SUBMISSION ON FORUM CONSOLIDATION TO THE DEPARTMENT OF ENTERPRISE, TRADE AND EMPLOYMENT

FROM FREE LEGAL ADVICE CENTRES, JANUARY 2004

Introduction

The observations made in this submission are very much by way of preliminary remarks on a complex subject. It is perhaps no secret that since the passing of the Redundancy Payments Act in 1967 and the setting up of the Redundancy Appeals Tribunal (later renamed the Employment Appeals Tribunal), the manner in which methods and forums of complaint under employment rights legislation has developed has been relatively haphazard, with no clear evidence of any systematic approach on the part of successive administrations. The pressure of transposing a stream of employment related directives due to Ireland's membership of the EEC/EC/EU may have contributed to this. Nevertheless, we believe that a review of this system is long overdue and welcome the opportunity to contribute to this process.

Multiplicity of Forums/ Avenues of Appeal

It is submitted that there are too many bodies hearing complaints under the various pieces of employment legislation with four separate forums being involved in processing claims. Equally, there appears to be little consistency in relation to the choice of either the initial forum of complaint or the avenue of appeal.

Some claims can only be initiated in the Employment Appeals Tribunal (redundancy, notice and insolvency payments) and these in the main date back to the 1970's and 80's.

Unfair Dismissal claims can be brought in the Rights Commissioner Service or the E.A.T and from our experience this can cause great confusion for members of the public as to which avenue is preferable and why. This is further complicated by the right of an employer to object to a Rights Commissioner under the Unfair Dismissals Act, leading some claimants to wonder why they went down this route in the first place.

Equally, clients phoning our office are often confused over the title and function of the various bodies. It is common, for example, for a caller to look for advice in relation to a claim for unfair dismissal due to be heard before the Labour Court when what they really mean is the Employment Appeals Tribunal. Another example of causing unnecessary confusion is the renaming of the Office of the Director of Equality Investigations as the Equality Tribunal, in terms of its similarity to the Equality Authority. One hears complaints and the other offers advice and information on the legislation but it was hardly with clarity in mind for members of the public that the renaming took place.

Many claims begin in the Rights Commissioner Service (too numerous to list!) some of which involve a potential appeal to the E.A.T and some of which involve a potential

appeal to the Labour Court. There does not appear to be any rationale for the choice of the forum of appeal. Indeed, the choice in some cases seems odd. For example, quite complex anti-discrimination legislation on the rights of part time or fixed term contract employees allows for an appeal to be made to the Labour Court (where despite its name no lawyer is involved in the adjudication) when it could be argued that the Employment Appeals Tribunal might a preferable avenue given that each division of the tribunal is chaired by a lawyer who might be expected to have more experience of the contractual niceties involved.

Role of Rights Commissioner Service

If there is a consistent trend in this area, it is that since the Payment of Wages Act 1991, all employment legislation begins with a complaint to a Rights Commissioner (with the notable exception of the Employment Equality Act 1998). However, the situation with the development of the Rights Commissioner Service is illustrative of the confusion that permeates this area. Originally set up under the Industrial Relations Act 1969 as a body to deal with trade dispute issues involving individual grievances in order to take pressure of the Labour Court, it underwent a metamorphosis starting with the Unfair Dismissals Act 1977 and has since become the primary initial forum for dealing with complaints under individual protective employment legislation.

How well has it done this job and how is it coping with the increased number and complexity of the issues it has to resolve? Our experience of casework over the years and anecdotal evidence would tend to indicate a bit of a mixed bag. The trend towards Alternative Dispute Resolution (ADR) and away from the involvement of courts in the adjudication process is welcome but it should not be allowed to dilute the vindication of employment rights. It may be argued that in certain cases there has been too much concentration on the conciliation approach involving a ‘something for everyone’ result and not enough on the rights and wrongs of the dispute in question. It may be argued, for example, that there has been too much concentration on settlements.

Equally, there now appears to be a formidable waiting list building up for Rights Commissioner hearings. This is presumably due to issues of staffing and resources but may also be attributable in no small way to the increasing variety and complexity of legislation that the Commissioners have jurisdiction to hear. These services were set up to provide a speedy alternative to more formal proceedings. If they cease to provide this, then they are not doing their job.

A further problem, certainly from FLAC’s point of view, is the policy of the service not to publish decisions under a number of pieces of legislation because the Commissioners hearings are in private (courtesy of Section 13 of the Industrial Relations Act 1969). We have no problem with hearings taking place in private or the identity of the parties to a complaint being withheld. What does constitute a difficulty, especially from the point of view of an organisation involved in advising members of the public on their employment rights, is the failure to publish decisions. It is thus impossible to provide guidance on how the Act is being interpreted, unless one or other of the parties decides to appeal to the

Labour Court. It is arguable, given that much of this legislation stems from the transposition of E.U directives, that this is a failure to vindicate that most important of employment rights – access to information.

Equality Claims/Role of Labour Court

Claims under the Employment Equality Act 1998 are processed in a unique manner. Unless the complaint involves dismissal or constructive dismissal or a gender complaint that the complainant has the option to process directly in the Circuit Court, the matter is assigned for hearing to an Equality Officer. With the agreement of the parties, the Equality Officer may act as a mediator and this is certainly a useful development that might be extended to other employment legislation. Assuming that one or other of the parties objects to mediation, a joint hearing takes place and a decision is ultimately issued by the Equality Officer. Either party has six weeks to appeal that decision to the Labour Court, whose decision is final subject to the right to appeal to the High Court on a point of law.

One of the net effects of this complaints system is that no lawyer is required to be involved in the adjudication process. Many may see this as a good thing and a healthy demystification of the process by way of Alternative Dispute Resolution. However, on closer examination, is this complaints system not without its problems? An increasing number of employers opt for legal representation at Equality Officer or Labour Court hearings. Given the complete absence of civil legal aid in this arena, this invariably puts the unrepresented complainant at a substantial disadvantage even if s/he is treated with kid gloves by the forum in question. This also leaves us with the curious spectacle of lawyers arguing often quite complex legal arguments before a non-lawyer forum.

There is no right of cross examination at an equality hearing. The Labour Court itself may question a witness on behalf of a representative of the parties but there is no right to directly question a witness. This involves an unsatisfactory process whereby the representative suggests the question which the Chair then asks. The witness directs his/her answer to the Court, even though the framer of the question is present to hear the answer. Any follow up questions must be similarly directed through the Chair. This questioning by proxy is awkward and unsatisfactory and again it might be argued that it fails to vindicate a claimant's or indeed a respondent's employment rights.

Indeed, it is arguable that the Labour Court is not in fact a court at all and badly needs to be renamed. The fact that it was given its name as far back as the Industrial Relations Act 1946 when it was the only forum of its type is testament to this fact. In the intervening period, a number of other institutions have been created that have served to heighten confusion in relation to its role. Reference has already been made to the misapprehension of many workers in relation to the role of the Labour Court vis a vis the Employment Appeals Tribunal. At least, the E.A.T can compel the attendance of witnesses by summons, cross examination of witnesses is permitted and the Chairperson of any sitting division of the tribunal is a practising lawyer. Thus, it might be considered a more appropriate forum for the resolution of disputes under employment legislation, leaving

the Labour Court (or the Trade Disputes Tribunal as it could be called) to deal with the more serious industrial relations issues with the Labour Relations Commission (LRC) as a forum of first instance.

Role of the Employment Appeals Tribunal

At present, the panel of legally qualified chairs of the Tribunal is quite large and some vice chairs hear very few cases in any year. Without wishing to impugn any individual's abilities, one would have to question the amount of knowledge of the employment law area that some appointees initially bring to the job as well as to query how much on the job training is provided by the Tribunal to its lawyer members. It may not help that the vast majority of appointees are simultaneously running their legal practices, whether as solicitors or barristers and only come into the Department to hear cases. It may be that with the increasing range and complexity of employment legislation, a Chairperson of the Employment Appeals Tribunal might become a full time post. The drawback here of course is that many legal professionals would not be willing to sacrifice their practices to take up a full time post. On the other hand, it might be suggested that a chair should require judicial experience or indeed be an existing judge to hear employment disputes.

A further problem with the smooth functioning of the Employment Appeals Tribunal is the sometimes inordinate time it can take to issue written determinations in unfair dismissal cases. Taken together with the long waiting time to have a claim heard, this can be very disheartening for a client anxious to get on with their working life. Our understanding is that this delay is often due, not to the fact that a decision has not been made, but to the difficulty of liaising between the relevant chair/panel members and the relevant secretary in terms of writing up and signing off on a given determination. Surely, this situation can be improved with better administration.

The E.A.T started out as a forum to process employment appeals speedily and inexpensively. Whatever about the latter being achieved, which is very much dependent on whether a claimant deems legal representation to be necessary in their particular case given the total absence of legal aid, it is arguable that the former is not being delivered on given the substantial time gap from the filling out of the T1A form to the receipt of the written determination.

Employment Rights Enforcement Unit

Some points of note in relation to the various bodies incorporated under this unit include:

The number of Labour Inspectors is still far too few to carry out the range of supervisory functions under the array of legislation they are responsible for.

Although enforcement on behalf of a claimant by the Minister is, in principle, very helpful and necessary, it does not extend to all pieces of employment legislation (for example, there is no provision for enforcement by the Minister of decisions under the Payment of Wages Act, a very fundamental piece of employment legislation involving

unlawful deductions from pay). Equally, there is inevitable time delays involved usually greater than if the claimant sought to enforce the decision themselves. Finally, the decision whether to enforce or not appears to be the Department's choice and it appears that where the chances of enforcement bearing fruit are slim, there is an understandable reluctance on the State's behalf to devote the resources. This brings us back to an issue that has been of concern to FLAC for some time in relation to enforcement of employment decisions, namely the question of informal insolvency. Unless a respondent employer is formally insolvent for the purposes of the Protection of Employees (Employer's Insolvency) Act 1984, it is very difficult to enforce a decision that may have taken considerable time and resources to obtain. Should there be a role for the newly established office of the Director of Corporate enforcement here?

Finally, in relation to the Information Unit (from whom FLAC regularly receives referrals on employment issues particularly outside the immediate area of employment legislation), it is apparent from our experience that it is providing a good and valuable service in terms of information provision.

Conclusion

There is, in our view, a strong case for consolidating all existing employment legislation into one overriding Act with specific chapters. All initial complaints could be made to the same forum with a common right of appeal. Appeals on points of law could be directed to the High Court. The Employment Tribunal and the Employment Appeals Tribunal (sitting with a judge and union/employer panel members) system operated in the U.K. may serve as a useful example. However, given that there are difficulties in Ireland in relation to the administration of justice (as opposed to limited functions and powers of a judicial nature) outside the courts, there is likely to be a constitutional imperative that a final right of appeal must lie to a civil court. However, for example, the Circuit Court has a division dealing exclusively with family proceedings. Might it not similarly deal with employment appeals?

FLAC intends in the coming year to carry out further research in to how employment rights complaints are processed in other Member States of the European Union with a view to making further suggestions for reform.

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