

Consultation on ERIR Reform

While agreeing with the broad thrust of most of the current proposals to reform the State's Employment Rights/Industrial Relations bodies and procedures I would like to contribute to the consultation process to the extent of cautioning against what I see as a real danger that the proposed reforms – much as they are necessary and worthwhile in themselves – will, effectively, lead to a reduction in the exposure of non-compliant employers to detection.

It is a given that there are compliant and non-compliant employers in every sector and that, all things else being equal, the non-compliant employer has a distinct unfair competitive advantage over the compliant.

I take it also as a given that society at large and, in particular, the compliant employer and the employees of the non-compliant employer require that the level of non compliance be kept to a minimum.

This can only be achieved through a rigorous and effective **routine** inspection process that targets areas where there is a known high risk of non-compliance and which is backed up by rigorous and effective enforcement procedures that will compensate employees appropriately for serious breaches of legislation, penalise non-compliant employers and restore the “level playing pitch” to the compliant employer's advantage. Anything short of this will lead inevitably to a race to the bottom - a process that has already begun following the recent High Court ruling on JLCs.

There is a view that enforcing employment rights places an undue financial burden on employers. It is difficult to see how this could be the case. The fact of the matter is that compliant employers (i.e. the vast majority of employers) not only have absolutely no problem with inspections but actually welcome the process in so far as it shows that their non-compliant competitors are being pursued. The argument that the inspection process places a significant administrative burden on employers is equally disingenuous - the document required by inspectors during the course of any inspection is no more than that routinely in place in any legitimate employment. The truth is that the only people complaining about the burden of inspection are non-compliant employers.

In policing Employment Rights I think that we need look no further than the measures proposed by the Dept of Social Protection in its recently announced Fraud Initiative which could be adapted for our purposes as follows:

"Wage-Theft is not a Victimless Crime"

- * Greater inter-agency co-operation among public bodies at national and local level to identify and combat non-compliance
- * Greater presence of Labour Inspectors on the ground
- * Target areas where wage theft is most likely to occur

- * Identify new methods to identify and recover underpayments to employees
- * Increased penalties for those underpaying employees
- * Greater liaison at national and local level with employer and worker groups to ensure good information exchange with a view to maintaining a fair and level playing pitch.

I am aware of a suggestion that breaches of employment law should no longer be regarded as criminal offences but would instead be processed through the Labour Court. I consider this a seriously retrograde step and one that would quickly be seized upon by unscrupulous employers as a signal that society regards wage-theft as a misdemeanour rather than a crime that may be pursued like any other crime.

I would also like to make the point that, under the present Inspection regime, there is a distinct and significant financial incentive for unscrupulous employers to deliberately underpay employees in the knowledge that, even in the event that such underpayment is ultimately detected, the extent to which such underpayments are pursued by NERA is so limited and so ineffective that, ultimately, there is still a substantial gain. (Currently, where NERA detects underpayments going back, say, 5 years, payment is only sought for the 12 month period prior to the inspection and, where, typically, up to 60% to 70% of the employees affected will be untraceable and, as such, cannot be paid, the savings to that employer are significant).

Any review of ERIR should also take into account the difficulties in enforcing the provisions of the Organisation of Working Time Act in relation to Annual Leave, Public Holidays and Sunday Premium. Article 31 of the OWTA includes a provision whereby breaches of the Act may be referred by the Minister **directly** to the Rights Commissioners where appropriate. This provision potentially gives NERA the authority to enforce the provisions of the Act but, for reasons that have never properly been explained (or, where they have been explained, they make no sense) the Department has made a policy decision **not** to use this power. The upshot of this is that breaches of the OWTA routinely and regularly detected during the course of inspections are, effectively, ignored.

It is also a matter of urgency that the confusion regarding the Sunday Premium provisions of the OWTA be clarified. At the very least the minimum quantum of such a premium should be stipulated and effective enforcement measures put in place to ensure compliance.

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