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

A Submission by the Citizens Information Board

The Citizens Information Board (CIB) very much welcomes the opportunity to make a submission to the Department of Jobs, Enterprise and Innovation on its proposal to reform the State's employment rights enforcement and redress mechanisms. The CIB Submission is informed by feedback from our delivery partners – Citizens Information Services (CISs)[1], the Citizens Information Phone Service (CIPS)[2], the Money Advice and Budgeting Service (MABS)[3] and the National Advocacy Service (NAS). Citizens Information Services dealt with almost a million queries on all aspects of social service provision and citizens' rights in 2010.

Role of Citizens Information Board

The CIB is required to assist and support people in identifying their needs and options and in accessing their entitlements to social services. The Board also has a role in monitoring the effectiveness of current social policy and services and highlighting issues which are of concern to users of those services. In practice, CISs and the CIPS provide information to the public but also gather information on clients' experiences[4] in accessing social and public services and asserting their rights. In recent years, assistance and advocacy work has developed as a growing component of the work of CISs and almost a quarter of CIS clients receive such support. 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. Such support contributes to workers getting awards to which they are entitled under the Redundancy Payments Acts, the Payment of Wages Act and the Unfair Dismissal legislation.

Employment Rights Queries

Ten per cent of queries to CISs are employment related. In the period January-June 2011 there were some 30,000 queries nationally on employment rights issues. Almost 17% of queries to CIPS in 2010 were employment related. Approximately 10% of all Social Policy Records are employment rights related.

Queries on employment rights to CISs and CIPS suggest that people who seek information and advice in relation to employment protection matters are generally non-unionised employees, people in low-paid jobs, part-time workers and people working for smaller employers. In the past couple of

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[1] There are 42 Citizens Information Services (CISs) in the national network.

[2] In 2010, CIPS' Information Officers responded to 144,513 requests for information and advice from the public

[3] There are 53 MABS companies delivering money advice nationwide.

[4] Information providers complete Social Policy Records on the CIB Oyster database in relation to queries which highlight a shortfall in a service/policy or difficulty with enforcement of rights. This information used by the CIB as a basis for social policy reports and submissions.

years, there is, as might be expected, an increasing number of queries relating to rights in redundancy or short-time working situations. It is also the case that an increasing number of employers are seeking information and advice from CISs and CIPS. The experience of CISs points to the substantial difficulties experienced by people seeking to assert their employment rights in terms of identifying the appropriate redress pathway and negotiating their way through it.

Enforcement Issues
A 2006 Citizens Information Board (formerly Comhairle) Social Policy Report on Employment Rights[5] highlighted the gap between entitlements set out in employment protection legislation and the possibility of being able to enforce these rights in practice. The report emphasised the need for easier access to institutions involved in employment rights enforcement. The reasons for the gap in enforcement identified were varied but included complexity of procedures, lack of adequate information on the part of employers and employees and the need for increased protection for employees (particularly those with less than one year's service) seeking to enforce rights.

The Report recommended:

- Fostering a stronger ethos of compliance among employers
- Better integration of employment protection enforcement institutions
- A single point of contact
- Easier access at regional/local level
- A Specialist Enforcement of Awards Unit (to assist employees, especially those of modest means to follow through on awards granted by redress bodies)

While the establishment of NERA with regional offices and the additional resources provided for workplace inspection has been a significant development, the issue of enforcement and the different roles of the various agencies continue to be identified as concerns. The proposal to develop new and more integrated systems of information and redress is, therefore, very much to be welcomed.

Information
Despite, enhanced information provision mechanisms in recent years, including those developed by NERA, CIB, ICTU and the Equality Authority, the queries to CISs and CIPs indicate an employment rights information deficit on the part of both employers and workers. A recurring theme across all of the employment rights issues identified by CISs and CIPS is an absence of precise information about entitlements and rights. Some workers rely on their employers for their information and the latter may either not have the right information or deliberately choose to misinform workers. The challenge of providing clear information is obviously made more difficult by the number of

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

redress mechanisms in existence at present.

Priorities for New Agencies
The CIB identifies the following as key factors to be considered in the reform of existing structures:

(a) Optimising information dissemination at national, regional and local levels

(b) Ensuring that the most urgent needs for information and support are met within a climate of budgetary restraint

(c) Continuing to promote an ethos of compliance, especially among smaller employers where the compliance deficit is likely to be most pronounced

(d) Enhancing collaboration between information-providing agencies, including CIB, ICTU, IBEC and ISME, CIPS at national level and CISs, Centres for the Unemployed and Youth Information Services at local level

(e) Strengthening enforcement mechanisms

(f) Enhancing advocacy support for people who have difficulty dealing with recalcitrant employers and/or in navigating the redress mechanisms

(g) 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)

(h) The role of the Health and Safety Authority in monitoring the Safety, Health and Welfare at Work legislation should be looked at in the context of the revised integrated structures.

Collaboration between Employment Rights Agencies and the CIB
The CIB has liaised with the Department and with NERA over the years and would be very happy to continue to work with any new agencies established in developing strategies and mechanisms 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.

Addressing Specific Questions Included in the Consultation Document

1.1 **Resolving disputes at workplace level:** The CIB agrees fully with the principle of as far as possible resolving all disputes at workplace level. This requires workplace mechanisms and protocols that are fit for purpose. It also requires the provision of a mediation service as part of the revised redress structures. Mediation should be made available once a complaint has been made and information and advice have been provided to the complainant. The potential of existing internal workplace mechanisms to bring about resolution should be explored fully. It is the view of the CIB that there should be a mandatory requirement for both complainants and employers to engage in mediation in the first instance and that provision should be made in the revised structures accordingly.

The Code of Practice: Grievance and Disciplinary Procedures S.I. NO. 146 of 2000 (under the Industrial Relations Act 1990) should be reviewed and strengthened to include a requirement for workplace mediation as part of the Code.

1.2 **Role of information:** While information has obviously a key role to play in identifying the validity of grievances/claims, information by itself will not achieve early resolution. There needs to be additional mechanisms that support early resolution. For example, standard internal workplace procedures should be obligatory and should be part of enforcement by the Inspectorate. Such procedures would be enhanced and supported by a strong mediation service. (See 2.9, 2.10 and 2.11 below).

1.3 **State Interventions:** State interventions should be available only after internal mechanism has been unsuccessful. However, the success or otherwise of internal mechanisms will depend on the regulatory workplace framework in place and its enforcement.

1.4 **Access to Fair and Efficient Adjudication:** This would be enhanced by more proactive promotion of employment rights, a rapid response time from State agencies and the simplification and integration of mechanisms and pathways to redress (as is being proposed). The public (both workers and employers) need to be supported to access dispute resolution mechanisms. CISs, as a first port of call for many citizens, have a particularly important role in this regard.

2.1 **Two-tier Model**: The 'single authoritative source of information and advice to facilitate disputes being resolved at workplace level to the greatest extent possible' mooted is highly important. Firstly, adequate and functioning

internal workplace mechanisms are fundamental to such an approach. Secondly, there should a mandatory requirement for workplace mediation as a crucial component of the first tier. The second- tier body would be a 'court of final appeal' and its decisions would be binding.

2.2 **Minimising Differentiation of Processing Channels:** A clear and accessible pathway to redress for all should be a core principle of delivery. However, care needs to be taken to ensure that access difficulties which may arise because of backlogs and blockages due to resource reasons are not carried disproportionately by those most disadvantaged in terms of workplace exploitation.

2.3 **All Claims Dealt With by One Body in the First Instance:** This should be the guiding principle with mediation offered as the first and most desirable possible resolution mechanism. However, caution needs to be exercised to ensure that the human rights aspect of the role of the Equality Tribunal is not lost in an integrated employment rights redress system.

2.4 **Role of Second –Tier Body**: This should only have a function in relation to appeals. The first hearing role of existing appeal bodies should be removed.

2.5 **How Minimal Differentiation Can be Applied Optimally:** It would be highly important to keep some distance between the mediation and conciliation service, the formal adjudication/appeals section and the inspectorate and enforcement section. While the functions of each would require some organisational distance, there is clearly a role for integrated information systems and collaborative work in the enforcement area.

2.6 **Statutory Redundancy Appeals:** There is a crucial difference between the administration of appeals and the administration of payments and this distinction should be maintained.

2.7 **Appointment and Tenure:** Knowledge and experience of industrial relations is essential for membership of such bodies as is knowledge and understanding of employment law. Also important would be the voice/experience of those providing frontline information, advice and advocacy support to people experiencing difficulties with enforcement.

Information and Advice

2.8 **Should there be one website:** While the goal should be to have one integrated website on employment law and related rights, any such website should be user friendly and easily navigable by people who only have basic IT skills.

The CIB would very much welcome an opportunity to discuss with the Department what role its website www.citizensinformation.ie could play in light of its function as the national source of information on public and social services.

2.9 **A More Coherent Approach to Advice and Information:**
While a more coherent and integrated approach is highly desirable, it is essential that the role of independent information, advice and advocacy services is maintained and enhanced.

2.10 **Best Method of Providing Information and Advice:** A combination of phone, website and face to face is required. The CIB three-channel approach provides a valuable model. CISs are well placed to take on the face to face role and are already doing a considerable amount in the area of employment law and rights. The CIB would welcome an opportunity to discuss with the Department how the role of CISs might be expanded in respect of employment rights information, advice and advocacy.

2.11 **Non-directive Advice to Employees and Employers:** CISs and CIPS can make a contribution as a first port of call for people requiring information and advice.

2.12 **Single Point of Entry:** The single point of entry model would need a clearly identified website and a national telephone local number. Both of these access points would have clear protocols for onward referral to either the First-tier Intervention Service (including mandatory mediation) and/or to CISs and other independent providers where additional support is deemed to be required.

2.13 **Single Application Form:** This would be highly desirable but it would have to be designed in such a manner as to make it easy to comprehend and complete.

2.14 **Measures for Improving Information Gathering:** As stated in answer to 2.13, an appropriately designed application form would be the key to capturing the required information at the outset and in one location. Such completed application forms could be maintained electronically and made available to agencies involved with a case as required. Data protection considerations would obviously need to be taken into account.

2.15 **Consistent Time Limit for Initiating Complaints/Appeals:** There should a general time limit of 6 months which could be extended to 12 months where an applicant can show reasonable cause for the delay.

2.16 **Arrangements for Representation of Claimants**: The existing role of CISs and other independent information, advice and advocacy services in supporting claimants should be acknowledged and the potential for enhancing this role as part of the revised redress structures should be explored.

2.17 **Power to Present/Refer A Complaint:** The CIB takes the view that the power to refer should rest with the complainant once s/he has been given all the necessary information and advice and told about the option of availing of advocacy support (when available). The reality as reported by CISs is that

employees often decide not to pursue complaints because they fear for future job security and /or because their employer lives in their local area.

2.18 **Enforcement :** Decisions from the second-tier body should be easily enforceable through the courts. This should be an administrative courts procedure without the need for a judge to hear a case. As already referred to, a Specialist Enforcement of Awards Unit (to assist employees, especially those of modest means) to follow through on awards granted by redress bodies should be established. In the meantime, there should be support from the Department's legal section available to employees who have to have recourse to the courts to enforce a decision.

3.1 **Interventions Prior to Formal Hearings/Inspections:** As already stated in answer to 1.1, there should be statutory provision for mediation*.*

3.2 **What is the best method:** The first response to a complaint should be the allocation of a case worker qualified in mediation to look at the situation and to identify options and protocols for mediation. The practice of the Equality Appeals Tribunal in this regard should be examined with a view to building on the strengths of its approach.

3.3 **Stage of Intervention:** Mediation should be available immediately after a complaint is made and following enquiries with employer and employee regarding whether the internal processes have been exhausted.

3.4 **Harnessing Expertise and Capacity Re. Factual Matters:** This is an important point as frequently a dispute can be resolved at first instance once there is clarity and certainty about the law in what can be at times a complex set of circumstance.

3.5 **Forging Positive Connections*:* I**ncentives need to be created to resolve disputes internally. The concept of workplace training for employers and employees on best practise models of dispute resolution should be explored.

3.6 **Requirement to Set Out Case in Writing:** This should be a general requirement and applicants should be referred to CISs or other bodies for assistance in this regard.

3.7 **Initial Examination of Complaints:** All complaints should be examined at the outset and mediation should be obligatory as part of process. Some incentive or penalty may be required to ensure practical and efficient compliance by all parties with such a requirement.

3.8 **Issues Amenable to Mediation:** The CIB takes the view that most cases can benefit from mediation. Even if a resolution is not found, it gets parties to understand and engage with the issues identified and to identify options for resolution.

3.9 **Preliminary Hearings**: It is difficult to see any role for preliminary hearings in the context of mediation being offered once a complaint has been made.

3.10 **Written Submissions**: While most cases would be best dealt with through the submission of an application form, followed by mediation, there would be exceptionally complex cases that would require to be determined on the basis of written submissions.

3.11 **Link between Attempts at Resolution and Formal Hearings:** Attempts made to resolve the dispute should be acknowledged at formal hearings. There needs to be some incentive in place to ensure that mediation is used as the first option for resolution. Cases where one party is happy to mediate and the other is not should be recorded and acknowledged. Also, parties could be asked at hearings why they have not availed of mediation.

3.12 **Uniform Procedures:** There should be uniform procedures regarding how all cases are to be dealt with in the first instance. These should include provision for mandatory workplace mediation.

3.13 **Dismissal of Cases by First Instance Jurisdictions**: Each case should be examined on its own merits and dealt with through the provision of information and advice and mediation prior to any hearing. If necessary after these interventions, the first instance jurisdiction should have the power to dismiss inappropriate claims.

3.14 **Hearings in Public or Private:** Mediation should take place in private and all other hearings should be conducted in public.

3.15 **Uniform Period for Submitting Appeals:** The period for submitting appeals should be uniform with provision for an extended period in very exceptional circumstances.

Key Points of Submission

- The experience of CISs points to the substantial difficulties experienced by people seeking to assert their employment rights in terms of identifying the appropriate redress pathway and negotiating their way through it. Addressing this issue must be at the core of the revised structures.

- Workplace mediation should be considered as a mandatory first option.

- Appeals should be heard within a set time limit -- delays in hearings and processing complaints do not create incentive for employers to settle cases quickly and may put workers with legitimate grievances off making complaints.

- The workplace inspectorate should regularly examine and monitor dispute resolution mechanisms within workplaces as part of their role.

- Incentives need to be created to resolve disputes internally. The concept of workplace training for employers and employees on best practice models of dispute resolution should be explored.

- The role of CISs in the area of employment rights information and advocacy should be considered as part of an integrated strategy for reform particularly in relation to their advocacy work in the area.

- The CIB would very much welcome an opportunity to discuss with the Department what role its website www.citizensinformation.ie could play in developing a fully integrated website on employment rights and on how the role of CISs could be developed and enhanced as part of a new two-tier structure.

Case Example

John had worked for his employer for 10 years. During that time he had continued to work as a construction worker even though the name of his employer changed after 6 years, (his new employer was his old employer's son, he was told on a Friday that the son's company would be paying him from the following Monday). When it came to his redundancy, his employer said he would pay him for the 4 years he had with his company not the six with his father's company, and that it would take some time to get the money together to pay him due to the economic downturn.

Some months passed and John’s former employer wasn't answering the phone to him. John sought help from the CIS and was advised that he should receive redundancy for the ten years on the basis that the transfer that occurred when the business changed hands was covered by the Transfer of Undertakings Regulations. It was 9 months since John had been made redundant. We made contact with former employer who told us that he was confident he would be able to make payment within a few weeks. This was what he kept telling John previously. We gave employer two further weeks and as nothing was happening we helped John to file a complaint to the Employment Appeal Tribunal. One year later the hearing took place.

John was awarded redundancy for the ten years and the decision was issued by the EAT six weeks after the hearing. As John's employer is unable to pay, an application has been filed to the Social Insurance Fund. The current processing time for these payments is 4 to 6 months.

Hopefully John will have his redundancy before the second anniversary of his being made redundant.