

**SUBMISSION BY THE EMPLOYMENT BAR ASSOCIATION
OF IRELAND TO THE MINISTER FOR JOBS, ENTERPRISE AND
INNOVATION, MR. RICHARD BRUTON TD, ON REFORM OF THE
STATE'S EMPLOYMENT RIGHTS AND
INDUSTRIAL RELATIONS STRUCTURES AND PROCEDURES**

INTRODUCTION

The Employment Bar Association welcomes the Minister for Jobs, Enterprise and Innovation's proposal to introduce rationalisation and reform of the fora for the resolution of individual employment rights disputes and supports the Minister's drive for reform of this area including the proposal to reduce the number of fora which are at present vested with jurisdiction to adjudicate on individual rights disputes.

The existing mechanisms have been established over many years and have resulted in both complexity in the institutional framework and confusion on the part of users of the various fora as to how best to navigate this legal landscape.

The Employment Bar Association (hereinafter referred to as 'the EBA') is an organisation of barristers who specialise in the practice of employment and labour law, acting for both employees and employers in all fora and in all courts, including the European Court of Human Rights and the European Court of Justice. The EBA membership has extensive experience in representing employees and employers in every type of employment dispute and in every fora for the resolution of employment rights disputes. The EBA membership also has extensive experience in the enforcement of decisions under employment statutes and EU Directives. The EBA is in the relatively unique position of being able to compare and contrast the various fora in terms of fairness, accessibility, costs and efficiency while also having experience of the higher courts' involvement in appeals, reviews of and challenges to the decisions and procedures of all those employment fora. The members of the EBA act for both employers and employees and also both on a pro-bono basis and on a no foal no fee basis in ensuring that legal representation is available to those who cannot afford it.

This submission is grounded in that experience and it is the association's belief that a reformed system should be rooted in respect for the rights of the parties to

employment rights disputes in the first instance and designed solely to protect the interests of those employees and employers. Every attempt must be made to ensure that the proposed new system is designed for employees and employers as having an equal interest in the devising of a fair, efficient and cost-effective means of resolving legal rights disputes, while respecting fundamental legal and European law rights. Central to these are the rights to work and earn a livelihood and the right to a fair hearing. A system which leaves parties unsatisfied that their claim has been properly adjudicated will only lead to protracted appeals and challenges in the courts, with the resulting additional costs and delay.

1. The Separation of Employment Rights Disputes and Industrial Relations Disputes and the Need for Appropriate Expertise.

In attempting to reform the fora for the resolution of employment rights disputes it is essential that a clear separation be made between employment rights disputes and industrial relations disputes. Disputes involving employment rights which are provided by statute and frequently by European law require independent and impartial legal adjudication. On the other hand industrial relations disputes are amenable to resolution in a different manner with the central role being given to the industrial relations expertise of those charged with resolving the dispute.

Where an employee has an individual grievance at work which is not rooted in a claim of breach of his or her employment rights, then that employee, or those employees who collectively share that grievance, require a means of resolving those grievances in the workplace and a fast and efficient industrial relations grievance resolution process. That process requires industrial relations experts for its resolution and it was for just such a reason that the Rights Commissioner service and the Labour Court were established. It is submitted that it is essential that the Labour Court retain its role in industrial relations dispute resolution and that it is likewise essential that that role not be confused or overlap with the entirely separate role of adjudicating individual employment disputes.

However, just as resolution of industrial relations disputes requires the involvement of industrial relations experts, employment rights disputes requires the involvement of legal experts in the adjudicative process. This is particularly important given the complexity of Irish and European employment law. The Minister's consultation paper alone lists over 30 statutes under which claims may be brought by employees. This

is apart from all the European legislation which has had such a far reaching effect on the rights of employees in this country.

2. The Legal Principles which must underline a Reformed Structure

Article 6 of the European Convention on Human Rights provides:-

“In the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The rights contained in the Convention are now part of Irish law since the enactment of the European Convention of Human Rights Act 2003. The State is obliged to respect the rights of Irish persons as provided for and protected by the European Convention. It is therefore incumbent upon the State in reforming the legal provisions governing employment rights disputes to ensure that the statutory framework established is compatible with the State's obligations under the Convention and to do otherwise puts the State at risk of a Declaration of Incompatibility under the 2003 Act.

The Charter of Fundamental Rights of the European Union applies where Ireland is implementing European Union law and thus covers a significant proportion of Irish employment law. Article 47 of the Charter provides:-

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.”

It is therefore submitted that it is essential that a reformed system of employment rights disputes must ensure they are resolved before “***an independent and impartial tribunal***” which conducts a “***fair and public hearing within a reasonable time***” with “***the possibility of being advised, defended and represented***”. Otherwise Ireland is at risk of the judicial process of implementing European employment law rights being set aside by the European Court of Justice as being in breach of the State’s binding obligations pursuant to the Charter.

It is the experience of the members of the EBA that both employees and employers who become involved in employment rights disputes express the most trenchant criticism of the present system when they feel they have been deprived of a fair hearing. For the reformed system to succeed it must command the respect of all the participants and users of the system. In order to command that respect it must be capable of withstanding the most rigorous scrutiny on the long established criteria for fair and public hearings by independent and impartial tribunals.

The EBA recognises that employment rights disputes may be resolvable at an early stage through intervention by way of voluntary mediation or indeed as a result of a preliminary hearing. However, the fundamental principle underpinning the system must be that for those cases that require a hearing it must take place in public and those members of the tribunal charged with hearing the dispute must be independent and impartial. It would thus be a clear breach of both the European Convention and the Charter of Fundamental Rights of the European Union were the members of the tribunal not to have full independence from the state in the performance of their functions. It would likewise be a breach of these rights were the members of the tribunal to be solely the nominees of organisations or bodies within the State given exclusive nomination rights in respect of such positions. Conflicts of interest, real or perceived, can easily arise in this arena.

The EBA recommends that a transparent and independent public appointments procedure be established for all members of adjudicative bodies in the resolution of employment rights disputes.

It is submitted that the reform proposed presents a unique opportunity to establish a clearly independent tribunal designed to guarantee the rights of both employees and employers to have these disputes adjudicated in accordance with their constitutional

rights and their rights under European law and under the European Convention on Human Rights .

The EBA believes that the present and increasing complexity of employment law is in any event such that it is essential for the protection of the interests of all parties to employment rights disputes that the tribunal adjudicating such disputes is presided over by a professionally qualified and appropriately experienced lawyer. The role of persons with appropriate and relevant industrial relations expertise has been an important complementary feature of the Employment Appeals Tribunal. It is submitted that it is an important complement to the legal expertise required for fair and proper adjudication of such claims .

It has been suggested in recent debate in public fora on this issue that the proposal that professionally qualified and appropriately experienced lawyers be an essential part of the adjudicative tribunal is in some way an expression of a vested interest of the legal profession. Perhaps it is a sign of just how much the legal profession is now regularly derided in public debate that there is even a perceived need on our association's behalf to state what might otherwise be the obvious: the adjudication of important legal rights in a complex area of law requires adjudication by lawyers in order to protect the interests and the legal rights of all the parties to the process.

3. The Importance of the Cases

In the commentary and debate on the issue of reform of this area much emphasis has been placed on how many cases can possibly be easily resolved either close to the workplace or early after a claim is made. It has not however, in our submission, been sufficiently recognised that the rights in question in this area are extremely important and of considerable value and/or cost to the parties involved. It is common that jurisdiction is granted under employment statutes to the relevant tribunals to award compensation of up to two years salary; in other cases the relevant tribunal is empowered to reinstate the employee in his or her employment; under the Protection of Employees (Fixed Term Work) Act 2003 jurisdiction is granted to the relevant tribunal to award a Contract of Indefinite Duration to the employee concerned which can mean permanent employment to someone who has been denied permanency or has been dismissed.

It must be recognised that the value of these cases is in most cases equivalent to the jurisdiction of the High Court and exceeds the jurisdiction of the Circuit Court.

It is important to recognise that the parties fully understand and appreciate the value of these cases and for that reason will seek legal advice in respect of them. It is of course their right to be legally represented in the adjudication of these disputes. The very value or potential cost of the cases to them and the complexity of the law concerned explains the frequency with which parties seek legal advice and representation in these disputes. This is their right.

The EBA is of the view that a distinction can be drawn between cases in which the employment relationship subsists and which are disputes which are therefore amenable to possible resolution “closer to the workplace” and those disputes which arise after the employment relationship has terminated. Often employees who are dismissed have been accused of misconduct. Employees can be desperate to clear their name, and a failure to allow them to do so can impact on ability to get a job in the future. For employers, they or their other employees may be accused by an employee of discrimination or bullying which can involve significant reputational issues. All parties to an employment dispute have rights and obligations and both employees and employers must be satisfied that the system adjudicating on those rights and obligations has the ability to do so properly.

The importance of the rights to both the employee and the employer cannot, however, be overstated. To be unfairly dismissed from one’s employment can be a life changing event. To be wrongly accused of having unfairly dismissed an employee or to have discriminated against or harassed an employee can be an extremely costly and damaging matter for an employer. . Where a system of adjudicating their rights is not seen as fair, thorough, competent and impartial, unsatisfied parties will no doubt resort to the courts and to judicial review to challenge the decision, resulting in increased cost and increased delay. Such an eventuality does not deliver cost savings or value for money to the tax payer.

The proposed reforms provide a welcome opportunity to establish a single forum for the adjudication of all employment rights disputes in the first instance and a single appellate body thereafter.

4. Mediation

The EBA is of the view that mediation has a role to play in the resolution of employment rights disputes and may be offered to the parties after any such claim has been lodged. Mediation by definition cannot be mandatory as it simply does not work unless both parties agree to engage with it in a *bona fide* attempt to resolve the dispute.

Mediation has been utilised by the Equality Tribunal since 2000. It is not mandatory, but rather a default mediation, in other words it takes place unless there is an objection by the parties. It is clear that mediation, while important, is not a solution to any more than a certain percentage of disputes. Moreover, mediation makes the process of resolving the dispute more lengthy, as a mediation has to be set up and scheduled, using the resources of a tribunal or commissioner, and another formal hearing then has to be set up subsequently for the mediations that fail.

5. Resolution of Grievances and Disputes as close to the Workplace as Possible

It is noted that the Minister's consultation paper seeks resolution of grievances and disputes as close to the workplace as possible and as early as possible after they arise. It must be recognised that this is only possible in real terms where the employment relationship subsists. Almost all of the work of the Employment Appeals Tribunal and a huge amount of the work of the Equality Tribunal is concerned with the manner in which employment is terminated or denied. Resolution of grievances close to the workplace has no reality for these types of disputes.

It must also be recognised that if an employee claims a breach of his or her employment rights then he or she is entitled to have those claims adjudicated in accordance with the principles outlined earlier. While other alternative dispute resolution processes can be offered to the parties they can only be engaged in on a voluntary basis.

6. A Simple and Efficient Institutional Structure

The consultation paper envisages industrial relations grievances and rights disputes being processed through different channels of both the first instance adjudicative body and the appellate body. It is submitted on behalf of the EBA that this is to perpetuate a confusion inherent within the present system which it is necessary to end. In order for the processes to work efficiently, effectively and in compliance with the rights of all the parties involved, a clear distinction ought to be made between the industrial relations dispute resolution framework and the employment rights dispute resolution framework.

The EBA agrees that an integrated two tier model should be adopted for employment rights disputes.

The EBA submits that all claims in respect of employment related complaints and claims including equality matters should be submitted to and dealt with by one body at first instance.

It is further submitted that there should be a right of appeal on the part of either side to the body of second instance.

Insofar as possible there should be a single application forum for all individual first instance employment rights claims.

It is essential that an outline summary of the Complainant's complaint under each individual statutory provision under which a claim is made should be included in the claim. It is only if this requirement is established in the claim forms that there is any prospect of ensuring a streamlined and efficient processing of the claim with early intervention by way of preliminary hearing or otherwise if possible. Otherwise, it will require a full hearing before the claim is actually assessed and the appropriate means of resolving it determined. The best method of identifying suitable cases for early intervention is to have some information provided in respect of each individual claim on the initial claim form.

There is merit in having a "preliminary hearing" process. It should be open to either party to request such a preliminary hearing and to set out the reasons why they believe such a preliminary hearing prior to a full adjudicative hearing of the claim or

claims concerned would be of assistance. It would then be for the adjudicative body itself to determine whether or not to accede to the request for such a preliminary hearing. Alternatively and/or in addition a system of “call-over” of cases could be established for the purposes of efficient case management. Decisions could then be made at such call-over of cases as to whether cases were suitable for mediation, whether written submissions were necessary, whether time limits should be imposed in respect of preliminary matters prior to hearing and applications for early hearing could be made in appropriate urgent cases.

It is submitted that it is not possible for employment rights disputes to be determined on the basis of written submissions only as that would constitute a breach of the constitutional, European law and European Convention rights of the parties concerned. While it may be possible that the parties might wish to waive their right to such a hearing and to proceed by way of written submission such could only be entertained in cases where it was clear that the parties understood fully that they were waiving their right to a full hearing and the implications thereof.

It is submitted that the hearings of employment rights disputes must be heard in public. The fact that many cases are heard in private at the present time is in fact a clear breach of the parties rights and the State’s obligations as set out above. A reformed system cannot perpetuate such blatant violation of the legal rights of the parties concerned.

7. The First Instance Body

It is submitted that individuals may always be able to take their case to the first instance body either with or without a legal representative.

It is submitted that the best model for a first instance body is provided by the Employment Appeals Tribunal where there is a legally qualified chairperson and two persons with industrial relations expertise representing both sides of the industrial divide. The EAT annual report for 2010 records that 8,778 cases were referred to the EAT and 6,064 were disposed of. In 2010 only 183 of the EAT’s determinations were appealed to the Circuit Court. Further it appears that only three cases ended up in the High Court either by way of ultimate appeal from the Circuit Court or as a result of an application to the High Court for judicial review of the Employment Appeals

Tribunal decision. This represents a very high rate of acceptance of decisions of the EAT by the parties involved. It is the sincerely held view of the EBA that no such similar level of acceptance of decisions would be afforded for a decision at first instance by an adjudicative body equivalent to the Rights Commissioner system presently in place.

In addition to the risk of a very significant degree of dissatisfaction with the decision and thus the high rate of appeal there is also the very significant danger of the high number of applications for judicial review of decisions of an unsatisfactory first instance body. Experience in asylum and immigration matters gives grounds for this belief. For example in 2010 there were just under 500 applications for judicial review in the High Court in matters other than asylum and immigration. In the area of asylum and immigration there were 936 applications for judicial review. It is admitted that this is as a result of a system of adjudication in the area of asylum and immigration that is unsatisfactory and fails to command the respect of its users. The dangers inherent in establishing a system that fails to adequately protect the rights of the parties who use it is illustrated to the recent call by former Supreme Court Judge, Ms. Justice Catherine McGuinness, for a reform of the decision and appeals procedure in asylum and immigration cases. (Irish Times, 2 September 2011) Ms. Justice McGuinness's plea is for a fair, transparent and independent adjudicative process to replace that which has resulted in a huge rate of applications for judicial review in the High Court as a result of the defects in the system and the lack of acceptance of the decisions it produces.

It is also submitted that the Employment Appeals Tribunal represents a most cost effective model in comparison to the other employment rights fora currently in existence.

It is submitted that if only one person is to sit as a member of the first instance body then this person must be such an appropriately experienced lawyer. Otherwise the experience of the members of the EBA indicates that the system will be one in which there will be a very large rate of appeal from the decisions of the first instance tribunal and/or a large incidence of applications for judicial review in the High Court of the decisions of the first instance body.

The submissions of the EBA are rooted in what is the genuinely held belief that what the parties to employment rights disputes wants is a fair, expeditious and

independent hearing. They must be assured that they have such before there will be any acceptance of the decision of such a first instance body.

Many employees will seek to process their claims before this body without legal representation. In order to ensure that the new system is responsive to the greatest possible degree to the needs of those appearing without legal representation, there must be a legally qualified person adjudicating upon that dispute in order to ensure the greatest protection for the legal rights of vulnerable employees and to best protect the decision making body from challenges to its procedures or decisions.

8. Upper Tier Appellate Body

It is submitted that there should be a right of automatic appeal to the appellate body on the part of either party to employment rights dispute. It is essential that the upper tier body would be presided over by an appropriately experienced and professionally qualified lawyer. This appellate body should also avail of the expertise of persons with industrial relations experience.

9. Conclusion

The Minister's proposals for reform in this area provide a unique and timely opportunity to provide a modern and efficient employment rights adjudicative process that respects the rights and obligations of all parties concerned.

The independence and impartiality of those charged with adjudicating this essential and vitally important area must withstand the most searching scrutiny as regards that independence and impartiality.

The EAT model presents the best practice model and it is submitted is the most cost-efficient of the different fora now in operation.

The EBA pledges itself to support the Minister in his quest for a reformed system which is improved and modernised and lowers costs for all concerned.

Dated: 13th day of September 2011