

Submissions on the Proposals for Reform of the State's Employment Rights and Industrial Relations Structures and Procedures

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Introduction

I have been a vice chair of the Employment Appeals Tribunals (EAT) since 1997 and I make this submission based on my experience over the last fourteen years but also, I lecture in the University of Ulster on Northern Irish Industrial Tribunals so I am familiar with the UK/ Northern Irish employment legislation and practice of the Industrial Tribunals in Northern Ireland.

The first matter to note is that the Northern Ireland has attempted over the last ten years to introduce changes legislatively to encourage the resolution of employment disputes between parties within the workplace to avoid the need for parties to attend the Industrial Tribunals and so to cut costs.

This has been successful in part and I hope to demonstrate where the NI legislation has worked successfully and where it has not, which has required legislative roll back.

The proposal of the one stop shop and the independence of the adjudicating body

Firstly; the proposal to merge the adjudicative body (EAT) and the advisory body/ industrial relations body (NERA/ LRC/ Labour Court) into one, is wrong footed. No jurisdiction – including UK/ NI has done this. The bodies have two different functions, each of which is important but very different. One is a declaration of employment rights - necessary in order to enforce both domestic and European legal entitlements independently and fairly. The other is a way to resolve disputes through a

compromise of the parties' individual entitlements in order to allow the employment relationship to continue.

To merge the two functions into one body would result in neither body functioning properly but particularly would impair the integrity and independence of the adjudicating body.

The independence of the adjudicative body (the EAT) which hears evidence and then impartially decides whether the legal rights of the parties have been infringed, is vital to preserve. The substantive law (employment rights and obligations) will not change, therefore the independence and integrity of the body which ensures the preservation of those rights and obligations must be preserved. The function of this body is clearly separate and distinct from an advisory/ mediation body.

In order to be an advisory/ mediation body, the facts and circumstances of the issue must be investigated or at least considered by that body. As such, the advisory/mediation body becomes involved with and in some ways a party to what is happening on the ground. This obviously is a good thing in that at ground level, resolution between the parties can be achieved. However the same body - or an emanation of that body - cannot then go on to supposedly hear the matter entirely afresh and determine the matter, as if it has not been party to the pre hearing discussions. Even if there was some sort of Chinese wall separating the two functions, the perception in the eyes of the public will be that it is that same body. This will mean that if the case does not find resolution, and must go to a hearing, that because the adjudicating body will have already been involved with the dispute, it cannot be independent. With the proposed one-point entry structure the likelihood of a case of a bias case being brought to the High Court is high apart from the proposal being vulnerable from ECHR (European Court of Human Rights) perspective and I would strongly urge against its introduction.

The Employment Appeals Tribunal and its NI/UK equivalent

The equivalent of the Employment Appeals Tribunal (EAT) in Northern Ireland is the Industrial Tribunal (IT). In England and Wales a decision of the IT can be appealed to an Employment Appeal Tribunal but despite its name, this is not an equivalent to the Irish EAT because in the UK EAT, a senior judge adjudicates and the procedures are very different. So any comparison drawn between the Irish EAT and the UK EAT is erroneous.

In Northern Ireland, there is no EAT so if a party wishes to appeal a decision of the IT, they must go to the Northern Irish High Court. From a cost point of view, such appeals are prohibitive so the cases tend to begin and end in the IT. A comparative analysis of the Northern Irish IT and the Irish EAT is worth considering.

Like the Irish EAT, the membership of the Northern Irish IT is as follows; a legally qualified chairperson (a barrister or solicitor of at least ten years standing) and two lay members (one union, one employers' organisation side).

Unlike the Irish EAT, the Northern Irish IT has jurisdiction over discrimination cases. So like the current proposals suggest there is precedent for the EAT to also deal with rights under the equality legislation. Again, in hearing discrimination cases, the IT is independent; it hears evidence and impartially determines whether the employment rights under the equality legislation have been breached or not.

Conciliation Officers?

Unlike the Irish EAT, under the Northern Irish industrial tribunal system there is an option for the parties to conciliate prior to the hearing. However this is performed by a body which is very strictly separate to the Industrial Tribunal process. The procedure is that there is a set period of time (usually 6 weeks) for the parties, if they wish to enter a conciliation process they have right to do so with the assistance of a conciliation officer that is appointed by a separate and distinct public body namely the Northern Irish Labour Relations Agency. The function of the LRA is to advise parties on their respective rights, to assist in conciliation and to publish employment advice

publications. To re-state, the conciliation officer is independent of the industrial tribunal process and may not then contribute to or give evidence during the Tribunal hearing if the conciliation has not proved successful. Therefore the independence and integrity of the Industrial Tribunal is upheld.

In NI there was an attempt in 2004 to introduce regulations to try to “force” parties to resolve their difficulties themselves. This was done by way of a provision which stated that unless the parties used specific statutory resolution procedures (set out in the 2004 Statutory Dispute Resolution Procedures NI) a claim could not be presented before the IT. This, unsurprisingly, did not work and the legislation was amended earlier this year with a simple caveat namely that if, having heard the evidence, it was clear that the parties had failed to attempt to resolve their differences when they were given an opportunity to do so but failed to avail of that opportunity – the compensation award would reflect that. Therefore an award will be reduced, if the employee has failed to use resolution processes that were open to him/her, or likewise the award will be increased if the employer is at fault. The IT may vary an award upwards or downwards by up to 50%. This light touch legislation has proved to be much more effective and a much greater incentive for parties to resolve the issues between them, themselves.

It should be noted that this provision already exists in the Irish legislation in that the conduct of the parties (including their failure to use resolution procedures made available to them) may be taken into account when the EAT makes an award (1993 Unfair Dismissals Act)

Lawyers sitting as vice chairs

Regardless of the differences between the jurisdictions, under each jurisdiction; the Irish system, the Northern Irish system and the UK system, the role of the qualified lawyer, whose role is to interpret the law on a case by case basis, is central. This is vital to the fairness and integrity of the system. To abandon this would be a mistake in my view. Under the NI and UK system the lawyers who act as chairpersons must be practising for ten years. This qualification and experience are both necessary in

my view. It is not unusual for points of law to arise for consideration in EAT hearings. This is unsurprisingly as the pursuit and defence of legal rights is the objective of both parties in every case. To attempt to exclude lawyers from this process is without merit and does not lead to greater efficiency in the hearing of cases.

A lawyer has the training and experience to conduct a case properly. They hear evidence, make rulings on the admissibility of that evidence, consider and interpret the law and apply it in the context of conducting a fair and impartial hearing. They do so in the context of oftentimes complicated set of facts. The ability to do this well depends on the quality of the lawyer and the experience that they have but it is a juggling of a number of skills that a non lawyer is not trained or experienced to do. The reason I say this is that lawyer on the EAT needs to know not just about interpreting employment legislation but also know the rules of contract law, constitutional law and natural justice requirements. To attempt to exclude the lawyer from the decision making process of adjudicating legal rights is a mistake. And not just a mistake from the lawyers' point of view, it will be most manifestly unfair on the "little guy"; the aggrieved individual or aggrieved employer whose legal rights have been infringed. The protection of their rights must be at the heart of proposed changes – far ahead of broad sweeping changes that may look efficient on paper but have the wrong focus at the centre.

And this should be at first instance. Most cases never go further than at first instance and therefore most cases will be determined at this first hearing stage. The system should ensure that the first hearing of all cases will be fair, impartial and the law will be applied correctly. As stated already, I believe that the decision maker in this context needs to be legally qualified and have the experience of a lawyer who has practised for several years. The question must be asked; why is it the case that most cases brought to the EAT reject the option of a Rights Commissioner determining the matter first?

What I believe to be a mistake that is at the heart of these proposals is the notion that a formal, independent and fair hearing where a lawyer is part of the panel is somehow inefficient or results in the backlog in cases. This claim is without merit. The reasons for the backlog are clearly demonstrated in the submissions filed by the

Chairperson of the EAT; a very large increase in caseload – mainly redundancies and market driven dismissals and yet no proportionate increase in either staff or funding. When the work load was normal prior to 2007, the delays in the system were insignificant. This fact alone should provide a pause for thought.

Preliminary Applications

In Northern Ireland the IT has the jurisdiction to make pre hearing orders such as discovery, orders for inspection and witness subpoenas. This is more necessary in discrimination/equality cases than dismissal cases. The interlocutory procedures will probably be necessary if the equality jurisdiction is transferred to the EAT but for other cases, such as unfair dismissals or redundancy, an automatic right to bring an interlocutory application will add another unnecessary layer of administration for the Department to cope with especially as the orders that can be made by the EAT currently are perfectly adequate to ensure a fair hearing. I would urge caution against adding another layer of bureaucracy to allow for interlocutory orders to be made. Although I accept that it is likely to be necessary in equality cases.

Efficiencies that might be made

- Redundancy cases, in which there is evidence that a company has either ceased trading or has been struck off the company register, could be dealt with administratively and no EAT hearing would be required. This limited measure would take a very significant number of cases out of the system.
- The EAT could be given the jurisdiction to hear and determine equality/discrimination cases.
- The Northern Irish model could be followed in terms of a voluntary conciliation procedure. In practice this would mean that once a case has been filed with the EAT, an advisory body such as NERA would be notified and NERA would offer an assisted conciliation of six weeks to see if that matter can be resolved. If it is accepted by both parties, the EAT process is stayed for six

weeks. If it is not accepted or has been unsuccessful, NERA would notify the EAT and the matter reverts back to the EAT for hearing, thus preserving the independence and integrity of the EAT hearing.

Conclusion

I have attempted to cover all issues raised in the Consultation document. I have tried to draw comparison with NI/UK – both in terms of their mistakes and successes. I would suggest that whatever reforms are embarked upon, that the main focus is to preserve the rights of an individual who comes seeking relief and this is best done by an effective and independent decision-making body made up of members who have both legal and practical experience. This, together with a separate advisory/mediation body, that is properly funded and staffed, to give individuals and companies informed and practical advice and conciliation assistance.

But to combine the two is firstly without precedent in this or any other comparative jurisdiction and is also vulnerable to challenge under ECHR.

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