

Submission on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures

Introduction

This document makes submissions on principles which should guide the reform proposed by the Minister for Jobs, Enterprise and Innovation. It also proposes a new structure for the determination of legal rights. The core submissions are shown in bold type.

The industrial relations function – currently discharged by the Labour Court, Labour Relations Commission and Rights Commissioners

This function is discharged on a voluntarist basis, i.e. the parties to the dispute cannot be forced to come before the body which will attempt to resolve the dispute; nor can they be forced to comply with the body's recommendation. In order to operate, these bodies develop (and indeed must develop) a relationship of trust with those who regularly appear before them. They engage (and indeed must engage) in practices designed to promote agreement between the parties.

The legal function – currently discharged by the High Court, Circuit Court, Labour Court, Employment Appeals Tribunal, Rights Commissioner and Equality Officers

This function is discharged by the determination and enforcement of employees' legal rights. In so doing, these bodies are engaged in the administration of justice. They must be fair and be seen to be fair in their dealings with the parties before them.

The relationships and practices which are essential to the resolution of a dispute on a voluntarist basis are inimical to the determination of legal rights in a manner which is fair and which is seen to be fair.

It is submitted that those persons or bodies discharging the industrial relations function should be independent of those discharging the legal function. This function should not be discharged by the same persons or bodies discharging the industrial relations function.

If the industrial relations function is discharged by bodies and persons who are independent of those discharging the legal function, then they may take a pro-active role where a legal claim has been made. For example, in the United Kingdom, ACAS (the industrial relations body) is given the name and contact details for the parties to legal claims. They contact the parties and offer to mediate a settlement between them. This service would be particularly valuable where one or both parties are not legally represented and contact between the parties in an attempt to settle would therefore be inappropriate.

The advisory function

The Minister's consultation document seems to contemplate that the body dealing with disputes at first instance should also provide advice on the claim.

If the body is determining the question whether or not the employees' rights have been breached, that body cannot also give advice to the employee on what rights may have been breached or how he or she should proceed. It would lead to actual or perceived bias against the employer.

It is submitted that the body discharging the advisory function should be independent of the bodies discharging the industrial relations and legal function.

How should the legal function be discharged?

It is crucial that employees' and employers' rights be correctly and fairly determined at first instance.

The law regulating employees' and employers' legal rights is vast and complex. It comprises not only Irish statutes but also European Directives and Regulations and the common law. The awards made can be sizeable, often well within the minimum High Court jurisdiction. For example, on 27 July 2011, the High Court (on a full appeal under the Unfair Dismissals Act 1977) made an award of 197,000 Euros in favour of a single employee – reduced from a total possible award of 298,000 Euros because the employee had already received 101,000 Euros from his employer: *JVC Europe Ltd v Panisi* [2011] IEHC 279. The determinations can be life altering for the parties, as where for example the Rights Commissioner or the Employment Appeals Tribunal must determine whether or not an employee was bullied by a manager and thereby constructively dismissed. If, as is contemplated by the Minister's consultation document, claimants are to be permitted to put any employment related claim before the first instance body, the body will need to understand all of the relevant law and not merely particular statutes in order to determine the claim. Furthermore if, as is also contemplated by the Minister's document, parties are to be encouraged to make their claims and defend their claims without legal representation, then it is even more crucial that the body itself possess legal expertise so that it may correctly apply and interpret the law and correctly determine the rights of the parties before it.

Nor should a fear of formalism dictate the structure or practices of the new body. The Minister's consultation document refers (in Appendix 4) to past criticisms of the current system (dating from 2004). It says that there is inconsistency between the bodies regarding the formality of hearings, the rules of evidence and the use of adversarial versus inquisitorial procedures; it says that delays are excessive and result from a procedural focus on the conduct of a formal hearing; it says that claimants feel the need to incur legal expenses in many fora and the Employment Appeals Tribunal is criticized as being 'overly legalistic'. It is submitted that these criticisms of formalism and

legalism are misguided. Given the fact that the body is engaged in the administration of justice and the importance and monetary value of the rights under determination, it is only right that formal procedures be adopted which are in conformity with the requirements of the law. In *Ryanair v Labour Court* [2007] 4 IR 199 (a case post-dating the criticisms listed in the Minister's consultation document) the Supreme Court criticized the Labour Court for *insufficient* formality. The Court held that where one party to the dispute gave oral evidence to the court, then that court could not reach a conclusion merely on the basis of arguments made by the union and Ryanair documentation in the absence of oral evidence from the other party.

It is submitted therefore that the decision at first instance should be taken by a body possessing not only proven experience of the workplace but also legal expertise. It is submitted that the Employment Appeals Tribunal model satisfies these requirements. It sits with a lawyer, a person who is representative of employees and a person who is representative of employers.

In order to limit costs and prevent duplication, **it is submitted that there should be one appeal only from this body, to the High Court on a point of law.**

Public hearing by an independent and impartial tribunal

Article 6 of the Convention on Human Rights provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Having regard to the requirements of the Convention, it is submitted that

- **The body should carry out its hearings in public and should publish its decisions.**

- **The body should be independent of the State. The members of the body should not be civil servants.**
- **All members of the body - whether lawyers or representatives of employees or employers - should be appointed on merit to their position by an independent body, either the Public Appointments Service or the Judicial Appointments Board.**
- **The body should be seen to be independent. It should not conduct its hearings in the offices of the Department of Jobs, Enterprise and Innovation or any other departmental buildings. The secretaries to the body should be civil servants of the state rather than civil servants of the government.**

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16 September 2011