



**Local Government Management Services Board**

Submission to

**The Department of Jobs, Enterprise & Innovation**

On

**Streamlining of State Employment Rights Bodies**

September, 2011

## **1.0 Introduction**

- 1.1 This submission is made by the Local Government Management Services Board (LGMSB). The LGMSB was established in 1997 to be a centre of excellence in the provision of management services, human resource and industrial relations support and advice to local authorities in Ireland. A core function of the Board is the professional representation for local authority employers at third party proceedings, including the Labour Relations Commission, Rights Commissioner hearings, Employment Appeals Tribunal, Equality Tribunal and the Labour Court. It also provides information, analysis and guidance to local authorities on employment rights and details of new and amended legislation.
- 1.2 As a major stakeholder and a user of the third party disputes resolution mechanisms, the LGMSB welcomes the Minister for Jobs, Enterprise and Innovation, Mr Richard Bruton's announcement of his intention to streamline the State's employment rights bodies and the Board broadly supports the principles proposed. A single body, dealing with disputes and grievances in the first instance, and a single body dealing with appeals, will clearly result in a more efficient and user friendly system with easier access to mechanisms for disputes resolution. However, in order to ensure that the proposed new bodies are robust enough to deliver access to justice and fair and efficient adjudication and to ensure that the effectiveness that exists under some of the current systems is maintained, the new proposed structure will require careful design in its detail.
- 1.3 The LGMSB sincerely hopes that the reforms being introduced by the Minister will take cognisance of public sector employers as the major stakeholders and users of the employment rights bodies that they are, thus ensuring that the necessary balance of knowledge and experience exists in the system.

## **2.0 Current Situation**

- 2.1 The current situation for resolving employment disputes, grievance resolution and vindication of employees' rights is cumbersome and complex. The last two decades have

witnessed a major growth in employment legislation; much of this growth was influenced by Ireland's membership of the European Community. In consequence, statute now determines many key aspects of the employment relationship that were previously determined by collective agreements. Currently there are five bodies with responsibility for adjudicating in disputes involving employment rights. Three of these bodies (on occasions four) have first instance jurisdiction; the Equality Tribunal hearing all claims under the Employment Equality Acts, 1998 – 2008 at first instance, the Rights Commissioner having jurisdiction under the majority of employment rights legislation. While the Rights Commissioner has jurisdiction to hear unfair dismissal cases at first instance, should one party object then the Employment Appeals Tribunal has first instance jurisdiction. It should be noted, however, the Employment Appeals Tribunal operates first instance jurisdiction in the majority of cases under the Unfair Dismissals Acts, 1977 – 2007. Appeals under the 1977 – 2007 Acts are to the Circuit Court, with a further right of appeal to the High Court. Appeals on all other first instance cases heard by the Employment Appeals Tribunal are appealable to the High Court on a point of law only. Decisions of Rights Commissioners are appealed to either the Labour Court or Employment Appeals Tribunal depending on the statute concerned.

2.2 This is an extraordinarily complex array of procedures which gives rise to situations where a claimant can pursue cases to a range of bodies seeking enforcement of statutory rights against the same employer. For example, an employer could be at the Rights Commissioner, Labour Court, Employment Appeals Tribunal and Equality Tribunal arising from the termination of employment of one employee.

2.3 The level of duplication is such that even the most experienced practitioners have difficulty in navigating the maze of procedures that are in place to deal with the range of individual rights based cases that can be pursued. When this is coupled with the more traditional voluntary mechanisms that are normally used to deal with collective issues, the overall system of third party dispute resolution is a mishmash of interventions that is undoubtedly in need of reform.

## **3.0 Proposal**

3.1 The Minister's proposal, essentially, is to have a single body for employment rights grievances and disputes in the first instance and another single body dealing with appeals and the use of a common format to submit claims, with the creation of one, common portal of entry.

### ***Body of First Instance***

3.2 This proposal would appear to envisage the first instance jurisdiction of the Rights Commissioner, the Employment Appeals Tribunal and the Equality Tribunal all subsumed into one body of first instance. In order for this proposal to be successful, the LGMSB is of the view that the structure of the institution of first instance and the profile of adjudicators is crucial.

3.3 Disputes before third part institutions generally fall into one of two categories: rights based disputes and interest based disputes. Each category requires a very highly trained, competent and properly managed adjudicator to ably deal with the dispute in question. However, it is submitted that there is a different talent and range of experience required by adjudicators/decision makers in relation to the different categories of dispute. In the case of rights based disputes, an in-depth knowledge of employment law is required, along with the ability to understand and interpret statutes. The capacity to research, analyse and apply case law to fact, coupled with skills in the general application of the law, are essential and a significant level of experience in prosecuting rights based cases is fundamental. In relation to interest based disputes, different qualities are required of an adjudicator/ decision maker. A strong knowledge, understanding and experience of industrial relations and negotiation processes are necessary.

3.4 In order to facilitate the development of expertise amongst adjudicators, separate areas of case classification should exist. For example, a number of adjudicators should specialise in rights based disputes, another group should specialise in employment equality cases and a group in interest based cases. However, each individual adjudicator should have the same "powers" vested in them. Unlike the current situation where Equality Officers are vested with extensive legislative powers, whereas Rights Commissioners have

virtually none, under the new system the necessary powers should be vested in each adjudicator.

- 3.5 In the case of rights based disputes, the LGMSB is of the view, that it is essential that adjudicators must be capable of taking evidence and administering oaths in the course of the processing / hearing of the dispute. However, in order to ensure an efficient user friendly system for dealing with all employment rights issues, “documents only hearing” should be considered in the first instance. This “hearing” would not necessarily require the attendance of any of the parties to the dispute, merely the submission of the necessary evidentiary documentation to support and sustain the claim and the defence. This would then allow for a system whereby issues of common agreement, agreed evidence and matters of fact, may be dispensed with without delay and only the actual matters in dispute would require being subject to adjudication at an oral hearing. This could also provide a mechanism for dealing and dispensing with vexatious and misconceived claims.
- 3.6 Notwithstanding this, it is also submitted that in every category of employment related dispute being addressed by a body of first instance, a more extensive use of mediation should be made available to the parties. This could operate on a similar basis to the voluntary system which is currently operated by the Equality Tribunal. Arbitrators who have competencies in each area, i.e. rights based cases, equality and interest based cases, should be trained in mediation in their respective area of expertise.
- 3.7 In all circumstances, arbitrators/decisions makers employed in the Body of first instance should be employed through an open and transparent recruitment process. They should, in all circumstances, be employed on the basis of their knowledge, experience and qualifications in employment law and industrial relations. The LGMSB is of the view that all employed in the body of first instance should be direct employees of the Body and properly managed and directed by the Body. The recruitment process must allow for candidates to be drawn from across both the private and public sectors and from both employer representative bodies and the trade union movement.

3.8 In order to assist the Body of first instance to deal efficiently and in the timeliest manner possible with complaints, it must be supported by a properly resourced and capable secretariat.

### ***Appeals Body***

3.9 It would appear from the Minister's announcement that the Labour Court will provide the basis on which the appeals body will be formed. The LGMSB welcomes and supports this proposal and would see that there is a logical and rational basis for this approach.

3.10 However, the LGMSB would submit that this may require some structural changes being made to the Court. The LGMSB would welcome an enhanced Labour Court headed up by a single Chairman. The structures of the Court would not require significant alteration; for example, the LGMSB would see the Labour Court retaining the permanent three person divisions. Each division should continue to consist of one Chairman (or Deputy Chairman), a member recruited from the workers' representative bodies/organisations and a member recruited from an employers' representative bodies/agencies both within the public sector and the private sector. The LGMSB would envisage the current appellant role of the Employment Appeals Tribunal being taken over by the Labour Court. If this is the case then additional divisions would then be required; however, unlike the submission made in respect of the body of first instance, each division of the Labour Court, in its appellant role, should be capable of dealing with all categories of appeal, rights based, equality based and interest based. A continuance of the investigative style hearing, which is a feature of the Labour Court, would be preferable and, in particular in employment rights based appeals, an inquisitorial approach should be adopted rather than the overly legalistic, adversarial approach which has become a feature of the Employment Appeals Tribunal. All the powers currently vested in the Employment Appeals Tribunal should obviously be vested in the Labour Court. There should also be a mechanism for the appeals body to review and analyse decisions and case law on an on-going basis thus ensuring a standard and consistency in decisions and compliance with established case law and authority.

3.11 Consideration must also be given to the question of whether it is appropriate or necessary that every appeal to the Labour Court be heard *de novo*. There may be instances or cases where every question of law and fact does not require review and

where it is not appropriate for fresh evidence to be presented. This question requires serious debate and in-depth examination, including all the legal implications involved. The decision must ensure that there is no deleterious effect on proper vindication of an individual's rights and/or entitlements. In all circumstances, final appeal should be to the High Court on a point of law. It is also submitted that there should be a consistent method of enforcing awards of employment rights. Determinations of the Labour Court should all be enforceable by direction of the Circuit Court on application by the employee concerned, his/her representative and/or the Minister.

3.12 These changes would obviously require additional divisions being appointed to the Labour Court; as with to all appointments to the body of first instance, in all circumstances, personnel appointed to all divisions of the Labour Court should be employed through an open and transparent recruitment process. They should in all circumstances, be employed on the basis of their knowledge, experience and qualifications in employment law and industrial relations. Also the provision of a capable, well resourced secretariat is essential to the proper running of the Labour Court.

## **4.0 Case Management**

4.1 One of the significant aims of the reform process must be to achieve a considerable reduction in the time scale for the processing of cases. Currently, waiting periods vary hugely from one institution to another. It is not unheard of for claimants and witnesses to be called on to give evidence on issues which accrued over three years previously. The new system must also reduce and, where possible, eliminate the possibility of forum shopping. By having a single point of entry for all claims provision can be made for strict case management and elimination of duplication.

4.2 At the single point of entry, a separate process should be available to complainants whereby they can receive advice and information. This process may eliminate the need for formal claims to be made and may also inform individuals on the submission of claims, if necessary and on any other option which may be available to them. The second process which should be available should be an online application form for all first instances industrial relations claims and a separate form for all rights based claims.

4.3 Once a form has been submitted to the body of first instance, it should then be assessed before any hearing is scheduled. Staff involved in this process should be adequately trained, and, where necessary, consultation with appropriate adjudicators should take place. Where appropriate, direct contact should be made with complainants; in certain cases it may even prove possible to provide resolution and/or clarification to an issue without the need for a worker or employer to resort to a formal process through this direct contact. In other instances, further documentation and information may be required from one or both parties. In all instances mediation should be considered, and, if appropriate, should be offered on a voluntary basis to the parties.

## **5.0 Conclusion**

5.1 The challenge being undertaken by the proposed reform is an immense undertaking. However, every experienced practitioner is aware that it is a task requiring pursuit. The incremental development of employment law over the past 20 years has resulted in a complicated system which is both confusing and costly. By streamlining and simplifying the complaint, appeal and enforcement procedures and by improving the advice and guidance available to employers and to workers it will be possible to introduce a new institutional structure, which will lead to the efficient and effective resolution of workplace grievances and disputes to the benefit of workers, employers and, ultimately, the taxpayer.

5.2 The arrangements for the appointment and tenure of those working in and/or appointed to the new streamlined employment rights bodies will obviously be examined as part of the reform process. While the LGMSB is an employer's body, representing employer's interests in all aspects of employment law, it is public sector employers, namely, local authorities, which are represented by the LGMSB. Public sector employers are frequent users, if not the most frequent users, of the third party disputes mechanisms. When the Labour Court was established, under the Industrial Relations Act, 1946, the "nominating organisation" designated by the then Minister for Industry and Commerce, to nominate an employers' member to the Labour Court was the Irish Business and Employers Confederation (IBEC). Historically, IBEC has nominated employers' members solely

from the private sector. This historic situation clearly reflects the fact that, in 1946, public sector employers, as a general rule, were not users of the State industrial relations institutions, as an internal arbitration process, sitting on an ad hoc basis, existed for civil and public servants. However, it should be noted that all public servants, with the exception of the civil service, are now classified as “employees” and as such all employment disputes are handled by the State’s employment right’s bodies. In the case of the Civil Service, all rights based disputes are handled by the State’s employment right’s bodies.

5.3 Under the Public Service Agreement 2010 – 2014 (“the Croke Park Agreement”) the Labour Court is the final arbitrator in all disputes (other than where a conciliation or arbitration scheme applies) which arise under this Agreement. This means that that all public servants and public service employers, with the exception of the civil service, will have all disputes under the Agreement heard and arbitrated on by the Labour Court; yet public sector employers are not afforded the same opportunity as IBEC to nominate an employer member to the Court. The Labour Court should be seen to be balanced in every way and fully resourced by the best possible candidates from across all sectors, both public and private.

5.4 The LGMSB has welcomed the initiative of the Minister and the opportunity to positively engage in this consultation process.