

Eamonn Gallagher
Department of Jobs, Enterprise and Innovation
Davitt House
65A Adelaide Road
Dublin 2

16 September 2011

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

Dear Eamonn,

I welcome the opportunity to contribute to the debate on reform of Ireland's employment rights dispute resolution machinery. The Minister's Consultation Paper raises many issues and questions, some of which I will address hereunder. The first issue concerns maintaining good employment relations and resolving workplace conflict.

It is axiomatic that the quality of the employment relationship determines how many disputes arise at workplace level, their nature and their severity. All the industrial relations/human resource literature shows that, where good employment relationships prevail, the conditions which give rise to disputes are less likely to be present and that, when difficulties do arise, systems, attitudes and the general culture of the workplace will be better attuned to taking pro-active and positive steps to address the issue from the outset.

I suspect, although I am not aware of any empirical research having been done on this, that there is a disproportionately high representation of SMEs in individual employment cases handled by the various employment rights dispute resolution bodies. Such employers generally have no specialist expertise in conflict management and a preference for informal management styles.

Disputes at workplace level arise from a wide variety of causes and it is unrealistic to expect that a single process can be applied across the board to resolve them but many can and should be addressed at or near their point of origin through informal engagement between those involved. If this approach fails or is inappropriate in the circumstances, more formal procedures are needed.

In their introduction to a recent special issue of the *International Journal of Human Resource Management*, Professors Roche and Teague conclude that established hierarchical management practices used to address individual workplace grievances and disputes, which were often developed in unionised workplaces, are not suitable for modern organisations. More innovative conflict management strategies should be developed. They refer to a range of processes and mechanisms for conflict resolution - usually referred to as ADR-such as workplace mediation, fact-finding, ombudsmen, arbitration or peer-review panels. The literature they cite show that such ADR techniques – in particular workplace mediation – has positive effect for both employers and employees. ADR-led conflict management systems are associated by commentators with “higher productivity, lower conflict, related costs, more adaptive organisations and higher organisational morale and commitment”.

Consequently the Minister needs to devise a series of levers or mechanisms to encourage both the early resolution of disputes and the operation of ADR as an integral part of the conflict management system. Personally I would not be in favour of introducing statutory minimum disciplinary/dismissal and grievance procedures which mirror the arrangements introduced in Britain in October 2004 (and in Northern Ireland in April 2005). The Minister should note the reasons why those procedures were removed in April 2009, the principal one being that the procedures were “counter productive”. It was found that they brought an unhelpful level of increased formality and complexity to the dispute resolution system, in that both sides were encouraged to think at the outset in terms of a potential tribunal claim.

It is worth recalling, however, that these statutory procedures were introduced because the British government believed that insufficient efforts were being made by both employers and employees to resolve disputes in the workplace with the result that increasing numbers unnecessarily ended up in a tribunal. To ensure that there was no return to the *status quo ante*, the ACAS Code of Practice on Disciplinary and Grievance Procedures was revised and tribunal outcomes were linked to failure to comply therewith. So, if a tribunal finds that an employee has unreasonably failed to adhere to the Code of Practice, it may apply a reduction of up to 25% in any award it may make. Similarly it may increase an award by up to 25% where it is the employer who has unreasonably failed to comply.

This approach, or a variant thereof, is worth considering as the LRC’s Code of Practice (S.I. 146 of 2000) fulfils a similar role as that of ACAS in Britain.

It terms of promoting effective workplace ADR, the Minister may be aware that the NI Department of Employment and Learning are developing “best practice standards” which employers and employees can use as a template to refine their in-house procedures. The Department is working with a number of public sector bodies and trade unions to pilot best practice in-house ADR systems. The Department is also exploring the development and delivery of training in ADR techniques leading to a recognised accreditation/qualification because it believes that official recognition of such skills would increase confidence in the capability and independence of the individual in question.

The second issue concerns the establishment of a simple and efficient institutional structure and raises a number of questions of real importance. There is no rational case that can be made against the adoption of an integrated two-tier model as a grounding principle. All employment related complaints, including employment equality complaints, should be submitted to and dealt with by one first instance body. Given that statutory redundancy payments are now administered by the Department of Social Protection, it would be logical that statutory redundancy appeals are also handled through the established social welfare structure thus reverting to the original intention behind the Redundancy Payments Bill 1967.

I would propose that the single point of entry for all disputes, whether they be disputes of right or disputes of interest, should be the Labour Relations Commission. The Commission’s function would be to seek to bring about a resolution of the dispute whether by the provision of advice, investigation, conciliation, mediation or binding arbitration (if both parties agree) as appropriate. In the event that the Commission believes that no further efforts on its part will bring about a resolution of the dispute, the matter should then be referred, in the case of disputes of interest if both parties agree, to the Labour Court or, in the case of disputes of right, to a restructured Employment Appeals Tribunal, from which a further appeal would lie only to the High Court on a point of law. Alternatively a complainant, as is presently the case with gender equality disputes, should be able to proceed directly in the Circuit Court by way of an Employment Law Civil Bill. There is no rational basis for differentiation between gender discriminatory dismissals, for instance, and unfair dismissal.

This structure, while providing for a single point of entry, recognises that the procedures involved in adjudicating on disputes of interest are not necessarily appropriate for adjudicating on disputes of right. All disputes of whatever nature, however, should go through a filtering process ensuring that both the Labour Court and the Employment Appeals Tribunal are “courts of last instance”.

The Employment Appeals Tribunal, as with the Labour Court, would sit as a tripartite body with permanent chairs with suitable legal qualifications selected through a public competition organised by the Public Appointments Service aided by two lay wing people drawn from a panel also organised by the Public Appointments Service. All members, terms and conditions of engagement must be compatible with the requirements of Article 6 ECHR to ensure their impartiality and independence. If the parties to a dispute, which has not been resolved through the LRC preliminary process, receive a fair and satisfactory hearing with a well reasoned decision, there should be no necessity for an appeal, except on a point of law.

The Tribunal hearing should be also in public, although the Tribunal should be empowered to issue restricted reporting orders and should also be empowered to award costs, including legal costs, where one party (or his or her representative) is found to have been acting frivolously or vexatiously or has unreasonably failed to comply with procedural requirements. The Tribunal should also be empowered to require payment of deposits in cases where the complaint or defence is considered unsustainable.

If it is found necessary to enforce an LRC arbitrated decision or a decision of the Employment Appeals Tribunal, the enforcement application in all cases should be to the Circuit Court.

In keeping with the aim of seeking to resolve disputes close to the point of origin, there should be shorter time limits for lodging complaints, say two or three months from date of dispute arising. There should be limited possibilities for extending the time but consideration might be given to following the PIAB analogy of suspending the running of time while the dispute goes through the LRC process.

Conclusion

Where a dispute arises in the workplace, both parties should be encouraged to resolve same in-house without having to avail of the State's services. There should be incentives for employers adopting suitable procedures and for both parties availing of same if appropriate. Disputes which are not resolved internally should be referred, within a short time limit, to the LRC who will attempt to resolve that dispute by adopting a range of techniques appropriate to the nature of the particular dispute. In the event that the dispute cannot be resolved by the LRC, the dispute should then be referred on through the appropriate channel, thus recognising that disputes of interest require a different adjudicative regime to disputes of right. A complainant should remain free, however, to institute proceedings for breach of his or her employment rights in the Circuit Court, which should also be the forum for enforcement of decisions made through the statutory process.

Given the time constraints involved on meeting the Minister's deadline for submission, I have not had the time to elaborate further on the proposals above. I would welcome the opportunity to meet with members of the Implementation Body to examine in more detail the contents of this submission (and others received) and the issues raised in the consultation paper which are not considered here.

Yours sincerely

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