

Employment Appeals Tribunal's response to the consultation document on "Reform of the State's Employment Rights and Industrial Relations Structures and Procedures".

I am pleased to avail of the opportunity, limited though it is, to respond to your consultation document. I have engaged in consultation with members of the Tribunal. Hereunder are our views.

Minister,

The decision to abolish the Tribunal is not based on submissions made to any review body at any stage but seems to have been for a long time the desire of the Department. No good reason has ever been advanced by the Department for this perceived bias. This bias flies in the face of all the evidence to the contrary: The Tribunal is an extremely low cost body giving exceptional per unit value, its record on appeals to the Circuit Court and on both appeals and judicial reviews in the High Court is exceptional by any standard. In regard to the two latter points I would like to state that: Re placing legally qualified vice chairmen with lay chairman will have serious ramifications in the arena of costly judicial reviews for the state. Converting the low variable cost of the Tribunal members to a much higher fixed cost, as will inevitably result with the new measures and proposals, is incomprehensible. If you were to adopt these measures it will be wholly contrary to Government's policy to lower numbers in the public service.

1 Single Entry Point:

We believe that a single entry point for all claims, a single website and a single authoritative source of information will be positive developments and will eliminate confusion. Once the entry is made the claimant will be directed to the relevant body. In light of the exceptionally high number of claims being referred to the various bodies in the present economic climate all efforts should be concentrated on getting the single entry point working efficiently and effectively before contemplating any other changes. In light of the elimination of the confusion and opportunity for forum shopping from the system, once the single entry point is working efficiently and in light of the views set out below, we believe that further consideration should be given at that stage to what other and whether any other changes are necessary for the efficient working of the system.

2a Impact of proposed changes on dismissed employees

Dismissed employees are the only group of aggrieved employees whose employment rights will be substantially and seriously downgraded by the proposed changes.

The Unfair Dismissal Acts 1977 confers an option on the parties in an unfair dismissal case to have their claims heard at first instance either by a Rights Commissioner or the Tribunal. This was an enlightened and progressive measure and has proved to be effective and cost efficient. This power of election creates a natural division with the more complex cases currently being referred to the Tribunal and the simpler cases going to the Rights Commissioners. To withdraw this power of election is a serious diminution of the rights of dismissed employees.

Of all aggrieved employees the dismissed employee is in the most vulnerable position. He is without income, his reputation is in question, and his future opportunities to earn a livelihood as well as his mental and psychological well-being are at risk. Such employees need immediate access to justice. Compelling them to go through a two-tier system, will double the costs to the parties, the employment bodies and the state as well as significantly increasing delay in the resolution of the dispute and compel the dismissed employees go through the most traumatic of hearings twice.

There is support for the view that dismissal cases require special consideration. In fact both the CEO of the LRC and the Chairman of the Labour Court have expressed this view.

The current backlog of cases for hearing before the EAT is a function of the trebling of its case load in recent years (3,173 in 2007 to 9,458 in 2009) and the lack of administrative resources to deal with the increase. The delay in hearing cases is not a reflection of any fault in the present institutional structure, rather it is due to a failure to provide the EAT with adequate administrative resources, which were available in other sections of the Department. The Tribunal increased its throughput of work by 30% in 2010 and by a further 14% increase in the first half of 2011. Had additional staff been available from less urgent work in other parts of the Department, the increased output would have been greater.

It will be an enormous mistake for the Department to cut off the right of appeal to the Circuit Court in unfair dismissal cases. Such a measure will result in a hugely increased number of costly judicial reviews. In the case of one body where there is no right of appeal to the Circuit Court, in a period of 18 months there were 495 new judicial reviews at a cost of approx. €3million.

Article 6 of the ECHR requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This proposed downgrading of dismissed employees rights, the most vulnerable group of aggrieved employees, is unconscionable.

Of course all of the above, and what follows below, also refers to employers who although they may have acted fairly, have become involved in the process through the lodgement of a claim against them.

2b Employment Appeals Tribunal

The EAT feels that it is best suited to hear such cases if the parties so choose. The current three-person panel in the EAT system with a member from each side of industry and an independent legal chairman to interpret the law is likely to provide greater balance, and probably a greater sense of a “fair hearing”. There is more confidence in the decision of a competent, independent and balanced tripartite body, whose members come to its task with three different perspectives. This is borne out by the extraordinarily low level of appeals taken from the Tribunal’s determinations. Parties feel their cases are fully aired at the Tribunal hearing and they accept the decision made by a body consisting of three adjudicating members.

Every year the majority of claimants under the Unfair Dismissal Acts opt to have their claim heard by the Tribunal.

It is faulty and dangerous logic to extrapolate from existing statistics when considering the number of appeals that would lie to the appellate body from the recommendation of a Rights Commissioner, if the system is changed because one is not comparing like situations. In a radically changed system, where parties, who would have wished to have their claims adjudicated by a tripartite body, will be forced instead to submit to a hearing before a Rights Commissioner, the very high probability is that the level of appeals from the Rights Commissioners to the Tribunal will soar. This change is not improving the procedures to deal with the employment rights for the parties but simply introducing another level of proceedings.

The Tribunal does not require submission and has the distinct advantage that parties wishing to make a claim before it can do so with a minimum of formality and without any representation, if the claimant so chooses.

Relative costs show that the Tribunal is the cheapest tripartite body.

As termination cases (Unfair Dismissals, Redundancy and Minimum Notice) are inter-related they should all be referred to the same body as suggested in “Towards 2016”.

In England the process for vindicating employment rights involves an initial application to an Employment Tribunal having a legally qualified chairman of the standing of a judge, and an appeal therefrom to the Employment Appeal Tribunal. Both of these are tripartite bodies. The “Brian Barry Report”, presented at the recent conference in UCD shows that over 75 % of respondents favoured a tripartite body at both first instance and appellate level.

The Tribunal should be a standalone independent body outside the two- tier system. While the Minister’s proposal has not catered for this, the Tribunal hopes that having given serious consideration to these and other submissions, he will take this point into consideration and realise its value.

The Tribunal has built up a whole corpus of employment law over the past 44 years which has been a guide for employers and employees and helped regulate the employment relationship in the workplace. Minister, do you intend abandoning all this experience and expertise?

2c Advantages of EAT

The EAT has already implemented a range of administrative efficiencies and others are in train.

- Its cost to the exchequer as regards payment to Tribunal members is extremely low (average of €342 per case for the 6,064 cases processed in 2010). Other costs which are administrative apply to all bodies.
- The EAT is operated on a very flexible basis which, for example, enabled a 30% increase in claims dealt with in 2010, and a further 14% increase in the first half of 2011. Furthermore, these have been achieved with only a very marginal increase in staff numbers. Had additional staff been available from less urgent work in other parts of the Department, the increased output would have been much greater. As I have already outlined Minister, the Tribunal has sufficient members to hear further cases but lacks the administrative resources to do so, while these were available in other sections of the Department.
- The Tribunal has a sterling record in the low number of Judicial Reviews and appeals to the High Court. In 2010 there was not one judicial review and only one appeal to the High Court. From the knowledge available at time of compiling the latest Annual Report not one decision of the Tribunal had been overturned by the Circuit Court on appeal.
- From the recent Supreme Court decision in the Davy case, it is clear that almost always when facts are contested written submissions are not sufficient and an oral hearing is in general almost always required. (See Clause 3.10 in Consultation document)

3 Other Relevant Considerations:

Bearing Point are consultants on IT and administration, not on legal practices and procedures. Their recommendations for multi layered intervention in the processing of a case is not based on any relevant experience or expertise and runs contrary to the experience in other countries where similar steps were taken and had to be abandoned for their detrimental effect. Furthermore, in this time of recession, their proposals, which have been adopted by the Department, will require significant outlay in terms of personnel and cost. I would like to remind you that the low cost of the Tribunal is due in no small part to its lean process rather than having a multi-layered one as proposed.

As the positive aspects of the current system were not addressed in the submissions to the earlier review body or by the consultants the proposals are based on incomplete information.

The speed at which the Department is attempting to progress the whole process is a cause of some disquiet.

4. Common Standard of Practice (Refer 3.12 in Consultation Document)

There cannot be a common standard of practice for the hearing of employment rights disputes and for dealing with collective interests.

The distinction between individual employment rights and collective interests/industrial relations is significant. The culture and processes for resolving these two types of disputes are wholly different and must perforce be maintained. Voluntarism, negotiation and compromise are the hallmarks of resolving industrial disputes. On the other hand, there is an entitlement to vindicate employment rights. There is a constitutional obligation to apply fair procedures in the adjudication of employment rights disputes.

The right to fair and constitutional procedures cannot be altered or diminished. While the rules of evidence may frequently be less stringently applied in proceedings before the EAT than in the courts they cannot be relaxed to a level that would imperil the parties' constitutional right to a fair hearing. Any infringement of the right to a fair hearing will inevitably result in costly judicial reviews. Indeed the right to earn a livelihood is a constitutional right.

It is this failure to understand the distinction between the two processes that gives rise to the unfair and unsustainable criticism of "legalism" against the Tribunal.

Since a somewhat major overhaul of the system is being undertaken not to have gone back to first principles, as was envisaged by the McCarthy Report (An Bord Snip Nua), is a missed opportunity and raises the question Why?

To succeed in any reform demands first principles analysis of what each body does and why. The suggested process of using one of the participant organizations to lead the process, could suggest imposing a pre-determined conclusion. NERA has no adjudicative function or experience and would need the input of practitioners involved in the adjudicative process. The reviewing of the EAT in conjunction with the R CS was an arbitrary decision given that the latter has more in common with the Labour Court.

There is no independent justification for this proposal. There is no analysis of the potential cost or savings to the Exchequer.

Pertinent Question:

- The Tribunal would like to ask how many divisions dedicated to employment rights appeals will be in the new body? Is it envisaged that the Labour Court will only require one additional division for the hugely increased workload? It can hardly be the position that the decision makers believe that the much larger caseload of the Tribunal will be reduced to such a low level that it will only require one division. Surely this highlights the need for further analysis before radical steps, which will lead to severe difficulties, are implemented.

Kate T. O'Mahony

Chairman