

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

Responses to Questions Raised in Consultation Document

As the former Head of Mediation in the Equality Tribunal from 2005 to 2011, I would like to put before the Consultation Group my own personal response to the questions raised in the paper "Consultation on the Reform of State's Employment Rights and Industrial Relations Structures and Procedures".

The attached document contains my views on long-term reform of the State's Employment Rights and Industrial Relations Structures and is in addition to my earlier submission containing an Interim Proposal for utilising the Equality Tribunal's Mediation Service to reduce the workload of all existing employment dispute bodies (see Appendix A).

I strongly believe that proper utilisation of the States existing professional mediation structures can contribute immensely to current initiatives to reform the State's Employment Rights Structures and Procedures.

Accordingly, I am attaching my own personal answers to many of the questions raised in your Consultation document in the hope that my views might go some way towards helping to identify the best way forward for the employment rights sector.

I am available to discuss the proposals in greater detail at any time and, if required, to help develop and implement the suggested proposals.

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

Observations of Brian O'Byrne, Former Head of Mediation The Equality Tribunal

Responses to Questions Raised in Consultation Document

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?

- **By encouraging employers to engage in-house mediators**
- **By putting in place an external panel of professionally trained employment rights mediators (perhaps in conjunction with the Mediators Institute of Ireland) who would be available to engage with employers as disputes arise**
- **By setting up a monthly Mediation Forum for mediators from within existing employment dispute agencies and from outside to encourage sharing of expertise**

Integrated structure

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

- **YES - "differentiation" of processing channels should be minimised and all claims in respect of employment related complaints/claims should be dealt with by one body of first instance?**
- **Employment rights cases should only go to the body of second instance on appeal**

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?

- **A newly constituted Employment Rights Tribunal should act as a single point of entry for all claims of first instance dealing with individual industrial relations and employment rights claims.**

- **That body should be equipped to provide professional mediation “up-front” in all cases. Investigations should only be considered an option for those cases that don’t resolve at mediation or are deemed unsuitable for mediation.**
- **Mediation must, however, retain its status as a voluntary process. Therefore, it is important that parties are not pressurised into mediation if they refuse to engage**
- **However, where a party refuses to engage in mediation without reasonable explanation, they should be informed that the case file will be noted to allow the Deciding Officer to raise the matter of their refusal with them at hearing.**
- **There should be total consistency between the bodies regarding the degree of formality of hearings, rules of evidence and the extent of use of adversarial vs. inquisitorial procedures**
- **In particular, there should be a consistent approach to all cases with ALL Hearings being held in private and ALL decisions/determinations being published in full. Only in very exceptional circumstances should anonymity be permitted in published decisions.**
- **All subsequent appeals should be dealt with by a single appellate body (the Labour Court) with only appeals on a point of law going to the High Court**
- **NERA (or a separate arm of the new Tribunal) should retain responsibility for Inspectorate and Advisory functions**
- **The LRC arm of the new Tribunal should deal with Collective Disputes separately from others**

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?

- **To ensure the smooth transition to a new structure, the tenure, grades and working conditions of existing full-time staff should not be subjected to any immediate radical alteration or reform. These arrangements can be addressed in time as the new agency develops and begins to find its feet.**
- **However, there is a need for an urgent review of the terms and conditions under which members of the appellate bodies are recruited and carry out their functions to ensure better value for money (i.e. arrangement of hearings and travel expenses)**

Information and Advice

2.8 Should there be one website covering all employment rights and industrial relations matters?

Yes - one dedicated website should be developed with three sections as follows:

- **Section 1 offering a full and comprehensive advice service on employment rights with all relevant leaflets readily available for download**
- **Section 2 describing the full mediation and investigation process from the initiation stage to the appeal stage**
- **Section 3 providing links to downloadable versions of all relevant complaint and appeal forms**

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?

- **No - I believe that the Advice and the Investigative bodies should be separate entities, or at least two distinctly separate arms of any new agency, to avoid any accusations of bias from allegations that the Investigative Body may have provided assistance to a complainant through the supply of information.**

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

- **Through a fully comprehensive website supported by a NERA-type public telephone advice service with information leaflets available from both.**

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?

- **Not in the short-term. This information should already be available to potential users from existing representative bodies (SIPTU, IBEC etc)**

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?

- **By the establishment of a new Employment Rights Tribunal into which the LRC, Equality Tribunal and EAT would be subsumed.**

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

- **Yes. For example the existing Equality Tribunal’s claim form EE1 could easily be expanded to include a “Tick Box” option covering all sections of existing employment legislation under which claims can be made (these boxes can be reduced later in line with any new streamlined legislation that is introduced)**

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

- **Any new Complaint Form should encourage the complainants themselves to provide a comprehensive description of their complaint details which may in itself be sufficient to avoid having to seek a fully-fledged submission.**
- **Respondents can then be asked to provide their response to the allegations on being informed of the complaint having been received.**

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

- **Following on from a well-publicised advertisement campaign by the Advisory Body, a three-month time limit should be introduced for initiating all complaints and appeals (subject to the retention of existing “exceptional circumstances” appeal options)**

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?

- **Yes. More consistent arrangements are required for the representation of claimants. Stronger rules need to be laid down to discourage the increasing trend whereby complainants and respondents arrive at a Hearing with a previously unannounced representative/solicitor. Not only is this unfair to the other party but it can seriously affect the structure that the Investigating Officer has planned for the hearing.**

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. Trade Unions themselves should be trusted to present/refer complaints where they cannot already do so and, in special circumstances, the claimant’s parent/guardian.**

Enforcement

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

- **All determinations should be legally enforceable from the outset with parties having recourse to a higher-tier appeal mechanism if they are unhappy with the determination. Formal decisions should replace recommendations in all cases**

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?

- **Mediation needs to be brought to the forefront in dealing with all employment disputes.**
- **All complaints should be screened initially for suitability for mediation (e.g. cases involving dissolved companies would not be deemed suitable)**
- **On receipt of a complaint, all parties should be invited to attend mediation as a first voluntary step in the dispute resolution process.**
- **A single central Mediation Service Office should be used for all mediation sessions in Dublin (possible the Equality Tribunal's existing offices in Clonmel Street which already houses a professional team of mediators and dedicated mediation rooms)**
- **Consideration should also be given to housing the "Single Point of Entry" office in the same location. By so doing, new case files will be available on-site to mediators thereby eliminating the cost of transporting new case files to other locations.**
- **Where a party refuses to engage in mediation without reasonable explanation, the case file should be noted to allow the Deciding Officer to take it into account when hearing the case.**

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

- **By way of screening by a suitably experienced Mediator (i.e. similar to the screening process successfully utilised by the Equality Tribunal's Head of Mediation since 2006)**

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?

- **On receipt of a complaint, all parties should be invited to attend mediation as a first voluntary step in the dispute resolution process.**
- **The Equality Tribunal has probably the largest group of professionally qualified mediators under one roof in Ireland. These mediators currently utilise Equality Mediation Agreements to legally settle matters that are not directly before the Tribunal itself (e.g. LRC and EAT complaints).**
- **The Equality Tribunal's mediation agreements are legally binding under equality legislation and enforceable by the courts unlike those of other organisations. Accordingly, as part of such agreements complaints before the LRC and EAT are also legally closed .**
- **It is recommended that any new Agency that is formed should harness and utilise the mediation expertise that already exists in the Equality Tribunal to form the backbone of a new Mediation Service to provide “up-front mediation” as part of a Single Entry Facility. (See copy of my separate submission at Appendix A entitled “Interim Proposal to Utilise Existing Mediation Expertise” for a more detailed account of how this system would operate)**
- **This new Mediation Service would consist of the Equality Tribunal’s existing team of professionally qualified mediators complemented by the mediation expertise currently available to the LRC.**

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?

- **Major benefits could accrue to both sides from the establishment of a Forum bringing together “internal” and “external” mediation experts in preventive alternative dispute resolution methods. This Forum could be utilised as a Training Ground for suitably qualified “external” mediators who could eventually be employed to deal with “out-sourced” mediation cases.**

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

- **Any new Complaint Form should encourage the complainants themselves to provide a comprehensive description of their complaint details which may in itself be sufficient to avoid having to seek a fully-fledged submission. Respondents can then be asked to provide their response to the submission on being informed of the complaint having been received.**

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

- **All complaints should be screened on receipt by a suitably experienced Mediator (i.e. similar to the screening process successfully utilised by the Equality Tribunal’s Head of Mediation since 2006 where 80% of cases screened were found to be suitable for mediation)**
- **If deemed suitable for mediation, all parties should be invited to attend mediation as the first step in the dispute resolution process.**

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?

- **Upfront mediation can be extremely useful in dismissal cases as it provides an early opportunity for reinstatement if both parties are agreeable. Evidence shows that complainants are unlikely to want to return to their place of employment if they are out of work for a significant amount of time.**
- **On the other hand, Mediation will not resolve cases where an Interview Board has found a candidate unsuitable. In such cases a hearing is required to decide whether the Interview Board’s decision was unfair or discriminatory. Nor will mediation resolve cases where the respondents are a dissolved company as no one is likely to appear for the respondents.**

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

- **No – preliminary hearings require preliminary decisions which only add to the existing workload**

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

- **Yes – in situations where the admissibility of a complaint under existing legislation requires a decision or in cases where documentary evidence is sufficient to decide a case (payslips, overtime records, annual leave records)**

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?

- **In accordance with best practice, all mediation processes should be conducted in a confidential manner with parties agreeing beforehand that information obtained at mediation cannot be used to their benefit at a subsequent hearing.**
- **However, where a party refuses to engage in mediation without reasonable explanation, the case file should be noted to allow the Deciding Officer to take it into account when hearing the case.**

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 - a dedicated and uniform set of Guidelines and Procedures should be developed to cover the conduct of all cases**

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 – power to dismiss such cases without formal hearing should be in place once the decision can be appealed**

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

- **All Hearings should be held in private to allow for a more smooth-running dispute resolution service with less interference from the media.**

3.15 Should there be a uniform period for submitting appeals?

- **Yes - One month maximum in all cases on the understanding that all decisions are conveyed by registered post or by other means where delivery can be confirmed**

**Consultation on the Reform of State's Employment Rights and
Industrial Relations Structures and Procedures.**

**Interim Proposal to Utilise Existing Mediation Expertise
from Brian O'Byrne,
Former Head of Mediation, the Equality Tribunal**

Compared to the other three employment dispute agencies, the Equality Tribunal, through its Mediation Service, is best positioned to lead any fresh coordinated attempt to increase closures of complaints across all four employment dispute-resolution bodies.

The Equality Tribunal's Mediation Service is highly regarded by participants from all sides in the employment law arena and I believe that we should now use the expertise that Service possesses to put it to the forefront in resolving employment rights complaints. This proposal is aimed at reducing the workload of all the employment dispute bodies with the Equality Tribunal's professionally qualified team of Mediators taking the initiative in closing complaints.

Consider the following facts:

- Mediation is now universally accepted as the best way forward for resolving conflict in all areas where disputes exist
- The Equality Tribunal has probably the largest group of professionally qualified mediators under one roof in Ireland (to my knowledge LRC mediators are mostly "in-house" trainees.)
- The Equality Tribunal's mediation agreements are legally binding under equality legislation and enforceable by the courts unlike those of other organisations.
- Equality Mediation Agreements have already been utilised to legally settle matters that are not directly before the Tribunal itself (e.g. LRC and EAT complaints).

- The majority of employment cases coming before the Tribunal's mediators also have related complaints with the LRC, EAT or Labour Court. All such complaints are normally put on the table at an Equality Mediation with Agreements providing for the closure of all related complaints.
- The Tribunal is expected to receive close to 1000 complaints in 2011 of which an estimated 50% will be linked to related complaints lodged with the LRC, EAT or Labour Court.
- Analysis of the Tribunal's 2009 Registers shows that the equivalent of one full-time Mediator closed twice as many cases than a full-time Equality Officer in 2009.
- In recent years the Tribunal's Mediation Service has been closing two thirds of cases referred to it.

Proposals

- The Equality Tribunal Mediation Service should be the first "port of call" for all complaints of discrimination which also have related claims lodged with the LRC, EAT or Labour Court (potentially up to 500 cases annually)
- Those cases deemed suitable for mediation will be offered a mediation date by the Tribunal as part of their initial acknowledgement letter from the Tribunal's Secretariat.
- The other bodies will be notified of the linked cases that are going to mediation and asked to put their related cases on hold pending the outcome of mediation.
- The benefit to the other organisations is that they will not have to process or assign the linked cases that they receive. Instead, they will simply acknowledge the complaint, indicating that the case is being put on hold pending the outcome of the Tribunal's mediation process.
- The expectation being that two-thirds of these linked cases will eventually require no further action having being closed by the Equality Tribunal's mediators.

How will the Equality Tribunal adapt itself ?

Mediators

- The Tribunal's Equality Officer / Mediators will devote 33% of their available time to Mediation (compared to 25% at present) to allow its 15 mediators to handle 30 mediations each per year (to cater for the expected 400/500 cases that are likely to go to mediation)
- A rota will be put in place for mediators where they will dedicate one day every three weeks to mediations in Dublin. On that day each mediator will conduct a session in the morning and afternoon.
- Similar days will be arranged in country locations to meet the demand from the different regions.

Secretariat

- Secretariat in conjunction with the Head of Mediation will screen cases for mediation as they are received.
- In cases considered suitable for mediation, the initial letter that goes to the parties in Dublin cases **will also allocate them a date for a mediation session**. In country cases, the parties will be told that a date will be assigned shortly.
- Secretariat will monitor the allocation of mediation cases and agree dates with individual Mediators.
- The Tribunal's complaint form EE1 will be updated to include the following questions:

Are you willing to participate in mediation ? Yes / No (To establish whether there is any point in arranging a mediation session)

Is the Respondent still in business ? Yes / No (To establish whether there is any point in arranging a mediation session - respondent may be a dissolved company with no assets)

Have you lodged or are you considering lodging a related claim with any of the following (Please tick box):

Labour Relations Commission []
Employment Appeals Tribunal []
Labour Court []

(to enable the Tribunal to notify the other body and ask them to put their case on hold pending outcome of mediation)