Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures

Submission of Irish Hotels Federation

Introduction

The Irish Hotels Federation (IHF) is the national organisation of the hotel and guesthouse industry in Ireland and welcomes the opportunity to participate, on behalf of its members, in this consultation process. The Irish Hotels Federation firmly believes that the objective of any review of the industrial relations procedures and institutions should, particularly in the current economic environment, be to support and foster job creation particularly in sectors which are labour intensive and where excessive regulations/labour costs are barriers to maintaining existing and creating further employment.

The history of much of the current industrial process has demonstrated a bias towards increasing the cost of employment for employers and thereby contributing to the erosion of the competitiveness of Ireland. The fact that Ireland has the second highest national minimum wage rate in the EU is in itself a major anti-competitive factor. This difficulty is exacerbated in the case of a number of businesses by the existence of the Joint Labour System which further adds to labour costs and regulations. It is unfortunate that the government appears to be intent on re-establishing the joint labour committee system, notwithstanding it being deemed unconstitutional by the High Court. This approach does not in the view of the IHF augur well for our attempts as a country to substantially improve competitiveness.

There appears to be little dispute about the need for reform, but we have a fear that any revised structures in the industrial relation system will be used to enforce a bureaucratic framework of unnecessary employment regulations. It is the IHF's view that there should be an effective system in place to enforce fair and reasonable employment conditions which apply to all sectors of the economy. While the process of bringing an employment rights claim is less formal, and potentially less costly by comparison with the civil courts we are concerned that certain changes could give further impetus to the involvement of the legal profession in employment rights issues unless the stated objective of creating "a simpler structure and simplified and streamlined procedures." is kept in sharp focus. Any changes that are proposed must, as an overriding objective, have the confidence and support of employers.

Key Issues for Consideration

In the light of the foregoing reservations we submit hereunder our detailed observations regarding the issues raised in the consultative paper. In particular our observations are informed by three guiding principles:

A. Encouraging and supporting the early resolution of grievance and disputes in a manner that supports the direct employer/employee relationship,
B. Introducing simple and efficient third party institutional structures where issues cannot be resolved internally,
And
C. Ensuring that suitably qualified persons with an understanding of the challenges facing employers are providing conciliation/mediation and adjudication services thus minimising the number of formal hearings and the consequent need for expensive professional representation/advocacy.

Our submission is structured within the framework of questions raised in the consultation document.

Section 1

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?

An objective under this heading should be to eliminate the causes of disputes or the causes of non-compliance with employment regulations by employers. Many of these causes arise from the unreasonableness or inappropriateness of certain "rights" in the current economic environment. Examples of these would be premium payments for Sunday work, statutory overtime pay entitlements and inflexibility in rostering. An overarching objective should be to eliminate any sectoral entitlement and ensure that employment regulations were applicable to all sectors of the employment and not selective sectors as prevailed within the JLC system. In this way awareness of these rights and obligations would be universal and not specific to any sectors.

IHF supports the objective of resolving ***grievance and disputes as close to the workplace as possible and as early as possible after they arise.*** We are however, somewhat concerned at the prospect of external intervention in issues relating to the direct Employer/Employee relationship as not all grievances or disputes would lend themselves to such a remedy. However there is evidence from Inspections that we have been involved in where NERA inspectors identify a breach of employment legislation, such as the failure to provide a written statement to an employee pursuant to the Terms of Employment

(Information) Act 1994 to 2001, or the recording of annual leave or rest breaks as provided by the Organisation of Working Time Act 1997, and require that the employer correct the breach. In the event that the breach is not corrected, the employer is then the subject of more formal enforcement methods. IHF believes that this approach has worked well, and should continue.

The availability and provision of timely up-to-date factual information can help to facilitate early resolution of disputes and grievances but the commercial sensitivity of such information as far as it concerns the employer involved must always be respected. The primary objective in the resolution of all disputes, particularly in the difficult economic circumstances, must always be to protect the sustainability of the enterprise and thereby most of the jobs provided by it and within the business sector in which it operates. IHF notes the reference to a "single authoritative source of information and advice", and agree that this will help to improve awareness for all users of these services and aid the early resolution of workplace disputes. The telephone service provided by NERA is another valuable information and advice resource for employers and employees on employment legislation and should be maintained in its current form.

The Labour Court practices in the past have overly concentrated on the industrial relations aspects in arriving at settlements influenced by settlements in other disputes, in businesses that do not necessarily have similar challenges. This is not appropriate in an economic environment where the survival of so many enterprises is at risk. In this context it is essential that the Court places primacy on the economic realities of the employer's circumstances and the need to maximise employment and not be focused on providing a resolution to what may be unreasonable demands.

The benefits of access by employers and employees to a just fair and efficient adjudication process can only be assured when confidence is built in such a process. Many disputes arise from seeking to improve the conditions of employment of employees notwithstanding the economic circumstances and the State needs to ensure that there are suitably trained and experienced 3rd party officials to deliver this process. The State should have available highly trained persons who understand business imperatives and particularly in the present environment the basics for economic survival and be able to apply these principles in trying to resolve the dispute in hand.

A simple change in our employment legislation could give practical effect to the desire to resolve issues where possible at local level and certainly as close as possible to their point of origin. The State could introduce amending legislation that places an onus on the parties to utilise and exhaust internal procedures before an employee can refer an employment rights case to a third party. Third parties would decline to hear a case until they were presented with definitive evidence that the employee or ex employee had utilised and exhausted internal procedures. This suggestion would give a real impetus to exhausting internal procedures, place a greater responsibility on the parties to seek to resolve the matter locally and would in our opinion ultimately reduce the volume of cases being referred to the State system.

Promoting Compliance over Prosecution and Monetary Awards

The consultation paper makes reference to a move towards redress, rather than prosecution in aiming to improve compliance rates. The move away from criminal prosecution of employers is very welcome and IHF believes there should be a greater emphasis on supporting changes to behaviour where compliance issues arise and to correction in the event of failure to comply. This should be followed by the awarding of sums limited to the loss incurred by the breach, rather than on redress or damages.

For certain claims, such as those pursuant to the Terms of Employment (Information) Act 1994 to 2001 and the Organisation of Working Time Act 1997, the opportunity of redress for minor transgressions has fuelled an industry, led by elements of the legal profession, intent on bringing multiple claims arising out of a single set of facts to secure significant damages. This practice is deliberately designed to force a settlement even where the employer believes he or she has no case to answer, but with the knowledge that the time spent defending the claims renders the submission of a defence financially unviable for the employer. Even where the legislation provides for other redress options such as issuing a written contract e.g. (Terms of Employment (Information) Act 1994 to 2001, the focus is on securing the maximum monetary award and this approach receives a sympathetic hearing from certain segments of the third party community. The legislation should be redrafted to provide a focus on ensuring compliance rather than encourage spurious claims based on the prospect of securing an award particularly for first time offences.

A further difficulty for employers is the complex web of employment legislation which places enormous demands on employers. IHF believes that the existing body of employment rights legislation is onerous in the obligations it imposes and in many cases is difficult to comprehend. The objective should be to provide for the consolidation or restatement of key pieces of employment and industrial relations legislation to reduce the administrative burden on employers, simplify the language used and so ensure greater understanding of and compliance with its key provisions. Derogations for smaller employers should also be considered in this context.

A Claimant should also have to submit a formal request letter to their employer in advance of submitting any statutory claims. The letter would provide for certain information to be forwarded to the employee or ex-employee within a defined period (e.g. 14 days) .This letter would afford an opportunity to resolve claims where the facts are unlikely to be in dispute (e.g. claims for confirmation of annual leave or wages received**)** without the need for any State involvement.

Employment litigation should not be any different to other civil claims, where it is considered appropriate that applicants pay a fee. IHF would support a fee requirement for each claim lodged, (€50 per claim) subject to an overall limit of €100, which we believe would help to deter frivolous or vexatious claims, and multiple claims arising from the same set of facts. The proposed fee will not deter genuine claimants.

Where a claimant is deemed to have submitted a vexatious claim or allegation they should incur a monetary penalty and the Employer should be able to recover any reasonable costs they have incurred.

The IHF should also be supported in providing approved training and development programmes to our members in such areas as:

- Understanding Employment Legislation
- Effective Grievance Handling
- Managing Disciplinary Issues
- Effective Workplace Communications
- Understanding the Operation of the New Employment Rights and Industrial Relations Structures and Procedures that emerge from this exercise

Section 2

A simple and efficient institutional structure and a high quality customer service with a single authoritative source of information, a single entry point and minimum scope for forum shopping.

Efficient Institutional Structures –Moving to an Integrated Structure

The IHF supports the two tier model as suggested in the discussion paper but with an important change to capture the key differences between individual Rights issues and collective Industrial Relations issues.

The differentiation of processing channels should be minimised to optimised the benefits of the proposed reforms and avoid the introduction of institutional and procedural rigidities.

Individual Rights Issues

The Rights arena should see a two tier approach involving Rights Commissioners as the point of referral for all first instance employment rights disputes (including those currently under the auspices of the Equality Tribunal) with an appeal to a newly constituted Employment Appeals Tribunal. This revised EAT should be placed on a permanent footing so that cases can be handled in a timely manner and to ensure greater consistency of decision making.

The facility to object to a Rights Commissioner hearing a case should be confined to the area of Unfair Dismissals particularly as there is the possibility of reinstatement/re-engagement and substantial compensation awards.

We agree that there is an advantage in having statutory redundancy appeals handled on an administrative basis but the employer must retain the right to appeal any such decisions.

IHF would welcome the introduction of online forms, but we favour a requirement that such forms are printed off, completed, signed and submitted by post, as is currently the practice. We are concerned that moving to a single application form for all claims could actually lead to a proliferation of claims as people cover the bases by ticking all the available boxes, (e.g. Current experience of the T1A form). While multiple claims may continue to be submitted they should be heard at a single forum.

Appointments to Third Party Positions

Rights Commissioners should have appropriate expertise to resolve the different type of cases that will arise and we envisage that they will have to specialise in particular areas of the law. This would allow for the building of expertise by the people dealing with cases in areas of individual industrial grievances, disputes of rights and equality issues. Each of these areas has separate and different aspects and issues which need different skills and knowledge to deal with. It is also essential that the persons dealing with cases are competent and well informed of the commercial aspects attaching to the enterprises in which the issues arise.

In considering appointments to the Employment Appeals Tribunal, there appears to be little concern for the key qualities or attributes that may be required to fulfil that role. Guidance is required as to the competency profile of candidates to be appointed to the role of Chair/Vice-Chair. This should include relevant legal qualifications in employment rights legislation, substantial post-qualification experience in employment law or litigation, an appreciation of business and employment challenges and a commitment to continuing professional development.

Collective Industrial Relations Issues

The collective Industrial Relations arena should continue on a voluntary basis as heretofore with referrals into the LRC Conciliation service and to the Labour Court for Recommendation if the Commission is of the view that no further efforts on their part will resolve the matter.

There is an absolute need to maintain organisational distance between the distinctive roles of the inspectorate and enforcement and the conciliation and mediation processes dealing with disputes and the advisory/mediation/investigative procedures. It has been the case in the past that the inspectorate's (NERA) interpretation of the legal requirements in many cases was not correct and had to be challenged. It is essential that an effective route of challenging interpretations is available and that there is a right of legal appeal particularly where employers may be subject to criminal proceedings. The consultation paper refers to a new first instance body comprising certain activities of the Rights Commissioner Service, Equality Tribunal, EAT and NERA. It appears that the reform proposal is to consolidate these bodies into one single entry entity. We are concerned about how the NERA advisory and inspection services are to be integrated within the body of first instance. The function of NERA is very different from the other bodies and should remain so. There is merit in separately considering the integration of Information and Inspection functions performed in the employment arena.

The appointment and tenure of those working in or appointed to the new bodies should be changed. It is essential that those appointed should have a balanced knowledge of business and not just a legal background in employment rights. It would be useful if those serving on bodies are recruited from outside of the state sector and that there should not be a bias towards employing persons with a trade union background. Appointments to the Labour Relations Commission Conciliation service should be expanded beyond the Civil Service to include competent personnel with the necessary skill set and relevant commercial/private sector experience.

Thus the IHF is strongly of the view that there should be different channels through which the different types of cases would be processed.

Information and Advice

It appears to be suggested that the first instance body will also be a source of information and advice. This would be inappropriate where the first instance body could be involved in advising one party and then hearing the dispute once initiated. These functions should be kept entirely separate and distinct.

A website covering all employment rights and industrial relation matters would certainly be

helpful but it would be more helpful if these rights applied to all employment sectors of the economy not just to individual sectors as was the case within the JLC system.

A more coherent and coordinated approach to the provision of advice and information on industrial relations and employment rights issues should form part of the service of a separate body.

The best format for providing such information and advice is to have a frequently asked questions section on the website and to have available a number of experts to advise on individual issues. This section should be dynamic and ever changing to reflect issues which arise in practice.

A competent advisor could be located within the state system (but not within the mediation/adjudication services) and should be in a position to give non directive advice to employers and employees on the options available to them on the basis of the facts provided and where to go for help if required.

Single Entry Point of Entry

The IHF understands that the proposed streamlining is not intended to alter the voluntary conciliation and mediation processes that deal with collective disputes at the LRC with an agreed referral onto the Labour Court.

In this context the IHF supports a single point of entry for all employment rights claims as an alternative to the current multiple entry system which creates confusion and facilitates 'forum shopping' by claimants and their Representatives .

- A single entry point of entry for all individual employment rights complaints/claims is desirable. This should include cases heard by the Equality Tribunal which should be brought within the ambit of the Rights Commissioner Service with specially qualified Rights Commissioners hearing such cases. (The current delays in processing claims before the Equality Tribunal with numerous examples of 2-3 years duration being the norm) are totally unacceptable.) Indeed Rights Commissioners may need to specialise in particular areas to deal with the complexity of employment legislation.
- Applications should be through a standardised format for all first instance issues with PPSI numbers and their Representative's details captured within a database to highlight frequent users.
- Following the submission of the claim there should be a standard request form seeking further information in support of the claim. This information should be made available to the Employer who should then be able to respond in writing to the claim as presented with evidence as appropriate.
- There should be a consistent time limit for initiating all complaints/claims and all appeals. In the case of complaints/claims not more than 3 months (extendable in truly exceptional circumstances to 6 months) and in the case of an appeal not more than six weeks from date of issue/receipt of the recommendation.
- Strict guidelines should be issued to all third parties setting out timescales within which cases must be processed including the maximum time that should elapse between a hearing and the issuing of recommendations /determinations.
- If a hearing is deemed to be necessary then this should be convened in a location convenient for the Employer. The Hearing should be conducted in a manner that

does not require professional representation, and written submissions provided in advance are desirable.

- The IHF is concerned that representation by legal experts has become the norm before existing employment rights bodies which was never intended. The representation of claimants and of employers should only arise where there are obvious points of law at issue in a case and this can be clarified in advance.
- The power to present or refer a complaint should be limited to the claimant or in the case of the claimant being a minor (or incapacitated) to that person's parent or guardian. The entitlement to participation by trade unions and the legal profession is neither helpful nor desirable and creates a platform to undermine the direct employer-employee relationship.
- The staffing of the Rights Commissioner service will also have to be addressed with suitably qualified individuals nominated against a set of specific criteria that are properly validated before being appointed into the Role for a defined period. They should have a clear appreciation of the challenges faced in managing a business and the imperative of issuing findings that do not undermine the viability of a business. They must also appreciate that there are times when an employer may have handled a case in a less than perfect way but the reasons for doing so were sound. There should be an effective system of oversight of the Rights Commissioner service and a monitoring of recommendations issued.
- The Rights Commissioner can continue to seek to resolve issues between the parties if that is feasible but ultimately they may have to issue a recommendation which may be appealed by either or both parties. They should not operate in an exclusively mediation/conciliation as this may not be desirable and all information must be exchanged between the parties.
- The Employer should retain the right to object to a case being handled by the Rights Commissioner Service where the issue relates to the termination of the employment relationship, (e.g. an unfair dismissal claim). In such instances the LRC could provide a voluntary mediation service option to the parties prior to a hearing of the Employment Appeals Body.

Appeals

The IHF is concerned at the possibility that appeals would be heard by an amalgamated body formed from the Labour Court and the Employment Appeals Tribunal (EAT) acting as a court of final appeal against the recommendations from the lower tier (i.e. Rights Commissioners and Conciliation Service).

The IHF believes that this amalgamated body would create unnecessary and undesirable confusion between Rights issues and Collective /Industrial Relations issues. We need a clear separation between the two bodies as the issues that arise and the type of decision making required is in our view fundamentally different. IR and employment rights hearings require a different set of skills and IR skills may be utilised to try to resolve employment rights issues and this could be inappropriate.

The Labour Court has a clear role to play as a court of last resort in circumstances where in unionised employments issues cannot be resolved between the Employer, their staff and Trade Union(s) through internal procedures (and the conciliation process of the LRC) has been fully exhausted. However, we also represent many employers who invest heavily in developing effective direct workplace relationships with their staff and there would be a serious concern at rights appeals being heard by a body that is clearly imbued within a collective Industrial Relations ethos.

Awards by employments rights bodies in excess of €2,000 should in all cases be capable of being appealed to the Circuit Court and not just on a point of law to the High Court as suggested. All decisions of the Employment Appeals Tribunal in relation to Unfair Dismissal should be capable of being appealed to the Circuit Court as heretofore. In the event of this appeal being unsuccessful the legal process should be employed to enforce rulings. In the absence of an appeal the legal remedies for enforcement should apply.

We do support the establishment of the EAT on a permanent footing along the lines of the Labour Court but they need to be clearly separated institutionally. They may be located in the same building and use the same back office/shared service facilities for efficiency purposes but their focus is entirely different and they need to be constituted differently. The appeals bodies would share many common features and facilities with the first instance bodies, including a common case management system with shared case numbering and identification elements. This will help address the issue of "forum shopping" which, if misused, can result in multiple claims arising from the same set of facts being processed in different institutions.

The full time Chair (and Vice Chairs) of the Employment Appeals Body would need to have a legal background but they should also have an appreciation of business/employment issues and challenges. Their appointments should be confirmed (and not nominated) by the Minister and they should be supported by suitably qualified Employer and Employee Representatives drawn from a panel nominated by Employer and Employee Representative Bodies including IHF.

The current delays in convening EAT hearings and the issuing of Determinations are unacceptable. Placing the EAT on a permanent footing would in our view also provide for greater consistency of decision making and ensure that cases were processed in a more timely manner.

The appellate body should allow for a complete de novo hearing and the approach of the Appellate body should be to hear evidence primarily via written submissions with evidence gathered under oath on critical issues only. This would permit a slightly less formal approach and may reduce the perceived need of the parties to be professionally represented.

Awards

The IHF is concerned about the level of awards in certain cases which we believe are neither necessary nor proportionate. Guidance is required to ensure that third parties take account of the impact of their awards on employment levels, and that they take due account of the commercial circumstances of individual employers or vulnerable sectors. The employment rights bodies should be obliged to place the protection of jobs at the forefront of their consideration in determining the merits of a case and in deciding the level of damages awarded by way of redress.

Enforcement

Awards by employments rights bodies should in all cases be subject to appeal through the civil court system if appropriate and not just on a point of law. In the absence of an appeal the legal remedies for enforcement should apply.

Section 3

Minimum number of cases presenting for resolution at formal hearings, through active case progression and an increased range of interventions

The IHF would agree that the State should only intervene by means of inspection and adjudication hearings where absolutely necessary.

As previously stated, claimants should be required by law to exhaust all internal grievance procedures available within the company before submitting a case to a third party. There should be a specific declaration to this effect in any documentation they sign when they submit a case to a third party. Failure to fully exhaust internal procedures should be taken into account in a third party's decision, both in terms of whether the claim should succeed and in terms of any redress to be awarded.

Facilitating early supportive intervention would be helpful in the Inspectorate function in a manner that promotes compliance, affords a reasonable period for the employer to demonstrate compliance and then verify same without retrospection arising. It is unlikely that telephone contact would be appropriate for an adjudication role but it may be appropriate where the legislation is clear and the facts are unlikely to be in dispute and where misunderstandings can be readily resolved.

Criteria should be set for identifying cases suitable for early intervention and such criteria should determine where the issue is just a misunderstanding of the facts or rights or the existence of a vexatious claim or allegation.

There is some scope for harnessing the expertise and capacity of personnel within existing bodies to decide on straight-forward issues where only factual matters are in dispute but care has to be taken where the dispute is bases on interpretation of requirements and where the views of the personnel involved may not be universally accepted or in many cases be in correct.

There is always scope for forging positive connections between public dispute resolution systems and external experts but we would need further information on precisely what is envisaged before we could comment further.

We are concerned about the perceived scope for the introduction of "informal hearings" with the potential for misunderstandings and also concerns about the status of any outcomes from such a process. We believe that this would be fraught with difficulties and would simply add another layer to the current process.

When a case moves to a formal stage it is fair that the parties be required to set out their case in writing and ideally exchanged(or available to be viewed) in advance. In this way the case is clearly identified and it gives an opportunity to the respondent to deal directly with the issues.

To be effective all complaints/claims should be examined for potential intervention but time limits should apply to the offer of conciliation or mediation support and these time limits should be reasonably short – about four to 6 weeks.

There are particular issues where mediation is likely to be particularly helpful or alternatively where it is not likely to be helpful. In general mediation is likely to be helpful but where legal interpretations arise the resolution may be outside the competence of the mediator.

The idea of a preliminary hearing process has potential but much depends on the calibre of the mediator.

Most cases should be dealt with on the basis of written submissions. The existence of a written submission focuses the claim or complaint and enables the respondent to respond directly to the issues.

Attempts at resolution should not have any bearing on any subsequent hearing and it would be helpful if such hearing was in private and proceedings not referred to at any subsequent hearing. In this way parties might be more flexible at the resolution process and more likely to arrive at an agreement.

It would helpful if the first instance hearing would have the power to dismiss what it deems to be frivolous, vexatious or misconceived claims without holding a formal hearing. In this way the system would be protected from abuse and multiple claims.

Hearings of employment rights disputes should not be, in the first instance or on appeal, heard in public as this introduces an unnecessary further dynamic into proceedings. It is often used to bring pressure to bear on an employer even where a case lacks any substance. However the decision of the appeal body should be made public as awareness of precedents is important as these Determinations may be subject to appeal through the civil court system.

It would be useful to have a uniform set of procedures regulating the conduct of hearings held at first instance and on appeal to give employers a better sense of what they are likely to encounter. Video material could be usefully employed to provide practical examples of how Rights Commissioner Hearings and Employment Appeals Tribunal Hearings are conducted.