

To: Mr. EMMETT BRUNSWER
Department of Jobs + Entrepreneurship Innovation
Daring Horse
65 A Adelaide Road,
Dublin 2. 8/9/11

re Views on operation of EX2 &
Proposed CHANGES.

Dear Mr. BRUNSWER,
I enclose my views &
Recommendations on the above.
Hope they will be of some assistance.

John Boland

CHARLES CORCORAN

THE EMPLOYMENT APPEALS TRIBUNAL-RECOMMENDATIONS

IMPORTANT CONCEPTS/BACKGROUND

RIGHTS

Personal Rights

It is essential in the interest of justice that in a situation where people have valuable rights and entitlements, including Constitutional rights, and where these rights are in dispute or the subject of controversy, that proper procedures are in place to deal with those disputes, otherwise such disputes will eventually end up regularly in the costly forum of the Courts.

In the employment area such rights usually consist of the right to have a job, the right to earn a livelihood, the right to a fair hearing by a proper forum, the right in certain cases to reprimand or to penalise or to sanction.

Such rights are normally referred to as personal rights, because they relate to people as individuals, attracting, because of their vital importance, many legal entitlements.

General Rights

These rights can be contrasted with personal rights in that they deal with the rights of groups and different sections within society i.e. the right to negotiate on behalf of sections of society and groups with other sections of society and groups, the right to make agreements, to set and agree conditions in a climate of mutual trust. Such is achieved by negotiation, consensus and mutual agreements and are usually decided by the majority of members of each respective group.

In the industrial and employment area such rights are usually enjoyed by trade unions representing employees in the workplace, with power under licence, to negotiate agreements, with employer recognised bodies, usually over pay and conditions.

FUNCTIONS

In situations where controversy arises as to the exercise of these rights two functions come into play i.e.

1/ Judicial Functions

Where disputes arise between individual parties over personal rights, with each party representing opposing views then in the absence of agreement either the courts or preferably some independent adjudicating body must adjudicate on such disputes. These bodies because of the nature of these rights, in deciding the issues raised either in favour of one party or against one party, have to impose sanctions, or make awards. Such functions are by necessity binding and are commonly known as judicial functions. Such bodies are said to be exercising judicial functions.

In the employment area such bodies exercising judicial functions are normally the Employment Appeals Tribunal, the Circuit Court on appeal, and in certain circumstances the High Court and the Supreme Court, because they adjudicate on disputes involving personal rights e.g. dismissals—whether the dismissal is fair or unfair, also redundancy—

whether a redundancy situation exists or not, given the circumstances involved, or whether an employee is unfairly selected for redundancy or not. Such decisions in the Employment Appeals Tribunal and the Circuit Court on appeal are open to challenge in the higher courts, so it is imperative that the adjudication body, when adjudicating on disputes adopts fair procedures, and natural and Constitutional justice. Bodies who exercise Judicial Functions which are outside the Courts regime are independent quasi-judicial bodies, because they exercise many of the functions of the courts and as such must be independent and their decisions are legally binding subject to the right of appeal. This area in conjunction with the Personal Rights as already outlined is governed mainly by the Unfair Dismissals Acts 1977 as amended, and the Redundancy Payments Acts 1967 as amended, and other Acts conferring ancillary rights.

2/ Non-Judicial Functions

Where disputes arise between different groups in society over a variety of issues and such groups try to negotiate a solution to the satisfaction of both parties, and agreement is eventually reached involving "a give- and- take" approach, and involving skilled negotiators or representatives acting for each respective group. Such agreements are not normally legally binding and come by way of mutual trust and understanding coupled with long-standing norms and practices, where a dispute arises later on then either party can refer the matter in dispute to an independent body which will make a recommendation on the matter in dispute. Because of their make-up and powers bestowed on them such bodies usually enjoy immunity from suit. Such bodies and parties are said to be exercising non-judicial functions. In the employment area as already stated such parties mainly consist of both employer and employee trade unions, the Labour Court and the Labour Relations Committee. As already stated, such agreements, because of their nature are not normally open to challenge in the higher courts. This area together with the General Rights as already outlined outlined above is governed mainly by the Industrial Relations Acts.

CONCLUSIONS

Having regard to the sentiments as expressed the following patterns emerge. In the employment area two distinct streams or patterns come into play each one presenting its own type of problems i.e.

1/Personal Rights - identified mainly as dismissals, redundancies, payment of wages etc and dealt with by independent quasi-judicial bodies, exercising judicial functions.

2/General Rights- identified mainly as the right to negotiate and make agreements which although are not legally binding carry a status, and are of a standing which enables them to survive by virtue of mutual trust and established practices.

3/It is obvious that both roles are distinctly separate and should be kept that way because they deal with different problems, which involve different methods and systems in

dealing with each respective set of problems, otherwise confusion leading to costly court referrals would be the norm.

4/In a general but not precise way these separate streams or patterns are reflected as follows:

(a)The first stream – dealing with personal rights, and exercising judicial functions is at present dealt with by the Employment Appeals Tribunal, an independent quasi- judicial independent tribunal comprising of three members i.e. a Chairman who is a practising barrister or solicitor, a member from the trade union sector and finally a member from the employers' group. Its headquarters is located at Davitt House, 65a Adelaide Road, Dublin 2, and hearings are organised and held in Dublin and in various locations throughout the country. As already stated this area is governed by the Unfair Dismissals Acts 1977 as amended, and the Redundancy Payments Acts 1967 as amended, and other Acts.

(b)The second stream—dealing with general rights, and exercising non-judicial functions is at present dealt by the Trade Union body both collectively and individually who are licensed to negotiate and broker agreements with the various recognised employer groups. When there are difficulties over the interpretation of such agreements these are usually referred to the Labour Court or the Labour Rights Commission who issue findings which are by way of recommendation only but which nevertheless carry considerable weight and influence, and ensure industrial peace, goodwill, economic stability, and understanding. examples of such agreements in the past have been National Wage Agreements, and at present the “Croke Park Agreement”. The Labour Court is located at Number 4 Haddington Road, Dublin 4. It is not a Judicial Court, making legally binding decisions but rather making recommendations to parties who have place their trust and reliance on such body. The Labour Relations Commission is located at Tom Johnson House, Dublin 4. As already stated this area is governed by the Industrial Relations Acts.

RECOMMENDATIONS

1/1 recommend that both roles should be kept separate since they each deal with different problems with different personnel, and in a different way, as of necessity. This would avoid confusion, and delays culminating with probable numerous referrals to the courts. The approach recommended is a simple and straightforward approach involving minimum disruption.

It is accepted, appreciated, and recognised, that both bodies have carried out tremendous work over the years, in the case of the first stream the Employment Appeals Tribunal, given the increase in volume of cases coming before the Tribunal over the years coupled with a minute increase of staff and administrative facilities, and in the case of the second stream which has in no small way contributed to the industrial peace which has been prevalent down through the years.

In the case of the first stream one can only judge its performance in a meaningful, fair and objective manner by measuring its performance taking into account the substantial

increase in the volume of cases together with the increase in staff and support facilities and allowing for retirements and transfers.

ADVANTAGE: Each respective body deals with its own specific area separately so there is no duplicity or overlapping.

2/1 recommend that the Tribunal would continue to operate mainly under the Unfair Dismissals Act 1977 as amended and The Redundancy Payments Acts 1967 as amended, but would be expanded to include dealing with such matters as denoted in Paragraph 4/1. The composition of the Tribunal has proven to be very effective since it is comprised of a solicitor/barrister acting as chairperson, ensuring that proper and fair and Constitutional procedures are adopted by the Tribunal in carrying out its work thus avoiding costly court referrals, and this is borne out by the fact that so few referrals have been made to the High Court. That both remaining members one coming from the Trade Union area and the other from the Employers' Associations, have a wealth of knowledge and experience in dealing with industrial relations and the practical problems in the work-place, especially problems involving individuals' rights or the rights of small groups of workers and also in dealing with and negotiating with management. This ensures a very fair hearing for the parties involved. The fee structure in comparison to other similar Tribunals is very low. That the tribunal while sitting is an ideal forum for speedily dealing with ancillary statutory entitlements if pleaded by the parties concerned e.g. Holiday entitlements, under the Organisation and Working Time Act 1997, entitlement under the Minimum Notice and Terms of Employment Acts 1973 to 2005, to proper notice.

ADVANTAGE: The present make-up of the Tribunal ensures a very fair and thorough hearing for the parties.

3/While both streams should be separate that does not mean that there should be no changes.

ADVANTAGE: Some tidying up needs to be done.

4/1 would recommend that any remaining part of the judicial functions pertaining to personal rights i.e. Employment Equality Agency, matters dealing with anti-discrimination and equality and bullying in the workplace, and which form a very small part of the Labour Court/Labour Relations Commission set up, would be transferred to the Employment Appeals Tribunal. I would recommend that any part of the Employment Appeals Tribunal which deals with industrial relations (if any) be transferred to the Labour Court/Labour Relations Committee

ADVANTAGE: That such changes as recommended would involve the minimum legislative change, disruption and expense, with little or no interference with existing contractual obligations. Such change by its nature would be carried out speedily and effectively. Each body/stream will be able to concentrate fully on its own area of expertise. There would be no confusion or overlapping of resources.

5/1 also recommend that the Tribunal should remain in its present form because unlike the District Courts and Circuit Courts, including the Circuit Court on appeal from the Tribunal and also the Registrars Courts, the Tribunal issues a full written report on its

5
decision or what is normally referred to as a "reported decision", signed by the presiding Chairperson, whereas all of the above Courts only make an Order stating the result and any sanction or award, and nothing more.

ADVANTAGE: The fact that there is a written report from the Tribunal is of tremendous value to the parties whether they are represented or not, and helps to understand how the decision was arrived at, and whether they should appeal or not.

6/As the Employment Appeals Tribunal in its present form, is also in many cases, forum of hearing of first instance and as such is not operating as an appeals tribunal I would recommend that its name be changed to "Industrial Hearing Tribunal" or "Employment Disputes Tribunal".

ADVANTAGE: It would be more appropriate, and lead to less confusion.

7/Under the Payment of Wages Act 1997 and the corresponding statutory instrument, whereby an employee disputes payments received for work done. I would recommend that the provision providing for service of proceedings separately on the employer be abolished as it is unnecessary and confusing. That proceedings be served on the Tribunal who will notify the other party, should suffice as is the case in all other proceedings in this area. That the necessary amendments to the Act and to the corresponding Statutory Instrument be made accordingly.

ADVANTAGE: This eliminates obvious confusion that created great difficulty for the respective parties, at the hearing stage. It also brings it into line with all other applications to the Tribunal.

8/In relation to agreement by settlement where the parties settle the matters in dispute by mutual agreement and compromise. Every effort is made to encourage this, at different stages of the hearing i.e. before the hearing starts, while parties are exchanging documents, and after the first or second day, when the respective parties would be more enlightened as to how their case is going, but without getting the Tribunal involved as direct involvement by the Tribunal could compromise its neutrality.

10/20/2014
However this must be operated in a controlled way, and the Tribunal has to strike a balance between allowing time for discussion leading to a possible compromise and a discussion which simply would be just wasting valuable time.

I recommend that this should continue but only as described above. However any request from the parties for time to discuss should be seriously considered and monitored.

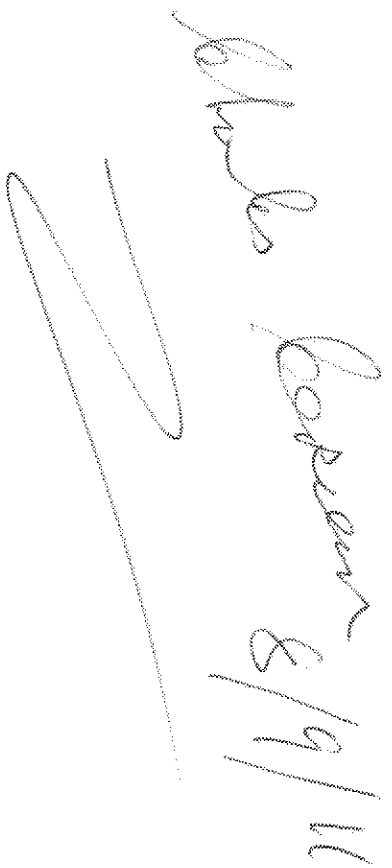
ADVANTAGE: It saves time and obviates the need for reports. However an experienced Tribunal should gauge such discussions carefully so as to reduce time wasting to a minimum in the event of a settlement not being reached.

OTHER POINTS.

- 1/ If another system was adopted as proposed, for the hearing these cases, then the parties would not have the benefit of the legal and practical collective expertise of the Tribunal and this could lead to problems.
- 2/ Likewise as already stated a judgement from the Registrars Court would only involve an order stating the result together with the sanction and or the award. There would be no report. This would be a huge disadvantage.
- 3/ It is ironic that on appeal to the Circuit Court (a higher body) from the Employment Appeals Tribunal, there is only an Order encompassing the result and the sanction or award! There is no written report.
- 4/ The Registrars Courts at that level are already overloaded with ancillary applications and may not have the capacity to deal with detailed hearings and additional long lists, as would involve the Employment Appeals Tribunal.
- 5/ The Registrars Courts deal mainly with ancillary applications in relation to or as part of full hearings in the Circuit Court and may not be suitable for full employment hearings or disputes.
- 6/ New system as proposed would involve a high degree of legislative change which would be complex, confusing and costly in the long run. It would also involve a lengthy transitional period.
- 7/ New system as proposed would involve transferring hearings from the more informal atmosphere of the Tribunal system to the more formal atmosphere of the courts.
- 8/ New system as proposed would have serious implications in relation to existing contractual obligations.
- 9/ The existing system should continue together with a certain amount of "tidying up", aimed at avoiding unnecessary confusion and overlapping, as it has performed reasonably well over the years and has a very low fee structure compared to other similar tribunals, where fees are paid per case at a higher level rather than per day at a reasonably low level.
- 10/ Part of the confusion over the years was caused by the introduction of a small amount of judicial bodies and powers into the second stream as outlined which created a certain amount of duplicity and overlapping with the first stream as described above.
- 11/ It would be very difficult and confusing to try and run an employment hearing simultaneously or on a transitional basis with tribunal hearings, in that the Registrars Court is a court with a single person presiding whereas the tribunal hearing would have

three personnel presiding, and similarly the first forum would only issue an Order in the usual form whereas the second forum would be issuing a written report together with its Determination Order.

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Member of Assessors panel for NRA/IFA, Compulsory Purchase/L and Disputes,
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Charles Corcoran 8/19/11