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Posted Date: 12/09/2011 19:03:01
Subject: Submission on Reform of State's Employment Rights and Industrial Relations Structures and Procedures
Attachment(s): Consolidated Unfair Dismissals (Claims and Appeals) Regulations, 1977.docx

Dear Minister

Further to your circular entitled Consultation on the Reform of the State's Employment Rights and Industrial Relations Structures and Procedures dated 15 August 2011, I outline below my own observations as a solicitor practising in the area of employment law adopting the headings contained in the said circular.

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?

It would be of immense practical benefit if the Department of Jobs, Enterprise and Innovation drafted a set of model employment policies dealing with, inter alia, disciplinary and grievance procedures. These standardised policies, which should be capable of basic customisation by employers, could be annexed to an online employment law handbook for dissemination to the public. This publication should then be updated on an at least annual basis to reflect changes to the law. A standardised set of employment policies would not only enhance the general public's awareness of their own employment rights, they would also serve to expedite the hearing of cases before the various employment law tribunals and may ultimately result in more settlements being achieved through the predictability of outcomes based upon a bank of precedent decisions dealing with similar (if not identical) policies.

1.2 Can the provision of timely, up-to-date factual information help to facilitate early resolution of grievances/claims and stem the flow of formal cases being submitted?

Perhaps. Consideration should be given to amending the Data Protection Acts 1988 and 2003 so that an access request by an employee is complied with promptly by an employer and an employee whose request is not facilitated promptly does not have to wait (currently) 40 days before preferring a complaint to the Data Protection Commissioner. Consideration should also be given to creating a register of decisions so that a prospective employee can conduct a search online against his prospective employer to ascertain whether or not that employer has a good track record of upholding employees rights. This can be justified on the basis that employers frequently conduct background checks on prospective employees and request them to provide references prior to employing them.

1.3 When and how should interventions be available from the State?

Recourse to the proposed employment tribunal, and subsequent appeal to an employment appeals tribunal, should only be available to an employee following proof that he has exhausted the relevant internal disciplinary or grievance policy, as appropriate. (Refer to 1.1 above)

1.4 How do you think access by employers and employees to a just, fair and efficient adjudication process can be ensured?

Ideally, once a formal complaint has been made to the proposed employment tribunal a hearing date should be obtained within six months and any subsequent appeal heard within an additional 3 months. The employment tribunal should enjoy statutory injunctive powers, the power to order discovery of documents, to compel the attendance of witnesses and a statutory power of contempt to deal with parties who wilfully refuse to obey its orders. In addition, the various statutory time limits in which to prefer a complaint under the applicable employment statutes should be standardised to avoid prejudice.

Integrated structure

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

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Yes.

2.2 Do you agree that “differentiation” of processing channels should be minimised to optimise the benefits of the proposed reform and to avoid re-introduction of institutionalised and procedural rights?

Yes.

2.3 Should all claims in respect of employment related complaints/claims (including employment related equality matters) be submitted and dealt with by one body of first instance?

Yes. The Department of Jobs, Enterprise and Innovation should draft a comprehensive complaint and answer forms which would include all pertinent information in addition to requiring parties to effectively plead their claim by analogy to legal pleadings. The factual contents of this form should be verified on affidavit by analogy to the requirements of personal injury litigation under section 14 of the Civil Liability and Courts Act 2004. This would also remove the risk of trial by ambush at the hearing of the complaint itself. Such a comprehensive complaint form would also facilitate the early assignation of complaints to two proposed categories of adjudicator: non-lawyers and lawyers. The former category of adjudicators (like the existing Rights Commissioners) could adjudicate on the legally straightforward cases while the more complex cases, as evidenced by the pleadings, could be assigned to a panel of private legal professionals (like the existing legal professional members of the Employment Appeals Tribunal).

2.4 Should employment rights cases only go to the body of second instance on appeal (i.e. should the right of either side to object to the body of first instance hearing a case be removed)?

Yes. Furthermore, the right of appeal should be qualified by the requirement that the appellant enter into a form of recognisance bond and lodge a sum of money (based upon the financial information supplied in the initial complaint or answer form) with the secretariat to avoid the bringing of unmeritorious appeals simply to delay judgment.

2.5 If minimal differentiation within a two-tier structure is to be pursued, what would the optimum streams/chambers be within the first instance and the appeals entity?

Refer to 2.2 above. The proposed employment tribunal should consist of one member (a non-lawyer or lawyer depending on the complexity of the case). The employment appeals tribunal should consist of three members, at least one of which should be a lawyer. Enforcement proceedings for general employment law

breaches should be prosecuted by the Minister before the District Court with the employment tribunal itself concerned solely with individual or class actions brought by employees against employers.

2.6 What would be the advantages and disadvantages of having statutory redundancy appeals handled on an administrative basis, perhaps through established social welfare appeals structure, given that statutory redundancy payments are now administered by the Department of Social Protection?

The use of detailed complaint and answer forms, as advocated above, could result in legally straightforward cases, where the material facts are not in dispute, being dealt with on an administrative basis and complex cases being assigned to a lawyer member employment tribunal.

Appointment, tenure, etc, arrangements in new streamlined employment rights bodies

2.7 Should the arrangement 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?

The Exchequer could achieve significant payroll costs by appointing (lawyer) tribunal members from a specially constituted panel of legal professionals prepared to undertake employment tribunal and employment appeals tribunal work on a case by case basis as distinct from being fulltime employees of the State.

Information and Advice

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

Yes. The site should also contain Restatements of the various employment law statutes, certified by the Attorney General under the Statute Law (Restatement) Act 2002, and therefore admissible in proceedings before the proposed employment tribunal and employment appeals tribunal.

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. The proposed employment tribunal should merely provide an adjudicative function. It should be the function of the Department of Jobs, Enterprise and

Innovation to provide access to employment rights information generally and thereafter for individuals to take their own legal advice as to how the law applies to their own particular circumstances.

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

An online employment law handbook which is updated on a regular basis to take account of changes to the law.

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?

No. This is the function of the employer's or employee's trade union/lawyers and should not concern the Department of Jobs, Enterprise and Innovation.

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 be best achieved?

Through a adequately-funded and statutorily independent Labour Relations Commission which would oversee the operation of the proposed employment tribunal and employment appeals tribunal and provide administrative support. Appointments to this body should be open to the public and conducted solely through the Commission for Public Service Appointments to avoid any potential political interference with the operation of the LRC and thereby maintain confidence in its impartiality among the private and public sector.

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

Yes. Refer to 2.3 above. Appropriate penalties should be available, by analogy with section 25 of the Civil Liability and Courts Act 2004, for any person who gives, or dishonestly causes to be given, information which is false or misleading in any material respect, and he knows to be false or misleading,

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

Refer to 1.4, 2.3 and 2.13 above.

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

Yes. 6 weeks (42 days) to make a complaint to the proposed employment tribunal from the date of the last occurrence of the conduct complained of and 3 weeks (21 days) from the date of the determination to appeal to the employment appeals tribunal. A statutory power to extend the first time limit (i.e. 6 weeks) should be available where the complainant can demonstrate he made an access request to the respondent within that period under the Data Protection Acts 1988 and 2003 and/or Freedom of Information Acts 1997 and 2003.

2.16 Do you agree that more consistent arrangements are required for the representation of claimants so as to enable individual to nominate a person to represent them at hearing e.g. trades union

official, solicitor, other representatives, etc?

Yes. Consideration should be given to delimiting the extent of decision of the Supreme Court in *Burns and Hartigan v Governor of Castlereagh Prison* [2009] ELR 109 (<http://www.courts.ie/judgments.nsf/f69fbd31c73dda2580256cd400020877/b896cec33cb792ed8025758b0050e32c?OpenDocument>) through appropriate legislation to further this objective.

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?

No. A simple power of attorney under section 16 of the Powers of Attorney Act 1996 is already available to deal with appropriate cases. A trade union, however, should be entitled to take a class action on behalf of a group of employees with identical complaints.

Enforcement

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

Yes. Section 8 of the Enforcement of Court Orders Act 1940 should be extended to include an order for payment of compensation from the proposed employment tribunal or employment appeals tribunal, as appropriate, and thereby enforceable in the District Court, as distinct from the (present) Circuit Court, under Order 57 of the District Court Rules 1997 (as amended) to both reduce legal costs and the time involved in obtaining a court order, the breach of which would attract imprisonment.

Facilitating early intervention and alternative dispute resolution methods

3.1 Should there be a uniform set of procedures regulating the conduct of hearings in all cases heard at first instance?

Yes. See attached consolidated Unfair Dismissal (Claims and Appeals) Regulations 1977 which include the relevant legislation regulating practice and procedure before the existing Employment Appeals Tribunal.

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

A comprehensive complaint and reply form. Refer to 1.4, 2.3 and 2.13 above.

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.

It is the writer's opinion that alternative dispute resolution is inappropriate to the resolution of employment complaints, being better suited to familial disputes. If the matter is capable of amicable solution, it should have already been resolved at an internal level where appropriate grievance and disciplinary policies are in existence (refer to 1.1 above). Employers and employees who appear before the proposed employment tribunal will simply want a decision on the merits, as their representatives will (presumably) have endeavoured to settle the claim prior to hearing. Consequently, the requirement to engage in mediation adds an unnecessary layer, causes delays and incurs addition costs. I understand the statistical information from the Equality Tribunal is supportive of the foregoing conclusion concerning the use of mediation under the Employment Equality Acts 1998 to 2008 and Equal Status Acts 2000 to 2008.

3.4 Is there scope for harnessing the expertise and capacity of personnel within the existing bodies to decide on straightforward issues where purely factual matters are in dispute?

Yes. The existing Rights Commissioner Service could easily be adapted to form the proposed employment tribunal discussed above, with lawyers being assigned to specific cases where the complaint form and answer demonstrates the issues are not straightforward.

3.5 Is there scope for forging positive connections between public dispute resolution system and external experts in preventative dispute resolution methods at workplace level?

No. The proposed employment tribunal and employment appeals tribunal should be independent, and seen to be independent, of any external influences and should provide an adjudicative role alone. Refer to 2.9 above.

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

Yes. Refer to 2.9 above.

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

No. Refer to 3.3 above.

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?

No. Refer to 3.3 above.

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

Yes. For example, the lack of the availability of interlocutory injunctive

relief before the Equality Tribunal, coupled with the extraordinary delay in obtaining a hearing date, means that in access to employment claims an employer can illegally discriminate against a prospective employee safe in the knowledge that by the time the case is eventually heard the only practical remedy available to the Equality Officer is compensation, which itself is capped at the euro equivalent of IR£10,000. Once a complaint form has been submitted, it should be open to the employee to apply to the employment tribunal, on notice to the employer, for appropriate interlocutory relief. By analogy with equity, the employee should be obliged to give some form of undertaking as to damages, by reference to the financial information contained in the complaint form, so that the employer has recourse to some form of security in the event that the complaint is successfully defended.

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

Yes, but only where the salient facts are not in issue as between the parties. The jurisprudence of the Superior Courts concerning the availability of an oral hearing before the Financial Services Ombudsman may be of assistance. In brief, where there is a clear conflict of evidence as to the facts of the complaint, as is usually the case, the only appropriate means for determining such a conflict of evidence is through the medium of an oral hearing where parties have the right to call witnesses and cross-examine.

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?

Yes, but only where the parties make an pre-hearing offer in open correspondence (i.e. not a without prejudice offer). By analogy with common law, the respondent should be entitled make a Calderbank-like Offer (i.e. without prejudice save as to costs) to dispose of the claim prior to hearing. In the event that the complainant succeeds at hearing, but does not recover a sum greater than the said offer, the employment tribunal should have the power to direct him to pay the respondent's costs.

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. Refer to 3.1 above.

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, but only in clear cases where the salient facts are not in dispute. Refer to 3.10 above.

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

By analogy with the provisions of Article 34.1 of the Constitution of Ireland 1937, employment disputes and appeals should, in principle, be heard in public save for certain limited circumstances (e.g. the claim involves the tendering of commercially sensitive evidence the disclosure of which would be seriously prejudicial to the legitimate interests of employer). See, for example. Section 205(7) of the Companies Act 1963.

3.15 Should there be a uniform period for submitting appeals?

Yes. Refer to 2.15 above.

Finally, it is submitted that further costs could be saved by requiring the proposed employment tribunal and employment appeals tribunal to utilise the existing infrastructure of the Courts Service around the country. The various courthouses would prove a more appropriate setting than (currently) hotels and presumably the Department of Jobs, Enterprise and Innovation could obtain the use of such facilities for free, or at least at a significant discount. Moreover, the previous rollout of DAR (Digital Audio Recording) to most courthouses by the Courts Service would avoid the current need to take copious notes of the various witnesses' oral testimony and thereby facilitate a more efficient use of the State's limited resources.

I am available to discuss these observations if required.

Regards

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