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6 September, 2011

Mr Richard Bruton, TD
Minister for Jobs, Enterprise and Innovation
Department of JEI
Kildare Street, Dublin 2.

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

Dear Minister,

I am pleased to avail of the opportunity to respond to your consultation document "Reform of the State's Employment Rights and Industrial Relations Structures and Procedures". I am a lay member of the Employment Appeals Tribunal (EAT) for the past 18 months, having been nominated from the employer organisation side. I have considerable experience in public policy as my work prior to retirement was as Chief Economist of the IFA for about three decades, which included a central role in the Social Partnership process from its foundation and a long period of involvement in NESAC. I was also a member of the Commission on Taxation.

I wish to state at the outset that I have serious concerns about the approach being taken in the consultation document. This is primarily because I believe it is a fundamental mistake to seek to lump together two relatively separate areas of public policy relating to employment: (i) industrial relations in ongoing employment situations, and (ii) individual employment rights in situations of termination of employment. The EAT specialises in the latter role, dealing in particular with cases taken under legislation on Redundancy Payments, Unfair Dismissals including constructive dismissal cases, Unfair Selection for Redundancy, and Minimum Notice.

I am strongly of the view that the most logical approach for the Government would be to implement separate but parallel reforms in these two policy areas, with the objectives of improving internal efficiencies and minimising the areas of overlap and duplication between them. For ease of reference, I refer to this proposed structure as a “parallel track” approach. This would be a much more pragmatic approach bearing in mind (a) some strong positive aspects of the present organisations (see later comments on EAT), and (ii) the complexity in reforming legislation in the employment area, which would require considerable consultation and consensus.

In the proposed “parallel track” structure, it would be necessary that the reform should result in a single lead organisation for each. As regards the industrial relations area, the recommendation of the 2009 McCarthy Report (An Bord Snip Nua) to merge the Labour Court and the Labour Relations Commission (which includes the Rights Commissioners service) into a single service should be implemented, and this should be the lead agency for this area. As regards employment rights on the termination of employment, the Employment Appeals Tribunal should be the lead agency. (see later comments on EAT).

It will be seen that a number of the detailed proposals in the consultation paper make much more sense if they are implemented in the “parallel track” context. These include: a single entry point for each track, a single information source, and the abolition of “forum hopping”.

I wish to make the following points in relation to the reform of the other institutions referred to in the consultation document. As regards NERA, the recommendation of the McCarthy report is to “merge the Health and Safety Authority and NERA into one Work Place Inspectorate”. As regards the Equality Tribunal, the McCarthy report recommends that consideration should be given to “the merits of merging the Equality Tribunal into a rationalised Industrial Relations structure”. Both of these recommendations are worthy of serious consideration.

There are a number of further points which I wish to raise in relation to the consultation paper.

First, the term “consultation paper” is somewhat of a misnomer, as it is clear that one model (referred to as “the new two-tier model) is the only model considered.

There is no independent justification for this proposal, no analysis of the potential cost saving to the Exchequer is given, little or no account seems to have been taken of the McCarthy report, and it is apparent that the recommendations of the Chairperson of the EAT have been largely ignored.

Second, the paper seems to be quite dismissive of the Employment Appeals Tribunal, despite its long and successful record, and its very important positive inherent attributes. I include amongst these positive attributes the following:

- The cost of the EAT to the exchequer as regards payment to Tribunal members is extremely low (average of €342 per case for the 6,064 cases processed in 2010). There are additional administration costs, but any system will involve a certain administrative cost which is unlikely to be lower than currently in the EAT.
- The EAT is operated on a very flexible basis which, for example, enabled a 30% increase in claims dealt with in 2010, and a further 14% increase in the first half of 2011. Furthermore, these have been achieved with only a very marginal increase in staff numbers. Had additional staff been available from less urgent work in other parts of the Department, the increased output would be greater.
- It is quite wrong to suggest that the delay in hearing cases in the EAT in recent times is a reflection of the institutional structure or operation. There are quite obvious causes of this problem, notably the rapid increase in the Irish workforce up to 2007, the major recession and rise in unemployment since then, and the rigidity of the public sector as regards allocation of personnel resources.
- The current three-person panel in the EAT system is likely to provide greater balance, and probably a greater sense of a “fair hearing”, than the Rights Commissioners system. I am aware that many employees who come forward with grievances specifically state that they do not want their case heard by a Rights Commissioner. This should not be treated as a trivial consideration, if confidence of the workforce in the State’s Employment Rights system is to be retained.

- The incidence of Judicial Reviews of EAT cases is miniscule. In contrast, I understand that the incidence of such Reviews in other prominent comparable bodies is quite high, resulting in additional costs to the parties involved.
- The EAT is self-sufficient in dealing with cases of individual employment rights on termination of employment, and this should continue to be the case. There is no need for a more complex two-tier system involving a “body of first instance” and “body of second instance” as suggested in the consultation paper. Furthermore, the EAT is a quasi-judicial body, and its determinations are legally binding and enforceable. In contrast, decisions / recommendations of Rights Commissioners can be appealed to either the EAT or the Labour Court (depending on the particular legislation).

I hope that the reform you propose to undertake in these policy areas is not just “change for the sake of change”, bearing in mind that you do not envisage a comprehensive review of all the relevant legislation at this stage. I fully support the Government’s objective of achieving greater efficiencies in public services. However, in this very minor area of public expenditure, it is important that adequate consultation with stake-holders is undertaken, that the positive attributes of the present system are not lost, and that the intended beneficiaries of the system - employers and employees - are not disadvantaged. And of course it is very important that the outcome as regards cases where employment has been terminated should not result in a significant incidence of such cases ending up before the Courts, which would defeat the *raison d’etre* of the EAT. Finally, I would appeal to you to ignore the self-serving comments made by a senior officer of the LRC concerning the EAT in recent months.

I hope that my thoughts will contribute something useful to the consultation process. The Chairperson of the EAT, Ms Kate O’Mahony, will be making an overall submission on behalf of the Tribunal, reflecting the wide experience of herself and the members.

Yours sincerely,

Con Lucey.

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