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19 July 2012

Employment Law Review
Employment Relations Policy and legislation Branch
Room 203
Adelaide House
39-49 Adelaide Street
Belfast
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To whom it may concern

**Re: Labour Relations Agency Response to the Department for Employment and Learning Employment Law Review Discussion Document May 2012**

The Board of the Labour Relations Agency (the Agency) at its meeting 21 June 2012 determined the following response to the Department's Employment Law Review Discussion Document May 2012.

## Introductory Comment

The Agency notes the commitment of the Assembly to the ongoing implementation of matters deriving from the DEL Review of Dispute Resolution 2010. We also welcome the support of DEL in effecting the Agency's statutory duties of improving employment relations and resolving employment disputes.

Taking into account recent initiatives to improve employment relations the Agency is of the view that:

1. The overriding aim of the review of employment law, should be to further the commitment in the NI Executive's Economic Strategy of promoting the early resolution of workplace disputes. The Agency takes the view that any fresh initiatives should enhance the Agency's capability (a) to promote good employment practice at workplace level and (b) to assist parties to resolve employment disputes as close to source as possible.

2. Care needs to be taken when considering changes to Northern Ireland (NI) employment law from both the perspectives of (1) promoting enterprise and creating jobs and (2) improving employment relations. While promoting enterprise, creating jobs and improving employment relations are mutually supportive, it is important to achieve consistency on matters of detail.

3. Employment law initiatives currently being taken forward in Great Britain (GB) require careful assessment in respect of their potential impact on employment relations in NI. As the DEL Minister has indicated in his Foreword, his approach is about developing regional solutions. Employment law and employment relations arrangements in GB are not the same as those in NI e.g. (a) statutory provision for discipline is in place in NI but not in GB and (b) ACAS no longer offer a statutory arbitration service.

4 It is noted that recent employment relations initiatives relate to the NI economic and social context e.g. the NI micro firm economy and the patterns of claims submitted to NI tribunals. The Agency supports this principle in so far as action taken leads to the improvement of employment relations and the promotion of alternative dispute resolution (ADR).

The Agency response to the matters raised by the DEL discussion paper is as follows.

## 1 Early conciliation

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.

The Agency is of the view that the submission of claims to the LRA and the subsequent engagement of the parties with Agency staff will make a positive contribution to the early resolution of disputes. We believe that the understanding and promotion of the full range of ADR processes will be considerably enhanced.

The Agency reserves comment on the operational, organisational and resource issues that will need to be considered prior to such an initiative.

In the event that such an initiative is being contemplated by the Department the Agency strongly advises that discussions with the Agency are entered into as soon as possible. There will be considerable advantage in early discussions in respect of the working up of draft proposals.

## 2 Rapid resolution

The Agency is of the view that it would not be advantageous to provide a Tribunal 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.

There remain two outstanding, more practical, issues (1) in the event how is a 'fast track' case to be defined and (2) are there, in NI, sufficient 'fast track' cases to warrant a separate system outside of (a) ADR processes, including statutory arbitration and (b) the normal Tribunal processes?

The point is well made in the DEL discussion paper that NI Tribunals have made significant strides in respect of case management and administrative efficiency. In addition the enhancement of ADR processes deriving from the DEL Review of Dispute Resolution 2010 is at its infancy. We have yet to fully implement and subsequently evaluate the 2010 initiatives. The full menu of ADR processes has yet to be developed in NI. We are not in a mature ADR position. It would appear, therefore, premature to be considering a Tribunal (GB Legal Officer) 'fast track' system at this point in time.

## 3 Mediation

The Agency, in 2009, took 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. At some time in the future it may well be necessary to regulate and professionalise the employment mediation industry but such a requirement is not immediately apparent.

The Agency would welcome discussions on how an employment mediation network might be constituted, facilitated and managed. Is this to be a loose voluntary association of practicing

employment mediators who meet to discuss current best practice? The question of the Agency's relationship with such a network remains open for discussion. We would, as a matter of course, be supportive of a network that was seeking to develop employment mediation on a professional basis.

Issues around a Code of Ethics and continuous professional development etc; would more appropriately rest with the establishment of a registered independent professional body.

As part of the NI ADR system the Agency is willing to consider the establishment of an Agency register of accredited mediators as currently held for LRA arbitrators and LRA equal pay experts.

### 4 Establishment of Expert User Group

It would appear sensible for the Tribunals to consult with as wide a group of Tribunal users as would be reasonably practicable. By Tribunal users we refer to a wider group than interested professional parties.

The Agency takes the view that the LRA has a close and unique relationship with the Tribunals as evidenced by the recent agreement of an OITFET/LRA Memorandum of Understanding. The Agency is open to discussions on how we might make a contribution to the Industrial Tribunal Rules Committee. Our aim would be to assist with the streamlining of the system and to promote collaborative and joined up thinking on issues such as improvements to the case management discussion process (CMDs).

### 5 Witness statements

The Agency welcomes measures taken to improve the efficiency of the Tribunal system.

### 6 Chairs sitting alone in unfair dismissal cases

The Agency is not in favour of a Tribunal Chair sitting alone in unfair dismissal cases. The Agency is of the view that unfair dismissal cases benefit from a balanced employment relations input as provided by lay members of an industrial tribunal. Unfair dismissal is a mature jurisdiction where the majority of cases can turn on the facts and on the reasonableness of the behaviour of employers and employees. The loss of lay members would, in the view of the Agency, dilute the credibility of tribunals and weaken the sense of fairness derived from decisions made by Tribunals comprising legal and lay members.

### 7 Witness expenses
### 8 Charging fees to use tribunals
### 9 Pre-hearing deposit
### 10 Costs
### 11 Financial penalties

It would appear prudent to ensure that the existing rules and regulations are fully and properly applied before additional or amended rules and regulations are introduced. If this were not the case on what grounds and with what evidence would the introduction of amended rules and regulations be justified?

The Agency's overriding concern is that the system should maintain our ability to assist parties to resolve actual or potential OITFET cases. The LRA currently plays a significant role in resolving Tribunal cases prior to hearing. If the manner in which arrangements for expenses, fees, deposits, costs and penalties are revised or introduced were to undermine the success and further development of our ADR services it could lead to a higher proportion of cases being heard and therefore increase the overall cost of the system rather than reduce the burden on the State.

Consideration should also be given to the aspiration of fair and equal access to justice contained in the Legal Services Commission's (LSC) mission statement. The LSC statement refers to the ability of all, regardless of means, to secure fair and equitable solutions to justiciable issues and disputes through the courts, tribunals or other mechanisms including negotiation and alternative dispute resolution arrangements.

## 12 Renaming of Compromise Agreements as Settlement Agreements

The Agency has responded to DEL on this matter 22 March 2012. The Agency expressed the view that a mere change in title was of no great significance given that the term 'Settlement' is argued to be more positive and acceptable than 'Compromise'.

However there appears to be a move in GB to allow 'settlement agreements' to subsume elements of 'protected conversations' and 'no-fault dismissal' provisions. These proposals are currently subject to debate in GB and have created a degree of controversy. At the time of writing it remains unclear how these developments in GB will progress.

The Agency takes the view that developments in GB may well taint the title of 'Settlement Agreement'. The Agency revises its position as stated 22 March 2012 to a position of maintaining the title 'Compromise Agreement', without any change to substance or process, until the current developments in GB are finalised and until the implications for employment relations, of the finalised GB position, become clearer.

The Agency is of the view that any future proposed change to the title, substance or process of compromise agreements becomes subject to full public consultation.

## 13 Transfer of Undertakings (Protection of Employment) (NI) Regulations 2006, and the Service Provision Change (Protection of Employment) (NI) Regulations 2006.

The Agency refers to its response to DEL 17 January 2012 on 'Call for Evidence : effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Service Provision Change (Protection of Employment) Regulations 2006' and has no further comment to make until more specific proposals are presented following the 'Call for Evidence'.

## 14 Change in qualifying period for exercising right to claim unfair dismissal.

The Agency notes that the rationale for this proposal, in GB, is to promote the necessary business confidence that encourages employers to increase their workforce. There appears to be no evidence to this effect. BIS has expressed the view that the detection of any effect of a change would be challenging.

If implemented the proposal may lead to an increase in multi-jurisdictional claims which tend to be more difficult to conciliate particularly those joined with discrimination jurisdictions. The question arises whether regional statistics would indicate grounds for challenge to this proposal?

Overall a change would appear to make no significant difference.

## 15 Collective Redundancies

The Agency takes the view, irrespective of the timescale, that quality engagement between employers, employees and their representatives is the critical factor.

## 16 Limits on certain employment rights related payments

The Agency has no comment on the details however this seems to be a sensible proposal. Consideration should be given to the date of increase being harmonised throughout the UK.

## 17 Proposal to introduce compensated no fault dismissal for micro firms

At the time of writing it is unclear how this development will progress in GB. The Agency has no comment to offer until more specific proposals are presented following the 'Call for Evidence'.

## 18 Introduction of a system of protected conversations

At the time of writing it is unclear how this development will progress in GB. The Agency has no comment to offer until more specific proposals are presented following BIS consultation.

## 19 Review of employment regulations

The Agency has no comment on the details other than to welcome any rationalisation that does not frustrate good employment relations.

## 20 Reform of the Recruitment Sector

The Agency has no comment on the reform of the recruitment sector. DEL should note that the Agency, at the request of DEL, is currently gathering information on the operation of the Agency Worker's Directive.

I am available should any of the above responses require further clarification.

Yours sincerely

Bill Patterson
Chief Executive
Labour Relations Agency

***Chairman:*** *Mr Jim McCusker* ***Chief Executive:*** *Mr W J K Patterson MBA FCIPD*