

TOWARDS FLEXIBLE WORKPLACE
GOVERNANCE:
EMPLOYMENT RIGHTS, DISPUTE
RESOLUTION AND SOCIAL PARTNERSHIP
IN THE IRISH REPUBLIC

Studies in Public Policy

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GOVERNANCE:
EMPLOYMENT RIGHTS,
DISPUTE RESOLUTION AND
SOCIAL PARTNERSHIP IN
THE IRISH REPUBLIC

Paul Teague

Studies in Public Policy: 18



2005

First published 2005
by The Policy Institute
Trinity College, Dublin 2, Ireland
www.policyinstitute.tcd.ie

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A catalogue record is available for this book from
the British Library

ISBN 1-902585-12-7

Cover design by Ed Miliano, Dublin
Origination by Carole Lynch, Sligo
Printed by ColourBooks Limited, Dublin

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Executive summary

Research aims

A high cost is paid if employment grievances are not settled fairly and efficiently. Days can be lost due to some form of industrial action, sickness and absenteeism rates can be high, and management-employee relations can become strained if not embittered. Disharmony at the workplace can impede organisations from creating adaptable structures to succeed in today's challenging business environment. Trust and cooperation at work are key intangible assets for the advancement of competitiveness, but they are also the first casualties when grievances are higher than they ought to be. It is clearly in the interest of everyone – employees, employers and governments – to have high quality dispute resolution mechanisms.

Whether a dispute resolution system can settle employment grievances and conflicts fairly and quickly is a matter of institutional design. This paper argues that the dispute resolution system in Ireland must adopt the principles of flexible workplace governance if it is to remain effective at solving disputes in the context of a rapidly changing economy and labour market. The essential elements of flexible workplace governance are illustrated in the following properties.

- Multiple channels for the resolution of disputes both inside and outside the organisation in recognition that not all grievances can be solved the same way and that some will require third party public intervention.
- Arrangements that promote the resolution of disputes close to the point of origin. At the same time, these organisational schemes should not be designed in a manner that dilutes prevailing employment rights or makes it difficult for employees to access public bodies that handle complaints about infringements to employment rights.
- Methods of regulation that are not guided by a 'command-and-control' mentality but by a cascading effect involving the use of 'soft' methods of regulation before the 'hard' edge of legal penalties is brought into the equation.

- Blurred boundaries between dispute resolution and dispute prevention activities in recognition of the close interdependencies and complementarities between initiatives in each field: a dispute resolution system is more likely to function better when arrangements are in place that are successful in promoting cooperative management-employee interactions.
- Trouble shooting arrangements that can be quickly brought into play to fend off a potential employment dispute or break an impasse reached in an on-going dispute. Such trouble-shooting arrangements should be a feature of both public and organisational dispute resolution systems
- Acceptance by all employment relations actors that the non-union sector is a permanent feature of employment relations systems and that the unionised sector may learn from the dispute resolution practices followed by 'advanced' non-union companies.
- Recognition by government that new legislation is required to address the relative absence of satisfactory procedures and practices to deal with employment grievances and disputes in some non-union firms.
- Mechanisms that are designed to promote mutual gains or integrative bargaining strategies, which emphasise the merits of joint action and collaborative problem solving, by managers and employees.

Research findings

The paper also argues that to diffuse the principles of flexible workplace governance the institutions associated with dispute resolution in Ireland must address the following five challenges.

- 1 Creating arrangements and procedures that encourage the resolution of disputes nearest to the point of their origin without compromising the ability of individuals (and groups) to vindicate their employment rights.
- 2 Developing a non-legalistic alternative to regulation when drafting employment legislation: soft and hard regulations become increasingly coupled.

- 3 Publicly sponsored employment dispute agencies must work more closely with representative trade bodies and the social partners to develop 'umbrella' forms of dispute resolution that are sensitive to the needs of particular sectors.
- 4 Promoting cross learning between union and non-union forms of dispute resolution, or at least best practice non-union forms of dispute resolution.
- 5 Removing the artificial divide between dispute resolution and dispute prevention. To do this effectively will require a concerted drive against aggressive adversarialism in the employment relations system.

The paper considers the organisations associated with employment dispute resolution in the Republic of Ireland to be well placed and well able to address these challenges for two reasons. Firstly, reflection and analysis of their functioning since their establishment clearly shows that these organisations are continually willing to adopt new procedures that advance their ability to settle disputes: the bodies are highly pragmatic. In addition, the employees working in dispute resolution organisations are highly professional and strongly committed to delivering a fast and efficient service. This combination of pragmatism and creativity should ensure the maintenance of a 'high reliability' dispute resolution system in the future.

Acknowledgements

I have amassed many debits in the course of writing this monograph. I would like to thank Frances Ruane, Bob Holton and Orla Lane for making my stay as Visiting Fellow at the Policy Studies Institute of Trinity College Dublin a happy and productive experience. I would also like to thank Sinead Riordan of the Policy Institute who provided encouragement and advice during the writing of the monograph. Thanks are due to Damien Thomas for reading an early draft of the manuscript and providing insightful and positive comments. I owe a debt of gratitude to the many people in public and private organisations who were willing to talk with me and share their expertise of dispute resolution in Irish employment relations. I am grateful to those in charge of the Change Management Fund, Department of Finance, who supported my Fellowship at the Institute. Without these people and organisations this monograph would not have seen the light of day. Finally, I want to say thanks to my family, to my partner Anne and my children Ellen and Eoin, for their understanding and support, even though they remain mystified about how someone can gain reward from writing about employment relations.

Dispute resolution and the employment relationship

1.1 Introduction

Conflict at work is commonplace. The sources of employment grievances are many and vary in complexity as well as intensity. Some arise from inter-management rivalries while others involve disputes between employees. But most of all, workplace conflict arises from employee-management interactions. Employees sometimes allege inappropriate (if not illegal) behaviour by managers such as discrimination, bullying, violations of health and safety rules and so on. For its part, management sometimes takes disciplinary action to address alleged bad behaviour by employees such as poor time keeping, drinking at work and so on. Thus, disputes regrettably are part and parcel of everyday working life. As a result, an important function of an employment relations system, both at national and company level, is to establish arrangements and procedures which enjoy the confidence of both employees and management, to deal expeditiously and fairly with work grievances and disputes (Tyler, 1984).

Effective dispute resolution arrangements not only ensure that employees enjoy dignity and justice at work, but are also likely to improve competitiveness. An economy that is unable to settle work grievances fairly and efficiently invariably pays a high cost. Days can be lost due to some form of industrial action, sickness and absenteeism rates can be high and management-employee relations can become strained if not embittered. Disharmony at the workplace can impede organisations from creating adaptable structures to succeed in today's challenging business environment. Trust and cooperation at work are key intangible assets for the advancement of competitiveness, but they are also the first casualties when grievances are higher than they ought to be. It is in the interest of everyone – employees, employers and governments – to have high quality dispute resolution mechanisms (Thibaut and Walker, 1975).

1.2 Purpose of the paper

The purpose of this paper is twofold. One is to assess the work of public agencies in the Irish Republic charged with settling employment disputes. This evaluation is important not only because it is good practice to examine the ability of public institutions to perform the tasks that they were put in place to do, but also to gauge how the far-reaching changes occurring in labour markets are impacting on traditional employment relations dispute procedures. The other is to investigate the implications for organisational level dispute resolution of new work practices and human resources management policies that have recently been diffusing between countries. The import of this investigation should not be underestimated since the Irish employment relations system may be on the cusp of widespread change that will have important implications for dispute resolution mechanisms.

1.3 Changing Irish employment relations

Twenty years ago Irish employment relations could be broadly described as adversarial and voluntarist and these features heavily shaped procedures to settle employment disputes and grievances. The voluntary system of industrial relations is premised on freedom of contract and freedom of association, and in terms of the British/Irish tradition, is based on free collective bargaining on the one hand and relative legal abstention in industrial relations on the other. At the same time, the voluntary tradition never meant a total rejection of public intervention or labour law, but merely a preference for joint trade union and employer regulation of employment relations. Adversarial employment relations is the situation where a strong 'them and us' mentality pervades the relationship between trade unions and employers. Each side sees itself as having divergent, if not competing, interests. Collective bargaining is used to obtain a compromise or accommodation between the divergent positions normally adopted by trade unions and management.

Adversarialism and voluntarism have both been challenged in recent times. The growth of social partnership at both national and enterprise levels, predicated on a consensual approach to employment relations, sits uneasily with adversarial attitudes. Social partnership promotes cooperative interactions between managers and employees so that shared understandings and joint

action can be fostered on business and workplace matters. Mutuality and not adversarialism is the by-word. The close association between voluntarism and collective bargaining has also been undermined by a variety of developments. These include both the emergence of non-union forms of employment relations, partly fuelled by the emergence of multinational enterprises that are reluctant to cede recognition to trade unions, and the growth of small enterprises, which traditionally have been a poor recruiting ground for organised labour. Together these developments represent a threat to private sector collective bargaining.

Social partnership and the growth of non-union companies have encouraged the fragmentation of employment relations in Ireland to the extent that it is no longer accurate to suggest that adversarialism and free collective bargaining are the main organising principles for the entire employment relations system (Prodzynski, 1992). New procedures and practices have been diffused across a wide range of human resource management and employment topics. Interpreting the implications of such changes has been a matter of hot debate but the fact that change has occurred is widely accepted (McCartney and Teague, 2003). Contrasting employment practices, emblematic of different models of how to organise the labour market, sit side-by-side. While it would be misleading to suggest adversarialism is down-and-out – this ideology continues to have a significant influence, particularly in the public sector – many intriguing questions are raised by the fragmentation of Irish industrial relations. Is the emergence of non-union human resources policies always and everywhere a threat to union-dominated forms of employment relations? Which will win the day – the problem-solving ethos of social partnership or adversarial employment relations? In a situation where there is diversity of employment relation strategies and procedures would it not be too prescriptive for public policy to support one approach over the others?

At the same time as collective employment relations is experiencing rapid change, the number of cases passing through the public agencies charged with resolving employment disputes is as high, if not higher, than ever. The causes of this heavy caseload are varied. Identity groups and new social movements are using labour law to advance equality and other rights at the workplace. Although collective bargaining is on the back foot, individuals are not shying away from using employment legislation to settle alleged

infringement of employment rights. Social transformations such as the massive growth of female labour market participation are necessitating the employment relationship to be governed in a different way – the need for legislation on family-friendly policies is an obvious case in point. To the extent that there is any coherent shift in the Irish employment relations system it is away from voluntarism and adversarialism and towards one in which the themes of identity and regulation are core themes.

This shift has far reaching implications for resolution of employment disputes at both national and organisational levels. Many of these implications have yet to be carefully considered. This paper aims to both enrich our understanding of unfolding dispute resolution developments and provide some answers to the policy challenges that arise. Before this investigation begins however, some important contextual remarks are provided about why employment disputes arise, the tools most commonly used to resolve such grievances and how and why these arrangements evolve over time.

1.4 Why do disputes arise?

The employment relationship is essentially an exchange relationship governed by a contract. For the most part, this contract sets down rates of remuneration, work specifications and tasks tied to a particular job and conditions of employment. Employment contracts should be transparent so that the mutual responsibilities and obligations of employers and employees are clearly understood by both parties. To help understand why employment disputes arise it is important to distinguish between the determination and implementation of employment contracts.

Consider first of all the determination of employment contracts. When recruiting new staff, employers do not enjoy complete freedom in designing terms and conditions of employment. They are constrained by a range of labour laws that give employees a series of statutory rights – minimum levels of pay, a battery of health and safety safeguards, working time entitlements et cetera. Thus, employment legislation binds employers (and employees) when they are negotiating employment contracts.

In addition to observing statutory rights, employers (and employees) may also have to abide by externally and internally negotiated collective agreements. Many countries, including the

Republic of Ireland, have employment relations systems in which levels of pay and employment conditions for specific categories of occupations and workers are determined by trade unions and employer bodies outside the organisation. These collective bargaining arrangements can be either national, sectoral or occupational.

Externally negotiated collective agreements hold some benefits for employers by reducing the time and costs associated with negotiating employment contracts on an individual basis. But they can also make it difficult for employers to align job roles with business and organisational needs. Organisations may also reach internal deals with a trade union or group of trade unions to conclude enterprise-specific employment terms and conditions. Thus, as well as having to comply with 'external' collective agreements, employers might also have to comply with additional internal deals. Organisations that are tied to either external or internal collective agreements are more constrained when it comes to writing employment contracts than those not recognising a trade union. This is why the distinction between unionised and non-unionised workplaces is such an emotive and controversial debate in employment relations.

The implementation of established rights at the workplace is a fertile ground for employment disputes. Complaints, grievances and disputes can arise at the workplace when people feel that their employment rights, whether these are established by legislation, collective agreement or through an individually negotiated employment contract, have been infringed. An important distinction to make is between substantive and procedural rights. Substantive rights are those pay and conditions that have been established by law, collective agreement or an employment contract. Minimum wage rates, overtime pay rates and holiday entitlements are examples of substantive rights. Procedural rights are different from substantive rights in that they relate to the mechanisms used to manage the employment relationship. Thus, for example, most organisations have well-developed disciplinary and grievance procedures for the handling of disputes. Workplace grievances can arise when established procedures are not observed. The key point is that different dimensions to the management of the employment relationship give rise to distinctive types of complaints, grievances and disputes. Unfortunately, sometimes disputes are of a scale and

complexity that cannot be resolved internally within organisations, let alone between the involved parties. Thus, all modern economies require a publicly sponsored dispute resolution body.

1.4.1 What are the tools of dispute resolution?

Four processes are normally involved in the resolution of disputes. These are conciliation, facilitation, mediation, and arbitration (Wade, 1998). Each process is designed to perform a particular task, although it would be wrong to establish strong demarcations between the different processes. Moreover, all share the similar property of engaging the expertise of a third party neutral to help produce a settlement to a dispute. Conciliation seeks to open channels of communication between parties to a dispute. Facilitation is a process used to resolve impasses involving relatively large numbers. Facilitators normally act as moderators to improve the flow of information and foster mutual understandings in large meetings.

Mediation is a process in which a third party neutral pro-actively gets involved in a dispute to help the participants reach a settlement (Bush and Folger, 1994). This normally involves the mediator getting the disputants to establish a dialogue aimed at resolving their differences. For the most part, mediators do not like being in a position where they are effectively fixing the problem and are more comfortable orchestrating or guiding dispute resolution proceedings (Carnevale and Pruitt, 1992).

Arbitration may be binding or non-binding. In non-binding arbitration, a third party neutral, the arbitrator, is presented with evidence and arguments from the various participants in a dispute and then after reflection issues a decision as to how the dispute should be settled. The role of the arbitrator is to be impartial, objective and fair. In essence, advisory dispute resolution processes provide parties to a dispute with a neutral evaluation of facts and a portfolio of possible outcomes to a dispute. This work is done to encourage disputants to re-enter negotiations on the basis of a recommended solution to a dispute (Greenhaugh, 1987). Binding arbitration involves an arbitrator or arbitration panel imposing a settlement on disputing parties. It is a quasi-judicial process that adopts the trappings of court proceedings (Naughton, 1990). Normally the decision of the arbitrator can be judicially enforced.

Some dispute resolution systems combine or integrate two processes in the one programme. Consider the case of med-arb

schemes (shorthand for mediation and arbitration). Med-arb can take a variety of alternative forms but it usually involves a mediator abandoning attempts to get an agreed negotiated settlement and donning an arbitrator's cap to settle a workplace dispute (Fuller, 1971). The benefit of such an arrangement is that the mediator-cum-arbitrator is usually in full command of the facts of a case and thus better placed to reach a decision that is informed and reasonable. A reading of the literature suggests that eight factors have a bearing on the effectiveness of an employment dispute resolution mechanism.

- Conflict level: as the level of conflict increases, the likelihood of a settlement decreases.
- Complexity of dispute: some cases are clearly more difficult to mediate than others. This can be due to the high stakes involved in the issue – someone's job may hinge on the outcome – or due to the complexity of statutory rules on the matter – for example a sex discrimination or fair treatment case.
- Commitment of the parties to the mediation option: a consensus in the literature is that mediation will be most effective when the disputing parties show an unambiguous commitment to the process.
- Availability of resources: another way this could be phrased is the relative power capabilities of the disputants. If employees feel that the management team has greater access to information or resources to present a case to the mediator then they will show reluctance to use the process. Moreover, if a disputant has limited resources they will be more suspicious of the process, thus reducing the possibilities of the mediator realising a settlement.
- Mediator resources: research suggests that the more resources the mediator can bring to the table the more influential he or she will be: for example the capacity to verify the information provided by the disputants or the ability to 'buy-in' expert assistance from third parties would greatly assist the mediator.
- Reputation of mediator: the literature suggests that high status/ranking mediators are more likely to reach a settlement (although it needs to be pointed out that the evidence to support this claim is not robust).

- Visibility of mediator: confidentiality and low visibility are considered preconditions for the successful resolution of a dispute.

The literature also suggests that a cumulative dynamic is associated with the effectiveness of a dispute resolution programme (Susskind et al, 1999). Reputation, in essence, drives this dynamic: the more a dispute resolution programme is able to produce a settlement in grievances the more respect and acceptance it gains from employers, management and employees. Similarly, if mediators obtain settlements that restore, and even help transform, professional and working relationships between disputing parties then they will enjoy enhanced prestige and status (Gallanter, 1998). As a result, they become better placed to resolve disputes in the future. Any institution, programme or person that deploys expedient, shortsighted or inappropriate actions to resolve employment conflicts may quickly lose legitimacy.

1.5 The institutional character of dispute resolution

The institutional character of employment dispute resolution systems evolves over time (Ury et al, 1998). At the early stages of industrialisation, for example, craft guilds played an important role in resolving disputes at work by setting standards for labour productivity, work quality and behaviour on-the-job. Guild members found to be in breach of established standards would be liable to a fine and even exclusion from the trade, if the offence were serious enough. Although different procedures were used to determine whether a breach of standards had occurred, craft guilds were essentially using a form of private governance to settle disputes. The legal system or other public institutions were not heavily involved in the resolution of workplace conflicts. Most governments were content to delegate this responsibility to autonomous social institutions like craft guilds.

As industrialisation deepened, these essentially 'self-regulation' or 'self-policing' methods of resolving employment-related disputes started to lose functionality. Employers were unhappy with the level of authority 'autonomous' dispute resolution activity bequeathed to craft unions inside organisations. Furthermore, once production started to be organised according to the principles of scientific management, large numbers of unskilled workers gained

employment in the industrial sector for the first time. These workers fell outside the reach of craft guilds and thus were not covered by established dispute resolution mechanisms. The rise of mass production required a rewriting of the social rules that incorporated people into work.

Inventing these new social rules frequently involved protracted, and at times bloody, employer-employee conflicts. In the end different groups of workers were incorporated into the world of work through different institutional terms and conditions, including mechanisms used to settle workplace disputes. The craft-based model of employment dispute resolution continued although in a revised and diluted form. Unskilled workers, particularly in large factories, tended to be governed by collective industrial relations. These essentially involved the use of collective bargaining agreements to establish a floor of workplace rights and conditions. Trade unions were central to this system and for this reason they enjoyed a special public status. Governments conferred upon organised labour a privileged position inside the political and economic system not enjoyed by other interest groups. Mass trade unionism and widespread collective bargaining led to governments getting entangled in the regulation of the employment relationship. Public rules, which in practice usually meant labour law, were required to establish orderly procedures on matters such as strikes, lockouts, trade union recognition and so on. In most industrialised countries this system for governing the workplace reached its apex in the 1950s. At the same time, government was expanding its role in economic and social life. Delivering the variety of public provisions that emerged in the wake of the creation of the welfare state, particularly mass education and housing as well as comprehensive health services, caused the rapid growth in public sector employment. High trade union density alongside a permissive government attitude to employment rights in the non-market sector led to a distinctive work regime in the public services which was more employee friendly than in the private sector.

Thus, by the mid-fifties the old craft-based model of self-regulation had been surpassed by a different, more complex form of economic citizenship. Workers in different spheres of the economy were incorporated into employment on different institutional terms. This argument should not be taken too far. There were common, overarching elements to the model of economic citizenship that had

emerged: collective bargaining was the main vehicle used for the determination of employment conditions – it was also, paradoxically, the biggest generator and settler of employment disputes; trade unions were regarded as the main guarantors of economic citizenship – when someone considered that their employment rights had been infringed they normally went to see their shop steward (Dunlop, 1984). Reinforcing collective bargaining procedures, an economy-wide body of employment rights started to emerge (which often embodied the core assumptions that employees were male and worked full time). A public machinery for dispute resolution existed in the wings to fire fight when organisational-level or collective bargaining procedures failed to settle a grievance or dispute.

1.6 Employment relations systems in transition: the challenges for dispute resolution

The important point from the previous section is that as economic and social structures change so too do the institutional mechanisms used to resolve employment disputes. An emerging theme in the comparative employment relations literature is that labour market institutions are now once again in a period of transition (Osterman et al, 2001). Economic and social transformations have caused established rules and procedures that incorporated people into the world of work in the second part of the twentieth century to lose economic functionality and social coherence: they are unable to perform the tasks they were put in place to do. Some of these transformations are well known and are listed below.

- Greater product market competitiveness caused by deepening market integration in Europe and the spread of economic globalisation more generally.
- The rise of ‘weightless’ forms of business activity.
- The diffusion of new technologies that are encouraging new forms of corporate organisation as well as business strategies.
- New patterns of work, leading to higher numbers of temporary and part-time jobs as well as to more self-employment.
- The rise of small and medium-sized enterprises primarily servicing customised and niche markets.
- The increase in female labour force participation.

- The fall in demand for unskilled labour and the concomitant rise in demand for qualified labour.

These economic and labour market changes are creating new challenges to employment relations institutions. Consider the well-known distinction between high road and low road business strategies. In the past a common argument was that firms could pursue one of two alternative strategies in response to increased competitive pressures. On the one hand, they could compete on the basis of cost. Strategies of this kind put downward pressure on wages and other employment benefits (pensions for example) and increased the intensification of work to secure greater worker productivity. On the other hand, they could compete on the basis of quality, which normally requires the introduction of a variety of new 'high performance' work practices. New employment systems of this kind only reach maximum potential if they are underscored by a high degree of cooperation and collaboration between managers and employees. Consensual interactions of this type invariably require attractive wages and employment conditions. Thus, a conventional assumption is that employers have two alternative choices opened to them when developing corporate strategies and that as far as possible public policies should be geared towards encouraging them to follow the high road. High quality work systems are more likely to allow firms to balance fairness and competitiveness at the workplace.

However, the big problem here, revealed by increasing bodies of research, is that the stark divide between high and low road competitive strategies does not correspond to the actual situation on the ground. Increasingly, firms develop 'hybrid' competitive policies that lead to the simultaneous diffusion of cost-based and quality orientated employment systems. These systems have uncertain consequences for employees. Consider the following example. Increasing numbers of employees are working under a human resource management regime which on the one hand gives them considerable freedom to organise their own working time but on the other obliges them to meet a series of designated targets. From an employee point of view a human resource management regime of this kind can have both positive and negative effects. On the positive side, greater autonomy opens up the possibility of organising working time in a highly flexible and personalised way. On the negative side, it can mean that to meet targets they have to

give unprecedented levels of commitment and creativity to the organisation, which could lead to a new form of labour subordination.

Disputes and grievances about job tasks and work rules are more likely to arise in working environments of this kind. But the problem is that it is hard to disentangle the positive and negative features of such individual 'employment' practices. Indeed there is increasing recognition that such regimes are giving rise to new forms of employment complaints and grievances. It is not coincidental that stress and other forms of emotional hardship have emerged at the same time as target setting has become a widespread management tool. Detecting and properly dealing with these new grievances will challenge organisations to move beyond established dispute resolution and prevention policies. Although organisations are not walking away from tried and tested methods of settling employment grievances, they are nevertheless anxious to sponsor new forms of dispute resolution. This matter has become an important source of employment relations experimentation and there appears to be a particular focus on devising high-grade internal dispute resolution mechanisms to deal with the 'new' work grievances such as bullying and stress (Rowe, 1990a).

Economic and social transformations are also casting a shadow over prevailing assumptions that underpin labour law. In the past, much employment regulation was predicated on the idea of the full time male worker. However, the new emerging patterns of work call this assumption into question. The message is that new patterns of work require different forms of regulation. This explains the flurry of legislative activity that has occurred since the early nineties on emerging features to the employment relationship. Table 1 outlines the nature of new employment laws – eleven in total – adopted in the Republic of Ireland over the past decade or so. As a result of these laws, quite detailed rules and regulations now exist governing the employment of women, ethnic minorities, gays and lesbians, disabled people, the elderly. A comprehensive set of rules also exists in the area of health and safety and information and consultation. A huge increase has occurred in the scope and depth of employment protection rights, much of which focuses on developing individual rights. This development has led to employers complaining quite vociferously that labour regulation has become hugely burdensome, impeding their ability to compete in product markets.

The growth in the volume and complexity of employment regulation has widespread implications for dispute resolution. Small firms, which normally do not have a formalised human resource management department, find it difficult to comply with all employment rights obligations and thus become more exposed to cases of alleged breaches of employment rights. Bigger firms with a more formalised approach to people management are seeking new ways for the effective resolution of employee grievances in order to avoid employees using law against the organisation. The mainstream public dispute resolution agencies are also challenged by the recent growth in labour law. In particular, bodies like the Labour Relations Commission (LRC) are searching for new ways to help settle employment disputes. All in all, the emphasis is on introducing innovation to virtually all aspects of workplace dispute resolution. The purpose of this paper is to assess the extent and direction of change in this area in the Irish Republic.

Table 1. Labour Laws adopted in the Republic of Ireland since 1990

Legislation	Provisions
<i>Industrial Relations Act, 1990</i>	Updates and amends previous industrial relations legislation
<i>Payment of Wages Act, 1991</i>	Covers methods of payment, allowable deductions and employee information in relation to wages by means of a payslip
<i>Unfair Dismissals Act, 1993</i>	Updates and amends previous legislation dating from 1977
<i>Maternity Protection Act, 1994</i>	Replaces previous legislation and covers matters such as maternity leave, the right to return to work after such leave and health/safety during and immediately after the pregnancy
<i>Terms of Employment (Information) Act, 1994</i>	Updates previous legislation relating to the provision by employers to employees of information on such matters as job description, rate of pay and hours of work
<i>Adoptive Leave Act, 1995</i>	Provides for leave from employment principally by the adoptive mother and for

	her right to return to work following such leave
<i>Protection of Young Persons (Employment) Act, 1996</i>	Replaces previous legislation dating from 1977 and regulates the employment and working conditions of children and young persons
<i>Organisation of Working Time Act, 1997</i>	Regulates a variety of employment conditions including maximum working hours, night work, annual and public holiday leave
<i>Parental Leave Act, 1998</i>	Provides for a period of unpaid leave for parents to care for their children and for a limited right to paid leave in circumstances of serious family illness
<i>Employment Equality Act, 1998</i>	Prohibits discrimination in a range of employment-related areas. The prohibited grounds of discrimination are gender, marital status, family status, age, race, religious belief, disability, sexual orientation and membership of the Traveller community. The Act also prohibits sexual and other harassment.
<i>National Minimum Wage Act, 2000</i>	Introduces an enforceable national minimum wage
<i>Carer's Leave Act, 2001</i>	This provides for an entitlement for employees to avail of temporary unpaid carer's leave to enable them to care personally for persons who require full-time care and attention
<i>Protection of Employees (Part-Time Work) Act, 2001</i>	Replaces the Worker Protection (Regular Part-Time Employees) Act, 1991. It provides for the removal of discrimination against part-time workers where such exists. It aims to improve the quality of part-time work, to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner that takes account of the needs of employers and workers. It guarantees that

	part-time workers may not be treated less favourably than full-time workers.
<i>Organisation of Working Time (Records)(Prescribed Form and Exemptions) Regulations, 2001</i>	This obliges employers to keep a record of the number of hours worked by employees on a daily and weekly basis, to keep records of leave granted to employees in each week as annual leave or as public holidays and details of the payments in respect of this leave. Employers must also keep weekly records of starting and finishing times of employees.

1.7 Conclusions

Four issues are discussed in this chapter. The first outlines the major practices and procedures associated with the settling of employment disputes and grievances. The second highlights that institutional procedures used to resolve disputes change over time in line with evolving patterns of economic and business life. The implication is that all those directly involved in employment dispute resolution need to avoid a blind defence of established ways of doing things and accept the need for change. The third explains that we are in the middle of a period of substantial reform to labour market institutions, with implications for all aspects of employment relations, including dispute resolution. The final argument is that the shape and direction of any reform pathway to the Irish dispute resolution system has yet to be fully worked out. The remainder of this paper explores how the Irish system of dispute resolution, both at organisational and public policy levels, is addressing these challenges to update and in some instances change existing arrangements.

Beyond alternative dispute resolution

2.1 Introduction

The case for renewing dispute resolution procedures is widely accepted. This begs the question: what should be the guiding principle behind any reform programme? Alternative dispute resolution (ADR) is a key theme in the literature that discusses changes to existing procedures to settle employment grievances and disputes. Thus, it must figure prominently in any search for innovative procedures used to resolve disputes at the workplace. Brown and Marriot define alternative dispute resolution as 'a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes generally involving the intercession and assistance of a neutral and impartial third party' (1999:12). Alternative dispute resolution should not be interpreted as a completely new departure as it overlaps with established methods of reaching settlements to workplace grievances – conciliation, arbitration et cetera, and so does not throw overboard tried and tested methods of resolving disputes. Yet it is an umbrella term able to capture new initiatives inside organisations and public agencies operating to redesign dispute resolution procedures. Some of these new initiatives are controversial particularly for trade unions as they are seen as attempts to reduce the import of labour legislation and promote 'non-union' employment relations (Zack, 1999).

The purpose of this chapter is to examine the meaning of alternative dispute resolution and assess its suitability to guide reform to the Irish system of dispute resolution. Two main arguments arise from this discussion on ADR. On the one hand, it is argued that ADR is essentially an American invention that has arisen as a result of certain features of its employment relations system and which in many instances is used to weaken statutory-based employment rights and collective bargaining arrangements (Dunlop and Zack, 1997). On the other hand, it is suggested that some of the principles and practices associated with ADR should not be dismissed out of hand as they contain interesting initiatives

to solve workplace disputes in a fair and expeditious manner (Rowe, 1990b). Instead, the various initiatives that have been corralled somewhat arbitrarily under the umbrella term ADR should be carefully evaluated to assess whether they can be aligned with the historical and institutional context of Irish dispute resolution arrangements. Put simply, ADR should neither be uncritically embraced nor rejected out of hand. A pragmatic approach should be adopted, capable of incorporating those practices that can advance the interests of Irish employers and employees while casting aside those deemed to be inappropriate.

The chapter also suggests that any innovations to dispute resolution should have the goal of creating a system of flexible workplace governance in Ireland. This would ideally consist of the following properties:

- Multiple channels for the resolution of disputes both inside and outside the organisation in recognition that not all grievances can be solved the same way and that some will require third party public intervention.
- Arrangements that promote the resolution of disputes close to the point of origin. At the same time, these organisational schemes should not be designed in a manner that dilutes prevailing employment rights or makes it difficult for employees to access public bodies that handle complaints about infringements to employment rights.
- Methods of regulation that are not guided by a 'command-and-control' mentality but by a cascading effect which involves the use of 'soft' methods of regulation before the 'hard' edge of legal penalties is brought into the equation.
- Blurred boundaries between dispute resolution and dispute prevention activities in recognition of the close interdependencies and complementarities between initiatives in each field: a dispute resolution system is more likely to function better when arrangements are in place that are successful in promoting cooperative management-employee interactions.
- Trouble shooting arrangements that can be quickly brought into play to fend off a potential employment dispute or break an impasse reached in an ongoing

dispute. Such trouble-shooting arrangements should be a feature of both public and organisational dispute resolution systems.

- Acceptance by all employment relations actors that the non-union sector is a permanent feature of employment relations systems and that the unionised sector may learn from the dispute resolution practices followed by 'advanced' non-union companies.
- Recognition by government that new legislation is required that seeks to address the relative absence of satisfactory procedures and practices to deal with employment grievances and disputes in some non-union firms.
- Mechanisms that are designed to promote mutual gains or integrative bargaining strategies, which emphasise the merits of joint action and collaborative problem solving, by managers and employees.

From this list of properties it can be seen that flexible workplace governance is a wider concept than ADR in a number of important respects. First, it recognises the importance of legal interventions to provide those in work with a plinth of statutory employment rights. At the same time, it encourages the invention of new, more decentralised arrangements for the implementation of these rights and a move away from command-and-control methods to ensure compliance with these regulations. Secondly, it seeks to reconcile in-house arrangements for the settlement of disputes with a well-developed public dispute resolution machinery. No effort is sought to substitute one for the other. Third, it encourages the blurring of the boundary between dispute resolution and dispute avoidance/prevention activity so that a wider repertoire of initiatives is used to promote employment relations order and peace. Finally, it encourages a permissive view of the instruments used to solve workplace grievances. In effect, flexible workplace governance is probably better seen as a form of conflict management at the workplace rather than a dispute resolution regime. Many of these points are developed in more detail as the analysis progresses: however, the most important immediate task is to explain the origin and meaning of ADR.

2.2 Alternative dispute resolution: an American invention

Table 2 outlines the various practices and procedures associated with this concept.

Table 2. Key ADR practices and procedures

ADR Practices and Procedures	Key elements of practice/procedure
<i>Preventive ADR</i>	Averting conflict at work by creating procedures that promote cooperative interactions between management-employee relations. This practice does not actually stop disputes. Rather, it provides a mechanism for channelling disputes into problem solving processes.
<i>Negotiated Rule-Making</i>	The substance as well as the procedures of any law, rule or regulation are negotiated before they become final. Often called 'reg-neg'.
<i>Joint Problem Solving</i>	Parties who usually represent opposing interests on an issue use Interest Based Problem Solving procedures to reach a settlement.
<i>Negotiated ADR</i>	Disputants reach their own (without a neutral) resolution to a dispute or matter through interest-based principles of problem solving, i.e. coming to a solution which satisfies all disputants' interests and concerns.
<i>Interest-Based Problem Solving (IBPS)</i>	Resolving problems by identifying interests, i.e. needs, desires, concerns, fears, and coming up with options which address all the interests of those involved in solving the problem.
<i>Negotiate</i>	To discuss, bargain and confer with another (or with multiple parties) to arrive at a settlement of some matter.

<i>Facilitated ADR</i>	A neutral assists disputants in reaching a satisfactory resolution to the matter at issue. The neutral has no authority to impose a solution.
<i>Mediation</i>	A voluntary process where a neutral, acceptable to the disputants, assists the parties in resolving a mutual problem, exploring options for resolution, which focuses on the future relationship of the parties. The neutral is neither a decision-maker nor an expert adviser.
<i>Conciliation</i>	To reconcile or appease in an act of good will with the assistance of a neutral.
<i>Ombudsperson</i>	A neutral who reviews a complaint and assists in reaching a fair settlement. Sometimes this neutral will be utilised as a clearinghouse for the various types of ADR procedures suitable for the matter at issue.
<i>Fact-Finding ADR</i>	A neutral, often but not always a technical or subject matter expert, examines or appraises the facts of a particular matter and makes a finding or conclusion. This procedure may be binding or non-binding depending upon the parties.
<i>Early Neutral Evaluation</i>	A neutral reviews aspects of a dispute and renders an advisory opinion as to the likely outcome.
<i>Expert Fact-finding</i>	A neutral with appropriate expertise in the matter, reviews aspects of a dispute and renders either a recommendation or decision.
<i>Advisory ADR</i>	A neutral third party reviews defined aspects of a dispute and gives an opinion as to the likely outcome.
<i>Early Neutral Evaluation</i>	A neutral reviews aspects of a dispute and renders an advisory opinion as to the likely outcome.

<i>Mini-trials</i>	In this instance, the neutral may predict the likely outcome of a formal adjudication. The process is voluntary, quick and non-judicial.
<i>Non-Binding Arbitration</i>	A decision rendered which is essentially a recommendation. The neutral may advise on a possible settlement.
<i>Imposed ADR</i>	A neutral makes a <i>binding</i> decision regarding the merits of a dispute. Disputes are usually over a possible breach of contract or agreement. The neutral party may be an individual or panel. This type of ADR is closest to traditional dispute resolution.
<i>Binding Arbitration</i>	A third party (individual or panel) renders a decision with which the disputants must comply. There are limited appeal rights to a higher authority.

The key point to note in Table 2 is the catch-all character of ADR. For this reason, it is important to set out the origins of the concept. For the most part, these lie in American human resource management. Specific features of the USA employment relations system are pertinent to explaining the rise of such practices, particularly in the late eighties and nineties.

Since the early sixties the two most pronounced features of American employment relations have been the virtual disappearance of collective bargaining from USA industry and the expansion of legal regulation of the employment relationship. With the demise of a 'collective method' to resolve disputes effectively, more and more individuals who considered that their legal employment rights had been violated sought redress through the normal judicial process. The result was a massive increase in the number of legal cases claiming violation of statutory employment rights going before the courts. This trend was particularly marked in the late eighties. Employers reacted to this litigation explosion by writing employment contracts which required a prospective employee to sign, as a condition of recruitment, a commitment to arbitrate alleged breaches of statutory rights, particularly in the area of unfair dismissals and give up their right to use the courts to settle such grievances (Blancero, 1995). A measure of uncertainty existed about

the legality of such employment contracts. In 1991, the USA Supreme Court cleared up this uncertainty in its ruling in the controversial *Gilmer* case. The Supreme Court ruling in this case approved the use of binding arbitration by non-union employers to resolve disputes over employment discrimination claims. It gave employers the green light to develop employment contracts that contained binding arbitration clauses as an alternative to litigation. Contracts of this kind make it difficult, if not impossible, for workers to use the courts to enforce statutory employment rights. For the past decade, USA companies have been busy building new 'private' systems of dispute resolution that are purposely designed to disconnect in-house procedures from external arrangements that exist to enforce statutory employment rights (Rowe, 1993). Table 3 outlines the main ADR arrangements that have been put in place by employers.

Table 3. Alternative Dispute Resolution Mechanisms

Type of ADR mechanism	Key elements of ADR mechanism
<i>Ombudsman</i>	A designated 'neutral' third party inside an organisation assigned the role of assisting the resolution of a grievance or conflict situation. The activities of an ombudsman include fact-finding, providing counselling and conciliation between disputing parties. High-grade persuasion skills are the key asset of a good ombudsman.
<i>Mediation</i>	A process under the stewardship of a third party designed to help those involved in a dispute reach a mutually acceptable settlement. The third party has no direct authority in the process and is limited to proposing or suggesting options that may open a pathway to a mutually agreeable resolution.
<i>Peer Review</i>	A panel composed of appropriate employees or employees and managers which listens to the competing arguments in a dispute,

	reflects upon the available evidence and proposes a resolution. Whether or not the decision of the panel is binding varies across organisations.
<i>Management Review Boards</i>	Sometimes called dispute resolution boards, these panels are solely composed of managers and have more or less the same remit as peer reviews. Again the decision of the panel may or may not be final.
<i>Arbitration</i>	A neutral third party is empowered to adjudicate in a dispute and set out a resolution to the conflict. This may or may not be binding depending upon the prevailing labour legislation and the design of the arbitration process.

Some argue that it is too simplistic to trace the rise of alternative dispute systems to the *Gilmer* case, arguing that these arrangements would have occurred anyway (Marks et al, 1984). In other words, opinion differs as to why organisations establish ADR systems. Although the most popular position is to view ADR as of a piece with a wider trade union substitution strategy being pursued by employers, other motivations have been identified as important drivers behind the ADR movement (Block et al, 1996). In no order of importance these include:

- greater employee preference for dispute resolution mechanisms that are more individual in focus and confidential
- the spread of 'soft' HRM strategies that seek to diffuse enlightened employment relations strategies
- growing government concern with the overload experienced by many statutory institutions responsible for reducing conflict at work
- greater diversity in organisational forms and economic activity that is weakening established institutional methods for resolving workplace conflict.

2.2.1 *The content of ADR*

Whatever the precise motivations, ADR practices have spread rapidly across USA companies (Cohen, 1991). The type of ADR mechanisms introduced varies across organisations. Some use a single procedure such as an Ombudsman while others offer a more comprehensive multi-layered programme. One multinational company has a five-option ADR scheme involving the following:

- an open door policy that encourages an employee to discuss a problem with their supervisor or manager in confidence and without fear of retaliation
- an employee hotline that offers an employee, who wishes to remain anonymous, the facility of ringing an advisor to find out the available options to solving a problem
- a conference which involves an employee discussing the problem in a formal setting with a representative of the company to work out a procedure to solve a grievance or dispute
- a mediation facility to help solve the dispute. Either party can request this alternative, which involves obtaining the services of a trained external arbitrator to preside over proceedings. If mediation is invoked then each party is obliged to participate, but the process is non-binding
- an arbitration facility is also offered if the dispute has not been resolved at an early stage. The employee can elect to make the process binding. The procedure is formal and involves an external arbitrator receiving written submissions from the various involved parties and listening to evidence in a hearing. If an employee grievance is upheld then the arbitrator can make an award that is equivalent to any of the options open to a court of law.

This is a comprehensive 'deep' ADR system, which would be the exception: most organisations would operate a more streamlined procedure, involving only one or two options.

The *scope* of ADR mechanisms differs across organisations (McCabe, 1988). Some companies confine their use to particular groups of employees or certain sections of the company or an identified list of employment related matters. Some large

companies with multiple sites may have both unionised and non-unionised establishments. In such a situation, some employees may be covered by collective bargaining agreements that could include written procedures for the handling of disputes and grievances while other employers may be 'covered' by an ADR system. All in all, ADR procedures vary considerably in complexion and purpose. The literature assessing the impact of ADR is still relatively underdeveloped. Much of what has been written on the subject either focuses on 'best practice' rules for the diffusion of such arrangements or debates the implication of ADR for worker rights (Rowe, 1993). With regard to the best practice rules the literature suggests that alternative dispute resolution procedures reach full potential under a number of conditions.

- Senior management must show active and committed support.
- Employees should actively participate in the design of an alternative dispute resolution procedure.
- ADR procedures should be triggered as early as possible in a dispute.
- Due process must be upheld at all times, otherwise the credibility (and thus the effectiveness) of the system will be jeopardised.
- ADR outcomes should be monitored so that managerial or organisational practices can be amended to avoid similar disputes arising in the future.

The last point is seen as particularly important. Virtually all guides to ADR encourage enterprises to recognise the broader potential of such arrangements. Thus, for example, ADR procedures, if successfully employed, may permit an organisation to learn more about the shortcomings and risks associated with particular business practices and processes (Weston and Feliu, 1988).

2.3 ADR and employment rights

The debate about the equity implications of ADR is trenchant and ongoing. Stone (1999) argues that the decision in the *Gilmer* case and the rise of ADR inside organisations has undermined established 'due process' practices associated with the governance of the employment relationship. Stone suggests it is normal practice for employees covered by ADR procedures to have no voice in the

selection of an arbitrator, few rights of representation, restricted ability to write opinions and to make fact-finding investigations. Moreover, employers usually have the right to unilaterally change procedures. Dunlop and Zack (1997) take a different view. While conceding that many of the new schemes are employer-promulgated procedures, they suggest that some unintended consequences have emerged from the operation of these new arrangements that potentially hold out benefits for employees. In particular, they suggest that companies when developing new arbitration arrangements have been obliged to use the services of experienced mediators who have had long established connections with the Federal Mediation and Conciliation Services, which have resulted in management not always getting its own way.

To protect their own probity and to instil as much fairness as possible into the new arrangements, these mediators have insisted on policies that safeguard their independence and encourage the use of 'best practice' procedures. Many of these policies are making their way into extra-firm guidelines. A well-known set of guidelines is the *Due Process Protocol* developed by the Alliance for Education in Dispute Resolution (Commission on the Future of Worker-Management Relations, 1994). This protocol suggests that an alternative dispute resolution system must provide the following.

- A neutral arbitrator that has an understanding of the relevant law and is capable of understanding the concerns of each party.
- A fair system that allows a complainant to collect information to present his or her case.
- The option of employees to have independent representation.
- A fair method of cost sharing so that the system is affordable to employees.
- A range of remedies that is at least equal to those available through the law.
- A written opinion by the arbitrator explaining the rationale for the result.
- A provision for a judicial review to ensure that the result is consistent with prevailing employment law.

Dunlop and Zack argue that these guidelines aim to establish public yet non-legalistic standards to benchmark the merits or otherwise of

privately constructed ADR arrangements. They suggest that any public standard-setting procedure should exhort organisations to have workplace disputes systems that

- (i) make it apparent how the procedures allow the disputing parties retain control of the dispute and its resolution
- (ii) ensure the 'third party' used to promote settlements is sufficiently competent, neutral and trained to win the confidence of all parties to the dispute
- (iii) ensure that any claimant has the ability to advocate properly his or her case.

Dunlop and Zack also argue that professional associations of arbitrators and barristers as well as bodies like the Federal Mediation and Conciliation Services and Equal Opportunity Commissions positively engage with the rise of ADR to ensure that these procedures are applied consistently and even-handedly. In other words the project must be to design ADR arrangements so that they embody the three key principles of procedural fairness – neutrality, trust and standing. They argue that it is in the interests of organisations to follow such principles, as employees are likely to have greater confidence in the dispute resolution system. Certainly, this is a creative argument but whether organisations will voluntarily comply with socially preferable ADR systems in the present climate of American employment relations is open to doubt (Edwards, 1993). The full consequences of alternative dispute resolution, particularly in terms of fairness, have yet to unfold and the matter will be a source of debate for many years to come.

2.4 The international transfer of ADR innovations

The outcomes to ADR procedures in the USA remain a puzzle, yet these arrangements are beginning to be transmitted to other countries. For example, the Canadian Federal Labour Relations Agency has introduced some aspects of ADR into all operational programmes. The purpose is to encourage more consensual decision-making approaches to the resolution of workplace disputes so that there can be a move from the more adversarial win-lose methods that have been traditionally employed to reach settlements. A battery of services has been created to this end. An innovative solutions team has been established, an interest-based conflict

resolution unit has been set up and experts provide advice on facilitation, training and development for organisations. The emphasis is on promoting collaborative relationships between management and workers. As a result, the organisational identity and mission of the Agency has been substantially redesigned.

The Canadian experience is interesting because a different meaning and purpose is given within it to the term ADR. In the USA, ADR procedures are a response to the escalating number and cost of grievance and dispute cases. In contrast, ADR has been used in Canada to broaden the scope of dispute resolution activities performed by public bodies so that they are not so narrowly tied to the operation of collective bargaining. In essence the Canadians are seeking to modernise, under the heading of ADR, the character of dispute resolution both at national and organisational levels to fit with contemporary labour market dynamics. Thus on first appearance, the international transmission of ADR might appear a crude convergence story about different countries diffusing in a rather unsophisticated way USA-invented conflict resolution practices. On closer examination a more subtle process of domestic assimilation is going on involving employment relations actors in a particular country remoulding an internationally recognised development to fit an internal employment relations agenda. ADR has not been used in Canada to circumvent labour market regulation and accelerate the demise of collective bargaining structures but to reconnect employment relations systems with emerging labour market patterns and workplace practices.

At the same time, vulgar international transmission remains possible: national employment relations actors might seek to adopt, in slavish fashion, the American meaning of ADR to keep pace with perceived international best practice. The manner in which ADR crosses borders is not destined to follow any one particular trajectory, but will depend on the character of the national employment relations systems and the type of response domestic actors have to ADR procedures. This is an important observation for those involved in fashioning the Irish dispute resolution system: great care has to be taken in assessing the applicability of American ADR innovations for management-employee interactions in Ireland. Put simply, an 'Irish agenda' has to be created for the diffusion of ADR experiments, which in practice means that any initiatives in this area must be sensitive to the prevailing institutional context.

Perhaps the most salient domestic institutional feature that needs to be borne in mind is the continuing importance of trade unions in the Irish system. Although trade union density rates have declined in the nineties, they retain considerable influence in some parts of the economy, mainly in the public and 'old' manufacturing sectors. This means that many employment disputes and grievances are still resolved through collectively agreed procedures. This is different to the US experience where collective agreements and trade unions have all but disappeared from the private sector and have an uneven presence in the public sector. Another factor that needs to be taken into account is that Ireland has well-established quasi-judicial and administrative agencies that play an active role in the settling of employment grievances. This is unlike the USA where such dispute resolution institutions are nowhere near as developed. This suggests that promotion of purely employer promulgated ADR innovations in the Irish context, to the exclusion of other possible innovations, would be a short sighted strategy. Unions would see it as the crude diffusion of American human resource management practices and public dispute resolution bodies would be of the opinion that it was an attempt to undermine their role. A wider tack has to be taken to modernising methods of resolving employment disputes in Ireland.

2.5 Renewing dispute resolution in Ireland: three guiding principles

Any project to refresh dispute resolution mechanisms in Ireland should be guided by three aims. The first is to promote initiatives, which enjoy the support of all parties, for the more effective settlement of employment grievances at the workplace (MacFarlane, 1997). Getting grievances resolved nearest to the point of origin should be the new mantra. The second is to encourage public agencies responsible for handling employment disputes to assess the adequacy of existing procedures and mechanisms used to enforce labour market regulations. It is now everyday speak to say that 'one-size-fits-all' regulations are fairly blunt, if not ineffective, instruments to govern modern economies and societies marked by ever-increasing diversity and complexity. A business environment in which people are doing increasingly different things in tiny organisations makes the task of devising and enforcing regulatory standards exceptionally difficult. This is as true for dispute

resolution as it is for any other aspect of economic and corporate governance.

At the moment, virtually nobody appears happy with the direction of labour market governance. On the one hand, enterprises complain that they are being 'over-regulated'. On the other hand, employees complain that as economic complexity has increased so the opportunities for organisations not to comply with regulatory rules have multiplied. Paradoxically, this all round dissatisfaction has created an opening for new innovatory forms of employment relations, including dispute resolution mechanisms. In searching for new ways to devise and enforce employment regulation the public dispute resolution machinery must strive to ensure that any initiative enjoys the confidence and support of all stakeholders.

A third aim of dispute resolution innovation is to go beyond the motive of many ADR schemes in the USA, which is to introduce purely employer-promulgated arrangements. An accommodation has to be found between new private and public initiatives so that they can sit beside one another. But this co-existence must not be framed in a manner that permits 'private'-led schemes to be labelled 'good' and the main driver of modernisation and the 'public' sphere to be viewed as 'bad', crippled by inertia and devoid of creative thinking. The main task must be to build a national framework that encourages multiple channels for dispute resolution that fosters both public and private led innovations (Fisher, 1989). It may be asking too much for strong complementarities to emerge between these different channels. However, a dispute resolution framework that is hybrid in character is perfectly acceptable, possibly even preferable. At the same time, a select number of core principles should motivate the upgrading of any aspect of the dispute resolution system. In the Irish context, mechanisms to settle employment disputes should be influenced by two core themes. One is responsive regulation and the other is problem solving. The meaning of each term for dispute resolution in Ireland is developed below.

2.5.1 Responsive regulation and dispute resolution

Responsive regulation, sometimes called cascading rule making, seeks to go beyond approaches that counterpoise private and public initiatives and soft and hard regulation. Instead it attempts to forge connections between these categories (Mnookin and Kornhauser, 1979). The point of departure for many responsive regulation

arrangements is the assumption that command and control rules can no longer be properly policed or enforced. In today's decentralised economy, an army of inspectors would be required to ensure compliance with rules that are designed and administered by the centre. However, government simply does not have the resources to operate such enforcement regimes. With centralised rules likely to be only partially enforced the task is to devise smarter regulatory arrangements. Responsive regulation seeks to meet this challenge by making public rules simpler and more flexible while at the same time more effective.

A key trait of responsive regulation is the *delegation* of rule enforcement, but only in the context of a wider framework of escalating penalties and sanctions (this is why responsive regulation is sometimes called cascading rule setting). With regard to dispute resolution (and employment relations more generally), the approach amounts to building a form of conditional delegation or self-enforced regulation into labour market regulation. In practice this means that organisations are allowed to write their own rules or design an alternative means to achieve the goals of any statutory rule provided these comply with publicly established minimum conditions. Moreover, organisations would have the option to police themselves for non-compliance, provided the procedures used to self-monitor and self-correct were carefully designed, open to some form of credible validation process and enjoy the confidence of those most directly affected by them. The external validation of internal procedures for the setting of rules is perhaps the most important aspect of responsive regulation. Conditional delegation or deregulation only reaches its maximum potential when organisations behave as 'good' employers. But all employers are not good and this is why the 'big gun' of penalties must be retained within the regulatory regime. Thus the ability of firms to design their own rules is set within a regulatory framework of escalating interventions: organisations are kept inside the bounds of public accountability and legal enforcement. If they fail to reach minimum national standards they face sanctions and penalties.

Responsive regulation has import for renewing employment dispute resolution mechanisms in the Republic of Ireland. First of all, it allows soft and hard regulations to be embodied in the one policy regime. Hard regulation means adopting rules that set out to constrain employers and employees whereas soft regulation is more

open-ended and more focused on establishing procedures to guide management-employee interventions on a specific employment topic. Responsive regulation tries to incorporate both approaches. This form of regulatory regime meets a key design precondition for any innovations to dispute resolution procedures. It allows the introduction of initiatives combining voluntary and legal methods to settle workplace conflict. The promise here is that organisations can devise dispute resolution experiments, which may be even ADR-inspired, but employees retain an assurance that a conduit is not being developed for the undermining of established employment rights. Building such flexible systems of workplace governance is probably the optimal strategy to adopt in the Irish context. To proceed in any other manner would be shortsighted. Moreover, the evidence suggests that diffusing 'American' inspired ADR arrangements willy-nilly in countries with dense employment regulations and quasi-legal procedures for the handling of workplace grievances can very quickly run into the sand.

Consider the experience of a scheme launched by ACAS, the body charged with settling employment disputes in Britain (Brown, 2003). In 2000, ACAS introduced a voluntary arbitration scheme for the resolution of unfair dismissals cases as an alternative to cases being taken to an employment tribunal. The motivation was to provide a confidential, fast, cost-efficient non-legalistic resolution of these disputes. The scheme has a number of distinct features. One is that it obliges the parties at the outset of the process to waive a range of legal rights they would otherwise enjoy. These include: the right to a public hearing; the right to have the case resolved in accordance with strict law; the right to summon witnesses and for these to be cross-examined; and the right to a full and reasoned decision which can be made public. A second feature is that the decision of the arbitrator is binding. There are very limited grounds for appeal. Moreover, neither party can re-open the original claim and seek to have it heard at an employment tribunal. A third feature is that the arbitrator plays the decisive role in the process. He/she can set dates and locations for hearings if the parties do not cooperate on these matters. The parties are obliged to co-operate with the arbitrator, particularly with regard to requests for documents or the attendance of witnesses. Fourth, each party meets their own costs. During 2000-2001, ACAS dealt with over 90,000 employment tribunal applications involving firms employing fewer than 200 workers.

Over 70 per cent of the complaints raised in these applications were either settled by ACAS or withdrawn by the parties. Although this is an impressive settlement rate, 27,000 cases still went to employment tribunals. Only twelve cases actually used the arbitration alternative. It is hard not to conclude from this experience that only a tiny fraction of people are likely to sign away their legal rights, particularly in 'high stakes' employment disputes such as unfair dismissals. The broader lesson to be learnt from this initiative is that introducing new 'voluntary' forms of dispute resolution as an alternative to procedures used to enforce established employment rights is unlikely to gain wide support. This is particularly the case in a situation where public institutions are deeply involved in the resolution of disputes. Responsive regulation seeks to circumvent this problem by combining voluntary and legal mechanisms to settle alleged breaches of employment rights in the one regime.

2.5.2 A problem solving approach to dispute resolution

If legal penalties are to be the last station in a cascading self-enforcement process then an important task must be to upgrade the efficacy of organisational level as well as other extra-firm procedures used to solve disputes before the imposition of sanctions. This is where the second core principle, a problem solving approach to dispute resolution, enters the story (Mitchell and Banks, 1996). An important proposition of this paper is that problem-solving, rather than American-style ADR procedures, should be at the centre of the Irish system of dispute resolution as it is an approach more in tune with the Irish context and more able to foster forms of employment grievance and dispute settlement activity that advance the goals of fairness and competitiveness in the labour market.

A problem solving approach to dispute resolution has four main elements. One is to promote a distinct policy identity for the dispute resolution system. The key policy identity that the Irish dispute resolution system must espouse is that work-related grievances and disputes can be resolved by a variety of institutional mechanisms and procedures operating both inside and outside organisations. Organisations and public agencies charged with dispute resolution must not limit themselves to a narrow number of procedures when addressing employment disputes. A variety of programmes should be available to reduce conflict at work. Moreover, the multiple

actors involved in dispute resolution should be encouraged to talk to one another. Open debate not only allows the plurality of perspectives on dispute resolution to be heard but also facilitates comparisons between different settlement methods.

The second aspect of the problem-solving approach is to establish strong 'input legitimacy' foundations to dispute resolution. Input legitimacy is about ensuring that those most likely to be affected by a proposed employment dispute settlement procedure have some influence in its construction (Susskind and Cruikshank, 1987). It is also about giving those that use public dispute resolution mechanisms an opportunity to pass evaluation on their experience. Achieving high levels of input legitimacy will allow for greater transparency, deeper support and more widespread acceptance of the dispute resolution machinery – all essential ingredients of procedural justice. Of course, the other side of the coin is output legitimacy. Mechanisms have to be put in place to evaluate the success or otherwise of dispute resolution processes in carrying out the tasks they were set up to do. A dispute resolution must not only meet procedural justice benchmarks, it must also be able to solve conflicts speedily and, as far as possible, to the satisfaction of all concerned parties. It must be efficient as well as fair.

The third aspect of the problem-solving approach relates to the attitudes, behaviour and processes that link together input and output legitimacy. In particular, those engaged in the dispute resolution process must be guided by a problem solving rather than an adversarial approach. This important distinction needs further elaboration. Modern dispute resolution systems, particularly those in the Anglo-Saxon tradition, have been constructed on the assumption that interactions between employees and employers are competing and adversarial. As a result, an ethos of adversarialism tends to pervade nearly all quarters of the employment relations system, including dispute resolution. An adversarial approach to the resolution of employment disputes encourages 'linear concessions on the road to compromises' (Carrie Menkel-Meadow, 1984: 832). The sequence of deal-making under this model consists of: (1) the setting of target points – what the parties would like to achieve; (2) the setting of reservation points – the point below which the party seeks not to go; (3) the ritual of offer and counter-offer that produces reciprocal concessions; and (4) the arrival at a compromise solution at some point where the target and reservation points

overlap for the two parties. In a nutshell, a 'split the difference' ethos pervades the 'adversarial' approach to dispute resolution.

This adversarial approach to dispute resolution has been influential in Anglo-Saxon industrial relations systems such as those in Ireland, UK, USA and Canada. In these countries the main task of the public institutions charged with resolving employment disputes (e.g. bodies such as the LRC) is to stand above employer and employee interactions, intervening only when relationships between the two become embittered for one reason or another. As a result, agencies are required to be neutral so that they can oversee a 'split-the-difference' process that will finally bring employers and employees who are in conflict to an agreement. The 'neutrality' principle has in fact become something of a coveted arrangement for dispute resolution bodies in adversarial employment relations systems (Costantino and Merchant, 1996). The argument usually made in defence of the principle is that dispute resolution institutions run the risk of being tarnished as pro-business or pro-labour if they seek to influence or mould the behaviour of either employers or employees. On the surface, this seems to be a convincing argument but on closer examination, upholding the neutrality principle may allow the adversarial orientation of the dispute resolution system to go unchallenged. Of course, the adversarial approach can produce solutions to workplace conflict, but it can also generate avoidable employment disputes as a 'them and us' mentality encourages both employers and employees to adopt unreasonable stances at the workplace or in negotiations about some employment relations matter. Moreover, in an adversarial system the possibility exists of the dispute resolution institutions becoming used by employers and employees to gain advantage in the bargaining games they play: the institutions are captured by employee-employer interactions which they are seeking to stand above.

A problem-solving approach adopts a different track to the resolution of disputes. It frames the issue of settling disputes not as one of intervening when appropriate to settle workplace conflicts, but as part of a wider on-going process of building cooperative relationships between employers and employees. In this way, as much emphasis is placed on dispute prevention as dispute resolution. One consequence is to move dispute resolution institutions away from the principle of neutrality and towards strategies that actively encourage employers and employees to adopt

practices and procedures promoting mutual gain relationships. A second feature of the problem solving approach is its greater focus on integrated bargaining rather than redistributive bargaining. The distinction between these two forms of negotiation is explored at greater length in chapter 5, so it will not be explained in detail here. It is sufficient to say that problem-solving approaches encourage employment relations actors to seek solutions to disputes in the context of the need to sustain high quality collaborative relationships. Less emphasis is placed on winning at the expense of the 'other side', which is characteristic of the adversarial approach. Thus the key principles of a problem-solving approach to negotiations are:

- avoid making early decisions but build a connection with the disputing parties by avoiding taking a partisan position
- encourage parties not to get side-tracked by peripheral matters such as personality differences
- establish the main interests and matters at stake in the conflict and encourage all those involved in the process to focus on these
- develop a variety of settlement pathways that could end the dispute
- ensure pathways have objective and fair criteria for a resolution
- ensure pathways facilitate 'buy-in' by all parties.

A problem solving approach is consistent with the notion of flexible workplace governance. First, it recognises the continuing importance of regulation even if it has a preference for decentralised non-legalistic ways of resolving disputes. Voluntary and regulatory procedures are seen as complementary, rather than in collision with one another. Second, the problem-solving approach recognises the need for a plurality of institutions, both public and private, and which are both inside and outside the firm. A dispute resolution system that has a multitude of procedures to address grievances at the workplace is more likely to uphold the principles of procedural and substantive justice. Adversarial dispute resolution mechanisms are overly reliant on 'collective' employment relations institutions.

Although the problem-solving approach is different from the adversarial approach it also stands apart from the American version of ADR. It is more accepting of trade unions. Moreover, it regards

public institutions as having an important role to play in settling workplace disputes. At the same time, the problem-solving approach is tolerant of non-union workplaces provided that employees in these organisations have access to proper procedures for the resolution of workplace conflict. In fact, given the relatively open-ended and experimental ethos of the problem solving approach it would welcome some level of cross-fertilisation between union and non-union organisations on new forms of dispute resolution. Such cross-organisational learning would be regarded as helping dispute resolution procedures adapt to modern patterns of employment.

2.6 Conclusions

This chapter set out to explain the meaning of alternative dispute resolution, the dominant theme in the academic and policy literature on settling grievances at the workplace. It also assessed the debate about the merits or otherwise of ADR that is currently taking place in the USA, the country-of-origin of these practices. The argument put forward is that whilst some individual ADR initiatives are a promising new departure from which both union and non-union organisations could learn, it would be ill-advised to transmit fully the 'American' approach into the Irish system of dispute resolution. The Irish situation, which houses a range of extra-firm institutional and quasi-legal procedures for the handling of workplace dispute resolution procedures, was considered ill-suited to an approach so narrowly focused on diffusing employer promulgated arrangements. At the same time, the lack of 'fit' between the American approach and the Irish context does not weaken the case for renewal of the Irish system. It simply means that different organising principles should guide the pathway of reform in Ireland. Responsive regulation and problem solving are put forward as the core values that should steer dispute resolution innovations.

The public machinery for employment dispute resolution

3.1 Introduction

Workplace disputes whether of a collective or individual character can get so intractable that the parties involved require third-party assistance to help them reach a settlement (Mnookin and Susskind, 1999). Third-party conciliators or mediators may become involved in an employment dispute through a purely employer-led arrangement such as the alternative dispute resolution measures described in the previous chapter. Alternatively, the arrangement could be the product of a joint employer-trade union agreement. Arrangements of this kind normally arise from a social partnership or collective bargaining agreement. Although each of these arrangements is quite different in character both share the similar quality of being a private form of dispute resolution. Private forms of dispute resolution can make a significant contribution towards creating a stable employment relations environment provided they are well organised and enjoy the support of employees.

Yet these arrangements are unlikely to create on their own a well-functioning national system of dispute resolution. Public institutions are also likely to be required for a number of reasons. First of all, public institutions will be needed to perform run-of-the-mill administrative functions associated with any rule-enforcement regime. Information systems need to be in place so that companies and employees are aware of their legal rights and obligations. An advice service is needed to handle queries from employment relations actors about the import of particular employment laws. In addition, the evidence suggests that public institutions can perform the important role of promoting fair treatment at the workplace – government sponsored equal opportunity agencies would be an example of this type of activity. Finally, most countries have found it beneficial to create quasi-judicial processes, such as employment tribunals to help address alleged infringements of employment rights.

Developing quasi-judicial processes within an employment dispute resolution system can be advantageous for three reasons. Firstly, they normally have the authority to bring together disputing parties in an effort to conclude a settlement. This ‘convening power’ (Dorf, 2003) is particularly useful in situations where relationships between the disputing parties have become embittered or have reached an impasse. Secondly, public agencies involved in dispute resolution can perform the role of honest broker in the difficult negotiations that sometimes arise when employers and trade unions are trying to reach a collective agreement. Thirdly, public agencies can improve the resolution of disputes by virtue of possessing a ‘disentrenching capacity’ (Dorf, 2003). This attribute allows public agencies to ensure compliance with employment regulations and agreements by giving them the ability to impose a penalty default.¹ The three identified advantages set out above – convening power, perceived neutrality and disentrenching capabilities – confer important problem solving functions on public agencies. Yet these benefits are not automatically guaranteed: public agencies can easily under-perform due to a range of administrative failures – poorly designed programmes, an outmoded approach to dispute resolution, a lack of legitimacy amongst the employment relations actors and so on. Thus, the exact contribution of public agencies to dispute resolution can only be gauged through an assessment of what they do and the degree to which they are successful in fulfilling designated tasks. This is the context for a review of the Irish dispute resolution system.

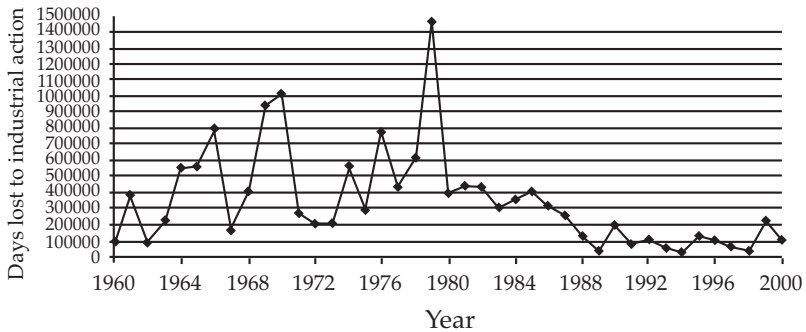
3.2 Public agencies and the Irish system of dispute resolution

The Irish Republic enjoys a relatively stable employment relations environment, particularly on the matter of collective disputes, and it is likely that the current social partnership arrangements have played a large role in this. Figure 1 outlines the number of days lost due to industrial action since 1960 and, as it clearly shows, the period since 1998 has been by far the most stable. When the current phase of social partnership is compared with the previous round of

¹ A penalty default is the situation where a party (or parties) to a dispute faces sanctions, which makes it worse off than if it had complied with the original settlement. Possessing this authority allows the public dispute resolution bodies to check bad behaviour on the part of employment relations actors: for example, the temptation to renege on agreements is reduced.

centralised agreements in the seventies and early eighties, it is readily apparent that the current regime has experienced fewer employment disputes. The most peaceful years during the earlier regime (1971, 1972, 1973 and 1975) just about compare with the worst years of the current phase of social partnership (1990 and 1999). Admittedly, such comparisons are crude; nevertheless, they give some indication why there is such strong support for the continuation of social partnership in government.

Figure 1. Days lost to industrial action in the Republic of Ireland, 1960–2000



Source: Central Statistics Office

This story of greater stability under the recent social partnership agreements is corroborated by the figures on the numbers of days per year lost due to employment actions over the past four decades. Two features stand out from the data provided in Figure 1. First, the decade with the highest number of annual days lost due to industrial action was the 1970s. Second, the 1990s is the most stable decade, experiencing a lower number of annual days lost due to industrial action than any of the three previous decades: for example, the average loss of days was just over 100,000 in the 1990s, compared to over 500,000 days during the 1970s. The climate with regard to collective employment relations is as good now as it has been at any time in the last half century. Social partnership, as a dispute avoidance strategy, clearly helped to bring about this relatively orderly situation. At the same time, the public agencies charged with dispute resolution also made an important contribution.

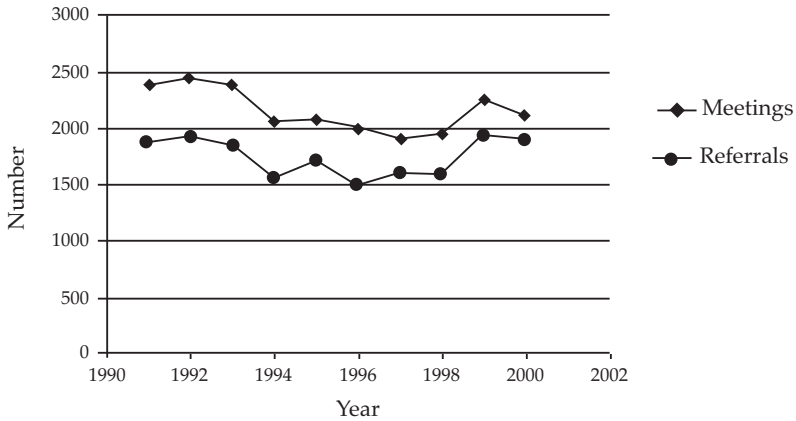
3.3 The Labour Relations Commission

Perhaps the most appropriate starting point for the discussion of these public agencies is the high profile Labour Relations Commission (LRC). The Commission was established by the Industrial Relations Act 1990 and became operational in 1991. Today, it is one of the main public institutions for the resolution of employment disputes and the promotion of cooperative, stable management-union interactions in Ireland. It currently employs thirty-four staff and six Rights Commissioners. Its annual operating budget is roughly €2,750,000, which it receives from the Department of Enterprise, Trade and Employment. The mission statement of the Commission is 'promoting the development and improvement of Irish industrial relations policies, procedures and practices through the provision of appropriate, timely and effective services to employers, trade unions and employees'. In pursuit of this mission, it provides four overlapping services.

3.3.1 Service 1: Labour Relations Commission Conciliation Service

First, there is a conciliation service that is open to all employees and employers excluding members of the defence forces, police and prisons services. It is a free and informal facility (both employees and employers are discouraged from using legal representation). The officers running the service are highly trained in industrial relations matters and are experienced mediators. There is no binding or compulsory element to the service. Parties take part in the programme voluntarily and a settlement arises by mutual agreement. The service is activated when a party contacts the Commission requesting assistance, but the process can only advance when all parties to the dispute agree to get involved. When an all-party agreement is secured the Commission assigns an experienced mediator to the case. The mediator acts as an independent and impartial chairperson and seeks to frame negotiations between the parties in a manner that will assist them in concluding a mutually acceptable agreement. The service appears to be highly effective as Commission figures suggest that 80 per cent of all cases (referrals is the term used by the LRC) are settled amicably.

Figure 2. Conciliation service referrals, 1990–2002



Source: Labour Relations Commission

As Figure 2 shows, there is a high level of demand for the service. In 2001, the service dealt with approximately 1,900 cases, of which roughly two-thirds originated from the private sector and the remainder from the public sector. Over 2,000 actual meetings were convened in pursuit of settlements. This is a normal annual workload for the conciliation service. Only in 1996 did the number of referrals dip below 1,500 (1,487) – since 1991 the average annual number of cases has been approximately 1,800. Figure 3 shows that the most common category of dispute dealt with by the service relates to issues of pay and remuneration, followed by restructuring and rationalisation, and conditions of employment. The distribution of cases across industrial sectors is even. For example, in 2000, three sectors – health and social services, transport, storage and communications, and manufacture of food, drink and tobacco – each accounted for 11 per cent of the total referrals to the service. The other 66 per cent of referrals were spread across sixteen sectors. The LRC sees this service as highly efficient given that a satisfactory settlement package is reached in the vast majority of cases.

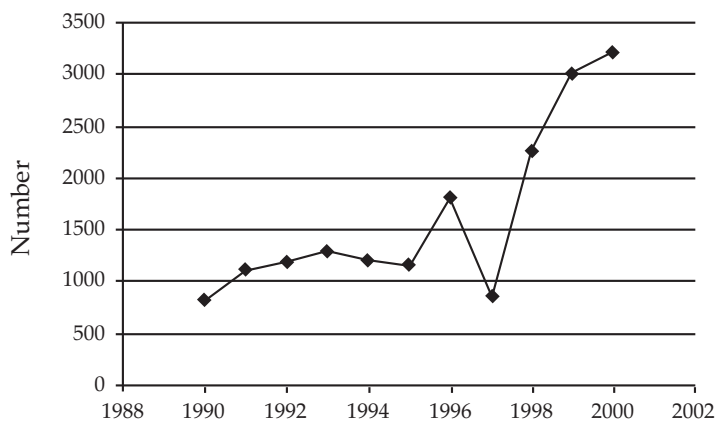
3.3.2 Service 2: Rights Commissioners

The LRC also provides a rights commissioners service. Again, this service was established by the Industrial Relations Act 1969 to provide a non-legalistic and fast procedure to settle disputes. The

remit of the rights commissioners is to help solve employment disputes and grievances raised by either an individual or small group of employees. No less than thirteen pieces of employment legislation (soon to be fifteen) give the commissioners an active role in the settlement of disputes. Commissioners are not lawyers, but are highly experienced employment relations experts. They are usually nominated either by IBEC or ICTU but perform an independent role when involved in dispute resolution. A commissioner becomes involved in an employment dispute when a claimant – individuals or small groups of workers – request their intervention under a particular piece of legislation. The responsibility of the commissioner on becoming involved in an employment dispute is to first conduct an investigation and gather as much information as possible on the grievance, including holding a hearing where the various parties to the dispute have the opportunity to present their case. After this, commissioners present the findings of their investigations in the form of either non-binding recommendations or as decisions, depending on the legislation under which the case was referred.

The caseload of the commissioners, as demonstrated in Figure 3, has more or less continuously increased over the years. In 1990, for example, about 800 cases were referred to the commissioners, but this increased to 3,500 in 2002. The disputes most regularly handled involve cases concerning unfair dismissal, payment of wages, working time, holiday pay and disciplinary matters.

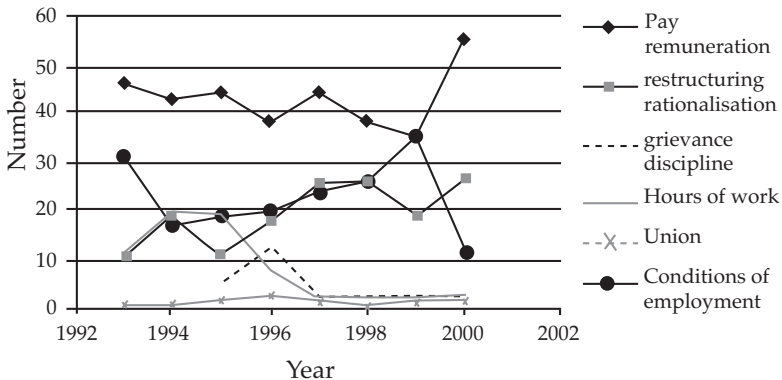
Figure 3. Referrals to the Rights Commissioner, 1988–2002



Source: Labour Relations Commission

Figure 4 shows the breakdown of referrals to the rights commissioners by the relevant piece of employment legislation. This shows that the core aspects of employment relations – payment systems and dismissals – are still the main source of workplace disputes and grievances. The commissioners are efficient in dealing with cases. For example, of the 3,206 cases referred to the commissioners in 2000, 1,623 received a hearing before the end of the year. Approximately 675 cases were withdrawn before the hearing stage and the eventual outcome of these disputes is not clear. The remaining cases were still in progress at the end of the year. In those cases that received a hearing, the commissioners mostly found in favour of the claimant. This is in line with the annual trend: every year the commissioners uphold the claim in the majority of cases. Parties that disagree with the decision of the rights commissioners can appeal to the Labour Court.

Figure 4. Nature of the disputes referred to rights commissioners



Source: Labour Relations Commission

Two further aspects of the work of the commissioners are worthy of comment. First, the establishment of the commissioners in 1969 shows that Ireland has long recognised the importance of possessing an extra-firm procedure to uphold the employment rights of workers through essentially non-legalistic activity. The ideals of a non-adversarial, problem-solving approach to the resolution of employment disputes are thus not alien to the Irish public dispute

resolution machinery. This represents a solid foundation for further developments in this area. The second feature is the high number of cases that the commissioners find in favour of the claimant each year. This suggests that the number of organisations not complying fully with employment laws is uncomfortably high. Either there are too many unscrupulous employers or the public agencies charged with preventing employment disputes are not connecting well enough with employers to inform them of their obligations under employment law. Against this background, the case for re-assessing the level of penalties associated with flouting labour legislation is strong. Moreover, it reinforces the argument made earlier for new preventive dispute resolution activity, particularly in the area of individual rights.

3.3.3 Service 3: Advisory, Development and Research Services Unit

The third strand of the work of the LRC mostly involves preventive dispute resolution activity and is carried out by the Advisory, Development and Research Services whose remit is to give independent and impartial advice to employers and employees about employment relations practices that foster cooperative manager-employee interactions. In addition, it has the task of developing initiatives that encourage managers and employees to follow 'best practice' employment relations practices. In essence, the service seeks to provide a range of activities that challenge adversarial relations between employers and employees and encourages them to forge sustainable cooperative relationships. Examples of these activities include the conducting of diagnostic audits in organisations considered – either by themselves or by the Labour Court – to have poor employment relations. In 2002, the unit carried out twenty-two diagnostic audits, eight in the public sector and fourteen in the private sector.

Two further areas of work by the advisory unit are worthy of mention. One is joint working party activity, which arises when the Labour Court, as part of a recommendation on settling an employment dispute, encourages an organisation to establish a joint working party, comprising of management and employees. The purpose of these working parties is to devise agreed procedures for the implementation of the recommendation. In 2002, the unit was involved in ten working groups, some of which involved recasting the entire employment relations system of an organisation. The other

service provided by the unit that needs highlighting is preventive mediation activity, much of which focuses on the preparation of Codes of Practice. Section 42 of the Industrial Relations Act 1990 permits the drafting of a Code of Practice that essentially sets out best practice to be followed on an employment relations topic (see Appendix 1). The advisory service plays an influential role in the promulgation of these instruments. Essentially the unit works with the social partners and other directly affected stakeholders in the preparation of a draft code acceptable to everyone. Once consensus is reached the draft is sent to the Minister for Enterprise, Trade and Employment who by order declares it a Code of Practice. To date, seven Codes of Practice have been produced.

- Code of Practice on Dispute Procedures, including Procedures in Essential Services.
- Code of Practice on Duties and Responsibilities of Employee Representatives and the Protection and Facilities to be Afforded them by their Employer.
- Code of Practice on Grievance and Disciplinary Procedures.
- Code of Practice on Compensatory Rest Periods.
- Code of Practice on Sunday Working in the Retail Trade.
- Code on Practice on Voluntary Dispute Resolution.
- Code of Practice Detailing Procedures for Addressing Bullying in the Workplace.

3.3.4 The Commission's strategic outlook

At the end of 2001, the Commission carried out a strategic review to set out a new action programme to guide its future work (Mulvey, 2003). This review was considered necessary in the light of the multiple changes taking place within the Irish employment relations environment. Four changes were identified as being particularly important. One was economic and social development in Ireland. A combination of economic openness and social consensus was seen as an important driver behind the Celtic Tiger. Employment relations institutions were attributed a key role in connecting these two separate arenas and thus the proper functioning of these bodies was seen as crucial to continued economic growth and prosperity. Another was workplace change. Irish employment relations were seen as echoing the pattern of employment transformation occurring

across relatively affluent economies – greater use of part-time and temporary work, increased experimentation with new human resource management techniques and so on. At the same time, equal importance was also given to country-specific innovations such as the diffusion of enterprise partnerships. A third change was the growth of non-union companies in the country; two contrasting forms of management-employee interactions, union and non-union, are now sitting side-by-side. Finally, an increase in the volume and complexity of labour law as well as reforms to the institutional framework for Irish employment relations, specifically the creation of the Office of Equality Investigations (now the Equality Tribunal) and the National Centre for Partnership and Performance, were seen as opening up new possibilities for dispute avoidance and resolution.

All these developments were regarded as impinging on the work of the Commission. For instance, complex labour law makes the work of the rights commissioners more difficult. Another example would be the creation of new dispute avoidance and resolution bodies, which raises the danger of overlap and duplication. Thus a higher level of coordination than ever before is required between the agencies. In other words, the employment relations transformations that have taken place since its formation in the early nineties required the Commission to renew its strategic perspective. Five challenges were identified as important to the future activities of the Commission.

- 1) To continue to deliver an effective service and maintain the Commission's reputation for providing a quality service.
- 2) The need to anticipate and adapt to change: the Commission should have organisational systems and methods of working that allow it to make informed decisions about unfolding events and have the ability to make appropriate adjustments accordingly.
- 3) Correct positioning in the industrial relations sector: the Commission needed an organisational identity that defined its role in a distinctive manner so that it is able to stand apart from other agencies in the industrial relations field.
- 4) Maintain an effective and committed workforce: having a motivated and high skilled team of employees was seen as central to the future success of the work of

Commission. This required the Commission to be in a position to offer continuous training and good working conditions.

- 5) Maintain support of principals and clients: ongoing support from the government and social partners was regarded as essential if the Commission is to fulfil its remit of delivering high quality services.

An action programme, including new proposals, was set out to allow the Commission to progress towards meeting these objectives. With regard to conciliation, it was proposed that the rights commissioners would develop a new package of support for individual and small cases. The development of new Mediation and Arbitration schemes was also put forward. A number of complementary measures were outlined to enhance the ability of the Commission to make informed interventions to improve industrial relations stability. These included improvements in the diagnostic tools used to promote cooperative employment relations, and more effective implementation of codes of practice. A further proposal was the introduction of a customer care programme.

The Commission argued that the operationalisation of this ambitious programme required additional resources. New posts were asked for in the areas of information and communication, as well as in administrative support. Increased resources were also considered necessary to develop training and skill programmes, launch new schemes and redesign existing organisation systems. The government appointed a team of consultants to assess the merits of this claim for additional resources. The team concluded that the Commission was under-resourced both in terms of professional and administrative staff and that this acted as a major constraint on the organisation pursuing strategic development activity. It argued that if government wanted the Commission to take on a more pro-active role with regard to employment relations then additional resources would have to be found. Currently the Commission is holding discussions with government on the recommendations of the consultants' report.

Some positive change has emerged from this rethinking. In particular, the Commission will shortly launch a new mediation service and a new arbitration service. The new mediation service will provide support facilities to such groups of employees that previously had not the right of access to public dispute resolution

procedures (including certain categories of public sector jobs). The service will also be targeted at complex disputes that require sensitive and dedicated assistance to ensure their resolution. The new arbitration service is intended primarily for those parties involved in a dispute that are referred to the Labour Court by the Conciliation Service or rights commissioners. The expectation is that these parties may wish to avail of this speedier service rather than wait for a hearing at the Labour Court. Thus the motivation is to provide a more flexible and rapid service to the public. These changes are to be welcomed as they are in line with the thrust of the argument presented in this paper for innovation in the public dispute resolution system.

3.4 The Labour Court

The second main institution charged with solving employment relations disputes is the Labour Court. Established in 1946, the original motive for creating the Court was to provide conciliation and arbitration in trade disputes. This early remit was enlarged to include employment relations, mainly as a result of the growth in employment legislation. Today, the Court has the legal competence to act in four designated employment relations areas: industrial relations disputes; employment equality; the organisation of working time; and the national minimum wage. The contemporary mission of the Court is to 'find a basis for real and substantial agreement through the provision of a fast, fair, informal and inexpensive arrangement for the adjudication and resolution of industrial disputes'. The Labour Court is not a court of law and operates more like an industrial tribunal. Its function is to provide a variety of its services, free of charge, for the fast resolution of disputes. The Court projects itself as a 'court of last dispute' by which is meant that whatever possible cases come before it should have exhausted all other available procedures to end the dispute. The Court can make Recommendations or issue Orders. Recommendations set out its assessment of disputes and the terms on which they should be settled. These are not binding on the parties to a dispute, but carry a high level of informal authority (i.e. soft regulation instruments). Orders made by the Court are binding as they normally relate to Court decisions with regard to breaches of registered employment agreements or infringements to legally binding labour legislation.

The Court consists of nine full-time members: three are nominated by IBEC, three by ICTU and three by government. Government sponsored members fill the positions of Chairman and Deputy Chairmen of the Court. Only in exceptional cases do all nine members sit in the one hearing. The usual practice is for a hearing to consist of three members drawn from the respective constituencies. A team of civil servants, divided into five administrative sections, which specialise in particular tasks such as organising the conduct of investigations and the processing of referrals (cases), assists the Court. In general, the Court deals with disputes that are referred to it. On occasions however, particularly when an industrial relations dispute is threatening to spiral out of control with widespread spillover consequences, it will make the decision to intervene. There are numerous ways in which a case can be referred to the Court.

- LRC referrals: sometimes the LRC conciliation service is unable to find a mutually acceptable settlement to a dispute and at the request of the involved parties it refers the matter to the Labour Court.
- LRC waivers: on occasions the LRC will waive its conciliation function and pass the matter straight to the Labour Court.
- Labour Court intervention: the Court in the context of a major industrial dispute will take the initiative and invite the parties to use its services.
- Ministerial intervention: the Minister for Enterprise, Trade and Employment may refer a dispute to the Court.
- Direct referral: if an employer refuses to use the services of the rights commissioners to settle an industrial dispute, the involved employee or group of employees (or their representatives) can make a direct referral to the Labour Court provided they agree in advance to accept the recommendation of the Court.
- Appeals: either party to a dispute that has been heard by the rights commissioner or investigated by the Office of Equality Investigations can appeal the Recommendation or decision. In the case of a rights commissioner, one of the parties can appeal to have the recommendation enforced.

The Court is a busy institution. It dealt with 428 cases in 2000, most of them 'collective' in character and related to pay claims. Employment dismissals also figured prominently in the work of the Court. Equality cases while relatively small in number, are considered to be the most complex and time consuming to resolve partly because of the need to consult national and European legislation and partly because they require careful investigations. The number of cases heard by the Court that are appeals against decisions/recommendations of the rights commissioner has steadily grown in recent years. For example, in 2000 some 287 objections were lodged to recommendations of rights commissioners. In general, members of the Court are of the view that it operates in a smooth and efficient manner. If there is one issue with which the members are unhappy it is that the convention of the Court operating at the back end of the mediation and arbitration process is being compromised by some employment relations actors eager to bring the Court into a dispute as quickly as possible. The Court is determined to make a stand against this 'bad behaviour'.

3.5 The Employment Appeals Tribunal

The Employment Appeals Tribunal was established by the Redundancy Payments Act 1967. Its original mandate was to adjudicate in disputes about redundancy between employees and employers, but its remit has continuously expanded since it was first established. It now deals with employment disputes arising under thirteen different pieces of employment legislation, as listed below.

- Redundancy Notice and Payments Acts 1967 to 1991.
- Minimum Notice and Terms of Employment Acts 1973 to 1991.
- Unfair Dismissals Acts 1977 to 1993.
- Maternity Protection Act 1994.
- Protection of Employees (Employers' Insolvency) Acts 1984 to 1991.
- Payment of Wages Act 1995.
- Terms of Employment (Information Act) Act 1994.
- Adoptive Leave Act 1995.
- Protection of Young Persons (Employment) Act 1996.
- Organisation of Working Time Act 1997.
- Parental Leave Act 1998.
- Protections for Persons Reporting Child Abuse Act 1998.

When the Tribunal was first established its aim was to provide a speedy, inexpensive and informal procedure for the settlement of disputes involving alleged infringements of statutory rights. However, greater formalism has crept into Tribunal proceedings with professional legal teams now used in most cases that appear before it. For example, in 2001, trade unions, solicitors or other counsel represented 81 per cent of 'employee parties' and 64 per cent of 'employer parties' were represented either by employer associations, solicitors or other counsel. The requirement for the Tribunal to act judicially adds to the sense of formalism, making it the most legalistic of all the statutory or public bodies associated with the resolution of employment disputes. At the same time, Tribunal proceedings do not fully follow those of a proper court of law. In particular, although it has the authority to take evidence under oath this is not a frequent practice. Moreover, the strict rules of evidence that a formal court is obliged to follow are not always enforced and on occasions the Tribunal permits 'hearsay evidence'. It may be useful to point out that the Employment Appeals Tribunal differs from the Labour Court. Whereas the latter gets directly involved in settling employment disputes, this activity falls outside the competence of the Employment Appeals Tribunal. Moreover, Tribunal appeals usually deal with legal employment rights which are subject to a qualifying period of employment: for example, before a person evokes unfair dismissal legislation s/he needs to have been employed by the organisation for more than a year. However, the Labour Court may deal with cases of alleged infringement of employment rights where the qualifying period of employment has not been reached.

The Tribunal consists of a Chairman and twenty-two Vice-Chairmen. In addition, there is a panel of sixty members, thirty of whom are nominated by IBEC and thirty by ICTU. Tribunal hearings normally consist of three individuals, a Vice-Chairman and two panel members. The Tribunal operates on a regional basis, holding hearings in various towns and cities. The main benefit of this decentralised service is that parties involved in a dispute do not have to travel to Dublin for a hearing. During 2002, the Tribunal sat on 225 days at 55 different venues throughout the country. The total number of sittings was 693 (334 in Dublin and 359 outside of Dublin). The Tribunal deals with a large number of cases each year. The overall trend during the 1990s was a steady increase in the

numbers availing of its services. In 2001, the Tribunal received 5,257 referrals, a 56 per cent increase on the 2000 figure of 3,377. Of the 5,257 cases referred, the Tribunal was able to 'dispose' of 3,994.

For the most part, the Tribunal considered claims under legislation relating to unfair dismissals, redundancy and minimum notice, and the organisation of working time. Table 4 shows the handling of cases in 2001 under the relevant five pieces of legislation outlined. A number of features are worthy of comment. First of all, under most pieces of legislation the Tribunal 'allows' a larger number of cases than it dismisses. Second, an uncomfortably high number of cases are withdrawn either just before the beginning of a Tribunal hearing or sometime during proceedings. This trend has not been seriously investigated but the view of Tribunal officials is that cases withdrawn during proceedings is due to the final verdict of the Tribunal becoming more or less apparent. Cases withdrawn before the start of proceedings are explained by parties not wanting to go through the ordeal of a hearing or because the parties realise that they have reached the final round of a hard bargaining game and are willing to settle rather than go through the ordeal of a Tribunal sitting. While these explanations are plausible, Tribunal withdrawals merit closer investigation, not least because important information would be uncovered about the motives and behaviour of people and organisations involved in dispute resolution.

Table 4. Claims referred to the Employment Appeals Tribunal, 2001

Legislation	Referrals disposed of	Referrals allowed	Referrals dismissed	Referrals withdrawn*	Referrals withdrawn#
Redundancy Payments Acts 1967 to 2001	612	553	253	124	55
Minimum Notice and Terms of Employment Acts 1973 to 2001	3,216	2,336	1,774	216	135
Unfair Dismissals Acts 1977 to 2001	894	691	124	301	158

Payment of Wages Act 1991	75	60	21	N/a	N/a	29
Worker Protection Act 1991	65	54	2	20	15	17

Source: Employment Appeals Tribunal

Note: 'Referrals withdrawn*' = referrals withdrawn during hearings.
'Referrals withdrawn#' = referrals withdrawn prior to hearings.

A popular misconception is that those parties that have cases upheld by the Tribunal receive high levels of compensation. Table 5 sets out the distribution of compensation awarded by the Tribunal in unfair dismissal cases in 2001. It shows that out of a total of 163 cases, only five received awards in exceed of €25,000; 24 cases received awards above €10,000; and 113 cases received awards less than €5,000. The largest single category of awards fell within the range of €1,001–€2,000 with 36 cases receiving this amount. Overall, the total amount awarded by the Tribunal was €860,654 and, therefore, the average award per case was €5,286. The clear message emerging from this analysis is that winning a case at the Employment Appeals Tribunal does not usually lead to high levels of monetary compensation.

Table 5. Compensation awards by the Employment Tribunal

Compensation award	Number	Compensation award	Number
0	1	5,001-6,000	9
1-250	12	6,001-7,000	9
251-500	14	7,001-8,000	5
501-750	8	8,001-9,000	1
751-1000	9	9,001-10,000	2
1001-2000	36	10,001-15,000	14
2001-3000	10	15,001-20,000	3
3001-4000	14	20,001-25,000	2
4001-5001	9	>25,000	5

Source: Employment Appeals Tribunal

3.5.1 Re-appraising the work of employment tribunals

Many governments are currently appraising the performance of employment tribunals (or the domestic equivalent body). Three motives normally lie behind these evaluations. One is the cost factor. As a result of the sharp increase in the number of cases going to employment tribunals, the costs of operating such bodies are spiralling with a corresponding increase in costs for the exchequer. A number of governments are even considering introducing charges so that users must pay to use the services of the public dispute resolution machinery. A second motive is to improve the customer focus of tribunals. Driven by new public management thinking, innovations are being introduced to reduce the length of time taken to resolve a dispute. Examples of these changes include the introduction of a fast track to deal with straightforward claims and the setting of time limits for the handling of disputes. Finally, although the tribunal process offers the opportunity to individuals or organisations either to redress a perceived infringement of employment rights or to clear their name, it can also be an extremely stressful and unhappy experience, extracting a heavy toll in human terms. Thus governments are anxious to promote non-legalistic methods to settle grievances, preferably at the workplace, as it is believed everyone benefits from these procedures – hence the drive towards ADR.

For the purposes of this paper, in-depth interviews were held with civil servants and senior people in charge of operating the Employment Appeals Tribunal system to assess whether any of these factors were at play in Ireland. These interviews revealed a group of highly motivated and able professionals dedicated to the settling of disputes in a manner that was fair to all. Interestingly, this group was of the view that present arrangements did not require changing, at least not in any radical way. The consensus opinion was that current procedures were by and large delivering an effective and efficient service. It was considered that the waiting list for a Tribunal hearing was not overly long and the administrative costs were not burdensome. Moreover, it was suggested that the majority of applicants to the Tribunal wanted ‘their day in court’ and that this motivation more than outweighed the human stress and discomfort caused by such proceedings. Moves in other countries to increase the number of disputes settled outside the Tribunal were seen mostly as an attempt to water down the ability

of individuals to access a quasi-judicial process to settle a perceived infringement of a statutory employment right. Thus without the door being closed on organisational reform, the unanimous view was that the case for change was not proven. In addition, it was suggested that proposals for reform should be based on evidence that a problem existed or that a procedure was flawed and were widely accepted by the social partners.

Up to a point these arguments are persuasive. There is no convincing evidence to suggest that the service provided by the Tribunal is deficient. All the evidence indicates that cases referred to the Tribunal are processed within a reasonable time frame – this period has actually shortened in recent years despite the increased number of applicants. In 2000, the average waiting period between the receipt of an application and a date for a hearing in unfair dismissals cases in Dublin was 8 weeks and in provincial areas 12 weeks: the figures in 1997 were 12 and 16 weeks respectively. Although it is hard to pin down the exact costs of running the Tribunal service, there is no indication that these are spiralling out of control. At the same time, there is room for some change. A lack of reliable information and data exists on important matters such as withdrawals. More information on such topics would allow a more informed assessment to emerge about the quality of the service provided by the Tribunal. Thus introducing a new procedure aimed at gathering the views of clients who use the service would be a worthwhile new initiative. It would provide more solid evidence to gauge properly whether innovations such as pre-hearing sessions to promote the quick settlement of disputes would be welcomed. Thus although the Tribunal does provide a proficient service, the scope nevertheless remains to introduce changes designed to upgrade customer care.

3.5.2 Upholding the Employment Equality Act

In 1998, the Dáil passed the Employment Equality Act, which introduced a number of important changes to the enforcement of equality laws in Ireland. First of all, a new institution, the Office of the Director of Equality Investigations (ODEI) (renamed the Equality Tribunal in 2002), was established to deal with complaints of discrimination in the areas of gender, marital status, family status, sexual orientation, religious belief, age disability, race and membership of the Traveller community. The creation of the ODEI

brought about a range of organisational changes to the pre-existing public bodies working against discrimination in Irish society. For instance, the Equality Service of the Labour Relations Commission was transferred to the ODEI as were some functions previously carried out by the Equality Commission. A division of labour has been established between the Equality Commission and Equality Tribunal which sees the former concentrating on activities that seek the diffusion of practices and codes of behaviour of fair treatment to all sexes and groups and the latter focusing on processing claims of infringement to equality rights. The Tribunal, however, does not exclusively handle all such cases. The Labour Court, for example, can still deal with claims of unfair dismissal based on discrimination. Thus in a technical sense the promotion of employment equality is shared across a number of organisations.

Of greater importance to this analysis are the innovations introduced by the Act to address referrals (complaints) of discrimination. The ODEI can deal with referrals of discrimination via two different routes. One is the well-established, quasi-judicial route of investigations. This process entails an Equality Officer conducting a detailed investigation into the referral. Equality Officers have extensive legal powers to collect information, including the right to enter workplaces and other premises, as part of their investigative work. A key part of an investigation is the written submission by parties involved in the case. Each case would also involve the holding of semi-formal proceedings that provide all the involved parties the opportunity to call witnesses and to respond to allegations made by the other party. These proceedings allow the Equality Officer to gain invaluable information on the case. On completion of the investigation, the Equality Officer issues a decision. Decisions are legally binding and are published. In effect the investigation process is like an Equality Court or Tribunal. An Equality Officer working at the Tribunal described the process as a 'court of first instance'.

The alternative route to dealing with referrals of discrimination is mediation. The 1998 Employment Equality Act (and the 2000 Equality Act) obliges the Tribunal to offer a mediation alternative to settle a claim of discrimination. Yet neither piece of legislation furnished the Tribunal with a definition of mediation nor set down a proscribed list of activities or practices that should be included in the process. Thus a degree of uncertainty prevailed within the ODEI

about how to deliver a comprehensive mediation service. To fulfil the mediation mandate, a designated group of Equality Officers received specialised training and a working definition of mediation was developed, setting out the core values and operating guidelines for the new service. The definition of mediation developed by Bush and Folger (1994) heavily influenced the character of this mission statement, which believes that mediation should be understood 'as an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement'. Working from this definition, the Tribunal set out a number of operating principles to underpin its mediation activities:

- consent: each party must give their approval before the mediation process can begin
- impartiality: the mediation services avoids taking sides in a dispute
- voluntary process: either party can withdraw at any stage from the mediation process
- accessibility: the mediation service will ensure accessibility for all users and will make special arrangements as necessary for people with disabilities and/or who experience difficulties in travelling to and from the service
- participation: full and active engagement is required from all parties and participants in the mediation process
- power balancing: the mediation process encourages balanced negotiation and will be intolerant of any behaviour considered manipulative or intimidating
- advice: if the mediation touches on rights and obligations other than those set out in the initial complaint then each party will be advised to seek independent advice
- issues for discussion: not only are the parties responsible for the matters to be negotiated in the mediation process, but must also take full ownership of the terms of the settlement should one be reached
- confidentiality: the mediation process is confidential and none of its activities or proceedings are published

- joint sessions: normally mediation will be held in the presence of all the participants. But special sessions can be made for bi-lateral negotiations
- disclosure: when signing up to mediation all the parties must commit themselves to full disclosure of all relevant information
- settlement: once each party has signed up to a settlement then the agreement becomes legally-binding and may be enforced on application to the Circuit Court
- no settlement: if the parties fail to conclude a settlement then the complainant is free to lodge a referral and seek an investigation.

The ODEI has actively promoted the mediation alternative, offering it in every case. It proclaims that mediation holds a range of benefits to those involved in a complaint such as:

- participants keep full ownership of the negotiation of a solution: a third party does not impose decisions
- mediation offers a quick and informal route to a settlement
- mediation encourages participants to clarify precisely their concerns and grievances, thereby enabling comprehensive and more sustainable settlements
- mediation is a private process – details of proceedings and settlements are not published
- costs associated with trying the option are virtually zero. Both parties can, at any time, walk away from the process and a complainant can ask for an investigation if no settlement is reached.

The different operating principles behind the investigations and mediation processes are set out in Table 6.

Table 6. Investigations versus Mediation

Investigations	Mediation
semi-judicial process	negotiation process
delegation to a third party	participants retain full ownership
formal proceedings	emphasis on informality
winner/loser scenario	mutually acceptable settlements
difficult to accommodate 'grey' areas	accommodation of 'grey' areas
decisions based on findings of facts	underlying tensions and grievance addressed
public knowledge	private and confidential

The full mediation service has been operational since 2001. Five Equality Mediation Officers staff the programme. Each potential case arriving at the Office is first screened for its admissibility. If it passes this assessment then the participants are offered either the mediation or investigation process to deal with the case. Table 7 sets out the number of mediation referrals dealt with by the Office in its first year.

Table 7 shows that by the end of the first year of operation the ODEI dealt with a total of 102 mediation referrals: 56 cases related to alleged infringements of rights established by the Employment Equality Act, whereas the other 46 cases concerned equal status. Of the 56 employment equality cases, 2 were settled through mediation and a further 9 withdrew from the process without resolution. Thus, 11 cases that started the mediation process were considered closed by the end of the year. In addition, a further 24 cases that were due to enter mediation were settled voluntarily before the beginning of the process. Overall, therefore, 26 of the 56 cases were settled while the total number of cases closed was 35. With regard to the equal status cases, of the referrals that began the mediation process 9 were successfully settled while another 7 were withdrawn without a settlement. Thus by the end of the year, 16 cases that started mediation were closed. A further 2 cases were settled before the mediation process started. As a result, of the 46 equal status cases, 11 cases were settled and 18 were closed.

Table 7. Mediation Referrals, 2001

Mediation Referrals	Employment Equality Act	Equal Status	Total
Cases Referred 2001	56	46	102
Settled at Mediation	2	9	11
Not Resolved	9	7	16
Total Closed at Mediation	11	6	27 %
Settled (without mediation)	24	2	26
Total Settled	26	11	37
Total Closed	5	18	53

Source: The Equality Tribunal

Clearly it is still too early to make any authoritative comment on the new mediation service. In the Irish context, where an adversarial ethos still hangs over employment relations and the custom-and-practice is to bring claims of infringements of employment rights to a tribunal or similar quasi-judicial process, it is questionable whether individuals, trade unions or organisations will automatically 'connect' with a mediation option. The Equality Tribunal probably needs to do more educational work to make mediation an acceptable and legitimate pathway to the settling of disputes involving discrimination. However, the indications are that the new service is a worthwhile public policy innovation. For instance, on average the 11 cases settled by mediation in 2001 took under 5 months to resolve, which compares favourably with the 19 months average time span to conclude an investigation. Overall, the new service needs to be supported as it sends out the positive signal that the public institutions engaged in dispute resolution are willing to adopt new methods of workings and to increase the avenues open to individuals and organisations when seeking a resolution to a dispute (McDermott et al, 2000).

3.6 Settlement masters and framing the resolution to disputes

A case was made in chapter 2 for the adoption of a problem-solving approach to dispute resolution. The assumption behind this approach is that the disputing parties, are willing to engage in some form of dispute resolution process: relationships have not broken

down to the extent that an impasse has been reached in the conflict. However, this is not always the case. Occasionally, relationships become so embittered that the disputing parties cannot proceed: they are either so enraged or have become so intransigent that they become either unable or unwilling to enter dialogue designed to bring the dispute to an end. Such stalemate situations normally arise in collective employment disputes – those involving trade unions and employers. A public dispute resolution system usually has some contingency procedure that can be activated to kick-start a settlement dialogue (MacFarlane, 1997).

These mechanisms take a variety of institutional forms but are normally referred to as settlement masters in the literature (Ziegenfuss, 1988). Settlement masters can be either individuals or a panel of individuals who work to avert a looming dispute, intervene to prevent a dispute escalating or supervise the implementation of a settlement. They are essentially pro-active mediators or trouble-shooters. They are not usually an established part of the dispute resolution machinery: in today's parlance they would be described as a 'virtual' procedure, on stand-by to be called into action whenever necessary. Invariably the individuals who are appointed to perform the role of settlement master enjoy a high reputation amongst employers and trade unions and have wide experience. Settlement masters facilitate dispute resolution mostly by reframing the nature of the dispute so that the disputing parties feel obliged to change the way they relate to each other or redefine the negotiations agenda. For the most part, disputants respond in a constructive manner to proposals made by settlement masters. This is normally partly because settlement masters exercise a degree of moral authority over the disputants to the extent that the latter are persuaded to modify their stance in one way or another and partly because disputants calculate that not to interact with these people would damage their position.

Over the years settlement masters have been used in Ireland to help solve high profile disputes, normally strikes. For example, in the early nineties settlement masters were called into action to solve a strike involving the main provider of electricity in the country, the ESB, which was threatening to escalate out of control (ESB, 1981). They were also used at that time to resolve a critical dispute in the banking industry. On both occasions, the intervention was relatively successful. Settlement masters are now an established and ongoing

feature of employment relations in Ireland. In 2000, a significant step was taken to put this essentially informal and *ad hoc* process on a much firmer footing. In particular, the social partnership agreement signed that year, the *Programme for Prosperity and Fairness*, established a National Implementation Body whose remit is to ensure that all participants adhere to the 'peace clause' contained in the agreement. Essentially this body's role is to police the new agreement. Membership of the body consists of the Secretary to the Cabinet, the Director of IBEC, and the General Secretary of ICTU. Within a year of its establishment the new body was called into action. An acrimonious dispute had erupted at Aer Lingus involving cabin staff and had halted the state-owned airline's operations. This dispute was potentially serious as it threatened to unravel a multi-union management plan for the restructuring of the airline. Shortly after the intervention of the Implementation Body, both sides were participating in talks at the Labour Court and a settlement was reached.

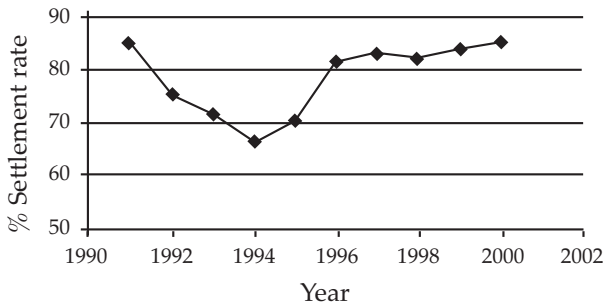
Some are uneasy with the role of settlement masters in dispute resolution as they feel such individuals may have the unintended consequence of casting a shadow over organisations such as the LRC and the Labour Court. This view regards the very presence of an informal mechanism to help settle conflicts as tantamount to an admission that the formal bodies are not able to cover all contingencies when it comes to maintaining stable employment relations. However, this line of argument appears unpersuasive. In the first instance, the National Implementation Body and other forms of 'settlement mastering' usually seek to work with the formal bodies by recommending that the disputing parties negotiate or discuss a settlement under the guidance of some part of the public dispute resolution machinery. In other words, a complementarity is sought between informal and formal processes. Moreover, it appears to be a matter of good public policy to put in place an arrangement that can act as a safety net in the dispute resolution process. All in all, the record suggests that settlement masters have played a positive role in the Irish dispute resolution system and are fully supported by the social partners.

3.7 Conclusions

A comprehensive public framework for the resolution of employment disputes has developed in the Republic of Ireland. The

full battery of dispute resolution techniques – conciliation, mediation, arbitration, adjudication and regulation are offered by the various agencies. In addition, both formal and informal processes are in place to provide those involved in a dispute with alternative avenues to reach a settlement. Thus in broad terms there appear to be no deep-seated problems or significant policy failures associated with the functioning of any of the agencies. For example, as Figure 5 shows, the Labour Relations Commission usually settles about 85 per cent of the cases referred to it. The staff of the various agencies appear highly committed to delivering a neutral and professional service to employers and employees.

Figure 5. Settlement rate at the Labour Relations Commission, 1990–2002



Source: Labour Relations Commission

This conclusion does not mean that there is no room for improvement. For a start, each of the various public institutions involved in dispute resolution must continually strive to reduce the time frame for handling disputes, making the services they preside over as simple and as user-friendly as possible whilst remaining open to innovation. Continuous improvement must be the watchword of these bodies. To these ends greater effort has to be made to monitor customer satisfaction. Feedback mechanisms of this type are crucial to dispute resolution provision because they assist in the evaluation of the services. In addition, these surveys can help identify trends in employment grievances, thus allowing the agencies to make necessary internal adaptations. Further,

customer surveys can provide invaluable information on the attitude, motivation and behaviour of disputants that would permit more authoritative answers to questions such as: are we living in a more litigious society? Accordingly, dispute resolution agencies should put in place customer care programmes that would provide the information necessary to evaluate the effectiveness of the service (Kochan et al, 2000).

A further matter is that a degree of institutional overlap appears to exist within the public framework for dispute resolution. For example, at least three different codes of practice have been devised on the issue of bullying at the workplace – hardly evidence of streamlined public policy. A further example is that it is possible for the LRC, Labour Court and the Equality Tribunal to deal with equality-based employment grievances. Yet another example is that when it comes to conciliation and mediation it is hard at times to be certain when the remit of the LRC ends and that of the Labour Court begins. Functional overlap and blurred lines of demarcation between dispute resolution bodies can have disadvantages. First, potential users of the service may find it difficult to know which agency to visit with their grievance. However, although it is difficult to make a definitive judgment, this does not appear to be a serious problem. On occasions, some people may have been inconvenienced by initially going to the ‘wrong’ institution, but it is doubtful that this has led to an employment grievance not being addressed. The second potential problem is one of ‘institutional shopping’ in which a person takes a grievance from agency to agency in search of a successful verdict. There is little, if any, evidence to suggest this is actually happening. Certainly none of the agencies interviewed considered this to be a problem. While this may be the case, the worry remains that the various dispute resolution bodies lack any formal arrangement to discuss differing experiences and to consider how greater coordination, even consolidation, could be obtained across the various available services and procedures. This paper argues that there is a clear need for a formal procedure that requires the various bodies to meet on a regular basis.

Some particular issues need to be addressed. For instance, the Labour Court has expressed its concern that on occasions its services are requested too early in the dispute settlement process, thereby compromising its role as ‘court of last resort’. Officials of the Court have expressed the strong suspicion that both trade unions and

employers are only too willing at times to entangle the Court in collective bargaining negotiations to advance their own claim. Treating the Court in such a way undermines its main purpose. In addressing this matter the Court may wish to review its own procedures to assess whether these challenge employers and trade unions sufficiently to defend their actions against a range of deliberative or problem-solving criteria.

One way this could be done is by reorganising the transmission mechanisms through which cases that have been at the LRC arrive at the Labour Court. The purpose of the change would be to insert more rigorous 'problem-solving' procedures. It would be important for any reforms to distinguish between individual or small-scale grievances and large-scale collective disputes. With regard to individual and small-scale disputes one possible reform would be the introduction of a formal neutral evaluation report from the Rights Commissioners to the Court. This report would be used in cases where either or both parties have signalled that they wish to appeal the decision of the Rights Commissioner to the Labour Court. The formal neutral report would accompany the case to the Court. It would not only set out the information gathered by the Commissioners in the course of its own investigations, but would set out the position of each party *vis á vis* the law and the LRC's codes of conduct (which are used as benchmarks to determine the merits of a case) as interpreted by the Commissioners. Each party, as part of their appeal, would be required to respond to the neutral evaluation report and argue why the verdict of the Rights Commissioner is misguided.

The benefits of producing a neutral evaluation report are fourfold (Levine, 1989). First, it would allow parties to gain a greater appreciation of the strengths and weaknesses of their respective cases. Second, it would encourage a better delineation of the 'interests' in a dispute. Very often employment grievances either of an individual or collective kind are fuelled by a number of factors that are not directly relevant to the case, for example longstanding personal animosities. Getting the parties to focus on the specifics of the case reduces the influence of these indirect negative factors. Third, it may facilitate reflection on possible alternative avenues to resolve the dispute.

Fourth, it may get the parties to act reasonably in exchanging information and documents relevant to the dispute. Formal neutral evaluation reporting is practiced widely in the USA and Canada. Research into the process suggests that it works well and is viewed as

fair and efficient by participants (Marks et al, 1998). Neutral evaluation reporting may bring benefits to the LRC and the Labour Court: it may even be useful in some revised form to the operation of the Employment Appeals Tribunal. Under such a procedure those considering making an appeal against a Rights Commissioner's verdict would have to justify their decision in a more precise and transparent manner, which may assist the Court in its deliberations. With regard to the work of the Employment Tribunals, if disputants were obliged to defend their position in some early neutral evaluation procedure before the start of formal proceedings it may reduce the significant number of cases withdrawn during Tribunal hearings.

A further innovation that merits consideration is the introduction of settlement conferences for collective employment disputes (Weslund, 1990). Such conferences would be convened before the Labour Court started formal proceedings and would require the parties to: (1) give assurances that all earlier conciliation procedures have been exhausted; (2) provide reasons why recommendations that are likely to have been made at earlier stages were unacceptable; (3) transparently set out their interests in the dispute. Again this procedure would oblige parties to justify their action, focus on the interests in the case and to think about possible avenues for the resolution of the dispute. Most Canadian provinces use such a device and it appears to work well. In the Irish context, the principal merits of a settlement conference would be to inject a greater problem-solving ethos into the dispute resolution process and help re-establish the Labour Court as the 'court of last resort'. If each party had to justify publicly their position, the conference may act as a deterrent to opportunistic use of the Court to advance sectional demands in negotiations. Such changes are largely operational but may help improve the work of the dispute resolution bodies and could be diffused with minimal difficulty.

Present arrangements suggest that no serious institutional blockage exists to the diffusion of problem solving innovations. If anything all the bodies are disposed to this kind of change. A good example is the work of the Equality Tribunal in developing a mediation track to run in parallel with the enforcement of established workplace employment rights. An encouraging feature of this example is the careful manner in which mediation was introduced. The result is that the potential and limits to mediation as a dispute resolution are fully understood inside the Tribunal: it is

recognised that it cannot be used in every circumstance and some cases will still need to be addressed by formal, legal methods. Thus an astute policy learning process is evident inside the Tribunal which views mediation, and other ADR procedures for that matter, not as alternatives but rather as complements to legally established employment rights.

The line of argument pursued in these conclusions introduces a paradox into the argument. On the one hand, the analysis suggests that the dispute resolution agencies are hardworking and flexible institutions in the sense that they are prepared to adapt to change. On the other hand, the number of employment grievance and dispute cases, especially those involving alleged infringement of individual employment rights, handled by the various agencies are not diminishing and in some instances are increasing at a worrying rate. This paradox is hard to resolve. It certainly suggests that the dispute *avoidance* work of the dispute resolution institutions, as opposed to their dispute *resolution* activities, needs to be increased. It also suggests that more needs to be done at organisational level to resolve disputes and grievances speedily and as close to the origins of the problem as possible. This requires organisations to improve in-house procedures designed to settle disputes. Public dispute resolution agencies will have a key role in facilitating, guiding and supporting organisational-level change of this type. In addition, more focused and dedicated initiatives are required to implant a greater ethos of mutuality and cooperation into employment relations to overcome 'them and us' attitudes and behaviour, which continue to be a barrier to stable management/employee interactions. The following two chapters examine these themes in detail.

Private sector dispute resolution

4.1 Introduction

The shape of the wider employment relations system heavily influences the pattern of work-related dispute resolution in a particular country. Until the end of the eighties, the Irish system of employment relations could have been described as voluntarist and adversarial. However, during the past two decades a variety of factors, some country-specific and others more universalistic in character, have effectively dissolved this national pattern.² Irish employment relations have been fragmented. No overarching model governs the employment relationship in the country.

Inevitably, this development has made a strong imprint on the dynamics of dispute resolution in the Irish private sector, with strong implications for the conduct and character of public policy. This chapter examines a range of dispute resolution issues that arise from the fragmentation of employment relations and is organised as follows. Firstly, it assesses whether new laws are required to establish clearer procedures for the handling of employment grievances that emerge from the burgeoning small firms sector, a part of the economy where formalised arrangements for the management of the employment relationship are underdeveloped. Following this, it reviews the available evidence on the diffusion of new employment practices and concludes that a fragmentation has occurred to organisational-level human resource management systems. Three matters relating to dispute resolution are identified for further investigation. The first is the controversy whether public policy should be more permissive in helping trade unions gain

² Some of these factors are dealt with in greater detail in chapter one. They include the growth of a large foreign-owned sector as well as a burgeoning small firms sector, neither of which are traditionally fertile places for trade union recruitment, the diffusion of new employment practices and changing preferences in the workforce for more individual procedures for the handling of employment-related matters.

recognition in workplaces. The second is the nature of dispute resolution in non-union firms, particularly in large, foreign-owned, establishments. The analysis tries to assess whether this is the dispute resolution model of the future. The third is the character of dispute resolution in hybrid HRM systems. The investigation seeks to answer the question whether companies can operate 'pick and mix' dispute resolution arrangements on a sustainable basis. The conclusion brings together the arguments developed in the chapter and teases out the implications for the direction of public policy and the resolution of workplace conflict.

4.2 Dispute resolution in the small firms sector

Around the globe, national dispute resolution systems are continuously grappling with the common challenge of how to provide a high quality service that is: (1) responsive and accessible; (2) expeditious but fair; and (3) dependable and consistent. In part it depends on the dispute resolution machinery having the necessary level of resources to fulfil the functions it was put in place to do. It is also tied to the ability of this machinery to adjust internally so that its programmes are in line with unfolding economic and social changes. Sometimes more than internal adjustment is required to close any identified gap between what organisations are doing on the matter of workplace employment problems and the services that are offered by the public dispute resolution agencies. Occasionally, government may have to resort to radical measures and recast the functions of particular agencies to make these relevant to new patterns of employment relations activity.

A growing challenge to the efficiency of the dispute resolution machinery in Ireland is the increasing number of people working in small firms. A feature of many small firms is the absence of specialised human resource management skills, rendering the management of the employment relationship that more difficult. When recruiting staff the small firm owner is required to comply with a range of legal rules and procedures (such as paying a minimum wage, complying with equal opportunities and health and safety regulations) yet many find it difficult to keep abreast of the various regulations. Moreover, many small firms do not have formal internal procedures to handle workplace grievances and disputes. As a result, many are not only unaware of their statutory obligations and the consequences of not complying with legal rules,

but rely on purely informal methods to resolve workplace grievances. This combination appears to have made the small firms sector an unstable environment for the proper adherence to individual employment rights.

The previous chapter showed that the number of cases involving individuals handled by the Rights Commissioners has increased in recent years and that the majority of these cases are upheld. Many of these cases involve small firms. This is circumstantial evidence to suggest that some small firms are not fully complying with core aspects of labour law designed to give people a level of protection at work. This regrettable situation may be the direct outcome of small employers not being fully aware of the legal responsibilities they shoulder when recruiting employees. Without expert human resource knowledge or well-developed procedures to manage the employment relationship, the risk of employment disputes or grievances actually happening increases dramatically. As the size of the small firms sector expands the danger is that this problem will become more pronounced. Employer organisations, such as IBEC, are trying to address the matter by delivering training seminars and workshops that inform small firm owners of their legal responsibilities and increase their capabilities to manage people at the workplace. These education and training events are very worthwhile and must continue. However, additional pro-active measures will be required by the public dispute resolution agencies in conjunction with other organisations, to improve the public information channels used to make small firm employers and employees aware of their rights and responsibilities. Fresh initiatives will also be required from professional and trade associations that aim to develop fair and reputable dispute prevention or avoidance arrangements for small firms for their members. Even if all these measures were installed it remains an open question whether they are sufficient to address the problem.

Part of the problem lies in an asymmetry that has emerged inside the country's labour law regime. On the one hand, the amount of substantive employment law has increased appreciably in the past few decades, but on the other hand, government makes few statutory demands on small firms to possess formal grievances and disciplinary procedures. This is an important discrepancy, as organisations that have a diligent approach to substantive labour law also tend to possess proper grievance procedures. Or to put the

matter slightly differently, those organisations without formal procedures are more likely to appear before the Labour Court, the Employment Appeals Tribunal and the Equality Tribunal. Thus introducing fresh legislation that would require *all* firms with more than five employees to have grievances and disciplinary procedures deserves consideration. Opponents of this line of action, who are strongly motivated to protect the perceived highly voluntarist character of Irish employment relations, will doubtless argue that such legal action is not required as dispute resolution agencies already use the various codes of conduct developed by the LRC and others when assessing employer behaviour. Thus a 'set' of public benchmarks is seen to exist to guide the actions of both employers and the deliberations of the various agencies, making it unnecessary to introduce new law on this matter. This line of argument is not fully convincing as it is based on a mistaken view of how codes of practice function. For the most part, they are used to encourage best or good practice and not to establish minimum standards. The purpose of the law would be to establish a set of minimum procedural standards on grievance and disciplinary matters in contracts of employment (see Appendix 1). Codes of practice would be used to build upon the law and encourage employers and employees to adopt more advanced procedures to resolve disputes at work.

The UK government has recently introduced legislation (Employment Act 2002) deserving of careful consideration by those professionally involved in the dispute resolution field in the Republic of Ireland. This new legislation requires all organisations, even those with less than five employees, to provide staff with a grievance and disciplinary procedure. Five separate matters are covered by the legislation: (1) minimum dismissal and procedural standards; (2) modified standards in cases of gross misconduct justifying summary dismissal without notice; (3) minimum formal grievance procedural standards; (4) modified grievance standards (where the person raising a grievance is a former employee); (5) general requirements for minimum disciplinary and grievance procedural standards. The legislation also adopts a new incentive structure to encourage compliance with the minimum grievance and disciplinary procedures. In particular, a tribunal will be required in normal circumstances to increase an award by 10-50 per cent if an employer unreasonably fails to provide or follow the established minimum standards. Conversely an employee who has

unreasonably failed to use the established procedures will have an award decreased by 10–50 per cent. Both the CBI and the TUC supported this change to the awards system. The legislation also obliges employees to raise their concerns with their employers and exhaust internal grievance procedures before the employment tribunal will accept their case. Employees who fail to raise a grievance will not be allowed to file a case with the Tribunal. Exceptions to this rule would include cases of serious bullying or intimidation. This part of the legislation is designed to advance the principle that all parties should seek to resolve disputes at the workplace before an application is made to an employment tribunal. It also meets employer demands that employees should, in the first instance, exhaust internal grievance procedures. To offset criticisms that the legislation is but another example of the government placing regulatory burdens on small firms, the law also changes the way unfair dismissal cases are judged. Certain procedural shortcomings may be disregarded provided the employer has adopted and used minimum procedural standards. At the same time, it has to be conceded that the new legislation will have cost disadvantages for small firms. Overall, the proposed legislation is a well thought-out package of proposals designed to improve the handling of disputes by this sector. A similar piece of legislation should be considered for the Irish labour market.

New legislation of this kind in Ireland, as mentioned earlier, should be accompanied by greater preventive activities to reduce the possibilities of grievances and disputes arising in the workplace. More imaginative use should be made of multi-media technology to inform employers and employees of their rights and responsibilities. For example, all first time employers should be provided with an integrated package of simple employment law fact sheets and an interactive CD ROM, which should be updated once a year through a remote procedure. The various codes of conduct developed by the public dispute resolution agencies should tell employers how to deal with a situation. Bodies like the advisory service of the LRC should work with trade and professional associations to develop innovative alternative dispute resolution procedures for their sectors such as is currently the case in the UK where ACAS and the prison officers association, together with the prison authorities, are developing a new internal scheme for the handling of grievances and disputes. This type of action should be

replicated in the Republic of Ireland. Public agencies could provide free seminars to businesses with fewer than five employees and pilot the provision of one-to-one free dispute resolution visits to employers with less than fifty employees and if found useful turn the initiative into a national programme. In addition, a number of pilot programmes could be developed for the small firm sector, using a variety of different providers and funding methods, for a shared HR resource for small firms. None of these ideas represent 'hard' policy recommendations, rather they highlight the case for greater experimental action on alternative dispute resolution in the small firms sector. There is a strong case for introducing legally based procedures that promote a more professional approach to the handling of employment grievances.

4.3 Fragmenting employment relations: implications for dispute resolution

One of the most contentious matters in recent employment relations literature has been the growth of non-union organisations. This development has figured prominently in discussions about payment systems, the character of employment protection, and the future of trade unions. It has also had a big influence on the design and operation of dispute resolution (Delaney and Feuille, 1992). The concern that cuts across these discussions is whether established employment rights are being weakened as employers opt for more market-driven procedures.

The remainder of this chapter focuses on the dispute resolution aspects to this controversial discussion. Three specific topics are discussed. The first concerns the argument frequently made by organised labour that the current public policy procedures to resolve disputes about trade union recognition are too employer-friendly. This matter is important for the future of dispute resolution because if a more permissive public policy regime were to be established on trade union recognition then, presumably, collective mechanisms for the settlement of employment conflicts would gain a shot in the arm. The second topic investigated is the nature of dispute resolution in non-union firms. The assessment focuses on whether employees are disadvantaged by these arrangements and if so, to what extent? If it is found that some positive elements exist to non-union dispute resolution procedures then the intriguing possibility opens up of unionised companies learning from these practices. The third topic

explored, which to some extent overlaps with the second, is whether organisations can operate hybrid forms of dispute resolution that combine ‘union’ and ‘non-union’ procedures and practices on a sustainable basis and if so, what are the implications for public policy on dispute resolution? These three topics are quite contentious and frequently inspire highly partisan commentaries. To avoid these pitfalls, it is important to provide an evidence-based approach to the nature and extent of change to human resource management in organisations during the past decade.

4.3.1 Changes and developments in HR management from the 1990s onwards

One story suggested anecdotally by Roche (1995) and corroborated empirically by McCartney and Teague (2004) is that several models of employment relations are emerging, side-by-side, in Ireland. McCartney and Teague use a statistical technique to group the establishments in their survey into four clusters, which have similar combinations of innovative work practices, and human resource management techniques.³ The characteristics of each group are summarised in Table 8. In assessing these models, however, it is important to bear in mind that they are ideal types – characteristics that few if any companies will match exactly. Nonetheless, they indicate the broad employment philosophies that currently appear to be in use in Ireland.

The largest cluster is labelled ‘traditional union’ and is characterised by adversarial (also called pluralist) industrial relations. Typically, firms in this category adopt few, if any, innovative work practices. Many of the establishments in this cluster are indigenously owned manufacturing plants. Cluster 2 is labelled ‘hybrid non-union’. Firms in this group tend to be multinationals in the electronics sector, although this is not exclusively the case. The distinguishing feature of this group, apart from the absence of trade unions, is that they adopt a ‘pick and mix’

³ Scores on the following practices were used to classify establishments into the four clusters. For example, ‘work organisation’: job rotation; team working; Task Forces; TQM. For ‘HRM’: training; individual performance pay; group performance pay; union job protection; employer volunteered job security pledges; employee involvement (consultative); employee participation (delegative). Other identifiers used included: unionisation; competitive strategy; job autonomy.

approach to workplace reform and human resource management. While they are fundamentally traditional mass production operations, the organisations in Cluster 2 pursue greater operational flexibility through such practices as job rotation. A lack of any significant training investment is a feature of this cluster, suggesting this is achieved through multi-tasking rather than multi-skilling.

Another difference between 'traditional' indigenous firms and organisations in this category is that the latter expect employees to routinely contribute productivity enhancing suggestions. However, this expectation is not reciprocated by giving employees any decision-making authority to determine their own working practices etc. Finally, employees in these establishments, unlike those in the other categories, enjoy little job security. There is no union representation and no voluntary commitment from management to preserve jobs. As such, the mix of practices in this cluster appears designed to allow employers to shed labour quickly and conveniently in response to demand fluctuations. Cluster 3 is labelled 'innovative union'. This cluster mainly contains banks, but also includes indigenous food and beverage producers, and branches of electronics multinationals that arrived in Ireland during the 1970s and 1980s. The key characteristic of firms in this group is that substantial workplace reform has occurred in a unionised environment. The incidence of innovative work practices such as Task Forces and TQM is high as is progressive human resource management policies on training and participation. The final cluster is 'innovative non-union'. Most of the firms in this group display a high adoption of participatory work practices. Characteristically, these work practices are supported by HRM arrangements such as training and job security, which encourage employees to embrace change. Furthermore, some of the firms in this cluster appear to be using employee participation mechanisms which not only solicit employees' involvement in operational matters, but which also devolve decision making rights in areas of broader relevance to knowledgeable and well informed employees.

A positive view of such organisational-level employment systems is that Irish establishments are experimenting widely with more participatory forms of work organisation. In addition, the majority of firms introducing participatory practices are involving a large number of employees: in terms of the scope of organisational change there appears to be no insider/outsider divide.

Furthermore, the evidence suggests that some establishments endow employees with significant decision making authority in areas such as process development, work scheduling, quality control etc. This important finding lends weight to the view that team working etc. allows employees to obtain greater influence over decisions that affect them in the workplace. Finally, the information provided shows that workplace change is not the preserve of any one type of firm. Instead the evidence suggests that it can prosper in all types of organisation – unionised and non-union, big and small, indigenous and foreign owned.

Some assessments are less upbeat in their interpretation of the evidence. For example, Roche and Geary (2000) are sceptical as to whether meaningful innovations are occurring to organisational-level employment systems in Ireland. Echoing an emerging debate in the international literature, they argue that the sustainability of the workplace changes taking place as well as the distributive implications are far from clear. The most obvious concern is that although the use of individual new employment practices is widespread, the extent to which they are beneficial to employers is open to doubt. Therefore, while there is experimentation, a lot of the innovation in Irish employee relations that is taking place is tentative and occurring at the margins.

A keen debate has occurred about the respective merits of the optimistic and pessimistic perspectives on Irish employment relations. However, most of those involved in this debate share the view that Irish employment relations are fragmented – management-employee interactions do not reflect the dominance of any one employment model. Union firms co-exist alongside non-union organisations, many organisations are hybrids – happy to embrace some change to workplace practices, but also eager to retain tried and tested methods. This picture of a fragmented system of workplace employment relations impacts on the debate about the character of dispute resolution and the handling of grievances at organisation-level.

Table 8. The characteristics of Irish employment models

Practice	Cluster 1: Traditional Union	Cluster 2: Hybrid non-Union	Cluster 3: Innovative Union	Cluster 4: Innovative non-Union
<i>Identifiers:</i>				
Unionisation	High	Low	High	Low
Competitive strategy	Low Road	Middle Road	Middle/High	High
Road Job autonomy	Low	Low	Moderate	High
<i>Work Organisation:</i>				
Job rotation	Low	Moderate	High	Moderate
TQM	Low	Low	High	High
Task Forces	Low	Low	High	High
Team working	Low	Low	Moderate	High
<i>HRM:</i>				
Training	Low	Moderate	High	High
Individual PRP	Moderate	High	Low	Moderate
Group PRP	Low	Low	Moderate	High
Union job protection	High	Low	Moderate	Low
Job security pledges	Low	Low	Moderate	High
Employee consultation	Low	High	Low	High
Employee delegation	Low	Moderate	Moderate	High
% of total sample	33.8	31.0	25.3	9.9

Source: Adapted from McCartney and Teague, 2004.

4.4 Trade unions and the fate of collectively agreed employment dispute systems

To argue that a fragmentation has occurred to employment systems in Ireland is to accept that traditional collective bargaining procedures are no longer the sole, perhaps even the dominant, method of incorporating people into the world of work. This raises the matter of the future fate of collective dispute resolution systems. Unions, not surprisingly, are eager to retain the traditional model of dispute resolution, which ensures that the nature of workplace conflict – both in terms of substance and procedure – is governed by collective agreements. They have expressed concern that these

arrangements are being weakened by organisations which refuse to recognise trade unions, even when employees have expressed a desire to join a union. Public policy procedures that deal with disputes about union recognition are considered weak and serve to compound the situation. From the standpoint of organised labour, maintaining collective dispute resolution procedures at the workplace requires government to strengthen the public policy regime on trade union recognition. Employers on the other hand would like to see employment relations innovations introduced by non-union multinational companies, including new dispute resolution procedures, influencing other parts of the Irish employment system. They argue that employees increasingly seek 'individualised' forms of dispute resolution and that the design of dispute resolution must in some way reflect this preference.

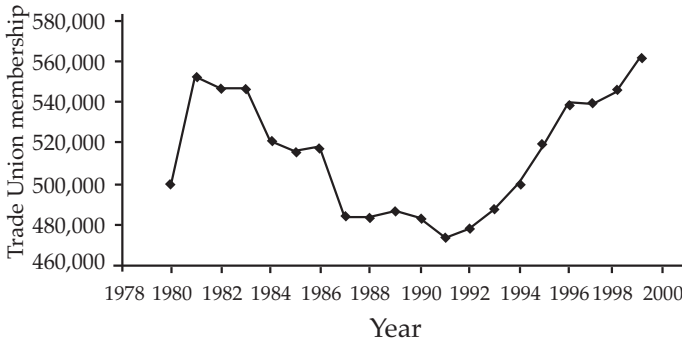
Organised labour's position on this matter is undoubtedly spurred by unpromising trends in trade union membership. Since 1980, the trade union movement in the Republic of Ireland has undergone large-scale reorganisation, mainly through mergers.⁴ The top three unions, SIPTU, IMPACT and MANDATE, have 59% of total trade union membership while the ten largest unions make up 86.4% of total union membership. Efforts to streamline trade union structures have not paid full dividends in terms of increasing trade union density levels. Figure 6 shows that the absolute numbers of those in employment and belonging to a trade union have increased over the past few decades. Yet when we turn to trade union density levels – the share of the labour force in trade unions – the figures are less comforting for organised labour.

Since the mid-1980s, Irish trade union density levels, as demonstrated in Figure 7, have steadily declined from a high of nearly 48% in 1983 to just over 35% in 1999. If the period of social partnership is specifically examined, trade union density has fallen from 43.8% to 35%. Two different views exist about the cause of the decline in trade union density. One holds that the decline is due to employer union avoidance and substitution strategies (Gunnigle, 2000; Gunnigle, O'Sullivan and Kinsella, 2001). The other argues that trade union membership has simply not been able to keep pace

⁴ Between 1981 and 1999, the number of trade unions fell from 86 to 46. A merger in 1989 created Ireland's biggest union called SIPTU. In 1999, SIPTU had a total membership of 226,659, which amounted to just over 45% of the membership of trade unions holding negotiating licences.

with the quite spectacular increases in employment. Whatever the precise reasons for the decline in trade union density, this trend has been used to back up the argument that trade union recognition procedures are too weak and favour employers.

Figure 6. *Transitions in trade union membership in Ireland, 1980–1999*



Source: Figures from the Department of Labour (now the Department of Enterprise, Trade and Employment) and the Labour Relations Commission.

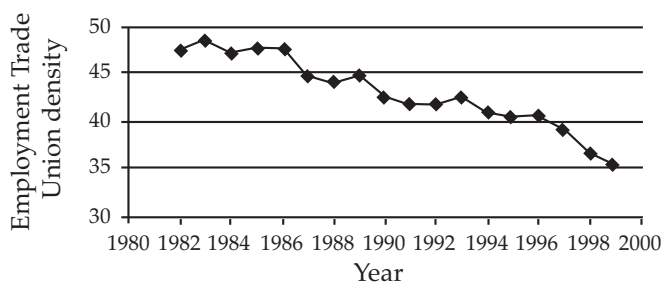
Ireland's heavily reliance on inward investment is seen as the source of this problem (Gunnigle, 2000). Many trade union activists point to a paradox in successive governments' employment relations strategies. On the one hand, governments have promoted social partnership, thereby giving trade unions unprecedented access to national economic and social decision-making. On the other hand, they have adopted policies that have made it difficult for trade unions to recruit at company level.

A key demand of the trade union movement currently is for fresh legislation that makes it easier for trade unions to gain recognition from employers. An apocalyptic tone is not however, necessary on this matter. The problem with trade union recognition in Ireland is not dire and in fact compares quite favourably with the experiences of other advanced economies. Moreover, Gunnigle et al (2001) report that the 1999 Cranfield-Limerick survey found that 69 per cent of participating organisations recognised trade unions. While this figure may overstate the general level of trade union recognition in the Irish private sector, it nevertheless shows that it is far too early to write the obituary of trade unions in Ireland. An

important 'collectivist' dimension will continue to Irish employment relations for the foreseeable future. At the same time, it would be misleading to paint too rosy a picture about the state of organised labour. Gunnigle et al (2001) also noted that whereas the 1999 recognition figure stood at 69 per cent, the 1992 version of the survey found a figure of 83 per cent, a drop of 14 per cent in seven years. Thus while trade unions continue to be important institutions in Irish social and economic life, there is no forward march of labour.

Gunnigle (2000) argues that the established public policy regime that handles disputes about trade union recognition favours employers. The Labour Court normally deals with trade union recognition disputes and in such cases, the usual procedure is for the Court to issue a non-binding recommendation on how to resolve the dispute. Over the years the strong trend has been for the Court to make recommendations that support employee demands for trade union recognition. Gunnigle's argument is that a sizable number of employers ignore such recommendations and refuse to deal with trade unions because they face no legal or public sanction for taking this course of action. Due to this compliance and enforcement problem, established public procedures to deal with trade union recognition problems are regarded as too weak.

Figure 7. Trade union density in Ireland, 1980–2000



Source: Figures from the Labour Relations Commission and the Central Statistics Office

This matter has been the source of heated exchanges in the negotiations preceding the signing of several national social partnership agreements. In 2000, the High Level Group, which polices the operation of agreements, proposed a new procedure that

addressed employer and trade union concerns about trade union recognition. Its report recommended in the first instance that the LRC establish a Code of Conduct on Voluntary Dispute Resolution: the LRC supported this recommendation and introduced such a code in October 2000. The code created the following procedures for the resolution of trade union recognition disputes. The procedure starts when a union makes a claim on the company on substantive employment relations issues, for example pay and conditions, but not recognition itself. If the company refuses to recognise the claim and collective bargaining does not occur, the claim can be referred to the LRC. The first move by the Commission is to bring together the disputing parties in an effort to reach a voluntary settlement. If no resolution arises at this stage, the LRC can then make its own proposals to try and resolve the issue. If a settlement continues to prove elusive the parties are then asked to enter a mutually agreed 'cooling off period', which normally lasts approximately six months. During the cooling off period, the Commission may engage expert assistance, including the involvement of ICTU and IBEC, to help solve the dispute. If after the cooling-off period the dispute has not been resolved, the LRC disengages from the process.

The second part of the High-Level Group's Report set out the procedures to be followed should such a deadlock situation, as described above, arise. It is also the procedure invoked when an employer or trade union refuses to use the voluntary dispute resolution code. These procedures formed the basis of the Industrial Relations (Amendment) Act 2001. In a situation where the parties refuse to participate in the LRC's voluntary code, the Act makes provision for the case to be heard by the Labour Court. Normally this hearing is likely to result in a non-binding recommendation on the substantive matters of the dispute. If this recommendation does not lead to a settlement either party can ask the Labour Court for a determination. A determination more or less repeats the contents of the recommendation but opens up two other possible procedures for the resolution of the dispute. Under the first option, either party to the dispute (in nearly all cases it will be the union) waits for twelve months for the implementation of the determination. If this does not happen they can then proceed to the Circuit Court to have the determination legally enforced. Under the alternative option (known as the fast-track procedure) any party to the dispute can seek a review of the determination after three months. Provided that

the circumstances of the case have not radically changed the review simply reaffirms the initial determination. If the decision of the review has not been implemented within six weeks then the case can be brought before the Circuit Court for a legally binding 'enforcement order'.

Some trade unions have expressed their unhappiness with the 2001 Act, largely because it did not introduce any new regulation on trade union recognition disputes, focusing instead mainly on procedural matters. As a result, it is not surprising that the matter once again figured prominently in the negotiations leading to the 2003 social partnership agreement, *Sustaining Progress*. The negotiations led to a commitment (written into the social partnership agreement) by the government to provide the LRC and the Labour Court with the necessary resources to ensure that trade union recognition dispute cases are settled within a maximum time frame of thirty-four weeks. In addition, a new victimisation code was introduced clarifying the meaning of the term. The new code is designed to help the deliberations of the LRC and the Labour Court when addressing cases involving allegations of victimisation against individuals involved in trade union organising activity.

These revised procedures fall short of a new statutory regime on trade union recognition. Realistically this government, or possibly a government of any political hue, is unlikely to cede to this request. Politicians are reluctant to introduce tougher regulation on this matter as it may tarnish the country's reputation as a warm home for inward investment. It is a vivid example of how economic openness causes domestic politicians in a country to impose constraints on their actions. Although trade unions remain unhappy with the present arrangements, it is unlikely that any tougher interventions will be introduced that go beyond the compromise set out in *Sustaining Progress*.

With trade union recognition rules likely to remain unchanged for the foreseeable future, organised labour will find it increasingly difficult to recruit new members: changing social attitudes and the growth of service industries are not going to help either. It is difficult to envisage a sustained revival in trade union density in Ireland. The fate of the unions may not get much worse, but it is unlikely to get much better. If this turns out to be the case, then most private sector workers in the country will be employed by organisations where there is little or no trade union recognition. As

a result, most employees will not have access to collectively agreed dispute resolution procedures or trade union representation should they become involved in an employment grievance.

This raises the sensitive matter of the quality of dispute resolution procedures in non-union organisations in medium and large sized organisations. Little informed analysis exists on these arrangements, although anecdotal commentary suggests considerable variation exists in terms of quality. This paper further explores this issue by investigating an acknowledged best practice case as it may reveal practices that resolve disputes in a fair and fast manner and which could be used to inform public policies in the area. Indeed if a range of practices are uncovered that appear to solve disputes effectively and enjoy legitimacy amongst employees then intriguing questions can be asked about whether dispute resolution in a non-unionised environment holds lessons for unionised settings. In an effort to tease out some of these issues the next section details the dispute resolution system that exists in Intel, the US multinational, which has a large non-unionised site in the Republic. Intel was selected as it is widely seen as having an elaborate dispute resolution system.

4.5 Dispute resolution in a non-union firm: Intel

Intel is one of the largest business organisations engaged in the information and communication technology (ICT) sector. It is widely known as a non-union employer, but also for having a sophisticated employee 'voice' system that seeks to foster meaningful communication between managers and employees and provides employees with the opportunity to make complaints. A well-organised dispute resolution system, called 'The Open Door Process', is attached to this voice system. The open door process permits employees to raise any work-related concern first with their immediate manager and then with subsequent levels of management until they get a resolution. Company policy is to address employee grievances in a prompt and fair manner. The process is operated by an employee relations team consisting of the site employee relations adviser and four employee relations specialists. The employee relations team is separate from the human resource department in an effort to signal its independence. To reinforce its autonomy from local personnel matters, the site employee relations adviser reports to a senior manager at corporate

headquarters in the USA and not to the director of human resources in the Irish operation.

The function of the employee relations team is to provide confidential coaching, advice, counsel and support to employees on any work related concern. The activities of the employee relations team are divided between four separate levels. At Level 1, employee relations specialists help employees resolve problems that they may have regarding employment benefits or working conditions, for example enquiries about pensions, maternity leave and so on. At this preliminary level, the emphasis is on assisting employees and supervisors resolve problems that have been raised. If complaints or grievances cannot be resolved at Level 1, the matter then progresses more or less automatically to Level 2, which is when the open door scheme comes into play proper. Level 2 sees the department or shift manager becoming directly involved in the search for a resolution to the problem. At this stage, the employee relations specialist actively helps the employee design and present their case/complaint. If the decision reached by the manager is not to the satisfaction of the employee, then s/he can take the matter further and evoke Level 3 of the dispute resolution machinery.

The decision to progress from one level to another is taken solely by the employee. The role of the employee relations specialist is that of advocate or adviser, not decision taker. At Level 3, the factory manager and the site employment relations adviser attempt to find a resolution to the problem. More formal and in-depth arrangements are normally used at this stage to find an acceptable settlement. Those involved in the dispute may be required to make a written statement and present their case in front of a panel consisting of the factory manager and the site employee relations adviser. These two people do not operate in the first instance as arbitrators, but in effect as company-level settlement managers: they actively explore various alternative paths to resolve the dispute. If none of these alternatives prove fruitful only then do they don an arbitrator's hat and make a proposal on how to resolve the dispute. If the employee finds this proposal/ decision unacceptable the case can then progress to Level 4. At this point, the site manager becomes involved. Again, the expectation is that the site manager will seek to craft a solution that is acceptable to all parties.

The evidence suggests that the vast majority of concerns/complaints are satisfactorily dealt with at Level 1. About half of all

matters that arise relate to employees seeking advice on things such as accessing maternity benefits, finding out about the possibilities of moving from full to part-time work or taking early retirement. Virtually all these matters are handled to the satisfaction of the employee. The remaining cases that arise at Level 1 generally relate to tensions or problems in the relationship between an employee and supervisor. Nearly all these complaints are settled to the satisfaction of the employee. The majority of cases that reach Level 2 relate to the rigorous performance management system operated by the company. Usually these cases involve an employee who is unhappy with the assessment appraisal score they have received from a supervisor. This appraisal system generates a relatively high number of complaints, as annual pay increments are conditional on employees obtaining a good assessment score. Other employee grievances handled at Level 2 cover a broad range of matters from harassment and bullying to the poor implementation of employment conditions. Most cases that enter Level 2 are satisfactorily resolved, usually within a 4-week time frame. With regard to cases relating to the performance management procedures, the available data suggest that in both 2000 and 2001 the majority of cases were resolved by changing in some manner the initial assessment/appraisal. In most of the cases in which no changes were made the employees pursued the matter to Level 3. At Level 3 most outstanding cases are brought to a closure. In 2002, only one case from an initial total of 715 raised at Level 1 required the direct attention of the site manager of Intel Ireland at Level 4.

4.5.1 Key characteristics of the Intel dispute resolution system

There are a number of notable features to this dispute resolution system. The first is that beyond Level 1 most of the registered concerns and grievances relate to the operation and outcomes of the organisation's performance appraisal system. This suggests that an inevitable consequence of having a relatively demanding appraisal system, which is directly connected to the payment system, is a large number of complaints. This matter raises an interesting efficiency question about whether the design of an appraisal system may actually generate more costs than benefits. Addressing such questions, however, is beyond the scope of this paper. A second point is that given the number of complaints made every year it would appear that employees are readily prepared to use the

procedure: there appears to be few access problems whether of a formal or informal nature. Thirdly, the Open Door Process appears to be organised along the principles of deliberative problem solving rather than more traditional 'splitting the difference' adjudication procedures. Not only are factual evidence and records used whenever possible, but the working premise is that everybody should behave reasonably so that an acceptable settlement can be found. Fourthly, the scheme appears to operate in a relatively independent manner as evidenced by the large number of changes made to initial management decisions. The independence of the employee relations team from the human resource management department appears to be an important variable influencing this outcome. The legitimacy of the dispute resolution mechanism may be damaged if employees regarded it as a part of the human resource management department.

It is interesting to note that the Employee Relations Team itself is subject to Intel's fairly rigorous continuous improvement programme. Every year the team has to identify a number of matters – the internal language used is 'focal points' – on which it will seek to make improvements. In 2002, for example, these 'focal points' concentrated on two matters. One was the marketing and delivery of employee relations services and secondly, to promote diversity training to avoid tensions emerging between Irish and non-Irish employees. The emphasis of these activities is to increase the dispute avoidance (as opposed to the dispute resolution) work of the team. The annual assessment of the employee relations team is made by senior management at the company's headquarters in the USA. This involves evaluating whether the team has reached the targets it has set for itself and comparing the performance of the team against that of similar teams in other subsidiaries. Thus the employment relations team is in the frontline of the internal competition between different subsidiaries to win favour with headquarters. This strategic position ensures that the senior management in Intel Ireland gives active and on-going support to the employee relations service.

4.5.2 What can be learnt from Intel?

Clearly the Intel dispute resolution procedure strongly reflects an 'American' style enterprise-level HRM system. The main features of this system are efforts to establish direct connections between

people management and continuous organisational improvement, linking the management of the employment relationship to strategic decision-making inside the organisation, and promoting new human resource management policies that diffuse innovative consultation and communication structures as well as novel practices on matters such as dispute resolution. The 'open door' procedure that operates inside Intel is of a piece with this type of system. For the most part, it succeeds in fulfilling its designated aim of providing individual employees with accessible and fair procedures to challenge managerial decisions and to obtain a satisfactory resolution to grievances. The employment relations unit that operates the scheme mainly uses collaborative problem-solving practices to settle disputes. Although the analogy should not be pushed too far, there are elements of Intel's system that touch upon Jacoby's (1997) argument that many large firms, particularly in knowledge industries, are developing 'modern manors', involving the development of paternalistic HRM policies inside the organisation to provide employees with an internal safety net.

Clearly, the system is non-union: little scope exists to settle employment disputes on a collective basis. On this basis alone, many would argue that the Intel system should be strongly opposed. Yet, this paper sees this as an excessively negative verdict. Intel is not a bleak house where employees are governed mostly by 'hard' HRM policies and have to deal with a series of petty tyrannies characteristic of the sweatshop. Moreover, it does appear to have created and maintained a dispute resolution system that provides employees with procedural and substantive worksite justice. In other words, the fact that trade unions are absent from an organisation does not mean that a sense of fair play and equitable treatment is not present.

It could even be argued that the Intel experience holds lessons for trade unions and public agencies tasked with the responsibility of settling disputes. Chapter 2 noted that important changes are taking place to the world of work that are either generating new types of grievances or making certain practices or behaviour once tolerated no longer acceptable, for example workplace stress, bullying, sexual harassment. On the whole, grievances and disputes related to these matters are highly personal, which employees seek to settle on an individual basis. Collective dispute resolution mechanisms may not be the appropriate way to deal with such

cases. As the Intel dispute resolution instruments are geared almost exclusively to the settling of individual grievances its experience could hold lessons for the unionised firm or for public agencies seeking to find novel ways to settle grievances without enforcing individual workplace rights. The heavy emphasis on fact-finding and evidence-based procedures is an area that unionised firms could learn some 'tip and tricks' from non-union companies. This is not an argument for unionised organisations to become non-unionised. It is simply to highlight that the Mexican stand off that has emerged between these two types of enterprise-level employment systems is unhelpful as it is limiting the potential for cross-organisational learning.

4.6 'Mixed' organisational HRM regimes and dispute resolution: the case of Allied Irish Bank

One argument sometimes used to counter the above line of thinking is that unionised and non-unionised environments are distinctive because each type of workplace regime installs employment practices that operate as integrated bundles which are difficult to unpack and thus not easy to transfer. This argument draws upon a prominent idea in the academic literature on the economics of organisation that emphasises the need for complementarity between structures, practices and procedures in organisations (Milgrom and Roberts, 1992). The idea is straightforward enough: organisations where a strong 'fit' exists between different practices are more likely to be efficient as organisational complementarities ensure that the collective impact of a bundle of HRM policies is greater than the sum of the individual parts. The thinking has also left a strong imprint on the employment relations literature, giving rise to the assumption that it is more advantageous to introduce work practices such as dispute resolution procedures in bundles. At the level of theory this argument appears plausible, but the survey evidence of workplace practices in Ireland and in other countries suggest that the situation on the ground is different. As suggested earlier in this chapter, almost all the studies on this matter in Ireland show that the majority of organisations do not have tightly integrated bundles of HRM policies. If there is a trend, it is towards firms adopting a pragmatic pick and mix approach to the adoption of employment practices. This suggests that many firms are not overly concerned with diffusing complementary bundles of HRM

policies and have internal employment systems that consist of a range of policies and practices drawn from a variety of contrasting employment relations traditions. To give a fuller insight into how such a situation can arise a case study of AIB is presented below.

Allied Irish Bank has a human resource management system that is neither fully union nor non-union in orientation. Instead, it consists of an amalgam of practices and procedures that are commonly associated with different models of HRM. Although about 40 per cent of its workforce are not in any union, the organisation still engages in collective bargaining with the Irish Bank Officials Association (IBOA) – one of a number of trade unions that operate in the Irish financial sector – to set terms and conditions for all employees. At the same time, it has a number of HRM policies that are commonly associated with non-union workplaces. For example, it has a non-union grievance procedure alongside a formal union grievance procedure. It also has a partnership arrangement established in collaboration with the IBOA, but which also covers non-union employees. This hybrid HRM system emerged unintentionally rather than by design.

In the seventies and eighties, employment relations in the Irish banking industry were highly adversarial. During this period a number of high profile and prolonged strikes occurred across the industry. An industrial relations dispute in the early nineties brought matters to a head inside AIB. At this time, the strategic priorities of the management and unions were virtually irreconcilable. Management was eager to restructure and rationalise the organisation, a move that would involve significant job losses. The union, which was not part of ICTU, and thus under no obligation to stay within the pay award limits established by the prevailing national social partnership agreement, demanded a big wage increase for its AIB members. Senior management was in no mood to cede to this wage claim. Managers calculated that the circumstances were right to end the adversarial employment relations culture inside the organisation by ‘taking on’ the unions. The wage demand was rejected and, in response, the union initiated strike action. To signal the uncompromising stance that it was going to adopt, AIB management quickly announced that employees who got involved in strike action would be suspended. This considerably raised the stakes in the dispute for it effectively turned the dispute from being a wage claim into a conflict about the future

status of the trade union inside the organisation. If the union was to stand any chance of winning the dispute it now had to close the entire operation of the bank.

A major confrontation erupted with the union working hard to close bank offices and management equally determined to keep them open. In the end, about 40 per cent of the workforce crossed picket lines, a sufficient number to allow management to maintain a skeleton service. This weakened the strike action and triggered convulsions inside the union. Some of those who crossed the picket line decided to leave the union while the union took the decision to expel those members who had not complied with the strike call. Great acrimony opened up between union and non-union members, strengthening the position of management even further. The strike finally ended without the union obtaining its wage claim. However, the legacy of embittered relations between the management and union as well as between those employees who had gone on strike and those who had continued working was hardly a healthy environment to seek improved organisational performance.

Management may have 'won' the strike, but it now had to restore 'normal' relations inside the organisation. It essentially had to deal with two matters. One was to ensure that the sizable number of staff no longer in the union had a voice inside the organisation as well as access to proper comprehensive procedures that afforded them protection at the workplace against arbitrary decision-making. To this end, management established a staff consultative committee consisting of senior management and employees 'elected by their peers'. Management would use this committee to inform non-unionised staff of corporate performance and proposed plans for the future. Members of the committee would have the opportunity to quiz management about possible changes to corporate or organisation strategies, to make representations about certain aspects of working conditions that were considered unsatisfactory or in need of change, and to exchange views on matters that were causing anxiety within the workplace.

In addition to establishing a staff forum, AIB also created what was, in effect, a non-union grievance arrangement procedure. Several independent staff advisers were established to help employees address complaints and grievances by providing employees with: information about AIB policy on particular employment matters;

assistance on how to present and advance a complaint; and general support and guidance. AIB also appointed an external ombudsman with wide experience in the resolution of disputes to assist in the settlement of disputes. However, the ombudsman was not given an explicit set of terms of reference. The arrangement was rather informal but essentially the remit was to act in an impartial way to help settle grievances and disputes inside the organisation. (Appendix 2 includes a more formal set of terms and conditions for the role of ombudsman used by an international bank.) More specifically, the ombudsman would investigate a particular grievance, report findings and when appropriate, make recommendations about how the dispute could be solved in an expeditious and fair manner. All employees whether members of the union or not were allowed to use this service. Together, the creation of a staff consultative committee and an ombudsman effectively amounted to the presence of a non-union representation and grievance procedure inside AIB.

The second priority for management was to restore working relations with the trade union. Senior management did not view the initiatives introduced for non-union employees as part of a long-term master plan to marginalise by attrition the IBOA, but rather as measures to address a representation gap that had emerged inside the organisation after the strike. Equally, management recognised that it had to repair the schism with the IBOA arising from the strike. It sought to do this by seeking a working relationship with the union based more on cooperation than on adversarialism. A range of joint management/union initiatives was launched, including a series of visits to other European countries where management-employee interactions in the banking sector are for the most part consensual. On the back of these initiatives, both sides expressed a willingness to be more pragmatic when dealing with one another in the future. Coincidentally, at the national level, the leadership of IBEC and ICTU had started to promote the idea of enterprise partnerships. Management and unions inside AIB latched on to this idea as an appropriate way to give institutional expression to the new spirit of cooperation between them.

The partnership deal reached at AIB did not cover substantive matters. For example, the workings of the partnership arrangement inside the organisation were to be kept at arms-length from the collective bargaining process used to conclude collective

agreements for unionised staff working in the bank. Rather the agreement set down a number of principles that should underscore the relationships between the union and management and all staff across the organisation namely:

- enhancing the prosperity and success of the enterprise
- maintaining secure employment for all staff
- raising levels of trust
- acknowledging the right of staff to elect to join or not to join a trade union, while acknowledging IBOA as the representative body for banking staff
- developing a co-operative and partnership culture through agreed adaptability, flexibility and innovation
- creating a structure which gives effect to true partnership.

The concluded agreement, with its emphasis on enunciated principles, was very much in keeping with the open-ended character of national-level thinking on how partnership should unfold at the workplace. Since the deal was signed at the end of the nineties, both IBOA and management have more or less kept to the values and principles of the partnership deal. Relationships between the two parties are now more cooperative and less confrontational. The net effect of these various innovations and changes was that by the late 1990s AIB had a patchwork internal HRM regime, which combined elements of union and non-union approaches to the management of the employment relationship.

4.6.2 What can be learnt from AIB?

This case study of AIB is at odds with the fashionable thinking that suggests organisations should implement complementary bundles of HRM practices. The AIB experience suggests that an organisation can pursue an employment relations strategy that at once persists with tried and tested personnel policies, allows other policies to change through a slow process of mutation and diffuses fairly radical innovations. In other words, organisations can function on a sustainable basis with hybrid HRM systems. The AIB case study is consistent with the less popular evolutionary theory of the firm, which suggests that organisations introduce change incrementally. From this perspective, root and branch transformations are seldom involved as organisations mainly opt for the gradual mutation

pathway where established routines and procedures are 'recombined' in one way or another with innovatory practices (see Nelson and Winter, 1982). To expect enterprises to implement new HRM practices in bundles or to diffuse state-of-the-art dispute resolution policies in one decisive move may be overly demanding. In essence what is being suggested is that management-employee interactions are better seen as the product of an open-ended experimentation and interpretive process, which makes it hard to predict in advance the configuration and functioning of organisational-level dispute resolution practices.

These remarks have salience for the possible reform of the work of public agencies charged with promoting such changes. The message emerging from this analysis is that if organisational rules and routines relating to the management of the employment relationship, including dispute resolution procedures, are never fixed, but are continuously evolving, then the public agencies must allow organisations to follow a pathway to modernisation that is appropriate to their own circumstances (Rowe, 1997). Public policy should not be overly prescriptive. The driving motivation behind public policy should be to facilitate and give support to customised forms of organisational level dispute resolution procedures that first and foremost enjoy the confidence of both employers and employees (Greenhaugh, 1986).

4.7 Conclusions

Three important conclusions arise from the analysis of this chapter. In the first instance it is clear that some parts of the legal regime currently underpinning dispute resolution in Ireland need refreshing and modernisation. In particular, legal revisions are required to introduce a series of mandatory minimal procedures and practices for the handling of employment grievances and disputes and to create new incentives and penalties that encourage employers and employees to follow these arrangements. Reforms of this type may help resolve some of the identified shortcomings in the present system. One such shortcoming is the uncomfortably high level of individual cases using the public machinery for dispute resolution. The data suggest that the present method of encouraging small firms to adopt proper dispute resolution procedures by writing and disseminating codes of practice is not fully effective. A compliance problem has emerged despite the

sterling work of bodies such as the Labour Relations Commission and the Labour Court. Fresh legal rules may be required to promote fair procedures for the handling of disputes at work. At the same time, a new battery of centralised, heavy-handed employment relations regulations should not be implemented. The purpose of the new regulation would be to make it compulsory for firms to have formalised and widely understood procedures for the handling of grievances and disputes while also requiring employees to exhaust these internal procedures before they can take a case to a public dispute resolution agency.

The second important conclusion touches upon the underlying motivation or rationale that should guide public policy interventions in the area of dispute resolution. A strong view held by organised labour both in Ireland and elsewhere is that government should enact legal rules that oblige employers to recognise trade unions when the majority of their workforce have expressed a wish to join a trade union. This matter has figured prominently in the negotiations related to the national social agreements. The plausible argument pursued by organised labour is that the compromise solution worked out on this, issued by the High Level Group in 2001, is too cumbersome and convoluted to be effective. Further action is needed to make these procedures less unwieldy. Yet, it is unlikely that government will cede to the demands of trade unions and introduce permissive regulations on trade union recognition. Trade unions cannot expect government to introduce public policies and legislation that in effect operate as a compensation device for their inability to maintain or recruit members.

The third main conclusion relates to cross-fertilisation. The Irish employment relations system is fragmented: different forms of workplace employment relations sit side-by-side and this is unlikely to change in the foreseeable future. Accordingly, the competition that already exists between these sub-systems is likely to continue, if not intensify. Trade unions will be eager to make inroads into the non-union sector. For its part, non-union organisations are likely to accelerate efforts to embed 'individualised' practices to manage the employment relationship. Competition between these sub-systems is only to be expected. Indeed, regime competition of this kind can be productive as it encourages each constituency to innovate and accept change to organisational level employment relations systems (Zack, 1997).

There are indications that each sub-system is learning from the other, with the effect of lowering the walls between them. An example of this is the collaborative initiative involving trade unions and employers' organisations around enterprise-level partnerships. Signs are emerging that such learning behaviour is spilling over to dispute resolution matters. Levels of contact and communication are increasing between human resource managers in union and non-union organisations who are eager to compare each other's grievance procedures and to discuss the strengths and weaknesses of alternative dispute resolution procedures such as the role of the ombudsperson. These contacts represent an informal form of benchmarking and suggest that many organisations are seeking ways to innovate dispute resolution mechanisms. Public agencies such as the LRC should be doing more to promote and facilitate such activities. For instance, alternative dispute resolution in unionised organisations would be an interesting programme for the Advisory Service of the LRA to organise. The basic principle is that public policies should not promote one model of employment relations to the detriment of another, but encourage cross learning and bench-marking between different sub-systems so that better quality dispute resolution takes place across the economy.

Dispute resolution in the public sector

5.1 Introduction

Dispute resolution in the public sector shares many features of private sector arrangements designed to settle grievances. At the same time, the scale and organisational characteristics of the public sector permit it to develop a wider and more comprehensive range of activities than is likely to be found in the private sector, with the exception perhaps of very large companies. The ideal public sector dispute resolution system would contain most, if not all, of the following properties.

- Decentralisation – ability to settle disputes, grievances and complaints at the lowest level possible.
- Speed – disputes should be addressed as quickly as possible.
- Fairness – parties to a dispute must be confident that they will be treated fairly and equitably.
- Comprehensive – a variety of procedures and alternatives must be available to assist in the resolution of a dispute.
- Transparency – employees should be fully aware of the availability of the dispute resolution services.
- Monitoring – the capacity should exist to monitor and evaluate internal developments as well as to keep abreast of external best practice on dispute avoidance.
- Experimentation – capability should exist to promote experimental initiatives and to diffuse positive lessons that improve the overall dispute resolution effort.
- Problem solving and deliberation – deliberation and problem-solving measures should be evident to *prevent* the emergence of employment grievances and disputes.
- Resources – adequate resources should be made available for dispute resolution activities.
- Mediating capacity – in addition to decentralised arrangements to settle disputes the ‘organisational

centre' must have its own capacity to intervene to avoid or settle disputes.

Different national public sector dispute resolution systems possess their own idiosyncrasies, causing the competencies listed above to combine in different ways. At the same time, most tend to gravitate towards a split-level organisational design. Local parts of a national public sector frequently have a degree of autonomy to develop customised dispute resolution services. This is in keeping with the idea that a resolution to an employment dispute should be sought closest to the origins of the problem. These decentralised spheres of dispute resolution normally carry out most of the functions associated with administering the service. For example, they would compile their own lists of internal and external mediators and arbitrators. In addition, they would organise appropriate training sessions and launch new initiatives to improve existing provisions.

To enable and support decentralised arrangements the organisational centre normally carries out a variety of roles. First, it establishes and sustains the core overarching values and principles that guide the operation of the various lower units of dispute resolution. The purpose is to combine a common organisational identity with administrative decentralisation. Second, it develops its own dispute resolution capability so that parties to a dispute have access to a higher level procedure should they be dissatisfied with the first attempts at reaching a settlement. The overall goal is to facilitate the settling of disputes in-house. In addition to this activity, the centre usually has the capacity to bring into play settlement masters. A third function of the organisational centre is a monitoring role. The purpose of this is not only to assess the performance of internal dispute resolution arrangements, but also to examine external developments and assess whether these merit adoption. Basically, this monitoring task strives to continually improve and upgrade dispute settlement procedures and policies.

5.2 The Irish system of public sector dispute resolution

The Irish system of public sector dispute resolution displays some of these best practice properties. The system is usually referred to as the conciliation and arbitration service for the settling of disputes. Modern arrangements in this area have their origin in changes introduced in the 1950s. Each of the main employee groups in the

public sector has its own conciliation and arbitration procedures. For example, teachers, health workers, gardaí, civil servants and local authorities have separate arrangements. However, the Central Conciliation and Arbitration Board, which is housed within the Department of Finance, has responsibility for the overall coordination and control of the system.

The distinctive feature of conciliation and arbitration activities in the Irish public sector is that they are used for both collective bargaining and dispute resolution purposes. Conciliation schemes more or less deal with the full scope of employment relations matters including rates of pay, organisation of working time, 'hiring and firing' rules, terms and conditions of employment. Arbitration tends to deal with a narrower range of matters: whereas pay, holiday and sick entitlements and overtime provision can be discussed, issues relating to recruitment and selection and job grades are excluded. The organisational character of conciliation differs across the public sector. In the civil service, for example, there is a division between a central council that deals with matters relating to pay and conditions of service and departmental councils that concentrate on matters of local interest. In the education field, there is a single central conciliation council. At the conciliation stage, particularly when collective bargaining agreements are at stake, trade unions make every effort to forge a common position.

Although arrangements are decentralised a high level of coherence is evident on both employee and employer sides. Arbitration also varies across occupational groups in the public sector. Usually however, an arbitration panel consists of an independent chair, representatives of managers and employees and a number of independent members who are normally Labour Court members. Every effort is made by these panels to find a resolution to a dispute or grievance without involving external bodies such as the Labour Court. Indeed, only a select group of workers, industrial civil service, education employees (except teachers), health boards, voluntary hospitals, local authority 'servants' and non-commercial state bodies, have been given access to the Labour Court. If any of these workers are involved in a collective dispute, they follow the same practice as private sector workers in that they first go to the LRC to try and reach an amicable settlement. If this proves unsuccessful they may then proceed to the Labour Court, which makes a recommendation that can be accepted or rejected by both

parties. Overall however, there is a strong emphasis on internal dispute resolution and to this end government, management and trade unions tend not to challenge arbitration decisions.

McGinley (1999) neatly reviews attempts over the past twenty years to reform the conciliation and arbitration system, identifying two noteworthy initiatives. The first was the government sponsored Commission on Industrial Relations in 1981. It proposed revisions to the Conciliation and Arbitration Scheme, specifically the establishment of a Labour Tribunal (a type of public sector Labour Court), to replace the various arbitration boards. The aim was to create a more rationalised and uniform service for the settling of disputes and grievances. However, the idea did not progress very far, largely due to the opposition of the main public sector unions. In the early nineties, the Department of Finance made a fresh effort to introduce reform to the conciliation and arbitration apparatus. Its recommendation sought to make public sector employment relations more stable by creating a professional pay setting and arbitration system.

In particular, the Department sought to establish a new pay unit, housed within the LRC to develop more informed and evidence-based wage claims. In addition, it sought to improve the functioning of the conciliation service through the introduction of facilitators to help mediate a settlement to disputes and an adjudication system to deal with minor complaints and grievances. With regard to arbitration, it proposed the establishment of a new three-person centralised tribunal to settle grievances and oversee the process by which trade unions make 'special' cases for pay awards. These proposals failed to get implemented as a package, but they did ensure that reform of the public sector industrial relations machinery became a live issue inside the national social partnership framework. For instance, the 1994 national agreement, *Programme for Competitiveness and Work*, included an appendix whereby all the parties committed to introducing reform into the employment relations in the public sector. Reforms were made to the various conciliation and arbitration schemes in the late nineties. Some of the schemes have been reformed more radically than others and the effectiveness of these reforms has been uneven. For example, in January 2000, the Conciliation and Arbitration Scheme for Teachers was modernised as a result of an agreement between the various unions, school management authorities and the Department of

Education and Science. A battery of state-of-the-art rules and procedures for resolving disputes was introduced, including facilitation, independent arbitration and adjudication. A similar process was agreed and applied to the Revenue Commissioners. In the health service, a review of industrial relations carried out in 2001 led to the creation of a small strategic team, comprising of senior management and trade union officials. This was charged with the responsibility of overseeing the implementation of difficult-to-agree negotiated compromises, identifying potential emerging difficulties and appropriate problem solving remedies.

In addition to these 'top-down' attempts, recent dispute resolution activity in the public sector has seen the development of innovative practices and policies at the decentralised level. For example, in 2001, Dublin City Council introduced The Dignity at Work Programme. The programme is embedded in a mission statement that adopts a strong stance against harassment, sexual harassment and bullying: it reads 'all staff, customers, clients and business contacts of Dublin City Council should be aware that Dublin City Council considers sexual harassment, harassment or bullying to be unacceptable and in breach of organisational policy... all staff will be treated equally and respected for their individuality and diversity.' This statement is backed up by formal and informal procedures to address these practices inside the organisation. A suite of preventive and awareness measures has been introduced, as have new mediation and investigation services. The purpose of this activity is to make available a comprehensive range of facilities to address the matter of bullying and harassment that unfortunately appear to be on the increase in many workplaces.

Although no authoritative assessment has been made of dispute resolution services in the Irish public sector, the consensus is that current arrangements are reasonably efficient at settling individual disputes. Opinion is more divided on the matter of managing collective disputes. One view, advanced mostly by employer organisations, is that irrespective of the creative work done in the realm of individual employment grievances, the public sector is not particularly efficient at resolving collective employment disputes. This view rests on the fact that the 'big' disputes over the past five-ten years have been in the public sector. Employers claim that trade unions cannot be relied upon to follow agreed procedures for the handling of employment disputes set out in codes of conduct,

thereby undermining the credibility of these voluntary commitments. Furthermore, they argue that trade unions frequently flouted the procedures set out in the *Programme for Prosperity and Fairness*, obliging a three weeks 'cooling off' period when a conflict arose on local productivity deals. Employers also claim that trade unions do not comply with the voluntary code on emergency cover in public sector disputes. Consequently, employers suggest that a binding/compulsory arbitration component should be built into public sector collective bargaining as part of the overall dispute resolution system. Trade unions strongly oppose such a move and suggest that the employers' claims are spurious. Whether or not employer claims are accurate, the issue of introducing compulsory arbitration into public sector pay determination keeps lingering around the employment relations agenda and it is thus worthwhile to set out the merits and drawbacks of compulsory arbitration, and some variants to it.

5.3 Compulsory arbitration and the 'narcotic effect'

Compulsory arbitration is the situation where a third-party procedure is automatically introduced into an employment relations dispute should the negotiating parties reach an impasse. Normally, under such a procedure the disputing parties are obliged to present their case to an arbitrator or an arbitration panel, which then makes a ruling or recommendation on the way the dispute can be resolved. In most cases, compulsory arbitration is binding: the parties have to agree with the decision reached by the arbitrator. By and large the employment relations literature is lukewarm about compulsory forms of arbitration. A commonly held view is that such procedures distort collective bargaining behaviour. The supporting argument for this view is that in an adversarial collective bargaining situation the arbitrator or arbitration panel normally uses 'split-the-difference' tactics to settle the employment dispute: a mid-way point is determined between the employer and union positions and this is put forward as the basis of a settlement (Ashenfelter and Bloom, 1984). While this tactic may initially prove effective, it will soon be self-defeating as employers and trade unions can predict the behaviour of the arbitrators and adjust their own behaviour accordingly.

Consider the scenario where compulsory arbitration is built into the negotiation machinery. In this situation, management and

unions will be tempted to adopt extreme positions when entering wage bargaining negotiations. Unions make a claim that is unrealistically high while the initial offer by management is too low. Some movement can be expected in the negotiation process, resulting in the gap narrowing between the union and management positions. Nevertheless, the movement is insufficient to allow for a negotiated settlement. As a result, the pay claim has to go to compulsory arbitration. The movement that has occurred in the negotiation process effectively amounts to each side's arbitration offer (Bazerman et al, 1992). Management and unions adopt these positions as neither wants to appear belligerent in the eyes of the arbitrator or arbitration panel. At the same time, the arbitration offers of management and unions are still above and below the point at which the two sides will settle. The assumption is that arbitration will bring the two parties to that point. The key issue here is that both management and unions have become dependent on the role of arbitration in settling disputes – a 'narcotic effect' has kicked in. Introducing compulsory arbitration into a bargaining situation may have the unintended consequence of undermining 'good faith' bargaining (Butler and Ehrenberg, 1981).

One way of reducing the narcotic effect is to make arbitration outcomes more uncertain. Introducing greater unpredictability into an arbitration arrangement can increase the likelihood of a negotiated settlement at the collective bargaining stage (Farber and Katz, 1979). Both parties become more risk averse and thus more prone to compromise at the early stage of negotiations. This thinking motivated the introduction of final offer arbitration (FOA) into the USA public sector in the 1970s and the UK private sector in the 1980s.⁵ Whereas the norm in conventional arbitration is to seek out a compromise arrangement, the final offer rule obliges the arbitrator or arbitrating panel to choose between the final offers of the parties to a dispute. In essence, the argument for FOA is that such procedures encourage management and unions to be more risk-averse and thus more moderate in the demands they make (Farber, 1980). Both will be more inclined to present initial and arbitration offers that are closer to their (undeclared) acceptable

⁵ In the USA, final offer arbitration was introduced into the public sector as an alternative to allowing government employees a right to strike. In the UK it was introduced as part of the 'new style' employment relations fashionable in the 1980s.

settlement point. Of course, with less distance between initial offers the possibility of a negotiated agreement actually increases. Thus the threat of final offer arbitration encourages management and unions to pursue 'good faith' bargaining. Increasing the potential costs of not agreeing induces management and unions to behave more reasonably (Wood, 1985).

Evidence from the United States suggests that collective bargaining tied to FOA is better at producing negotiated settlements than conventional compulsory arbitration arrangements (Lewin and Peterson, 1988). A study of FOA used by private sector companies in the UK by Metcalf and Milner (1993) reached a similar conclusion. It found that FOA outperformed compulsory arbitration in deterring disputes, particularly when coupled with some form of conciliation or mediation. In addition, it found that union negotiators were more prepared to compromise when FOA was part and parcel of the negotiation process. However, studies also indicate a downside to FOA, namely less equitable solutions to bargaining or negotiation impasses particularly when multiple issues are blocking the path to a settlement (Stevens, 1966). Adopting the 'winner takes all' tactic weakens the ability of the arbitration process to unbundle bargaining positions and develop a suite of proposals to address individual points raised by the disputants. As a result, a genuine and valid grievance may go unsettled under FOA, causing poor workplace relationships to persist. Attempts have been made to move from 'package-based' FOA, the situation where all or nothing outcomes are involved, to 'issue-based' FOA, which gives arbitrators more flexibility in balancing the respective claims of the parties. 'Issue-based' FOA also has a downside as it may encourage union and management to overload the bargaining agenda, making it more difficult to reach a negotiated settlement. Therefore, while the option of compulsory arbitration, or some variant of it, cannot be ruled out, equally it cannot be presented as a ready-made solution to identified problems with Irish public sector bargaining.

A sensible approach has been adopted on this matter in *Sustaining Progress*. This permitted a level of local bargaining so that employers and employees could negotiate a limited top-up to the nationally agreed pay awards and a procedure was created to cover the situation where employers claimed an inability to pay the discretionary award (a similar procedure was introduced for the

public sector), which in a limited set of circumstances permits binding compulsory arbitration.

Overall, it would be premature to move towards a comprehensive binding form of arbitration in the public sector. For the most part, demands for this form of action reflect more than anything else a sense of frustration that after nearly seventeen years of social partnership agreements a relatively high level of adversarialism continues to exist in public sector industrial relations. Managers and employees remain influenced as much by a 'them-and-us' mentality as by an ethos of trust and reciprocity that is supposed to be promulgated by partnership arrangements. Both government in its role as employer and trade unions must share the blame for this. Some trade unions have acted in an excessively sectionalist manner and invariably these groups of workers seek to free ride on the national pay deals by arguing that they require to be treated differently or exceptionally. Government has also played a poor hand. Although highly creative initiatives have been launched to promote problem-solving forms of dispute resolution in the public sector, these have been overshadowed by the inability of government to pursue a well-designed plan of action to challenge adversarial employment relations, particularly adversarial collective bargaining.

Consider the secondary teacher's dispute in 2001, which occurred after the full gambit of modern conflict resolution procedures had been introduced into the Teachers' Conciliation and Arbitration Scheme in the late nineties. These procedures were put to the test during 2001 when the three principal secondary teacher unions and the government, alongside the school management authorities, failed to reach agreement on a variety of matters relating to teachers' pay and working conditions. However, a settlement pathway could not be developed even with the use of these procedures. Opinion differs on the causes of this failure to reach a consensus and it would be inappropriate here to lay blame. It is however fair to say that a considerable amount of mistrust and sectionalism pervaded this dispute, effectively rendering the new dispute resolution procedures ineffective.

Thus well-crafted, state-of-art dispute resolution procedures are likely to be impaired by continued adversarialism and sectionalism in public sector employment relations. Moreover, to try and solve these problems by drawing on some form of dispute resolution mechanism such as compulsory arbitration is a high-risk strategy. A

more promising approach to the creation of more stable and collaborative forms of public sector industrial relations systems would be for the Irish government to refashion and increase its efforts in the realm of *dispute prevention*. In the first instance, such a strategy should focus on introducing the principles of interest-based bargaining or integrative bargaining into public sector pay setting. Integrative bargaining seeks to introduce greater deliberation and problem-solving activity into collective bargaining and reduce the level of adversarialism in the process. As this argument has a huge bearing on the future direction of dispute resolution in the public sector it is developed in some detail in the following sections.

5.4 The theory of interest-based bargaining

Table 9 sets out the main differences between adversarial and interest-based bargaining behaviour. In essence, the difference between adversarial and interest-based bargaining is the same as the distinction between distributive bargaining and integrative bargaining made by Walton and McKersie (1965) and described earlier in this paper. The principles and practices of integrative or interest-based bargaining are unlikely to spontaneously emerge within an organisation. In most cases, it requires a well-thought-out programme implemented and supported over a sustained period of time.

Table 9. Adversarial bargaining versus interest-based bargaining behaviour

Adversarial bargaining	Interest-based bargaining
Establish targets in advance	Assess all stakeholder interests in advance
Overstate opening positions	Convert positional demands from constituents into interests
Mobilise support amongst constituents	Frame issues based on interests
Appoint the key spokespeople	Avoid positional statements
Divide and conquer the other side	Use sub-committees and taskforces for joint data collection and analysis

Give as little as possible for what you get	Generate as many options as possible on each issue
Always keep the other side off balance	Take on the constraints of your counterparts
Never 'bargain against yourself'	Ensure constituents are educated and knowledgeable on the issues
Use coercive forms of power where appropriate	Troubleshoot agreement
An agreement reluctantly accepted is a sign of success	An agreement fully supported by all sides is a sign of success.

Source: Adopted from Cutcher-Gershenfeld, 2003

Ideally, such a programme would organise collective bargaining negotiations into a five-stage process.

- Phase one is the preparation stage at which negotiators obtain a mandate from their respective constituencies and collect evidence in support of their positions.
- Phase two marks the beginning of negotiations: the negotiations agenda is formally framed and discussions on particular topics open.
- Phase three is the exploration stage at which a variety of options are considered to settle the particular items on the negotiation agenda.
- Phase four, at this stage the negotiators focus on particular settlement options and discuss ways of tying together these into a settlement package. It is at this stage that the outline emerges of an overall agreement.
- Phase five is the end stage at which a formal agreement is concluded. This phase may sometimes be difficult as translating the broad principles of an agreement that emerges at phase four into detailed text is by no means straightforward or easy.

Before an organisation launches a programme to introduce integrative bargaining it needs to address the important strategic question of the institutional forum to be used for conducting these

new style negotiation relationships (Cutcher-Gershenfeld, 1994). Does it involve recasting existing collective bargaining arrangements or does it involve creating new institutional structures inside the organisation such as a works council, a social partnership body or some other form of representative agency? If a new arrangement is established then what relationship should it have with existing collective bargaining structures? An organisation would be ill-advised to proceed with an interest-based bargaining programme if it has not properly addressed these matters. Frequently, organisations come up with a solution that involves dividing the bargaining agenda into 'distributive' and 'interest-based' arenas and creating two separate processes ring-fenced from one another. The evidence suggests that the boundary delineating distributive and integrative bargaining is fairly arbitrary (Cutcher-Gershenfeld, 2001), but the usual practice is to allocate pay and other core aspects of employment contracts to the 'distributive' stream and to lodge topics such as family friendly policies and skill formation programmes in the 'integrative' stream.

The opposite track, however, is developed here as it is considered important not to create a big divide between the two approaches. Spillovers from one process to another should be encouraged, as integrative bargaining should have the scope to spread to matters normally considered within the remit of distributive bargaining (Eaton et al, 2003). To allow integrative bargaining reach maturity, organisations must prevent a 'silo' effect from developing between distributive and integrative bargaining. At the same time, charting a pathway from one form of bargaining to another confounds most organisations (Fisher et al, 1991). Undoubtedly, it requires sustained and concerted effort. There is no one best way or universal formula to follow when seeking to promote integrative bargaining. Organisations have to develop their own customised routes, although they should be guided by the core principles behind the approach. However, this paper argues in favour of a greater use of integrative bargaining within the Irish public sector.

5.4.1 Integrative bargaining and pay determination in the Irish public sector

Over the past decade, public sector pay in the Irish Republic has been mainly set at national level by the wage deals concluded through the social partnership agreements. These deals set out the

annual pay increases the public sector workers should receive but usually permit some scope for local bargaining. Public sector workers have fared relatively well under the national wage agreements and, on average, have seen their pay increase by over 60 per cent during this time. In addition to the pay increases awarded under the various national agreements, public sector workers also benefited from the system of 'specials'. This system, which is no longer operational, was essentially a comparability exercise that involved carrying out periodic reviews on pay rates for particular groups of public employees with designated private sector 'equivalents'. If it were found that public sector employees had fallen behind then they would receive 'special' increases.

This system of 'specials' was strongly influenced by British industrial relations practices and procedures of the 1950s (McGinley, 1976), particularly the recommendations of the Priestly Commission (1957) which argued that public sector pay should be based on two types of relativities: (1) external relativities – where public service workers are carrying out functions which are similar to jobs in the private sector, in other words pay comparability between public and private sector workers; (2) internal relativities – where possible analogues should be established between jobs within the public service. These conclusions influenced Irish public sector pay determination (giving rise to the system of comparison that is known as 'specials'), however the Irish government decided not to implement the institutional procedures proposed by the Priestly Commission for the conducting of the comparability exercise. In particular, Britain established a Pay Research Committee to examine pay comparability between private and public sector workers in a comprehensive manner. The Irish government did not follow suit. As a result, the arrangements to determine 'special' awards in Ireland were more *ad hoc* and informal, reflecting the strongly adversarial character of pay determination in the Irish public sector. It also meant that whereas the comparability exercise in Britain tended to be evidence-based the system in Ireland was less so.

The practice of awarding specials continued under the social partnership wage agreements. This left the door open for certain groups of workers to pursue sectionalist pay demands in the context of national pay setting: an incentive remained for these workers to declare that they are an exceptional case and should be treated differently from the mainstream. Moreover, in the absence of

transparent procedures to evaluate the merits of such claims, the temptation has been for these groups to reinforce their demands for special status with militant action. Consequently, the lack of 'deliberative' arrangements to deal with pay claims in a measured, evidence-based way nourishes adversarial behaviour. Little wonder that all the major industrial relations disputes under the present regime of social partnership have involved public sector workers demanding special treatment and thus greater pay.

5.5 The pay benchmarking exercise

The grievances raised by these groups of workers did not lack merit, but the correct mechanisms were not in place to manage public sector pay. In the absence of such procedures it is almost certain that pay distortions will arise in the public sector with government finding itself, sooner or later, in a fire-fighting situation to prevent industrial unrest. Senior government officials are acutely aware of the problem and have launched a number of efforts to recast the mechanisms for the setting of public sector pay beyond the arrangements set out in the national social partnership agreements. The latest, well published, initiative has been the public sector pay benchmarking scheme.

This initiative has its origins in a plan developed in the late eighties by senior government officials to introduce some form of performance related pay into the public sector. A number of consultancy reports were published which not only argued the case for such an arrangement but also developed a series of proposals on how it could be implemented. In contrast to the upbeat approach adopted in these reports, the specialised human resource management literature is far more equivocal about the impact of performance-related pay. Four dangers are usually highlighted.

1. Rewards under performance-related pay may not create a lasting commitment and at best only secure temporary compliance.
2. Performance-related pay is not an 'intrinsic' motivator: too little pay may demotivate but the opposite does not necessarily follow.
3. Performance related pay has a punitive dimension and thus may not be conducive to employee learning and innovation.

4. Performance related pay could destroy cooperation by making people compete for rewards.

These reservations were set to one side and government tabled the topic for negotiation in the talks for the *Programme for Prosperity and Fairness* partnership agreement. Although government officials pushed hard for a commitment to introduce performance related pay in the public sector, they met with strong resistance from the trade unions, particularly the public sector unions. For example, ICTU made it plain that the proposal was a step too far and would cause the union side to walk away from the negotiations for a new national agreement. In the circumstances, the government side had to relent and drop the proposal. After prolonged and difficult discussions it was agreed that rather than introducing a system of performance related pay, a pay benchmarking exercise would be conducted. However, anything but a 'shared understanding' existed amongst the social partners as to the meaning and impact of benchmarking. On the union side, there appeared to be a great deal of cynicism about the purpose of the benchmarking exercise. One infamous remark in 2000 by Joe O'Toole, the then chairperson of the public services committee of ICTU, likened the exercise to an ATM machine to be used by unions to withdraw money. Government officials on the other hand viewed benchmarking as a step towards connecting pay with performance and establishing a more systematic approach to public/private pay comparisons. Despite these contrasting interpretations, the initiative went ahead and a six-person body was set up under the chairmanship of Judge John Quirke. This body reported in the autumn of 2002, producing a thoroughly comprehensive attempt at establishing reasonable and credible comparisons between pay rates for jobs in the public and private sectors with similar level roles, duties and responsibilities. For example, the confidential salary survey conducted by the team covered 3,653 job grades involving 46,351 employees. In this regard, the scale and complexity of the exercise was unprecedented in Irish industrial relations.

Overall, the recommendations contained in the report for particular groups of workers would lead to an aggregate 8.9 per cent increase in the public sector pay bill. In determining the rate of increase for a particular job the body took account of factors such as the scale of the mismatch between existing levels of public sector pay and that of established private sector comparators and the

strategic importance of the job to public sector modernisation. Clearly those groups of public sector workers that fared less well expressed their disappointment with the report, but the overall response from trade unions was mildly positive. Initially the wider response to the report was somewhat muted, but as time went by and economic growth slowed, employers as well as many economists queried whether the government could afford to make the payments.

The body succeeded in establishing a more reliable and coherent set of comparisons between public and private sector jobs than had existed hitherto. It is fair to say that the exercise recast the analogues and comparisons underpinning the 'specials' system, which had become outmoded and no longer adequately matched public and private jobs in a convincing manner. Whether this has challenged the norms around the operation of the specials system is a more open question. Many public service employees had come to consider 'specials' as entitlements. Through creating new relativities, the body hoped that the benchmarking exercise would give rise to a new set of norms, which would create a more direct connection between pay and job performance in the public sector. Whether this shift in norms has occurred is a moot point. The danger is that the benchmarking team may have repeated the mistake of the 1950s by establishing a robust set of pay relativities between public and private jobs without creating on-going procedures, operating rules or institutions to guide public sector pay setting in the future. Establishing a rich body of empirical information about the association between pay and jobs in the public and private sectors at a particular point in time will not automatically lead to new pay norms to guide subsequent wage setting behaviour or expectations. Nor is it guaranteed to produce an informed comparability assessment in the future. A well-functioning public sector pay process requires some type of body with the capacity to collect information and listen to evidence to judge whether a particular wage claim has justification. In other words, the process must have the ability to act in a deliberative manner. Regrettably the benchmarking report is relatively quiet on this matter. This creates the danger that all parties will consider it to be 'business as usual', resulting in the dispersion of the pay increases awarded by the benchmarking team without any change to the prevailing 'adversarial' attitudes towards public sector wage

setting. This would be a highly unsatisfactory outcome, as it fails to address the need for a more durable and sustainable pay comparability system that has the confidence of the trade unions and the government.

A prime opportunity to introduce integrative bargaining into the Irish public sector has been lost. One way forward may lie in modifying and customising the pay review bodies used in Britain. These bodies use deliberative, problem-solving and evidence-based techniques to propose levels of pay increases as well as reforms to working conditions for particular groups of public sector workers. By continually monitoring pay and evaluating employment conditions for different segments of the public sector worker force, it is believed that wage claims are more likely to be settled in a reasonable and fair manner without recourse to industrial action. The section below describes the operation of these procedures for physiotherapists employed in the UK health service.

5.5.1 Pay review bodies: the role of fact-finding and deliberation in pay setting

Pay review bodies have played an influential role in the setting of public sector wages during the past twenty years in Britain. They are independent bodies, normally consisting of about eight people appointed by government, drawn from the public and private sectors. They have the remit to recommend annual increases to pay and changes to related conditions of service. They use a number of guidelines to help shape recommendations, which include trends in recruitment and selection, motivation and morale, the state of the economy and living standards. The actual work of the review body is best described as a combination of arbitration and deliberation. This is clear when one considers the case of the wage settlement reached in 2002 for physiotherapists and allied professions.

The review body recommended that physiotherapists receive a 3.6 per cent pay increase as well as a range of other benefits, including a 50 per cent increase to on-call and standby allowances. It reached its decision after nine months of activity during which it at first met with representatives of employers and union/professional associations to learn of the issues that were of most concern to them. In addition, the members made a number of 'site' visits to hospitals and community health programmes to discuss matters with managers and employees on the ground and to build

a more complete picture of the issues that they ought to be addressing. Subsequent to this preliminary activity, the review body commissioned research on particular issues including research into the impact of emergency duty on physiotherapists and radiographers and the reasons why physiotherapists join and leave the National Health Service. The next stage in the process was to conduct an 'evidence round', which involved all interested parties making written submissions on what they regarded as the key matters to be addressed by the review team. After the review body read the 'evidence', it organised a number of 'bi-lateral' sessions with the interested parties at which the various groups made an oral presentation to reinforce their main message. The sessions provided an opportunity to gain clarification on matters contained in written submissions. The 'evidence' round took about three months to complete. The body then deliberated on the information and research it had gathered and made its recommendations to the government. Employees, managers and government accepted the recommendations made for the physiotherapists.

The pay review process in this example clearly contains elements of deliberation and arbitration. There is a strong emphasis on informed evidence-based discussion and decision-making. Priority is given to setting an agenda that reflects the concerns and priorities of both employees and employers. Substantial effort is made to obtain the best possible data and information. No assumption is made that the different parties will always agree or easily move from their defined positions by simple appeals for cooperation. Differences of views are expected and the review body regards arbitrating between competing positions as an important part of their function. This approach places the review body in a better position to arbitrate an agreed resolution. In essence the pay review body attempts to move beyond the adversarial approach to pay and working conditions negotiations. It is also designed to prevent discontent building up on some aspects of working conditions by continuously reviewing the character of employer-employee interactions.

Whether these goals have been fully achieved in Britain is open to debate. Nevertheless the procedural mechanisms associated with pay reviews warrant close investigation. No suggestion is being made that pay review bodies should be diffused in mechanical fashion into Irish public sector employment relations but it is

suggested that the principles of deliberation and problem solving should be more used in the pay-setting process. Potentially, the social partnership arrangements could be used to push pay setting in this direction. Unfortunately however, to-date partnership has been promoted in a manner that effectively ring-fences it from any form of bargaining whether it is of a distributive or integrative kind.

5.6 Social partnership and integrative bargaining

The push to diffuse social partnership inside public and private sector organisations started in the wake of *Partnership 2000*, the national agreement signed by the social partners in 1996 (O'Donnell and Teague, 2001). This agreement saw a role for social partnership in promoting public sector change and set down six principles to guide such arrangements across the non-market sector, namely:

1. quality in the delivery of services
2. effective performance management at all levels
3. flexibility in the deployment of resources
4. training and development
5. the effective use of IT
6. an open participative approach to decision-making (Government of Ireland, 1996: 69).

The clear intention was for partnership to become a vehicle to enhance public sector performance. Since the late 1990s, there has been a considerable level of activity associated with the creation of partnership structures inside the public sector. In the civil service, for example, a three tier organisational system has emerged to enact the relevant clauses of the social partnership agreements. At the centre level, there is an overarching partnership structure to guide and monitor partnership-led activity in the sector. At the intermediate level, each government department has a partnership management committee to customise the implementation of nationally or centrally agreed policies and initiatives. At the ground level, each division or even work section has its own partnership committee to agree a programme of action for the immediate working environment. In this way, the partnership structure inside the public sector can be seen to possess both top-down and bottom-up dimensions. Partnership activity became closely tied to the wider project of public sector modernisation. The consensus view appears to be that while progress has been made in creating partnership

structures, these have yet to reach their full potential in terms of upgrading the operating performance of the public sector. A recent report evaluating the functioning of partnership committees in the civil service reached a number of conclusions:

- Partnership committees and processes have yet to create a distinctive identity and as a result, a lack of clarity exists amongst employees about the purpose and objectives of these arrangements.
- Differing views exist about the effectiveness of partnership arrangements. On the one hand, senior managers and trade unions were of the view that most partnership committees successfully completed the tasks they set for themselves. On the other hand, less senior managers and employees considered partnership processes to be slow and cumbersome.
- Differing views existed amongst union and management about how partnership arrangements should evolve, the institutional configuration these should take and the relationships that these should have with established collective bargaining procedures.

The overall impression is that while advances have been made the partnership process has yet to reach its full potential. The implications of this for bargaining processes and behaviour are twofold. The partnership channel inside the public sector has not been used in any systematic way to advance integrative bargaining processes. Interesting projects have developed here and there but no concerted or coherent initiative has emerged from the partnership arrangements. Secondly, traditional collective bargaining attitudes, behaviour and processes have remained relatively untouched by partnership principles. As a result, most trade union officials and representatives as well as managers at all levels remain unfamiliar with the main assumptions behind integrative bargaining. For example, recent public commentary about the merits or otherwise of the benchmarking exercise displayed little understanding of deliberation or interest-based negotiations. Use of the partnership framework to reorient public sector collective bargaining remains underdeveloped.

One possible response is that the partnership arrangements were designed to remain at a distance from employment relations matters

so that these bodies could focus on themes connected to public sector modernisation. At the level of espoused policy this is clearly true, but when it comes to actual policy a question mark hangs over the extent to which government has been able to place partnership at the centre of its drive to modernise and upgrade public sector activity. Instead, a range of different avenues has been used to improve the performance of the public sector. For example, as much emphasis has been placed on developing a new HRM framework in the public sector as on promoting social partnership. The result has been much uncertainty and confusion about the exact role for partnership in the public sector. In a sense these arrangements have ended up in a no-man's land, neither properly connected to collective bargaining nor to the activities of the HRM functions.

Yet partnership structures remain the most realistic channel to promote interest-based bargaining as both share a similar commitment to problem-solving and collaborative forms of employee-management interactions that could be used to deepen dispute prevention. These arrangements are squeezed by the continuation of a 'them and us' collective bargaining mentality on the one hand and an attempt to recast the HRM function on the other. Major change will have to be made if partnership is going to survive as a viable organisational structure. Roche (2002) concisely captures the need for renewal when calling for a second generation of partnership. The argument here is that the promotion of integrative bargaining should be the mainstay of this second generation period. To kick-start this new phase, an agreed list of integrative bargaining matters should be developed between the social partners to place the ideas of reciprocity and mutual gains at the centre of manager-employee interactions in the public sector. Concerted and well-supported action on this topic is probably the best available option to effect change in the adversarial attitudes and behaviour that still influence too much public sector employment relations.

The situation is far from bleak as the first 'green shoots' of new thinking are emerging along the lines set out above, as demonstrated by the adoption of a new *Action Plan for People Management* within the health service. The plan seeks to integrate industrial relations, partnership and HRM for the management of the employment relationship across the health service sector. It has seven key objectives:

- to manage people effectively
- quality of working life
- best practice policies and procedures
- improve industrial relations
- invest in education, training and development
- promote partnership
- performance management.

The substance of the policies and practices that will be pursued under each heading remains unclear. Nevertheless, this initiative is to be welcomed as it represents at least tacit recognition that the approaches adopted so far to link partnership and public sector modernisation have not been very well planned. It is to be hoped that it foreshadows a more integrated and joined-up approach for the future.

5.7 Conclusions

Over the past decade, perhaps even longer, most of the world's richer countries have launched a wide number of public sector reform programmes. The actual content and character of these programmes differ across countries, but all seek to promote public sector modernisation. On the one hand, governments are anxious that the economic and social functions of the state, which grew continually in the second part of the twentieth century, have become over-extended. On the other hand, they are concerned that the quality of public services needs improving. A frequent complaint is that large, impersonal and inefficient bureaucracies are providing sub-standard services to the public. Citizens, so the argument goes, often have an alienating and dispiriting experience of public sector 'goods'. As a result, delivering better quality services has become a key political priority almost everywhere. This then is the organisational context for almost any discussion about the role and functioning of public sector activity in rich economies in the twenty-first century.

Successive Irish governments have opened up a variety of pathways to advance public sector reform and modernisation. One such route has been the use of traditional collective bargaining to secure changes to work practices and tasks. Another was the launch of the Strategic Management Initiative (an initiative which sought to recast managerial processes and decision-making in the public

sector). A third avenue was the development of social partnership structures. The different strategies emerging from these various pathways have impinged on dispute resolution in different ways.

The result is a curious blend of progressive policy-making and missed opportunity. On the one hand, state-of-the-art dispute resolution innovations were introduced into the Irish public sector. For example, considerable effort was made in the late nineties to upgrade the conciliation and arbitration procedures in various parts of the public sector. On the other hand, opportunities to implement more problem-solving forms of employment dispute resolution were missed. For example, a yawning gap in the pay benchmarking report was the lack of explicit procedures that could be used to ensure that meaningful productivity improvements would accompany awards given to particular groups of public sector workers. No procedures were proposed for the conducting of pay comparability exercises in the future. The chance was lost to instil problem-solving and deliberative methods of engagement between employees and management on the key matter of pay and conditions. As a result, the public sector dispute resolution system can neither be described as fully open nor closed to innovation. It is a hybrid arrangement consisting of old and new policies sitting check-by-jowl.

The organisational overlaps, ambiguities and even inconsistencies arising from this situation have not been calamitous. After all, the level of employment disputes and conflict inside the public sector has fallen under the current social partnership regime. Yet, more progress could have been made to establish orderly employment relations in the sector. Public sector disputes now account for virtually all of the high profile employment disputes in Ireland. Moreover, despite concerted efforts to develop an organisational framework for the conduct of social partnership practices inside the public sector, mistrust and misunderstanding still appear to pervade managerial-employee interactions. One response to the continuing 'them and us' mentality has been to demand the introduction of more formal procedures and penalties to sanction behaviour that represents a deviation from the terms and conditions of national social agreements or collectively agreed procedures. Employer organisations complain that public sector trade unions sometimes do not adhere to LRC Codes of Practice. To curb such behaviour, they would like to see a form of compulsory arbitration introduced into public sector employment relations. A move in this

direction can be discerned in the latest social agreement, *Sustaining Progress*.

The analysis of this chapter is lukewarm on this move. It suggested that binding forms of arbitration have limits as a procedure to discipline wayward or opportunistic behaviour. Such mechanisms are often only concerned with the symptoms of a breakdown in orderly employment relations and rarely touch upon underlying causes. In other words, to improve public sector dispute resolution it may be necessary to adopt an approach that focuses more on changing the main attitudes and behaviour driving employment relations in the sector rather than on narrow settlement instruments such as mediation, arbitration and so on. Accordingly, the chapter proposes that a concerted attempt be made to promote cooperative forms of employment relations activity in the Irish public sector. In particular, a programme should be launched to diffuse what is termed integrative bargaining. An important consequence of this innovation would be the end of the divide between established forms of collective bargaining, social partnership activity and human resource management initiatives. Partnership arrangements would become the central plank for introducing innovations into the governance of the employment relationship in the Irish public sector.

To establish mutuality and reciprocity as the organising principles of public sector employment relations, government has to end the confusion about the exact status of the partnership arrangements in this part of the economy. This is not going to happen simply as a result of senior managers proclaiming that partnership is the vehicle to be used to deliver better quality service and improved performance. Public sector employees are not likely to dance to this single beat; rather they are more likely to treat partnership as a weasel word used by management to extract one-sided productivity concessions. Accordingly, more emphasis must be given to the matter of fairness when proclaiming the benefits of partnership. Partnership is not the same as cooperation and all too frequently these two words are conflated. A greater effort must be made to give partnership an organisational identity so that managers and employees see that it involves not only respecting the views of the 'other side' but also a commitment to problem-solving processes that seek to address each other's concerns. In practice, this means that more needs to be done to make partnership

arrangements the main driver behind HRM activities rather than the other way round. Partnership must become a genuine focal point for the promotion of decent work and the delivery of high-quality services. If that goal is achieved then a long way would have been travelled to end adversarialism in Irish employment relations and the prevention and resolution of disputes would be placed on much firmer foundations.

Towards the dispute resolution system of the future

6.1 Introduction: dispute resolution, the need for a public role

Efficient dispute resolution is closely linked to the performance of the wider employment relations system. Conflict is less likely to arise in employment relations systems that: (1) resolve bargaining problems associated with accommodating the competing claims made on organisations and indeed the economy as a whole; (2) ensure incentives are in line with the preferences and expectations of economic and social agents; and (3) create high quality information channels so that different interests have full knowledge of each other's thinking and concerns. Labour markets that exhibit these qualities are more likely to enjoy employment relations stability as well as a lower propensity to generate conflicts either of a collective or individual nature. In a nutshell, efficient workplace dispute resolution is, in part, a derivative of a wider consensus-orientated employment relations system.

At the same time, it must be recognised that dispute resolution is a difficult task. Three broad categories of barriers stand in the way of successful dispute resolution.

- (i) Tactical and strategic barriers: this refers to how individuals, in their efforts to maximise their short-term or long-term interests, may behave in a manner that is disadvantageous either for themselves or for all relevant parties.
- (ii) Psychological barriers: these arise not only from the human emotions that occur in conflict situations, but also from the contrasting and idiosyncratic ways individuals interpret information and evaluate risk when involved in a dispute settlement process. From this perspective, disputes and their resolution are intensively social interactive processes and not some instrumental bargaining game.

- (iii) Institutional and organisational procedures may shape behaviour or tie individuals to particular positions in a manner that is not conducive to dispute resolution. Of course, these are not stand-alone categories operating in isolation from one another. Frequently, they interact to multiply each other's effects and to blur the causes of the blockages that are holding up an agreement.

This is a hefty catalogue of potential barriers to successful dispute resolution, challenging the capacity of disputing parties to settle a dispute by themselves. Such a stance is to court all sorts of inequities: the imposition of a settlement by one party on another, resulting in their being a clear winner and loser from a dispute; the presence of on-going conflicts characterised by embittered relations between the protagonists. In other words, although conflict at work is inevitable, dispute resolution that satisfies the interests and aspirations of the participants is not. Invariably the economic, social and human costs of inefficient dispute resolution processes are high. This is the key justification for having public policy arrangements for the settlement of employment disputes and grievances as opposed to an absolute replica of the 'American' model of alternative dispute resolution. The latter system more or less gives employers a free hand to settle disputes internally within organisations. Whether such arrangements that give employers monopoly status to effectively fix the boundaries and operating rules of dispute resolution are ethical in terms of meeting employee demands for distributive or procedural justice is a matter of on-going debate.

A dispute resolution system with a strong public dimension is more likely to embed a series of values, rules and procedures that facilitate fair and speedy settlements to grievances and conflicts. Consider the issue of 'reactive devaluation of compromises and concessions' (Mnookin and Ross, 1995). Experimental research carried out under both real life and simulated conditions shows that a potential compromise to a dispute is received more receptively when proposed by a third-party intermediary than when proposed by the 'other side'. This is simply because parties to a dispute are likely to be distrustful of one another and are more willing to accept the assessment of an external 'neutral' agency or mediator. While a strong, some would say overwhelming, case can be made for a range of public rules and procedures to help settle employment disputes, the mere presence of public dispute resolution institutions does not lead to a

low-conflict employment relations system (Kolb, 1987). Or to put the matter slightly differently, because of their institutional character some dispute resolution systems are more successful than others in terms of enjoying a high degree of legitimacy amongst employment relations actors, being able to expedite cases and overseeing settlements that all disputants consider to be fair. Clearly, successful dispute resolution is to some extent tied to the question of institutional design. Good institutional design allows dispute resolution systems to capture the prized triptych of legitimacy, efficiency and equity.

6.2 The weakening of voluntarism

Many ingredients are involved in making dispute resolution institutions successful, but a key property is that these arrangements connect with the main patterns of economic and social life and have the capacity to move in line with unfolding transformations. Without these qualities, a governance gap may emerge inside dispute resolution processes – an asymmetry opens up between the assumptions, activities and programmes of those charged with settling disputes and the dynamics of organisations as well as the preferences of employees. The point of departure of this paper was that mismatches are emerging between established employment relations institutions and the wide-ranging and on-going changes occurring to the Irish economy and society. The mismatch is now so evident that the characterisation and functioning of many of these established institutions are being called into question.

Consider the depiction of the Irish system of employment relations as voluntarist. Over the years this description has been used to highlight the commonly accepted understanding that employers and unions much preferred their chance in a free collective bargaining tussle rather than allow government regulate employment relations through legal procedures and rules (Hardiman, 1988). Voluntarism has been a synonym for an employment relations system that is relatively free from legal and government interference. Yet this is hardly an accurate depiction of contemporary employment relations in Ireland given the significant growth in employment legislation. During the past decade, there have been thirteen separate pieces of labour law. Virtually no aspect of the employment relationship is completely free from regulation. In these circumstances, it is simply not credible to talk about Irish employment relations as being voluntarist.

The on-going encroachment of regulation into Irish employment relations has occurred at the same time as a reduction in the level of collective employment relations activity. The past decade has seen an almost continuous decline in collective bargaining inside private sector organisations largely arising from the increased numbers of 'non-union' multinational companies, together with the growth of hard-to-organise small firms. The decline in Ireland is nowhere near as dramatic as the USA where collective bargaining has more or less disappeared from the private sector. Moreover, collective employment relations continues to be an important employment relations practice, particularly in the public sector where it remains the dominant mechanism. Nevertheless, trade unions and collective employment relations have lost some of their capacity to operate as the guarantors of economic citizenship. However unpalatable it may be, this development cannot be ignored (Piore, 1991).

To argue that trade unions continue to have the coverage and strength to oblige employers to comply with economy-wide rules and norms for terms and conditions of employment is little more than a blind defence of an established social institution. The consequence of the greater use of regulation in the labour market alongside a relative decline in collective employment relations has been a shift away from a purely bargaining-based employment relations system towards a right-based system. One expression of this shift is that as trade union density declines, the numbers using the public agencies charged with settling disputes have grown. This suggests that as collective mechanisms typically used to govern the employment relationship lose some of their functionality so the demand for better processes and procedures to protect individual employment rights increases. The indications suggest that a wave of institutional modernisation is needed to ensure that in this time of economic and social transformation the employment relationship remains properly governed. If modernisation does not take place then almost certainly an optimal balance will not be obtained between labour market efficiency and equity. This observation is as true for dispute resolution as it is for any other aspect of employment relations.

6.3 New challenges for dispute resolution

The current social and economic transformations impact on dispute resolution systems in a number of ways. Consider the increase in individual employment rights. In response to changing labour

market patterns, the government introduced quite detailed legal rules on the terms and conditions of employment for certain categories of workers such as women and part-time workers. One does not have to be a supporter of labour market flexibility to recognise that many organisations are finding this new system of substantive regulation quite cumbersome. New burdens are being placed on business. Organisations feel challenged to maintain competitiveness and at the same time meet the standards and administrative obligations set by the new employment rules. Some organisations, particularly small firms, begin to lag behind and as a result, operate internal employment systems that are not necessarily in keeping with the requirements of labour market regulation. The result is an increase in claims of alleged breaches of employment rights by workers. This suggests that the shift towards a rights-based employment relations system may not only impair enterprise performance but also cause dispute resolution agencies to experience institutional overload. All in all, these changes present a number of challenges for dispute resolution mechanisms within Ireland.

6.3.1 Resolving the tension between organisational and public and legal dispute resolution mechanisms

Increased interest in alternative dispute resolution procedures is at least in part connected to the developments outlined in the previous section. Organisations are keen to develop procedures that commit employees to internal methods of dispute regulation. However, such employer-promulgated arrangements run the risk of compromising distributive and procedural justice. Consider the issue of procedural justice. The three key components to this concept are – neutrality, trust and reputation. Employer-driven dispute resolution systems may not win the confidence of employees if they are seen to be imbalanced in a manner that is likely to benefit the employer. Chapter 2 argued against the diffusion of an ‘American’ system of alternative dispute resolution, which sees employees overly tied to organisational dispute resolution. A system that simultaneously encouraged the resolution of disputes nearest to the point of their origin and maintained employee access to a wider public and legal dispute resolution mechanism was considered preferable. This is the first challenge with regard to dispute resolution that should be addressed both at organisational and the wider public level in Ireland.

6.3.2 Linking non-judicial and legalistic methods for the resolution of disputes

The second challenge is to attempt to 'couple' non-judicial and legalistic methods for the resolution of disputes. This approach has already been adopted with the development of a mediation alternative to the more legalistic investigation procedures used to address claims of discriminatory behaviour. Good grounds exist to argue that this policy needs to become mainstream practice. In forthcoming years, the Irish government is obliged to modernise and up-date most of the EU employment legislation that it has on the statute book. Building-in a non-legalistic alternative to the law when revising these statutes may help ease the regulatory burden experienced now by many businesses when complying with statutory employment rights. In developing this policy option Ireland could benefit from examining pioneering initiatives launched in the UK.

Consider the following example. In the context of revising the EU Directive on the Transfer of Undertakings, the British government encouraged the Local Government Association, the Employers' Organisation for Local Government, the TUC and CBI to devise an alternative dispute resolution procedure to handle complaints that may arise when a local authority transfers staff to an external provider as part of a contract to provide a local public service. The procedure created is set out in Appendix 3.

The exact content of the agreement is of secondary importance to this analysis. The main point is that the various clauses provide a standardised yet non-legalistic approach to the contracting out of services from the public to the private sector. Although the law on the Transfer of Understandings is not in any way compromised, both employers and employees have, for the first time, recourse to a quick and fair procedure to deal with any problems that may arise in this commercial situation. The aim behind the agreement is to ensure that employees involved in the process receive fair treatment, while money, time and expense are saved when dealing with disputes that may arise from procurement decisions. An important feature of the above agreement is how the traditional social partners linked up with the representative body for the sector to negotiate a procedure. This is the third challenge for public policy in the area of dispute resolution.

6.3.3 Linking all relevant parties within dispute resolution

Public institutions such as the LRC and Equality Tribunal, which have a responsibility for handling employment-related grievances, need to connect with a variety of corporate and labour market intermediary bodies to develop new conflict resolution arrangements for relevant sectors of the economy and areas of the workforce. Although external to any individual firm, these arrangements, because of their close proximity, are more likely to enjoy the confidence and trust of both managers and employees in relevant organisations. Conflict resolution procedures of this kind would be beneficial for large numbers of small firms that have problems keeping abreast of the requirements of employment regulations and may be more likely to fall foul of the law.

6.3.4 Promoting cross learning between union and non-union forms of dispute resolution

The fourth challenge is to promote cross learning between union and non-union forms of dispute resolution, or least best practice non-union forms of dispute resolution. Established 'collective' methods of handling grievances are not sufficiently fine-tuned to address some of the new problems arising in areas such as bullying, diversity and stress. Employees appear to be seeking more individual and packaged programmes to handle these disputes. This suggests that union-dominated grievances procedures may learn from some of the practices that have emerged in the non-union sector. This is not an argument for the collapse of collective forms of dispute resolution, but more a recognition that trade unions need to be open to innovation so that they remain relevant and connected to the interests of their members. To some extent, this type of cross-fertilisation of ideas is going on. For example, as explained in chapter 2, one non-union practice is for an organisation to install a mini call-centre which employees can use to obtain information about their rights, company benefit packages and grievance procedures. There is no good reason why such a service could not be used in a unionised environment. It is instructive that the British TUC has learnt from this practice and established a call centre that union members can access for advice on the best way to seek redress to an alleged infringement of employment rights.

Within Ireland some level of informal learning appears to be happening between human resource managers in union and non-

union companies. These managers are in regular discussions to share ideas and experiences and to seek advice on how to introduce successful new reforms. This activity, which is a form of loose benchmarking, is mainly designed to upgrade the procedures used to manage people. Too much should not be made of this activity as it is not widespread. Moreover, it is important to keep a touch of realism when discussing the relationship between union and non-union firms. A deep rivalry will continue between these different ways of designing the people management function inside organisations. This should be expected and not seen as deviant behaviour. But there is sufficient room for cross-organisational learning. Government should not get enmeshed in the trade union recognition argument. Instead, the focus should be on promoting cross-fertilisation schemes because the chief purpose of public policy must be to design new dispute resolution schemes that will benefit both organisations and employees.

6.3.5 Eliminating the divide between dispute resolution and dispute prevention

The fifth challenge is to remove the artificial divide between dispute resolution and dispute prevention that seems to prevail under existing arrangements. The industrial relations environment in the Republic of Ireland has been relatively good over the past number of years. Yet the incidence of adversarial relationships between management and unions remains uncomfortably high. These relationships are probably most evident in particular parts of the public sector. This paper argues that behaviour of this kind must be addressed, as it is a barrier to modern forms of work organisation such as team working and other cooperative types of management-employee relationships. One argument is that adversarialism should be addressed by stronger dispute resolution mechanisms such as compulsory forms of arbitration. Chapter 4 found this argument to be unpersuasive. Instead, it was suggested that more emphasis should be placed on developing and expanding dispute prevention activity in the public sector, particularly by organising a programme of integrative bargaining. The partnership framework was considered the most appropriate framework for the delivery of this programme.

These five challenges are considered to be amongst the important agenda items facing the Irish dispute resolution system. However, this paper also considers the system to be well placed to

address these challenges. It has many attractive features. Firstly, the evidence suggests that government is deeply committed to the principle of providing a dispute resolution service that addresses workplace grievances in a fair and efficient manner. Moreover, the employees working in the public dispute resolution agencies were found to be highly efficient and professional. A further positive feature is the presence of multiple institutional channels that can be explored to help an aggrieved employee to seek redress to an employment grievance. Finally, the evidence suggests that each public agency operating in this area has considerable internal flexibility, allowing it to adapt its working methods to new circumstances and launch experimental action where appropriate. Perhaps the only main drawback of current arrangements is that the social partnership framework is not connected in an integral manner with the area of dispute resolution and even dispute avoidance. It is perhaps too heavily focused on the regulation of wages at the national level and competitive performance at the organisational level. Bringing partnership arrangements into the picture would help enormously to create a flexible system of dispute resolution.

6.4 Social partnership and the delivery of a flexible system of dispute resolution

Over the past two decades, successive governments have developed a social partnership approach to labour market and wider economic governance (O'Donnell and Thomas, 1998). A great deal has been written about the Irish model of social partnership, much of which is either overly supportive or overly critical. This is not the place to rehearse these positions, but it is probably safe to say that the actual impact of social partnership lies somewhere between two extremes. When the first social partnership agreement was signed in 1987 the main motivation driving it was: a) to reduce the employment relations instability that was a feature of the Irish economy in the early-mid eighties; and b) to incorporate employers and unions into a broad coalition to address the country's dire economic problems. Since those early days, social partnership has evolved at both the national and enterprise level although it is fair to say that the former is more advanced than the latter.

At the national level, the social partnership framework has undoubtedly played a key role in the country's spectacular

economic and employment performance during the past decade. It has also positively contributed to a more stable and orderly employment relations environment, particularly in the private sector. The peak organisations of business and workers, IBEC and ICTU, appear to interact with one another in new ways. In particular, both organisations appear disposed to developing common policy positions not simply through a process of hard bargaining but also through problem-solving interactions that aim to devise solutions identified through a process of analysis and dialogue. These deliberative exchanges have brought considerable benefits. Firstly, they have revealed more information about the strengths and weaknesses of existing methods and procedures designed to organise the labour market. Secondly, improved quality of decision-making has occurred on particular policy matters (for example, pensions provision). In a nutshell, this has allowed shared understandings to emerge between business and labour about the economic threats and opportunities facing modern Ireland.

At the enterprise level, the main thrust behind the diffusion of partnership has been to promote a greater degree of mutuality in employee-management interactions. No blueprint or design plan has driven this activity. Instead, it has evolved in a highly pragmatic manner, influenced as much as anything by a desire to build consensus-making procedures inside the employment relations system. The vision promoted of enterprise partnership saw managers and workers sharing more information with each other, creating project teams to bring improvements to the organisation and its working environment, listening more intently to each other's concerns and working to strengthen informal processes that would allow them to cooperate more closely together (Greenhaugh and Chapman, 1995). Enterprise partnership was seen as much about developing an ethos of problem solving amongst managers and employees as building new institutional procedures inside organisations (O'Donnell and Teague, 2001).

No systematic evidence exists about the scale of the diffusion of enterprise partnerships and what they actually do. The available research suggests that enterprise partnerships normally arise in the private sector when an organisation is

- facing an imminent threat of closure
- launching a corporate restructuring programme and thus eager to gain the support of the workforce

- seeking to leave behind a period of poor employment relations
- and/or influenced by the leadership of a dedicated group of people, normally a coalition of trade union officers and managers, who carry sway inside the organisation.

In the public sector, social partnership principles have been diffused to help advance the modernisation of government services. Many arrangements have been established at a variety of levels in the public sector, but in an uneven manner. Departmental partnership committees in some instances are still searching for a *modus operandi*. Some of the factors causing this fragmented picture were explored in the previous chapter. Overall, the consensus is that the principles of social partnership have been more effective at the national level than at the enterprise level. There is a growing feeling that enterprise partnerships are losing their way both in the public and private sectors.

Yet the social partnership structures that have been established could be harnessed to meet the challenge of creating an up-to-date flexible system of dispute resolution. Consider the idea of creating a responsive regime of labour law regulation that would encourage dispute resolution inside organisations yet still permit employees to use public agencies to seek redress to an alleged infringement of an employment right. Responsive regulation promotes the private enforcement of public employment law. Conditional deregulation of this kind runs the danger of employers creating organisational-level dispute regulations systems that are rigged in their favour. To reduce this possibility employees should be closely involved in the design, delivery and monitoring of such systems, and so employee involvement or participation is a crucial element to a responsive regulation regime of dispute resolution. Enterprise partnerships are well positioned to perform this role and can act as the verifier that any new dispute resolution arrangement has the support of the workforce and is being implemented in a fair and efficient manner. Where the system is not performing properly then the enterprise partnership, or at least the employee representatives on this body, can act as whistleblowers. Enterprise partnership can become the fulcrum of a system that encourages the resolution of disputes through alternative and innovative methods, but ensures that such arrangements are not overly biased in favour of employers.

A feature of the Irish social partnership framework is the presence of a range of organisations charged with promoting these arrangements. For example, the National Centre for Partnership and Performance (NCPP) exists to promote the idea of partnership at all levels within the Irish economy. In addition, a number of training organisations have been jointly established by IBEC and ICTU to provide managers and employees with the skills to set-up and operate partnerships arrangements. These bodies could do more to promote pro-active forms of dispute resolution. For example, the NCPP could link more with the Equality Tribunal or the Labour Relations Commission to design initiatives whereby enterprise partnership arrangements could play a role in in-house dispute resolution arrangements. Invariably this type of activity would require these enabling bodies to think creatively about new and experimental forms of dispute resolution which would oblige a closer assessment of the mechanisms used to handle workplace grievances in the non-union sector. This paper clearly sees organisations such as NCPP having a leading role to play in the promotion of learning between the union and non-union sectors on disputes resolution.

A criticism of the development of social partnership in the public sector made in chapter 4 was that it was not strongly enough tied either to the collective bargaining system or the HRM function and was caught in no man's land between the two. This paper argues that partnership arrangements are likely to remain stunted in this situation as management and unions remain confused about what partnership arrangements are meant to do. Clarion calls for the use of enterprise partnerships to deliver better performance in the public service are unlikely to reverse this situation. Partnership can only positively contribute to the upgrading of organisational performance in the public sector if it is properly integrated into the collective bargaining and human resource management systems. To have a system where managers insist that developing partnership cannot intrude into their right to manage, where unions insist that partnership must be kept at arms length from collective bargaining activity, and yet partnership is given a mandate to bring about improved organisational performance, is a recipe for either deadlock or for weak partnership arrangements.

Partnership will only assist in the endeavour to modernise public services if it gives rise to meaningful joint manager/

employee initiatives, or problem-solving processes that reduce barriers to improved performance. This means intruding on the way collective bargaining is conducted and the methods managers use to make decisions. Connecting partnership with collective bargaining would open the door for a concerted initiative on integrative bargaining. Integrative bargaining is an attempt to weaken adversarial behaviour that is often associated with distributive bargaining. It also helps to dissolve the artificial barrier between dispute resolution and dispute prevention. Using partnership arrangements in the public sector as a vehicle to promote an alternative system of collective bargaining behaviour would not only help address the identified problem of adversarialism but would also help breathe new life into structures that are widely perceived to be flagging. The overall message is that a wider view must be taken of dispute resolution and partnership is an integral part of the picture.

6.5 Conclusion

The central thesis of this paper is that the old social contract at work and its associated institutions that promoted long-term job tenure and financial security is under threat from a variety of economic and social pressures. A new social contract is being forged that offers employees careers and employment rights that reflect their needs, aspirations and interests, but it has not yet reached maturity. Accordingly, we are in a period of institutional transition from one type of labour market governance regime to another. In this new environment, many features of established employment relations systems will require renewal, if not indeed a complete overhaul. Existing arrangements for the resolution of employment disputes and conflicts will be no exception to this broader trend. The purpose of this paper has been to map out some of the challenges that the Irish dispute resolution system will have to address and to develop some ideas about the character of the reforms that need to be made. These ideas should not be read as a blueprint but as an attempt to promote a debate about the shape of dispute resolution in the workplace of the future. The thrust of the paper's proposals revolve around the necessity of building a flexible dispute resolution system that embodies the principles of public regulation, decentralisation and individualisation.

Appendix 1

Code of Practice: Grievance and Disciplinary Procedures

1. Introduction

Section 42 of the Industrial Relations Act, 1990 provides for the preparation of draft Codes of Practice by the Labour Relations Commission for submission to the minister, and for the making by him of an order declaring that a draft Code of Practice received by him under section 42 and scheduled to the order shall be a Code of Practice for the purposes of the said Act. In May 1999 the Minister for Enterprise, Trade and Employment requested the Commission under Section 42 of the Industrial Relations Act, 1990 to amend the Code of Practice on Disciplinary Procedures (S.I. No. 1 17 of 1996) to take account of the recommendations on Individual Representation contained in the Report of the High Level Group on Trade Union Recognition.

The High Level Group, involving the Departments of the Taoiseach, Finance and Enterprise, Trade and Employment, the Irish Congress of Trade Unions (ICTU), the Irish Business and Employers Confederation (IBEC) and IDA-Ireland, was established under paragraph 9.22 of Partnership 2000 for Inclusion, Employment and Competitiveness to consider proposals submitted by ICTU on the Recognition of Unions and the Right to Bargain and to take account of European developments and the detailed position of IBEC on the impact of the ICTU proposals.

When preparing and agreeing the Code of Practice the Commission consulted with the Department of Enterprise, Trade and Employment, ICTU, IBEC, the Employment Appeals Tribunal and the Health and Safety Authority and took account of the views expressed to the maximum extent possible.

The main purpose of the Code of Practice is to provide guidance to employers, employees and their representatives on the general principles which apply in the operation of grievance and disciplinary procedures.

2. General

This Code of Practice contains general guidelines on the application of grievance and disciplinary procedures and the promotion of best practice in giving effect to such procedures. While the Code outlines the principles of fair procedures for employers and employees generally, it is of particular relevance to situations of individual representation.

While arrangements for handling discipline and grievance issues vary considerably from employment to employment depending on a wide variety of factors including the terms of contracts of employment, locally agreed procedures, industry agreements and whether trade unions are recognised for bargaining purposes, the principles and procedures of this Code of Practice should apply unless alternative agreed procedures exist in the workplace which conform to its general provisions for dealing with grievance and disciplinary issues.

3. Importance to procedures

Procedures are necessary to ensure both that while discipline is maintained in the workplace by applying disciplinary measures in a fair and consistent manner, grievances are handled in accordance with the principles of natural justice and fairness. Apart from considerations of equity and natural justice, the maintenance of a good industrial relations atmosphere in the workplace requires that acceptable fair procedures are in place and observed.

Such procedures serve a dual purpose in that they provide a framework which enables management to maintain satisfactory standards and employees to have access to procedures whereby alleged failures to comply with these standards may be fairly and sensitively addressed. It is important that procedures of this kind exist and that the purpose, function and terms of such procedures are clearly understood by all concerned.

In the interest of good industrial relations, grievance and disciplinary procedures should be in writing and presented in a format and language that is easily understood. Copies of the procedures should be given to all employees at the commencement of employment and should be included in employee programmes of induction and refresher training and trade union programmes of employee representative training. All members of management, including supervisory personnel and all employee representatives should be fully aware of such procedures and adhere to their terms.

4. General principles

The essential elements of any procedure for dealing with grievance and disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well defined and that an internal appeal mechanism is available.

Procedures should be reviewed and up-dated periodically so that they are consistent with changed circumstances in the workplace, developments in employment legislation and case law, and good practice generally.

Good practice entails a number of stages in discipline and grievance handling. These include raising the issue with the immediate manager in the first instance. If not resolved, matters are then progressed through a number of steps involving more senior management, HR/IR staff, employee representation, as appropriate, and referral to a third party, either internal or external, in accordance with any locally agreed arrangements.

For the purposes of this Code of Practice, 'employee representative' includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.

The basis of the representation of employees in matters affecting their rights has been addressed in legislation, including the Protection of Employment Act, 1977; the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations, 1980; Safety, Health and Welfare at Work Act, 1989; Transnational Information and Consultation of Employees Act, 1996; and the Organisation of Working Time Act, 1997. Together with the case law derived from the legislation governing unfair dismissals and other aspects of employment protection, this corpus of law sets out the proper standards to be applied to the handling of grievances, discipline and matters detrimental to the rights of individual employees.

The procedures for dealing with such issues, reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include the following.

- That employee grievances are fairly examined and processed.
- That details of any allegations or complaints are put to the employee concerned.

- That the employee concerned is given the opportunity to respond fully to any such allegations or complaints.
- That the employee concerned is given the opportunity to avail of the right to be represented during the procedure.
- That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

These principles may require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given or that the employee concerned be allowed to confront or question witnesses.

As a general rule, an attempt should be made to resolve grievance and disciplinary issues between the employee concerned and his or her immediate manager or supervisor. This could be done on an informal or private basis.

The consequences of a departure from the rules and employment requirements of the enterprise/organisation should be clearly set out in procedures, particularly in respect of breaches of discipline which if proved would warrant suspension or dismissal.

Disciplinary action may include

- an oral warning
- a written warning
- a final written warning
- suspension without pay
- transfer to another task, or section of the enterprise
- demotion
- some other appropriate disciplinary action short of dismissal
- dismissal.

Generally, the steps in the procedure will be progressive, for example, an oral warning, a written warning, a final written warning, and dismissal. However, there may be instances where more serious action, including dismissal, is warranted at an earlier stage. In such instances the procedures set out at paragraph four hereof should be complied with.

- An employee may be suspended on full pay pending the outcome of an investigation into an alleged breach of discipline.
- Procedures should set out clearly the different levels in the enterprise or organisation at which the various stages of the procedures will be applied.
- Warnings should be removed from an employee's record after a specified period and the employee advised accordingly.
- The operation of a good grievance and disciplinary procedure requires the maintenance of adequate records. As already stated, it also requires that all members of management, including supervisory personnel and all employees and their representatives be familiar with and adhere to their terms.

Appendix 2

The role of the ombudsman in employment dispute resolution: an example of the terms and conditions associated with this post, as employed at an international bank

1. Introduction

- 1.1 The Ombudsman is an independent person whose function is to act as an impartial mediator in the resolution, by mutual agreement, of cases of employment-related grievance or conflict.
- 1.2 All current staff members, including fixed-term and part time employees of the Bank, shall have access to the Ombudsman.

2. Functional relationships

- 2.1 The Ombudsman shall be appointed by the President after consultation with the Staff Council for a term not exceeding three (3) years.
- 2.2 In the exercise of his/her duties, the Ombudsman shall be independent of any department or official of the Bank.
- 2.3 The Ombudsman shall have direct access to the President and Vice-Presidents and to all staff members of the Bank.

3. Ombudsman functions

- 3.1 The Ombudsman shall consider staff members' inquiries or complaints of any nature related to their employment with the Bank. The scope of such inquiries or complaints shall be broadly interpreted and shall include matters pertaining to the administration of benefits as well as professional and staff relations matters.
- 3.2 The Ombudsman shall, in the exercise of his/her judgement, facilitate resolution of disputes, by means of mediation and conciliation or any other appropriate method, with the primary objective of settling grievances or disagreements and resolving problems between staff members and management.

- 3.3 All matters brought to the Ombudsman shall be considered solely on the merits of the case. The Ombudsman may make specific suggestions or recommendations, as appropriate, to both staff members and management on action needed to settle grievances. The recommendations of the Ombudsman shall not create precedent for any subsequent cases, although the Ombudsman may have regard to previous recommendations when considering current inquiries or complaints.
- 3.4 The Ombudsman may also investigate matters brought to his/her attention in a confidential manner by staff members and, if satisfied that remedial action should be taken, may make specific suggestions and recommendations, as appropriate. In cases which relate to a specific individual the Ombudsman will only investigate the matter if given the express permission of the staff member concerned. In cases which relate to more general matters affecting a group of staff members, the Ombudsman may investigate such matters brought to his/her attention without the express permission of the referring staff member.
- However, in such cases the anonymity of that staff member will be maintained unless and until the staff member has given express consent to be named by the Ombudsman.
- 3.5 At all times the Ombudsman shall take into account the rights and obligations existing between the Bank and the staff member, in addition to the equities of the situation.
- 3.6 The Ombudsman shall not have decision-making powers but shall advise and take recommendations.
- 3.7 The Ombudsman may, in his/her discretion, decline to consider matters that can be remedied only by action affecting Bank staff as a whole or a whole class of Bank staff. The Ombudsman may also, in his/her discretion, decline to consider matters that he/she considers have not been brought to his/her attention in a timely manner.
- 3.8 Upon request of the Chairman of the Appeals Committee, the Ombudsman may also, in his/her discretion, mediate between parties to an Appeal when they have been so referred.

4. Access to documents and confidentiality

- 4.1 The Ombudsman shall have unrestricted direct access to any personnel or other Bank files, including reports of the Appeals Committee, which the Ombudsman believes to be relevant to the discharge of the functions of the office of Ombudsman.
- 4.2 The Ombudsman shall respect the confidentiality of all information and documentation made available to him/her. Neither the Ombudsman nor any document in his/her possession may be produced as evidence in any Bank proceedings, including those of the Appeals Committee unless agreed by all parties.
- 4.3 On the initiative of the Appeals Committee or at the request of a party to Appeals Committee proceedings, and with the consent of the parties and the Ombudsman, the Ombudsman may be invited to appear before the Appeals Committee or provide documentary evidence to the Appeals Committee. The Ombudsman may not be compelled to disclose the identity of staff members by whom he/she has been consulted, nor shall the Ombudsman disclose the details of matters he/she has considered without the express permission of the staff members involved. All reports of the Appeals Committee shall be sent to the Ombudsman unless the Appellant objects.

5. Other recourse for staff complaints

- 5.1 The above provisions shall not be construed as in any way limiting staff members' access to any other recourse for the resolution of claims or grievances.
- 5.2 The time spent in consulting with the Ombudsman and the time employed by the latter in the performance of his/her functions on behalf of a staff member shall in no way affect the time limits for formal presentation of a claim or grievance to management or to the appeals Committee. In appropriate cases, however, the Ombudsman may request the Chairman of the Appeals Committee to consider exercising his/her discretion to extend the normal time limit for filing an Appeal in accordance with the applicable rules.

6. Reports

- 6.1 Subject always to the provisions of paragraph 4.2 above, the Ombudsman shall provide semi-annual reports to the President, the Vice President, Personnel and Administration, and the Staff Council. These reports shall be of a non-specific nature and will provide an overview of the Ombudsman's activities, together with any comments on Bank policies, procedures and practices that may have come to his/her attention.

7. Assistance with policy improvements

- 7.1 As a result of his/her experience in the exercise of the function, the Ombudsman may be consulted by management on policy issues where his/her views and experience might prove helpful.

8. Review of the terms of reference and performance of the Ombudsman

- 8.1 These Terms of Reference shall be subject to review by the Vice President, Personnel and Administration in consultation with the Staff Council and, as necessary, with the Ombudsman.
- 8.2 The performance of the Ombudsman in fulfilment of these Terms of Reference during his/her term of office will be subject to periodic review by the President, in consultation with the Vice President, Personnel and Administration and the Staff Council.

Appendix 3

Code of Practice on Handling Workforce Issues: Alternative Dispute Resolution Procedure

Introduction

This paper sets out a procedure for resolving disputes arising from the application of the Code of Practice on Handling Workforce Issues. All the parties agree that the procedure should be a last resort and all will make their best efforts to resolve problems by agreement. We also support the government criteria that the ADR should be fast, efficient and cost-effective.

The need to exhaust local procedures

The parties must exhaust all normal local procedures as required by paragraph 9 and paragraph 13 of the Code before invoking the Alternative Dispute Resolution procedure (ADR) provided for in paragraph 14.

Who is responsible for resolving disputes?

The ADR procedure will be under the supervision of an independent person appointed from an approved list supplied by ACAS. If the parties so agree, they may appoint two 'wing members' with an employer and trade union background to assist the independent person.

The dispute resolution process

Disputes will be resolved using the following three-stage procedure.

Stage 1: Initial reference to the independent person

The independent person will be invited to answer three questions:

- (i) Is this a dispute about the application of the Code?
If the answer is no, the matter can proceed no further.
If yes, then the independent person will move to question
- (ii) Have the parties exhausted local procedures?
If the answer is no, then the parties will be invited to make further local efforts to resolve the dispute. If yes, then the independent person will conduct an independent assessment, by answering question (iii) and giving reasons for the answer.
- (iii) Do the terms and conditions of employment on offer to new employees comply with the Code?
If the answer is yes, then the matter is deemed to be concluded and the contractor can continue to offer the same package of conditions to new employees. If the answer is no, then the dispute will proceed to Stage 2.

Time limit: Twenty working days.

Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions

Stage 2 begins with the parties being invited to seek to resolve the matter through further discussions.

The independent person will make themselves available to the parties to facilitate the process. The parties also have the option of establishing other arrangements for mediation.

If the parties can reach an agreement consistent with the Code then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute.

If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

Time limit: Ten working days, with the possibility that this might be extended by the agreement of the parties and with the consent of the independent person.

Stage 3: Final Reference to the Independent Person

The independent person invites the parties to make final submissions. If the independent person then believes it would be worthwhile, the parties may be given a short period of further discussion.

If there is no value in giving the parties more time – or if during any discussion the parties were unable to agree on how to bring the matter to a successful conclusion – then the independent person will proceed to a final binding arbitration. Having heard the evidence and reached a conclusion the independent person will impose a revised package of terms and conditions applicable to each of the affected employees.

Time limit: Ten working days

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Dispute resolution and the employment relationship

1.1 Introduction

Conflict at work is commonplace. The sources of employment grievances are many and vary in complexity as well as intensity. Some arise from inter-management rivalries while others involve disputes between employees. But most of all, workplace conflict arises from employee-management interactions. Employees sometimes allege inappropriate (if not illegal) behaviour by managers such as discrimination, bullying, violations of health and safety rules and so on. For its part, management sometimes takes disciplinary action to address alleged bad behaviour by employees such as poor time keeping, drinking at work and so on. Thus, disputes regrettably are part and parcel of everyday working life. As a result, an important function of an employment relations system, both at national and company level, is to establish arrangements and procedures which enjoy the confidence of both employees and management, to deal expeditiously and fairly with work grievances and disputes (Tyler, 1984).

Effective dispute resolution arrangements not only ensure that employees enjoy dignity and justice at work, but are also likely to improve competitiveness. An economy that is unable to settle work grievances fairly and efficiently invariably pays a high cost. Days can be lost due to some form of industrial action, sickness and absenteeism rates can be high and management-employee relations can become strained if not embittered. Disharmony at the workplace can impede organisations from creating adaptable structures to succeed in today's challenging business environment. Trust and cooperation at work are key intangible assets for the advancement of competitiveness, but they are also the first casualties when grievances are higher than they ought to be. It is in the interest of everyone – employees, employers and governments – to have high quality dispute resolution mechanisms (Thibaut and Walker, 1975).

1.2 Purpose of the paper

The purpose of this paper is twofold. One is to assess the work of public agencies in the Irish Republic charged with settling employment disputes. This evaluation is important not only because it is good practice to examine the ability of public institutions to perform the tasks that they were put in place to do, but also to gauge how the far-reaching changes occurring in labour markets are impacting on traditional employment relations dispute procedures. The other is to investigate the implications for organisational level dispute resolution of new work practices and human resources management policies that have recently been diffusing between countries. The import of this investigation should not be underestimated since the Irish employment relations system may be on the cusp of widespread change that will have important implications for dispute resolution mechanisms.

1.3 Changing Irish employment relations

Twenty years ago Irish employment relations could be broadly described as adversarial and voluntarist and these features heavily shaped procedures to settle employment disputes and grievances. The voluntary system of industrial relations is premised on freedom of contract and freedom of association, and in terms of the British/Irish tradition, is based on free collective bargaining on the one hand and relative legal abstention in industrial relations on the other. At the same time, the voluntary tradition never meant a total rejection of public intervention or labour law, but merely a preference for joint trade union and employer regulation of employment relations. Adversarial employment relations is the situation where a strong 'them and us' mentality pervades the relationship between trade unions and employers. Each side sees itself as having divergent, if not competing, interests. Collective bargaining is used to obtain a compromise or accommodation between the divergent positions normally adopted by trade unions and management.

Adversarialism and voluntarism have both been challenged in recent times. The growth of social partnership at both national and enterprise levels, predicated on a consensual approach to employment relations, sits uneasily with adversarial attitudes. Social partnership promotes cooperative interactions between managers and employees so that shared understandings and joint

action can be fostered on business and workplace matters. Mutuality and not adversarialism is the by-word. The close association between voluntarism and collective bargaining has also been undermined by a variety of developments. These include both the emergence of non-union forms of employment relations, partly fuelled by the emergence of multinational enterprises that are reluctant to cede recognition to trade unions, and the growth of small enterprises, which traditionally have been a poor recruiting ground for organised labour. Together these developments represent a threat to private sector collective bargaining.

Social partnership and the growth of non-union companies have encouraged the fragmentation of employment relations in Ireland to the extent that it is no longer accurate to suggest that adversarialism and free collective bargaining are the main organising principles for the entire employment relations system (Prodzynski, 1992). New procedures and practices have been diffused across a wide range of human resource management and employment topics. Interpreting the implications of such changes has been a matter of hot debate but the fact that change has occurred is widely accepted (McCartney and Teague, 2003). Contrasting employment practices, emblematic of different models of how to organise the labour market, sit side-by-side. While it would be misleading to suggest adversarialism is down-and-out – this ideology continues to have a significant influence, particularly in the public sector – many intriguing questions are raised by the fragmentation of Irish industrial relations. Is the emergence of non-union human resources policies always and everywhere a threat to union-dominated forms of employment relations? Which will win the day – the problem-solving ethos of social partnership or adversarial employment relations? In a situation where there is diversity of employment relation strategies and procedures would it not be too prescriptive for public policy to support one approach over the others?

At the same time as collective employment relations is experiencing rapid change, the number of cases passing through the public agencies charged with resolving employment disputes is as high, if not higher, than ever. The causes of this heavy caseload are varied. Identity groups and new social movements are using labour law to advance equality and other rights at the workplace. Although collective bargaining is on the back foot, individuals are not shying away from using employment legislation to settle alleged

infringement of employment rights. Social transformations such as the massive growth of female labour market participation are necessitating the employment relationship to be governed in a different way – the need for legislation on family-friendly policies is an obvious case in point. To the extent that there is any coherent shift in the Irish employment relations system it is away from voluntarism and adversarialism and towards one in which the themes of identity and regulation are core themes.

This shift has far reaching implications for resolution of employment disputes at both national and organisational levels. Many of these implications have yet to be carefully considered. This paper aims to both enrich our understanding of unfolding dispute resolution developments and provide some answers to the policy challenges that arise. Before this investigation begins however, some important contextual remarks are provided about why employment disputes arise, the tools most commonly used to resolve such grievances and how and why these arrangements evolve over time.

1.4 Why do disputes arise?

The employment relationship is essentially an exchange relationship governed by a contract. For the most part, this contract sets down rates of remuneration, work specifications and tasks tied to a particular job and conditions of employment. Employment contracts should be transparent so that the mutual responsibilities and obligations of employers and employees are clearly understood by both parties. To help understand why employment disputes arise it is important to distinguish between the determination and implementation of employment contracts.

Consider first of all the determination of employment contracts. When recruiting new staff, employers do not enjoy complete freedom in designing terms and conditions of employment. They are constrained by a range of labour laws that give employees a series of statutory rights – minimum levels of pay, a battery of health and safety safeguards, working time entitlements et cetera. Thus, employment legislation binds employers (and employees) when they are negotiating employment contracts.

In addition to observing statutory rights, employers (and employees) may also have to abide by externally and internally negotiated collective agreements. Many countries, including the

Republic of Ireland, have employment relations systems in which levels of pay and employment conditions for specific categories of occupations and workers are determined by trade unions and employer bodies outside the organisation. These collective bargaining arrangements can be either national, sectoral or occupational.

Externally negotiated collective agreements hold some benefits for employers by reducing the time and costs associated with negotiating employment contracts on an individual basis. But they can also make it difficult for employers to align job roles with business and organisational needs. Organisations may also reach internal deals with a trade union or group of trade unions to conclude enterprise-specific employment terms and conditions. Thus, as well as having to comply with 'external' collective agreements, employers might also have to comply with additional internal deals. Organisations that are tied to either external or internal collective agreements are more constrained when it comes to writing employment contracts than those not recognising a trade union. This is why the distinction between unionised and non-unionised workplaces is such an emotive and controversial debate in employment relations.

The implementation of established rights at the workplace is a fertile ground for employment disputes. Complaints, grievances and disputes can arise at the workplace when people feel that their employment rights, whether these are established by legislation, collective agreement or through an individually negotiated employment contract, have been infringed. An important distinction to make is between substantive and procedural rights. Substantive rights are those pay and conditions that have been established by law, collective agreement or an employment contract. Minimum wage rates, overtime pay rates and holiday entitlements are examples of substantive rights. Procedural rights are different from substantive rights in that they relate to the mechanisms used to manage the employment relationship. Thus, for example, most organisations have well-developed disciplinary and grievance procedures for the handling of disputes. Workplace grievances can arise when established procedures are not observed. The key point is that different dimensions to the management of the employment relationship give rise to distinctive types of complaints, grievances and disputes. Unfortunately, sometimes disputes are of a scale and

complexity that cannot be resolved internally within organisations, let alone between the involved parties. Thus, all modern economies require a publicly sponsored dispute resolution body.

1.4.1 What are the tools of dispute resolution?

Four processes are normally involved in the resolution of disputes. These are conciliation, facilitation, mediation, and arbitration (Wade, 1998). Each process is designed to perform a particular task, although it would be wrong to establish strong demarcations between the different processes. Moreover, all share the similar property of engaging the expertise of a third party neutral to help produce a settlement to a dispute. Conciliation seeks to open channels of communication between parties to a dispute. Facilitation is a process used to resolve impasses involving relatively large numbers. Facilitators normally act as moderators to improve the flow of information and foster mutual understandings in large meetings.

Mediation is a process in which a third party neutral pro-actively gets involved in a dispute to help the participants reach a settlement (Bush and Folger, 1994). This normally involves the mediator getting the disputants to establish a dialogue aimed at resolving their differences. For the most part, mediators do not like being in a position where they are effectively fixing the problem and are more comfortable orchestrating or guiding dispute resolution proceedings (Carnevale and Pruitt, 1992).

Arbitration may be binding or non-binding. In non-binding arbitration, a third party neutral, the arbitrator, is presented with evidence and arguments from the various participants in a dispute and then after reflection issues a decision as to how the dispute should be settled. The role of the arbitrator is to be impartial, objective and fair. In essence, advisory dispute resolution processes provide parties to a dispute with a neutral evaluation of facts and a portfolio of possible outcomes to a dispute. This work is done to encourage disputants to re-enter negotiations on the basis of a recommended solution to a dispute (Greenhaugh, 1987). Binding arbitration involves an arbitrator or arbitration panel imposing a settlement on disputing parties. It is a quasi-judicial process that adopts the trappings of court proceedings (Naughton, 1990). Normally the decision of the arbitrator can be judicially enforced.

Some dispute resolution systems combine or integrate two processes in the one programme. Consider the case of med-arb

schemes (shorthand for mediation and arbitration). Med-arb can take a variety of alternative forms but it usually involves a mediator abandoning attempts to get an agreed negotiated settlement and donning an arbitrator's cap to settle a workplace dispute (Fuller, 1971). The benefit of such an arrangement is that the mediator-cum-arbitrator is usually in full command of the facts of a case and thus better placed to reach a decision that is informed and reasonable. A reading of the literature suggests that eight factors have a bearing on the effectiveness of an employment dispute resolution mechanism.

- Conflict level: as the level of conflict increases, the likelihood of a settlement decreases.
- Complexity of dispute: some cases are clearly more difficult to mediate than others. This can be due to the high stakes involved in the issue – someone's job may hinge on the outcome – or due to the complexity of statutory rules on the matter – for example a sex discrimination or fair treatment case.
- Commitment of the parties to the mediation option: a consensus in the literature is that mediation will be most effective when the disputing parties show an unambiguous commitment to the process.
- Availability of resources: another way this could be phrased is the relative power capabilities of the disputants. If employees feel that the management team has greater access to information or resources to present a case to the mediator then they will show reluctance to use the process. Moreover, if a disputant has limited resources they will be more suspicious of the process, thus reducing the possibilities of the mediator realising a settlement.
- Mediator resources: research suggests that the more resources the mediator can bring to the table the more influential he or she will be: for example the capacity to verify the information provided by the disputants or the ability to 'buy-in' expert assistance from third parties would greatly assist the mediator.
- Reputation of mediator: the literature suggests that high status/ranking mediators are more likely to reach a settlement (although it needs to be pointed out that the evidence to support this claim is not robust).

- Visibility of mediator: confidentiality and low visibility are considered preconditions for the successful resolution of a dispute.

The literature also suggests that a cumulative dynamic is associated with the effectiveness of a dispute resolution programme (Susskind et al, 1999). Reputation, in essence, drives this dynamic: the more a dispute resolution programme is able to produce a settlement in grievances the more respect and acceptance it gains from employers, management and employees. Similarly, if mediators obtain settlements that restore, and even help transform, professional and working relationships between disputing parties then they will enjoy enhanced prestige and status (Gallanter, 1998). As a result, they become better placed to resolve disputes in the future. Any institution, programme or person that deploys expedient, shortsighted or inappropriate actions to resolve employment conflicts may quickly lose legitimacy.

1.5 The institutional character of dispute resolution

The institutional character of employment dispute resolution systems evolves over time (Ury et al, 1998). At the early stages of industrialisation, for example, craft guilds played an important role in resolving disputes at work by setting standards for labour productivity, work quality and behaviour on-the-job. Guild members found to be in breach of established standards would be liable to a fine and even exclusion from the trade, if the offence were serious enough. Although different procedures were used to determine whether a breach of standards had occurred, craft guilds were essentially using a form of private governance to settle disputes. The legal system or other public institutions were not heavily involved in the resolution of workplace conflicts. Most governments were content to delegate this responsibility to autonomous social institutions like craft guilds.

As industrialisation deepened, these essentially 'self-regulation' or 'self-policing' methods of resolving employment-related disputes started to lose functionality. Employers were unhappy with the level of authority 'autonomous' dispute resolution activity bequeathed to craft unions inside organisations. Furthermore, once production started to be organised according to the principles of scientific management, large numbers of unskilled workers gained

employment in the industrial sector for the first time. These workers fell outside the reach of craft guilds and thus were not covered by established dispute resolution mechanisms. The rise of mass production required a rewriting of the social rules that incorporated people into work.

Inventing these new social rules frequently involved protracted, and at times bloody, employer-employee conflicts. In the end different groups of workers were incorporated into the world of work through different institutional terms and conditions, including mechanisms used to settle workplace disputes. The craft-based model of employment dispute resolution continued although in a revised and diluted form. Unskilled workers, particularly in large factories, tended to be governed by collective industrial relations. These essentially involved the use of collective bargaining agreements to establish a floor of workplace rights and conditions. Trade unions were central to this system and for this reason they enjoyed a special public status. Governments conferred upon organised labour a privileged position inside the political and economic system not enjoyed by other interest groups. Mass trade unionism and widespread collective bargaining led to governments getting entangled in the regulation of the employment relationship. Public rules, which in practice usually meant labour law, were required to establish orderly procedures on matters such as strikes, lockouts, trade union recognition and so on. In most industrialised countries this system for governing the workplace reached its apex in the 1950s. At the same time, government was expanding its role in economic and social life. Delivering the variety of public provisions that emerged in the wake of the creation of the welfare state, particularly mass education and housing as well as comprehensive health services, caused the rapid growth in public sector employment. High trade union density alongside a permissive government attitude to employment rights in the non-market sector led to a distinctive work regime in the public services which was more employee friendly than in the private sector.

Thus, by the mid-fifties the old craft-based model of self-regulation had been surpassed by a different, more complex form of economic citizenship. Workers in different spheres of the economy were incorporated into employment on different institutional terms. This argument should not be taken too far. There were common, overarching elements to the model of economic citizenship that had

emerged: collective bargaining was the main vehicle used for the determination of employment conditions – it was also, paradoxically, the biggest generator and settler of employment disputes; trade unions were regarded as the main guarantors of economic citizenship – when someone considered that their employment rights had been infringed they normally went to see their shop steward (Dunlop, 1984). Reinforcing collective bargaining procedures, an economy-wide body of employment rights started to emerge (which often embodied the core assumptions that employees were male and worked full time). A public machinery for dispute resolution existed in the wings to fire fight when organisational-level or collective bargaining procedures failed to settle a grievance or dispute.

1.6 Employment relations systems in transition: the challenges for dispute resolution

The important point from the previous section is that as economic and social structures change so too do the institutional mechanisms used to resolve employment disputes. An emerging theme in the comparative employment relations literature is that labour market institutions are now once again in a period of transition (Osterman et al, 2001). Economic and social transformations have caused established rules and procedures that incorporated people into the world of work in the second part of the twentieth century to lose economic functionality and social coherence: they are unable to perform the tasks they were put in place to do. Some of these transformations are well known and are listed below.

- Greater product market competitiveness caused by deepening market integration in Europe and the spread of economic globalisation more generally.
- The rise of ‘weightless’ forms of business activity.
- The diffusion of new technologies that are encouraging new forms of corporate organisation as well as business strategies.
- New patterns of work, leading to higher numbers of temporary and part-time jobs as well as to more self-employment.
- The rise of small and medium-sized enterprises primarily servicing customised and niche markets.
- The increase in female labour force participation.

- The fall in demand for unskilled labour and the concomitant rise in demand for qualified labour.

These economic and labour market changes are creating new challenges to employment relations institutions. Consider the well-known distinction between high road and low road business strategies. In the past a common argument was that firms could pursue one of two alternative strategies in response to increased competitive pressures. On the one hand, they could compete on the basis of cost. Strategies of this kind put downward pressure on wages and other employment benefits (pensions for example) and increased the intensification of work to secure greater worker productivity. On the other hand, they could compete on the basis of quality, which normally requires the introduction of a variety of new 'high performance' work practices. New employment systems of this kind only reach maximum potential if they are underscored by a high degree of cooperation and collaboration between managers and employees. Consensual interactions of this type invariably require attractive wages and employment conditions. Thus, a conventional assumption is that employers have two alternative choices opened to them when developing corporate strategies and that as far as possible public policies should be geared towards encouraging them to follow the high road. High quality work systems are more likely to allow firms to balance fairness and competitiveness at the workplace.

However, the big problem here, revealed by increasing bodies of research, is that the stark divide between high and low road competitive strategies does not correspond to the actual situation on the ground. Increasingly, firms develop 'hybrid' competitive policies that lead to the simultaneous diffusion of cost-based and quality orientated employment systems. These systems have uncertain consequences for employees. Consider the following example. Increasing numbers of employees are working under a human resource management regime which on the one hand gives them considerable freedom to organise their own working time but on the other obliges them to meet a series of designated targets. From an employee point of view a human resource management regime of this kind can have both positive and negative effects. On the positive side, greater autonomy opens up the possibility of organising working time in a highly flexible and personalised way. On the negative side, it can mean that to meet targets they have to

give unprecedented levels of commitment and creativity to the organisation, which could lead to a new form of labour subordination.

Disputes and grievances about job tasks and work rules are more likely to arise in working environments of this kind. But the problem is that it is hard to disentangle the positive and negative features of such individual 'employment' practices. Indeed there is increasing recognition that such regimes are giving rise to new forms of employment complaints and grievances. It is not coincidental that stress and other forms of emotional hardship have emerged at the same time as target setting has become a widespread management tool. Detecting and properly dealing with these new grievances will challenge organisations to move beyond established dispute resolution and prevention policies. Although organisations are not walking away from tried and tested methods of settling employment grievances, they are nevertheless anxious to sponsor new forms of dispute resolution. This matter has become an important source of employment relations experimentation and there appears to be a particular focus on devising high-grade internal dispute resolution mechanisms to deal with the 'new' work grievances such as bullying and stress (Rowe, 1990a).

Economic and social transformations are also casting a shadow over prevailing assumptions that underpin labour law. In the past, much employment regulation was predicated on the idea of the full time male worker. However, the new emerging patterns of work call this assumption into question. The message is that new patterns of work require different forms of regulation. This explains the flurry of legislative activity that has occurred since the early nineties on emerging features to the employment relationship. Table 1 outlines the nature of new employment laws – eleven in total – adopted in the Republic of Ireland over the past decade or so. As a result of these laws, quite detailed rules and regulations now exist governing the employment of women, ethnic minorities, gays and lesbians, disabled people, the elderly. A comprehensive set of rules also exists in the area of health and safety and information and consultation. A huge increase has occurred in the scope and depth of employment protection rights, much of which focuses on developing individual rights. This development has led to employers complaining quite vociferously that labour regulation has become hugely burdensome, impeding their ability to compete in product markets.

The growth in the volume and complexity of employment regulation has widespread implications for dispute resolution. Small firms, which normally do not have a formalised human resource management department, find it difficult to comply with all employment rights obligations and thus become more exposed to cases of alleged breaches of employment rights. Bigger firms with a more formalised approach to people management are seeking new ways for the effective resolution of employee grievances in order to avoid employees using law against the organisation. The mainstream public dispute resolution agencies are also challenged by the recent growth in labour law. In particular, bodies like the Labour Relations Commission (LRC) are searching for new ways to help settle employment disputes. All in all, the emphasis is on introducing innovation to virtually all aspects of workplace dispute resolution. The purpose of this paper is to assess the extent and direction of change in this area in the Irish Republic.

Table 1. Labour Laws adopted in the Republic of Ireland since 1990

Legislation	Provisions
<i>Industrial Relations Act, 1990</i>	Updates and amends previous industrial relations legislation
<i>Payment of Wages Act, 1991</i>	Covers methods of payment, allowable deductions and employee information in relation to wages by means of a payslip
<i>Unfair Dismissals Act, 1993</i>	Updates and amends previous legislation dating from 1977
<i>Maternity Protection Act, 1994</i>	Replaces previous legislation and covers matters such as maternity leave, the right to return to work after such leave and health/safety during and immediately after the pregnancy
<i>Terms of Employment (Information) Act, 1994</i>	Updates previous legislation relating to the provision by employers to employees of information on such matters as job description, rate of pay and hours of work
<i>Adoptive Leave Act, 1995</i>	Provides for leave from employment principally by the adoptive mother and for

	her right to return to work following such leave
<i>Protection of Young Persons (Employment) Act, 1996</i>	Replaces previous legislation dating from 1977 and regulates the employment and working conditions of children and young persons
<i>Organisation of Working Time Act, 1997</i>	Regulates a variety of employment conditions including maximum working hours, night work, annual and public holiday leave
<i>Parental Leave Act, 1998</i>	Provides for a period of unpaid leave for parents to care for their children and for a limited right to paid leave in circumstances of serious family illness
<i>Employment Equality Act, 1998</i>	Prohibits discrimination in a range of employment-related areas. The prohibited grounds of discrimination are gender, marital status, family status, age, race, religious belief, disability, sexual orientation and membership of the Traveller community. The Act also prohibits sexual and other harassment.
<i>National Minimum Wage Act, 2000</i>	Introduces an enforceable national minimum wage
<i>Carer's Leave Act, 2001</i>	This provides for an entitlement for employees to avail of temporary unpaid carer's leave to enable them to care personally for persons who require full-time care and attention
<i>Protection of Employees (Part-Time Work) Act, 2001</i>	Replaces the Worker Protection (Regular Part-Time Employees) Act, 1991. It provides for the removal of discrimination against part-time workers where such exists. It aims to improve the quality of part-time work, to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner that takes account of the needs of employers and workers. It guarantees that

	part-time workers may not be treated less favourably than full-time workers.
<i>Organisation of Working Time (Records)(Prescribed Form and Exemptions) Regulations, 2001</i>	This obliges employers to keep a record of the number of hours worked by employees on a daily and weekly basis, to keep records of leave granted to employees in each week as annual leave or as public holidays and details of the payments in respect of this leave. Employers must also keep weekly records of starting and finishing times of employees.

1.7 Conclusions

Four issues are discussed in this chapter. The first outlines the major practices and procedures associated with the settling of employment disputes and grievances. The second highlights that institutional procedures used to resolve disputes change over time in line with evolving patterns of economic and business life. The implication is that all those directly involved in employment dispute resolution need to avoid a blind defence of established ways of doing things and accept the need for change. The third explains that we are in the middle of a period of substantial reform to labour market institutions, with implications for all aspects of employment relations, including dispute resolution. The final argument is that the shape and direction of any reform pathway to the Irish dispute resolution system has yet to be fully worked out. The remainder of this paper explores how the Irish system of dispute resolution, both at organisational and public policy levels, is addressing these challenges to update and in some instances change existing arrangements.

Beyond alternative dispute resolution

2.1 Introduction

The case for renewing dispute resolution procedures is widely accepted. This begs the question: what should be the guiding principle behind any reform programme? Alternative dispute resolution (ADR) is a key theme in the literature that discusses changes to existing procedures to settle employment grievances and disputes. Thus, it must figure prominently in any search for innovative procedures used to resolve disputes at the workplace. Brown and Marriot define alternative dispute resolution as 'a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes generally involving the intercession and assistance of a neutral and impartial third party' (1999:12). Alternative dispute resolution should not be interpreted as a completely new departure as it overlaps with established methods of reaching settlements to workplace grievances – conciliation, arbitration et cetera, and so does not throw overboard tried and tested methods of resolving disputes. Yet it is an umbrella term able to capture new initiatives inside organisations and public agencies operating to redesign dispute resolution procedures. Some of these new initiatives are controversial particularly for trade unions as they are seen as attempts to reduce the import of labour legislation and promote 'non-union' employment relations (Zack, 1999).

The purpose of this chapter is to examine the meaning of alternative dispute resolution and assess its suitability to guide reform to the Irish system of dispute resolution. Two main arguments arise from this discussion on ADR. On the one hand, it is argued that ADR is essentially an American invention that has arisen as a result of certain features of its employment relations system and which in many instances is used to weaken statutory-based employment rights and collective bargaining arrangements (Dunlop and Zack, 1997). On the other hand, it is suggested that some of the principles and practices associated with ADR should not be dismissed out of hand as they contain interesting initiatives

to solve workplace disputes in a fair and expeditious manner (Rowe, 1990b). Instead, the various initiatives that have been corralled somewhat arbitrarily under the umbrella term ADR should be carefully evaluated to assess whether they can be aligned with the historical and institutional context of Irish dispute resolution arrangements. Put simply, ADR should neither be uncritically embraced nor rejected out of hand. A pragmatic approach should be adopted, capable of incorporating those practices that can advance the interests of Irish employers and employees while casting aside those deemed to be inappropriate.

The chapter also suggests that any innovations to dispute resolution should have the goal of creating a system of flexible workplace governance in Ireland. This would ideally consist of the following properties:

- Multiple channels for the resolution of disputes both inside and outside the organisation in recognition that not all grievances can be solved the same way and that some will require third party public intervention.
- Arrangements that promote the resolution of disputes close to the point of origin. At the same time, these organisational schemes should not be designed in a manner that dilutes prevailing employment rights or makes it difficult for employees to access public bodies that handle complaints about infringements to employment rights.
- Methods of regulation that are not guided by a 'command-and-control' mentality but by a cascading effect which involves the use of 'soft' methods of regulation before the 'hard' edge of legal penalties is brought into the equation.
- Blurred boundaries between dispute resolution and dispute prevention activities in recognition of the close interdependencies and complementarities between initiatives in each field: a dispute resolution system is more likely to function better when arrangements are in place that are successful in promoting cooperative management-employee interactions.
- Trouble shooting arrangements that can be quickly brought into play to fend off a potential employment dispute or break an impasse reached in an ongoing

dispute. Such trouble-shooting arrangements should be a feature of both public and organisational dispute resolution systems.

- Acceptance by all employment relations actors that the non-union sector is a permanent feature of employment relations systems and that the unionised sector may learn from the dispute resolution practices followed by 'advanced' non-union companies.
- Recognition by government that new legislation is required that seeks to address the relative absence of satisfactory procedures and practices to deal with employment grievances and disputes in some non-union firms.
- Mechanisms that are designed to promote mutual gains or integrative bargaining strategies, which emphasise the merits of joint action and collaborative problem solving, by managers and employees.

From this list of properties it can be seen that flexible workplace governance is a wider concept than ADR in a number of important respects. First, it recognises the importance of legal interventions to provide those in work with a plinth of statutory employment rights. At the same time, it encourages the invention of new, more decentralised arrangements for the implementation of these rights and a move away from command-and-control methods to ensure compliance with these regulations. Secondly, it seeks to reconcile in-house arrangements for the settlement of disputes with a well-developed public dispute resolution machinery. No effort is sought to substitute one for the other. Third, it encourages the blurring of the boundary between dispute resolution and dispute avoidance/prevention activity so that a wider repertoire of initiatives is used to promote employment relations order and peace. Finally, it encourages a permissive view of the instruments used to solve workplace grievances. In effect, flexible workplace governance is probably better seen as a form of conflict management at the workplace rather than a dispute resolution regime. Many of these points are developed in more detail as the analysis progresses: however, the most important immediate task is to explain the origin and meaning of ADR.

2.2 Alternative dispute resolution: an American invention

Table 2 outlines the various practices and procedures associated with this concept.

Table 2. Key ADR practices and procedures

ADR Practices and Procedures	Key elements of practice/procedure
<i>Preventive ADR</i>	Averting conflict at work by creating procedures that promote cooperative interactions between management-employee relations. This practice does not actually stop disputes. Rather, it provides a mechanism for channelling disputes into problem solving processes.
<i>Negotiated Rule-Making</i>	The substance as well as the procedures of any law, rule or regulation are negotiated before they become final. Often called 'reg-neg'.
<i>Joint Problem Solving</i>	Parties who usually represent opposing interests on an issue use Interest Based Problem Solving procedures to reach a settlement.
<i>Negotiated ADR</i>	Disputants reach their own (without a neutral) resolution to a dispute or matter through interest-based principles of problem solving, i.e. coming to a solution which satisfies all disputants' interests and concerns.
<i>Interest-Based Problem Solving (IBPS)</i>	Resolving problems by identifying interests, i.e. needs, desires, concerns, fears, and coming up with options which address all the interests of those involved in solving the problem.
<i>Negotiate</i>	To discuss, bargain and confer with another (or with multiple parties) to arrive at a settlement of some matter.

<i>Facilitated ADR</i>	A neutral assists disputants in reaching a satisfactory resolution to the matter at issue. The neutral has no authority to impose a solution.
<i>Mediation</i>	A voluntary process where a neutral, acceptable to the disputants, assists the parties in resolving a mutual problem, exploring options for resolution, which focuses on the future relationship of the parties. The neutral is neither a decision-maker nor an expert adviser.
<i>Conciliation</i>	To reconcile or appease in an act of good will with the assistance of a neutral.
<i>Ombudsperson</i>	A neutral who reviews a complaint and assists in reaching a fair settlement. Sometimes this neutral will be utilised as a clearinghouse for the various types of ADR procedures suitable for the matter at issue.
<i>Fact-Finding ADR</i>	A neutral, often but not always a technical or subject matter expert, examines or appraises the facts of a particular matter and makes a finding or conclusion. This procedure may be binding or non-binding depending upon the parties.
<i>Early Neutral Evaluation</i>	A neutral reviews aspects of a dispute and renders an advisory opinion as to the likely outcome.
<i>Expert Fact-finding</i>	A neutral with appropriate expertise in the matter, reviews aspects of a dispute and renders either a recommendation or decision.
<i>Advisory ADR</i>	A neutral third party reviews defined aspects of a dispute and gives an opinion as to the likely outcome.
<i>Early Neutral Evaluation</i>	A neutral reviews aspects of a dispute and renders an advisory opinion as to the likely outcome.

<i>Mini-trials</i>	In this instance, the neutral may predict the likely outcome of a formal adjudication. The process is voluntary, quick and non-judicial.
<i>Non-Binding Arbitration</i>	A decision rendered which is essentially a recommendation. The neutral may advise on a possible settlement.
<i>Imposed ADR</i>	A neutral makes a <i>binding</i> decision regarding the merits of a dispute. Disputes are usually over a possible breach of contract or agreement. The neutral party may be an individual or panel. This type of ADR is closest to traditional dispute resolution.
<i>Binding Arbitration</i>	A third party (individual or panel) renders a decision with which the disputants must comply. There are limited appeal rights to a higher authority.

The key point to note in Table 2 is the catch-all character of ADR. For this reason, it is important to set out the origins of the concept. For the most part, these lie in American human resource management. Specific features of the USA employment relations system are pertinent to explaining the rise of such practices, particularly in the late eighties and nineties.

Since the early sixties the two most pronounced features of American employment relations have been the virtual disappearance of collective bargaining from USA industry and the expansion of legal regulation of the employment relationship. With the demise of a 'collective method' to resolve disputes effectively, more and more individuals who considered that their legal employment rights had been violated sought redress through the normal judicial process. The result was a massive increase in the number of legal cases claiming violation of statutory employment rights going before the courts. This trend was particularly marked in the late eighties. Employers reacted to this litigation explosion by writing employment contracts which required a prospective employee to sign, as a condition of recruitment, a commitment to arbitrate alleged breaches of statutory rights, particularly in the area of unfair dismissals and give up their right to use the courts to settle such grievances (Blancero, 1995). A measure of uncertainty existed about

the legality of such employment contracts. In 1991, the USA Supreme Court cleared up this uncertainty in its ruling in the controversial *Gilmer* case. The Supreme Court ruling in this case approved the use of binding arbitration by non-union employers to resolve disputes over employment discrimination claims. It gave employers the green light to develop employment contracts that contained binding arbitration clauses as an alternative to litigation. Contracts of this kind make it difficult, if not impossible, for workers to use the courts to enforce statutory employment rights. For the past decade, USA companies have been busy building new 'private' systems of dispute resolution that are purposely designed to disconnect in-house procedures from external arrangements that exist to enforce statutory employment rights (Rowe, 1993). Table 3 outlines the main ADR arrangements that have been put in place by employers.

Table 3. Alternative Dispute Resolution Mechanisms

Type of ADR mechanism	Key elements of ADR mechanism
<i>Ombudsman</i>	A designated 'neutral' third party inside an organisation assigned the role of assisting the resolution of a grievance or conflict situation. The activities of an ombudsman include fact-finding, providing counselling and conciliation between disputing parties. High-grade persuasion skills are the key asset of a good ombudsman.
<i>Mediation</i>	A process under the stewardship of a third party designed to help those involved in a dispute reach a mutually acceptable settlement. The third party has no direct authority in the process and is limited to proposing or suggesting options that may open a pathway to a mutually agreeable resolution.
<i>Peer Review</i>	A panel composed of appropriate employees or employees and managers which listens to the competing arguments in a dispute,

	reflects upon the available evidence and proposes a resolution. Whether or not the decision of the panel is binding varies across organisations.
<i>Management Review Boards</i>	Sometimes called dispute resolution boards, these panels are solely composed of managers and have more or less the same remit as peer reviews. Again the decision of the panel may or may not be final.
<i>Arbitration</i>	A neutral third party is empowered to adjudicate in a dispute and set out a resolution to the conflict. This may or may not be binding depending upon the prevailing labour legislation and the design of the arbitration process.

Some argue that it is too simplistic to trace the rise of alternative dispute systems to the *Gilmer* case, arguing that these arrangements would have occurred anyway (Marks et al, 1984). In other words, opinion differs as to why organisations establish ADR systems. Although the most popular position is to view ADR as of a piece with a wider trade union substitution strategy being pursued by employers, other motivations have been identified as important drivers behind the ADR movement (Block et al, 1996). In no order of importance these include:

- greater employee preference for dispute resolution mechanisms that are more individual in focus and confidential
- the spread of 'soft' HRM strategies that seek to diffuse enlightened employment relations strategies
- growing government concern with the overload experienced by many statutory institutions responsible for reducing conflict at work
- greater diversity in organisational forms and economic activity that is weakening established institutional methods for resolving workplace conflict.

2.2.1 *The content of ADR*

Whatever the precise motivations, ADR practices have spread rapidly across USA companies (Cohen, 1991). The type of ADR mechanisms introduced varies across organisations. Some use a single procedure such as an Ombudsman while others offer a more comprehensive multi-layered programme. One multinational company has a five-option ADR scheme involving the following:

- an open door policy that encourages an employee to discuss a problem with their supervisor or manager in confidence and without fear of retaliation
- an employee hotline that offers an employee, who wishes to remain anonymous, the facility of ringing an advisor to find out the available options to solving a problem
- a conference which involves an employee discussing the problem in a formal setting with a representative of the company to work out a procedure to solve a grievance or dispute
- a mediation facility to help solve the dispute. Either party can request this alternative, which involves obtaining the services of a trained external arbitrator to preside over proceedings. If mediation is invoked then each party is obliged to participate, but the process is non-binding
- an arbitration facility is also offered if the dispute has not been resolved at an early stage. The employee can elect to make the process binding. The procedure is formal and involves an external arbitrator receiving written submissions from the various involved parties and listening to evidence in a hearing. If an employee grievance is upheld then the arbitrator can make an award that is equivalent to any of the options open to a court of law.

This is a comprehensive 'deep' ADR system, which would be the exception: most organisations would operate a more streamlined procedure, involving only one or two options.

The *scope* of ADR mechanisms differs across organisations (McCabe, 1988). Some companies confine their use to particular groups of employees or certain sections of the company or an identified list of employment related matters. Some large

companies with multiple sites may have both unionised and non-unionised establishments. In such a situation, some employees may be covered by collective bargaining agreements that could include written procedures for the handling of disputes and grievances while other employers may be 'covered' by an ADR system. All in all, ADR procedures vary considerably in complexion and purpose. The literature assessing the impact of ADR is still relatively underdeveloped. Much of what has been written on the subject either focuses on 'best practice' rules for the diffusion of such arrangements or debates the implication of ADR for worker rights (Rowe, 1993). With regard to the best practice rules the literature suggests that alternative dispute resolution procedures reach full potential under a number of conditions.

- Senior management must show active and committed support.
- Employees should actively participate in the design of an alternative dispute resolution procedure.
- ADR procedures should be triggered as early as possible in a dispute.
- Due process must be upheld at all times, otherwise the credibility (and thus the effectiveness) of the system will be jeopardised.
- ADR outcomes should be monitored so that managerial or organisational practices can be amended to avoid similar disputes arising in the future.

The last point is seen as particularly important. Virtually all guides to ADR encourage enterprises to recognise the broader potential of such arrangements. Thus, for example, ADR procedures, if successfully employed, may permit an organisation to learn more about the shortcomings and risks associated with particular business practices and processes (Weston and Feliu, 1988).

2.3 ADR and employment rights

The debate about the equity implications of ADR is trenchant and ongoing. Stone (1999) argues that the decision in the *Gilmer* case and the rise of ADR inside organisations has undermined established 'due process' practices associated with the governance of the employment relationship. Stone suggests it is normal practice for employees covered by ADR procedures to have no voice in the

selection of an arbitrator, few rights of representation, restricted ability to write opinions and to make fact-finding investigations. Moreover, employers usually have the right to unilaterally change procedures. Dunlop and Zack (1997) take a different view. While conceding that many of the new schemes are employer-promulgated procedures, they suggest that some unintended consequences have emerged from the operation of these new arrangements that potentially hold out benefits for employees. In particular, they suggest that companies when developing new arbitration arrangements have been obliged to use the services of experienced mediators who have had long established connections with the Federal Mediation and Conciliation Services, which have resulted in management not always getting its own way.

To protect their own probity and to instil as much fairness as possible into the new arrangements, these mediators have insisted on policies that safeguard their independence and encourage the use of 'best practice' procedures. Many of these policies are making their way into extra-firm guidelines. A well-known set of guidelines is the *Due Process Protocol* developed by the Alliance for Education in Dispute Resolution (Commission on the Future of Worker-Management Relations, 1994). This protocol suggests that an alternative dispute resolution system must provide the following.

- A neutral arbitrator that has an understanding of the relevant law and is capable of understanding the concerns of each party.
- A fair system that allows a complainant to collect information to present his or her case.
- The option of employees to have independent representation.
- A fair method of cost sharing so that the system is affordable to employees.
- A range of remedies that is at least equal to those available through the law.
- A written opinion by the arbitrator explaining the rationale for the result.
- A provision for a judicial review to ensure that the result is consistent with prevailing employment law.

Dunlop and Zack argue that these guidelines aim to establish public yet non-legalistic standards to benchmark the merits or otherwise of

privately constructed ADR arrangements. They suggest that any public standard-setting procedure should exhort organisations to have workplace disputes systems that

- (i) make it apparent how the procedures allow the disputing parties retain control of the dispute and its resolution
- (ii) ensure the 'third party' used to promote settlements is sufficiently competent, neutral and trained to win the confidence of all parties to the dispute
- (iii) ensure that any claimant has the ability to advocate properly his or her case.

Dunlop and Zack also argue that professional associations of arbitrators and barristers as well as bodies like the Federal Mediation and Conciliation Services and Equal Opportunity Commissions positively engage with the rise of ADR to ensure that these procedures are applied consistently and even-handedly. In other words the project must be to design ADR arrangements so that they embody the three key principles of procedural fairness – neutrality, trust and standing. They argue that it is in the interests of organisations to follow such principles, as employees are likely to have greater confidence in the dispute resolution system. Certainly, this is a creative argument but whether organisations will voluntarily comply with socially preferable ADR systems in the present climate of American employment relations is open to doubt (Edwards, 1993). The full consequences of alternative dispute resolution, particularly in terms of fairness, have yet to unfold and the matter will be a source of debate for many years to come.

2.4 The international transfer of ADR innovations

The outcomes to ADR procedures in the USA remain a puzzle, yet these arrangements are beginning to be transmitted to other countries. For example, the Canadian Federal Labour Relations Agency has introduced some aspects of ADR into all operational programmes. The purpose is to encourage more consensual decision-making approaches to the resolution of workplace disputes so that there can be a move from the more adversarial win-lose methods that have been traditionally employed to reach settlements. A battery of services has been created to this end. An innovative solutions team has been established, an interest-based conflict

resolution unit has been set up and experts provide advice on facilitation, training and development for organisations. The emphasis is on promoting collaborative relationships between management and workers. As a result, the organisational identity and mission of the Agency has been substantially redesigned.

The Canadian experience is interesting because a different meaning and purpose is given within it to the term ADR. In the USA, ADR procedures are a response to the escalating number and cost of grievance and dispute cases. In contrast, ADR has been used in Canada to broaden the scope of dispute resolution activities performed by public bodies so that they are not so narrowly tied to the operation of collective bargaining. In essence the Canadians are seeking to modernise, under the heading of ADR, the character of dispute resolution both at national and organisational levels to fit with contemporary labour market dynamics. Thus on first appearance, the international transmission of ADR might appear a crude convergence story about different countries diffusing in a rather unsophisticated way USA-invented conflict resolution practices. On closer examination a more subtle process of domestic assimilation is going on involving employment relations actors in a particular country remoulding an internationally recognised development to fit an internal employment relations agenda. ADR has not been used in Canada to circumvent labour market regulation and accelerate the demise of collective bargaining structures but to reconnect employment relations systems with emerging labour market patterns and workplace practices.

At the same time, vulgar international transmission remains possible: national employment relations actors might seek to adopt, in slavish fashion, the American meaning of ADR to keep pace with perceived international best practice. The manner in which ADR crosses borders is not destined to follow any one particular trajectory, but will depend on the character of the national employment relations systems and the type of response domestic actors have to ADR procedures. This is an important observation for those involved in fashioning the Irish dispute resolution system: great care has to be taken in assessing the applicability of American ADR innovations for management-employee interactions in Ireland. Put simply, an 'Irish agenda' has to be created for the diffusion of ADR experiments, which in practice means that any initiatives in this area must be sensitive to the prevailing institutional context.

Perhaps the most salient domestic institutional feature that needs to be borne in mind is the continuing importance of trade unions in the Irish system. Although trade union density rates have declined in the nineties, they retain considerable influence in some parts of the economy, mainly in the public and 'old' manufacturing sectors. This means that many employment disputes and grievances are still resolved through collectively agreed procedures. This is different to the US experience where collective agreements and trade unions have all but disappeared from the private sector and have an uneven presence in the public sector. Another factor that needs to be taken into account is that Ireland has well-established quasi-judicial and administrative agencies that play an active role in the settling of employment grievances. This is unlike the USA where such dispute resolution institutions are nowhere near as developed. This suggests that promotion of purely employer promulgated ADR innovations in the Irish context, to the exclusion of other possible innovations, would be a short sighted strategy. Unions would see it as the crude diffusion of American human resource management practices and public dispute resolution bodies would be of the opinion that it was an attempt to undermine their role. A wider tack has to be taken to modernising methods of resolving employment disputes in Ireland.

2.5 Renewing dispute resolution in Ireland: three guiding principles

Any project to refresh dispute resolution mechanisms in Ireland should be guided by three aims. The first is to promote initiatives, which enjoy the support of all parties, for the more effective settlement of employment grievances at the workplace (MacFarlane, 1997). Getting grievances resolved nearest to the point of origin should be the new mantra. The second is to encourage public agencies responsible for handling employment disputes to assess the adequacy of existing procedures and mechanisms used to enforce labour market regulations. It is now everyday speak to say that 'one-size-fits-all' regulations are fairly blunt, if not ineffective, instruments to govern modern economies and societies marked by ever-increasing diversity and complexity. A business environment in which people are doing increasingly different things in tiny organisations makes the task of devising and enforcing regulatory standards exceptionally difficult. This is as true for dispute

resolution as it is for any other aspect of economic and corporate governance.

At the moment, virtually nobody appears happy with the direction of labour market governance. On the one hand, enterprises complain that they are being 'over-regulated'. On the other hand, employees complain that as economic complexity has increased so the opportunities for organisations not to comply with regulatory rules have multiplied. Paradoxically, this all round dissatisfaction has created an opening for new innovatory forms of employment relations, including dispute resolution mechanisms. In searching for new ways to devise and enforce employment regulation the public dispute resolution machinery must strive to ensure that any initiative enjoys the confidence and support of all stakeholders.

A third aim of dispute resolution innovation is to go beyond the motive of many ADR schemes in the USA, which is to introduce purely employer-promulgated arrangements. An accommodation has to be found between new private and public initiatives so that they can sit beside one another. But this co-existence must not be framed in a manner that permits 'private'-led schemes to be labelled 'good' and the main driver of modernisation and the 'public' sphere to be viewed as 'bad', crippled by inertia and devoid of creative thinking. The main task must be to build a national framework that encourages multiple channels for dispute resolution that fosters both public and private led innovations (Fisher, 1989). It may be asking too much for strong complementarities to emerge between these different channels. However, a dispute resolution framework that is hybrid in character is perfectly acceptable, possibly even preferable. At the same time, a select number of core principles should motivate the upgrading of any aspect of the dispute resolution system. In the Irish context, mechanisms to settle employment disputes should be influenced by two core themes. One is responsive regulation and the other is problem solving. The meaning of each term for dispute resolution in Ireland is developed below.

2.5.1 Responsive regulation and dispute resolution

Responsive regulation, sometimes called cascading rule making, seeks to go beyond approaches that counterpoise private and public initiatives and soft and hard regulation. Instead it attempts to forge connections between these categories (Mnookin and Kornhauser, 1979). The point of departure for many responsive regulation

arrangements is the assumption that command and control rules can no longer be properly policed or enforced. In today's decentralised economy, an army of inspectors would be required to ensure compliance with rules that are designed and administered by the centre. However, government simply does not have the resources to operate such enforcement regimes. With centralised rules likely to be only partially enforced the task is to devise smarter regulatory arrangements. Responsive regulation seeks to meet this challenge by making public rules simpler and more flexible while at the same time more effective.

A key trait of responsive regulation is the *delegation* of rule enforcement, but only in the context of a wider framework of escalating penalties and sanctions (this is why responsive regulation is sometimes called cascading rule setting). With regard to dispute resolution (and employment relations more generally), the approach amounts to building a form of conditional delegation or self-enforced regulation into labour market regulation. In practice this means that organisations are allowed to write their own rules or design an alternative means to achieve the goals of any statutory rule provided these comply with publicly established minimum conditions. Moreover, organisations would have the option to police themselves for non-compliance, provided the procedures used to self-monitor and self-correct were carefully designed, open to some form of credible validation process and enjoy the confidence of those most directly affected by them. The external validation of internal procedures for the setting of rules is perhaps the most important aspect of responsive regulation. Conditional delegation or deregulation only reaches its maximum potential when organisations behave as 'good' employers. But all employers are not good and this is why the 'big gun' of penalties must be retained within the regulatory regime. Thus the ability of firms to design their own rules is set within a regulatory framework of escalating interventions: organisations are kept inside the bounds of public accountability and legal enforcement. If they fail to reach minimum national standards they face sanctions and penalties.

Responsive regulation has import for renewing employment dispute resolution mechanisms in the Republic of Ireland. First of all, it allows soft and hard regulations to be embodied in the one policy regime. Hard regulation means adopting rules that set out to constrain employers and employees whereas soft regulation is more

open-ended and more focused on establishing procedures to guide management-employee interventions on a specific employment topic. Responsive regulation tries to incorporate both approaches. This form of regulatory regime meets a key design precondition for any innovations to dispute resolution procedures. It allows the introduction of initiatives combining voluntary and legal methods to settle workplace conflict. The promise here is that organisations can devise dispute resolution experiments, which may be even ADR-inspired, but employees retain an assurance that a conduit is not being developed for the undermining of established employment rights. Building such flexible systems of workplace governance is probably the optimal strategy to adopt in the Irish context. To proceed in any other manner would be shortsighted. Moreover, the evidence suggests that diffusing 'American' inspired ADR arrangements willy-nilly in countries with dense employment regulations and quasi-legal procedures for the handling of workplace grievances can very quickly run into the sand.

Consider the experience of a scheme launched by ACAS, the body charged with settling employment disputes in Britain (Brown, 2003). In 2000, ACAS introduced a voluntary arbitration scheme for the resolution of unfair dismissals cases as an alternative to cases being taken to an employment tribunal. The motivation was to provide a confidential, fast, cost-efficient non-legalistic resolution of these disputes. The scheme has a number of distinct features. One is that it obliges the parties at the outset of the process to waive a range of legal rights they would otherwise enjoy. These include: the right to a public hearing; the right to have the case resolved in accordance with strict law; the right to summon witnesses and for these to be cross-examined; and the right to a full and reasoned decision which can be made public. A second feature is that the decision of the arbitrator is binding. There are very limited grounds for appeal. Moreover, neither party can re-open the original claim and seek to have it heard at an employment tribunal. A third feature is that the arbitrator plays the decisive role in the process. He/she can set dates and locations for hearings if the parties do not cooperate on these matters. The parties are obliged to co-operate with the arbitrator, particularly with regard to requests for documents or the attendance of witnesses. Fourth, each party meets their own costs. During 2000-2001, ACAS dealt with over 90,000 employment tribunal applications involving firms employing fewer than 200 workers.

Over 70 per cent of the complaints raised in these applications were either settled by ACAS or withdrawn by the parties. Although this is an impressive settlement rate, 27,000 cases still went to employment tribunals. Only twelve cases actually used the arbitration alternative. It is hard not to conclude from this experience that only a tiny fraction of people are likely to sign away their legal rights, particularly in 'high stakes' employment disputes such as unfair dismissals. The broader lesson to be learnt from this initiative is that introducing new 'voluntary' forms of dispute resolution as an alternative to procedures used to enforce established employment rights is unlikely to gain wide support. This is particularly the case in a situation where public institutions are deeply involved in the resolution of disputes. Responsive regulation seeks to circumvent this problem by combining voluntary and legal mechanisms to settle alleged breaches of employment rights in the one regime.

2.5.2 A problem solving approach to dispute resolution

If legal penalties are to be the last station in a cascading self-enforcement process then an important task must be to upgrade the efficacy of organisational level as well as other extra-firm procedures used to solve disputes before the imposition of sanctions. This is where the second core principle, a problem solving approach to dispute resolution, enters the story (Mitchell and Banks, 1996). An important proposition of this paper is that problem-solving, rather than American-style ADR procedures, should be at the centre of the Irish system of dispute resolution as it is an approach more in tune with the Irish context and more able to foster forms of employment grievance and dispute settlement activity that advance the goals of fairness and competitiveness in the labour market.

A problem solving approach to dispute resolution has four main elements. One is to promote a distinct policy identity for the dispute resolution system. The key policy identity that the Irish dispute resolution system must espouse is that work-related grievances and disputes can be resolved by a variety of institutional mechanisms and procedures operating both inside and outside organisations. Organisations and public agencies charged with dispute resolution must not limit themselves to a narrow number of procedures when addressing employment disputes. A variety of programmes should be available to reduce conflict at work. Moreover, the multiple

actors involved in dispute resolution should be encouraged to talk to one another. Open debate not only allows the plurality of perspectives on dispute resolution to be heard but also facilitates comparisons between different settlement methods.

The second aspect of the problem-solving approach is to establish strong 'input legitimacy' foundations to dispute resolution. Input legitimacy is about ensuring that those most likely to be affected by a proposed employment dispute settlement procedure have some influence in its construction (Susskind and Cruikshank, 1987). It is also about giving those that use public dispute resolution mechanisms an opportunity to pass evaluation on their experience. Achieving high levels of input legitimacy will allow for greater transparency, deeper support and more widespread acceptance of the dispute resolution machinery – all essential ingredients of procedural justice. Of course, the other side of the coin is output legitimacy. Mechanisms have to be put in place to evaluate the success or otherwise of dispute resolution processes in carrying out the tasks they were set up to do. A dispute resolution must not only meet procedural justice benchmarks, it must also be able to solve conflicts speedily and, as far as possible, to the satisfaction of all concerned parties. It must be efficient as well as fair.

The third aspect of the problem-solving approach relates to the attitudes, behaviour and processes that link together input and output legitimacy. In particular, those engaged in the dispute resolution process must be guided by a problem solving rather than an adversarial approach. This important distinction needs further elaboration. Modern dispute resolution systems, particularly those in the Anglo-Saxon tradition, have been constructed on the assumption that interactions between employees and employers are competing and adversarial. As a result, an ethos of adversarialism tends to pervade nearly all quarters of the employment relations system, including dispute resolution. An adversarial approach to the resolution of employment disputes encourages 'linear concessions on the road to compromises' (Carrie Menkel-Meadow, 1984: 832). The sequence of deal-making under this model consists of: (1) the setting of target points – what the parties would like to achieve; (2) the setting of reservation points – the point below which the party seeks not to go; (3) the ritual of offer and counter-offer that produces reciprocal concessions; and (4) the arrival at a compromise solution at some point where the target and reservation points

overlap for the two parties. In a nutshell, a 'split the difference' ethos pervades the 'adversarial' approach to dispute resolution.

This adversarial approach to dispute resolution has been influential in Anglo-Saxon industrial relations systems such as those in Ireland, UK, USA and Canada. In these countries the main task of the public institutions charged with resolving employment disputes (e.g. bodies such as the LRC) is to stand above employer and employee interactions, intervening only when relationships between the two become embittered for one reason or another. As a result, agencies are required to be neutral so that they can oversee a 'split-the-difference' process that will finally bring employers and employees who are in conflict to an agreement. The 'neutrality' principle has in fact become something of a coveted arrangement for dispute resolution bodies in adversarial employment relations systems (Costantino and Merchant, 1996). The argument usually made in defence of the principle is that dispute resolution institutions run the risk of being tarnished as pro-business or pro-labour if they seek to influence or mould the behaviour of either employers or employees. On the surface, this seems to be a convincing argument but on closer examination, upholding the neutrality principle may allow the adversarial orientation of the dispute resolution system to go unchallenged. Of course, the adversarial approach can produce solutions to workplace conflict, but it can also generate avoidable employment disputes as a 'them and us' mentality encourages both employers and employees to adopt unreasonable stances at the workplace or in negotiations about some employment relations matter. Moreover, in an adversarial system the possibility exists of the dispute resolution institutions becoming used by employers and employees to gain advantage in the bargaining games they play: the institutions are captured by employee-employer interactions which they are seeking to stand above.

A problem-solving approach adopts a different track to the resolution of disputes. It frames the issue of settling disputes not as one of intervening when appropriate to settle workplace conflicts, but as part of a wider on-going process of building cooperative relationships between employers and employees. In this way, as much emphasis is placed on dispute prevention as dispute resolution. One consequence is to move dispute resolution institutions away from the principle of neutrality and towards strategies that actively encourage employers and employees to adopt

practices and procedures promoting mutual gain relationships. A second feature of the problem solving approach is its greater focus on integrated bargaining rather than redistributive bargaining. The distinction between these two forms of negotiation is explored at greater length in chapter 5, so it will not be explained in detail here. It is sufficient to say that problem-solving approaches encourage employment relations actors to seek solutions to disputes in the context of the need to sustain high quality collaborative relationships. Less emphasis is placed on winning at the expense of the 'other side', which is characteristic of the adversarial approach. Thus the key principles of a problem-solving approach to negotiations are:

- avoid making early decisions but build a connection with the disputing parties by avoiding taking a partisan position
- encourage parties not to get side-tracked by peripheral matters such as personality differences
- establish the main interests and matters at stake in the conflict and encourage all those involved in the process to focus on these
- develop a variety of settlement pathways that could end the dispute
- ensure pathways have objective and fair criteria for a resolution
- ensure pathways facilitate 'buy-in' by all parties.

A problem solving approach is consistent with the notion of flexible workplace governance. First, it recognises the continuing importance of regulation even if it has a preference for decentralised non-legalistic ways of resolving disputes. Voluntary and regulatory procedures are seen as complementary, rather than in collision with one another. Second, the problem-solving approach recognises the need for a plurality of institutions, both public and private, and which are both inside and outside the firm. A dispute resolution system that has a multitude of procedures to address grievances at the workplace is more likely to uphold the principles of procedural and substantive justice. Adversarial dispute resolution mechanisms are overly reliant on 'collective' employment relations institutions.

Although the problem-solving approach is different from the adversarial approach it also stands apart from the American version of ADR. It is more accepting of trade unions. Moreover, it regards

public institutions as having an important role to play in settling workplace disputes. At the same time, the problem-solving approach is tolerant of non-union workplaces provided that employees in these organisations have access to proper procedures for the resolution of workplace conflict. In fact, given the relatively open-ended and experimental ethos of the problem solving approach it would welcome some level of cross-fertilisation between union and non-union organisations on new forms of dispute resolution. Such cross-organisational learning would be regarded as helping dispute resolution procedures adapt to modern patterns of employment.

2.6 Conclusions

This chapter set out to explain the meaning of alternative dispute resolution, the dominant theme in the academic and policy literature on settling grievances at the workplace. It also assessed the debate about the merits or otherwise of ADR that is currently taking place in the USA, the country-of-origin of these practices. The argument put forward is that whilst some individual ADR initiatives are a promising new departure from which both union and non-union organisations could learn, it would be ill-advised to transmit fully the 'American' approach into the Irish system of dispute resolution. The Irish situation, which houses a range of extra-firm institutional and quasi-legal procedures for the handling of workplace dispute resolution procedures, was considered ill-suited to an approach so narrowly focused on diffusing employer promulgated arrangements. At the same time, the lack of 'fit' between the American approach and the Irish context does not weaken the case for renewal of the Irish system. It simply means that different organising principles should guide the pathway of reform in Ireland. Responsive regulation and problem solving are put forward as the core values that should steer dispute resolution innovations.

The public machinery for employment dispute resolution

3.1 Introduction

Workplace disputes whether of a collective or individual character can get so intractable that the parties involved require third-party assistance to help them reach a settlement (Mnookin and Susskind, 1999). Third-party conciliators or mediators may become involved in an employment dispute through a purely employer-led arrangement such as the alternative dispute resolution measures described in the previous chapter. Alternatively, the arrangement could be the product of a joint employer-trade union agreement. Arrangements of this kind normally arise from a social partnership or collective bargaining agreement. Although each of these arrangements is quite different in character both share the similar quality of being a private form of dispute resolution. Private forms of dispute resolution can make a significant contribution towards creating a stable employment relations environment provided they are well organised and enjoy the support of employees.

Yet these arrangements are unlikely to create on their own a well-functioning national system of dispute resolution. Public institutions are also likely to be required for a number of reasons. First of all, public institutions will be needed to perform run-of-the-mill administrative functions associated with any rule-enforcement regime. Information systems need to be in place so that companies and employees are aware of their legal rights and obligations. An advice service is needed to handle queries from employment relations actors about the import of particular employment laws. In addition, the evidence suggests that public institutions can perform the important role of promoting fair treatment at the workplace – government sponsored equal opportunity agencies would be an example of this type of activity. Finally, most countries have found it beneficial to create quasi-judicial processes, such as employment tribunals to help address alleged infringements of employment rights.

Developing quasi-judicial processes within an employment dispute resolution system can be advantageous for three reasons. Firstly, they normally have the authority to bring together disputing parties in an effort to conclude a settlement. This ‘convening power’ (Dorf, 2003) is particularly useful in situations where relationships between the disputing parties have become embittered or have reached an impasse. Secondly, public agencies involved in dispute resolution can perform the role of honest broker in the difficult negotiations that sometimes arise when employers and trade unions are trying to reach a collective agreement. Thirdly, public agencies can improve the resolution of disputes by virtue of possessing a ‘disentrenching capacity’ (Dorf, 2003). This attribute allows public agencies to ensure compliance with employment regulations and agreements by giving them the ability to impose a penalty default.¹ The three identified advantages set out above – convening power, perceived neutrality and disentrenching capabilities – confer important problem solving functions on public agencies. Yet these benefits are not automatically guaranteed: public agencies can easily under-perform due to a range of administrative failures – poorly designed programmes, an outmoded approach to dispute resolution, a lack of legitimacy amongst the employment relations actors and so on. Thus, the exact contribution of public agencies to dispute resolution can only be gauged through an assessment of what they do and the degree to which they are successful in fulfilling designated tasks. This is the context for a review of the Irish dispute resolution system.

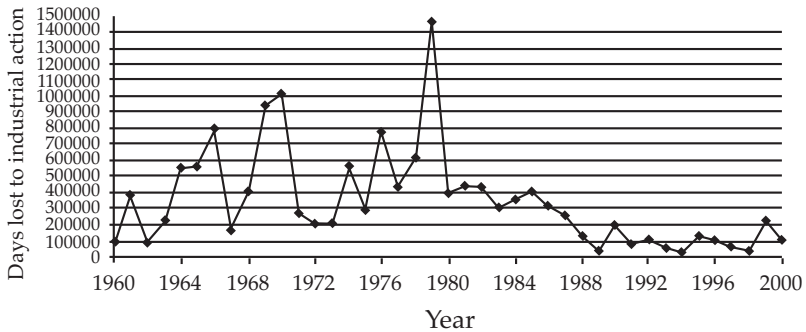
3.2 Public agencies and the Irish system of dispute resolution

The Irish Republic enjoys a relatively stable employment relations environment, particularly on the matter of collective disputes, and it is likely that the current social partnership arrangements have played a large role in this. Figure 1 outlines the number of days lost due to industrial action since 1960 and, as it clearly shows, the period since 1998 has been by far the most stable. When the current phase of social partnership is compared with the previous round of

¹ A penalty default is the situation where a party (or parties) to a dispute faces sanctions, which makes it worse off than if it had complied with the original settlement. Possessing this authority allows the public dispute resolution bodies to check bad behaviour on the part of employment relations actors: for example, the temptation to renege on agreements is reduced.

centralised agreements in the seventies and early eighties, it is readily apparent that the current regime has experienced fewer employment disputes. The most peaceful years during the earlier regime (1971, 1972, 1973 and 1975) just about compare with the worst years of the current phase of social partnership (1990 and 1999). Admittedly, such comparisons are crude; nevertheless, they give some indication why there is such strong support for the continuation of social partnership in government.

Figure 1. Days lost to industrial action in the Republic of Ireland, 1960–2000



Source: Central Statistics Office

This story of greater stability under the recent social partnership agreements is corroborated by the figures on the numbers of days per year lost due to employment actions over the past four decades. Two features stand out from the data provided in Figure 1. First, the decade with the highest number of annual days lost due to industrial action was the 1970s. Second, the 1990s is the most stable decade, experiencing a lower number of annual days lost due to industrial action than any of the three previous decades: for example, the average loss of days was just over 100,000 in the 1990s, compared to over 500,000 days during the 1970s. The climate with regard to collective employment relations is as good now as it has been at any time in the last half century. Social partnership, as a dispute avoidance strategy, clearly helped to bring about this relatively orderly situation. At the same time, the public agencies charged with dispute resolution also made an important contribution.

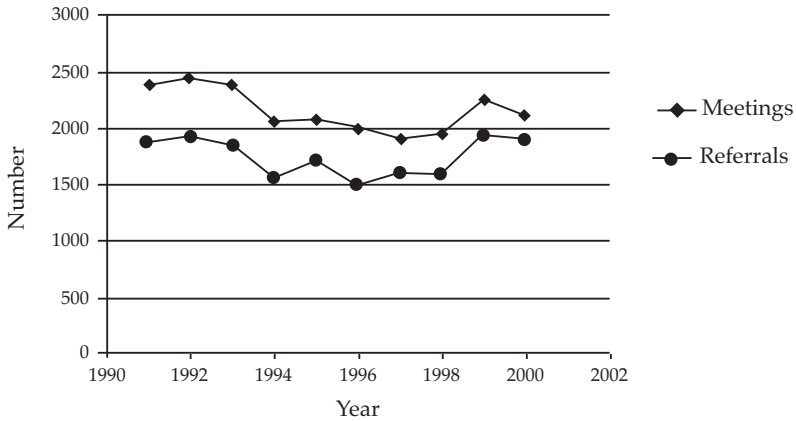
3.3 The Labour Relations Commission

Perhaps the most appropriate starting point for the discussion of these public agencies is the high profile Labour Relations Commission (LRC). The Commission was established by the Industrial Relations Act 1990 and became operational in 1991. Today, it is one of the main public institutions for the resolution of employment disputes and the promotion of cooperative, stable management-union interactions in Ireland. It currently employs thirty-four staff and six Rights Commissioners. Its annual operating budget is roughly €2,750,000, which it receives from the Department of Enterprise, Trade and Employment. The mission statement of the Commission is 'promoting the development and improvement of Irish industrial relations policies, procedures and practices through the provision of appropriate, timely and effective services to employers, trade unions and employees'. In pursuit of this mission, it provides four overlapping services.

3.3.1 Service 1: Labour Relations Commission Conciliation Service

First, there is a conciliation service that is open to all employees and employers excluding members of the defence forces, police and prisons services. It is a free and informal facility (both employees and employers are discouraged from using legal representation). The officers running the service are highly trained in industrial relations matters and are experienced mediators. There is no binding or compulsory element to the service. Parties take part in the programme voluntarily and a settlement arises by mutual agreement. The service is activated when a party contacts the Commission requesting assistance, but the process can only advance when all parties to the dispute agree to get involved. When an all-party agreement is secured the Commission assigns an experienced mediator to the case. The mediator acts as an independent and impartial chairperson and seeks to frame negotiations between the parties in a manner that will assist them in concluding a mutually acceptable agreement. The service appears to be highly effective as Commission figures suggest that 80 per cent of all cases (referrals is the term used by the LRC) are settled amicably.

Figure 2. Conciliation service referrals, 1990–2002



Source: Labour Relations Commission

As Figure 2 shows, there is a high level of demand for the service. In 2001, the service dealt with approximately 1,900 cases, of which roughly two-thirds originated from the private sector and the remainder from the public sector. Over 2,000 actual meetings were convened in pursuit of settlements. This is a normal annual workload for the conciliation service. Only in 1996 did the number of referrals dip below 1,500 (1,487) – since 1991 the average annual number of cases has been approximately 1,800. Figure 3 shows that the most common category of dispute dealt with by the service relates to issues of pay and remuneration, followed by restructuring and rationalisation, and conditions of employment. The distribution of cases across industrial sectors is even. For example, in 2000, three sectors – health and social services, transport, storage and communications, and manufacture of food, drink and tobacco – each accounted for 11 per cent of the total referrals to the service. The other 66 per cent of referrals were spread across sixteen sectors. The LRC sees this service as highly efficient given that a satisfactory settlement package is reached in the vast majority of cases.

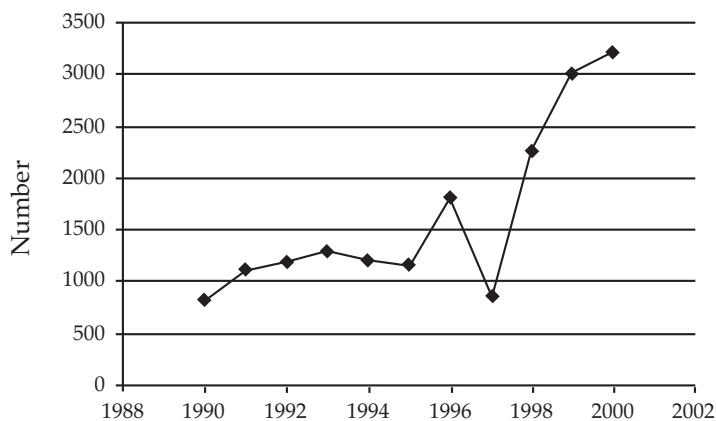
3.3.2 Service 2: Rights Commissioners

The LRC also provides a rights commissioners service. Again, this service was established by the Industrial Relations Act 1969 to provide a non-legalistic and fast procedure to settle disputes. The

remit of the rights commissioners is to help solve employment disputes and grievances raised by either an individual or small group of employees. No less than thirteen pieces of employment legislation (soon to be fifteen) give the commissioners an active role in the settlement of disputes. Commissioners are not lawyers, but are highly experienced employment relations experts. They are usually nominated either by IBEC or ICTU but perform an independent role when involved in dispute resolution. A commissioner becomes involved in an employment dispute when a claimant – individuals or small groups of workers – request their intervention under a particular piece of legislation. The responsibility of the commissioner on becoming involved in an employment dispute is to first conduct an investigation and gather as much information as possible on the grievance, including holding a hearing where the various parties to the dispute have the opportunity to present their case. After this, commissioners present the findings of their investigations in the form of either non-binding recommendations or as decisions, depending on the legislation under which the case was referred.

The caseload of the commissioners, as demonstrated in Figure 3, has more or less continuously increased over the years. In 1990, for example, about 800 cases were referred to the commissioners, but this increased to 3,500 in 2002. The disputes most regularly handled involve cases concerning unfair dismissal, payment of wages, working time, holiday pay and disciplinary matters.

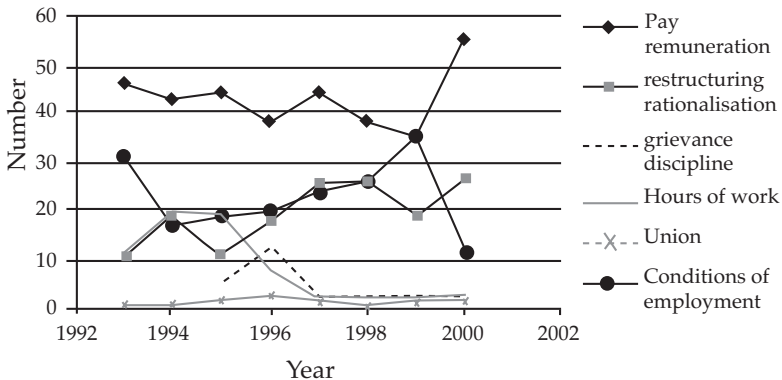
Figure 3. Referrals to the Rights Commissioner, 1988–2002



Source: Labour Relations Commission

Figure 4 shows the breakdown of referrals to the rights commissioners by the relevant piece of employment legislation. This shows that the core aspects of employment relations – payment systems and dismissals – are still the main source of workplace disputes and grievances. The commissioners are efficient in dealing with cases. For example, of the 3,206 cases referred to the commissioners in 2000, 1,623 received a hearing before the end of the year. Approximately 675 cases were withdrawn before the hearing stage and the eventual outcome of these disputes is not clear. The remaining cases were still in progress at the end of the year. In those cases that received a hearing, the commissioners mostly found in favour of the claimant. This is in line with the annual trend: every year the commissioners uphold the claim in the majority of cases. Parties that disagree with the decision of the rights commissioners can appeal to the Labour Court.

Figure 4. Nature of the disputes referred to rights commissioners



Source: Labour Relations Commission

Two further aspects of the work of the commissioners are worthy of comment. First, the establishment of the commissioners in 1969 shows that Ireland has long recognised the importance of possessing an extra-firm procedure to uphold the employment rights of workers through essentially non-legalistic activity. The ideals of a non-adversarial, problem-solving approach to the resolution of employment disputes are thus not alien to the Irish public dispute

resolution machinery. This represents a solid foundation for further developments in this area. The second feature is the high number of cases that the commissioners find in favour of the claimant each year. This suggests that the number of organisations not complying fully with employment laws is uncomfortably high. Either there are too many unscrupulous employers or the public agencies charged with preventing employment disputes are not connecting well enough with employers to inform them of their obligations under employment law. Against this background, the case for re-assessing the level of penalties associated with flouting labour legislation is strong. Moreover, it reinforces the argument made earlier for new preventive dispute resolution activity, particularly in the area of individual rights.

3.3.3 Service 3: Advisory, Development and Research Services Unit

The third strand of the work of the LRC mostly involves preventive dispute resolution activity and is carried out by the Advisory, Development and Research Services whose remit is to give independent and impartial advice to employers and employees about employment relations practices that foster cooperative manager-employee interactions. In addition, it has the task of developing initiatives that encourage managers and employees to follow 'best practice' employment relations practices. In essence, the service seeks to provide a range of activities that challenge adversarial relations between employers and employees and encourages them to forge sustainable cooperative relationships. Examples of these activities include the conducting of diagnostic audits in organisations considered – either by themselves or by the Labour Court – to have poor employment relations. In 2002, the unit carried out twenty-two diagnostic audits, eight in the public sector and fourteen in the private sector.

Two further areas of work by the advisory unit are worthy of mention. One is joint working party activity, which arises when the Labour Court, as part of a recommendation on settling an employment dispute, encourages an organisation to establish a joint working party, comprising of management and employees. The purpose of these working parties is to devise agreed procedures for the implementation of the recommendation. In 2002, the unit was involved in ten working groups, some of which involved recasting the entire employment relations system of an organisation. The other

service provided by the unit that needs highlighting is preventive mediation activity, much of which focuses on the preparation of Codes of Practice. Section 42 of the Industrial Relations Act 1990 permits the drafting of a Code of Practice that essentially sets out best practice to be followed on an employment relations topic (see Appendix 1). The advisory service plays an influential role in the promulgation of these instruments. Essentially the unit works with the social partners and other directly affected stakeholders in the preparation of a draft code acceptable to everyone. Once consensus is reached the draft is sent to the Minister for Enterprise, Trade and Employment who by order declares it a Code of Practice. To date, seven Codes of Practice have been produced.

- Code of Practice on Dispute Procedures, including Procedures in Essential Services.
- Code of Practice on Duties and Responsibilities of Employee Representatives and the Protection and Facilities to be Afforded them by their Employer.
- Code of Practice on Grievance and Disciplinary Procedures.
- Code of Practice on Compensatory Rest Periods.
- Code of Practice on Sunday Working in the Retail Trade.
- Code on Practice on Voluntary Dispute Resolution.
- Code of Practice Detailing Procedures for Addressing Bullying in the Workplace.

3.3.4 *The Commission's strategic outlook*

At the end of 2001, the Commission carried out a strategic review to set out a new action programme to guide its future work (Mulvey, 2003). This review was considered necessary in the light of the multiple changes taking place within the Irish employment relations environment. Four changes were identified as being particularly important. One was economic and social development in Ireland. A combination of economic openness and social consensus was seen as an important driver behind the Celtic Tiger. Employment relations institutions were attributed a key role in connecting these two separate arenas and thus the proper functioning of these bodies was seen as crucial to continued economic growth and prosperity. Another was workplace change. Irish employment relations were seen as echoing the pattern of employment transformation occurring

across relatively affluent economies – greater use of part-time and temporary work, increased experimentation with new human resource management techniques and so on. At the same time, equal importance was also given to country-specific innovations such as the diffusion of enterprise partnerships. A third change was the growth of non-union companies in the country; two contrasting forms of management-employee interactions, union and non-union, are now sitting side-by-side. Finally, an increase in the volume and complexity of labour law as well as reforms to the institutional framework for Irish employment relations, specifically the creation of the Office of Equality Investigations (now the Equality Tribunal) and the National Centre for Partnership and Performance, were seen as opening up new possibilities for dispute avoidance and resolution.

All these developments were regarded as impinging on the work of the Commission. For instance, complex labour law makes the work of the rights commissioners more difficult. Another example would be the creation of new dispute avoidance and resolution bodies, which raises the danger of overlap and duplication. Thus a higher level of coordination than ever before is required between the agencies. In other words, the employment relations transformations that have taken place since its formation in the early nineties required the Commission to renew its strategic perspective. Five challenges were identified as important to the future activities of the Commission.

- 1) To continue to deliver an effective service and maintain the Commission's reputation for providing a quality service.
- 2) The need to anticipate and adapt to change: the Commission should have organisational systems and methods of working that allow it to make informed decisions about unfolding events and have the ability to make appropriate adjustments accordingly.
- 3) Correct positioning in the industrial relations sector: the Commission needed an organisational identity that defined its role in a distinctive manner so that it is able to stand apart from other agencies in the industrial relations field.
- 4) Maintain an effective and committed workforce: having a motivated and high skilled team of employees was seen as central to the future success of the work of

Commission. This required the Commission to be in a position to offer continuous training and good working conditions.

- 5) Maintain support of principals and clients: ongoing support from the government and social partners was regarded as essential if the Commission is to fulfil its remit of delivering high quality services.

An action programme, including new proposals, was set out to allow the Commission to progress towards meeting these objectives. With regard to conciliation, it was proposed that the rights commissioners would develop a new package of support for individual and small cases. The development of new Mediation and Arbitration schemes was also put forward. A number of complementary measures were outlined to enhance the ability of the Commission to make informed interventions to improve industrial relations stability. These included improvements in the diagnostic tools used to promote cooperative employment relations, and more effective implementation of codes of practice. A further proposal was the introduction of a customer care programme.

The Commission argued that the operationalisation of this ambitious programme required additional resources. New posts were asked for in the areas of information and communication, as well as in administrative support. Increased resources were also considered necessary to develop training and skill programmes, launch new schemes and redesign existing organisation systems. The government appointed a team of consultants to assess the merits of this claim for additional resources. The team concluded that the Commission was under-resourced both in terms of professional and administrative staff and that this acted as a major constraint on the organisation pursuing strategic development activity. It argued that if government wanted the Commission to take on a more pro-active role with regard to employment relations then additional resources would have to be found. Currently the Commission is holding discussions with government on the recommendations of the consultants' report.

Some positive change has emerged from this rethinking. In particular, the Commission will shortly launch a new mediation service and a new arbitration service. The new mediation service will provide support facilities to such groups of employees that previously had not the right of access to public dispute resolution

procedures (including certain categories of public sector jobs). The service will also be targeted at complex disputes that require sensitive and dedicated assistance to ensure their resolution. The new arbitration service is intended primarily for those parties involved in a dispute that are referred to the Labour Court by the Conciliation Service or rights commissioners. The expectation is that these parties may wish to avail of this speedier service rather than wait for a hearing at the Labour Court. Thus the motivation is to provide a more flexible and rapid service to the public. These changes are to be welcomed as they are in line with the thrust of the argument presented in this paper for innovation in the public dispute resolution system.

3.4 The Labour Court

The second main institution charged with solving employment relations disputes is the Labour Court. Established in 1946, the original motive for creating the Court was to provide conciliation and arbitration in trade disputes. This early remit was enlarged to include employment relations, mainly as a result of the growth in employment legislation. Today, the Court has the legal competence to act in four designated employment relations areas: industrial relations disputes; employment equality; the organisation of working time; and the national minimum wage. The contemporary mission of the Court is to 'find a basis for real and substantial agreement through the provision of a fast, fair, informal and inexpensive arrangement for the adjudication and resolution of industrial disputes'. The Labour Court is not a court of law and operates more like an industrial tribunal. Its function is to provide a variety of its services, free of charge, for the fast resolution of disputes. The Court projects itself as a 'court of last dispute' by which is meant that whatever possible cases come before it should have exhausted all other available procedures to end the dispute. The Court can make Recommendations or issue Orders. Recommendations set out its assessment of disputes and the terms on which they should be settled. These are not binding on the parties to a dispute, but carry a high level of informal authority (i.e. soft regulation instruments). Orders made by the Court are binding as they normally relate to Court decisions with regard to breaches of registered employment agreements or infringements to legally binding labour legislation.

The Court consists of nine full-time members: three are nominated by IBEC, three by ICTU and three by government. Government sponsored members fill the positions of Chairman and Deputy Chairmen of the Court. Only in exceptional cases do all nine members sit in the one hearing. The usual practice is for a hearing to consist of three members drawn from the respective constituencies. A team of civil servants, divided into five administrative sections, which specialise in particular tasks such as organising the conduct of investigations and the processing of referrals (cases), assists the Court. In general, the Court deals with disputes that are referred to it. On occasions however, particularly when an industrial relations dispute is threatening to spiral out of control with widespread spillover consequences, it will make the decision to intervene. There are numerous ways in which a case can be referred to the Court.

- LRC referrals: sometimes the LRC conciliation service is unable to find a mutually acceptable settlement to a dispute and at the request of the involved parties it refers the matter to the Labour Court.
- LRC waivers: on occasions the LRC will waive its conciliation function and pass the matter straight to the Labour Court.
- Labour Court intervention: the Court in the context of a major industrial dispute will take the initiative and invite the parties to use its services.
- Ministerial intervention: the Minister for Enterprise, Trade and Employment may refer a dispute to the Court.
- Direct referral: if an employer refuses to use the services of the rights commissioners to settle an industrial dispute, the involved employee or group of employees (or their representatives) can make a direct referral to the Labour Court provided they agree in advance to accept the recommendation of the Court.
- Appeals: either party to a dispute that has been heard by the rights commissioner or investigated by the Office of Equality Investigations can appeal the Recommendation or decision. In the case of a rights commissioner, one of the parties can appeal to have the recommendation enforced.

The Court is a busy institution. It dealt with 428 cases in 2000, most of them 'collective' in character and related to pay claims. Employment dismissals also figured prominently in the work of the Court. Equality cases while relatively small in number, are considered to be the most complex and time consuming to resolve partly because of the need to consult national and European legislation and partly because they require careful investigations. The number of cases heard by the Court that are appeals against decisions/recommendations of the rights commissioner has steadily grown in recent years. For example, in 2000 some 287 objections were lodged to recommendations of rights commissioners. In general, members of the Court are of the view that it operates in a smooth and efficient manner. If there is one issue with which the members are unhappy it is that the convention of the Court operating at the back end of the mediation and arbitration process is being compromised by some employment relations actors eager to bring the Court into a dispute as quickly as possible. The Court is determined to make a stand against this 'bad behaviour'.

3.5 The Employment Appeals Tribunal

The Employment Appeals Tribunal was established by the Redundancy Payments Act 1967. Its original mandate was to adjudicate in disputes about redundancy between employees and employers, but its remit has continuously expanded since it was first established. It now deals with employment disputes arising under thirteen different pieces of employment legislation, as listed below.

- Redundancy Notice and Payments Acts 1967 to 1991.
- Minimum Notice and Terms of Employment Acts 1973 to 1991.
- Unfair Dismissals Acts 1977 to 1993.
- Maternity Protection Act 1994.
- Protection of Employees (Employers' Insolvency) Acts 1984 to 1991.
- Payment of Wages Act 1995.
- Terms of Employment (Information Act) Act 1994.
- Adoptive Leave Act 1995.
- Protection of Young Persons (Employment) Act 1996.
- Organisation of Working Time Act 1997.
- Parental Leave Act 1998.
- Protections for Persons Reporting Child Abuse Act 1998.

When the Tribunal was first established its aim was to provide a speedy, inexpensive and informal procedure for the settlement of disputes involving alleged infringements of statutory rights. However, greater formalism has crept into Tribunal proceedings with professional legal teams now used in most cases that appear before it. For example, in 2001, trade unions, solicitors or other counsel represented 81 per cent of 'employee parties' and 64 per cent of 'employer parties' were represented either by employer associations, solicitors or other counsel. The requirement for the Tribunal to act judicially adds to the sense of formalism, making it the most legalistic of all the statutory or public bodies associated with the resolution of employment disputes. At the same time, Tribunal proceedings do not fully follow those of a proper court of law. In particular, although it has the authority to take evidence under oath this is not a frequent practice. Moreover, the strict rules of evidence that a formal court is obliged to follow are not always enforced and on occasions the Tribunal permits 'hearsay evidence'. It may be useful to point out that the Employment Appeals Tribunal differs from the Labour Court. Whereas the latter gets directly involved in settling employment disputes, this activity falls outside the competence of the Employment Appeals Tribunal. Moreover, Tribunal appeals usually deal with legal employment rights which are subject to a qualifying period of employment: for example, before a person evokes unfair dismissal legislation s/he needs to have been employed by the organisation for more than a year. However, the Labour Court may deal with cases of alleged infringement of employment rights where the qualifying period of employment has not been reached.

The Tribunal consists of a Chairman and twenty-two Vice-Chairmen. In addition, there is a panel of sixty members, thirty of whom are nominated by IBEC and thirty by ICTU. Tribunal hearings normally consist of three individuals, a Vice-Chairman and two panel members. The Tribunal operates on a regional basis, holding hearings in various towns and cities. The main benefit of this decentralised service is that parties involved in a dispute do not have to travel to Dublin for a hearing. During 2002, the Tribunal sat on 225 days at 55 different venues throughout the country. The total number of sittings was 693 (334 in Dublin and 359 outside of Dublin). The Tribunal deals with a large number of cases each year. The overall trend during the 1990s was a steady increase in the

numbers availing of its services. In 2001, the Tribunal received 5,257 referrals, a 56 per cent increase on the 2000 figure of 3,377. Of the 5,257 cases referred, the Tribunal was able to 'dispose' of 3,994.

For the most part, the Tribunal considered claims under legislation relating to unfair dismissals, redundancy and minimum notice, and the organisation of working time. Table 4 shows the handling of cases in 2001 under the relevant five pieces of legislation outlined. A number of features are worthy of comment. First of all, under most pieces of legislation the Tribunal 'allows' a larger number of cases than it dismisses. Second, an uncomfortably high number of cases are withdrawn either just before the beginning of a Tribunal hearing or sometime during proceedings. This trend has not been seriously investigated but the view of Tribunal officials is that cases withdrawn during proceedings is due to the final verdict of the Tribunal becoming more or less apparent. Cases withdrawn before the start of proceedings are explained by parties not wanting to go through the ordeal of a hearing or because the parties realise that they have reached the final round of a hard bargaining game and are willing to settle rather than go through the ordeal of a Tribunal sitting. While these explanations are plausible, Tribunal withdrawals merit closer investigation, not least because important information would be uncovered about the motives and behaviour of people and organisations involved in dispute resolution.

Table 4. Claims referred to the Employment Appeals Tribunal, 2001

Legislation	Referrals disposed of	Referrals allowed	Referrals dismissed	Referrals withdrawn*	Referrals withdrawn#
Redundancy Payments Acts 1967 to 2001	612	553	253	121	55
Minimum Notice and Terms of Employment Acts 1973 to 2001	3,216	2,336	1,774	211	135
Unfair Dismissals Acts 1977 to 2001	894	691	124	108	158

Payment of Wages Act 1991	75	60	21	N/a	N/a	29
Worker Protection Act 1991	65	54	2	20	15	17

Source: Employment Appeals Tribunal

Note: 'Referrals withdrawn*' = referrals withdrawn during hearings.
'Referrals withdrawn#' = referrals withdrawn prior to hearings.

A popular misconception is that those parties that have cases upheld by the Tribunal receive high levels of compensation. Table 5 sets out the distribution of compensation awarded by the Tribunal in unfair dismissal cases in 2001. It shows that out of a total of 163 cases, only five received awards in exceed of €25,000; 24 cases received awards above €10,000; and 113 cases received awards less than €5,000. The largest single category of awards fell within the range of €1,001–€2,000 with 36 cases receiving this amount. Overall, the total amount awarded by the Tribunal was €860,654 and, therefore, the average award per case was €5,286. The clear message emerging from this analysis is that winning a case at the Employment Appeals Tribunal does not usually lead to high levels of monetary compensation.

Table 5. Compensation awards by the Employment Tribunal

Compensation award	Number	Compensation award	Number
0	1	5,001-6,000	9
1-250	12	6,001-7,000	9
251-500	14	7,001-8,000	5
501-750	8	8,001-9,000	1
751-1000	9	9,001-10,000	2
1001-2000	36	10,001-15,000	14
2001-3000	10	15,001-20,000	3
3001-4000	14	20,001-25,000	2
4001-5001	9	>25,000	5

Source: Employment Appeals Tribunal

3.5.1 Re-appraising the work of employment tribunals

Many governments are currently appraising the performance of employment tribunals (or the domestic equivalent body). Three motives normally lie behind these evaluations. One is the cost factor. As a result of the sharp increase in the number of cases going to employment tribunals, the costs of operating such bodies are spiralling with a corresponding increase in costs for the exchequer. A number of governments are even considering introducing charges so that users must pay to use the services of the public dispute resolution machinery. A second motive is to improve the customer focus of tribunals. Driven by new public management thinking, innovations are being introduced to reduce the length of time taken to resolve a dispute. Examples of these changes include the introduction of a fast track to deal with straightforward claims and the setting of time limits for the handling of disputes. Finally, although the tribunal process offers the opportunity to individuals or organisations either to redress a perceived infringement of employment rights or to clear their name, it can also be an extremely stressful and unhappy experience, extracting a heavy toll in human terms. Thus governments are anxious to promote non-legalistic methods to settle grievances, preferably at the workplace, as it is believed everyone benefits from these procedures – hence the drive towards ADR.

For the purposes of this paper, in-depth interviews were held with civil servants and senior people in charge of operating the Employment Appeals Tribunal system to assess whether any of these factors were at play in Ireland. These interviews revealed a group of highly motivated and able professionals dedicated to the settling of disputes in a manner that was fair to all. Interestingly, this group was of the view that present arrangements did not require changing, at least not in any radical way. The consensus opinion was that current procedures were by and large delivering an effective and efficient service. It was considered that the waiting list for a Tribunal hearing was not overly long and the administrative costs were not burdensome. Moreover, it was suggested that the majority of applicants to the Tribunal wanted ‘their day in court’ and that this motivation more than outweighed the human stress and discomfort caused by such proceedings. Moves in other countries to increase the number of disputes settled outside the Tribunal were seen mostly as an attempt to water down the ability

of individuals to access a quasi-judicial process to settle a perceived infringement of a statutory employment right. Thus without the door being closed on organisational reform, the unanimous view was that the case for change was not proven. In addition, it was suggested that proposals for reform should be based on evidence that a problem existed or that a procedure was flawed and were widely accepted by the social partners.

Up to a point these arguments are persuasive. There is no convincing evidence to suggest that the service provided by the Tribunal is deficient. All the evidence indicates that cases referred to the Tribunal are processed within a reasonable time frame – this period has actually shortened in recent years despite the increased number of applicants. In 2000, the average waiting period between the receipt of an application and a date for a hearing in unfair dismissals cases in Dublin was 8 weeks and in provincial areas 12 weeks: the figures in 1997 were 12 and 16 weeks respectively. Although it is hard to pin down the exact costs of running the Tribunal service, there is no indication that these are spiralling out of control. At the same time, there is room for some change. A lack of reliable information and data exists on important matters such as withdrawals. More information on such topics would allow a more informed assessment to emerge about the quality of the service provided by the Tribunal. Thus introducing a new procedure aimed at gathering the views of clients who use the service would be a worthwhile new initiative. It would provide more solid evidence to gauge properly whether innovations such as pre-hearing sessions to promote the quick settlement of disputes would be welcomed. Thus although the Tribunal does provide a proficient service, the scope nevertheless remains to introduce changes designed to upgrade customer care.

3.5.2 Upholding the Employment Equality Act

In 1998, the Dáil passed the Employment Equality Act, which introduced a number of important changes to the enforcement of equality laws in Ireland. First of all, a new institution, the Office of the Director of Equality Investigations (ODEI) (renamed the Equality Tribunal in 2002), was established to deal with complaints of discrimination in the areas of gender, marital status, family status, sexual orientation, religious belief, age disability, race and membership of the Traveller community. The creation of the ODEI

brought about a range of organisational changes to the pre-existing public bodies working against discrimination in Irish society. For instance, the Equality Service of the Labour Relations Commission was transferred to the ODEI as were some functions previously carried out by the Equality Commission. A division of labour has been established between the Equality Commission and Equality Tribunal which sees the former concentrating on activities that seek the diffusion of practices and codes of behaviour of fair treatment to all sexes and groups and the latter focusing on processing claims of infringement to equality rights. The Tribunal, however, does not exclusively handle all such cases. The Labour Court, for example, can still deal with claims of unfair dismissal based on discrimination. Thus in a technical sense the promotion of employment equality is shared across a number of organisations.

Of greater importance to this analysis are the innovations introduced by the Act to address referrals (complaints) of discrimination. The ODEI can deal with referrals of discrimination via two different routes. One is the well-established, quasi-judicial route of investigations. This process entails an Equality Officer conducting a detailed investigation into the referral. Equality Officers have extensive legal powers to collect information, including the right to enter workplaces and other premises, as part of their investigative work. A key part of an investigation is the written submission by parties involved in the case. Each case would also involve the holding of semi-formal proceedings that provide all the involved parties the opportunity to call witnesses and to respond to allegations made by the other party. These proceedings allow the Equality Officer to gain invaluable information on the case. On completion of the investigation, the Equality Officer issues a decision. Decisions are legally binding and are published. In effect the investigation process is like an Equality Court or Tribunal. An Equality Officer working at the Tribunal described the process as a 'court of first instance'.

The alternative route to dealing with referrals of discrimination is mediation. The 1998 Employment Equality Act (and the 2000 Equality Act) obliges the Tribunal to offer a mediation alternative to settle a claim of discrimination. Yet neither piece of legislation furnished the Tribunal with a definition of mediation nor set down a proscribed list of activities or practices that should be included in the process. Thus a degree of uncertainty prevailed within the ODEI

about how to deliver a comprehensive mediation service. To fulfil the mediation mandate, a designated group of Equality Officers received specialised training and a working definition of mediation was developed, setting out the core values and operating guidelines for the new service. The definition of mediation developed by Bush and Folger (1994) heavily influenced the character of this mission statement, which believes that mediation should be understood 'as an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement'. Working from this definition, the Tribunal set out a number of operating principles to underpin its mediation activities:

- consent: each party must give their approval before the mediation process can begin
- impartiality: the mediation services avoids taking sides in a dispute
- voluntary process: either party can withdraw at any stage from the mediation process
- accessibility: the mediation service will ensure accessibility for all users and will make special arrangements as necessary for people with disabilities and/or who experience difficulties in travelling to and from the service
- participation: full and active engagement is required from all parties and participants in the mediation process
- power balancing: the mediation process encourages balanced negotiation and will be intolerant of any behaviour considered manipulative or intimidating
- advice: if the mediation touches on rights and obligations other than those set out in the initial complaint then each party will be advised to seek independent advice
- issues for discussion: not only are the parties responsible for the matters to be negotiated in the mediation process, but must also take full ownership of the terms of the settlement should one be reached
- confidentiality: the mediation process is confidential and none of its activities or proceedings are published

- joint sessions: normally mediation will be held in the presence of all the participants. But special sessions can be made for bi-lateral negotiations
- disclosure: when signing up to mediation all the parties must commit themselves to full disclosure of all relevant information
- settlement: once each party has signed up to a settlement then the agreement becomes legally-binding and may be enforced on application to the Circuit Court
- no settlement: if the parties fail to conclude a settlement then the complainant is free to lodge a referral and seek an investigation.

The ODEI has actively promoted the mediation alternative, offering it in every case. It proclaims that mediation holds a range of benefits to those involved in a complaint such as:

- participants keep full ownership of the negotiation of a solution: a third party does not impose decisions
- mediation offers a quick and informal route to a settlement
- mediation encourages participants to clarify precisely their concerns and grievances, thereby enabling comprehensive and more sustainable settlements
- mediation is a private process – details of proceedings and settlements are not published
- costs associated with trying the option are virtually zero. Both parties can, at any time, walk away from the process and a complainant can ask for an investigation if no settlement is reached.

The different operating principles behind the investigations and mediation processes are set out in Table 6.

Table 6. Investigations versus Mediation

Investigations	Mediation
semi-judicial process	negotiation process
delegation to a third party	participants retain full ownership
formal proceedings	emphasis on informality
winner/loser scenario	mutually acceptable settlements
difficult to accommodate 'grey' areas	accommodation of 'grey' areas
decisions based on findings of facts	underlying tensions and grievance addressed
public knowledge	private and confidential

The full mediation service has been operational since 2001. Five Equality Mediation Officers staff the programme. Each potential case arriving at the Office is first screened for its admissibility. If it passes this assessment then the participants are offered either the mediation or investigation process to deal with the case. Table 7 sets out the number of mediation referrals dealt with by the Office in its first year.

Table 7 shows that by the end of the first year of operation the ODEI dealt with a total of 102 mediation referrals: 56 cases related to alleged infringements of rights established by the Employment Equality Act, whereas the other 46 cases concerned equal status. Of the 56 employment equality cases, 2 were settled through mediation and a further 9 withdrew from the process without resolution. Thus, 11 cases that started the mediation process were considered closed by the end of the year. In addition, a further 24 cases that were due to enter mediation were settled voluntarily before the beginning of the process. Overall, therefore, 26 of the 56 cases were settled while the total number of cases closed was 35. With regard to the equal status cases, of the referrals that began the mediation process 9 were successfully settled while another 7 were withdrawn without a settlement. Thus by the end of the year, 16 cases that started mediation were closed. A further 2 cases were settled before the mediation process started. As a result, of the 46 equal status cases, 11 cases were settled and 18 were closed.

Table 7. Mediation Referrals, 2001

Mediation Referrals	Employment Equality Act	Equal Status	Total
Cases Referred 2001	56	46	102
Settled at Mediation	2	9	11
Not Resolved	9	7	16
Total Closed at Mediation	11	6	27 %
Settled (without mediation)	24	2	26
Total Settled	26	11	37
Total Closed	5	18	53

Source: The Equality Tribunal

Clearly it is still too early to make any authoritative comment on the new mediation service. In the Irish context, where an adversarial ethos still hangs over employment relations and the custom-and-practice is to bring claims of infringements of employment rights to a tribunal or similar quasi-judicial process, it is questionable whether individuals, trade unions or organisations will automatically 'connect' with a mediation option. The Equality Tribunal probably needs to do more educational work to make mediation an acceptable and legitimate pathway to the settling of disputes involving discrimination. However, the indications are that the new service is a worthwhile public policy innovation. For instance, on average the 11 cases settled by mediation in 2001 took under 5 months to resolve, which compares favourably with the 19 months average time span to conclude an investigation. Overall, the new service needs to be supported as it sends out the positive signal that the public institutions engaged in dispute resolution are willing to adopt new methods of workings and to increase the avenues open to individuals and organisations when seeking a resolution to a dispute (McDermott et al, 2000).

3.6 Settlement masters and framing the resolution to disputes

A case was made in chapter 2 for the adoption of a problem-solving approach to dispute resolution. The assumption behind this approach is that the disputing parties, are willing to engage in some form of dispute resolution process: relationships have not broken

down to the extent that an impasse has been reached in the conflict. However, this is not always the case. Occasionally, relationships become so embittered that the disputing parties cannot proceed: they are either so enraged or have become so intransigent that they become either unable or unwilling to enter dialogue designed to bring the dispute to an end. Such stalemate situations normally arise in collective employment disputes – those involving trade unions and employers. A public dispute resolution system usually has some contingency procedure that can be activated to kick-start a settlement dialogue (MacFarlane, 1997).

These mechanisms take a variety of institutional forms but are normally referred to as settlement masters in the literature (Ziegenfuss, 1988). Settlement masters can be either individuals or a panel of individuals who work to avert a looming dispute, intervene to prevent a dispute escalating or supervise the implementation of a settlement. They are essentially pro-active mediators or trouble-shooters. They are not usually an established part of the dispute resolution machinery: in today's parlance they would be described as a 'virtual' procedure, on stand-by to be called into action whenever necessary. Invariably the individuals who are appointed to perform the role of settlement master enjoy a high reputation amongst employers and trade unions and have wide experience. Settlement masters facilitate dispute resolution mostly by reframing the nature of the dispute so that the disputing parties feel obliged to change the way they relate to each other or redefine the negotiations agenda. For the most part, disputants respond in a constructive manner to proposals made by settlement masters. This is normally partly because settlement masters exercise a degree of moral authority over the disputants to the extent that the latter are persuaded to modify their stance in one way or another and partly because disputants calculate that not to interact with these people would damage their position.

Over the years settlement masters have been used in Ireland to help solve high profile disputes, normally strikes. For example, in the early nineties settlement masters were called into action to solve a strike involving the main provider of electricity in the country, the ESB, which was threatening to escalate out of control (ESB, 1981). They were also used at that time to resolve a critical dispute in the banking industry. On both occasions, the intervention was relatively successful. Settlement masters are now an established and ongoing

feature of employment relations in Ireland. In 2000, a significant step was taken to put this essentially informal and *ad hoc* process on a much firmer footing. In particular, the social partnership agreement signed that year, the *Programme for Prosperity and Fairness*, established a National Implementation Body whose remit is to ensure that all participants adhere to the 'peace clause' contained in the agreement. Essentially this body's role is to police the new agreement. Membership of the body consists of the Secretary to the Cabinet, the Director of IBEC, and the General Secretary of ICTU. Within a year of its establishment the new body was called into action. An acrimonious dispute had erupted at Aer Lingus involving cabin staff and had halted the state-owned airline's operations. This dispute was potentially serious as it threatened to unravel a multi-union management plan for the restructuring of the airline. Shortly after the intervention of the Implementation Body, both sides were participating in talks at the Labour Court and a settlement was reached.

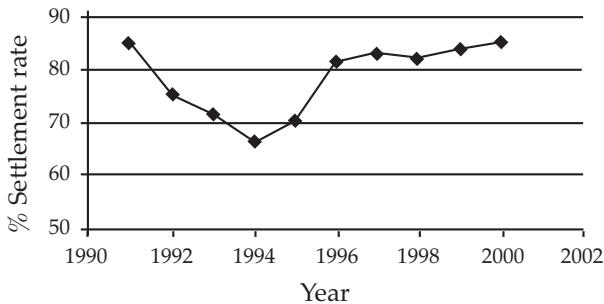
Some are uneasy with the role of settlement masters in dispute resolution as they feel such individuals may have the unintended consequence of casting a shadow over organisations such as the LRC and the Labour Court. This view regards the very presence of an informal mechanism to help settle conflicts as tantamount to an admission that the formal bodies are not able to cover all contingencies when it comes to maintaining stable employment relations. However, this line of argument appears unpersuasive. In the first instance, the National Implementation Body and other forms of 'settlement mastering' usually seek to work with the formal bodies by recommending that the disputing parties negotiate or discuss a settlement under the guidance of some part of the public dispute resolution machinery. In other words, a complementarity is sought between informal and formal processes. Moreover, it appears to be a matter of good public policy to put in place an arrangement that can act as a safety net in the dispute resolution process. All in all, the record suggests that settlement masters have played a positive role in the Irish dispute resolution system and are fully supported by the social partners.

3.7 Conclusions

A comprehensive public framework for the resolution of employment disputes has developed in the Republic of Ireland. The

full battery of dispute resolution techniques – conciliation, mediation, arbitration, adjudication and regulation are offered by the various agencies. In addition, both formal and informal processes are in place to provide those involved in a dispute with alternative avenues to reach a settlement. Thus in broad terms there appear to be no deep-seated problems or significant policy failures associated with the functioning of any of the agencies. For example, as Figure 5 shows, the Labour Relations Commission usually settles about 85 per cent of the cases referred to it. The staff of the various agencies appear highly committed to delivering a neutral and professional service to employers and employees.

Figure 5. Settlement rate at the Labour Relations Commission, 1990–2002



Source: Labour Relations Commission

This conclusion does not mean that there is no room for improvement. For a start, each of the various public institutions involved in dispute resolution must continually strive to reduce the time frame for handling disputes, making the services they preside over as simple and as user-friendly as possible whilst remaining open to innovation. Continuous improvement must be the watchword of these bodies. To these ends greater effort has to be made to monitor customer satisfaction. Feedback mechanisms of this type are crucial to dispute resolution provision because they assist in the evaluation of the services. In addition, these surveys can help identify trends in employment grievances, thus allowing the agencies to make necessary internal adaptations. Further,

customer surveys can provide invaluable information on the attitude, motivation and behaviour of disputants that would permit more authoritative answers to questions such as: are we living in a more litigious society? Accordingly, dispute resolution agencies should put in place customer care programmes that would provide the information necessary to evaluate the effectiveness of the service (Kochan et al, 2000).

A further matter is that a degree of institutional overlap appears to exist within the public framework for dispute resolution. For example, at least three different codes of practice have been devised on the issue of bullying at the workplace – hardly evidence of streamlined public policy. A further example is that it is possible for the LRC, Labour Court and the Equality Tribunal to deal with equality-based employment grievances. Yet another example is that when it comes to conciliation and mediation it is hard at times to be certain when the remit of the LRC ends and that of the Labour Court begins. Functional overlap and blurred lines of demarcation between dispute resolution bodies can have disadvantages. First, potential users of the service may find it difficult to know which agency to visit with their grievance. However, although it is difficult to make a definitive judgment, this does not appear to be a serious problem. On occasions, some people may have been inconvenienced by initially going to the ‘wrong’ institution, but it is doubtful that this has led to an employment grievance not being addressed. The second potential problem is one of ‘institutional shopping’ in which a person takes a grievance from agency to agency in search of a successful verdict. There is little, if any, evidence to suggest this is actually happening. Certainly none of the agencies interviewed considered this to be a problem. While this may be the case, the worry remains that the various dispute resolution bodies lack any formal arrangement to discuss differing experiences and to consider how greater coordination, even consolidation, could be obtained across the various available services and procedures. This paper argues that there is a clear need for a formal procedure that requires the various bodies to meet on a regular basis.

Some particular issues need to be addressed. For instance, the Labour Court has expressed its concern that on occasions its services are requested too early in the dispute settlement process, thereby compromising its role as ‘court of last resort’. Officials of the Court have expressed the strong suspicion that both trade unions and

employers are only too willing at times to entangle the Court in collective bargaining negotiations to advance their own claim. Treating the Court in such a way undermines its main purpose. In addressing this matter the Court may wish to review its own procedures to assess whether these challenge employers and trade unions sufficiently to defend their actions against a range of deliberative or problem-solving criteria.

One way this could be done is by reorganising the transmission mechanisms through which cases that have been at the LRC arrive at the Labour Court. The purpose of the change would be to insert more rigorous 'problem-solving' procedures. It would be important for any reforms to distinguish between individual or small-scale grievances and large-scale collective disputes. With regard to individual and small-scale disputes one possible reform would be the introduction of a formal neutral evaluation report from the Rights Commissioners to the Court. This report would be used in cases where either or both parties have signalled that they wish to appeal the decision of the Rights Commissioner to the Labour Court. The formal neutral report would accompany the case to the Court. It would not only set out the information gathered by the Commissioners in the course of its own investigations, but would set out the position of each party *vis á vis* the law and the LRC's codes of conduct (which are used as benchmarks to determine the merits of a case) as interpreted by the Commissioners. Each party, as part of their appeal, would be required to respond to the neutral evaluation report and argue why the verdict of the Rights Commissioner is misguided.

The benefits of producing a neutral evaluation report are fourfold (Levine, 1989). First, it would allow parties to gain a greater appreciation of the strengths and weaknesses of their respective cases. Second, it would encourage a better delineation of the 'interests' in a dispute. Very often employment grievances either of an individual or collective kind are fuelled by a number of factors that are not directly relevant to the case, for example longstanding personal animosities. Getting the parties to focus on the specifics of the case reduces the influence of these indirect negative factors. Third, it may facilitate reflection on possible alternative avenues to resolve the dispute.

Fourth, it may get the parties to act reasonably in exchanging information and documents relevant to the dispute. Formal neutral evaluation reporting is practiced widely in the USA and Canada. Research into the process suggests that it works well and is viewed as

fair and efficient by participants (Marks et al, 1998). Neutral evaluation reporting may bring benefits to the LRC and the Labour Court: it may even be useful in some revised form to the operation of the Employment Appeals Tribunal. Under such a procedure those considering making an appeal against a Rights Commissioner's verdict would have to justify their decision in a more precise and transparent manner, which may assist the Court in its deliberations. With regard to the work of the Employment Tribunals, if disputants were obliged to defend their position in some early neutral evaluation procedure before the start of formal proceedings it may reduce the significant number of cases withdrawn during Tribunal hearings.

A further innovation that merits consideration is the introduction of settlement conferences for collective employment disputes (Weslund, 1990). Such conferences would be convened before the Labour Court started formal proceedings and would require the parties to: (1) give assurances that all earlier conciliation procedures have been exhausted; (2) provide reasons why recommendations that are likely to have been made at earlier stages were unacceptable; (3) transparently set out their interests in the dispute. Again this procedure would oblige parties to justify their action, focus on the interests in the case and to think about possible avenues for the resolution of the dispute. Most Canadian provinces use such a device and it appears to work well. In the Irish context, the principal merits of a settlement conference would be to inject a greater problem-solving ethos into the dispute resolution process and help re-establish the Labour Court as the 'court of last resort'. If each party had to justify publicly their position, the conference may act as a deterrent to opportunistic use of the Court to advance sectional demands in negotiations. Such changes are largely operational but may help improve the work of the dispute resolution bodies and could be diffused with minimal difficulty.

Present arrangements suggest that no serious institutional blockage exists to the diffusion of problem solving innovations. If anything all the bodies are disposed to this kind of change. A good example is the work of the Equality Tribunal in developing a mediation track to run in parallel with the enforcement of established workplace employment rights. An encouraging feature of this example is the careful manner in which mediation was introduced. The result is that the potential and limits to mediation as a dispute resolution are fully understood inside the Tribunal: it is

recognised that it cannot be used in every circumstance and some cases will still need to be addressed by formal, legal methods. Thus an astute policy learning process is evident inside the Tribunal which views mediation, and other ADR procedures for that matter, not as alternatives but rather as complements to legally established employment rights.

The line of argument pursued in these conclusions introduces a paradox into the argument. On the one hand, the analysis suggests that the dispute resolution agencies are hardworking and flexible institutions in the sense that they are prepared to adapt to change. On the other hand, the number of employment grievance and dispute cases, especially those involving alleged infringement of individual employment rights, handled by the various agencies are not diminishing and in some instances are increasing at a worrying rate. This paradox is hard to resolve. It certainly suggests that the dispute *avoidance* work of the dispute resolution institutions, as opposed to their dispute *resolution* activities, needs to be increased. It also suggests that more needs to be done at organisational level to resolve disputes and grievances speedily and as close to the origins of the problem as possible. This requires organisations to improve in-house procedures designed to settle disputes. Public dispute resolution agencies will have a key role in facilitating, guiding and supporting organisational-level change of this type. In addition, more focused and dedicated initiatives are required to implant a greater ethos of mutuality and cooperation into employment relations to overcome 'them and us' attitudes and behaviour, which continue to be a barrier to stable management/employee interactions. The following two chapters examine these themes in detail.

Private sector dispute resolution

4.1 Introduction

The shape of the wider employment relations system heavily influences the pattern of work-related dispute resolution in a particular country. Until the end of the eighties, the Irish system of employment relations could have been described as voluntarist and adversarial. However, during the past two decades a variety of factors, some country-specific and others more universalistic in character, have effectively dissolved this national pattern.² Irish employment relations have been fragmented. No overarching model governs the employment relationship in the country.

Inevitably, this development has made a strong imprint on the dynamics of dispute resolution in the Irish private sector, with strong implications for the conduct and character of public policy. This chapter examines a range of dispute resolution issues that arise from the fragmentation of employment relations and is organised as follows. Firstly, it assesses whether new laws are required to establish clearer procedures for the handling of employment grievances that emerge from the burgeoning small firms sector, a part of the economy where formalised arrangements for the management of the employment relationship are underdeveloped. Following this, it reviews the available evidence on the diffusion of new employment practices and concludes that a fragmentation has occurred to organisational-level human resource management systems. Three matters relating to dispute resolution are identified for further investigation. The first is the controversy whether public policy should be more permissive in helping trade unions gain

² Some of these factors are dealt with in greater detail in chapter one. They include the growth of a large foreign-owned sector as well as a burgeoning small firms sector, neither of which are traditionally fertile places for trade union recruitment, the diffusion of new employment practices and changing preferences in the workforce for more individual procedures for the handling of employment-related matters.

recognition in workplaces. The second is the nature of dispute resolution in non-union firms, particularly in large, foreign-owned, establishments. The analysis tries to assess whether this is the dispute resolution model of the future. The third is the character of dispute resolution in hybrid HRM systems. The investigation seeks to answer the question whether companies can operate 'pick and mix' dispute resolution arrangements on a sustainable basis. The conclusion brings together the arguments developed in the chapter and teases out the implications for the direction of public policy and the resolution of workplace conflict.

4.2 Dispute resolution in the small firms sector

Around the globe, national dispute resolution systems are continuously grappling with the common challenge of how to provide a high quality service that is: (1) responsive and accessible; (2) expeditious but fair; and (3) dependable and consistent. In part it depends on the dispute resolution machinery having the necessary level of resources to fulfil the functions it was put in place to do. It is also tied to the ability of this machinery to adjust internally so that its programmes are in line with unfolding economic and social changes. Sometimes more than internal adjustment is required to close any identified gap between what organisations are doing on the matter of workplace employment problems and the services that are offered by the public dispute resolution agencies. Occasionally, government may have to resort to radical measures and recast the functions of particular agencies to make these relevant to new patterns of employment relations activity.

A growing challenge to the efficiency of the dispute resolution machinery in Ireland is the increasing number of people working in small firms. A feature of many small firms is the absence of specialised human resource management skills, rendering the management of the employment relationship that more difficult. When recruiting staff the small firm owner is required to comply with a range of legal rules and procedures (such as paying a minimum wage, complying with equal opportunities and health and safety regulations) yet many find it difficult to keep abreast of the various regulations. Moreover, many small firms do not have formal internal procedures to handle workplace grievances and disputes. As a result, many are not only unaware of their statutory obligations and the consequences of not complying with legal rules,

but rely on purely informal methods to resolve workplace grievances. This combination appears to have made the small firms sector an unstable environment for the proper adherence to individual employment rights.

The previous chapter showed that the number of cases involving individuals handled by the Rights Commissioners has increased in recent years and that the majority of these cases are upheld. Many of these cases involve small firms. This is circumstantial evidence to suggest that some small firms are not fully complying with core aspects of labour law designed to give people a level of protection at work. This regrettable situation may be the direct outcome of small employers not being fully aware of the legal responsibilities they shoulder when recruiting employees. Without expert human resource knowledge or well-developed procedures to manage the employment relationship, the risk of employment disputes or grievances actually happening increases dramatically. As the size of the small firms sector expands the danger is that this problem will become more pronounced. Employer organisations, such as IBEC, are trying to address the matter by delivering training seminars and workshops that inform small firm owners of their legal responsibilities and increase their capabilities to manage people at the workplace. These education and training events are very worthwhile and must continue. However, additional pro-active measures will be required by the public dispute resolution agencies in conjunction with other organisations, to improve the public information channels used to make small firm employers and employees aware of their rights and responsibilities. Fresh initiatives will also be required from professional and trade associations that aim to develop fair and reputable dispute prevention or avoidance arrangements for small firms for their members. Even if all these measures were installed it remains an open question whether they are sufficient to address the problem.

Part of the problem lies in an asymmetry that has emerged inside the country's labour law regime. On the one hand, the amount of substantive employment law has increased appreciably in the past few decades, but on the other hand, government makes few statutory demands on small firms to possess formal grievances and disciplinary procedures. This is an important discrepancy, as organisations that have a diligent approach to substantive labour law also tend to possess proper grievance procedures. Or to put the

matter slightly differently, those organisations without formal procedures are more likely to appear before the Labour Court, the Employment Appeals Tribunal and the Equality Tribunal. Thus introducing fresh legislation that would require *all* firms with more than five employees to have grievances and disciplinary procedures deserves consideration. Opponents of this line of action, who are strongly motivated to protect the perceived highly voluntarist character of Irish employment relations, will doubtless argue that such legal action is not required as dispute resolution agencies already use the various codes of conduct developed by the LRC and others when assessing employer behaviour. Thus a 'set' of public benchmarks is seen to exist to guide the actions of both employers and the deliberations of the various agencies, making it unnecessary to introduce new law on this matter. This line of argument is not fully convincing as it is based on a mistaken view of how codes of practice function. For the most part, they are used to encourage best or good practice and not to establish minimum standards. The purpose of the law would be to establish a set of minimum procedural standards on grievance and disciplinary matters in contracts of employment (see Appendix 1). Codes of practice would be used to build upon the law and encourage employers and employees to adopt more advanced procedures to resolve disputes at work.

The UK government has recently introduced legislation (Employment Act 2002) deserving of careful consideration by those professionally involved in the dispute resolution field in the Republic of Ireland. This new legislation requires all organisations, even those with less than five employees, to provide staff with a grievance and disciplinary procedure. Five separate matters are covered by the legislation: (1) minimum dismissal and procedural standards; (2) modified standards in cases of gross misconduct justifying summary dismissal without notice; (3) minimum formal grievance procedural standards; (4) modified grievance standards (where the person raising a grievance is a former employee); (5) general requirements for minimum disciplinary and grievance procedural standards. The legislation also adopts a new incentive structure to encourage compliance with the minimum grievance and disciplinary procedures. In particular, a tribunal will be required in normal circumstances to increase an award by 10-50 per cent if an employer unreasonably fails to provide or follow the established minimum standards. Conversely an employee who has

unreasonably failed to use the established procedures will have an award decreased by 10–50 per cent. Both the CBI and the TUC supported this change to the awards system. The legislation also obliges employees to raise their concerns with their employers and exhaust internal grievance procedures before the employment tribunal will accept their case. Employees who fail to raise a grievance will not be allowed to file a case with the Tribunal. Exceptions to this rule would include cases of serious bullying or intimidation. This part of the legislation is designed to advance the principle that all parties should seek to resolve disputes at the workplace before an application is made to an employment tribunal. It also meets employer demands that employees should, in the first instance, exhaust internal grievance procedures. To offset criticisms that the legislation is but another example of the government placing regulatory burdens on small firms, the law also changes the way unfair dismissal cases are judged. Certain procedural shortcomings may be disregarded provided the employer has adopted and used minimum procedural standards. At the same time, it has to be conceded that the new legislation will have cost disadvantages for small firms. Overall, the proposed legislation is a well thought-out package of proposals designed to improve the handling of disputes by this sector. A similar piece of legislation should be considered for the Irish labour market.

New legislation of this kind in Ireland, as mentioned earlier, should be accompanied by greater preventive activities to reduce the possibilities of grievances and disputes arising in the workplace. More imaginative use should be made of multi-media technology to inform employers and employees of their rights and responsibilities. For example, all first time employers should be provided with an integrated package of simple employment law fact sheets and an interactive CD ROM, which should be updated once a year through a remote procedure. The various codes of conduct developed by the public dispute resolution agencies should tell employers how to deal with a situation. Bodies like the advisory service of the LRC should work with trade and professional associations to develop innovative alternative dispute resolution procedures for their sectors such as is currently the case in the UK where ACAS and the prison officers association, together with the prison authorities, are developing a new internal scheme for the handling of grievances and disputes. This type of action should be

replicated in the Republic of Ireland. Public agencies could provide free seminars to businesses with fewer than five employees and pilot the provision of one-to-one free dispute resolution visits to employers with less than fifty employees and if found useful turn the initiative into a national programme. In addition, a number of pilot programmes could be developed for the small firm sector, using a variety of different providers and funding methods, for a shared HR resource for small firms. None of these ideas represent 'hard' policy recommendations, rather they highlight the case for greater experimental action on alternative dispute resolution in the small firms sector. There is a strong case for introducing legally based procedures that promote a more professional approach to the handling of employment grievances.

4.3 Fragmenting employment relations: implications for dispute resolution

One of the most contentious matters in recent employment relations literature has been the growth of non-union organisations. This development has figured prominently in discussions about payment systems, the character of employment protection, and the future of trade unions. It has also had a big influence on the design and operation of dispute resolution (Delaney and Feuille, 1992). The concern that cuts across these discussions is whether established employment rights are being weakened as employers opt for more market-driven procedures.

The remainder of this chapter focuses on the dispute resolution aspects to this controversial discussion. Three specific topics are discussed. The first concerns the argument frequently made by organised labour that the current public policy procedures to resolve disputes about trade union recognition are too employer-friendly. This matter is important for the future of dispute resolution because if a more permissive public policy regime were to be established on trade union recognition then, presumably, collective mechanisms for the settlement of employment conflicts would gain a shot in the arm. The second topic investigated is the nature of dispute resolution in non-union firms. The assessment focuses on whether employees are disadvantaged by these arrangements and if so, to what extent? If it is found that some positive elements exist to non-union dispute resolution procedures then the intriguing possibility opens up of unionised companies learning from these practices. The third topic

explored, which to some extent overlaps with the second, is whether organisations can operate hybrid forms of dispute resolution that combine ‘union’ and ‘non-union’ procedures and practices on a sustainable basis and if so, what are the implications for public policy on dispute resolution? These three topics are quite contentious and frequently inspire highly partisan commentaries. To avoid these pitfalls, it is important to provide an evidence-based approach to the nature and extent of change to human resource management in organisations during the past decade.

4.3.1 Changes and developments in HR management from the 1990s onwards

One story suggested anecdotally by Roche (1995) and corroborated empirically by McCartney and Teague (2004) is that several models of employment relations are emerging, side-by-side, in Ireland. McCartney and Teague use a statistical technique to group the establishments in their survey into four clusters, which have similar combinations of innovative work practices, and human resource management techniques.³ The characteristics of each group are summarised in Table 8. In assessing these models, however, it is important to bear in mind that they are ideal types – characteristics that few if any companies will match exactly. Nonetheless, they indicate the broad employment philosophies that currently appear to be in use in Ireland.

The largest cluster is labelled ‘traditional union’ and is characterised by adversarial (also called pluralist) industrial relations. Typically, firms in this category adopt few, if any, innovative work practices. Many of the establishments in this cluster are indigenously owned manufacturing plants. Cluster 2 is labelled ‘hybrid non-union’. Firms in this group tend to be multinationals in the electronics sector, although this is not exclusively the case. The distinguishing feature of this group, apart from the absence of trade unions, is that they adopt a ‘pick and mix’

³ Scores on the following practices were used to classify establishments into the four clusters. For example, ‘work organisation’: job rotation; team working; Task Forces; TQM. For ‘HRM’: training; individual performance pay; group performance pay; union job protection; employer volunteered job security pledges; employee involvement (consultative); employee participation (delegative). Other identifiers used included: unionisation; competitive strategy; job autonomy.

approach to workplace reform and human resource management. While they are fundamentally traditional mass production operations, the organisations in Cluster 2 pursue greater operational flexibility through such practices as job rotation. A lack of any significant training investment is a feature of this cluster, suggesting this is achieved through multi-tasking rather than multi-skilling.

Another difference between 'traditional' indigenous firms and organisations in this category is that the latter expect employees to routinely contribute productivity enhancing suggestions. However, this expectation is not reciprocated by giving employees any decision-making authority to determine their own working practices etc. Finally, employees in these establishments, unlike those in the other categories, enjoy little job security. There is no union representation and no voluntary commitment from management to preserve jobs. As such, the mix of practices in this cluster appears designed to allow employers to shed labour quickly and conveniently in response to demand fluctuations. Cluster 3 is labelled 'innovative union'. This cluster mainly contains banks, but also includes indigenous food and beverage producers, and branches of electronics multinationals that arrived in Ireland during the 1970s and 1980s. The key characteristic of firms in this group is that substantial workplace reform has occurred in a unionised environment. The incidence of innovative work practices such as Task Forces and TQM is high as is progressive human resource management policies on training and participation. The final cluster is 'innovative non-union'. Most of the firms in this group display a high adoption of participatory work practices. Characteristically, these work practices are supported by HRM arrangements such as training and job security, which encourage employees to embrace change. Furthermore, some of the firms in this cluster appear to be using employee participation mechanisms which not only solicit employees' involvement in operational matters, but which also devolve decision making rights in areas of broader relevance to knowledgeable and well informed employees.

A positive view of such organisational-level employment systems is that Irish establishments are experimenting widely with more participatory forms of work organisation. In addition, the majority of firms introducing participatory practices are involving a large number of employees: in terms of the scope of organisational change there appears to be no insider/outsider divide.

Furthermore, the evidence suggests that some establishments endow employees with significant decision making authority in areas such as process development, work scheduling, quality control etc. This important finding lends weight to the view that team working etc. allows employees to obtain greater influence over decisions that affect them in the workplace. Finally, the information provided shows that workplace change is not the preserve of any one type of firm. Instead the evidence suggests that it can prosper in all types of organisation – unionised and non-union, big and small, indigenous and foreign owned.

Some assessments are less upbeat in their interpretation of the evidence. For example, Roche and Geary (2000) are sceptical as to whether meaningful innovations are occurring to organisational-level employment systems in Ireland. Echoing an emerging debate in the international literature, they argue that the sustainability of the workplace changes taking place as well as the distributive implications are far from clear. The most obvious concern is that although the use of individual new employment practices is widespread, the extent to which they are beneficial to employers is open to doubt. Therefore, while there is experimentation, a lot of the innovation in Irish employee relations that is taking place is tentative and occurring at the margins.

A keen debate has occurred about the respective merits of the optimistic and pessimistic perspectives on Irish employment relations. However, most of those involved in this debate share the view that Irish employment relations are fragmented – management-employee interactions do not reflect the dominance of any one employment model. Union firms co-exist alongside non-union organisations, many organisations are hybrids – happy to embrace some change to workplace practices, but also eager to retain tried and tested methods. This picture of a fragmented system of workplace employment relations impacts on the debate about the character of dispute resolution and the handling of grievances at organisation-level.

Table 8. The characteristics of Irish employment models

Practice	Cluster 1: Traditional Union	Cluster 2: Hybrid non-Union	Cluster 3: Innovative Union	Cluster 4: Innovative non-Union
<i>Identifiers:</i>				
Unionisation	High	Low	High	Low
Competitive strategy	Low Road	Middle Road	Middle/High	High
Road Job autonomy	Low	Low	Moderate	High
<i>Work Organisation:</i>				
Job rotation	Low	Moderate	High	Moderate
TQM	Low	Low	High	High
Task Forces	Low	Low	High	High
Team working	Low	Low	Moderate	High
<i>HRM:</i>				
Training	Low	Moderate	High	High
Individual PRP	Moderate	High	Low	Moderate
Group PRP	Low	Low	Moderate	High
Union job protection	High	Low	Moderate	Low
Job security pledges	Low	Low	Moderate	High
Employee consultation	Low	High	Low	High
Employee delegation	Low	Moderate	Moderate	High
% of total sample	33.8	31.0	25.3	9.9

Source: Adapted from McCartney and Teague, 2004.

4.4 Trade unions and the fate of collectively agreed employment dispute systems

To argue that a fragmentation has occurred to employment systems in Ireland is to accept that traditional collective bargaining procedures are no longer the sole, perhaps even the dominant, method of incorporating people into the world of work. This raises the matter of the future fate of collective dispute resolution systems. Unions, not surprisingly, are eager to retain the traditional model of dispute resolution, which ensures that the nature of workplace conflict – both in terms of substance and procedure – is governed by collective agreements. They have expressed concern that these

arrangements are being weakened by organisations which refuse to recognise trade unions, even when employees have expressed a desire to join a union. Public policy procedures that deal with disputes about union recognition are considered weak and serve to compound the situation. From the standpoint of organised labour, maintaining collective dispute resolution procedures at the workplace requires government to strengthen the public policy regime on trade union recognition. Employers on the other hand would like to see employment relations innovations introduced by non-union multinational companies, including new dispute resolution procedures, influencing other parts of the Irish employment system. They argue that employees increasingly seek 'individualised' forms of dispute resolution and that the design of dispute resolution must in some way reflect this preference.

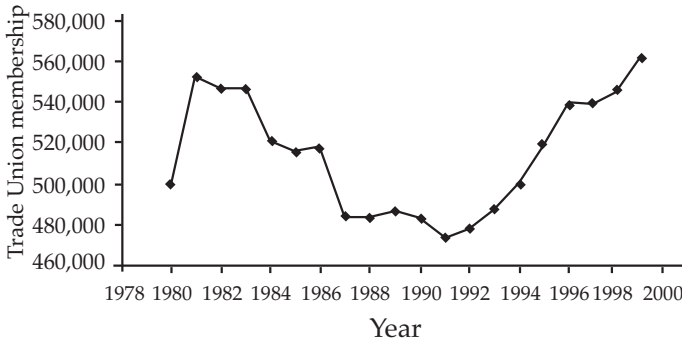
Organised labour's position on this matter is undoubtedly spurred by unpromising trends in trade union membership. Since 1980, the trade union movement in the Republic of Ireland has undergone large-scale reorganisation, mainly through mergers.⁴ The top three unions, SIPTU, IMPACT and MANDATE, have 59% of total trade union membership while the ten largest unions make up 86.4% of total union membership. Efforts to streamline trade union structures have not paid full dividends in terms of increasing trade union density levels. Figure 6 shows that the absolute numbers of those in employment and belonging to a trade union have increased over the past few decades. Yet when we turn to trade union density levels – the share of the labour force in trade unions – the figures are less comforting for organised labour.

Since the mid-1980s, Irish trade union density levels, as demonstrated in Figure 7, have steadily declined from a high of nearly 48% in 1983 to just over 35% in 1999. If the period of social partnership is specifically examined, trade union density has fallen from 43.8% to 35%. Two different views exist about the cause of the decline in trade union density. One holds that the decline is due to employer union avoidance and substitution strategies (Gunnigle, 2000; Gunnigle, O'Sullivan and Kinsella, 2001). The other argues that trade union membership has simply not been able to keep pace

⁴ Between 1981 and 1999, the number of trade unions fell from 86 to 46. A merger in 1989 created Ireland's biggest union called SIPTU. In 1999, SIPTU had a total membership of 226,659, which amounted to just over 45% of the membership of trade unions holding negotiating licences.

with the quite spectacular increases in employment. Whatever the precise reasons for the decline in trade union density, this trend has been used to back up the argument that trade union recognition procedures are too weak and favour employers.

Figure 6. *Transitions in trade union membership in Ireland, 1980–1999*



Source: Figures from the Department of Labour (now the Department of Enterprise, Trade and Employment) and the Labour Relations Commission.

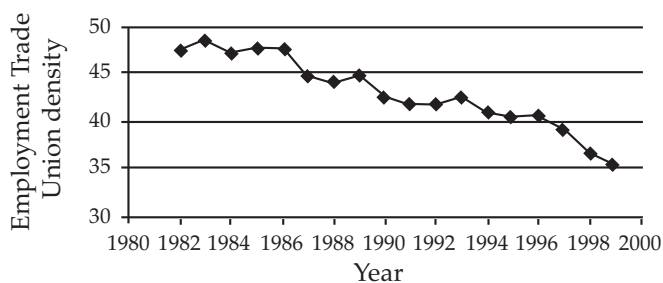
Ireland's heavily reliance on inward investment is seen as the source of this problem (Gunnigle, 2000). Many trade union activists point to a paradox in successive governments' employment relations strategies. On the one hand, governments have promoted social partnership, thereby giving trade unions unprecedented access to national economic and social decision-making. On the other hand, they have adopted policies that have made it difficult for trade unions to recruit at company level.

A key demand of the trade union movement currently is for fresh legislation that makes it easier for trade unions to gain recognition from employers. An apocalyptic tone is not however, necessary on this matter. The problem with trade union recognition in Ireland is not dire and in fact compares quite favourably with the experiences of other advanced economies. Moreover, Gunnigle et al (2001) report that the 1999 Cranfield-Limerick survey found that 69 per cent of participating organisations recognised trade unions. While this figure may overstate the general level of trade union recognition in the Irish private sector, it nevertheless shows that it is far too early to write the obituary of trade unions in Ireland. An

important 'collectivist' dimension will continue to Irish employment relations for the foreseeable future. At the same time, it would be misleading to paint too rosy a picture about the state of organised labour. Gunnigle et al (2001) also noted that whereas the 1999 recognition figure stood at 69 per cent, the 1992 version of the survey found a figure of 83 per cent, a drop of 14 per cent in seven years. Thus while trade unions continue to be important institutions in Irish social and economic life, there is no forward march of labour.

Gunnigle (2000) argues that the established public policy regime that handles disputes about trade union recognition favours employers. The Labour Court normally deals with trade union recognition disputes and in such cases, the usual procedure is for the Court to issue a non-binding recommendation on how to resolve the dispute. Over the years the strong trend has been for the Court to make recommendations that support employee demands for trade union recognition. Gunnigle's argument is that a sizable number of employers ignore such recommendations and refuse to deal with trade unions because they face no legal or public sanction for taking this course of action. Due to this compliance and enforcement problem, established public procedures to deal with trade union recognition problems are regarded as too weak.

Figure 7. Trade union density in Ireland, 1980–2000



Source: Figures from the Labour Relations Commission and the Central Statistics Office

This matter has been the source of heated exchanges in the negotiations preceding the signing of several national social partnership agreements. In 2000, the High Level Group, which polices the operation of agreements, proposed a new procedure that

addressed employer and trade union concerns about trade union recognition. Its report recommended in the first instance that the LRC establish a Code of Conduct on Voluntary Dispute Resolution: the LRC supported this recommendation and introduced such a code in October 2000. The code created the following procedures for the resolution of trade union recognition disputes. The procedure starts when a union makes a claim on the company on substantive employment relations issues, for example pay and conditions, but not recognition itself. If the company refuses to recognise the claim and collective bargaining does not occur, the claim can be referred to the LRC. The first move by the Commission is to bring together the disputing parties in an effort to reach a voluntary settlement. If no resolution arises at this stage, the LRC can then make its own proposals to try and resolve the issue. If a settlement continues to prove elusive the parties are then asked to enter a mutually agreed 'cooling off period', which normally lasts approximately six months. During the cooling off period, the Commission may engage expert assistance, including the involvement of ICTU and IBEC, to help solve the dispute. If after the cooling-off period the dispute has not been resolved, the LRC disengages from the process.

The second part of the High-Level Group's Report set out the procedures to be followed should such a deadlock situation, as described above, arise. It is also the procedure invoked when an employer or trade union refuses to use the voluntary dispute resolution code. These procedures formed the basis of the Industrial Relations (Amendment) Act 2001. In a situation where the parties refuse to participate in the LRC's voluntary code, the Act makes provision for the case to be heard by the Labour Court. Normally this hearing is likely to result in a non-binding recommendation on the substantive matters of the dispute. If this recommendation does not lead to a settlement either party can ask the Labour Court for a determination. A determination more or less repeats the contents of the recommendation but opens up two other possible procedures for the resolution of the dispute. Under the first option, either party to the dispute (in nearly all cases it will be the union) waits for twelve months for the implementation of the determination. If this does not happen they can then proceed to the Circuit Court to have the determination legally enforced. Under the alternative option (known as the fast-track procedure) any party to the dispute can seek a review of the determination after three months. Provided that

the circumstances of the case have not radically changed the review simply reaffirms the initial determination. If the decision of the review has not been implemented within six weeks then the case can be brought before the Circuit Court for a legally binding 'enforcement order'.

Some trade unions have expressed their unhappiness with the 2001 Act, largely because it did not introduce any new regulation on trade union recognition disputes, focusing instead mainly on procedural matters. As a result, it is not surprising that the matter once again figured prominently in the negotiations leading to the 2003 social partnership agreement, *Sustaining Progress*. The negotiations led to a commitment (written into the social partnership agreement) by the government to provide the LRC and the Labour Court with the necessary resources to ensure that trade union recognition dispute cases are settled within a maximum time frame of thirty-four weeks. In addition, a new victimisation code was introduced clarifying the meaning of the term. The new code is designed to help the deliberations of the LRC and the Labour Court when addressing cases involving allegations of victimisation against individuals involved in trade union organising activity.

These revised procedures fall short of a new statutory regime on trade union recognition. Realistically this government, or possibly a government of any political hue, is unlikely to cede to this request. Politicians are reluctant to introduce tougher regulation on this matter as it may tarnish the country's reputation as a warm home for inward investment. It is a vivid example of how economic openness causes domestic politicians in a country to impose constraints on their actions. Although trade unions remain unhappy with the present arrangements, it is unlikely that any tougher interventions will be introduced that go beyond the compromise set out in *Sustaining Progress*.

With trade union recognition rules likely to remain unchanged for the foreseeable future, organised labour will find it increasingly difficult to recruit new members: changing social attitudes and the growth of service industries are not going to help either. It is difficult to envisage a sustained revival in trade union density in Ireland. The fate of the unions may not get much worse, but it is unlikely to get much better. If this turns out to be the case, then most private sector workers in the country will be employed by organisations where there is little or no trade union recognition. As

a result, most employees will not have access to collectively agreed dispute resolution procedures or trade union representation should they become involved in an employment grievance.

This raises the sensitive matter of the quality of dispute resolution procedures in non-union organisations in medium and large sized organisations. Little informed analysis exists on these arrangements, although anecdotal commentary suggests considerable variation exists in terms of quality. This paper further explores this issue by investigating an acknowledged best practice case as it may reveal practices that resolve disputes in a fair and fast manner and which could be used to inform public policies in the area. Indeed if a range of practices are uncovered that appear to solve disputes effectively and enjoy legitimacy amongst employees then intriguing questions can be asked about whether dispute resolution in a non-unionised environment holds lessons for unionised settings. In an effort to tease out some of these issues the next section details the dispute resolution system that exists in Intel, the US multinational, which has a large non-unionised site in the Republic. Intel was selected as it is widely seen as having an elaborate dispute resolution system.

4.5 Dispute resolution in a non-union firm: Intel

Intel is one of the largest business organisations engaged in the information and communication technology (ICT) sector. It is widely known as a non-union employer, but also for having a sophisticated employee 'voice' system that seeks to foster meaningful communication between managers and employees and provides employees with the opportunity to make complaints. A well-organised dispute resolution system, called 'The Open Door Process', is attached to this voice system. The open door process permits employees to raise any work-related concern first with their immediate manager and then with subsequent levels of management until they get a resolution. Company policy is to address employee grievances in a prompt and fair manner. The process is operated by an employee relations team consisting of the site employee relations adviser and four employee relations specialists. The employee relations team is separate from the human resource department in an effort to signal its independence. To reinforce its autonomy from local personnel matters, the site employee relations adviser reports to a senior manager at corporate

headquarters in the USA and not to the director of human resources in the Irish operation.

The function of the employee relations team is to provide confidential coaching, advice, counsel and support to employees on any work related concern. The activities of the employee relations team are divided between four separate levels. At Level 1, employee relations specialists help employees resolve problems that they may have regarding employment benefits or working conditions, for example enquiries about pensions, maternity leave and so on. At this preliminary level, the emphasis is on assisting employees and supervisors resolve problems that have been raised. If complaints or grievances cannot be resolved at Level 1, the matter then progresses more or less automatically to Level 2, which is when the open door scheme comes into play proper. Level 2 sees the department or shift manager becoming directly involved in the search for a resolution to the problem. At this stage, the employee relations specialist actively helps the employee design and present their case/complaint. If the decision reached by the manager is not to the satisfaction of the employee, then s/he can take the matter further and evoke Level 3 of the dispute resolution machinery.

The decision to progress from one level to another is taken solely by the employee. The role of the employee relations specialist is that of advocate or adviser, not decision taker. At Level 3, the factory manager and the site employment relations adviser attempt to find a resolution to the problem. More formal and in-depth arrangements are normally used at this stage to find an acceptable settlement. Those involved in the dispute may be required to make a written statement and present their case in front of a panel consisting of the factory manager and the site employee relations adviser. These two people do not operate in the first instance as arbitrators, but in effect as company-level settlement managers: they actively explore various alternative paths to resolve the dispute. If none of these alternatives prove fruitful only then do they don an arbitrator's hat and make a proposal on how to resolve the dispute. If the employee finds this proposal/ decision unacceptable the case can then progress to Level 4. At this point, the site manager becomes involved. Again, the expectation is that the site manager will seek to craft a solution that is acceptable to all parties.

The evidence suggests that the vast majority of concerns/complaints are satisfactorily dealt with at Level 1. About half of all

matters that arise relate to employees seeking advice on things such as accessing maternity benefits, finding out about the possibilities of moving from full to part-time work or taking early retirement. Virtually all these matters are handled to the satisfaction of the employee. The remaining cases that arise at Level 1 generally relate to tensions or problems in the relationship between an employee and supervisor. Nearly all these complaints are settled to the satisfaction of the employee. The majority of cases that reach Level 2 relate to the rigorous performance management system operated by the company. Usually these cases involve an employee who is unhappy with the assessment appraisal score they have received from a supervisor. This appraisal system generates a relatively high number of complaints, as annual pay increments are conditional on employees obtaining a good assessment score. Other employee grievances handled at Level 2 cover a broad range of matters from harassment and bullying to the poor implementation of employment conditions. Most cases that enter Level 2 are satisfactorily resolved, usually within a 4-week time frame. With regard to cases relating to the performance management procedures, the available data suggest that in both 2000 and 2001 the majority of cases were resolved by changing in some manner the initial assessment/appraisal. In most of the cases in which no changes were made the employees pursued the matter to Level 3. At Level 3 most outstanding cases are brought to a closure. In 2002, only one case from an initial total of 715 raised at Level 1 required the direct attention of the site manager of Intel Ireland at Level 4.

4.5.1 Key characteristics of the Intel dispute resolution system

There are a number of notable features to this dispute resolution system. The first is that beyond Level 1 most of the registered concerns and grievances relate to the operation and outcomes of the organisation's performance appraisal system. This suggests that an inevitable consequence of having a relatively demanding appraisal system, which is directly connected to the payment system, is a large number of complaints. This matter raises an interesting efficiency question about whether the design of an appraisal system may actually generate more costs than benefits. Addressing such questions, however, is beyond the scope of this paper. A second point is that given the number of complaints made every year it would appear that employees are readily prepared to use the

procedure: there appears to be few access problems whether of a formal or informal nature. Thirdly, the Open Door Process appears to be organised along the principles of deliberative problem solving rather than more traditional 'splitting the difference' adjudication procedures. Not only are factual evidence and records used whenever possible, but the working premise is that everybody should behave reasonably so that an acceptable settlement can be found. Fourthly, the scheme appears to operate in a relatively independent manner as evidenced by the large number of changes made to initial management decisions. The independence of the employee relations team from the human resource management department appears to be an important variable influencing this outcome. The legitimacy of the dispute resolution mechanism may be damaged if employees regarded it as a part of the human resource management department.

It is interesting to note that the Employee Relations Team itself is subject to Intel's fairly rigorous continuous improvement programme. Every year the team has to identify a number of matters – the internal language used is 'focal points' – on which it will seek to make improvements. In 2002, for example, these 'focal points' concentrated on two matters. One was the marketing and delivery of employee relations services and secondly, to promote diversity training to avoid tensions emerging between Irish and non-Irish employees. The emphasis of these activities is to increase the dispute avoidance (as opposed to the dispute resolution) work of the team. The annual assessment of the employee relations team is made by senior management at the company's headquarters in the USA. This involves evaluating whether the team has reached the targets it has set for itself and comparing the performance of the team against that of similar teams in other subsidiaries. Thus the employment relations team is in the frontline of the internal competition between different subsidiaries to win favour with headquarters. This strategic position ensures that the senior management in Intel Ireland gives active and on-going support to the employee relations service.

4.5.2 What can be learnt from Intel?

Clearly the Intel dispute resolution procedure strongly reflects an 'American' style enterprise-level HRM system. The main features of this system are efforts to establish direct connections between

people management and continuous organisational improvement, linking the management of the employment relationship to strategic decision-making inside the organisation, and promoting new human resource management policies that diffuse innovative consultation and communication structures as well as novel practices on matters such as dispute resolution. The 'open door' procedure that operates inside Intel is of a piece with this type of system. For the most part, it succeeds in fulfilling its designated aim of providing individual employees with accessible and fair procedures to challenge managerial decisions and to obtain a satisfactory resolution to grievances. The employment relations unit that operates the scheme mainly uses collaborative problem-solving practices to settle disputes. Although the analogy should not be pushed too far, there are elements of Intel's system that touch upon Jacoby's (1997) argument that many large firms, particularly in knowledge industries, are developing 'modern manors', involving the development of paternalistic HRM policies inside the organisation to provide employees with an internal safety net.

Clearly, the system is non-union: little scope exists to settle employment disputes on a collective basis. On this basis alone, many would argue that the Intel system should be strongly opposed. Yet, this paper sees this as an excessively negative verdict. Intel is not a bleak house where employees are governed mostly by 'hard' HRM policies and have to deal with a series of petty tyrannies characteristic of the sweatshop. Moreover, it does appear to have created and maintained a dispute resolution system that provides employees with procedural and substantive worksite justice. In other words, the fact that trade unions are absent from an organisation does not mean that a sense of fair play and equitable treatment is not present.

It could even be argued that the Intel experience holds lessons for trade unions and public agencies tasked with the responsibility of settling disputes. Chapter 2 noted that important changes are taking place to the world of work that are either generating new types of grievances or making certain practices or behaviour once tolerated no longer acceptable, for example workplace stress, bullying, sexual harassment. On the whole, grievances and disputes related to these matters are highly personal, which employees seek to settle on an individual basis. Collective dispute resolution mechanisms may not be the appropriate way to deal with such

cases. As the Intel dispute resolution instruments are geared almost exclusively to the settling of individual grievances its experience could hold lessons for the unionised firm or for public agencies seeking to find novel ways to settle grievances without enforcing individual workplace rights. The heavy emphasis on fact-finding and evidence-based procedures is an area that unionised firms could learn some 'tip and tricks' from non-union companies. This is not an argument for unionised organisations to become non-unionised. It is simply to highlight that the Mexican stand off that has emerged between these two types of enterprise-level employment systems is unhelpful as it is limiting the potential for cross-organisational learning.

4.6 'Mixed' organisational HRM regimes and dispute resolution: the case of Allied Irish Bank

One argument sometimes used to counter the above line of thinking is that unionised and non-unionised environments are distinctive because each type of workplace regime installs employment practices that operate as integrated bundles which are difficult to unpack and thus not easy to transfer. This argument draws upon a prominent idea in the academic literature on the economics of organisation that emphasises the need for complementarity between structures, practices and procedures in organisations (Milgrom and Roberts, 1992). The idea is straightforward enough: organisations where a strong 'fit' exists between different practices are more likely to be efficient as organisational complementarities ensure that the collective impact of a bundle of HRM policies is greater than the sum of the individual parts. The thinking has also left a strong imprint on the employment relations literature, giving rise to the assumption that it is more advantageous to introduce work practices such as dispute resolution procedures in bundles. At the level of theory this argument appears plausible, but the survey evidence of workplace practices in Ireland and in other countries suggest that the situation on the ground is different. As suggested earlier in this chapter, almost all the studies on this matter in Ireland show that the majority of organisations do not have tightly integrated bundles of HRM policies. If there is a trend, it is towards firms adopting a pragmatic pick and mix approach to the adoption of employment practices. This suggests that many firms are not overly concerned with diffusing complementary bundles of HRM

policies and have internal employment systems that consist of a range of policies and practices drawn from a variety of contrasting employment relations traditions. To give a fuller insight into how such a situation can arise a case study of AIB is presented below.

Allied Irish Bank has a human resource management system that is neither fully union nor non-union in orientation. Instead, it consists of an amalgam of practices and procedures that are commonly associated with different models of HRM. Although about 40 per cent of its workforce are not in any union, the organisation still engages in collective bargaining with the Irish Bank Officials Association (IBOA) – one of a number of trade unions that operate in the Irish financial sector – to set terms and conditions for all employees. At the same time, it has a number of HRM policies that are commonly associated with non-union workplaces. For example, it has a non-union grievance procedure alongside a formal union grievance procedure. It also has a partnership arrangement established in collaboration with the IBOA, but which also covers non-union employees. This hybrid HRM system emerged unintentionally rather than by design.

In the seventies and eighties, employment relations in the Irish banking industry were highly adversarial. During this period a number of high profile and prolonged strikes occurred across the industry. An industrial relations dispute in the early nineties brought matters to a head inside AIB. At this time, the strategic priorities of the management and unions were virtually irreconcilable. Management was eager to restructure and rationalise the organisation, a move that would involve significant job losses. The union, which was not part of ICTU, and thus under no obligation to stay within the pay award limits established by the prevailing national social partnership agreement, demanded a big wage increase for its AIB members. Senior management was in no mood to cede to this wage claim. Managers calculated that the circumstances were right to end the adversarial employment relations culture inside the organisation by ‘taking on’ the unions. The wage demand was rejected and, in response, the union initiated strike action. To signal the uncompromising stance that it was going to adopt, AIB management quickly announced that employees who got involved in strike action would be suspended. This considerably raised the stakes in the dispute for it effectively turned the dispute from being a wage claim into a conflict about the future

status of the trade union inside the organisation. If the union was to stand any chance of winning the dispute it now had to close the entire operation of the bank.

A major confrontation erupted with the union working hard to close bank offices and management equally determined to keep them open. In the end, about 40 per cent of the workforce crossed picket lines, a sufficient number to allow management to maintain a skeleton service. This weakened the strike action and triggered convulsions inside the union. Some of those who crossed the picket line decided to leave the union while the union took the decision to expel those members who had not complied with the strike call. Great acrimony opened up between union and non-union members, strengthening the position of management even further. The strike finally ended without the union obtaining its wage claim. However, the legacy of embittered relations between the management and union as well as between those employees who had gone on strike and those who had continued working was hardly a healthy environment to seek improved organisational performance.

Management may have 'won' the strike, but it now had to restore 'normal' relations inside the organisation. It essentially had to deal with two matters. One was to ensure that the sizable number of staff no longer in the union had a voice inside the organisation as well as access to proper comprehensive procedures that afforded them protection at the workplace against arbitrary decision-making. To this end, management established a staff consultative committee consisting of senior management and employees 'elected by their peers'. Management would use this committee to inform non-unionised staff of corporate performance and proposed plans for the future. Members of the committee would have the opportunity to quiz management about possible changes to corporate or organisation strategies, to make representations about certain aspects of working conditions that were considered unsatisfactory or in need of change, and to exchange views on matters that were causing anxiety within the workplace.

In addition to establishing a staff forum, AIB also created what was, in effect, a non-union grievance arrangement procedure. Several independent staff advisers were established to help employees address complaints and grievances by providing employees with: information about AIB policy on particular employment matters;

assistance on how to present and advance a complaint; and general support and guidance. AIB also appointed an external ombudsman with wide experience in the resolution of disputes to assist in the settlement of disputes. However, the ombudsman was not given an explicit set of terms of reference. The arrangement was rather informal but essentially the remit was to act in an impartial way to help settle grievances and disputes inside the organisation. (Appendix 2 includes a more formal set of terms and conditions for the role of ombudsman used by an international bank.) More specifically, the ombudsman would investigate a particular grievance, report findings and when appropriate, make recommendations about how the dispute could be solved in an expeditious and fair manner. All employees whether members of the union or not were allowed to use this service. Together, the creation of a staff consultative committee and an ombudsman effectively amounted to the presence of a non-union representation and grievance procedure inside AIB.

The second priority for management was to restore working relations with the trade union. Senior management did not view the initiatives introduced for non-union employees as part of a long-term master plan to marginalise by attrition the IBOA, but rather as measures to address a representation gap that had emerged inside the organisation after the strike. Equally, management recognised that it had to repair the schism with the IBOA arising from the strike. It sought to do this by seeking a working relationship with the union based more on cooperation than on adversarialism. A range of joint management/union initiatives was launched, including a series of visits to other European countries where management-employee interactions in the banking sector are for the most part consensual. On the back of these initiatives, both sides expressed a willingness to be more pragmatic when dealing with one another in the future. Coincidentally, at the national level, the leadership of IBEC and ICTU had started to promote the idea of enterprise partnerships. Management and unions inside AIB latched on to this idea as an appropriate way to give institutional expression to the new spirit of cooperation between them.

The partnership deal reached at AIB did not cover substantive matters. For example, the workings of the partnership arrangement inside the organisation were to be kept at arms-length from the collective bargaining process used to conclude collective

agreements for unionised staff working in the bank. Rather the agreement set down a number of principles that should underscore the relationships between the union and management and all staff across the organisation namely:

- enhancing the prosperity and success of the enterprise
- maintaining secure employment for all staff
- raising levels of trust
- acknowledging the right of staff to elect to join or not to join a trade union, while acknowledging IBOA as the representative body for banking staff
- developing a co-operative and partnership culture through agreed adaptability, flexibility and innovation
- creating a structure which gives effect to true partnership.

The concluded agreement, with its emphasis on enunciated principles, was very much in keeping with the open-ended character of national-level thinking on how partnership should unfold at the workplace. Since the deal was signed at the end of the nineties, both IBOA and management have more or less kept to the values and principles of the partnership deal. Relationships between the two parties are now more cooperative and less confrontational. The net effect of these various innovations and changes was that by the late 1990s AIB had a patchwork internal HRM regime, which combined elements of union and non-union approaches to the management of the employment relationship.

4.6.2 What can be learnt from AIB?

This case study of AIB is at odds with the fashionable thinking that suggests organisations should implement complementary bundles of HRM practices. The AIB experience suggests that an organisation can pursue an employment relations strategy that at once persists with tried and tested personnel policies, allows other policies to change through a slow process of mutation and diffuses fairly radical innovations. In other words, organisations can function on a sustainable basis with hybrid HRM systems. The AIB case study is consistent with the less popular evolutionary theory of the firm, which suggests that organisations introduce change incrementally. From this perspective, root and branch transformations are seldom involved as organisations mainly opt for the gradual mutation

pathway where established routines and procedures are 'recombined' in one way or another with innovatory practices (see Nelson and Winter, 1982). To expect enterprises to implement new HRM practices in bundles or to diffuse state-of-the-art dispute resolution policies in one decisive move may be overly demanding. In essence what is being suggested is that management-employee interactions are better seen as the product of an open-ended experimentation and interpretive process, which makes it hard to predict in advance the configuration and functioning of organisational-level dispute resolution practices.

These remarks have salience for the possible reform of the work of public agencies charged with promoting such changes. The message emerging from this analysis is that if organisational rules and routines relating to the management of the employment relationship, including dispute resolution procedures, are never fixed, but are continuously evolving, then the public agencies must allow organisations to follow a pathway to modernisation that is appropriate to their own circumstances (Rowe, 1997). Public policy should not be overly prescriptive. The driving motivation behind public policy should be to facilitate and give support to customised forms of organisational level dispute resolution procedures that first and foremost enjoy the confidence of both employers and employees (Greenhaugh, 1986).

4.7 Conclusions

Three important conclusions arise from the analysis of this chapter. In the first instance it is clear that some parts of the legal regime currently underpinning dispute resolution in Ireland need refreshing and modernisation. In particular, legal revisions are required to introduce a series of mandatory minimal procedures and practices for the handling of employment grievances and disputes and to create new incentives and penalties that encourage employers and employees to follow these arrangements. Reforms of this type may help resolve some of the identified shortcomings in the present system. One such shortcoming is the uncomfortably high level of individual cases using the public machinery for dispute resolution. The data suggest that the present method of encouraging small firms to adopt proper dispute resolution procedures by writing and disseminating codes of practice is not fully effective. A compliance problem has emerged despite the

sterling work of bodies such as the Labour Relations Commission and the Labour Court. Fresh legal rules may be required to promote fair procedures for the handling of disputes at work. At the same time, a new battery of centralised, heavy-handed employment relations regulations should not be implemented. The purpose of the new regulation would be to make it compulsory for firms to have formalised and widely understood procedures for the handling of grievances and disputes while also requiring employees to exhaust these internal procedures before they can take a case to a public dispute resolution agency.

The second important conclusion touches upon the underlying motivation or rationale that should guide public policy interventions in the area of dispute resolution. A strong view held by organised labour both in Ireland and elsewhere is that government should enact legal rules that oblige employers to recognise trade unions when the majority of their workforce have expressed a wish to join a trade union. This matter has figured prominently in the negotiations related to the national social agreements. The plausible argument pursued by organised labour is that the compromise solution worked out on this, issued by the High Level Group in 2001, is too cumbersome and convoluted to be effective. Further action is needed to make these procedures less unwieldy. Yet, it is unlikely that government will cede to the demands of trade unions and introduce permissive regulations on trade union recognition. Trade unions cannot expect government to introduce public policies and legislation that in effect operate as a compensation device for their inability to maintain or recruit members.

The third main conclusion relates to cross-fertilisation. The Irish employment relations system is fragmented: different forms of workplace employment relations sit side-by-side and this is unlikely to change in the foreseeable future. Accordingly, the competition that already exists between these sub-systems is likely to continue, if not intensify. Trade unions will be eager to make inroads into the non-union sector. For its part, non-union organisations are likely to accelerate efforts to embed 'individualised' practices to manage the employment relationship. Competition between these sub-systems is only to be expected. Indeed, regime competition of this kind can be productive as it encourages each constituency to innovate and accept change to organisational level employment relations systems (Zack, 1997).

There are indications that each sub-system is learning from the other, with the effect of lowering the walls between them. An example of this is the collaborative initiative involving trade unions and employers' organisations around enterprise-level partnerships. Signs are emerging that such learning behaviour is spilling over to dispute resolution matters. Levels of contact and communication are increasing between human resource managers in union and non-union organisations who are eager to compare each other's grievance procedures and to discuss the strengths and weaknesses of alternative dispute resolution procedures such as the role of the ombudsperson. These contacts represent an informal form of benchmarking and suggest that many organisations are seeking ways to innovate dispute resolution mechanisms. Public agencies such as the LRC should be doing more to promote and facilitate such activities. For instance, alternative dispute resolution in unionised organisations would be an interesting programme for the Advisory Service of the LRA to organise. The basic principle is that public policies should not promote one model of employment relations to the detriment of another, but encourage cross learning and bench-marking between different sub-systems so that better quality dispute resolution takes place across the economy.

Dispute resolution in the public sector

5.1 Introduction

Dispute resolution in the public sector shares many features of private sector arrangements designed to settle grievances. At the same time, the scale and organisational characteristics of the public sector permit it to develop a wider and more comprehensive range of activities than is likely to be found in the private sector, with the exception perhaps of very large companies. The ideal public sector dispute resolution system would contain most, if not all, of the following properties.

- Decentralisation – ability to settle disputes, grievances and complaints at the lowest level possible.
- Speed – disputes should be addressed as quickly as possible.
- Fairness – parties to a dispute must be confident that they will be treated fairly and equitably.
- Comprehensive – a variety of procedures and alternatives must be available to assist in the resolution of a dispute.
- Transparency – employees should be fully aware of the availability of the dispute resolution services.
- Monitoring – the capacity should exist to monitor and evaluate internal developments as well as to keep abreast of external best practice on dispute avoidance.
- Experimentation – capability should exist to promote experimental initiatives and to diffuse positive lessons that improve the overall dispute resolution effort.
- Problem solving and deliberation – deliberation and problem-solving measures should be evident to *prevent* the emergence of employment grievances and disputes.
- Resources – adequate resources should be made available for dispute resolution activities.
- Mediating capacity – in addition to decentralised arrangements to settle disputes the ‘organisational

centre' must have its own capacity to intervene to avoid or settle disputes.

Different national public sector dispute resolution systems possess their own idiosyncrasies, causing the competencies listed above to combine in different ways. At the same time, most tend to gravitate towards a split-level organisational design. Local parts of a national public sector frequently have a degree of autonomy to develop customised dispute resolution services. This is in keeping with the idea that a resolution to an employment dispute should be sought closest to the origins of the problem. These decentralised spheres of dispute resolution normally carry out most of the functions associated with administering the service. For example, they would compile their own lists of internal and external mediators and arbitrators. In addition, they would organise appropriate training sessions and launch new initiatives to improve existing provisions.

To enable and support decentralised arrangements the organisational centre normally carries out a variety of roles. First, it establishes and sustains the core overarching values and principles that guide the operation of the various lower units of dispute resolution. The purpose is to combine a common organisational identity with administrative decentralisation. Second, it develops its own dispute resolution capability so that parties to a dispute have access to a higher level procedure should they be dissatisfied with the first attempts at reaching a settlement. The overall goal is to facilitate the settling of disputes in-house. In addition to this activity, the centre usually has the capacity to bring into play settlement masters. A third function of the organisational centre is a monitoring role. The purpose of this is not only to assess the performance of internal dispute resolution arrangements, but also to examine external developments and assess whether these merit adoption. Basically, this monitoring task strives to continually improve and upgrade dispute settlement procedures and policies.

5.2 The Irish system of public sector dispute resolution

The Irish system of public sector dispute resolution displays some of these best practice properties. The system is usually referred to as the conciliation and arbitration service for the settling of disputes. Modern arrangements in this area have their origin in changes introduced in the 1950s. Each of the main employee groups in the

public sector has its own conciliation and arbitration procedures. For example, teachers, health workers, gardaí, civil servants and local authorities have separate arrangements. However, the Central Conciliation and Arbitration Board, which is housed within the Department of Finance, has responsibility for the overall coordination and control of the system.

The distinctive feature of conciliation and arbitration activities in the Irish public sector is that they are used for both collective bargaining and dispute resolution purposes. Conciliation schemes more or less deal with the full scope of employment relations matters including rates of pay, organisation of working time, 'hiring and firing' rules, terms and conditions of employment. Arbitration tends to deal with a narrower range of matters: whereas pay, holiday and sick entitlements and overtime provision can be discussed, issues relating to recruitment and selection and job grades are excluded. The organisational character of conciliation differs across the public sector. In the civil service, for example, there is a division between a central council that deals with matters relating to pay and conditions of service and departmental councils that concentrate on matters of local interest. In the education field, there is a single central conciliation council. At the conciliation stage, particularly when collective bargaining agreements are at stake, trade unions make every effort to forge a common position.

Although arrangements are decentralised a high level of coherence is evident on both employee and employer sides. Arbitration also varies across occupational groups in the public sector. Usually however, an arbitration panel consists of an independent chair, representatives of managers and employees and a number of independent members who are normally Labour Court members. Every effort is made by these panels to find a resolution to a dispute or grievance without involving external bodies such as the Labour Court. Indeed, only a select group of workers, industrial civil service, education employees (except teachers), health boards, voluntary hospitals, local authority 'servants' and non-commercial state bodies, have been given access to the Labour Court. If any of these workers are involved in a collective dispute, they follow the same practice as private sector workers in that they first go to the LRC to try and reach an amicable settlement. If this proves unsuccessful they may then proceed to the Labour Court, which makes a recommendation that can be accepted or rejected by both

parties. Overall however, there is a strong emphasis on internal dispute resolution and to this end government, management and trade unions tend not to challenge arbitration decisions.

McGinley (1999) neatly reviews attempts over the past twenty years to reform the conciliation and arbitration system, identifying two noteworthy initiatives. The first was the government sponsored Commission on Industrial Relations in 1981. It proposed revisions to the Conciliation and Arbitration Scheme, specifically the establishment of a Labour Tribunal (a type of public sector Labour Court), to replace the various arbitration boards. The aim was to create a more rationalised and uniform service for the settling of disputes and grievances. However, the idea did not progress very far, largely due to the opposition of the main public sector unions. In the early nineties, the Department of Finance made a fresh effort to introduce reform to the conciliation and arbitration apparatus. Its recommendation sought to make public sector employment relations more stable by creating a professional pay setting and arbitration system.

In particular, the Department sought to establish a new pay unit, housed within the LRC to develop more informed and evidence-based wage claims. In addition, it sought to improve the functioning of the conciliation service through the introduction of facilitators to help mediate a settlement to disputes and an adjudication system to deal with minor complaints and grievances. With regard to arbitration, it proposed the establishment of a new three-person centralised tribunal to settle grievances and oversee the process by which trade unions make 'special' cases for pay awards. These proposals failed to get implemented as a package, but they did ensure that reform of the public sector industrial relations machinery became a live issue inside the national social partnership framework. For instance, the 1994 national agreement, *Programme for Competitiveness and Work*, included an appendix whereby all the parties committed to introducing reform into the employment relations in the public sector. Reforms were made to the various conciliation and arbitration schemes in the late nineties. Some of the schemes have been reformed more radically than others and the effectiveness of these reforms has been uneven. For example, in January 2000, the Conciliation and Arbitration Scheme for Teachers was modernised as a result of an agreement between the various unions, school management authorities and the Department of

Education and Science. A battery of state-of-the-art rules and procedures for resolving disputes was introduced, including facilitation, independent arbitration and adjudication. A similar process was agreed and applied to the Revenue Commissioners. In the health service, a review of industrial relations carried out in 2001 led to the creation of a small strategic team, comprising of senior management and trade union officials. This was charged with the responsibility of overseeing the implementation of difficult-to-agree negotiated compromises, identifying potential emerging difficulties and appropriate problem solving remedies.

In addition to these 'top-down' attempts, recent dispute resolution activity in the public sector has seen the development of innovative practices and policies at the decentralised level. For example, in 2001, Dublin City Council introduced The Dignity at Work Programme. The programme is embedded in a mission statement that adopts a strong stance against harassment, sexual harassment and bullying: it reads 'all staff, customers, clients and business contacts of Dublin City Council should be aware that Dublin City Council considers sexual harassment, harassment or bullying to be unacceptable and in breach of organisational policy... all staff will be treated equally and respected for their individuality and diversity.' This statement is backed up by formal and informal procedures to address these practices inside the organisation. A suite of preventive and awareness measures has been introduced, as have new mediation and investigation services. The purpose of this activity is to make available a comprehensive range of facilities to address the matter of bullying and harassment that unfortunately appear to be on the increase in many workplaces.

Although no authoritative assessment has been made of dispute resolution services in the Irish public sector, the consensus is that current arrangements are reasonably efficient at settling individual disputes. Opinion is more divided on the matter of managing collective disputes. One view, advanced mostly by employer organisations, is that irrespective of the creative work done in the realm of individual employment grievances, the public sector is not particularly efficient at resolving collective employment disputes. This view rests on the fact that the 'big' disputes over the past five-ten years have been in the public sector. Employers claim that trade unions cannot be relied upon to follow agreed procedures for the handling of employment disputes set out in codes of conduct,

thereby undermining the credibility of these voluntary commitments. Furthermore, they argue that trade unions frequently flouted the procedures set out in the *Programme for Prosperity and Fairness*, obliging a three weeks 'cooling off' period when a conflict arose on local productivity deals. Employers also claim that trade unions do not comply with the voluntary code on emergency cover in public sector disputes. Consequently, employers suggest that a binding/compulsory arbitration component should be built into public sector collective bargaining as part of the overall dispute resolution system. Trade unions strongly oppose such a move and suggest that the employers' claims are spurious. Whether or not employer claims are accurate, the issue of introducing compulsory arbitration into public sector pay determination keeps lingering around the employment relations agenda and it is thus worthwhile to set out the merits and drawbacks of compulsory arbitration, and some variants to it.

5.3 Compulsory arbitration and the 'narcotic effect'

Compulsory arbitration is the situation where a third-party procedure is automatically introduced into an employment relations dispute should the negotiating parties reach an impasse. Normally, under such a procedure the disputing parties are obliged to present their case to an arbitrator or an arbitration panel, which then makes a ruling or recommendation on the way the dispute can be resolved. In most cases, compulsory arbitration is binding: the parties have to agree with the decision reached by the arbitrator. By and large the employment relations literature is lukewarm about compulsory forms of arbitration. A commonly held view is that such procedures distort collective bargaining behaviour. The supporting argument for this view is that in an adversarial collective bargaining situation the arbitrator or arbitration panel normally uses 'split-the-difference' tactics to settle the employment dispute: a mid-way point is determined between the employer and union positions and this is put forward as the basis of a settlement (Ashenfelter and Bloom, 1984). While this tactic may initially prove effective, it will soon be self-defeating as employers and trade unions can predict the behaviour of the arbitrators and adjust their own behaviour accordingly.

Consider the scenario where compulsory arbitration is built into the negotiation machinery. In this situation, management and

unions will be tempted to adopt extreme positions when entering wage bargaining negotiations. Unions make a claim that is unrealistically high while the initial offer by management is too low. Some movement can be expected in the negotiation process, resulting in the gap narrowing between the union and management positions. Nevertheless, the movement is insufficient to allow for a negotiated settlement. As a result, the pay claim has to go to compulsory arbitration. The movement that has occurred in the negotiation process effectively amounts to each side's arbitration offer (Bazerman et al, 1992). Management and unions adopt these positions as neither wants to appear belligerent in the eyes of the arbitrator or arbitration panel. At the same time, the arbitration offers of management and unions are still above and below the point at which the two sides will settle. The assumption is that arbitration will bring the two parties to that point. The key issue here is that both management and unions have become dependent on the role of arbitration in settling disputes – a 'narcotic effect' has kicked in. Introducing compulsory arbitration into a bargaining situation may have the unintended consequence of undermining 'good faith' bargaining (Butler and Ehrenberg, 1981).

One way of reducing the narcotic effect is to make arbitration outcomes more uncertain. Introducing greater unpredictability into an arbitration arrangement can increase the likelihood of a negotiated settlement at the collective bargaining stage (Farber and Katz, 1979). Both parties become more risk averse and thus more prone to compromise at the early stage of negotiations. This thinking motivated the introduction of final offer arbitration (FOA) into the USA public sector in the 1970s and the UK private sector in the 1980s.⁵ Whereas the norm in conventional arbitration is to seek out a compromise arrangement, the final offer rule obliges the arbitrator or arbitrating panel to choose between the final offers of the parties to a dispute. In essence, the argument for FOA is that such procedures encourage management and unions to be more risk-averse and thus more moderate in the demands they make (Farber, 1980). Both will be more inclined to present initial and arbitration offers that are closer to their (undeclared) acceptable

⁵ In the USA, final offer arbitration was introduced into the public sector as an alternative to allowing government employees a right to strike. In the UK it was introduced as part of the 'new style' employment relations fashionable in the 1980s.

settlement point. Of course, with less distance between initial offers the possibility of a negotiated agreement actually increases. Thus the threat of final offer arbitration encourages management and unions to pursue 'good faith' bargaining. Increasing the potential costs of not agreeing induces management and unions to behave more reasonably (Wood, 1985).

Evidence from the United States suggests that collective bargaining tied to FOA is better at producing negotiated settlements than conventional compulsory arbitration arrangements (Lewin and Peterson, 1988). A study of FOA used by private sector companies in the UK by Metcalf and Milner (1993) reached a similar conclusion. It found that FOA outperformed compulsory arbitration in deterring disputes, particularly when coupled with some form of conciliation or mediation. In addition, it found that union negotiators were more prepared to compromise when FOA was part and parcel of the negotiation process. However, studies also indicate a downside to FOA, namely less equitable solutions to bargaining or negotiation impasses particularly when multiple issues are blocking the path to a settlement (Stevens, 1966). Adopting the 'winner takes all' tactic weakens the ability of the arbitration process to unbundle bargaining positions and develop a suite of proposals to address individual points raised by the disputants. As a result, a genuine and valid grievance may go unsettled under FOA, causing poor workplace relationships to persist. Attempts have been made to move from 'package-based' FOA, the situation where all or nothing outcomes are involved, to 'issue-based' FOA, which gives arbitrators more flexibility in balancing the respective claims of the parties. 'Issue-based' FOA also has a downside as it may encourage union and management to overload the bargaining agenda, making it more difficult to reach a negotiated settlement. Therefore, while the option of compulsory arbitration, or some variant of it, cannot be ruled out, equally it cannot be presented as a ready-made solution to identified problems with Irish public sector bargaining.

A sensible approach has been adopted on this matter in *Sustaining Progress*. This permitted a level of local bargaining so that employers and employees could negotiate a limited top-up to the nationally agreed pay awards and a procedure was created to cover the situation where employers claimed an inability to pay the discretionary award (a similar procedure was introduced for the

public sector), which in a limited set of circumstances permits binding compulsory arbitration.

Overall, it would be premature to move towards a comprehensive binding form of arbitration in the public sector. For the most part, demands for this form of action reflect more than anything else a sense of frustration that after nearly seventeen years of social partnership agreements a relatively high level of adversarialism continues to exist in public sector industrial relations. Managers and employees remain influenced as much by a 'them-and-us' mentality as by an ethos of trust and reciprocity that is supposed to be promulgated by partnership arrangements. Both government in its role as employer and trade unions must share the blame for this. Some trade unions have acted in an excessively sectionalist manner and invariably these groups of workers seek to free ride on the national pay deals by arguing that they require to be treated differently or exceptionally. Government has also played a poor hand. Although highly creative initiatives have been launched to promote problem-solving forms of dispute resolution in the public sector, these have been overshadowed by the inability of government to pursue a well-designed plan of action to challenge adversarial employment relations, particularly adversarial collective bargaining.

Consider the secondary teacher's dispute in 2001, which occurred after the full gambit of modern conflict resolution procedures had been introduced into the Teachers' Conciliation and Arbitration Scheme in the late nineties. These procedures were put to the test during 2001 when the three principal secondary teacher unions and the government, alongside the school management authorities, failed to reach agreement on a variety of matters relating to teachers' pay and working conditions. However, a settlement pathway could not be developed even with the use of these procedures. Opinion differs on the causes of this failure to reach a consensus and it would be inappropriate here to lay blame. It is however fair to say that a considerable amount of mistrust and sectionalism pervaded this dispute, effectively rendering the new dispute resolution procedures ineffective.

Thus well-crafted, state-of-art dispute resolution procedures are likely to be impaired by continued adversarialism and sectionalism in public sector employment relations. Moreover, to try and solve these problems by drawing on some form of dispute resolution mechanism such as compulsory arbitration is a high-risk strategy. A

more promising approach to the creation of more stable and collaborative forms of public sector industrial relations systems would be for the Irish government to refashion and increase its efforts in the realm of *dispute prevention*. In the first instance, such a strategy should focus on introducing the principles of interest-based bargaining or integrative bargaining into public sector pay setting. Integrative bargaining seeks to introduce greater deliberation and problem-solving activity into collective bargaining and reduce the level of adversarialism in the process. As this argument has a huge bearing on the future direction of dispute resolution in the public sector it is developed in some detail in the following sections.

5.4 The theory of interest-based bargaining

Table 9 sets out the main differences between adversarial and interest-based bargaining behaviour. In essence, the difference between adversarial and interest-based bargaining is the same as the distinction between distributive bargaining and integrative bargaining made by Walton and McKersie (1965) and described earlier in this paper. The principles and practices of integrative or interest-based bargaining are unlikely to spontaneously emerge within an organisation. In most cases, it requires a well-thought-out programme implemented and supported over a sustained period of time.

Table 9. Adversarial bargaining versus interest-based bargaining behaviour

Adversarial bargaining	Interest-based bargaining
Establish targets in advance	Assess all stakeholder interests in advance
Overstate opening positions	Convert positional demands from constituents into interests
Mobilise support amongst constituents	Frame issues based on interests
Appoint the key spokespeople	Avoid positional statements
Divide and conquer the other side	Use sub-committees and taskforces for joint data collection and analysis

Give as little as possible for what you get	Generate as many options as possible on each issue
Always keep the other side off balance	Take on the constraints of your counterparts
Never 'bargain against yourself'	Ensure constituents are educated and knowledgeable on the issues
Use coercive forms of power where appropriate	Troubleshoot agreement
An agreement reluctantly accepted is a sign of success	An agreement fully supported by all sides is a sign of success.

Source: Adopted from Cutcher-Gershenfeld, 2003

Ideally, such a programme would organise collective bargaining negotiations into a five-stage process.

- Phase one is the preparation stage at which negotiators obtain a mandate from their respective constituencies and collect evidence in support of their positions.
- Phase two marks the beginning of negotiations: the negotiations agenda is formally framed and discussions on particular topics open.
- Phase three is the exploration stage at which a variety of options are considered to settle the particular items on the negotiation agenda.
- Phase four, at this stage the negotiators focus on particular settlement options and discuss ways of tying together these into a settlement package. It is at this stage that the outline emerges of an overall agreement.
- Phase five is the end stage at which a formal agreement is concluded. This phase may sometimes be difficult as translating the broad principles of an agreement that emerges at phase four into detailed text is by no means straightforward or easy.

Before an organisation launches a programme to introduce integrative bargaining it needs to address the important strategic question of the institutional forum to be used for conducting these

new style negotiation relationships (Cutcher-Gershenfeld, 1994). Does it involve recasting existing collective bargaining arrangements or does it involve creating new institutional structures inside the organisation such as a works council, a social partnership body or some other form of representative agency? If a new arrangement is established then what relationship should it have with existing collective bargaining structures? An organisation would be ill-advised to proceed with an interest-based bargaining programme if it has not properly addressed these matters. Frequently, organisations come up with a solution that involves dividing the bargaining agenda into 'distributive' and 'interest-based' arenas and creating two separate processes ring-fenced from one another. The evidence suggests that the boundary delineating distributive and integrative bargaining is fairly arbitrary (Cutcher-Gershenfeld, 2001), but the usual practice is to allocate pay and other core aspects of employment contracts to the 'distributive' stream and to lodge topics such as family friendly policies and skill formation programmes in the 'integrative' stream.

The opposite track, however, is developed here as it is considered important not to create a big divide between the two approaches. Spillovers from one process to another should be encouraged, as integrative bargaining should have the scope to spread to matters normally considered within the remit of distributive bargaining (Eaton et al, 2003). To allow integrative bargaining reach maturity, organisations must prevent a 'silo' effect from developing between distributive and integrative bargaining. At the same time, charting a pathway from one form of bargaining to another confounds most organisations (Fisher et al, 1991). Undoubtedly, it requires sustained and concerted effort. There is no one best way or universal formula to follow when seeking to promote integrative bargaining. Organisations have to develop their own customised routes, although they should be guided by the core principles behind the approach. However, this paper argues in favour of a greater use of integrative bargaining within the Irish public sector.

5.4.1 Integrative bargaining and pay determination in the Irish public sector

Over the past decade, public sector pay in the Irish Republic has been mainly set at national level by the wage deals concluded through the social partnership agreements. These deals set out the

annual pay increases the public sector workers should receive but usually permit some scope for local bargaining. Public sector workers have fared relatively well under the national wage agreements and, on average, have seen their pay increase by over 60 per cent during this time. In addition to the pay increases awarded under the various national agreements, public sector workers also benefited from the system of 'specials'. This system, which is no longer operational, was essentially a comparability exercise that involved carrying out periodic reviews on pay rates for particular groups of public employees with designated private sector 'equivalents'. If it were found that public sector employees had fallen behind then they would receive 'special' increases.

This system of 'specials' was strongly influenced by British industrial relations practices and procedures of the 1950s (McGinley, 1976), particularly the recommendations of the Priestly Commission (1957) which argued that public sector pay should be based on two types of relativities: (1) external relativities – where public service workers are carrying out functions which are similar to jobs in the private sector, in other words pay comparability between public and private sector workers; (2) internal relativities – where possible analogues should be established between jobs within the public service. These conclusions influenced Irish public sector pay determination (giving rise to the system of comparison that is known as 'specials'), however the Irish government decided not to implement the institutional procedures proposed by the Priestly Commission for the conducting of the comparability exercise. In particular, Britain established a Pay Research Committee to examine pay comparability between private and public sector workers in a comprehensive manner. The Irish government did not follow suit. As a result, the arrangements to determine 'special' awards in Ireland were more *ad hoc* and informal, reflecting the strongly adversarial character of pay determination in the Irish public sector. It also meant that whereas the comparability exercise in Britain tended to be evidence-based the system in Ireland was less so.

The practice of awarding specials continued under the social partnership wage agreements. This left the door open for certain groups of workers to pursue sectionalist pay demands in the context of national pay setting: an incentive remained for these workers to declare that they are an exceptional case and should be treated differently from the mainstream. Moreover, in the absence of

transparent procedures to evaluate the merits of such claims, the temptation has been for these groups to reinforce their demands for special status with militant action. Consequently, the lack of 'deliberative' arrangements to deal with pay claims in a measured, evidence-based way nourishes adversarial behaviour. Little wonder that all the major industrial relations disputes under the present regime of social partnership have involved public sector workers demanding special treatment and thus greater pay.

5.5 The pay benchmarking exercise

The grievances raised by these groups of workers did not lack merit, but the correct mechanisms were not in place to manage public sector pay. In the absence of such procedures it is almost certain that pay distortions will arise in the public sector with government finding itself, sooner or later, in a fire-fighting situation to prevent industrial unrest. Senior government officials are acutely aware of the problem and have launched a number of efforts to recast the mechanisms for the setting of public sector pay beyond the arrangements set out in the national social partnership agreements. The latest, well published, initiative has been the public sector pay benchmarking scheme.

This initiative has its origins in a plan developed in the late eighties by senior government officials to introduce some form of performance related pay into the public sector. A number of consultancy reports were published which not only argued the case for such an arrangement but also developed a series of proposals on how it could be implemented. In contrast to the upbeat approach adopted in these reports, the specialised human resource management literature is far more equivocal about the impact of performance-related pay. Four dangers are usually highlighted.

1. Rewards under performance-related pay may not create a lasting commitment and at best only secure temporary compliance.
2. Performance-related pay is not an 'intrinsic' motivator: too little pay may demotivate but the opposite does not necessarily follow.
3. Performance related pay has a punitive dimension and thus may not be conducive to employee learning and innovation.

4. Performance related pay could destroy cooperation by making people compete for rewards.

These reservations were set to one side and government tabled the topic for negotiation in the talks for the *Programme for Prosperity and Fairness* partnership agreement. Although government officials pushed hard for a commitment to introduce performance related pay in the public sector, they met with strong resistance from the trade unions, particularly the public sector unions. For example, ICTU made it plain that the proposal was a step too far and would cause the union side to walk away from the negotiations for a new national agreement. In the circumstances, the government side had to relent and drop the proposal. After prolonged and difficult discussions it was agreed that rather than introducing a system of performance related pay, a pay benchmarking exercise would be conducted. However, anything but a 'shared understanding' existed amongst the social partners as to the meaning and impact of benchmarking. On the union side, there appeared to be a great deal of cynicism about the purpose of the benchmarking exercise. One infamous remark in 2000 by Joe O'Toole, the then chairperson of the public services committee of ICTU, likened the exercise to an ATM machine to be used by unions to withdraw money. Government officials on the other hand viewed benchmarking as a step towards connecting pay with performance and establishing a more systematic approach to public/private pay comparisons. Despite these contrasting interpretations, the initiative went ahead and a six-person body was set up under the chairmanship of Judge John Quirke. This body reported in the autumn of 2002, producing a thoroughly comprehensive attempt at establishing reasonable and credible comparisons between pay rates for jobs in the public and private sectors with similar level roles, duties and responsibilities. For example, the confidential salary survey conducted by the team covered 3,653 job grades involving 46,351 employees. In this regard, the scale and complexity of the exercise was unprecedented in Irish industrial relations.

Overall, the recommendations contained in the report for particular groups of workers would lead to an aggregate 8.9 per cent increase in the public sector pay bill. In determining the rate of increase for a particular job the body took account of factors such as the scale of the mismatch between existing levels of public sector pay and that of established private sector comparators and the

strategic importance of the job to public sector modernisation. Clearly those groups of public sector workers that fared less well expressed their disappointment with the report, but the overall response from trade unions was mildly positive. Initially the wider response to the report was somewhat muted, but as time went by and economic growth slowed, employers as well as many economists queried whether the government could afford to make the payments.

The body succeeded in establishing a more reliable and coherent set of comparisons between public and private sector jobs than had existed hitherto. It is fair to say that the exercise recast the analogues and comparisons underpinning the 'specials' system, which had become outmoded and no longer adequately matched public and private jobs in a convincing manner. Whether this has challenged the norms around the operation of the specials system is a more open question. Many public service employees had come to consider 'specials' as entitlements. Through creating new relativities, the body hoped that the benchmarking exercise would give rise to a new set of norms, which would create a more direct connection between pay and job performance in the public sector. Whether this shift in norms has occurred is a moot point. The danger is that the benchmarking team may have repeated the mistake of the 1950s by establishing a robust set of pay relativities between public and private jobs without creating on-going procedures, operating rules or institutions to guide public sector pay setting in the future. Establishing a rich body of empirical information about the association between pay and jobs in the public and private sectors at a particular point in time will not automatically lead to new pay norms to guide subsequent wage setting behaviour or expectations. Nor is it guaranteed to produce an informed comparability assessment in the future. A well-functioning public sector pay process requires some type of body with the capacity to collect information and listen to evidence to judge whether a particular wage claim has justification. In other words, the process must have the ability to act in a deliberative manner. Regrettably the benchmarking report is relatively quiet on this matter. This creates the danger that all parties will consider it to be 'business as usual', resulting in the dispersion of the pay increases awarded by the benchmarking team without any change to the prevailing 'adversarial' attitudes towards public sector wage

setting. This would be a highly unsatisfactory outcome, as it fails to address the need for a more durable and sustainable pay comparability system that has the confidence of the trade unions and the government.

A prime opportunity to introduce integrative bargaining into the Irish public sector has been lost. One way forward may lie in modifying and customising the pay review bodies used in Britain. These bodies use deliberative, problem-solving and evidence-based techniques to propose levels of pay increases as well as reforms to working conditions for particular groups of public sector workers. By continually monitoring pay and evaluating employment conditions for different segments of the public sector worker force, it is believed that wage claims are more likely to be settled in a reasonable and fair manner without recourse to industrial action. The section below describes the operation of these procedures for physiotherapists employed in the UK health service.

5.5.1 Pay review bodies: the role of fact-finding and deliberation in pay setting

Pay review bodies have played an influential role in the setting of public sector wages during the past twenty years in Britain. They are independent bodies, normally consisting of about eight people appointed by government, drawn from the public and private sectors. They have the remit to recommend annual increases to pay and changes to related conditions of service. They use a number of guidelines to help shape recommendations, which include trends in recruitment and selection, motivation and morale, the state of the economy and living standards. The actual work of the review body is best described as a combination of arbitration and deliberation. This is clear when one considers the case of the wage settlement reached in 2002 for physiotherapists and allied professions.

The review body recommended that physiotherapists receive a 3.6 per cent pay increase as well as a range of other benefits, including a 50 per cent increase to on-call and standby allowances. It reached its decision after nine months of activity during which it at first met with representatives of employers and union/professional associations to learn of the issues that were of most concern to them. In addition, the members made a number of 'site' visits to hospitals and community health programmes to discuss matters with managers and employees on the ground and to build

a more complete picture of the issues that they ought to be addressing. Subsequent to this preliminary activity, the review body commissioned research on particular issues including research into the impact of emergency duty on physiotherapists and radiographers and the reasons why physiotherapists join and leave the National Health Service. The next stage in the process was to conduct an 'evidence round', which involved all interested parties making written submissions on what they regarded as the key matters to be addressed by the review team. After the review body read the 'evidence', it organised a number of 'bi-lateral' sessions with the interested parties at which the various groups made an oral presentation to reinforce their main message. The sessions provided an opportunity to gain clarification on matters contained in written submissions. The 'evidence' round took about three months to complete. The body then deliberated on the information and research it had gathered and made its recommendations to the government. Employees, managers and government accepted the recommendations made for the physiotherapists.

The pay review process in this example clearly contains elements of deliberation and arbitration. There is a strong emphasis on informed evidence-based discussion and decision-making. Priority is given to setting an agenda that reflects the concerns and priorities of both employees and employers. Substantial effort is made to obtain the best possible data and information. No assumption is made that the different parties will always agree or easily move from their defined positions by simple appeals for cooperation. Differences of views are expected and the review body regards arbitrating between competing positions as an important part of their function. This approach places the review body in a better position to arbitrate an agreed resolution. In essence the pay review body attempts to move beyond the adversarial approach to pay and working conditions negotiations. It is also designed to prevent discontent building up on some aspects of working conditions by continuously reviewing the character of employer-employee interactions.

Whether these goals have been fully achieved in Britain is open to debate. Nevertheless the procedural mechanisms associated with pay reviews warrant close investigation. No suggestion is being made that pay review bodies should be diffused in mechanical fashion into Irish public sector employment relations but it is

suggested that the principles of deliberation and problem solving should be more used in the pay-setting process. Potentially, the social partnership arrangements could be used to push pay setting in this direction. Unfortunately however, to-date partnership has been promoted in a manner that effectively ring-fences it from any form of bargaining whether it is of a distributive or integrative kind.

5.6 Social partnership and integrative bargaining

The push to diffuse social partnership inside public and private sector organisations started in the wake of *Partnership 2000*, the national agreement signed by the social partners in 1996 (O'Donnell and Teague, 2001). This agreement saw a role for social partnership in promoting public sector change and set down six principles to guide such arrangements across the non-market sector, namely:

1. quality in the delivery of services
2. effective performance management at all levels
3. flexibility in the deployment of resources
4. training and development
5. the effective use of IT
6. an open participative approach to decision-making (Government of Ireland, 1996: 69).

The clear intention was for partnership to become a vehicle to enhance public sector performance. Since the late 1990s, there has been a considerable level of activity associated with the creation of partnership structures inside the public sector. In the civil service, for example, a three tier organisational system has emerged to enact the relevant clauses of the social partnership agreements. At the centre level, there is an overarching partnership structure to guide and monitor partnership-led activity in the sector. At the intermediate level, each government department has a partnership management committee to customise the implementation of nationally or centrally agreed policies and initiatives. At the ground level, each division or even work section has its own partnership committee to agree a programme of action for the immediate working environment. In this way, the partnership structure inside the public sector can be seen to possess both top-down and bottom-up dimensions. Partnership activity became closely tied to the wider project of public sector modernisation. The consensus view appears to be that while progress has been made in creating partnership

structures, these have yet to reach their full potential in terms of upgrading the operating performance of the public sector. A recent report evaluating the functioning of partnership committees in the civil service reached a number of conclusions:

- Partnership committees and processes have yet to create a distinctive identity and as a result, a lack of clarity exists amongst employees about the purpose and objectives of these arrangements.
- Differing views exist about the effectiveness of partnership arrangements. On the one hand, senior managers and trade unions were of the view that most partnership committees successfully completed the tasks they set for themselves. On the other hand, less senior managers and employees considered partnership processes to be slow and cumbersome.
- Differing views existed amongst union and management about how partnership arrangements should evolve, the institutional configuration these should take and the relationships that these should have with established collective bargaining procedures.

The overall impression is that while advances have been made the partnership process has yet to reach its full potential. The implications of this for bargaining processes and behaviour are twofold. The partnership channel inside the public sector has not been used in any systematic way to advance integrative bargaining processes. Interesting projects have developed here and there but no concerted or coherent initiative has emerged from the partnership arrangements. Secondly, traditional collective bargaining attitudes, behaviour and processes have remained relatively untouched by partnership principles. As a result, most trade union officials and representatives as well as managers at all levels remain unfamiliar with the main assumptions behind integrative bargaining. For example, recent public commentary about the merits or otherwise of the benchmarking exercise displayed little understanding of deliberation or interest-based negotiations. Use of the partnership framework to reorient public sector collective bargaining remains underdeveloped.

One possible response is that the partnership arrangements were designed to remain at a distance from employment relations matters

so that these bodies could focus on themes connected to public sector modernisation. At the level of espoused policy this is clearly true, but when it comes to actual policy a question mark hangs over the extent to which government has been able to place partnership at the centre of its drive to modernise and upgrade public sector activity. Instead, a range of different avenues has been used to improve the performance of the public sector. For example, as much emphasis has been placed on developing a new HRM framework in the public sector as on promoting social partnership. The result has been much uncertainty and confusion about the exact role for partnership in the public sector. In a sense these arrangements have ended up in a no-man's land, neither properly connected to collective bargaining nor to the activities of the HRM functions.

Yet partnership structures remain the most realistic channel to promote interest-based bargaining as both share a similar commitment to problem-solving and collaborative forms of employee-management interactions that could be used to deepen dispute prevention. These arrangements are squeezed by the continuation of a 'them and us' collective bargaining mentality on the one hand and an attempt to recast the HRM function on the other. Major change will have to be made if partnership is going to survive as a viable organisational structure. Roche (2002) concisely captures the need for renewal when calling for a second generation of partnership. The argument here is that the promotion of integrative bargaining should be the mainstay of this second generation period. To kick-start this new phase, an agreed list of integrative bargaining matters should be developed between the social partners to place the ideas of reciprocity and mutual gains at the centre of manager-employee interactions in the public sector. Concerted and well-supported action on this topic is probably the best available option to effect change in the adversarial attitudes and behaviour that still influence too much public sector employment relations.

The situation is far from bleak as the first 'green shoots' of new thinking are emerging along the lines set out above, as demonstrated by the adoption of a new *Action Plan for People Management* within the health service. The plan seeks to integrate industrial relations, partnership and HRM for the management of the employment relationship across the health service sector. It has seven key objectives:

- to manage people effectively
- quality of working life
- best practice policies and procedures
- improve industrial relations
- invest in education, training and development
- promote partnership
- performance management.

The substance of the policies and practices that will be pursued under each heading remains unclear. Nevertheless, this initiative is to be welcomed as it represents at least tacit recognition that the approaches adopted so far to link partnership and public sector modernisation have not been very well planned. It is to be hoped that it foreshadows a more integrated and joined-up approach for the future.

5.7 Conclusions

Over the past decade, perhaps even longer, most of the world's richer countries have launched a wide number of public sector reform programmes. The actual content and character of these programmes differ across countries, but all seek to promote public sector modernisation. On the one hand, governments are anxious that the economic and social functions of the state, which grew continually in the second part of the twentieth century, have become over-extended. On the other hand, they are concerned that the quality of public services needs improving. A frequent complaint is that large, impersonal and inefficient bureaucracies are providing sub-standard services to the public. Citizens, so the argument goes, often have an alienating and dispiriting experience of public sector 'goods'. As a result, delivering better quality services has become a key political priority almost everywhere. This then is the organisational context for almost any discussion about the role and functioning of public sector activity in rich economies in the twenty-first century.

Successive Irish governments have opened up a variety of pathways to advance public sector reform and modernisation. One such route has been the use of traditional collective bargaining to secure changes to work practices and tasks. Another was the launch of the Strategic Management Initiative (an initiative which sought to recast managerial processes and decision-making in the public

sector). A third avenue was the development of social partnership structures. The different strategies emerging from these various pathways have impinged on dispute resolution in different ways.

The result is a curious blend of progressive policy-making and missed opportunity. On the one hand, state-of-the-art dispute resolution innovations were introduced into the Irish public sector. For example, considerable effort was made in the late nineties to upgrade the conciliation and arbitration procedures in various parts of the public sector. On the other hand, opportunities to implement more problem-solving forms of employment dispute resolution were missed. For example, a yawning gap in the pay benchmarking report was the lack of explicit procedures that could be used to ensure that meaningful productivity improvements would accompany awards given to particular groups of public sector workers. No procedures were proposed for the conducting of pay comparability exercises in the future. The chance was lost to instil problem-solving and deliberative methods of engagement between employees and management on the key matter of pay and conditions. As a result, the public sector dispute resolution system can neither be described as fully open nor closed to innovation. It is a hybrid arrangement consisting of old and new policies sitting check-by-jowl.

The organisational overlaps, ambiguities and even inconsistencies arising from this situation have not been calamitous. After all, the level of employment disputes and conflict inside the public sector has fallen under the current social partnership regime. Yet, more progress could have been made to establish orderly employment relations in the sector. Public sector disputes now account for virtually all of the high profile employment disputes in Ireland. Moreover, despite concerted efforts to develop an organisational framework for the conduct of social partnership practices inside the public sector, mistrust and misunderstanding still appear to pervade managerial-employee interactions. One response to the continuing 'them and us' mentality has been to demand the introduction of more formal procedures and penalties to sanction behaviour that represents a deviation from the terms and conditions of national social agreements or collectively agreed procedures. Employer organisations complain that public sector trade unions sometimes do not adhere to LRC Codes of Practice. To curb such behaviour, they would like to see a form of compulsory arbitration introduced into public sector employment relations. A move in this

direction can be discerned in the latest social agreement, *Sustaining Progress*.

The analysis of this chapter is lukewarm on this move. It suggested that binding forms of arbitration have limits as a procedure to discipline wayward or opportunistic behaviour. Such mechanisms are often only concerned with the symptoms of a breakdown in orderly employment relations and rarely touch upon underlying causes. In other words, to improve public sector dispute resolution it may be necessary to adopt an approach that focuses more on changing the main attitudes and behaviour driving employment relations in the sector rather than on narrow settlement instruments such as mediation, arbitration and so on. Accordingly, the chapter proposes that a concerted attempt be made to promote cooperative forms of employment relations activity in the Irish public sector. In particular, a programme should be launched to diffuse what is termed integrative bargaining. An important consequence of this innovation would be the end of the divide between established forms of collective bargaining, social partnership activity and human resource management initiatives. Partnership arrangements would become the central plank for introducing innovations into the governance of the employment relationship in the Irish public sector.

To establish mutuality and reciprocity as the organising principles of public sector employment relations, government has to end the confusion about the exact status of the partnership arrangements in this part of the economy. This is not going to happen simply as a result of senior managers proclaiming that partnership is the vehicle to be used to deliver better quality service and improved performance. Public sector employees are not likely to dance to this single beat; rather they are more likely to treat partnership as a weasel word used by management to extract one-sided productivity concessions. Accordingly, more emphasis must be given to the matter of fairness when proclaiming the benefits of partnership. Partnership is not the same as cooperation and all too frequently these two words are conflated. A greater effort must be made to give partnership an organisational identity so that managers and employees see that it involves not only respecting the views of the 'other side' but also a commitment to problem-solving processes that seek to address each other's concerns. In practice, this means that more needs to be done to make partnership

arrangements the main driver behind HRM activities rather than the other way round. Partnership must become a genuine focal point for the promotion of decent work and the delivery of high-quality services. If that goal is achieved then a long way would have been travelled to end adversarialism in Irish employment relations and the prevention and resolution of disputes would be placed on much firmer foundations.

Towards the dispute resolution system of the future

6.1 Introduction: dispute resolution, the need for a public role

Efficient dispute resolution is closely linked to the performance of the wider employment relations system. Conflict is less likely to arise in employment relations systems that: (1) resolve bargaining problems associated with accommodating the competing claims made on organisations and indeed the economy as a whole; (2) ensure incentives are in line with the preferences and expectations of economic and social agents; and (3) create high quality information channels so that different interests have full knowledge of each other's thinking and concerns. Labour markets that exhibit these qualities are more likely to enjoy employment relations stability as well as a lower propensity to generate conflicts either of a collective or individual nature. In a nutshell, efficient workplace dispute resolution is, in part, a derivative of a wider consensus-orientated employment relations system.

At the same time, it must be recognised that dispute resolution is a difficult task. Three broad categories of barriers stand in the way of successful dispute resolution.

- (i) Tactical and strategic barriers: this refers to how individuals, in their efforts to maximise their short-term or long-term interests, may behave in a manner that is disadvantageous either for themselves or for all relevant parties.
- (ii) Psychological barriers: these arise not only from the human emotions that occur in conflict situations, but also from the contrasting and idiosyncratic ways individuals interpret information and evaluate risk when involved in a dispute settlement process. From this perspective, disputes and their resolution are intensively social interactive processes and not some instrumental bargaining game.

- (iii) Institutional and organisational procedures may shape behaviour or tie individuals to particular positions in a manner that is not conducive to dispute resolution. Of course, these are not stand-alone categories operating in isolation from one another. Frequently, they interact to multiply each other's effects and to blur the causes of the blockages that are holding up an agreement.

This is a hefty catalogue of potential barriers to successful dispute resolution, challenging the capacity of disputing parties to settle a dispute by themselves. Such a stance is to court all sorts of inequities: the imposition of a settlement by one party on another, resulting in their being a clear winner and loser from a dispute; the presence of on-going conflicts characterised by embittered relations between the protagonists. In other words, although conflict at work is inevitable, dispute resolution that satisfies the interests and aspirations of the participants is not. Invariably the economic, social and human costs of inefficient dispute resolution processes are high. This is the key justification for having public policy arrangements for the settlement of employment disputes and grievances as opposed to an absolute replica of the 'American' model of alternative dispute resolution. The latter system more or less gives employers a free hand to settle disputes internally within organisations. Whether such arrangements that give employers monopoly status to effectively fix the boundaries and operating rules of dispute resolution are ethical in terms of meeting employee demands for distributive or procedural justice is a matter of on-going debate.

A dispute resolution system with a strong public dimension is more likely to embed a series of values, rules and procedures that facilitate fair and speedy settlements to grievances and conflicts. Consider the issue of 'reactive devaluation of compromises and concessions' (Mnookin and Ross, 1995). Experimental research carried out under both real life and simulated conditions shows that a potential compromise to a dispute is received more receptively when proposed by a third-party intermediary than when proposed by the 'other side'. This is simply because parties to a dispute are likely to be distrustful of one another and are more willing to accept the assessment of an external 'neutral' agency or mediator. While a strong, some would say overwhelming, case can be made for a range of public rules and procedures to help settle employment disputes, the mere presence of public dispute resolution institutions does not lead to a

low-conflict employment relations system (Kolb, 1987). Or to put the matter slightly differently, because of their institutional character some dispute resolution systems are more successful than others in terms of enjoying a high degree of legitimacy amongst employment relations actors, being able to expedite cases and overseeing settlements that all disputants consider to be fair. Clearly, successful dispute resolution is to some extent tied to the question of institutional design. Good institutional design allows dispute resolution systems to capture the prized triptych of legitimacy, efficiency and equity.

6.2 The weakening of voluntarism

Many ingredients are involved in making dispute resolution institutions successful, but a key property is that these arrangements connect with the main patterns of economic and social life and have the capacity to move in line with unfolding transformations. Without these qualities, a governance gap may emerge inside dispute resolution processes – an asymmetry opens up between the assumptions, activities and programmes of those charged with settling disputes and the dynamics of organisations as well as the preferences of employees. The point of departure of this paper was that mismatches are emerging between established employment relations institutions and the wide-ranging and on-going changes occurring to the Irish economy and society. The mismatch is now so evident that the characterisation and functioning of many of these established institutions are being called into question.

Consider the depiction of the Irish system of employment relations as voluntarist. Over the years this description has been used to highlight the commonly accepted understanding that employers and unions much preferred their chance in a free collective bargaining tussle rather than allow government regulate employment relations through legal procedures and rules (Hardiman, 1988). Voluntarism has been a synonym for an employment relations system that is relatively free from legal and government interference. Yet this is hardly an accurate depiction of contemporary employment relations in Ireland given the significant growth in employment legislation. During the past decade, there have been thirteen separate pieces of labour law. Virtually no aspect of the employment relationship is completely free from regulation. In these circumstances, it is simply not credible to talk about Irish employment relations as being voluntarist.

The on-going encroachment of regulation into Irish employment relations has occurred at the same time as a reduction in the level of collective employment relations activity. The past decade has seen an almost continuous decline in collective bargaining inside private sector organisations largely arising from the increased numbers of 'non-union' multinational companies, together with the growth of hard-to-organise small firms. The decline in Ireland is nowhere near as dramatic as the USA where collective bargaining has more or less disappeared from the private sector. Moreover, collective employment relations continues to be an important employment relations practice, particularly in the public sector where it remains the dominant mechanism. Nevertheless, trade unions and collective employment relations have lost some of their capacity to operate as the guarantors of economic citizenship. However unpalatable it may be, this development cannot be ignored (Piore, 1991).

To argue that trade unions continue to have the coverage and strength to oblige employers to comply with economy-wide rules and norms for terms and conditions of employment is little more than a blind defence of an established social institution. The consequence of the greater use of regulation in the labour market alongside a relative decline in collective employment relations has been a shift away from a purely bargaining-based employment relations system towards a right-based system. One expression of this shift is that as trade union density declines, the numbers using the public agencies charged with settling disputes have grown. This suggests that as collective mechanisms typically used to govern the employment relationship lose some of their functionality so the demand for better processes and procedures to protect individual employment rights increases. The indications suggest that a wave of institutional modernisation is needed to ensure that in this time of economic and social transformation the employment relationship remains properly governed. If modernisation does not take place then almost certainly an optimal balance will not be obtained between labour market efficiency and equity. This observation is as true for dispute resolution as it is for any other aspect of employment relations.

6.3 New challenges for dispute resolution

The current social and economic transformations impact on dispute resolution systems in a number of ways. Consider the increase in individual employment rights. In response to changing labour

market patterns, the government introduced quite detailed legal rules on the terms and conditions of employment for certain categories of workers such as women and part-time workers. One does not have to be a supporter of labour market flexibility to recognise that many organisations are finding this new system of substantive regulation quite cumbersome. New burdens are being placed on business. Organisations feel challenged to maintain competitiveness and at the same time meet the standards and administrative obligations set by the new employment rules. Some organisations, particularly small firms, begin to lag behind and as a result, operate internal employment systems that are not necessarily in keeping with the requirements of labour market regulation. The result is an increase in claims of alleged breaches of employment rights by workers. This suggests that the shift towards a rights-based employment relations system may not only impair enterprise performance but also cause dispute resolution agencies to experience institutional overload. All in all, these changes present a number of challenges for dispute resolution mechanisms within Ireland.

6.3.1 Resolving the tension between organisational and public and legal dispute resolution mechanisms

Increased interest in alternative dispute resolution procedures is at least in part connected to the developments outlined in the previous section. Organisations are keen to develop procedures that commit employees to internal methods of dispute regulation. However, such employer-promulgated arrangements run the risk of compromising distributive and procedural justice. Consider the issue of procedural justice. The three key components to this concept are – neutrality, trust and reputation. Employer-driven dispute resolution systems may not win the confidence of employees if they are seen to be imbalanced in a manner that is likely to benefit the employer. Chapter 2 argued against the diffusion of an ‘American’ system of alternative dispute resolution, which sees employees overly tied to organisational dispute resolution. A system that simultaneously encouraged the resolution of disputes nearest to the point of their origin and maintained employee access to a wider public and legal dispute resolution mechanism was considered preferable. This is the first challenge with regard to dispute resolution that should be addressed both at organisational and the wider public level in Ireland.

6.3.2 Linking non-judicial and legalistic methods for the resolution of disputes

The second challenge is to attempt to 'couple' non-judicial and legalistic methods for the resolution of disputes. This approach has already been adopted with the development of a mediation alternative to the more legalistic investigation procedures used to address claims of discriminatory behaviour. Good grounds exist to argue that this policy needs to become mainstream practice. In forthcoming years, the Irish government is obliged to modernise and up-date most of the EU employment legislation that it has on the statute book. Building-in a non-legalistic alternative to the law when revising these statutes may help ease the regulatory burden experienced now by many businesses when complying with statutory employment rights. In developing this policy option Ireland could benefit from examining pioneering initiatives launched in the UK.

Consider the following example. In the context of revising the EU Directive on the Transfer of Undertakings, the British government encouraged the Local Government Association, the Employers' Organisation for Local Government, the TUC and CBI to devise an alternative dispute resolution procedure to handle complaints that may arise when a local authority transfers staff to an external provider as part of a contract to provide a local public service. The procedure created is set out in Appendix 3.

The exact content of the agreement is of secondary importance to this analysis. The main point is that the various clauses provide a standardised yet non-legalistic approach to the contracting out of services from the public to the private sector. Although the law on the Transfer of Understandings is not in any way compromised, both employers and employees have, for the first time, recourse to a quick and fair procedure to deal with any problems that may arise in this commercial situation. The aim behind the agreement is to ensure that employees involved in the process receive fair treatment, while money, time and expense are saved when dealing with disputes that may arise from procurement decisions. An important feature of the above agreement is how the traditional social partners linked up with the representative body for the sector to negotiate a procedure. This is the third challenge for public policy in the area of dispute resolution.

6.3.3 Linking all relevant parties within dispute resolution

Public institutions such as the LRC and Equality Tribunal, which have a responsibility for handling employment-related grievances, need to connect with a variety of corporate and labour market intermediary bodies to develop new conflict resolution arrangements for relevant sectors of the economy and areas of the workforce. Although external to any individual firm, these arrangements, because of their close proximity, are more likely to enjoy the confidence and trust of both managers and employees in relevant organisations. Conflict resolution procedures of this kind would be beneficial for large numbers of small firms that have problems keeping abreast of the requirements of employment regulations and may be more likely to fall foul of the law.

6.3.4 Promoting cross learning between union and non-union forms of dispute resolution

The fourth challenge is to promote cross learning between union and non-union forms of dispute resolution, or least best practice non-union forms of dispute resolution. Established 'collective' methods of handling grievances are not sufficiently fine-tuned to address some of the new problems arising in areas such as bullying, diversity and stress. Employees appear to be seeking more individual and packaged programmes to handle these disputes. This suggests that union-dominated grievances procedures may learn from some of the practices that have emerged in the non-union sector. This is not an argument for the collapse of collective forms of dispute resolution, but more a recognition that trade unions need to be open to innovation so that they remain relevant and connected to the interests of their members. To some extent, this type of cross-fertilisation of ideas is going on. For example, as explained in chapter 2, one non-union practice is for an organisation to install a mini call-centre which employees can use to obtain information about their rights, company benefit packages and grievance procedures. There is no good reason why such a service could not be used in a unionised environment. It is instructive that the British TUC has learnt from this practice and established a call centre that union members can access for advice on the best way to seek redress to an alleged infringement of employment rights.

Within Ireland some level of informal learning appears to be happening between human resource managers in union and non-

union companies. These managers are in regular discussions to share ideas and experiences and to seek advice on how to introduce successful new reforms. This activity, which is a form of loose benchmarking, is mainly designed to upgrade the procedures used to manage people. Too much should not be made of this activity as it is not widespread. Moreover, it is important to keep a touch of realism when discussing the relationship between union and non-union firms. A deep rivalry will continue between these different ways of designing the people management function inside organisations. This should be expected and not seen as deviant behaviour. But there is sufficient room for cross-organisational learning. Government should not get enmeshed in the trade union recognition argument. Instead, the focus should be on promoting cross-fertilisation schemes because the chief purpose of public policy must be to design new dispute resolution schemes that will benefit both organisations and employees.

6.3.5 Eliminating the divide between dispute resolution and dispute prevention

The fifth challenge is to remove the artificial divide between dispute resolution and dispute prevention that seems to prevail under existing arrangements. The industrial relations environment in the Republic of Ireland has been relatively good over the past number of years. Yet the incidence of adversarial relationships between management and unions remains uncomfortably high. These relationships are probably most evident in particular parts of the public sector. This paper argues that behaviour of this kind must be addressed, as it is a barrier to modern forms of work organisation such as team working and other cooperative types of management-employee relationships. One argument is that adversarialism should be addressed by stronger dispute resolution mechanisms such as compulsory forms of arbitration. Chapter 4 found this argument to be unpersuasive. Instead, it was suggested that more emphasis should be placed on developing and expanding dispute prevention activity in the public sector, particularly by organising a programme of integrative bargaining. The partnership framework was considered the most appropriate framework for the delivery of this programme.

These five challenges are considered to be amongst the important agenda items facing the Irish dispute resolution system. However, this paper also considers the system to be well placed to

address these challenges. It has many attractive features. Firstly, the evidence suggests that government is deeply committed to the principle of providing a dispute resolution service that addresses workplace grievances in a fair and efficient manner. Moreover, the employees working in the public dispute resolution agencies were found to be highly efficient and professional. A further positive feature is the presence of multiple institutional channels that can be explored to help an aggrieved employee to seek redress to an employment grievance. Finally, the evidence suggests that each public agency operating in this area has considerable internal flexibility, allowing it to adapt its working methods to new circumstances and launch experimental action where appropriate. Perhaps the only main drawback of current arrangements is that the social partnership framework is not connected in an integral manner with the area of dispute resolution and even dispute avoidance. It is perhaps too heavily focused on the regulation of wages at the national level and competitive performance at the organisational level. Bringing partnership arrangements into the picture would help enormously to create a flexible system of dispute resolution.

6.4 Social partnership and the delivery of a flexible system of dispute resolution

Over the past two decades, successive governments have developed a social partnership approach to labour market and wider economic governance (O'Donnell and Thomas, 1998). A great deal has been written about the Irish model of social partnership, much of which is either overly supportive or overly critical. This is not the place to rehearse these positions, but it is probably safe to say that the actual impact of social partnership lies somewhere between two extremes. When the first social partnership agreement was signed in 1987 the main motivation driving it was: a) to reduce the employment relations instability that was a feature of the Irish economy in the early-mid eighties; and b) to incorporate employers and unions into a broad coalition to address the country's dire economic problems. Since those early days, social partnership has evolved at both the national and enterprise level although it is fair to say that the former is more advanced than the latter.

At the national level, the social partnership framework has undoubtedly played a key role in the country's spectacular

economic and employment performance during the past decade. It has also positively contributed to a more stable and orderly employment relations environment, particularly in the private sector. The peak organisations of business and workers, IBEC and ICTU, appear to interact with one another in new ways. In particular, both organisations appear disposed to developing common policy positions not simply through a process of hard bargaining but also through problem-solving interactions that aim to devise solutions identified through a process of analysis and dialogue. These deliberative exchanges have brought considerable benefits. Firstly, they have revealed more information about the strengths and weaknesses of existing methods and procedures designed to organise the labour market. Secondly, improved quality of decision-making has occurred on particular policy matters (for example, pensions provision). In a nutshell, this has allowed shared understandings to emerge between business and labour about the economic threats and opportunities facing modern Ireland.

At the enterprise level, the main thrust behind the diffusion of partnership has been to promote a greater degree of mutuality in employee-management interactions. No blueprint or design plan has driven this activity. Instead, it has evolved in a highly pragmatic manner, influenced as much as anything by a desire to build consensus-making procedures inside the employment relations system. The vision promoted of enterprise partnership saw managers and workers sharing more information with each other, creating project teams to bring improvements to the organisation and its working environment, listening more intently to each other's concerns and working to strengthen informal processes that would allow them to cooperate more closely together (Greenhaugh and Chapman, 1995). Enterprise partnership was seen as much about developing an ethos of problem solving amongst managers and employees as building new institutional procedures inside organisations (O'Donnell and Teague, 2001).

No systematic evidence exists about the scale of the diffusion of enterprise partnerships and what they actually do. The available research suggests that enterprise partnerships normally arise in the private sector when an organisation is

- facing an imminent threat of closure
- launching a corporate restructuring programme and thus eager to gain the support of the workforce

- seeking to leave behind a period of poor employment relations
- and/or influenced by the leadership of a dedicated group of people, normally a coalition of trade union officers and managers, who carry sway inside the organisation.

In the public sector, social partnership principles have been diffused to help advance the modernisation of government services. Many arrangements have been established at a variety of levels in the public sector, but in an uneven manner. Departmental partnership committees in some instances are still searching for a *modus operandi*. Some of the factors causing this fragmented picture were explored in the previous chapter. Overall, the consensus is that the principles of social partnership have been more effective at the national level than at the enterprise level. There is a growing feeling that enterprise partnerships are losing their way both in the public and private sectors.

Yet the social partnership structures that have been established could be harnessed to meet the challenge of creating an up-to-date flexible system of dispute resolution. Consider the idea of creating a responsive regime of labour law regulation that would encourage dispute resolution inside organisations yet still permit employees to use public agencies to seek redress to an alleged infringement of an employment right. Responsive regulation promotes the private enforcement of public employment law. Conditional deregulation of this kind runs the danger of employers creating organisational-level dispute regulations systems that are rigged in their favour. To reduce this possibility employees should be closely involved in the design, delivery and monitoring of such systems, and so employee involvement or participation is a crucial element to a responsive regulation regime of dispute resolution. Enterprise partnerships are well positioned to perform this role and can act as the verifier that any new dispute resolution arrangement has the support of the workforce and is being implemented in a fair and efficient manner. Where the system is not performing properly then the enterprise partnership, or at least the employee representatives on this body, can act as whistleblowers. Enterprise partnership can become the fulcrum of a system that encourages the resolution of disputes through alternative and innovative methods, but ensures that such arrangements are not overly biased in favour of employers.

A feature of the Irish social partnership framework is the presence of a range of organisations charged with promoting these arrangements. For example, the National Centre for Partnership and Performance (NCPP) exists to promote the idea of partnership at all levels within the Irish economy. In addition, a number of training organisations have been jointly established by IBEC and ICTU to provide managers and employees with the skills to set-up and operate partnerships arrangements. These bodies could do more to promote pro-active forms of dispute resolution. For example, the NCPP could link more with the Equality Tribunal or the Labour Relations Commission to design initiatives whereby enterprise partnership arrangements could play a role in in-house dispute resolution arrangements. Invariably this type of activity would require these enabling bodies to think creatively about new and experimental forms of dispute resolution which would oblige a closer assessment of the mechanisms used to handle workplace grievances in the non-union sector. This paper clearly sees organisations such as NCPP having a leading role to play in the promotion of learning between the union and non-union sectors on disputes resolution.

A criticism of the development of social partnership in the public sector made in chapter 4 was that it was not strongly enough tied either to the collective bargaining system or the HRM function and was caught in no man's land between the two. This paper argues that partnership arrangements are likely to remain stunted in this situation as management and unions remain confused about what partnership arrangements are meant to do. Clarion calls for the use of enterprise partnerships to deliver better performance in the public service are unlikely to reverse this situation. Partnership can only positively contribute to the upgrading of organisational performance in the public sector if it is properly integrated into the collective bargaining and human resource management systems. To have a system where managers insist that developing partnership cannot intrude into their right to manage, where unions insist that partnership must be kept at arms length from collective bargaining activity, and yet partnership is given a mandate to bring about improved organisational performance, is a recipe for either deadlock or for weak partnership arrangements.

Partnership will only assist in the endeavour to modernise public services if it gives rise to meaningful joint manager/

employee initiatives, or problem-solving processes that reduce barriers to improved performance. This means intruding on the way collective bargaining is conducted and the methods managers use to make decisions. Connecting partnership with collective bargaining would open the door for a concerted initiative on integrative bargaining. Integrative bargaining is an attempt to weaken adversarial behaviour that is often associated with distributive bargaining. It also helps to dissolve the artificial barrier between dispute resolution and dispute prevention. Using partnership arrangements in the public sector as a vehicle to promote an alternative system of collective bargaining behaviour would not only help address the identified problem of adversarialism but would also help breathe new life into structures that are widely perceived to be flagging. The overall message is that a wider view must be taken of dispute resolution and partnership is an integral part of the picture.

6.5 Conclusion

The central thesis of this paper is that the old social contract at work and its associated institutions that promoted long-term job tenure and financial security is under threat from a variety of economic and social pressures. A new social contract is being forged that offers employees careers and employment rights that reflect their needs, aspirations and interests, but it has not yet reached maturity. Accordingly, we are in a period of institutional transition from one type of labour market governance regime to another. In this new environment, many features of established employment relations systems will require renewal, if not indeed a complete overhaul. Existing arrangements for the resolution of employment disputes and conflicts will be no exception to this broader trend. The purpose of this paper has been to map out some of the challenges that the Irish dispute resolution system will have to address and to develop some ideas about the character of the reforms that need to be made. These ideas should not be read as a blueprint but as an attempt to promote a debate about the shape of dispute resolution in the workplace of the future. The thrust of the paper's proposals revolve around the necessity of building a flexible dispute resolution system that embodies the principles of public regulation, decentralisation and individualisation.

Appendix 1

Code of Practice: Grievance and Disciplinary Procedures

1. Introduction

Section 42 of the Industrial Relations Act, 1990 provides for the preparation of draft Codes of Practice by the Labour Relations Commission for submission to the minister, and for the making by him of an order declaring that a draft Code of Practice received by him under section 42 and scheduled to the order shall be a Code of Practice for the purposes of the said Act. In May 1999 the Minister for Enterprise, Trade and Employment requested the Commission under Section 42 of the Industrial Relations Act, 1990 to amend the Code of Practice on Disciplinary Procedures (S.I. No. 1 17 of 1996) to take account of the recommendations on Individual Representation contained in the Report of the High Level Group on Trade Union Recognition.

The High Level Group, involving the Departments of the Taoiseach, Finance and Enterprise, Trade and Employment, the Irish Congress of Trade Unions (ICTU), the Irish Business and Employers Confederation (IBEC) and IDA-Ireland, was established under paragraph 9.22 of Partnership 2000 for Inclusion, Employment and Competitiveness to consider proposals submitted by ICTU on the Recognition of Unions and the Right to Bargain and to take account of European developments and the detailed position of IBEC on the impact of the ICTU proposals.

When preparing and agreeing the Code of Practice the Commission consulted with the Department of Enterprise, Trade and Employment, ICTU, IBEC, the Employment Appeals Tribunal and the Health and Safety Authority and took account of the views expressed to the maximum extent possible.

The main purpose of the Code of Practice is to provide guidance to employers, employees and their representatives on the general principles which apply in the operation of grievance and disciplinary procedures.

2. General

This Code of Practice contains general guidelines on the application of grievance and disciplinary procedures and the promotion of best practice in giving effect to such procedures. While the Code outlines the principles of fair procedures for employers and employees generally, it is of particular relevance to situations of individual representation.

While arrangements for handling discipline and grievance issues vary considerably from employment to employment depending on a wide variety of factors including the terms of contracts of employment, locally agreed procedures, industry agreements and whether trade unions are recognised for bargaining purposes, the principles and procedures of this Code of Practice should apply unless alternative agreed procedures exist in the workplace which conform to its general provisions for dealing with grievance and disciplinary issues.

3. Importance to procedures

Procedures are necessary to ensure both that while discipline is maintained in the workplace by applying disciplinary measures in a fair and consistent manner, grievances are handled in accordance with the principles of natural justice and fairness. Apart from considerations of equity and natural justice, the maintenance of a good industrial relations atmosphere in the workplace requires that acceptable fair procedures are in place and observed.

Such procedures serve a dual purpose in that they provide a framework which enables management to maintain satisfactory standards and employees to have access to procedures whereby alleged failures to comply with these standards may be fairly and sensitively addressed. It is important that procedures of this kind exist and that the purpose, function and terms of such procedures are clearly understood by all concerned.

In the interest of good industrial relations, grievance and disciplinary procedures should be in writing and presented in a format and language that is easily understood. Copies of the procedures should be given to all employees at the commencement of employment and should be included in employee programmes of induction and refresher training and trade union programmes of employee representative training. All members of management, including supervisory personnel and all employee representatives should be fully aware of such procedures and adhere to their terms.

4. General principles

The essential elements of any procedure for dealing with grievance and disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well defined and that an internal appeal mechanism is available.

Procedures should be reviewed and up-dated periodically so that they are consistent with changed circumstances in the workplace, developments in employment legislation and case law, and good practice generally.

Good practice entails a number of stages in discipline and grievance handling. These include raising the issue with the immediate manager in the first instance. If not resolved, matters are then progressed through a number of steps involving more senior management, HR/IR staff, employee representation, as appropriate, and referral to a third party, either internal or external, in accordance with any locally agreed arrangements.

For the purposes of this Code of Practice, 'employee representative' includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.

The basis of the representation of employees in matters affecting their rights has been addressed in legislation, including the Protection of Employment Act, 1977; the European Communities (Safeguarding of Employees Rights on Transfer of Undertakings) Regulations, 1980; Safety, Health and Welfare at Work Act, 1989; Transnational Information and Consultation of Employees Act, 1996; and the Organisation of Working Time Act, 1997. Together with the case law derived from the legislation governing unfair dismissals and other aspects of employment protection, this corpus of law sets out the proper standards to be applied to the handling of grievances, discipline and matters detrimental to the rights of individual employees.

The procedures for dealing with such issues, reflecting the varying circumstances of enterprises/organisations, must comply with the general principles of natural justice and fair procedures which include the following.

- That employee grievances are fairly examined and processed.
- That details of any allegations or complaints are put to the employee concerned.

- That the employee concerned is given the opportunity to respond fully to any such allegations or complaints.
- That the employee concerned is given the opportunity to avail of the right to be represented during the procedure.
- That the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

These principles may require that the allegations or complaints be set out in writing, that the source of the allegations or complaint be given or that the employee concerned be allowed to confront or question witnesses.

As a general rule, an attempt should be made to resolve grievance and disciplinary issues between the employee concerned and his or her immediate manager or supervisor. This could be done on an informal or private basis.

The consequences of a departure from the rules and employment requirements of the enterprise/organisation should be clearly set out in procedures, particularly in respect of breaches of discipline which if proved would warrant suspension or dismissal.

Disciplinary action may include

- an oral warning
- a written warning
- a final written warning
- suspension without pay
- transfer to another task, or section of the enterprise
- demotion
- some other appropriate disciplinary action short of dismissal
- dismissal.

Generally, the steps in the procedure will be progressive, for example, an oral warning, a written warning, a final written warning, and dismissal. However, there may be instances where more serious action, including dismissal, is warranted at an earlier stage. In such instances the procedures set out at paragraph four hereof should be complied with.

- An employee may be suspended on full pay pending the outcome of an investigation into an alleged breach of discipline.
- Procedures should set out clearly the different levels in the enterprise or organisation at which the various stages of the procedures will be applied.
- Warnings should be removed from an employee's record after a specified period and the employee advised accordingly.
- The operation of a good grievance and disciplinary procedure requires the maintenance of adequate records. As already stated, it also requires that all members of management, including supervisory personnel and all employees and their representatives be familiar with and adhere to their terms.

Appendix 2

The role of the ombudsman in employment dispute resolution: an example of the terms and conditions associated with this post, as employed at an international bank

1. Introduction

- 1.1 The Ombudsman is an independent person whose function is to act as an impartial mediator in the resolution, by mutual agreement, of cases of employment-related grievance or conflict.
- 1.2 All current staff members, including fixed-term and part time employees of the Bank, shall have access to the Ombudsman.

2. Functional relationships

- 2.1 The Ombudsman shall be appointed by the President after consultation with the Staff Council for a term not exceeding three (3) years.
- 2.2 In the exercise of his/her duties, the Ombudsman shall be independent of any department or official of the Bank.
- 2.3 The Ombudsman shall have direct access to the President and Vice-Presidents and to all staff members of the Bank.

3. Ombudsman functions

- 3.1 The Ombudsman shall consider staff members' inquiries or complaints of any nature related to their employment with the Bank. The scope of such inquiries or complaints shall be broadly interpreted and shall include matters pertaining to the administration of benefits as well as professional and staff relations matters.
- 3.2 The Ombudsman shall, in the exercise of his/her judgement, facilitate resolution of disputes, by means of mediation and conciliation or any other appropriate method, with the primary objective of settling grievances or disagreements and resolving problems between staff members and management.

- 3.3 All matters brought to the Ombudsman shall be considered solely on the merits of the case. The Ombudsman may make specific suggestions or recommendations, as appropriate, to both staff members and management on action needed to settle grievances. The recommendations of the Ombudsman shall not create precedent for any subsequent cases, although the Ombudsman may have regard to previous recommendations when considering current inquiries or complaints.
- 3.4 The Ombudsman may also investigate matters brought to his/her attention in a confidential manner by staff members and, if satisfied that remedial action should be taken, may make specific suggestions and recommendations, as appropriate. In cases which relate to a specific individual the Ombudsman will only investigate the matter if given the express permission of the staff member concerned. In cases which relate to more general matters affecting a group of staff members, the Ombudsman may investigate such matters brought to his/her attention without the express permission of the referring staff member.
- However, in such cases the anonymity of that staff member will be maintained unless and until the staff member has given express consent to be named by the Ombudsman.
- 3.5 At all times the Ombudsman shall take into account the rights and obligations existing between the Bank and the staff member, in addition to the equities of the situation.
- 3.6 The Ombudsman shall not have decision-making powers but shall advise and take recommendations.
- 3.7 The Ombudsman may, in his/her discretion, decline to consider matters that can be remedied only by action affecting Bank staff as a whole or a whole class of Bank staff. The Ombudsman may also, in his/her discretion, decline to consider matters that he/she considers have not been brought to his/her attention in a timely manner.
- 3.8 Upon request of the Chairman of the Appeals Committee, the Ombudsman may also, in his/her discretion, mediate between parties to an Appeal when they have been so referred.

4. Access to documents and confidentiality

- 4.1 The Ombudsman shall have unrestricted direct access to any personnel or other Bank files, including reports of the Appeals Committee, which the Ombudsman believes to be relevant to the discharge of the functions of the office of Ombudsman.
- 4.2 The Ombudsman shall respect the confidentiality of all information and documentation made available to him/her. Neither the Ombudsman nor any document in his/her possession may be produced as evidence in any Bank proceedings, including those of the Appeals Committee unless agreed by all parties.
- 4.3 On the initiative of the Appeals Committee or at the request of a party to Appeals Committee proceedings, and with the consent of the parties and the Ombudsman, the Ombudsman may be invited to appear before the Appeals Committee or provide documentary evidence to the Appeals Committee. The Ombudsman may not be compelled to disclose the identity of staff members by whom he/she has been consulted, nor shall the Ombudsman disclose the details of matters he/she has considered without the express permission of the staff members involved. All reports of the Appeals Committee shall be sent to the Ombudsman unless the Appellant objects.

5. Other recourse for staff complaints

- 5.1 The above provisions shall not be construed as in any way limiting staff members' access to any other recourse for the resolution of claims or grievances.
- 5.2 The time spent in consulting with the Ombudsman and the time employed by the latter in the performance of his/her functions on behalf of a staff member shall in no way affect the time limits for formal presentation of a claim or grievance to management or to the appeals Committee. In appropriate cases, however, the Ombudsman may request the Chairman of the Appeals Committee to consider exercising his/her discretion to extend the normal time limit for filing an Appeal in accordance with the applicable rules.

6. Reports

- 6.1 Subject always to the provisions of paragraph 4.2 above, the Ombudsman shall provide semi-annual reports to the President, the Vice President, Personnel and Administration, and the Staff Council. These reports shall be of a non-specific nature and will provide an overview of the Ombudsman's activities, together with any comments on Bank policies, procedures and practices that may have come to his/her attention.

7. Assistance with policy improvements

- 7.1 As a result of his/her experience in the exercise of the function, the Ombudsman may be consulted by management on policy issues where his/her views and experience might prove helpful.

8. Review of the terms of reference and performance of the Ombudsman

- 8.1 These Terms of Reference shall be subject to review by the Vice President, Personnel and Administration in consultation with the Staff Council and, as necessary, with the Ombudsman.
- 8.2 The performance of the Ombudsman in fulfilment of these Terms of Reference during his/her term of office will be subject to periodic review by the President, in consultation with the Vice President, Personnel and Administration and the Staff Council.

Appendix 3

Code of Practice on Handling Workforce Issues: Alternative Dispute Resolution Procedure

Introduction

This paper sets out a procedure for resolving disputes arising from the application of the Code of Practice on Handling Workforce Issues. All the parties agree that the procedure should be a last resort and all will make their best efforts to resolve problems by agreement. We also support the government criteria that the ADR should be fast, efficient and cost-effective.

The need to exhaust local procedures

The parties must exhaust all normal local procedures as required by paragraph 9 and paragraph 13 of the Code before invoking the Alternative Dispute Resolution procedure (ADR) provided for in paragraph 14.

Who is responsible for resolving disputes?

The ADR procedure will be under the supervision of an independent person appointed from an approved list supplied by ACAS. If the parties so agree, they may appoint two 'wing members' with an employer and trade union background to assist the independent person.

The dispute resolution process

Disputes will be resolved using the following three-stage procedure.

Stage 1: Initial reference to the independent person

The independent person will be invited to answer three questions:

- (i) Is this a dispute about the application of the Code?
If the answer is no, the matter can proceed no further.
If yes, then the independent person will move to question
- (ii) Have the parties exhausted local procedures?
If the answer is no, then the parties will be invited to make further local efforts to resolve the dispute. If yes, then the independent person will conduct an independent assessment, by answering question (iii) and giving reasons for the answer.
- (iii) Do the terms and conditions of employment on offer to new employees comply with the Code?
If the answer is yes, then the matter is deemed to be concluded and the contractor can continue to offer the same package of conditions to new employees. If the answer is no, then the dispute will proceed to Stage 2.

Time limit: Twenty working days.

Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions

Stage 2 begins with the parties being invited to seek to resolve the matter through further discussions.

The independent person will make themselves available to the parties to facilitate the process. The parties also have the option of establishing other arrangements for mediation.

If the parties can reach an agreement consistent with the Code then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute.

If no agreement can be reached within the allotted time then the dispute will proceed to Stage 3.

Time limit: Ten working days, with the possibility that this might be extended by the agreement of the parties and with the consent of the independent person.

Stage 3: Final Reference to the Independent Person

The independent person invites the parties to make final submissions. If the independent person then believes it would be worthwhile, the parties may be given a short period of further discussion.

If there is no value in giving the parties more time – or if during any discussion the parties were unable to agree on how to bring the matter to a successful conclusion – then the independent person will proceed to a final binding arbitration. Having heard the evidence and reached a conclusion the independent person will impose a revised package of terms and conditions applicable to each of the affected employees.

Time limit: Ten working days

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