

**Response of John Horgan  
To the  
Consultation Paper issued by  
Richard Bruton, T.D.  
Minister for Jobs, Enterprise and Innovation**

**Introduction**

This response has been drafted following consultation with members of the HR Forum, a body of senior HR professionals. Following its initial workshop in October 2010, the reform of the states industrial relations and employment rights institutions was identified as a key issue. I was asked to draft a paper on this topic and it was presented to a meeting of the Forum at the Irish management Institute on 22 March 2011. While the ideas contained in that paper and this response met with the general approval of the member of the Forum they have been amended in the light of further consultation and discussion. Nevertheless they remain the responsibility of the author and do not purport to represent the views of all member of the Forum.

I broadly agree with the import of the reforms as set out in the discussion paper but I wish to point out some important and substantial changes that should be made if the objectives set out are to be achieved.

The first important observation is that throughout the document and discussion there is a continuing lack of clarity as to the difference between the channels for dealing with disputes of right and disputes of interest. For example in the introduction it is stated

*I have proposed that the current complex and confusing array of industrial relations and employment rights bodies be rationalised into an integrated two-tier structure.*

While in the Press Release it is stated that

*The proposed streamlining of individual industrial relations and employment rights redress mechanisms will not affect the well-established statutory mediation and conciliation processes that deal with collective disputes under the remit of the Labour Relations Commission and the Labour Court.*

At the top of page 4 it is stated

*And a system which respects differences between categories/types of cases (e.g. disputes of right and disputes of interest) but not to the point where they are an overriding influence on structure.*

I would like to submit that the difference between disputes of right and disputes of interest should be **crucial in deciding on the structure of the institutions.**

The failure to appreciate this difference has been the cause of many of the problems with the current system. Most spectacularly it has been the cause of the debacle of the Industrial Relations (Miscellaneous Provisions) Acts 2001 and 2004. I have been involved in some of the cases that came before the Labour Court under this legislation and the Labour Court's failure to appreciate the difference required of it in dealing

with cases under this legislation despite the pleadings of some of parties lead to the Supreme Court decision in the Ryanair and IMPACT case and to the inevitable failure of the legislation. This is not a once off incident.

The Labour Court has consistently demonstrated that it is not a suitable forum to deal with disputes of right. Even in a recent case involving Rehab, LCR19994, concerning the right to representation, the Labour Court refused to call witnesses and instead took account of a letter written by IBEC on behalf of Rehab, who refused to attend the Court hearing. The Committee on inquiry into the 1913 Dispute, the Askwith Inquiry, upheld the right of workers to select their own representative. Almost one hundred years later the Labour Court has declined to uphold this right but recommended instead that the employer, Rehab, be allowed to veto the employee's representative. There are many other examples of Labour Court confusing its role as an industrial relations mediator and its adjudicative function under employment rights legislation. In my experience most practicing lawyers have no confidence in the Labour Court's ability to administer employment law though they have, quite justifiably, great respect for its industrial relation role.

The constitution and decision making provisions of the Labour as set out in the Industrial Relations Acts make it entirely unsuitable as a forum for deciding issues of rights and I think it likely that a future High Court would find this to be the case. The fact that the representative members are a subject to their appointing bodies means that they are often compromised by perceived or real pressure to reach particular decisions. While this may be appropriate in collective bargaining issues it is unacceptable where individual rights are concerned. The procedures by which decisions are arrived at under the Industrial Relations Acts are also inappropriate for rights issues because they give primacy to the views of the representative members and do not allow for the expression of dissenting views. These rules do not of course apply to the EAT and rightly so.

**I would like to submit therefore that while there should indeed be a single point of entry and channel for all disputes of right there should be a separate point of entry and channel for disputes of interest. It is of the utmost importance to the parties that they know clearly from the outset which type of dispute and therefore which channel they are to use and what outcome they may expect.**

15 September 2011

## **Detailed Responses as Requested in the Consultation Paper**

Maintaining good employment relations and resolving workplace conflict

### ***1.1 How do you think employers and employees can best be supported in resolving disputes at workplace level?***

It should be made clear to employers and employees that the primary responsibility for resolving disputes rests with them. The state does not have the resources to ensure that all employers have procedures and policies in place nor can this be legally mandated. However, it may be helpful if non-binding examples of good policies and procedures were available on a website. In the current economic climate it is doubtful if the state can afford to give “free” consultancy services to private sector employers. The proliferation of the current Statutory Instruments called Codes of Practice is not the way forward as they are largely ignored and the Labour Court has failed to observe or enforce them.

### ***1.2 Can the provision of timely, up-to-date factual information help to facilitate early resolution of grievances/ claims and stem the flow of formal cases being submitted?***

Yes, but it is doubtful if this can be afforded at this time.

### ***1.3 When and how should interventions be available from the State?***

A distinction should be made between services provided to the private sector and those provided to the public sector. In the latter case the cost should be borne by the public sector organization. In the former, the range of services probably should be subject to a rigorous cost benefit analysis. However the provision of “free” consultants must be questioned at this time.

### ***1.4 How do you think access by employers and employees to a just, fair and efficient adjudication process can be ensured?***

Yes but not on the current model.

The first instance adjudication needs to be short sharp and lean. I would suggest that the first instance hearing of all employment rights cases only, including equality cases should be heard and decided in two hours. (Incidentally this is longer than the time the Labour Court allocates to cases) The claimant should be restricted to 30 minutes to make his/ her case. The employer should be similarly restricted and the adjudicator should be allowed 30 minutes to ask questions for clarification and then should give a determination of the legal position in 30 minutes or less. It appears to me that anything more elaborate than this is beyond the capacity of the state to provide for first instance cases. I estimate that there will be approximately 30,000 cases per year and to type with this number will require about 50 adjudicators working full time. I envisage that these would be full time civil servants in the Department of Jobs Enterprise and Innovation and be at EO and HEO level. Not all adjudicators would need to be trained and expert in all areas of employment rights. Some could be specialized at least initially and gradually extend their area of competence through appropriate training. I understand that this model works well in some areas of the USA. See Below for a proposal on the appellate tier.

## ***Integrated structure***

### ***2.1 Do you agree that the integrated two-tier model should be adopted as guiding principle?***

No. There is no case for having disputes of interest going to the same institution. While the proposal recognizes that a “different channel” may be required, the two are so different that there is a great deal of merit in keeping them entirely separate.

### ***2.2. Do you agree that "differentiation" of processing channels should be minimised to optimise the benefits of the proposed reform and to avoid re-introduction of institutional and procedural rigidities?***

Yes but not to the extent that disputes of right can be confused with disputes of interest in the same structure. The parties should be clear from the outset of a claim or dispute as to which process is being invoked and what the ground rules are for dealing with it.

### ***2.3 Should all claims in respect of employment related complaints/claims (including employment related equality matters) be submitted and dealt with by one body of first instance?***

Yes

### ***2.4 Should employment rights cases only go to the body of second instance on appeal (i.e. should the right of either side to object to the body of first instance hearing a case be removed)?***

Yes

### ***2.5 If minimal differentiation within a two-tier structure is to be pursued, what would the optimum streams / chambers be within both the first instance and the appeals entity? For example, is there a need to retain some organisational distance / separation between the distinctive roles of***

***o The inspectorate function (i.e. NERA’s role in inspection, enforcement and where appropriate prosecution);***

***o the conciliation and mediation processes dealing with collective disputes; o the advisory / mediation / investigative procedures dealing with individual industrial***

***relations and employment rights claims; o any subsequent formal adjudication on such individual cases.***

### ***How might a satisfactory segregation of these distinctive functions be best achieved?***

If an institutional difference is not made between the two separate functions then both will be less effective. For example, an employee needs to know that the body that might give a recommendation for five weeks’ annual leave is not the same as the body that enforces the statutory minimum four weeks’ leave. Similarly an employee who is seeking his/her statutory entitlement to four week’s leave should not be confused by hearing that the same body recently recommended five week’s leave in a competitor firm.

### ***2.6 What would be the advantages and disadvantages of having statutory redundancy appeals handled on an administrative basis, perhaps through the established social welfare appeals structure, given that statutory redundancy payments are now administered by the Department of Social Protection?***

Claims for entitlement to statutory redundancy payments made by employees should be treated as any other statutory employment right.

***Appointment, tenure, etc, arrangements in new streamlined employment rights bodies***

***2.7 Should the arrangements for the appointment and tenure of those working in/appointed to the new streamlined employment rights bodies be changed, and if so, what should be the guiding principles?***

The problem with the EAT arises primarily from the membership of the body. Currently it appears to be run for the convenience of its members. There is no need for representative members at the appellate stage. The questions at this stage are legal questions pure and simple and they should be decided by qualified lawyers working full time in this field. They should be employed directly by the Department of Jobs, Enterprise and Innovation and be subject to the management of the Department while retaining their independence in decision making. Any party who makes an unsuccessful appeal from the first level adjudication should have to pay a small penalty, say €250, for having taken an unjustified appeal. This would be a deterrent to frivolous appeals. The legal positions could in time be opened to first instance adjudicators who have proven themselves competent and have received appropriate training.

Much discussion has taken place within the HR Forum on the question of the need for representative members on the EAT or its replacement. Some argue that the representative members bring a wealth of experience, knowledge and common sense to the proceedings of the EAT. This has not been my experience. The delays encountered in fixing adjourned hearings would continue if there were part time members who have other interests to attend to and it is doubtful if the costs associated with them can be justified at this time.

The arrangement for appointment to the Labour Court should be maintained but since it would be only dealing with industrial relations cases there would only be work for one division. This would greatly assist in achieving greater consistency of approach.

***Information and Advice***

***2.8 Should there be one website covering all employment rights and industrial relations matters?***

Yes

***2.9 Do you agree that a more coherent and co-ordinated approach to the provision of advice and information on industrial relations and employment rights issues should form part of the services of the new first instance body?***

No. The provision of advice should be separate from the adjudicative function.

***2.10 What is the best method of providing information and advice?***

A website. Consideration should be given to providing a list of mediators jointly approved by IBEC and ICTU on the site

***2.11 Should non-directive advice be provided to employees and employers on what options may be available to them on the basis of the facts provided and where to go for help if required?***

What is the point of non-directive advice?

***Single Point of Entry /Submitting Individual Industrial Relations and Employment Rights Claims***

***2.12 How can a single point of entry for all individual industrial relations and employment rights complaints/claims best be achieved?***

They should be separate

***2.13 Should there be a single application form for all individual first instance industrial relations and employment rights complaints/claims?***

Claims under employment rights should state the legal basis for the claim. This could be a multiple-choice form. Industrial Relations claims should come through the conciliation service that should be relocated back under the aegis of the Labour Court

***2.14 What measures could be taken to improve information gathering from complainants /applicants at application stage?***

Draft a suitable form

***2.15 Should there be a consistent time limit for initiating all complaints/claims/appeals and if so what should it be?***

No

***2.16 Do you agree that more consistent arrangements are required for the representation of claimants so as to enable individuals to nominate a person to represent them at a hearing e.g. trades union official, solicitor, other representatives, etc?***

Claimants should be entitled to have the representative of their choice without having to nominate the person in advance.

***2.17 Where the power to present/refer a complaint is currently limited to the claimant, should it be extended to include the claimant's trade union and, where appropriate, the claimant's parent/guardian?***

Yes, Of Course

***Enforcement***

***2.18 Should there be a consistent method of enforcing awards of employment rights bodies and if so what should that be?***

District Court

***Facilitating early interventions and alternative dispute resolution methods***

***3.1 What interventions should be available prior to a formal hearing or inspection to resolve grievances or non-compliance e.g. telephone contact, informal hearings, more formal mediation, conciliation or arbitration?***

Nothing that delays the first instance hearing. If an intervention is provided for it will delay cases. All cases should be scheduled for hearing within two weeks of being referred.

***3.2 What is the best method of identifying suitable cases for early intervention?***

There is none and no need for it.

***3.3 At what stage should the intervention take place, for example should it be available when the person first seeks information, prior to them lodging a complaint/claim or after a complaint/claim is lodged?***

Only when a claim is made. Priority should be given to employees who make a formal request for a first instance hearing. If the state can deal with these

expeditiously then it will have done its job. It is pointless to plan to use scarce resources on nice-to-have services when the state is not meeting its basic obligation to provide a simple first instance hearing of cases legitimately referred to it.

**3.4 *Is there scope for harnessing the expertise and capacity of personnel within the existing bodies to decide on straightforward issues where purely factual matters are in dispute?***

No. Putting a fact-finding stage will simply delay the hearing and clog up the system.

**3.5 *Is there scope for forging positive connections between the public dispute resolution system and external experts in preventive alternative dispute resolution methods at workplace level?***

The state's website should contain a list of external experts approved jointly by ICTU and IBEC and acceptable to those bodies.

**3.6 *Should parties be required to set their case out in writing?***

Yes. In so far as possible but they should not be restricted to the material set out in writing.

**3.7 *Should all complaints/claims be examined for potential interventions and should time-limits apply to the offers of conciliation or mediation support?***

No. The state does not have the resources to do this.

**3.8 *Are there particular kinds of issues, for instance, where mediation is likely to be especially helpful or, alternatively, where it is not likely to be helpful?***

The parties themselves are the only ones who can judge if mediation will be helpful. Mediation is of limited value in disputes of right.

**3.9 *Would there be merit in having a "preliminary hearing" process and if so how should it operate?***

No. It will only delay matters.

**3.10 *Should certain cases be dealt with on the basis of written submissions only?***

Only where both parties request it.

**3.11 *Should attempts at resolution have any bearing on any subsequent hearing or should the process be confidential and not admissible in any hearing?***

No appropriate for disputes of right. The current practice in the conciliation service is fine.

### ***Conduct of Proceedings***

**3.12 *Should there be a uniform set of procedures regulating the conduct of hearings in all cases heard at first instance?***

Yes, Most importantly it must be time bound to a max of two hours.

**3.13 *Should first instance jurisdictions be empowered to dismiss what are adjudged to be frivolous, vexatious or misconceived claims without holding a formal hearing?***

No. Everyone deserves hearing.

**3.14 *Should hearings of employment rights disputes /appeals be heard in public or in private?***

First instance hearings should be in private. The appellate hearing should be in public unless both parties request it to be in private.

**3.15 *Should there be a uniform period for submitting appeals?***

No. But delay should be a factor in deciding the case.

End

