

Mr Eamonn Gallagher
Department of Jobs, Enterprise and Innovation,
Davitt house
65a Adelaide Road,
Dublin 2

16 September 2011

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

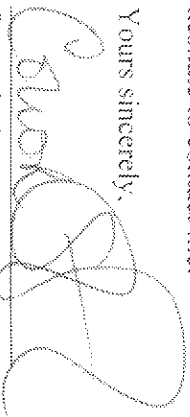
Dear Mr Gallagher,

Please find enclosed my submission in relation to reform of the State's employment rights and industrial relations structures.

Although I am currently an Equality Officer in the Equality Tribunal, I am making this submission in a personal capacity.

If you need clarification of any of the suggestions in my submission, please do not hesitate to contact me.

Yours sincerely,



Conor Stokes

3 Carrig Villas,
Kilincarrig,
Greystones,
Co. Wicklow

Mobile: (087) 6294459
Telephone: (01) 2872717

**Submission regarding the reform of the State's
Employment Rights and Industrial Relations
Structures and Procedures.**

From: Conor Stokes, Equality Officer in the Equality Tribunal
(Submitting in a personal capacity)
3 Carrig Villas, Killincarrig, Greystones, Co. Wicklow
Telephone 01 287 2717, Mobile 087 6294459

To: Eamonn Gallagher, Department of Jobs, Enterprise and
Innovation, Davitt House, 65a Adelaide Road, Dublin 2.

Introduction

Although I have been working as an Equality Officer in the Equality Tribunal for the past four years, **I am writing this submission in a purely personal capacity.**

A number of the elements of this paper have been raised with other people in other contexts over the years but some of the elements are designed to stimulate debate and entail an 'outside-the-box' approach to dispute resolution in the employment field. In writing this submission, I have considered four principal documents:-

- An assignment I wrote while pursuing the Professional Diploma in Employment Law in UCED (submitted in December 2009), particularly part 4 on proposed reforms and part 5, its conclusions.
- The research paper 'Fit for Purpose?' Written by Richard Boyle and Muiris MacCarthaigh and published by the Institute of Public Administration (April 2011)
- A paper by Anthony Kerr, from the School of Law, UCED entitled 'The Resolution of Individual Employment Rights Disputes: The Reform Agenda (June 2011)
- Minister Bruton's consultation paper on the reform of the State's Employment Rights and Industrial Relations Structures and Procedures (August 2011)

Context

In considering the mission statements of the Labour Court, the Employment Appeals Tribunal, the Labour Relations Commission and the Equality Tribunal, a number of key aspirations can be identified that are relevant to the current debate. The agencies seek to provide services that are:

1. timely;
2. fair/appropriate;
3. informal; and
4. inexpensive.

Therefore, I suggest that any proposed reforms of the institutions should strive to achieve these ideals and to combine them with the NERA mission statement which aims "to achieve a national culture of employment rights compliance".¹

In his introduction to the recent consultation paper, Minister Bruton proposed an integrated two-tier system. I believe that this approach has merit for a number of reasons. Firstly, the current approach is unsustainable from cost perspective. Having regard to the state of the county's finances, the current employment conflict resolution mechanism is, simply put, unaffordable. By amalgamating the various agencies, the

¹NERA website - employmentrights.ie

State can avail of benefits from economies of scale and value-for-money afforded by a more efficient organisation.

Secondly, the current approach is unsustainable from a complexity perspective. In the introduction to the 2008 Annual report, the EAT makes the following point:

At the time, the creation of the Tribunal was considered an innovative move, by the State, in the area of employment rights. It was set up to ensure that a worker's statutory entitlement was given the force, as well as the full protection of the law. The Act thus established a forum within which the ordinary 'man in the street' could refer a claim to have those rights upheld.²

The system as it currently stands is too diversified and complex for legal practitioners, let alone for the 'man in the street'. Even a cursory glance at the reports and papers written about this area reveal a level of bureaucracy and complexity that is unsustainable in the provision of an efficient and effective employee conflict resolution system. Any reform to the system should make it more transparent to both employee and employer, thus enabling both parties to ensure that they are complying with the legislation without resorting to incurring additional costs.

However, I consider that there should be an independent Information Service to provide impartial information to employees and employers alike so as to enable the 'man in the street' to take or defend a claim regarding employment issues.

Suggested Reforms

I propose the following reforms:

1. A restatement of the law governing the employee/employer relationship in a codified manner, abolishing the various Acts and setting down the rights and obligations of both parties to the relationship in a logical and comprehensive manner. This could incorporate developments from the common law arena and from the European legislative framework.
2. Establish a system along the lines suggested by Teague & Doherty,³ comprising a first instance adjudication body, an appellate body and an independent Information Service which would include any information, inspection and advocacy roles. In relation to the adjudication and appellate bodies, I suggest adopting a system similar to the old UK immigration system where there was one decision maker at first stage, and one appeal decision maker, but with the facility for an expanded court to hear specific cases. Enable the appellate court to sit with three decision makers who can issue 'starred' decisions which it considers to be of particular relevance and precedent value. This serves the purpose of providing guideline decisions for both the first and appellate stages and assistance to practitioners who are advising clients. Appellate decision makers and administrators dealing with appeals should be able to request a tripartite court to sit where they deem the issues to be of particular importance or indeed, the initial adjudicator may be

² The Employment Appeals Tribunal Forty-First Annual Report 2008, p. 4

³ IRN 28, Reforming our IR Institutions – A Snap in the Wrong Direction?, Teague, P & Doherty, L.

- in a position to indicate whether such an expanded appellate body would be necessary in the event of an appeal.
3. The suggestion to have a third body dealing with the information inspection and advocacy role arises from concerns that I would have (i) as to the independence of the role of the institution were an employer or employee to find themselves defending allegations before that institution at a later stage and (ii) from the experiences that I have had with unrepresented parties in investigations that I have undertaken.
 4. Initial decision makers should be charged with an investigative role similar to that undertaken by existing Equality Officers⁴. This would enable unrepresented parties to appear before the first stage decision maker, secure in the knowledge that their case will be investigated.
 5. Ensure that there is no obligation to engage legal representation for parties to the adjudication and appellate bodies, thereby minimising costs. Although, of course, parties should be able to engage representatives if they so want, particularly in the appellate forum.
 6. Limit the right to appeal decisions/procedures of the appellate court to the High Court on points of law only, with exceptions as provided for by our European and International obligations. This would cut down on the additional steps that could be taken by parties and reduce the likelihood of mounting costs to the parties.
 7. Enable adjudicators and decision-makers to consider awarding amounts for 'pain & suffering' thereby limiting the necessity to take additional actions in other fora, e.g. personal injuries actions, etc.
 8. Impose an application fee, for example €40, to deter frivolous or vexatious applications and to fund the system. There is precedent for paying for access to justice in most courts, e.g. the Small Claims court charges an application fee of €18 and other courts charge stamping fees, etc when lodging claims. This fee could be made refundable to applicants who are successful in their cases and could be paid out by awarding this cost against unsuccessful respondents. In return for the payment of this fee, the new bodies should enter into a 'Customer Covenant' with applicants, guaranteeing amongst other specific deliverables, a level of customer service and a timely processing of their complaint.
 9. Make provision for position papers on the levels of awards (from within the 3rd body?). This would provide effective guidance on the forms of redress that could be provided to parties to employment actions and help to ensure consistency within and across the two strands of the system.
 10. Provide and encourage the use of alternate dispute resolution (ADR) methods along the lines of those provided by the Equality Tribunal and the Labour Relations Commission. This should facilitate the protection of ongoing employment relationships and could resolve a large percentage of cases in a non-confrontational manner, thereby reducing costs. Additional training could be provided to HR professionals and lawyers by the Information Service in relation to ADR thereby avoiding fractious employment relationships and leading to an overall reduction in the conflict that exists within the employee/employer relationship.

⁴ Employment Equality Acts, 1998-2008, S. 79

Conclusion

The ten suggestions above provide for a conflict resolution mechanism to deal with the employee/employer relationship that would be in line with the sentiments expressed in the existing institutions mission statements. These suggestions are aimed at providing a simpler, cost-effective system for resolving disputes in an informal manner. The system would be more open and transparent, providing fairness to each of the parties to a dispute. By codifying the law and placing an investigative role upon the first stage decision maker, the ordinary person could be assured that justice would be done and the experienced practitioner would be in a position to advise the client with more certainty.

Providing a two-stage system ensures that all parties can have their cases adjudicated upon in a fair and impartial manner and the addition of the provision for special, precedent cases enables all parties to consider the issues in light of additional guidance.

The suggestions above also provide for a more cost effective method of delivering the service, and would stop the 'forum shopping' element that currently exists whereby individuals apply to each of the existing institutions hoping, in some instances, to maximise the outcome rather than simply seeking to achieve a fair resolution.

On a note of caution, however, it would be important to maintain the informal nature of the system as it currently stands, enabling everybody to bring their dispute to a resolution without facing the daunting prospect of sitting in a more formalised courtroom.

Finally, there is no easy way to address the issue of how adjudicators/appeal decision makers should be recruited or appointed to their roles. From the perspective of various interest groups, the inclusion of their members seems logical. However a number of fundamental principles should be adhered to:

- The recruitment process should be open and transparent
- Decision makers should come from varied backgrounds in order to bring different perspectives to bear on the process
- Decision makers should be trained together in order to build up a collegiate atmosphere in the new entities
- A mechanism to ensure consistency within and across the new bodies should be put in place from the outset

If you wish to discuss any of these proposals further, my mobile phone number is 087 6294459 and my additional contact details are listed on the coversheet.



Conor Stokes

16 September 2011