



IRISH SMALL AND MEDIUM  
ENTERPRISES ASSOCIATION LTD

14<sup>th</sup> September 2011.

**Mr. Eamonn Gallagher,  
Department of Jobs, Enterprise & Innovation,  
Davitt House,  
65a Adelaide Road,  
Dublin 2.**

11259 employmentrightsbodyes

Dear Mr. Gallagher,

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

ISME, the Irish Small & Medium Enterprises Association, the only independent representative organisation for SMEs, welcomes the proposal by the Minister to reform the Employment Rights and Industrial Procedures of the State. The Association also welcomes the opportunity to contribute to the consultation process.

**Key issues for consideration**

The key issues, which ISME believes should be addressed with regard to reform of the structures are;

1. Speed through efficiency of progression of claims.
2. Avoidance of hearings where possible.
3. Non duplication of claims.
4. Consistency of approach.
5. Maintaining procedures that are employer and employee friendly.
6. Transparency, clarity and uniformity in the decision making process.

The current employment rights and industrial relations bodies were formed to support both employer and employee alike in the mediation of disputes and were originally designed to operate without the need for legal representation. The ever-increasing complexity and regulation attached to employment law has made these original aims more difficult to achieve. The system has become extremely legalistic adding significantly to costs for both employers and employees.

In relation to collective issues under the Industrial Relations Act, these should go through the normal industrial relations process of conciliation and then to The Labour Court for recommendation, as has been the case to date. This should be the only exception to the process.

**THE INDEPENDENT  
BUSINESS ORGANISATION**

Irish Small and Medium Enterprises Association Ltd

17 Kildare Street, Dublin 2, Ireland

Tel: (01) 662 2755 Fax: (01) 661 2157

Email: info@ismie.ie Web Site: www.isme.ie

## **Maintaining good employment relations and resolving workplace conflict**

The first point that needs to be made is that industrial relations in Ireland is supposed to be based on a voluntarist system without state interference, except in the event of seeking a resolution through state assisted mediation. It is important therefore that the role of the new proposed body is based on this voluntarist approach and not the quasi legal system that has developed over the years. There is a better chance of seeking resolution of disputes at the workplace level if the current mandatory system reverts back to a mainly voluntarist approach based on mediation.

Timely, accessible, up to date information that is outlined in a practical, easy to understand manner is essential to facilitating early resolution of grievances/claims. This information can be provided through a combination of web-site and telephone, with a panel of mediators/ advisors suggested and approved by ISME/IBEC/ICTU.

With regard to intervention, this should be available in a similar fashion to what is available under Labour Relation Agency in Northern Ireland where, before any claim commences a hearing, a mediator contacts both parties to see whether the matter could be resolved. This would encourage both parties to address the issues prior to a hearing and before involving themselves in the cost of representation at a hearing, by coming to some form of mutual agreement.

### **Integrated Structure**

ISME would agree that the structure should be simple and efficient. However, in ensuring that there is an integrated structure, it is important that there is confidence in that structure. This requires consistency and practical application. Clearly, industrial relations issues are not primarily one of a legal nature and therefore should be dealt with by a body which is familiar with industrial relations. Where matters require specialist knowledge such as Equality it may be best to allow divisions be established within the structure to reflect this.

The suggestion is that a two tier structure be established, ISME is of the belief that there should effectively be a **four tier structure**.

The **first tier** is that a claim would be forwarded to a processing/ inspectorate body, who would establish the basis of the claim and if it is compliant with existing legislation.

The **second tier** is that if there is a legitimate claim to answer, the inspectorate would attempt to get a resolution by conciliation/ mediation, between both parties, which is geared to resolve issues, without recourse to a hearing. The current inspectorate within the National Employment Rights Authority (NERA) could be maintained for this purpose.

The **third tier** would involve a case that is not resolved at the second stage being forwarded for referral to a Rights Commissioner/ Equality Officer who

would investigate all claims. Again, these bodies should be allowed to assist parties in resolving matters on an agreed basis if they so wish. Written submissions should be submitted prior to the hearing. Such documents should be exchanged between the parties no later than three weeks in advance of the hearing. Subsequent to receipt of such documents, the inspectorate's conciliation/mediation service should contact the parties to ascertain if they could assist in resolving the matter if at all possible, prior to going to the hearing.

The **fourth tier** is the Appeals Tribunal, which would hear all appeals. The Tribunal would, as is currently the case, adjudicate and issue determinations on matters as are appealed to it. Cases should be heard on a de novo basis.

Books of evidence should be submitted to the Appeals Tribunal in advance.

We would suggest that the majority of claims on employee rights, as opposed to claims of interest, are heard through the Rights Commissioners Service in the first instance, as opposed to a body consisting of the Labour Court, Equality Authority and Employment Appeals Tribunal, which are based on binding decisions and legal involvement.

As there are different powers, operations, interpretations and rules for each of the different institutions, it would make sense that the proposed body of first instance operates with a standardised set of rules and interpretations. Any decisions made would have to be uniform and transparent, outlining clarity on how decisions and recommendations are made, unlike the current system.

It is absolutely essential that individuals appointed to the new proposed structures have the requisite qualifications and experience, including an understanding of the operations of SMEs and employers in general. It is our experience that the system at present and those ruling on decisions tend to lean towards the side of the employee and appear to have little understanding of the position of the employer's side. While there may be clear and distinct Acts that have to be implemented, there is always a discretion on awards, and therefore this understanding could be applied.

With regard to the handling of claims, ISME is of the view that claims concerning individuals rights on matter such as minimum rates of pay, holidays, hours of work etc. should, in the first instance be screened and dealt with at the processing/inspectorate stage. Therefore, for example, if an employee claims they are not getting the minimum wage they will:

- refer this to the single referral body or inspectorate.
- somebody from that referral body or inspectorate would immediately contact the employer and ask them the facts, make the employer aware of their statutory obligations and also advise the employer that if they breach the statutory obligations they should immediately put in place proper procedures.

- If and only if the employer fails to implement the instructions of the inspector the matter would go for adjudication before a Rights Commissioner, who would award compensation if the employer is found to have failed to comply with the advice and is in breach of their legal obligations.

There is an inconsistent approach currently as an individual can go to a third party and pursue a claim, which results in unnecessary costs for both the employer and employee and awards of compensation which, in many cases in small companies, can be excessive. Therefore inspectors, who are not influenced by awards for compensation, but are there to offer instructions/advice, should continue to carry out their functions on the foot of complaints. In the case where an instruction is given by an inspector because they have identified a breach of legislation, and the employer fails to comply with their instruction, then a matter may then be referred by individuals to a first instance hearing where they will also have the right to compensation as well as payment of any monies due for a defined period.

### **Appointments**

The current system of nominations to the Labour Court, EAT and the Rights Commissioners Service is based on a dominance of representation by big business, trade unions and the legal profession, mainly based on Government appointments. It is important that representatives with an SME background are provided with the opportunity to be nominated to the aforementioned bodies and that these bodies continue to use Industrial Relations based personnel, rather than people who may have a legal background.

These appointments should be for a particular period of time and we suggest a five year period. However, were this to be introduced this should be done on a phased basis, to ensure there is continuity of service on the part of adjudicators and not a complete turn round every so many number of years. Reappointment should also be an option.

### **Information and Advice**

There is a strong need to ensure that there is easy access to information for both **employers** and **employees**, without them having to involve experts and in particular the legal profession. Such information should be provided by one source only and such information should be non directive, purely informative.

From a small business employer's perspective, taking into account the complexity of employment law, there is a dearth of information available that assist companies in complying with their employment obligations. The level of communication in this area is poor, and SME employers in particular, who do not have access to legal and HR Departments, have been left to find out for themselves the impositions they face. For the SME

employer this is very often an experiential learning in that they find out when a claim is taken by an employee or they receive a NERA (National Employment Rights Authority) inspection. The lack of communication in this area contrasts sharply with the intensity of the communication campaigns surrounding tax changes, for example.

To ensure fairness and an employer's subsequent ability to implement and manage this vast body of regulation, a comprehensive programme of information dissemination would seem appropriate, based on a national campaign promoting a one stop shop website, outlining the various pieces of legislation in a coherent, practical manner. This web-site should also include details of relevant cases that have come before the appropriate body and the outcome of those cases. Proposed changes to legislation should be flagged well in advance of implementation.

The web-site should be supported by a free phone service so that a person can ensure that not only do they have access to information, but they can attain this information in a form that is understandable to them, which is why internet only is not always suitable.

ISME would recommend that the current National Employment Rights Authority (NERA), information unit is amalgamated with the existing information service in the Labour Relations Commission.

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

We would agree with the suggestion that there is a single application form for all individual industrial relations and employment rights complaints/claims. The form should be simple and practical allowing for a more comprehensive outline of the complaints/claims being made, which would assist the employer in knowing the actual case against them. It is important in the claims process, that the claimant provides prima facie evidence of a claim and state the legal basis for the claim when they are submitting it, and this should be reflected in the application form.

With regard to claims, ISME is of the view that a claim should be made within three months of the occurrence, as opposed to the current six months period. An appeal from a decision of first instances to the Appeals Tribunal should be made within six weeks.

With regard to legislation it would be desirable that legislation was standardised such as has been done in the UK to have one Employment Act rather than the wide range of acts which are currently in place. Such an Act would ensure consistency of appeal periods etc. for all legislation.

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

The Association believes that the four tier system outlined in this submission will address early intervention and when that intervention should take place.

We also believe that the parties would initially set out their case in writing so as to assist the conciliation process. In other words before a claim is formally heard, both parties should have the opportunity to have the full claim outlined as opposed to the current situation, when many employers are only aware of the full extent of the claim when they are in the formal hearing. However, both parties should be provided with the opportunity of verbal representations when a case is being formally dealt with.

Consultation and mediation would be preferable to having a preliminary hearing.

### **Conduct of Proceedings**

As outlined previously the Association is of the view that there should be a uniform set of procedures regulating the conduct of all cases heard at first instance.

While the Association agrees that everyone is entitled to a hearing, we would suggest that first instance jurisdictions should be empowered to dismiss what are deemed to be frivolous, vexatious or misconceived claims without holding a formal hearing. Some form of financial penalty should be imposed on individuals that take a claim that is subsequently proven to be frivolous or vexatious.

Hearings should be held in private in the first instance.

### **Other Issues**

The current situation whereby one claim by an employee can be heard in a number of different fora, (forum shopping) is untenable, costing both additional time and money for the companies, the State and individuals concerned. In this regard **all related cases should be heard at the one hearing** and this should be scheduled rather than what happens at the EAT at present, where hearings are scheduled for a half day and then rescheduled some months later. This could be achieved by consulting parties prior to rescheduling, with a view to getting a realistic timeframe agreed. This need not be done by way of a hearing, with contact from the service by telephone/correspondence sufficient.

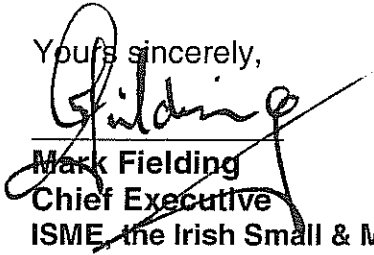
### **Conclusion**

The current system is far too cumbersome, with too many agencies involved in overseeing and implementing employment legislation. From a balanced and considered approach, based on an interpretative and conciliatory framework, we have moved to a highly regulated framework, which puts more emphasis on employees' rights, in comparison to the position of employers. Our body of legislation and its implementation has been framed and developed against the backdrop of the 'big business', trade union and 'government' employer perspective. It fails to appreciate the ability of SMEs to cope with its demands and in many cases it is overly expensive and bureaucratic.

The proposals we have outlined above should assist in addressing the current anomalies and should go some way to streamlining the current system to create a fairer, transparent and uniform structure for the benefit of all concerned.

I trust this clarifies our position.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Fielding', written over a horizontal line.

**Mark Fielding**  
**Chief Executive**  
**ISME, the Irish Small & Medium Enterprises Association**