cases where the judge is perceived to be conflicted, do other litigants have a right to object to the assigned judge. If changes are made to the manner of appointment of the “judges” at this proposed first tier, and criteria for appointment (see below) the perceived necessity to have a mechanism for objection *should* fall away.

Representation

The consultation paper addresses the question of representation at hearings. Whilst there might well be merit in limiting representation to those who have typically fulfilled that function to date, and who it might be accepted have greatest awareness of the processes involved, in reality there is no good reason for restricting representation, other than to require a party to state on all initial documentation who their representative is (if any), and any change to that representation.

Enforcement

CIPD submits that compensation for loss rather than damages should be maintained as the appropriate award in employment rights cases. Remedies such as re-instatement or re-engagement, which are provided under the **Unfair Dismissals Acts** are arguably impractical, whether for employer or employee. There should also be greater transparency as regards how a tribunal has arrived at its award.

Decision-Makers

Given that decisions in respect of the above matters affect the rights of employees and employers, it is essential that those who make the decisions must have the requisite knowledge and decision-making skills to do so. Whether the task is for example to decide an initial dispute as to whether a claimant is an employee or self-employed, or whether an employee has been unfairly dismissed, the decision is just as important, and requires the same judicious approach recognising that justice must be done, and be seen to be done to the parties. Potentially, this role could be undertaken by those within the ranks of Rights Commissioners and Equality Officers, although with a caveat that those appointed are clear that their role is distinct from that of dispute resolver.

Decision-maker appointments

In CIPD's submission there should be a move away from the current mechanisms by which individuals are appointed to the variety of decision-making roles.

CIPD queries whether there is any need for the determination of issues by three-person bodies. The present model for both Employment Appeals Tribunal and the Labour Court is based on patronage which is neither appropriate nor robust enough for the challenging times ahead. It is out-moded and infers there is a need for representatives of "Social Partner" interest groups to be involved in the process. This very notion suggests some sort of consensus or majority approach.

In CIPD's submission, the deciding of a dispute as to a right is not something to be determined based upon the background, nominating body, bias, prejudices and so forth of individuals appointed to these bodies. This is not to say that any such individual necessarily does or indeed has exercised bias, but the nominating system clearly suggests the person represent one sector, and that does lend to that impression.

CIPD recognises there is a debate in respect of whether qualified lawyers should fulfil the role of judge or decision-maker in employment rights disputes. Whatever the validity of that issue, in CIPD's submission it is essential that clear criteria are established as regards knowledge, experience, and suitability for judicious decision-making. Against such criteria applicants can be assessed for appointment, perhaps using the services of the Public Appointments Service. For many of the required roles, be they as decision-maker or dispute resolver, CIPD submits that a more open recruitment process would allow people of the highest quality meeting professional HR standards apply for and successfully fill the requisite positions.

Consideration should be given to providing initial and follow-up training to those appointed to decision-maker positions. In order to equip appointees to a standard, this training should cover legislation, the key facets of fair determination of issues, and relevant law of evidence.

As with judges, the holding of office as decision-maker should end when the incumbent reaches a particular age (perhaps following the date on which a person becomes eligible to the state pension). Continuing in office after a term (say five years) could be made conditional on meeting certain Continuing Professional Development (CPD) criteria, accordingly ensuring a degree of "quality control".

Costs

Whilst it is accepted that a claimant must have access to justice, just as any claimant before the courts must expend some money in embarking on litigation, CIPD would suggest the same apply to claims under employment rights legislation. Introducing a requirement that claimants pay a deposit (perhaps €250) which would be refundable in the event of a successful outcome to the claim or following agreement by the parties, might be a means of reducing vexatious or frivolous claims. The judge or other decision-maker should at the conclusion of a case make a determination on the question of the refund.

Hearings

There is good argument for suggesting that employment rights hearings be dealt with in private. Next to family matters, it might be said that an individual's work and working life is of greatest importance. It is hard to see the public interest in such issues as an employee's rights being dealt with in public. That said, decisions should

continue to be published, and consequently be the subject of disclosure and analysis.

Role of Labour Court

It is acknowledged that the Labour Court provides a valuable role in resolving disputes of interest. It was established for that purpose.

Over the years since, however, it has been given powers under various pieces of employment rights legislation to make legally binding determinations and to make decisions on appeal. Consistent with what has already been suggested in this submission, CIPD would argue that the Labour Court's jurisdiction be limited to interest-type cases. Apart from CIPD's concerns as regards the current appointments system, it is not appropriate that a body intended to support industrial harmony, and the compromises necessary to achieve that, also decide legal rights disputes. The perception that representatives on the Court represent interests whether of employers or of employees has the potential to undermine essential confidence for a different judicial context.

Accordingly it is submitted that its role be limited to interest-type disputes, and a distinct body (potentially consisting of a single individual) exercising appellate powers be set up as **the second-tier** body dealing with employment rights issues.

Follow-up

CIPD and our advisor Ian Moore of A&L Goodbody would be willing to meet with the Minister to discuss, if necessary clarify, and elaborate on this submission, and to express views on such an approach or scheme as the Minister decides is appropriate.

For and on behalf of CIPD Ireland
Michael McDonnell
Managing Director, CIPD Ireland

September 2011