

Submission by Legal-Island on Department of Jobs, Enterprise and Innovation suggested reforms of the State's Employment Rights and Industrial Relations Structures and Procedures

Firstly, might we say that we are very impressed by the scope of Minister Bruton's reforms, which are long overdue, and amazed at the speed at which he is pressing forward with these. With many years' experience in employment law and disputes throughout the island or Ireland and GB, we have never seen changes brought forward as quickly as this. It signals a positive desire to see the reforms implemented and not held up by red tape or minor objections. We accept that there are times when we should take a step back or introduce a pilot to test out reforms but doubt that many of the suggestions will be implemented with the Minister's obvious zeal for reform.

Turning to suggested topics of reform and areas of discussion we would make the following comments/suggestions:

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?

Employers must receive training in dispute resolution. They must be required to take responsibility for their own problems or they will abdicate that responsibility and the consequent disputes will be a drain on the State.

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 – people frequently get things wrong and dispute resolution processes work in large part because people realise during them that they got the wrong end of the stick or worked on wrong assumptions because of a lack of early communication and internal resolution mechanisms.

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

Early – as in providing information and advice – and later – as in assisting with or adjudicating on complaints that cannot be resolved in-house. There should be a requirement to go through a process which requires the parties to consider mediation. This, of course, is different to parties having to do it. But early intervention ADR works and is cost-effective from everyone's point of view.

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

- Simple forms (preferably one only)
- Costs awarded against vexatious parties or those who fail to turn up without good reason (both complainants and respondents)

- Penalisation of those who fail to follow reasonable procedures or engage in ADR without good reason. Don't make it compulsory – just require the parties to give a valid reason or face a possible penalty

Integrated structure

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

Yes.

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?

There will be the need for some specialisation to avoid allegations of bias or 'old boys' network' but Chinese walls should suffice e.g. equality cases can mainly be dealt with by civil servants and judges who specialise in equality issues; ex-LRC staff can deal with collective disputes; others can deal with employment protection rights etc. It needn't be complicated for the service users – it's more a question of how the new organisations allocate tasks internally.

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 – it can decide whether early intervention would be appropriate based on experience or a request from one of the parties. ACAS and the LRA are trying similar things and it seems to work pretty well.

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 – or face a penalty for failing to do so vexatiously. There must be some kind of appeal to avoid human rights issues but most disputes don't require formal proceedings, so an incentive to engage or disincentive to not engage would be good.

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?

Yes to above. Keep different sections within one department, just as best practice in disciplinary matters would dictate keeping, wherever possible, separate roles for those who investigate, make decisions and hear appeals.

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?

As above – just stream within the department. Why complicate matters for end users?

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?

All positions should be open to competition over time but only senior executives/President should be subject to fixed term contracts. Others should be on permanent contracts to build up expertise.

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?

Yes.

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

Website and telephone enquiry line.

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?

Yes – it stops matters becoming too formal too early and the digging in of positions that result. If people know there is a range of options available from speaking to one another, to writing, to seeking mediation/conciliation/arbitration etc as appropriate they will make informed choices.

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?

Use one form. Have several sections within one department. Reception/website can direct parties to correct section.

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

Yes. Keep it simple and limit number of words.

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

Case management and penalties for not swapping or providing information required or requested.

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

Yes. Three months for initial complaints, with authority to accept late applications based on existing case law. But three months should be enough for most. One month for appeals. Undertaking ADR in good faith should be acceptable reason for extension of time.

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?

Not so necessary if free advice is available early.

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.

Enforcement

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

County/High Court. Awards should be seen as enforceable at law after 6-8 weeks.

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?

All should be available or unscrupulous complainants and respondents will demand a hearing. ADR works but no one size fits all. The department should offer the most appropriate method based on discussions with the parties. Some might be free; some might cost but most work and are cheaper than courts and tribunals.

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

An enquiry line should refer callers to experienced officers, who can provide more detail on options.

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?

Both – courts refer parties to mediation all the time. Why not try ADR at different stages as matters progress and positions change. An agreed outcome is always better than an imposed one.

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?

Yes – there are many experts out there and some parties prefer to 'go private', as it were. If it resolves the dispute, and saves the State money in the process, then why not?

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?

Yes – why not have a bank of external experts who can supply services where required or give credit to employers and employees who have their own internal/external dispute resolution processes?

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

Yes – certainly if they are to move to a formal hearing but it is preferable beforehand in any case because it allows both sides to prepare and resolve misunderstandings. A party should be required to set out as much as necessary to allow the other party

an opportunity to know the case they have to face. Parties should be discouraged from going further than this - a requirement to produce witness statements for example should be avoided at all costs.

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

Yes – it can't go on indefinitely or people will abuse it.

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?

Yes. Mediation work particularly well early on, where there is an ongoing relationship between parties. It is less successful after positions have become too entrenched or where the parties would rather terminate the relationship than build it back up again. It can still work but the ACAS/LRA conciliation service is a lot cheaper if all parties really want to do is settle a claim for an amount of money and never see each other again.

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

Yes – for vexatious or weak cases or where either parties alleges inadequate information has been supplied. Instructions may be given by an experienced chairperson.

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

If both parties agree, why not? Put the question on the form – some people just want the matter decided quickly. It won't work in most cases, especially where the employment relationship is ongoing, but it might for small claims, like holiday pay or bonus pay, redundancy payments, notice pay, outstanding wages etc, if the parties are happy with that.

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?

The process and outcomes should be confidential but parties should be either incentivised to use ADR or penalised for not. ADR works – get them into it and most cases will resolve themselves without the need for a hearing, even if they initially go into it reluctantly or will low expectations.

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 – if it's a formal hearing, rather than an informal attempt to resolve issues, where a prescriptive procedure would be counter-productive. You have to let mediators

deal with things their way. Arbitration could be different – a formal procedure would be helpful there and similarly with all formal tribunal hearings.

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?

Yes. Far too many people on both sides fail to engage and treat the system as a joke.

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

ADR should be private. Hearings should be public. Justice must be seen to be done and public hearings incentivise the parties to use ADR.

3.15 Should there be a uniform period for submitting appeals?

Yes – one month unless there is a good reason for longer e.g. the parties have engaged in ADR since the hearing.

We would make the following final comment:

There needs to be more consistency in the standard of decisions. Too often decisions from the EAT and elsewhere state something along the lines of, “Having taken into account all of the evidence, we find for the complainant or the respondent.”

With the greatest respect, that is not justice, where neither party knows why they ‘won’ or ‘lost’. Tribunals should be required to explain their reasoning; not only in relation to the decision but to levels of awards. How can any advisers, legal or otherwise, advise a party on likely costs/gains or advantages of ADR if there is no logic explained in tribunal decisions? The current Equality Tribunals tend to be better in relation to why they come down on one side or the other but there is no real explanation as to why an award is two years’ compensation or a fraction of that. Awards for injury to feelings are incomprehensible. Perhaps you could take a look at the NI tribunal rules which require tribunals to set out their reasoning? It may lead to some longer decisions but it is better law and at least the parties know why they might want to appeal based on a point of law in the tribunal’s written decision.

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