DEL REVIEW OF THE NI EMPLOYMENT DISPUTE RESOLUTION SYSTEM

LRA RESPONSE TO DEL CONSULTATION QUESTIONS

4 SEPTEMBER 2009

Maintaining good employment relations/informal attempts to resolve disputes at work

Q1 What impact do the statutory dispute resolution procedures have on the development of strong employment relations?

To a limited degree the expectations raised by the new procedures have been realised in that the simplicity of the 3 step statutory procedures would appear to be well received. However the statutory procedures have proved ill-suited to some situations and have either made little difference or actually hampered effective pre-claim dispute resolution in many others.

One fundamental flaw in the statutory procedures is that they impose a "one size fits all" approach to the handling of employee grievances, disciplinary matters, and dismissal on any grounds. Secondly the procedures have resulted in the formalisation of discipline and particularly grievance issues at too early a stage. This frustrates pre-claim dispute resolution.

Q2. We are proposing an inter-agency approach to the provision of information and advice on employment law/workplace disputes. How might such an approach work most effectively?

The Agency, as the statutory expert body in employment relations, has been operating an inter-Agency approach on the provision of information and advice for some years. The Agency supports the principle of a 'one stop shop' for the provision of information and advice. In practice however it needs to be appreciated that there is a significant difference between providing information which can be communicated face to face, in hard copy or electronically, and the giving of advice which requires a professional working knowledge of good employment relations practice and employment law.

Historically the Department has provided information on employment legislation through its employment law booklets. The Agency, as part of a one stop shop approach, is willing to provide this service. Were an inter agency approach to be agreed between the social partners and key institutional stakeholders the Agency believes that we are best placed to undertake the 'one stop shop' role and would be willing to do so.

Q3. Do you agree that the public sector, as an employer, has a role to play in developing and promoting best practice?

The Agency is of the view that the public sector should play a leading role in adopting good employment practice and in-house alternative dispute resolution processes. The Agency is available to support the public sector in developing this role should the Assembly seek to develop in-house alternative dispute resolution as a matter of public policy.

Q4. Would enhancing the capability of managers through training in dispute prevention/resolution techniques encourage the development of employee relations best practice? If so, what type of training should be developed?

The Agency is of the view that the enhancing of management competence and capabilities in dispute prevention/resolution would encourage the development of good practice in employee relations and make a significant contribution to the pre-claim resolution of disputes. Agency workshops and good practice seminars in areas such as the handling of discipline and grievances currently provide the opportunity, particularly for small firms, to undertake such practical skills training. A comprehensive training programme should be based on an introduction to organisational behaviour and industrial relations complemented with a programme of skills/competency development in areas such as communications, dealing with inter-personal disputes, and collaborative problem solving. Development in alternative dispute resolution skills would also be required for more specialised roles particularly in larger organisations. The opportunity should be taken to promote these skills through skills councils and through regional/sector/workplace employment relations machinery.

It is particularly important that the Agency's facilitation role is enhanced to a full employment relations training role.

Q5. How can small businesses be supported to establish and maintain an employment relations culture supportive of dispute prevention/informal resolution of workplace disputes? What role should Government/the Labour Relations Agency/the Federation of Small Businesses and similar organisations play?

It is the Agency's experience that it is best to provide information, advice and assistance on a face to face basis. For example, every attempt should be made to facilitate and maximise on-site visits. The Agency provides a vetting service for small firm's employment documentation and, subject to the outcome of the DEL Review, is willing to develop employment policy and procedural guidelines designed to meet small firm needs and circumstances. The Agency is also willing to develop its partnership with INI in respect of the INI start up and 'Go for it' programmes. It is notable that the Inland Revenue in GB notify all new SMEs of ACAS services. This practice could be usefully introduced in NI. The Agency is also willing to further develop its work with the FSB in outreach initiatives to small firms and to undertake research into the needs of SMEs in NI. The case for developing a small firm's regional employment relations strategy should be explored.

Q6. Should some form of company accreditation associated with employment relations best practice be introduced? Should it be a new standard or should it form part of an established accreditation scheme? How could businesses be encouraged to become accredited?

The Agency takes the view that an additional company accreditation scheme is not at this point in time a priority in devising better methods for the resolution of workplace disputes.

Q7. Is there a need for inspection/enforcement machinery to produce more legally compliant workplaces?

In light of the Agency's statutory duty to improve industrial relations in Northern Ireland, the Agency request that DEL initiate discussions with the Agency prior to and as part of the development of any inspection/enforcement proposals.

Q8. What additional measures, statutory or non-statutory, would aid the promulgation of employee relations best practice?

A concerted programme for the promotion of good employment practice and alternative dispute resolution emphasising greater commitment to pre-claim dispute resolution should support the introduction of any new legislation.

FORMAL** PROCESSES **FOR RESOLVING DISPUTES AT WORK

Q9. Of the three possible options with regard to the statutory dispute resolution procedures, which is your preferred option and why do you feel this option is the most appropriate?

1. Retain the procedures without modification.

2. Modify the procedures, retaining them in part but preserving a process mandated by statute.

3. Repeal the procedures in full and replace them with a voluntary compliance model.

The Agency preferred option is Option 3 coupled with a bespoke approach to introducing new arrangements to NI.

The Agency favours the repeal of the current statutory dispute resolution procedures, as long as they are replaced by a package of measures to promote and support sound workplace decision making and effective dispute resolution; all of which must be underpinned by a statutory LRA Code of Practice articulating fundamental principles of fairness in workplace procedures with an emphasis on the pre-claim resolution of disputes.

The Agency supports the voluntary approach to participation in dispute resolution however there is one development that the Agency supports which would not be voluntary, that is a claimant should be required by law to submit a claim to the Agency before the claim is formally lodged with the Tribunal.

Q10. Should any additional measures, statutory or otherwise, be introduced to improve formal systems for resolving workplace disputes?

It is important to distinguish between statutory guidelines – which will have a status in law such that tribunals will take account of their provisions – and non-statutory guidance giving advice on good practice. Both are required.

Statutory guidelines set fundamental standards of fairness and outline the essential components of reasonable practice in handling issues that might lead to workplace disputes or claims. These should be published in the form of an LRA Code of Practice. Comprehensive non-statutory guidance in printed and web-based form should also be readily available to employers, employees and representatives alike.

Q11. Would there be any unintended consequences of the repeal of the statutory procedures (or part of them) that would need to be considered?

The most obvious potential consequence is that tribunal claims would increase because in the absence of common standards some employers might take a less rigorous approach to disciplinary decisions and dismissals; and because without effective in-house procedures for resolving grievances many employees would see the tribunals as the only route to obtain redress.

Q12. If the procedures or parts of them are to be repealed, what should replace them and how would compliance be encouraged?

If the procedures or parts of them are repealed the Agency takes the view that the Agency responses set out at Questions 1-14 of this consultation paper provide the basis for what should replace them and how compliance should be encouraged at the centre of which lie an LRA Code of Practice, LRA Guidelines and the promotion of in-house and pre-claim alternative dispute resolution.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

Q13. What are the strengths and weaknesses of current ADR services provided by the LRA?

The Agency sees its strengths in its independence from Government, employer, trade union and employee interests and in the provision of impartial advisory and dispute resolution services. A particular strength of the Agency lies in the statutory authority and statutory protections provided for its conciliation and arbitration services. Dispute resolution in the form of conciliation remains a statutory duty for the Agency.

The fundamental weakness of the Agency ADR services is that our statutory authority and protections are provided on the basis of an outdated concept of dispute resolution. The Agency therefore finds its current statutory authority and protections lacking in that they fail to allow the Agency the scope to offer the full range of contemporary ADR techniques. The Agency would propose that the statutory authority and protections currently allowed for the process of conciliation are allowed for alternative dispute resolution processes in general. Such a step would be essential for our expanding Agency services in facilitating the resolution of disputes before tribunal claims are lodged. This would enhance the capacity of the Agency in providing a much more targeted, flexible and responsive ADR service.

The Agency acknowledges that other stakeholders and interested parties will be replying to this consultation question and would welcome feedback from and discussions with DEL on the comments made. This will allow DEL the opportunity of making informed judgements on the responses.

Q14. How can the LRA improve its services?

Taking into account our knowledge and experience of employment relations at Board level and among our staff the Agency takes the view that our services can be best improved in areas such as:

- Maximising face to face communications between individual conciliation officers, claimants and respondents.
- Regulating the first meeting between the Agency, a claimant and the respondent.
- Developing plain English and other language based documentation explaining what alternative dispute resolution is including its advantages and disadvantages.
- Providing training in the field of employment relations.
- Facilitating the development of ADR skills
- Holding ADR outreach clinics and strategically promoting pre-claim dispute resolution.
- Being able to offer a full range of ADR techniques in resolving disputes.
- Developing the use of new technology in communicating the availability of ADR, its benefits and the various ADR processes.

Q15. Could the LRA be more involved in conciliation before a tribunal claim is lodged, and if so how?

The Agency is fully committed to enhancing its pre-claim dispute resolution services.

The Agency is of the view that should an individual decide to lodge a claim at Tribunal the current or an appropriate claim form should be submitted to the Agency prior to the claim being submitted to the tribunals.

The Agency's preferred view is to allow a period of eight weeks from the receipt of a claim by the Agency during which the parties are required to meet with the Agency in order that ADR processes are explained and considered. It should remain up to the parties whether or not they take advantage of the Agency's ADR processes at this or any other point of time.

Q16. Should the LRA be equipped to enable it to provide advice in addition to information?

The Agency currently provides information and advice on employment legislation, employment good practice and dispute resolution in the workplace particularly aimed at the small and medium sized firms.

The GB debate is aimed at enhancing the pro-active role of the ACAS Helpline e.g. informing callers as to the ADR options available to them in respect of the resolution of their issues and by directing the callers to the officers who are able to provide further assistance on those options. The Agency would welcome an enhanced role for the LRA Helpline.

Q17. Is some form of early neutral evaluation desirable and, if so, how should the process work?

Early neutral evaluation is but one ADR process amongst many. There is a need for the development of the flexible use of a variety of ADR techniques. Clearly early neutral evaluation in this context is desirable as a technique and can be provided as part of a broad menu of processes made available by the Agency.

Where tribunal claims or disputes that may result in a tribunal claim become, on a voluntary basis, the subject of early neutral evaluation the Agency would envisage that a suitably qualified Agency Employment Commissioner would be the most appropriate vehicle to provide the early neutral evaluation of a case. Early neutral evaluation would require the same protections as the current Agency statutory arbitration schemes but in the context of a more holistic employment relations approach.

The Agency is of the view that early neutral evaluation and other similar evaluation processes are preferably developed within the context of the Agency's ADR services and not within the litigious context of the tribunal process.

Q18. Should the statutory LRA arbitration scheme be expanded to cover a wider range of jurisdictions?

It is the view of the Agency that the scope of the current statutory arbitration schemes should be expanded to all relevant employment jurisdictions commensurate with those dealt with by the Industrial and Fair Employment Tribunals. It is the view of the Agency that statutory arbitration should be provided through an Employment Commissioner Scheme with provision for an appeal from the Employment Commissioner to the Industrial Court.

Q19. Should there continue to be time limits on the LRA's duty to attempt to resolve disputes post-claim?

The Agency is strongly of the view that there should be no time limits on the LRA's duty to attempt to resolve disputes. The current statutory provisions (7 and 13 weeks) concerning the LRAs conciliation role should be repealed.

Q20. Would it be beneficial to incorporate within the existing system a process comparable to Rights Commissioner hearings in the Republic of Ireland?

The Agency takes the view that there are advantages to elements of the Rights Commissioner approach when compared to the current statutory arbitration arrangements in NI. The Rights Commissioner approach is respected and utilised in ROI. The statutory arbitration arrangements in NI by comparison are not utilised to the same degree. There is an appeal from a Rights Commissioner decision to an EAT or Labour Court but no appeal is available from the NI statutory arbitration schemes. There would appear to be a greater degree of flexibility with the Rights Commissioner approach that allows for the fluid application of problem solving techniques.

The Agency is of the view that the current statutory arbitration arrangements should be revised (1) to allow statutory arbitration to apply to all relevant employment jurisdictions

commensurate with those dealt with by the Industrial and Fair Employment Tribunals and (2) to allow for an appeal from the Employment Commissioner to the Industrial Court.

In light of the above the Agency would set up a new Employment Commissioner Panel. The panel would be commissioned by the LRA to provide alternative dispute resolution services such as the early neutral evaluation of cases and arbitration. The Agency envisages legislation that would allow for the above proposal on the same basis as for the current statutory arbitration schemes, that is, legislation would provide for the LRA submitting for DEL approval a LRA Employment Commissioner Scheme.

Q21. Could a simplified tribunal application be used which would enable the LRA to assist the parties to determine how each case should be taken forward?

The Agency supports the general principle of simplifying (1) employment legislation and (2) the supporting administrative arrangements.

In practical terms the Agency supports the simplification of the Tribunal form as claimants and respondents appear to find the current form demanding. The simplification of the form would enhance access to justice. The practical implications of this proposal should be the subject of discussion between Tribunal users, DEL, the social partners and the Agency. The Agency awaits any proposal to simplify the form.

However the Agency is of the view that the IT1 and IT3 forms should remain comprehensive in scope and would not be in favour of the withdrawal of the provision that each party to a dispute sets out the substance of their claim/response in writing. This discipline considerably enhances the work of the Agency in working towards early resolution. There must be an attempt, to some degree, to state the basis and substance of the claim and response.

Q22. Would it be beneficial to allow for pauses in the time limits imposed on tribunal claims while ADR processes are taken forward?

Given the Agency position set out at Q15 above it would be the Agency that would receive the claim form and either during or at the end of an 8 week period the form would be forwarded to the relevant Tribunal or an Employment Commissioner. Given this scenario the Agency does not see how any pauses in time limits would be beneficial.

Q23. Should a subsequent tribunal be empowered to take into account the parties' actions with regard to ADR processes and penalise unreasonable behaviour?

The Agency is of the view that a subsequent tribunal should not be empowered to take into account the parties actions with regard to ADR processes. The integrity and confidentiality of participation in ADR processes should not be compromised in any way. Tribunals can do much to prompt parties to resolve their cases without having to impose formal sanctions. In particular, Chairmen may often be able to promote alternative dispute resolution in the course of case management discussions. In this regard the presence of an Agency officer at the Tribunal offices has worked very well.

LEGAL REMEDY

Q24. Should legal aid be available in respect of tribunal hearings and, if so, in what circumstances?

The Agency has no comment to make on this question.

Q25. Should the amount of the deposit be increased in deposit hearings, and if so, to what amount?

The Agency has no comment to make on this question.

Q26. Should the tribunal's powers to award costs be extended, and if so, in what circumstances?

The Agency is of the view that the current powers of tribunals to award costs are sufficient.

Q27. What, if any, beneficial changes could be made to time limits which apply in relation to the tribunal process?

The Agency is of the view that there is no discernible benefit to making changes to time limits.

Q28. Would it be desirable to provide a 'fast-track' service for more straightforward claims? If so, how should it operate?

The Agency is of the view that it would not be desirable to provide a fast track service for more straightforward claims. In NI such claims, in the main, are withdrawn or settled at an early stage. In addition the profile of claims in GB is different from NI in that more claims tend to be joined jurisdictions which, in relation to settlement, are not susceptible to a fast track approach.

Q29. Is there scope to strengthen the enforcement of tribunal awards?

The Agency has no comment to make on this question.

Q30. What steps, if any, can be taken to make improvements in how multiple claims are handled?

Where there is a collective dimension to a multiple claim everything possible should be done to encourage and enable the disputants to resolve the dispute directly through normal collective machinery or with third party assistance, with determination by the tribunal very much a last resort.

Where that does not prove possible, or where there is no "collective" dimension to the multiple claim, it would be desirable , in the first instance, to seek to resolve it by using ADR processes. However it may also be desirable to extend tribunals' management powers to formally identify appropriate test cases, particularly where the parties are unable or unwilling to do so; and for the outcome of those test cases to be binding on other related cases.

Individual employment rights on matters as diverse as holiday entitlement and equal pay are often caught up in the subject matter of collective negotiations. As a result, collective disputes are increasingly pursued via large scale multiple claims to the tribunals. Such matters ought to be determined through internal bargaining processes and where necessary with third party support in the form of conciliation or arbitration.

On the other hand, existing tribunal practices appear to offer an appropriate and effective means of determining other multiple claims, such as those brought by individuals no longer employed by the respondent and unrepresented by a trade union.

Q31. Should tribunals have the ability to make improvement recommendations? How would you envisage such a system working?

It is the Agency view that Tribunals that can demonstrate appropriate practical workplace relations experience may be in a position to indicate areas where consideration can be given to improvement. The Agency would be of the view that in such circumstances Tribunals should not be required to make detailed recommendations as these may be viewed by one or either party as tainted by the decision of the Tribunal on the substantive matters. It should then be up to the parties to decide if and how such recommendations are to be addressed.

Q32. Should tribunals be given statutory contempt powers?

The Agency has no comment to make on this question.

Q33. Should the powers of tribunals to restrict reporting be revised, and if so, in what way?

The Agency has no comment to make on this question.

Q34. Is there a need for a restructuring within the tribunal system in line with any of the following options?

1. Replacement of industrial tribunals and the Fair Employment Tribunal by a single Employment and Equality Tribunal.
2. Retention of industrial tribunals with a separate Equality Tribunal dealing with all equality cases.
3. Creation of a single Employment Tribunal but with an Equality Division focusing on equality cases.
4. Integration of all employment-related tribunals into a two-tier unified tribunal system.

The Agency has no comment on the structural aspects of the tribunal arrangements. However the Agency is of the view that all employment jurisdictions, industrial and equality, should be dealt with by a dedicated employment tribunal or tribunals. These employment tribunals should be separate from any bodies having jurisdiction in relation to the provision of goods, services and facilities.

APPEAL

Q35. Should the current appeal process be restructured?

The Agency is of the view that the decision of a Tribunal should be subject to appeal to an Employment Appeal Tribunal. Should an Employment Appeal Tribunal not be introduced it is the view of the Agency that the appeal from the Tribunal should go to the Court of Appeal. This is not the preferred view of the Agency as the judicial gap between the Tribunal and the Court of Appeal is considerable. On the other hand such a gap may well focus the minds of the Tribunals and the parties in fully exhausting the Tribunal considerations and proceedings.

Q36. Would the introduction of an Employment Appeal Tribunal be an improvement upon the current structure?

It is the view of the Agency that the introduction of an EAT would be an improvement upon the current structure. An EAT along with an Employment Commissioner Scheme would allow for greater access to justice. An EAT would further develop employment relations judicial capability in NI and allow for an appropriate appeal mechanism from the Tribunals.