# COLLABORATIVE PRACTICE: A RESOLUTION MODEL FOR IRISH EMPLOYMENT DISPUTES?

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Rory McMorrow

# ABSTRACT

Collaborative Practice: A resolution model for Irish employment disputes?

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Ireland has a comprehensive yet complex, statutory framework for the resolution of employment disputes. Various bodies offer conciliation, mediation, arbitration and regulation, however the processes are taking too long. The focus of this dissertation is on another form of dispute resolution – collaborative law and its suitability to the resolution of Irish employment disputes. The overarching question of this research is: *Can a dispute resolution model based on collaborative practice be a useful addition to alternative dispute resolution in Irish employment law?*

A review of ADR and employment literature provides a context for this research. The first phase of the primary research consisted of a survey of collaborative practitioners in Ireland to identify the current usage and success of collaborative law and whether practitioners felt collaborative law was suitable for the resolution of Irish employment disputes. The second phase entailed depth interviews with key employment stakeholders to verify the findings from phase A.

Analysis of the findings indicate that collaborative law could be a successful method of dispute resolution and that practitioners feel it is an appropriate method of dispute resolution for employment disputes.

# DEDICATION

Completing this dissertation has been due in no small part to my wonderful family, to whom this work is dedicated.

First and foremost, this dissertation is dedicated to my wife, Michelle, for her love and support, and for the sacrifices she has made that enabled me to complete this thesis. She was always there for a push in the right direction or a hug, whichever was needed.

To my kids, Conor, Ellen, Aaron and Noah, thank you for making me laugh and most of all for your patience - study is over, I'm now free to play again!

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My colleagues at LYIT who were always on hand to offer advice on various occasions.

My alarm clock, which unfortunately, never failed me at 5am!

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# LIST OF ABBREVIATIONS

| | |
|---|---|
| ABA | American Bar Association |
| ACAS | Advisory Conciliation and Arbitration Service |
| ACP | Association of Collaborative Practitioners |
| ADR | Alternative Dispute Resolution |
| CLP | Collaborative Law Process |
| CSO | Central Statistics Office |
| DJEI | Department of Jobs, Enterprise and Innovation |
| EAT | Employment Appeals Tribunal |
| EEA | European Economic Area |
| ESRI | Economic Social Research Institute |
| EU | European Union |
| FÁS | Foras Áiseanna Saothair |
| HSA | Health and Safety Authority |
| IACP | International Academy of Collaborative Practitioners |
| IADRWG | Interagency Alternative Dispute Resolution Working Group |
| IBEC | Irish Business and Employers Confederation |
| ICTU | Irish Congress of Trade Unions |
| IR | Industrial Relations |
| IRO | Industrial Relations Officer |
| LRC | Labour Relations Commission |
| LYIT | Letterkenny Institute of Technology |
| NADRAC | National Alternative Dispute Resolution Advisory Council |

| | |
|---|---|
| NERA | National Employment Rights Authority |
| OECD | Organisation for Economic Cooperation and Development |
| SME | Small and Medium Enterprise |
| SPSS | Statistical Package for Social Sciences |
| UCLRA | Uniform Collaborative Law Rules and Act |
| ULC | Uniform Law Commission |
| UNCITRAL | United Nations Commission on International Trade Law |

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# CHAPTER 1: INTRODUCTION

> *Discourage litigation. Persuade your neighbour to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man.*
>
> *Abraham Lincoln*

To date, there has been no development of collaborative practice into the field of employment in Ireland. The existing dispute resolution methods which currently apply in Ireland in employment disputes have been widely criticised on grounds of time delay, cost and the emotional/social consequences of submitting to an adversarial process. This research seeks to develop a model of collaborative practice which may provide an effective, more consensual, less expensive and quicker approach to resolving disputes in the employment field.

This research aims to investigate whether a dispute resolution model based on collaborative practice could be a useful addition to alternative dispute resolution methods in Irish employment disputes. In order to answer this question, three key objectives were identified:

1. To evaluate how successful collaborative practice has been to date in Ireland;
2. To determine whether collaborative practitioners view collaborative law as a viable method for employment dispute resolution in Ireland; and

3. To develop a collaborative practice model which reflects the unique attributes of Irish employment law conflicts.

## 1.1 CONTEXT

Currently in Ireland, disputants seeking redress in employment disputes may avail of a wide range of methods. Non adversarial dispute resolution techniques such as conciliation and mediation have been embedded in the Irish employment law system for a considerable period of time. There are two main tribunals, the Labour Court (an industrial relations tribunal) and the Employment Appeals Tribunal (EAT); while neither is a court of law, neither directly uses ADR methods. However, a third tribunal the Equality Tribunal uses both investigation and mediation: mediation being a recognised ADR technique.

The Labour Court deals largely with industrial relations disputes, equality issues, minimum wage, part-time and fixed-term work (Law Reform Commission, 2008); whereas, the EAT covers unfair/constructive dismissal, redundancy, minimum notice, terms of employment, holidays and wages. The EAT makes determinations that can be enforced through the circuit court, whereas the Labour Court makes recommendations which are non-binding. The role of the Equality Tribunal is to deal with issues of discrimination, and its mediation option is reported to be three times as quick as its investigation process (Equality Tribunal, 2002 as cited by Law Reform Commission, 2008).

However, all of these processes have long delays (EAT, 2010, Barry, 2009, McConalogue, 2012). Underlying the tribunal system is the Labour Relations Commission (LRC) which uses a number of ADR methods and aims to avoid referrals to the main employment tribunals. The main arms of the LRC are an Advisory Service (pre-dispute), a Conciliation Service (dispute resolution), a Mediation Service (dispute resolution), and a Rights Commissioner. While, the first three are ADR based, the Rights Commissioners specialise in individual rights from various legislative sources and at present have no ADR service.

Alternative dispute resolution (ADR) offers a range of dispute resolution choices which are more informal and interest-based than the formal and rights-based model of litigation (Law Reform Commission, 2008). Therefore the adversarial approach of litigation concentrates on the legal rights of parties; whereas, interest-based dispute resolution addresses the personal interests of the parties including personality, emotions, needs and desires, self-esteem, hidden expectations and unresolved issues (Law Reform Commission, 2008). ADR encompasses a wide range of different methods, some advisory, others facilitative and preventative. One such advisory method is collaborative law.

The collaborative law process was developed in the US by family law lawyer Stu Web. The collaborative law process which evolved has three defining features:

1. A commitment by the professional to withdraw if either party goes to court;
2. An honest, voluntary and good faith exchange of all relevant information;
3. A commitment to strive for solutions that take into account the interests of all family members. (Tesler, 2008; Cameron, 2004)

The process is predicated upon a change in role for the lawyers; the so-called paradigm shift (Reynolds & Tennant, 2001). Lawyers set aside their traditional adversarial approach and instead work to reach solutions in collaboration with the parties as part of a team (Kovach, 2001).

The growth in the application of collaborative practice to family law disputes has been rapid (Fairman, 2005). Collaborative practitioners are now beginning to apply the process of dispute resolution to other areas of law and the application of collaborative practice to the area of employment law is beginning to emerge in the US (Zeytoonion, 2004; Hoffman, 2004; Schachner Chanen, 2006).

## 1.2 CHAPTER OUTLINE

The overall study consisted of a literature review and a two-phase primary research. The literature review is presented in Chapters two and three. Chapter two introduces the employment law landscape in Ireland and the

challenges facing the State's employment dispute resolution bodies. It discusses the drivers of change such as government reforms, composition of the labour market, growth in employment legislation, rise of small firms and growth of non-union multinationals, within the employment area in Ireland. Chapter three describes and evaluates ADR and concludes with a focus on collaborative law, presenting a rationale as to why it might be applicable to employment disputes.

In Chapter four the researcher presents and justifies the research methodology that forms the basis of the primary study. The research objectives, research philosophy, research design, data collection methods and methods of analysis are articulated in this chapter. Phase one of the primary study consisted of a survey of collaborative practitioners in Ireland, this was followed by Phase two which comprised depth interviews with various employment stakeholders. Chapter five presents and analyses the findings from both Phases of the primary study.

Finally, Chapter six presents the conclusions drawn from the research and proposes a model for the use of collaborative law in employment disputes in Ireland. Chapter six also provides details on the limitations of the study while also providing details on the scope for further research.

# CHAPTER 2: THE EMPLOYMENT LANDSCAPE IN IRELAND

This chapter consists of three main sections. It begins with a description of conflict in the workplace and the measures that organisations could put in place to address grievances and disciplinary issues when they arise. The following section provides an overview of the State organisations which have been established to deal with employment related disputes in Ireland. Finally the last section aims to provide a description of the key challenges associated with the Irish employment landscape.

Significant change has taken place in the Irish workplace over the last 10-15 years. The workforce is now better educated, more diverse and increasingly "rights" aware. This presents new challenges to employers in their attempts to deal with conflict when it arises. Large scale industrial conflicts which were once the hallmark of employee unrest are now rarely seen; instead workplace conflict now manifests itself more on an individual level. IBEC (2008 p. v.) note "Getting to grips with workplace conflict inside organisations today is an increasingly important matter, at both organisational and individual level".

## 2.1 CONFLICT IN THE WORKPLACE

Conflict plays an important part of everyday life. The word conflict usually conjures up images of war and violence, and while these are certainly examples

of conflict; it can be easy to forget that we experience conflict in everyday situations both at home and in the workplace, as a result of misunderstandings, lack of communication and differences of opinion. Fiadjoe (2004, p.8) defines conflict "….as the result of the differences which make individuals unique and the different expectations which individuals bring to life". Similarly Coltri (2010) describes conflicts as consisting of at least two people or organisations, known as disputants, with incompatible goals, interests or needs.

If ignored, or not properly dealt with, conflict can be extremely damaging for an organisation in terms of both the working environment and productivity, it is therefore important that conflict is managed when it arises. Johnson *et al* (1993) maintain that conflict, when managed constructively, may result in the preservation of ongoing relationships where long-term relationships such as in the workplace, are of greater importance than the result of any short-term conflict. Conflict plays a significant role in the workplace, particularly for Irish employees who spend 57% more time per week coping with conflict than the average international worker, indeed 37% of Irish employees say they are frequently engaged in workplace disputes (Round Table, 2009). Organisations that can anticipate conflict, and develop procedures to deal with them when they occur, are less likely to find the tensions of future conflicts impairing their ability to continue to sustain cooperation. A key element in planning for conflict is the development of formal grievance and disciplinary procedures (Honeyman, 2003).

### 2.1.1 Grievances and Disciplinary Procedures

Employees, either individually or in groups, may at some point, have grievances which need addressed. Likewise there are situations which will arise where management must take disciplinary action against an employee. In order to preserve the employment relationship it is desirable, in the majority of instances, that these grievances or disciplinary issues are resolved informally and close to source. To assist organisations in Ireland with the development of grievance and disciplinary procedures, the Industrial Relations Act 1990, Code of Practice on Grievance and Disciplinary Procedures 2000, provides guidelines on how organisations should apply grievance and disciplinary procedures. The code provides that grievance and disciplinary procedures should be in writing, in a language which can be easily understood and all employees should receive a copy upon commencement of employment (Cox *et al*, 2009).

#### *(a) Grievance Procedures*

Grievances can be described as concerns, problems or complaints that employees raise with their employers (ACAS, 2011). When a grievance arises, it is important that it is dealt with expeditiously, as the non-handling of a grievance may promote employee unrest and lead to further disputes (Gunnigle *et al*, 2006). Effectively, operating grievance procedures can help prevent a grievance from escalating into a serious dispute. Generally, grievance systems have progressive steps. Walker and Hamilton (2010) note that a grievance resolution process involves a sequence of different steps, with a series of

individuals with increasing levels of seniority becoming involved as the dispute progresses. A typical grievance procedure as outlined by Walker and Hamilton (2010) consists of (a) discussion with the employee's supervisor; (b) a formal written grievance submission to management, (c) a formal grievance meeting with additional higher-level management, and (d) neutral third party involvement. Where the grievance procedure fails to yield a result the disputants may seek a resolution from one or several of the State Employment resolution bodies.

Although it would appear that grievance procedures are an important dispute prevention mechanism they do not come without their challenges. As Colsky (2004) points out disputes which an employee feels strongly enough about to pursue are usually with their manager, yet they are told in the first instance to work out the dispute directly with that manager. Secondly, the transfer of the dispute in the second stage from verbal to written communication channels tends to introduce a rigid frame of reference, while also removing the "personal touch". Also, by the time the dispute has reached the final stage parties will likely have become entrenched in their positions with litigation a likely result (Colsky, 2004). Furthermore, studies by Lewin (1990) and Lewin and Peterson (1999) suggest that employees who file grievances are to some extent punished for doing so in terms of performance ratings, promotion rates and higher turnover rates. Nevertheless, it would seem there can be positives e.g. being able to address complaints quickly; prevent minor issues from becoming big ones; resolve problems internally without government intervention; and build

confidence between workers and management (Walker & Hamilton, 2010), and these can outweigh any possible negative impact the implementation of grievance procedures might have for both the employer and employee.

### *(b) Disciplinary Procedures*

Organisations tend to establish agreed rules in areas such as performance, attendance and conduct at work (Gunnigle *et al* 2006). Should employees breach any of these rules employers must take disciplinary action. In order to take disciplinary action it is important that organisations have disciplinary procedures, which employees are aware of, in place to deal with it. Similar to grievance procedures, disciplinary procedures also take a tiered approach with increasingly severe consequences applied based on (a) the seriousness of the offence; and (b) whether it was a once off (Cox *et al*, 2009). A tiered approach may include a verbal warning followed by a written warning, followed by a final written warning followed by dismissal; however, depending on the seriousness of the offence dismissal may be warranted at an earlier stage (LRC, 2006). Regardless of the disciplinary action being taken it is imperative that the procedures used by the employer are deemed fair. As Cox *et al* (2009, p657) notes "…if an employer acts other than fairly towards an employee in the context of disciplinary proceedings, then they will be violating that employee's constitutional rights to fair procedures…" and thus leaving the employer facing a potential dispute.

While grievance and disciplinary procedures hope to resolve issues that arise in the workplace, it is often the case that no matter what internal procedures are in place, the employer and employee are unable to resolve their differences without outside assistance. Outside assistance may be provided by the State's Employment Dispute Resolution Bodies, while it may also take the form of private neutral third parties such as arbitrators or mediators who also provide services for resolving workplace disputes.

Section 2.2 will provide a description of the various State bodies involved in employment dispute resolution in Ireland.

## 2.2 STATE EMPLOYMENT DISPUTE RESOLUTION BODIES

"It can be said that a key distinguishing feature of Irish employment litigation is the multiplicity of different fora in which claims may be brought" (Cox *et al*, 2009, p 6). Ireland has a comprehensive, yet complex, statutory framework for the resolution of employment disputes with techniques such as conciliation, mediation, arbitration and regulation offered by various bodies. Prior to January 2012, when seeking redress from one of these bodies, disputing parties needed to ascertain which piece of legislation their dispute referred to, as this determined the forum from which to seek redress and the relevant documentation which needed to be submitted. However, as a result of the current Workplace Relations Reform Programme, a new mechanism for lodging complaints was implemented in January 2012. There is now a single

complaint form, which replaces over 30 forms previously in use (Department of Jobs, Enterprise and Innovation (DJEI), 2012). This single point of entry means disputants are no longer required to determine the piece of legislation a dispute refers to or the relevant body from which to seek redress. Table 2.1 indicates the various State employment fora currently operating in Ireland.

**Table 2.1 State Employment Law Fora**

| Body/Agency | Established |
|---|---|
| The Labour Court* | 1946 |
| The Employment Appeals Tribunal (EAT)* | 1967 |
| The Rights Commissioner Service (part of LRC)* | 1969 |
| The Health and Safety Authority | 1989 |
| The Labour Relations Commission (LRC)* | 1990 |
| The Equality Tribunal * | 1998 |
| The Equality Authority + | 1998 |
| The National Employment Rights Authority | 2008 |

**employment resolution body*
*+Formerly known as the Employment Equality Agency established in 1977*

Table 2.2 below outlines the dispute referrals to each of the State's employment resolution bodies over the five year period, 2006-2010.

**Table 2.2 Dispute Referrals to State Employment Resolution Bodies (2006 - 2010)**

| Year | Labour Court | Conciliation Service (part of LRC) | Rights Commissioner (part of LRC) | Employment Appeals Tribunal | Equality Tribunal | Total |
|---|---|---|---|---|---|---|
| **2010** | 1452 | 1193 | 15,671 | 8,778 | 821 | 29,925 |
| **2009** | 1433 | 1571 | 14,569 | 9,458 | 906 | 29,946 |
| **2008** | 1179 | 1317 | 10,900 | 5,457 | 996 | 21,857 |
| **2007** | 924 | 1283 | 9,077 | 3,173 | 852 | 17,316 |
| **2006** | 1364 | 1504 | 7,179 | 3,480 | 628 | 16,161 |
| **% Change** | **+6.5%** | **-20.7%** | **+118%** | **+152%** | **+31%** | **+85%** |

*Source: Relevant Body Annual Reports 2006 to 2010*

Table 2.2 above demonstrates that the number of referrals to the State employment resolution bodies has significantly increased in the last five years, with all bodies except for the LRCs Conciliation Service showing an increase in referrals. Referrals in 2010 show a slight decrease on 2009 and it will be interesting to see whether this downward trend continues. The following paragraphs will examine more closely and offer a fuller description and differentiation of the various bodies as they currently operate.

### 2.2.1 The Labour Court

The Labour Court was established by the Industrial Relations Act (1946) and was involved traditionally with Industrial Relations matters. However, it is now the forum for redress at first instance or on an appeal in a number of areas including Equality, Organisation of Working Time, Minimum Wage, Part-time Work and Fixed term work matters. The Labour Court is not a court of law; it operates as an industrial relations tribunal, hearing both sides in a case.

Except for cases heard under the Industrial Relations Acts 2001-2004, the Labour Court is restricted to making recommendations rather than enforceable determinations (Regan, 2009). The parties to the dispute may elect to accept or reject the recommendation, although in most cases the recommendation is accepted. In cases where employment legislation has been breached; or cases have been appealed against the decision of a Rights Commissioner or an Equality Officer the Labour Court may issue a legally binding determination (Gunnigle *et al*, 2006).

The majority of hearings are held in Dublin with a recommendation normally issued within 8 to 10 weeks of the case being received by the court. However, Charlie McConalogue (2012) stated in the Dáil that where cases are held outside Dublin the waiting time for a hearing is a minimum of six months.

Table 2.2 outlines that the number of cases referred to the Labour Court over the period 2006 to 2010 has increased by 6.5% from 1,364 to 1,452. Notably, the Labour Court (2010) observes that there is a continuation of the trend toward an increase in the number of employment rights disputes before the Labour Court, with 33% of the cases referred in 2010 in relation to appeals on employment rights. In addition, MacRory (2009) points out that while the Labour Court was designed to operate without the need for legal representation, the increasing complexity and regulation attached to employment law has made this aim redundant.

### 2.2.2 The Employment Appeals Tribunal (EAT)

Established by the Redundancy Payments Act, 1967, the Employment Appeals Tribunal is an independent body whose function is to provide a fair, inexpensive and informal means for individuals to seek remedies for alleged infringements of their statutory rights (EAT, 2010). Depending on the relevant Act, claims may be made directly to the EAT, in other cases the EAT hears Appeals against Decisions or Recommendations of the Rights Commissioners. The EAT issues legally binding "Determinations", which may be appealed to the High Court on a point of law. It consists of a chairperson and a panel of 35 vice-chairpersons who are legally qualified and a panel of other members nominated by the Irish Congress of Trade Unions (ICTU) and the bodies representative of employers (Regan, 2009).

Although originally established as an informal means for individuals to seek remedies, the EAT Procedures Revision Group (2007, p.3) note that one perspective evident from the Report of the Review Group on the Functions of the Employment Rights Bodies (2004) is that the EAT has moved from its informal model to a "..more long drawn out, over legalistic, adversarial, costly and, especially from the perspective of employees and unions, intimidating environment". A combination of factors have contributed to this, namely, the necessity for the EAT to have qualified legal chairs; the gradual adoption of the rules of evidence; and the substantial increase in employment rights legislation (EAT Procedures Revision Group, 2007; Teague & Thomas, 2008). The EAT argues however "that this more legalistic focus was a necessary and

appropriate response to the gradual emergence of a more complex and expansive rights-based regulatory environment" (Teague & Thomas, 2008, p.140). This increasingly legalistic focus has created a situation where employees, especially those without representation, union or legal, and smaller firms who cannot afford legal representation are at a distinct disadvantage (EAT Procedures Revision Group, 2007). In 2010, of the employee parties represented at the EAT, 57% had legal representation, while of the employer parties represented, 67% had legal representation (EAT, 2010).

The number of cases referred to the EAT has increased significantly over the five year period 2006 to 2010, from 3,480 to 8,778, an increase of approximately 152%. In 2010, 82% of the cases referred were in relation to legislation pertaining to the termination of employment namely, Minimum Notice and Terms of Employment Acts; Unfair Dismissals Acts; and the Redundancy Payments Acts (EAT, 2010). This may have been a consequence of the difficult economic conditions the country continues to experience. Moreover, the unprecedented growth in the number of cases has had a negative effect on the waiting times for hearings at the tribunal, with the average waiting time in 2010 standing at 58 weeks in Dublin and 55 weeks in other parts of the country (EAT, 2010). More recently during a Dáil Debate in January 2012 on the Industrial Relations (Amendment) Bill 2011, Charlie McConalogue maintained that waiting times for the EAT now stood at 74 weeks in Dublin and 76 weeks elsewhere. While it is essential that individuals and organisations have the opportunity for redress, the process can be a

stressful and unhappy experience exacerbated by the fact that they must wait at least a year for a hearing. Such delays may also result in parties becoming further entrenched in their positions while they await hearings (Roberts, 2002).

In addition, due to the long delays remedies such as reinstatement or reengagement in termination of employment cases become increasingly difficult to implement. Reinstatement involves the employee being re-employed and receiving backpay for the period of time between when their contract was terminated and the tribunal decision, while reengagement involves the employee being reemployed from the date of the tribunal decision with no backpay. The problem with delays and these remedies is firstly, the employer is likely to have employed someone else in the intervening period, and secondly, the delay may have further increased any ill-feeling between both parties and therefore making reengagement and reinstatement "unworkable" (EAT Procedures Revision Group, 2007).

In order to address the legalistic nature of the EAT and the unsatisfactory waiting times, perhaps the EAT needs to look at alternative forms of dispute resolution, however as Teague and Thomas (2008, p.149) point out the EAT feels "…that such innovations are potentially too risky, as they would interfere with the effectiveness of the integrated set of conventions and approaches that the Tribunal has adopted gradually during its 40-year life". However, while the EAT may be reluctant to embrace alternative dispute resolution, employers and employees need not be. Employers and employees

could seek to use alternative methods of dispute resolution which could result in a speedier resolutions than that being offered by the EAT. Chapter three will provide an outline of the various alternative methods of dispute resolution.

### 2.2.3 The Labour Relations Commission

The Labour Relations Commission (LRC) was setup in 1991 under the Industrial Relations Act (1990). The main function of the LRC is to promote the improvement of industrial relations. It has three main service divisions namely, (a) the Conciliation Service, (b) the Advisory Service; and (c) the Rights Commissioner's Service (LRC, 2009). Employers or employees who have a problem in this area may ask the LRC to provide its services to help resolve the dispute. The LRC also develops draft Codes of Practice for submission to the Minister for Enterprise, Trade and Employment, and although these do not have force of law, they may be taken into account in the course of proceedings before the Labour Court, Employment Appeals Tribunal and the Equality Tribunal.

#### (a) The Conciliation Service

The Conciliation Service is available to all employees and employers except those specifically excluded by law, namely: the army, garda and prison services. Reidy (2007, p115) describes conciliation as a "voluntary process in which the parties to the dispute are encouraged to take responsibility for its resolution". The LRC assigns a mediator, known as an Industrial Relations Officer (IRO), who assists parties in their efforts to reach a mutually

acceptable settlement to their dispute. The process is free, non-legalistic and informal and is completely voluntary as both parties must give consent prior to its commencement (LRC, 2004).

Table 2.2 above outlines that there has been a 20% reduction in the number of referrals to the Conciliation Service between 2006 and 2010. The LRC (2010) notes that '…although referral rates declined the nature of the Division's work in 2010 was such that disputes dealt with involved a very high degree of complexity and a high rate of conciliation input per referral'. Having achieved a settlement rate of 82% in 2010 of all cases referred (LRC, 2010), it is clear the Conciliation Service plays a key role as a part of the State's dispute resolution services, however in times when disputes are on the rise it is perhaps worrying that this is not matched by increases in referrals to the Conciliation Service.

**(b) Advisory Services Division**

The mission statement of the Advisory Services Division is "to work closely with employers, trade unions and employees to promote, develop and implement best industrial relations policies, practices and procedures, in order to enhance the economic well-being of the enterprise and assist in employment creation and retention" (LRC, 2008, p.23). This is a free, confidential service which assists employers and employees build, develop and implement on-going effective problem-solving mechanisms. The Advisory Service also develops Codes of Practice which are instruments put in place by Government which are

intended to give guidance to employers and trade unions on particular issues, however they are not legally enforceable. To date, the Division has prepared eight Codes of Practice.

Discontinuation ofthe Advisory Service was one of the recommendations in the report of the Special Group on Public Service Numbers and Expenditure Programmes (2009) (An Bord Snip Nua). These recommendations were aimed at achieving efficiencies and synergies while also rationalising the industrial relations and employment law fora in Ireland..

**(c) The Rights Commissioner Service**

Established by the Industrial Relations Act 1969, the Rights Commissioner Service aims to provide a non-legalistic and efficient procedure for resolving employment disputes involving individuals and small groups of employees (Reidy, 2007). Rights Commissioners are appointed by the Minister for Trade, Enterprise and Employment, and they operate as a service of the LRC, however they are independent in their functions. Rights Commissioners issue the findings of their investigations in the form of either decisions or non-binding recommendations, depending on the legislation under which a case is referred. Should parties be unhappy with the recommendation or decision of the Rights Commission, they may opt to appeal to the EAT or the Labour Court, and on a point of law to the High Court. Depending on the relevant Act, the Labour Court or Employment Appeals Tribunal will hear the appeal and will issue a decision, which is binding on the parties to the dispute.

The role of the Rights Commissioner has evolved over the past 20 years. Originally established to deal with industrial relations legislation, the Rights Commissioner Service now also plays a key role in employment rights legislation. As outlined in table 2.3 below, the Rights Commissioner now has a function in 17 separate pieces of legislation compared to just 3 in 1995 (DJEI, 2012). This change in role has contributed to the significant increase in the number of cases being referred to the Rights Commissioner. As demonstrated in table 2.2 above, there has been a huge increase in referrals to the service over the five year period 2006 – 2010, from 7,179 to 15,671, representing an increase of 118%.

### 2.2.4 The Equality Tribunal

The Equality Tribunal was established under the Employment Equality Act 1998 and is responsible for overseeing the Employment Equality Acts 1998-2008 which outlaws discrimination in the workplace based on gender, marital status, family status, age, disability, race, religion or belief, sexual orientation and membership of the Traveller Community (Cox *et al*, 2009). Although not mutually exclusive the Tribunal can deal with claims of discrimination in two ways, either by investigation or mediation (Teague & Thomas, 2008). The traditional method was for an Equality Officer to carry out an investigation into a referral and upon completion of the investigation issue a legally binding decision which is published (Reidy, 2007). Decisions may be appealed to the Labour Court. As an alternative to investigation the Equality Tribunal

launched its Mediation Service in 2000. The Mediation Service is a voluntary process which cannot proceed if either party objects. In 2004, the Director of the Equality Tribunal mandated that all cases referred to the Equality Tribunal should be assigned to the Mediation Service, thereby making mediation the default option and placing the onus on the parties to object to mediation (Teague & Thomas, 2008). Mediated agreements are legally binding decisions.

Since its inception in 1998, the number of cases being referred to the Equality Tribunal has risen dramatically. The Equality Tribunal (2008, p.5) points out that "As people become more aware of their rights and how to seek redress, the number of cases of alleged discrimination referred annually has risen 900% from 102 in 2000 to 998 in 2008". However, in 2010, there was a 10% decrease in referral, from 906 in 2009 to 821 in 2010, while referrals to the mediation service saw an increase of 10% from 199 in 2009 to 220 in 2010 (Equality Tribunal, 2010). 2010 also marked a turning point for the Equality Tribunal with more cases closed than new ones received. However, delays in obtaining a hearing at the Equality Tribunal are still a concern. As Barry (2009, p.5) points out "the delays in the Equality Tribunal are well known with far longer delays than any other fora". Similarly Dewhurst (2009) notes that applicants can expect to wait for up to eighteen months for a final determination of their case. In addition to this, former Tribunal Director Melanie Pine maintains that travel restrictions imposed on staff, which limits the range of hearings locations, will create inefficiencies for the Tribunal and hardship for the parties

(Smyth, 2010). These financial pressures are likely to have implications for the Tribunal in its efforts to reduce waiting times.

### 2.2.5 Equality Authority

Not to be confused with the Equality Tribunal, the Equality Authority is a statutory body set up to work towards the elimination of unlawful discrimination, to promote equality of opportunity and to provide information to the public on the equality legislation. It can advise and support in bringing a claim to the Tribunal but it has no power to decide a case.

The 2009 budget saw the Equality Authority's funding cut by 43% which prompted the Authority to issue a press release claiming that it would be "unable to fully or effectively carry out the full range of its core functions under the equality legislation and relevant EU Directives" (Equality Authority, 2008). MacRory (2009) maintained this action by the Irish Government clearly indicated the lack of importance they attributed to equality in modern Ireland. However perhaps the concerns of the Equality Authority (2008) and MacRory (2009) were unfounded given that the Annual Report 2009 showed that targets set before the cuts were announced were met and in some cases exceeded (Kelly, 2010). While the Government's decision to cut funding appears to be vindicated for now, further concerns as pointed out by Healy (2010) have been raised with the European Parliament in that "Ireland is not in compliance with European Law because of funding and staff cuts".

### 2.2.6 Health and Safety Authority

The Health and Safety Authority (HSA) was established under the Safety, Health and Welfare at Work Act 1989 with the main responsibility of promoting and enforcing workplace health and safety in Ireland (Cox *et al*, 2009). The Authority's strong legislative programme is fundamental to this objective. To ensure compliance with the legislation, the HSA takes a preventative approach which aims to reduce workplace accidents by providing guidance and support to employers and employees, however, if this approach fails the Authority takes legal action (Health and Safety Authority, 2009).

The HSA carried out 18,451 inspections and investigations in 2009; 11% of these resulting in enforcement powers being applied (Heath & Safety Authority, 2009).

### 2.2.7 National Employment Rights Authority

The National Employment Rights Authority (NERA) was setup as an office of the Department of Enterprise, Trade and Employment in 2007 with the aim of securing compliance with employment rights legislation. NERA provides an information service on employment rights to employers and employees; monitors employment conditions through its inspectors; may seek redress from the employer for the employee, and in some instances may initiate prosecutions against the employer (Cox *et al*, 2009, NERA, 2008).

The establishment of NERA saw the transfer and incorporation of several sections to it from the Department of Enterprise, Trade and Employment. The Labour Inspectorate section was incorporated into NERA's Inspection Services; the Employment Rights Information Unit was incorporated into NERA's Information Services and finally the Enforcement and Prosecution section was incorporated into the Enforcement and Prosecution service. The Information and Inspection Services experienced a decrease in activity in 2010, while there was a increase in both Enforcement and Prosecution activity (NERA, 2010).

## 2.3 THE DRIVERS OF CHANGE

As evidenced from above, the employment law fora in Ireland have, in some cases, been in existence for over 60 years. While these fora have encountered many changes over this period, they have evolved to meet the challenges presented. However, they are perhaps now facing a time when the whole employment landscape in Ireland is undergoing significant change, not least because of the global recession which has had a major effect on all aspects of the Irish economy. This section will describe the various factors which are impacting on the workplace in Ireland.

### 2.3.1 Government Reforms

In July 2011, in the opening address at the High Level Conference on the Resolution of Individual Employment Rights Disputes at the School of Law,

Minister for Jobs, Enterprise and Innovation, Richard Bruton cited the following problems with the current employment rights dispute resolution bodies in Ireland:

> A system not fulfilling its purpose, compliant businesses sucked into costly hearings, workers having to wait too long for a remedy, a system you wouldn't choose if you were starting out with a blank page.
>
> Five redress or enforcement bodies, (resulting in 'forum shopping') 35 different forms to launch proceedings, different time limits, different routes of appeal, a system that is too complex and requires professional help to negotiate it and a system overloaded by problems arising from the economic crisis'
>
> (Workplace Solutions, 2011)

This address signaled the launch of a major reform into the workplace relations structure in Ireland. On August 15, 2011, Minister Bruton launched a consultation process with the aim of establishing a world-class workplace relations service and employment rights framework. Following the period of consultation with the various stakeholders, April 2012 saw the publication of the '*Blueprint to Deliver a World-Class Workplace Relations Service*' (DJEI, 2012). This publication outlines the wide-ranging improvements that will be delivered by the end of 2012. Proposed improvements include:

- A two tier structure
    - A new body of first instance known as the Workplace Relations Commission which will combine the activities of NERA, the LRC, the Equality Tribunal, and the first instance functions of the Labour Court and the EAT

- An expanded Labour Court which will combine the appellate functions of the Labour Court and the EAT

- A single point of entry
- A single first instance complaint form replacing the existing system of 30 First Instance complaint forms
- A single appeals form replacing the existing system of 20 appeal forms
- A common time limit of six months for initiating complaints replacing the current system whereby time limits vary under different legislation
- A target of three months from when a complaint is lodged to when a hearing is scheduled

(A detailed overview of the key improvements is provided in appendix A).

It should be noted that this is not the first time reform of the workplace relations structures has been proposed in Ireland. In November 2008, in a response to dwindling public finances, the previous Government established a Special Group on Public Service Numbers and Expenditure Programmes (An Bord Snip Nua), to examine the current expenditure programmes in each Government Department and to make recommendations for reducing public service numbers so as to ensure a return to sustainable public finances (An Bord Snip Nua, 2009). Although the recommendations suggested in the report, which was issued in July 2009, were primarily targeted at achieving cost savings, they would, if implemented have had a major effect on the current workplace relations structure in Ireland. The report made the following recommendations:

1. Merge the Labour Court and the Labour Relations Commission.
2. Transfer of activities such as the administration for Joint Labour Committees and the Rights Commissioners to the National Employment Rights Authority.
3. Consider merging the Equality Tribunal into the rationalised IR structure.
4. Discontinue functions such as the Industrial Relations Advisory Service (part of the LRC), the Workplace Mediation Service, industrial relations research, public relations, etc.
5. Merge the Health and Safety Authority and the National Employment Rights Authority (NERA) into a single Work Place Inspectorate.

Notably the proposals from An Bord Snip Nua, similar to the current reform programme, involved the merging of several bodies and the discontinuance of a number of services. This is possibly recognition that the current system is overly complex and procedural. However, in hindsight, maybe the decision not to implement the proposals outlined by An Bord Snip Nua was a wise one. Implementing its recommendations would have resulted in a reduction of 58 staff across all employment fora and while it is perhaps impossible to determine what effect this would have had on already lengthy waiting times, it is unlikely the EAT would have been in favour, after all in its 2008 Annual

Report the EAT attributed the significant increase in the "number of cases disposed of" to the allocation of additional staff (EAT, 2008).

The proposed reform programme aims to deliver a simpler, more efficient and user friendly system than the current complex and outdated system. Indeed, the far ranging reforms proposed present a clear indication of the depth of problems associated with the existing structures. So far all targets have been met with the launch of the single point of entry, the development of a single complaint form, the creation of the workplace relations website, and the delivery of a pilot Early Resolution Service (DJEI, 2012).

In addition to the global recession and government reform programmes, Teague and Thomas (2008) have identified the following other factors, which have, and are, impacting the Irish employment landscape:

1. Composition of the labour market.
2. Decline of collective representation in the Irish economy.
3. Growth in employment legislation.
4. Rise of small firms.

These factors have had an impact on the number disputes arising and the complexity of the employment landscape. The following sections will describe each of the factors outlined above and how they have impacted upon the workplace in Ireland.

### 2.3.2 Composition of the labour market

There are three factors affecting the composition of the labour market – gender, labour quality and internationalisation.

#### *(a) Gender*

The last 30 years have seen significant growth in the level of female participation in the workplace. While female labour participation in Ireland sat at just under 30% in 1981 (CSO, 2003), it now represents 56% of all females (15-64) in Ireland (CSO, 2003; CSO, 2011a). This obviously demonstrates that there has been a substantial increase in the number of females entering the workforce in Ireland; however, what is possibly more significant is the increase in the female share of employment. Although females represented just 37% of total employment in 1996, and 42% in 2006 (Russell *et al*, 2009), FÁS/ESRI (2010) predict that females will represent 46% of total employment in Ireland by 2015 (this was achieved in 2011).

With the near equalization of genders in the workplace, it is perhaps no coincidence that there has been an increase in the number of sexual harassment cases before the Equality Tribunal. This "new" workplace puts an onus on employers and organisations to pay greater attention to equality legislation including equal status and equal pay[1]. Moreover it is important that employers and state organisations develop their dispute resolution mechanisms

[1] The National Employment Survey (2008 and 2009) found that averaged across all sectors females were earning approximately 12.8% less than males (CSO, 2011b)

which address any traditional power imbalance which might exist between males and females.

### *(b) Labour Quality*

"Educational attainment is often seen as a good indicator of human capital with the basic proposition that investment in education results in higher productivity and labour quality" (OECD, 2001 cited by Keeney 2010, p.152). The share of the workforce in Ireland with third level qualifications has experienced substantial growth over the last 15 years. In 1994, 15% of those in employment in Ireland had attained a third level qualification, by 2009 this had increased to 39% (Fórfas, 2010; Keeney, 2010), while FÁS/ESRI (2010) predict that 46% of all employed persons will hold a third level qualification by 2015. Although education should provide the worker with the competencies required for a particular area, the Fórfas report on the *Profile of Employment and Unemployment* (2010) demonstrates that it is qualifications together with experience which matter highly for employment prospects. Therefore, if an employer has a highly qualified employee with years of experience and on-the-job training, the likelihood is they will want to retain the services of that "ideal" employee. Given that Fórfas (2010) identified the current areas of labour shortages as being confined to areas for qualified persons with specific expertise and work experience, it would be advisable for employers to have the required methods for resolving disputes involving such workers when and if they arise, which preserve the employment relationship

going forward, and lessen the risk of losing the "skilled" employee through workplace disputes.

### *(c) Internationalisation*

In line with overall employment trends in Ireland, the number of non-nationals[2] in the workforce has declined since the onset of the global recession; however, in the preceding 10-15 years there was a steady increase in the number of non-nationals entering the Irish employment market. In 2008 non-nationals represented 15.8% of the entire Irish workforce (Fórfas, 2010). The number of non-nationals in the Irish workplace is reflected in the increasing number of cases being presented to the Equality Tribunal on the grounds of Race. In 2000 there were just two referrals to the Equality Tribunal on grounds of Race, while in 2010 there were 259; Race being now the most frequently cited ground (Equality Tribunal, 2000; Equality Tribunal, 2010).

Non-nationals gaining work permits pre-2000 were mainly highly skilled, however, since 2000 the trend has changed with a large number of permits being granted to unskilled immigrants particularly in the service and catering sector (Teague & Thomas, 2008). Due to the current employment permit system, non-nationals can find themselves in a powerless situation in the event of a dispute arising. The employment permit system[3], which binds a migrant worker to one employer, brings in its wake a dependence on that employer as

[2] The Department of Justice and Equality (2011) define a non-national as a person who is neither an Irish citizen nor an EEA national or Non-EEA dependant who has established a right to enter and be present in the State in accordance with EU Treaty Rights of free movement

[3] Employees from outside the EEA require a work permit

far as permit and legal status are concerned, leaving them open to exploitation. Although changing employer is an option it is prohibitively difficult in that the migrant worker must apply for a new permit, which can take several months, during which time they are unable to work, while the application process costs €1000 (Carbery, 2010). Moreover, where immigrant workers feel the need to seek redress through the State's employment bodies, they can ultimately end up having to leave the State. As Dewhurst (2009) notes, due to the substantial delays currently found in the employment dispute resolution processes migrant workers are often unable to remain in the State pending the determination of their hearing for financial or legal reasons. The State employment dispute bodies need to develop efficient systems for addressing disputes involving immigrant workers, which not alone address the delays being experienced, but also addresses the power imbalance created by work permits. They must also promote awareness among immigrant workers of their employment rights.

While it is likely that it is easier to encourage employers to participate in dispute resolution involving the highly skilled worker than the unskilled worker, employers might also be encouraged to participate in dispute resolution involving the unskilled worker rather than seek replacements at the first opportunity. Possibly the implementation of the Employment Compliance Bill 2008, with its increased penalties, will provide the necessary deterrents for employers who seek to replace employees too readily.

### 2.3.3 Decline of collective representation in the Irish economy

Traditionally industrial relations in Ireland could be characterised as mainly voluntaristic which meant a lack of legal intervention in industrial relations. Trade unions played a major role in industrial relations with their "…activities being associated with superior non-pay terms and conditions compared to organisations where unions were weak or absent" (Brown *et al*, 2000, p. 627). Organisations and the State employment dispute resolution bodies placed unions at the centre of the dispute resolution system as this was the ideal way of addressing the power imbalance which existed in the employment relationship. However, the industrial relations system in Ireland has undergone substantial change over the past 20 years with the gradual erosion of voluntarism and increasing legalisation of the employment relationship (Dobbins, 2010). Trade union density levels (the share of the labour force in trade unions) in Ireland and Britain, has been in decline since the mid-1980s with the majority of working people now working in non-union firms (Dobbins, 2010, Brown *et al*, 2000). While it is likely that trade unions will continue to play an active role in the employment environment in Ireland, possibly new methods of dispute resolution could be developed to complement the work of the unions in addressing the unequal power relationship which exists between employee and employer. As noted by Teague and Thomas (2008, p.10)

> …the challenge for the dispute resolution and employment rights bodies is to retain some of the old competencies that served them well in the past when dealing with industrial disputes but, at the same time, to develop new policies for the new industrial relations environment in which they are now operating.

### 2.3.4 Growth in employment legislation

Developments in employment legislation over the past twenty years have resulted in practically every aspect of the employment relationship in Ireland being protected by regulation (Teague, 2007). Employees will likely view this as good news because they can now take comfort in the fact that legislation exists to provide them with protection in areas such as minimum wages, equality, employment terms and maternity. However the likelihood of employers viewing it as good news is slim. Compliance with the raft of legislation passed has become extremely difficult for employers, particularly small employers who might not have the resources to ensure compliance, as noted by McNally (2012), "Employment law is an area that on a daily basis is becoming increasingly onerous for businesses, particularly for those firms that do not have any specialist in-house resources."

Table 2.3 outlines the principle pieces (29 in total) of legislation for which an employee/employer may claim under and the relevant body and appeal body to submit the claim to. Of the 29 pieces of legislation, 22 have been enacted since 1991, which represents an increase of 76%. As pointed out by Teague (2007, p.76) "The problem is that more labour law leads to a mass of employment rules that are very difficult to enforce properly". Dealing with the increase in legislation has not only proved challenging for employers but also for the State. It has resulted in a system which is both complex and confusing. There is currently a degree of overlap with the disputes that each dispute resolution body can handle, therefore resulting in uncertainty as to the

appropriate body an employee should submit a case (Teague, 2007). Furthermore depending on the piece of legislation there are varying appeal routes and varying time limits for which to make a claim or appeal thus increasing the complexity faced by a claimant. Moreover disputants have several opportunities to achieve a favorable result as they may submit claims to a number of the different bodies based on the same dispute, for example, an employee may issue a claim for unfair dismissal before the Employment Appeal Tribunal and simultaneously issue a claim for discrimination before the Equality Tribunal.

**Table 2.3 – Current Arrangements of the Employment Rights Bodies for Employment Rights Legislation**

| Legislation | First Instance Body | | | Appeal Body | |
|---|---|---|---|---|---|
| | LRC (Rights Commissioner) | EAT | Equality Tribunal | Appeal to EAT | Appeal to Labour Court |
| Adoptive Leave Acts, 1995 and 2005 | • | | | • | |
| Carer's Leave Act, 2001 | • | | | • | |
| Chemical Act 2008, Section 26 | • | | | • | |
| Competition Act, 2002 – 2006 | • | | | • | |
| Employment Equality Acts, 1998 to 2008 | | | • | | • |
| Employees (Provision of Information and Consultation) Act, 2006 | • | | | | • |
| Employment Permits Act 2006 | • | | | | • |
| European Communities (Protection of Employment) Regulations, 2000 | • | | | • | |
| European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003 | • | | | • | |
| European Communities (Organisation of Working Time) (Mobile Staff in Civil Aviation) Regulations 2006 | • | | | | • |
| Health Act 2007 | • | | | | • |
| Industrial Relations Acts, 1946 to 2004* | • | | | | • |
| Maternity Protection Acts 1994 and 2004 | • | | | • | |

| Legislation | First Instance Body | | | Appeal Body | |
|---|---|---|---|---|---|
| | LRC (Rights Commissioner) | EAT | Equality Tribunal | Appeal to EAT | Appeal to Labour Court |
| Minimum Notice and Terms of Employment Acts, 1973 to 2005 | | • | | None | |
| National Minimum Wage Act, 2000* | • | | | | • |
| Organisation of Working Time Act, 1997* | • | •** | | | • |
| Parental Leave Acts, 1998 and 2006 | • | | | | • |
| Payment of Wages Act, 1991 | • | | | • | |
| Pensions Act 1990 | • | | | • | |
| Protection for Persons Reporting Child Abuse Act, 1998 | • | | | • | |
| Protection of Employees (Employers' Insolvency) Acts, 1984 to 2004 | | • | | None | |
| Protection of Employees (Part-Time Work) Act, 2001* | • | | | | • |
| Protection of Employees (Fixed-Term Work) Act, 2003 | • | | | | • |
| Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 | • | | | •# | •# |
| Protection of Young Persons (Employment) Act, 1996 | • | | | • | |
| Redundancy Payments Acts, 1967 to 2007 | | • | | None | |
| Safety, Health and Welfare at Work Act, 1989 (now 2005 Act) | • | | | | • |
| Terms of Employment (Information) Acts, 1994 and 2001 | • | | | • | |
| Unfair Dismissals Acts, 1977 to 2007 | • | • | | • | |

Source: DJEI (2011)

* *Certain cases under these statutes are referred directly to the Labour Court, where there is a collective dimension or a failure to engage with the LRC.*

** *Claims under the OWT Act may be brought at first instance to the EAT only where the EAT is already hearing a case at first instance under the Redundancy Payments, Unfair Dismissals or Minimum Notice Acts and only for holiday pay entitlement under the OWT Act*

\# *Under this Act, the Labour Court hears cases about prospective exceptional redundancies (ex ante) and the EAT hears cases under the Unfair Dismissals Act after the redundancies have occurred (ex post).*

Raju (2007) noted that there is likely to be an increase in litigation in the future as awareness of rights and entitlements grows in tandem with the enactment of numerous laws creating new rights and obligations. This increase

is reflected in table 2.2 above. There was an 85% (16,161 to 29,925) increase in the number of cases presented to the various employment resolution bodies between 2006 and 2010. The challenge posed to Irish legislators is to develop a system to address this increase in disputes. Perhaps the current reform programme will go some way to achieving this, however in addition to the proposed reforms, employees and employers could also look at using innovative methods of ADR to resolve disputes, although this may prove challenging as "Most unionised and non-union firms in Ireland do not display any great appetite for ADR practices to solve problems at work" (Hann *et al*, 2010, p.23).

### 2.3.5 Rise of small firms

The CSO (2008, p.5) define small businesses as "enterprises employing less than 50 people". In 2005, approximately 97% of all businesses operating in the Republic of Ireland fell into this category. The CSO (2008) outlines that in 2000 there were 64,730 small businesses (Industrial, Construction and Services sectors), however in 2005 there were 86,172, which represents an increase of 33%.

The owner-manager of a small business must be multi-skilled. The owner/manager must be competent in the core business functions such as planning, marketing, finance operations and human resource management (Giroux, 2009). In comparison to large organisations, which have a wide variety of individuals to fulfill specific functions, owner-managers of small businesses must have the ability to fulfill the various functional roles in order

to ensure the effective management of their business on any given day (Giroux, 2009). Considering the challenge of carrying out these multiple functions, the increasing complexity of complying with employment legislation is proving an unwelcome headache. While they strive to survive small business owners are finding themselves susceptible to employment disputes as a result of non-compliance with a piece of legislation they may not have been aware of. As MacRory, (2009) points out

> the body of legislation has been framed and developed against the backdrop of "big business" and "government" employer perspective. It fails to appreciate the ability of the small and medium sized enterprise (SME) to cope with its demands.

While large organisations have the finance and trained personnel to deal with disputes it is not always the case with the SME owner. Furthermore, Walker and Hamilton (2010) note that small firms are both more likely to be involved in dispute hearings and more likely to lose compared with large firms. In light of this, perhaps small business could benefit from systems which are less time onerous and which can achieve a resolution closer to source. Possibly small businesses would be more in favour of informal ADR systems instead of the State's employment dispute resolution bodies, where their chances of losing may be lessened.

## 2.4 CONCLUSION

Employment dispute resolution in Ireland is clearly facing a challenging time. The difficult economic conditions have created record levels of unemployment, while the State employment dispute resolution bodies have seen dramatic increases in the number of cases being presented. The increases in referrals have had a negative effect on already inadequate waiting times thereby exacerbating what is already a stressful situation for the parties concerned. Furthermore the complex nature of employment dispute resolution has led to a process, which was setup to be informal, becoming increasingly legalistic. In order to meet the challenges presented the Government has undertaken a major reform programme of the State employment resolution bodies. However, as not all grievances can be resolved the same way, perhaps employers and employees should look at means of resolving workplace disputes using alternative dispute resolution methods which complement the services provided by the State, thereby enabling the resolution of disputes closer to source in a timely and efficient manner.

The next chapter will discuss ADR and the benefits that might accrue from using ADR in employment disputes.

# CHAPTER 3: ALTERNATIVE DISPUTE RESOLUTION

> *The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.*
>
> *Sandra Day O'Connor*

The previous chapter outlined the various challenges facing the area of employment dispute resolution in Ireland with a particular focus on the role played by the State's Employment Dispute Resolution bodies. While it is evident the State plays a crucial role in the resolution of employment disputes, disputants needn't always use these bodies to resolve their disputes. There are alternative forms of dispute resolution available. This chapter begins with a description of alternative dispute resolution (ADR) and its origins. The chapter will then outline various types of ADR and the benefits and weaknesses associated with ADR. Finally the chapter will focus on collaborative law and its potential for employment disputes.

## 3.1 ORIGINS OF ALTERNATIVE DISPUTE RESOLUTION

For centuries societies have been seeking to resolve disputes without recourse to the court system. Barrett and Barrett (2004) traces the roots of dispute resolution to 1800BC when the Mari Kingdom (now known as Syria) used arbitration and mediation to settle conflicts with other kingdoms. Xavier (2006) describes the 'Panchayat' method of dispute resolution in India which began approximately 2500 years ago and is still in operation today. This

system involves the assembly of the five most proficient, wise and revered elders selected by the village community. They are responsible for settling all kinds of disputes between individuals and villages by means of mutual settlements.

The Greeks were also no strangers to innovative means of dispute resolution with evidence of the use of Med-Arb around 400BC. This involved the appointment of a public arbitrator who first attempted to resolve the dispute amicably, however, if this was unsuccessful, he would call witnesses and seek submissions of evidence in writing before making a decision (Barrett & Barrett, 2004). Additionally, there is evidence covering the period 600AD to 1066AD that the Anglo Saxon's resolved their disputes on a dispute processing continuum using processes such as adjudication and arbitration (Sanchez, 1996).

Although dispute resolution processes have been in existence for thousands of years, it is the Pound Conference[4] in 1976 which is widely recognised within the legal profession as the birthplace of ADR (Nader, 1988, Marshall, 1998 and Hensler, 2004). Nader (1988, p273) notes that it was at this conference that "harmony and efficiency ideologies both came to replace the litigation justice model". Although all conference presenters addressed the theme of procedural reform, it was perhaps Professor Frank Sander's address on the "*Varieties of Dispute Processing*" which inspired court enthusiasm for ADR (Hensler, 1995).

[4] Pound Conference took place in St Paul, Minnesota on April 7-9, 1976. The conference title was "Causes of Popular Dissatisfaction with the Administration of Justice"

In England and Wales, Lord Woolf was appointed in 1994 by the then Lord Chancellor to review the civil justice system. The aim of the review was to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; to remove unnecessary distinctions of practice and procedure. The review resulted in the publication of two reports – *Access to Justice, Interim Report (1995) and Access to Justice Final Report (1996)*. ADR has since experienced significant development in England and Wales (Law Reform Commission, 2008).

ADR, through arbitration, has had a place in Irish legislation since 1698. The first Arbitration Act was the Act for Determining Differences using Arbitration, 1698. This Act remained unchanged until its amendment in 1954 with further amendments in 1980 and 2010 (Barrett & Barrett, 2004, Law Reform Commission, 2010). Further developments in Ireland have included the adoption of the UNCITRAL Model Law on International Commercial Arbitration with minor amendments, while 2012 could see the enactment of the Mediation Bill[5].

[5] A draft Mediation Bill was published on 1 March 2012. It builds on the recommendations of the Law Reform Commission Report on Alternative Dispute Resolution: Mediation and Conciliation. The Bill has been submitted to the Joint Oireachtas Committee for Justice, Defence and Equality for their consideration. Any views which the Committee submitted would be taken into consideration prior to finalisation of the Bill for publication

## 3.2 WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

In 2001 Attorney General Michael McDowell maintained "the legal mindset in Ireland was adversarial and combativeness was ingrained in the Irish legal profession" and that Irish lawyers were a bit "too trigger happy" to go down the litigation route (Lucey, 2001). It is perhaps therefore no surprise that traditionally in Ireland disputants have continuously resorted to litigation as their choice of dispute resolution mechanism. While litigation will provide a resolution to the dispute, the result usually comes at a price, as Burger (1982) observes, the time lapse, expense and emotional stress all weigh heavily on the value of the result. Although litigation has, and will continue to prove an effective means of dispute resolution, Henry (1999) notes that it is a process which is unavailable to most citizens because it is "too costly, painful, inefficient and destructive for a civilised society". It is therefore important that the legal profession and individuals seek to address litigation's shortcomings. ADR in many cases could be the answer.

Alternative Dispute Resolution is the term which describes processes for resolving disputes outside the traditional judicial legislative decision-making process. It represents a continuum of processes which are designed to resolve disputes in a manner which avoids the cost, delay, and unpredictability of more traditional adversarial processes such as litigation. In contrast to the adversarial approach of litigation which concentrates on the legal rights of the parties, ADR addresses the personal interests of the parties including

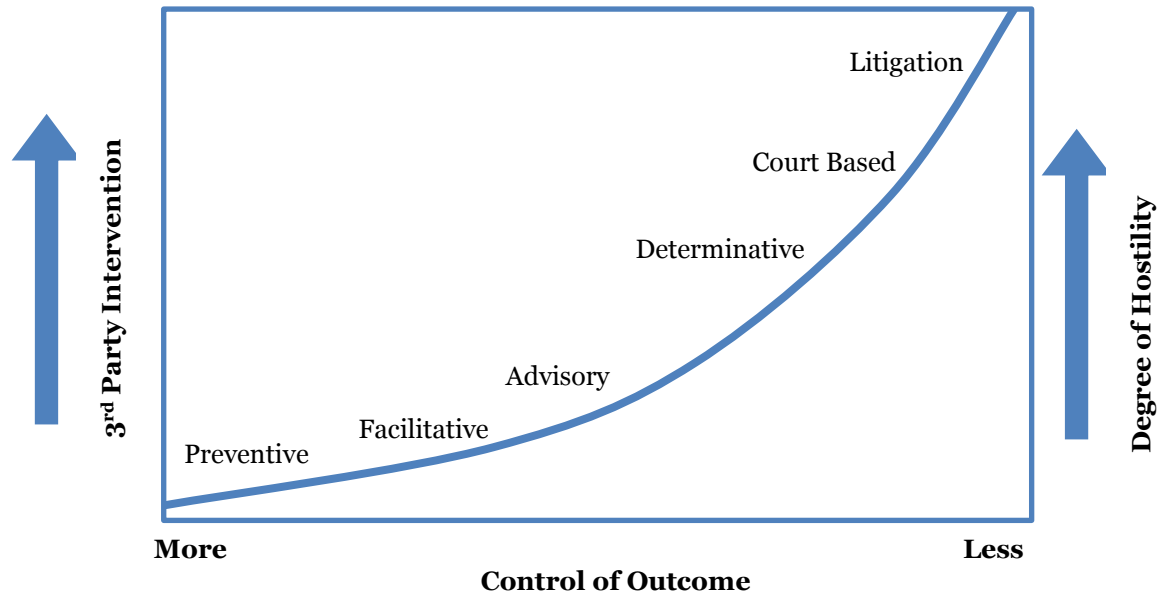
personality, emotions, needs and desires. It can be used to resolve disputes by empowering disputing parties to resolve their own disputes.

ADR can be applied in many situations including family, community, commercial contracts and employment disputes. Indeed Fiadjoe (2004) contends that "there is now increasing recognition of the fact that every type of dispute can be the subject of a dispute resolution process", however there is no "one size fits all". Judge Terence John points out, depending on the dispute, one process will be more suitable than the other, or in some cases, a combination of processes may be appropriate; the key is to be flexible and imaginative (Lewis, 2006). That said, Winkler (2007) would argue that not all disputes are suitable for ADR, for example, cases which require a precedent to be set and cases involving fraudulent conduct, may not be suitable for resolution using ADR.

## 3.3 THE ADR SPECTRUM

ADR processes may be arranged along a spectrum representing increasing costs, decreasing control of the parties and deteriorating relationships (Fiadjoe, 2004). Figure 3.1 illustrates the ADR spectrum in five categories as follows: Preventive, Facilitative, Advisory, Determinative and Court Based ADR.

**Figure 3.1: The ADR Spectrum**




Adapted from Woodcock Washburn (2006)

As can be observed from Figure 3.1, in preventive, facilitative and advisory ADR processes, the disputing parties have greater control over the outcome, there is less third party intervention and the level of hostility shown among disputing parties is low, therefore increasing the chances of preserving an ongoing relationship. In contrast, hostility among disputing parties increases when using determinative and court-based ADR processes, thereby lessening the likelihood of preserving a relationship going forward. Determinative and court-based processes also involve greater third party intervention than the other processes, and the disputing parties have little or no control over the outcome. The Law Reform Commission (2008) outlines the processes which are contained in each category (Table 3.1), however, it should be noted this is not an exhaustive list, as Marshall (1998) notes "No two disputes are the same;

no two disputants are the same. Therefore, no consistent mode of resolution will be appropriate."

**Table 3.1 ADR Spectrum**

| Preventive ADR | Facilitative ADR | Advisory ADR | Determinative ADR | Court-Based ADR |
|---|---|---|---|---|
| Negotiation | Mediation | Conciliation | Arbitration | Early Neutral Evaluation |
| Partnering | | Collaborative Law | Adjudication | Court Settlement |
| ADR Clauses | | | Expert Determination | Court Referred ADR |
| | | | | Small Claims Court |

*Source: The Law Reform Commission (2008)*

The following paragraphs will briefly describe each of the ADR categories outlined above.

### 3.3.1 Preventive ADR

Preventive dispute resolution processes including Negotiation and ADR Clauses, recognise that conflict is inevitable. Preventive ADR processes aim to establish at the outset how any disagreement should be handled and to channel these disagreements into a problem-solving arena early enough to avoid escalation into full-blown disputes. A preventive measure put in place by many employers is the drafting of grievance and disciplinary procedures in line with The Labour Relations Commission's Code of Practice on Grievances and Disciplinary procedures. ADR Clauses involve inserting clauses into contracts that provide for dealing with disputes if they arise while Partnering focuses on defining mutual objectives, improved communications, identifying possible

problems and developing formal dispute resolution methods (National Alternative Dispute Resolution Advisory Council (NADRAC), 2003). Preventive ADR techniques are most commonly found in both the construction and employment sectors (Law Reform Commission, 2008).

### 3.3.2 Facilitative ADR

In Facilitative ADR processes a neutral third party helps the disputing parties define the issues and find common ground. The disputing parties have complete control over the outcome of the dispute; the neutral third party facilitates the process and plays no advisory or determinative role in the resolution of the dispute (NADRAC, 2000). Mediation is a facilitative ADR process and is perhaps one of the most commonly known of all ADR processes. It is a non-binding process which is based on the principle of self-determination, i.e. the disputing parties are responsible for determining the outcomes (Lande & Herman, 2004). In the Mediation process disputing parties meet with a third party, the mediator, in an attempt to negotiate a settlement of their dispute. The process involves a series of joint and individual sessions in which the mediator will determine the underlying interests and needs of each party. Having established the areas of common ground the mediator will assist the parties in selecting options which maximize their interests (Law Reform Commission, 2010). If agreement is reached the mediator will write the terms of the agreement which will be signed by both parties at the final joint session.

### 3.3.3 Advisory ADR

Advisory ADR processes involve a practitioner assisting the disputants in reaching a mutually acceptable agreement. Ball and Redmond (2004) note that practitioner intervention may be both indirect and direct. ADR practitioners can influence outcomes indirectly by the way in which they conduct the process, assist parties in exploring options, reframe comments made by parties and convey messages during negotiations. Direct intervention might involve practitioners suggesting possible settlement terms, giving expert advice and in some cases, recommending settlement terms (Ball and Redmond, 2004).

The Conciliation process is similar to mediation, however in Conciliation the neutral third party plays a more advisory role and interventionist role. If the parties are unable to reach a mutually acceptable agreement, the conciliator issues a recommendation which is binding on the parties unless rejected by one of them. As outlined in chapter 2 the Labour Relations Commission offers Conciliation as one of its services.

### 3.3.4 Determinative ADR

Determinative ADR processes involve a dispute resolution practitioner evaluating a dispute and making a determination. In determinative ADR processes parties have very little control over the process and the outcomes. Arbitration and Adjudication involve the disputing parties presenting arguments and evidence to a dispute resolution practitioner (Arbitrator/Adjudicator) who makes a binding and enforceable determination.

Similarly, Expert Determination involves the disputing parties presenting arguments and evidence to a dispute resolution practitioner, however in this instance the dispute resolution practitioner is chosen on the basis of their qualification or experience in the subject matter of the dispute (NADRAC, 2003). Parties agree in advance to be bound by the Expert Determination.

### 3.3.5 Court Based ADR

Court Based ADR processes usually occur after litigation has been initiated and during the lead up to the commencement of the trial (Law Reform Commission, 2008). Although as noted in table 3.1 there are various methods; in Ireland it is perhaps the Small Claims Court which is most commonly known. The Small Claims Court is designed to handle consumer claims and business claims cheaply without involving a solicitor (Courts Service, 2006). It involves a District Court clerk mediating a settlement between the disputing parties with a maximum jurisdiction of €2,000.

Early Neutral Evaluation involves a neutral third party evaluating the arguments and evidence presented by disputing parties at an early stage in an attempt to resolve the dispute. The neutral third party makes a determination on the key issues and the most effective means of resolving the dispute (NADRAC, 2000). The Court Settlement process is whereby a judge assists parties in reaching an amicable settlement at a court settlement conference (Law Reform Commission, 2008). The judge can meet with parties separately

or together. Agreements are binding, however if settlement cannot be reached the case will continue but with a different judge.

## 3.4 Benefits and Weaknesses of ADR

"Litigation can be a stressful undertaking; it is a costly, lengthy, public exhibition of differences, leading to a great deal of ill-will between litigants" (Fiadjoe, 2004, p.1). While ADR does not provide all the answers to litigation's supposed shortcomings, there are several benefits attributed to using ADR processes. This section will describe the perceived benefits and weaknesses of using ADR.

### 3.4.1 Time Efficiencies

A key factor of any legal system is it functions in an efficient and timely manner - justice delayed is justice denied. Budd and Colvin (2008) describe an efficient dispute resolution system as

> ...one that conserves scarce resources, especially time and money. Systems that are slow and take a long time to produce a resolution are inefficient; systems with shorter timeframes that produce a relatively quick resolution are efficient.

The EAT (2010) reported waiting times of approximately 12 months while Dewhurst (2009) noted that waiting times for the Equality Tribunal could be up to 18 months. Lengthy waiting times such as these can add to a disputant's anxieties and exacerbate what is probably already a stressful situation. As ADR can often be scheduled at the convenience of the parties, it can provide

disputants with the opportunity to settle their dispute in a much speedier manner than litigation (Shamir, 2003). Furthermore, Zack (1997) observes "It (ADR) also holds promise for clearing the backlogs for labour agencies and tribunals, thereby helping government agencies to meet their societal responsibilities more effectively".

In addition, Galanter (2004) maintains ADR is one of the most prominent reasons for the reduction in the number of trials being presented to the US District Courts. Galanter (2004) noted that while the number of dispositions presented to US District Courts increased from 50,000 in 1962 to 258,000 in 2002, the proportion of these which were by trial decreased for the same period – from 11.5% in 1962 to 1.8% in 2002. Moreover, Blomgren Bingham *et al* (2009) notes that 88 hours staff time and 6 months litigation time were saved when using ADR compared to litigation involving the US Federal Government.

The above paragraph outlines that ADR has played a significant role in the speedier resolution of cases in the US and while it is difficult to determine if it could have the same effect in the Irish system, it does demonstrate that ADR can lead to speedier resolutions, indeed the Law Reform Commission (2008) notes that ADR "…may provide many parties with an efficient mechanism for the resolution of disputes". However, speedier resolutions may not be achievable in all disputes. Alternative dispute resolution processes do not always lead to a resolution, therefore it is possible that you could invest the

time and money in trying to resolve the dispute out-of-court and still end up having to go to court. Furthermore, in some instances ADR can be used as a delaying tactic, or an opportunity to gather information by a party fully intent on going down the litigation route anyway.

### 3.4.2 Flexibility

Traditional litigation is not flexible; in litigation the judge must follow applicable law and the necessary procedures such as timelines of appeals. ADR provides greater flexibility on several fronts. Firstly, the ADR professional chosen may be selected on their area of expertise such as Accountants or Human Resource specialists, it is not necessary that they have a legal background. Secondly, in ADR, parties may decide on the location of the meetings, the timeframe, the people to be involved in the process and importantly they decide what is an acceptable outcome rather than have one imposed, as Shamir (2003) notes, ADR can be adapted to meet the needs of the parties during the process and in achieving an agreed solution. The agreed solution may contain a variety of novel outcomes such as an apology or an explanation. These outcomes would not normally form part of a court agreement, however in contrast to court imposed decisions; the solutions in ADR usually better suit the needs of each party (Law Reform Commission, 2008).

While the flexibility of the process allows for a lack of legal representation, some disputants may feel disadvantaged by the lack of legal aid, advice or assistance available to them. Furthermore, while the flexibility of outcomes

allows for several settlement options to be presented, in most cases but not all, they are not legally binding enforceable outcomes; therefore if the aim is to compel somebody to do something, then litigation may be a better option.

As outlined in chapter 2, redress under employment legislation through the EAT is determined as compensation, reinstatement and reengagement. In 2010, the EAT reported that of the 217 determinations for Unfair Dismissal, reinstatement or reengagement were ordered in only 9, while the remaining 208 were awarded compensation. The over-reliance on compensation would appear to indicate there is currently a lack of flexibility in outcomes of employment disputes at the EAT.

### 3.4.3 Confidentiality

Where parties resolve their dispute using litigation, Sonnenfeld and Greco (1996) argue that it is possibly the most public means of doing so. ADR can help disputing parties resolve their disputes in a confidential manner. In fact, confidentiality is possibly one of the main factors in the success of ADR, as the EU Commission (2002, p.28) note "Confidentiality appears to be the key to the success of ADR because it helps guarantee the frankness of the parties and the sincerity of the communications exchanged in the course of the procedure". It affords disputing parties greater freedom to pursue settlement options which best suit that particular dispute, without fear of any precedent being set (Mahony and Klass, 2008). The principle of confidentiality sets out that the process should remain confidential between the parties, therefore disputing parties enter into the process knowing that they and any third parties they

choose to include are the only people who know of the dispute and any attempt to settle it (IADRWG, 2006). Furthermore, anything discussed between one party and the neutral third party in private meetings may not be disclosed to any other party without prior consent.

Although confidentiality creates an open environment for disputants to negotiate freely, there are instances where the principle of confidentiality could be questioned. For instance, should the public not be aware of unscrupulous employers who continually violate employment legislation? Does the reduced chance of adverse publicity negatively affect an employer's adherence to employment discrimination law (Mahony and Klass, 2008)? Moreover as agreements reached in a number of ADR processes are private and confidential, they do not act as precedents in future cases, which can result in similar type cases been resolved in different ways (Van Gramberg, 2006), therefore if there is a need to establish a point of law that others can rely on, there may be a need to go to court.

### 3.4.4 Preservation of Ongoing Relationships

While the preservation of amicable ongoing relationships may be important in all disputes, it is of particular importance in business, employment and family disputes. Zeytoonian (2009) maintains that

> One of the factors that make a case a good candidate for using non-adversarial approaches to dispute resolution is the importance of preserving the business, organizational or family relationship and keeping it healthy. If the relationship must survive the dispute, if there will be ongoing dealings or contact between the disputing parties after the dispute is resolved, then ADR

approaches like collaborative law, case evaluation and mediation have added value.

Litigation often fails to offer disputing parties the opportunity to preserve ongoing relationships. However the non-adversarial nature of ADR does present such an opportunity. ADR can assist parties in resolving dispute amicably, possibly resulting in improved relationships. In ADR processes, parties gain an understanding of each other's motives, needs and wants, which often result in improved relationships (Law Reform Commission, 2008).

### 3.4.5 Cost

Hiring a solicitor and pursuing a claim can be costly; so costly that in many instances disputing parties choose not to pursue their case due to a lack of resources (Zack, 1997). ADR can potentially relieve some of the costs associated with litigation and thereby increase access to justice for those less "well-off". In recent times a number of international reviews which support the potential of cost savings in ADR over litigation have been carried out. A review carried out by the Singapore Mediation Centre in 2006 estimated cost savings of $80,000 for cases which go to the high court, while in 1999 the Florida State Agency Administrative Dispute Resolution Pilot Project outlined that reported savings over anticipated litigation costs ranged from $2,250 to $700,000; finally, in 2007 the National Audit Office in England estimated that the average cost of legal aid in non-mediated cases was £1652 compared to £752 in mediated cases – a saving of £930 (Law Reform Commission, 2008).

In Ireland, it has been noted that ADR could provide the Government and State bodies with much needed savings in public expenditure. In March 2010 at a National Mediation Conference Symposium, Michael Gorman, Friarylaw, estimated that by using mediation instead of litigation Irish State bodies could save up to €200 million (Coulter, 2010). Additionally, An Bord Snip Nua (2009) maintained that all cases involving one state organisation against another should be resolved using ADR, thereby relieving the burden of legal costs borne by the state. A similar commitment was undertaken in England in 2001 when the Lord Chancellor published a formal pledge that government departments and agencies settle legal cases by ADR techniques (Baksi, 2010). Since 2006/2007 this pledge has resulted in savings of almost £190 million. However, while the above figures would indicate that ADR holds the potential for cost savings in dispute resolution, there are also occasions where ADR can add to the costs of resolving a dispute. As noted earlier, ADR can in some cases be an additional step in resolving a dispute. Every step along the way increases the costs. Therefore, resources which could have been used in bringing a case closer to trial may have been wasted in ADR where one party has no intention of settling (Winkler, 2007).

In addition to the financial cost of litigation there is the emotional cost. People can express many emotions in the dispute resolution process such as anger, rage, sadness, guilt and resentment. Emotions might not be addressed in litigation, which results in people still dealing with them even after the judgement. Indeed emotion-driven litigation which is aimed at punishing the

other party can exacerbate these emotions and cause great harm to the disputant (Martin, 2010). In contrast, ADR provides people with an opportunity to deal with their emotions. ADR aims to help people control their emotions and put them into perspective. People are better placed to make informed decisions once their emotions have been worked through and understood. Thomas (2006) notes that organisations which manage conflict constructively are better positioned to deal with people's emotions, which in turn results in a reduction in absenteeism and staff turnover and an increase in organisational loyalty and stable working relationships.

### 3.4.6 Self-Determination

In the litigation process disputants delegate responsibility for the resolution of their disputes to solicitors and judges, ultimately excluding themselves from the resolution of their dispute (Welsh, 2001). However in ADR the disputants have greater scope to take ownership of the dispute. One of the fundamental principles in ADR is self-determination which assumes that the disputing parties would be central to the process. It is founded upon party empowerment. The American Bar Association *et al* (2005, p.3) defines self-determination as:

> the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

While unregulated, the informal nature of mediation and conciliation have assisted in the resolution of disputes in Irish society for many years. In 2010,

the Law Reform Commission issued its final report on *Alternative Dispute Resolution: Mediation and Conciliation,* which recommended that legislation similar to the Draft Mediation and Conciliation Bill 2010 contained therein should be enacted. While this would be a welcome addition to Irish legislation, it remains to be seen what effect the formalisation of ADR might have. It is possible that the promise offered by self-determination in informal settings might be negated by regulation and formalisation. In terms of court-connected mediation, Welsh (2001) notes that due to the institutionalisation of mediation in the courts, disputing parties now play a less central role in the process. Furthermore, Welsh (2001) notes that the party centered empowerment concepts are being replaced with concepts that are more reflective of the traditional practices of lawyers and judges.

### 3.4.7 Access to Justice

Winkler (2007) notes that "Access to justice, as a fundamental principle of the civil justice system, dictates that problems of cost, delay, judicial economy and proportionality must become more prominent in our approach to delivery of legal services". Although the courts are an indispensable part of the justice system, access to justice could be restricted if the courts were the only means of resolving disputes. It is therefore important that any justice system includes an array of options for resolving disputes. ADR has the potential of extending access to justice to disputants who are unable, possibly due to lack of resources, to take the litigation route.

While the variety of options presented by a justice system incorporating both litigation and ADR is desirable, it still raises questions as to whether access to justice is really available for all parties especially given that the Law Society (2008) raised concerns that there still remains, significant areas of unmet legal needs in Ireland. Indeed, it could, be argued that a two-tier justice system is in place; one for those who can afford all options and one for those who cannot. Furthermore, while some disputants may be content with the outcomes available in ADR, some disputants may feel the "need" to go to court to resolve their dispute, however due to the cost of doing so, cannot afford to, these disputants may either give up or settle for an outcome in ADR which they otherwise might not have contemplated.

### 3.4.8 Power

The balance of power is a concern in the design of dispute resolution systems, as Teague (2007) notes "The underlying assumption is that, to be effective, conflict resolution systems must win the confidence of both employer and employee". In terms of the employment relationship there is a longstanding belief that there is an imbalance of power between employers and employees, giving the employer an unfair advantage (Hogbin, 2006). In addition, employers, particularly large organisations, tend to have greater access to resources which gives them a distinct advantage over the employee. As was noted earlier, litigation can be both a costly and lengthy process, thereby those with the greater resources are likely to hold the balance of power. In contrast, parties who opt to use ADR processes tend to resolve disputes both quicker

and at a lesser cost thus creating an environment where both parties can be viewed as equals.

Finally, in what is known as the repeat player phenomenon, Galanter (1974) distinguished between experienced "repeat players" and inexperienced "one shotters". Galanter established that the frequency of interaction with the legal system had an influence on the outcome of cases. In terms of employment disputes, employers could be viewed as the "repeat player" as they are more likely than individual employees to have had previous dealings with legal institutions or the various employment tribunals. The repeat player is also present in ADR. In a study of the repeat player in employment arbitration cases, Bingham (1997) found that employers who repeatedly used arbitration had a greater chance of winning than those who used it once. Although the "repeat player" phenomenon is also present in ADR, it is noted that dispute system design can attempt to minimize repeat player advantages (Menkel-Meadow, 2000). Systems which incorporate the employer paying the costs associated with the ADR process are seen as an attempt to balance the power; however, this raises other issues such as whether a system paid for by the employer is likely to be viewed as neutral by the employee (Menkel-Meadow, 2000). Indeed, it is possible that a bias or conflict of interest may arise if a third party neutral e.g. a mediator, were to receive a good deal of repeat business from the same employer.

The above sections describe ADR in general and the various benefits and weaknesses associated with it. The following section will focus on collaborative law – its origins, its evolvement and why it might be appropriate for Irish employment disputes.

## 3.5 THE ORIGINS OF COLLABORATIVE LAW

One of the most recent additions to the suite of ADR methods is collaborative law. Collaborative law was founded in 1990 by Minnesota divorce lawyer Stu Webb. Webb had been practicing family law for 17 years and had become disillusioned with the adversarial nature of it. Webb not only felt that the parties were being left feeling angry and stressed by the "fighting and bickering" but he was also. Having had enough, Webb was ready to quit the practice of law, however rather than quit he began experimenting with different ways to approach family law. The result of Webb's "experimenting" saw the establishment of collaborative law (Webb & Ousky, 2006). As word spread of the apparent success of collaborative law in Minnesota, lawyers in other states and in Canada sought to adapt this "new" form of law. Training in collaborative law was in demand. Webb together with San Francisco lawyer Pauline Tesler, with whom he had formed an alliance, carried out training sessions in California, Georgia, Florida, Vancouver and a number of other locations throughout the US and Canada. 2001 saw the establishment of the International Academy of Collaborative Practitioners (IACP), which now has 4,200 members in 24 countries (Lande, 2011). In 2002 collaborative law was

introduced to Europe with the launch of the Collaborative Law International European Institute in Austria. England adopted collaborative law with the first training taking place in September 2003 while the first training in Ireland, conducted by Pauline Tesler, took place in April 2004 (Smyth, 2009). Other countries which are now well established in collaborative law include Australia, France, Bermuda, Germany, Czech Republic, Netherlands, Switzerland, Hong Kong, New Zealand, Israel, Kenya and Uganda (Scott, 2008).

In 2007, the Uniform Law Commission (ULC) in the United States recognised a need for consistency in the practice of collaborative law. The Uniform Collaborative Law Rules and Act (UCLRA) was drawn up and approved by the ULC in 2009 (Schepard and Hoffman, 2010). Although rejected by the American Bar Association (ABA) in 2011, the UCLRA has been enacted by three states: Utah, Nevada and Texas, while several other states have introduced it, including Alabama, Hawaii, Massachusetts and District of Columbia (ABA, 2012).

To date, several studies of collaborative law have been undertaken (Lande, 2011). These studies were conducted by Julie McFarlane (Canada and United States, 2004), William Schwab (United States, 2003), Richard Shields (Canada, 2004), Gay Cox and Syd Sharples (United States, 2006), John Lande (United States, 2007), Michael Keet and Wanda Wiegers (Canada, 2008), Mark Sefton (England and Wales, 2008), and finally the IACP Research Committee (Worldwide, 2006 – to date). Initial empirical evidence from these studies

indicates that in general the clients are very satisfied with collaborative law and that cases are resolved both faster and more economically than traditional methods (Lande, 2011).

### 3.5.1 What is Collaborative Law?

In the Collaborative Law Process (CLP) both clients agree to hire solicitors who have received training in interest based negotiations. The collaborative solicitor will support his/her client but will not resort to arguments or accusations. Arguments are rarely effective because they invariably cause the other party to adopt entrenched positions. Collaborative lawyers are trained to avoid arguments in favour of more effective strategies such as goal setting, active listening, identifying common interests, generating creative solutions and maximizing outcomes (Webb & Ousky, 2006). The CLP begins with a four-way meeting where each party and their respective solicitor discuss how the case should proceed. Using the four-way meetings ensures parties are present and active in the problem solving and settlement negotiations. At the first four-way meeting the solicitors and each party sign the participation agreement which commits them to reaching a settlement. The participation agreement makes clear that negotiations will take place in good faith and that each party must voluntarily disclose all information pertinent to the resolution of the dispute (Webb & Ousky, 2006; Tesler, 2008). Furthermore the participation agreement prohibits either party from using information provided during the CLP in an adversarial manner, therefore creating a safe environment where critical questions can be answered without fear that the

answers will be used in opposition at a later date. However, it is perhaps the disqualification agreement which is the unique feature of collaborative law. The disqualification agreement, contained in the participation agreement, provides that, should the CLP fail to yield a settlement, the solicitors are precluded from representing their clients in any future litigation of the dispute (Tesler, 2008). Therefore the collaborative practitioner must withdraw from the case if it goes to court. Lande (2011) outlines that the intention of the disqualification agreement is to motivate the parties and relevant professionals to focus exclusively on negotiation.

The whole process can take between two and seven or more four-way meetings to reach agreement. The varying lengths will depend on factors such as, the number of issues to be resolved and their complexity, party flexibility and temperament, and solicitor skill in managing the process (Tesler, 2008). Finally, once an agreement is achieved the solicitors for each party jointly draft the agreement. These documents are then signed by the parties and filed with the appropriate court for approval making it a legally binding agreement (Homeyer & Amato, 2009).

### 3.5.2 Models of Collaborative Law

Gutterman (2004) outlines that the various models of collaborative law include the Traditional Model, the Interdisciplinary Team Model and the Referral Model. The Traditional Model, explained above, involves each party retaining a solicitor to assist in negotiations. The Referral Model is where the parties

commence the case with their collaborative solicitors and when necessary they bring in professionals such as collaborative coaches, a financial advisor and in family law cases where there are children involved, a child consultant. Collaborative coaches are usually mental health professionals who assist their client in managing their emotions and communicating effectively. The financial advisor might be an accountant or financial planner. These professionals must also sign the Participation Agreement thereby excluding themselves from taking part in any court proceedings should the CLP fail to produce an agreement.

Finally, while using a similar process, the Interdisciplinary Team Model or "Collaborative Divorce" involves the various professionals from the outset. The interdisciplinary team comprises the two clients, their respective solicitors, and financial, vocational and psychological experts. By having these professionals involved in the process, collaborative law can address the emotional, financial and legal needs of the parties. The professionals may communicate with each other freely during the process, however as with the other models, any work done within the process is inadmissible in court if the CLP fails to yield an agreement (Homeyer & Amato, 2009). Although party empowerment may be diminished in the Interdisciplinary Team Model in that the team may dictate the process and how clients will conduct themselves during the process, Lopich (2007) notes that advocates of the Interdisciplinary Model find that it provides a holistic resolution of clients' issues; it produces agreements that endure for longer; the clients receive more support during and

after the process; and the team remain available to the clients in the event of future disputes.

### 3.5.3 The Paradigm Shift

Abney (2005, p116) defines a paradigm shift as '.. the result of the transformation of a way of thinking which is brought about through crisis and revolution'. Moreover, Abney (2005) notes in order for a paradigm shift to take place old ideas must be replaced with new theories, as Tesler (2008, p.26) asserts

> no one should engage in collaborative representation without understanding that doing this work well requires *undoing* a professional lifetime of conscious and unconscious habits, and requires rebuilding from the bottom up an entirely new set of attitudes, behaviors, and habits. . . .
> [W]e must become beginners and *unlearn* a bundle of old, automatic behaviors before we can acquire [those] of a good collaborative lawyer.

This change in approach requires a change in the way of thinking for solicitors from an adversarial model to a problem solver model. This change will affect the discussion and the purpose of inquiry. In attempting to achieve settlement, solicitors practicing collaborative law must focus on the future rather than the past; relationships rather than facts, restructuring relationships rather than faultfinding; and interests rather than positions (Reynolds & Tennant, 2001). This could prove challenging for Irish solicitors, as noted by Attorney General Michael McDowell, the legal mindset in Ireland is adversarial and combative in nature (Lucey, 2001).

### 3.5.4 Ethical Consideration of Collaborative Law

Although collaborative law is now well established internationally, particularly in family law, there still remains a doubt on whether it is ethical. In 2007, collaborative law in the US achieved a major milestone when the ABA issued its ethics opinion on collaborative law approving the use of collaborative law agreements by lawyers (Hoffman, 2007). However, in Colorado, the Bar Association in its Rules of Professional Conduct deem the collaborative law process unethical if the lawyers sign the participation agreement along with their clients (Colorado Bar Association, 2007). It could be argued that Colorado is right, perhaps collaborative law is unethical, after all how can it be possible to act as a zealous advocate for your client within the collaborative law process; is it not the lawyer's job to "win"? While it remains the lawyer's job to "win", in contrast to the adversarial nature of litigation "win" in the collaborative law context need not involve the other side "losing". This does not mean the lawyer ceases to act as an advocate for their client. Indeed Reynolds and Tennant (2001) state 'In practicing collaborative law, an attorney never ceases to be an advocate as she or he commits to reaching an agreement as counselor rather than adversary'. Furthermore, Lande and Hermann (2004) maintain clients may actually get the "best of both worlds" - having a lawyer strongly advocate for them and getting the benefit of their collaborative problem-solving negotiation skills.

Colorado remains the sole state or nation to have declared collaborative law unethical (Homeyer, 2009). This has not, however, deterred the practice of

collaborative law in Colorado. Collaborative lawyers continue to practice, but only the clients sign the agreement and not the lawyers (Hoffman, 2007).

### 3.5.5 Collaborative Law in Ireland

Introduced to Ireland in 2004, collaborative law has established itself as a valuable tool in family law disputes. The Association of Collaborative Practitioners (ACP) is the national body in Ireland which was established in 2004 (Mallon, 2009), to (1) promote collaborative practice as a mechanism for settling disputes; (2) support practitioners by providing documentation and ethical guidelines for the practice of collaboration; and (3) provide training and peer review structures for collaborative practitioners (ACP, 2010).

At the Second European Collaborative Law Conference in May 2008, keynote speaker President Mary McAleese stated that "Ireland had endorsed collaborative law as its first choice for dispute resolution" (Abney, 2008). In addition, conference participants were further informed that, disputants and the legal profession in Ireland will be encouraged to investigate the possibilities of settling disputes with collaborative law before becoming involved in litigation" (Abney, 2008).

However that said, the continued growth and uptake of collaborative law in Ireland may depend on the establishment of practice groups within various regions and communities. Tesler (2008) maintains that the success of collaborative law in a community depends on the 'emergence of a sufficient

critical mass of interested and competent collaborative lawyers in the locale who can put out a consistent core message – individually and collectively'. The establishment of collaborative practice groups are an attempt at achieving a collective consistent message. They aim to promote collaborative law as a viable option for dispute resolution, which could/should result in an increase in collaborative activity for group members. In Ireland, the ACP website lists 11 regional practice groups in Belfast, Cork, West Cork, Dublin, South Dublin, Galway, Kildare/West Wicklow, Limerick and Clare, East Coast, South Coast, and West Dublin/Meath.

### 3.5.6 Collaborative Law and Employment Dispute

Reynolds and Tenant (2001) point out that collaborative law has potential uses in any dispute where a continued relationship is desired or required because it aims to preserve ongoing relationships. Fairman (2008) notes that collaborative law has experienced a "meteroric rise" in the United States and Canada and while it was initially developed to assist with Family Law disputes, lawyers are now beginning to experiment with collaborative law in civil and employment disputes. Similarly, Solovay and Maxwell (2009) observe that the success rate of collaborative law as demonstrated by its '…still-expanding popularity' has prompted calls for its expansion to non-family matters including business, employment, trusts and estates, and medical error.

As with family disputes, it is usually desirable that ongoing relationships are preserved in both employment and business disputes. The Law Society of South Australia (2012) point out that 'Collaborative practice can address the human dimensions of an employment law dispute and produce creative, win-win solutions that cannot be obtained in court'. Various types of employment dispute including termination and discrimination which can take years to litigate; which can have a major impact on employees' lives; and which are a drain on an employer's time and resources present opportunities for the successful use of collaborative law (Law Society of South Australia, 2012).

The Law Reform Commission (2010) suggested that the collaborative process be defined in legislation as it believes that collaborative law holds potential as a viable option for the public in various areas of law, perhaps one of these areas could be employment law.

## 3.6 SUMMARY

This chapter has discussed ADR, its origins, the various types and its benefits and weaknesses. The literature has outlined that there are multiple methods of ADR, with varying levels of party control, varying levels of third party intervention and finally varying levels of hostility shown among disputing parties. The literature identified the benefits of using ADR including cost savings, time efficiencies, balancing of power, however the literature also identified in most instances each of these possible advantages carried a caveat.

Finally the chapter concluded with an in-depth discussion on collaborative law and its potential use in employment disputes in Ireland.

The empirical research of this study tests the various benefits of ADR and whether they also apply to collaborative law in an Irish context. Furthermore it aims to test whether collaborative law could be applied to Irish employment disputes. The methodology for this empirical research is outlined in the next chapter.

# CHAPTER 4: RESEARCH METHODOLOGY

This chapter will describe the methodology undertaken for this study. The chapter commences with a discussion on the formulation of the research question followed by a description of the broad research objectives. The chapter then outlines the various research paradigms and which paradigm this study falls into. Following this, the chapter will describe the study's primary research which was conducted in two phases. Phase A, the quantitative research methodology, took the form of a survey. It is described in relation to the research objectives specific to the phase, the data collection method used, the measurement technique and the sampling process. Phase B, the qualitative research methodology, took the form of depth interviews. Similarly, this phase is also described in relation to the research objectives specific to the phase, the data collection method used, the measurement technique and the sampling process. Finally, the ethical considerations for this research are discussed.

## 4.1 RESEARCH QUESTION

When undertaking research the choice of research question is the most important decision facing the researcher (Saunders *et al*, 2009). Furthermore, Jones (2003) observes research questions which are both answerable and relevant are central to all good research projects. Research questions should

generate new insights and therefore it is important that relevant literature is consulted prior to, and during, the formation of research questions.

A review of the relevant literature is a necessary step in research question formation as it enables the researcher to determine the key areas of importance to the research question. It creates a foundation for advancing knowledge whilst also ensuring the research is in line with what other researchers attempts to understand what is happening (Robson, 2002; Webster & Watson, 2002). The literature review for this project identified various problems associated with existing employment dispute resolution in Ireland such as delay, cost, emotional stress (EAT Procedures Revision Group, 2007; Barry, 2009). Furthermore, the literature also outlined that there are a number of attributes which indicate that collaborative law may be an appropriate method of dispute resolution in employment disputes (Reynolds & Tenant, 2001). With this in mind the research question which this study aims to answer is:

**Can a dispute resolution model based on collaborative practice be a useful addition to alternative dispute resolution in Irish employment law?**

## 4.2 RESEARCH OBJECTIVES

Having established the research question the next challenge facing the researcher is to generate detailed research objectives (Hair *et al*, 2007).

Saunders *et al* (2009, p.600) define research objectives as 'clear, specific statements that identify what the researcher wishes to accomplish as a result of doing the research'.

As noted previously, literature in the area of employment disputes enabled the researcher to identify the key issues associated with employment disputes in Ireland, while the literature on collaborative law identified that collaborative law is already playing a role in employment disputes in other countries but is yet to be used in employment disputes in Ireland. In order to determine the suitability of collaborative law to employment disputes in Ireland, the researcher identified the following overall research objectives:

1. Evaluate how successful[6] collaborative practice has been to date in Ireland in the resolution of disputes.
2. Determine the extent to which collaborative practitioners view collaborative law as a viable method for employment dispute resolution in Ireland.
3. Create a collaborative practice model that reflects the unique attributes of Irish employment law conflicts.

Sub-objectives were generated from each of the above objectives. Sections 4.4.1 and 4.5.1 detail the sub-objectives for both phases of the study.

[6] For the purpose of this study, success is determined by the settlement rates. A discussion on how success was defined can be viewed in Section 4.4.3.

## 4.3 RESEARCH PHILOSOPHY

A research philosophy is a belief about the way in which information about a phenomenon should be gathered, analysed and used. Thorpe *et al* (2008) believe that an understanding of philosophical issues can be very useful in helping to clarify the research design and in helping the researcher identify the designs which will and will not work. Holden and Lynch (2004, p. 399) note that the philosophical approaches to research '…are delineated by several fundamental assumptions concerning ontology (reality), epistemology (knowledge), human nature (pre-determined or not) and methodology'. Moreover, these assumptions are consequential to each other (Holden & Lynch, 2004), that is, a researcher's ontological position will affect their epistemological persuasion which, in turn, affects their view of human nature and as a result, the choice of methodology.

Ontology is '..concerned with beliefs about what there is to know about the world' (Ritchie & Lewis, 2003, p.11). Mason (2002) notes that a researcher's ontological perspective requires them to understand how their worldview influences the research carried out. Epistemology, which encompasses the various research philosophies, is about knowledge itself – how it can be acquired and communicated. Positivism and intepretivism are the two major philosophical approaches to research.

A positivist approach to research maintains that '…the world is measurable, controllable, and explainable' (Knox, 2004, p.121). Positivism is a structured approach to gathering data and relies primarily on quantitative research methods which, it is argued, are effective for physical phenomena but not the inner life of individuals (Pring, 2000). The main advantage of the positivist approach is its generalisability, that is, the extent to which the findings of the research can be more generally applied to settings other than that in which they were originally tested (Robson, 2002).

In contrast to positivism, interpretivism focuses on the meaning rather than the measurement of social phenomena. Interpretivists argue that consciousness is subjective and the researcher is a central part of the research process. Interpretivism is seen as promoting the value of qualitative data in pursuit of knowledge (Kaplan & Maxwell, 1994). Carr (1994) reports that when using the qualitative approach there is usually no intention to count or quantify the findings of a study. Instead, in most instances, qualitative research relies on narrative information gained to help towards the understanding of phenomena and events. In contrast to positivism, generalisability is not always achievable in the qualitative approach.

In addressing the research question for this study a combination of approaches were used. Quantitative research was carried out first to determine the current usage of collaborative practice in Ireland and its possible use in Irish employment disputes. The evaluation of this research was instrumental in

determining key issues surrounding collaborative practice in Irish employment disputes for further examination in the qualitative phase. Manstead and Semin (1988) point out that the type of research question you are trying to answer will determine the strategies and tactics adopted. Similarly, Knox (2004, p.122) notes that '..the researcher should choose the most valid approach given his/her research question'. The rationale for the choice of each research strategy is outlined in sections 4.4 and 4.5.

Both pieces of research were analysed with a view to creating a model for resolving Irish employment disputes using collaborative practice. The analysis plan sought to assess the results with respect to:

- Whether or not collaborative practice is an effective method of dispute resolution?
- Whether or not collaborative practice could be used in employment disputes?
- Who should be included in an interdisciplinary team model of collaborative practice in employment disputes?
- Whether or not there are situations in which collaborative practice might not be suitable?

The research objectives for the quantitative and qualitative research are articulated in sections 4.4.1 and 4.5.1.

## 4.4 PHASE A: QUANTITATIVE RESEARCH METHODOLOGY

A postal survey of Collaborative Practitioners in Ireland, obtained from the Association of Collaborative Practitioners in Ireland (August 2011), was undertaken for this phase in September/October 2011. The first phase of the primary research sought to identify the current usefulness of collaborative practice in the Irish law context and in particular whether collaborative practice could be adapted to Irish employment disputes.

### 4.4.1 Research Objectives

| | |
|---|---|
| 1. | To establish how successful collaborative practice has been to date in Ireland in the resolution of disputes. |
| **Sub-Objectives** | |
| A | To identify the areas collaborative law has been practiced in in Ireland. |
| B | To determine the areas that collaborative law could be practiced in in Ireland. |
| C | To ascertain the current level of collaborative law activity in Ireland. |
| D | To examine the relationship between practice group membership and the level of activity and corresponding resolution rates |
| E | To determine a percentage resolution rate for collaborative law in Ireland. |
| F | To establish the time taken to resolve a case using collaborative law in Ireland. |
| G | To examine the costs of collaborative law compared to litigation in Ireland. |
| H | To identify the perceived benefits of collaborative law. |

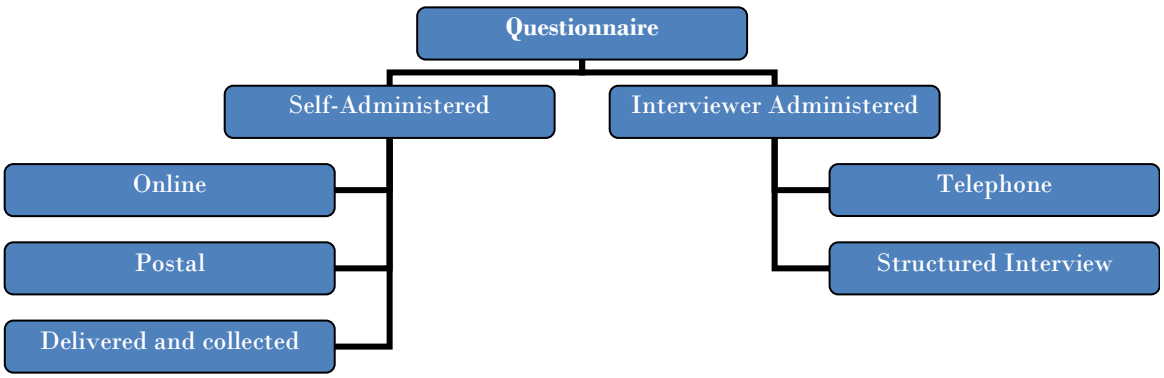
| | |
|---|---|
| I | To identify the perceived limitations of collaborative law. |
| J | To determine instances where collaborative law might not be appropriate. |

| | |
|---|---|
| 2. | To determine whether collaborative practitioners view collaborative law as a viable method for employment dispute resolution in Ireland. |
| **Sub-Objectives** | |
| A | To determine if collaborative law would be suitable to resolve individual employment disputes. |
| B | To determine if collaborative law would be suitable to resolve collective employment disputes. |
| C | To establish if type of organisation would have an effect on the usage of collaborative law. |
| D | To identify whether practitioners feel that cases involving discrimination could be resolved using collaborative law. |
| E | To establish if employee/employer gender would have an effect on the uptake of collaborative law. |
| F | To examine if location of employment i.e. Urban or Rural, could have an impact on the uptake of collaborative law. |
| G | To examine if employee skill i.e. highly skilled or unskilled, could have an impact on the uptake of collaborative law. |
| H | To determine if reinstatement and reengagement would be workable remedies in collaborative law. |
| I | To identify the perceived benefits of using collaborative law in employment disputes in Ireland. |
| J | To identify who might be members of an interdisciplinary team in an employment dispute. |

### 4.4.2 Data Collection Method

Saunders et al (2003, p.138) outline that 'Surveys are popular as they allow the collection of a large amount of data from a sizeable population in a highly economical way'. Having noted the geographical spread and the population size of 402, the research deemed the survey as the appropriate data collection method for Phase A. Nesbary (2000, p.10) defines survey research as 'the process of collecting representative sample data from a larger population and using the sample to infer attributes of the population'. Examples of data collection techniques using the survey strategy include questionnaires, structured observations and structured interviews. This study used a questionnaire. Figure 4.1 outlines the various types of questionnaires.

**Figure 4.1. Types of Questionnaire**




*Source: Saunders et al (2009, p.357)*

The choice of questionnaire will vary depending on a number of factors including size of sample; number of questions to be asked; types of question to be asked; and importance of reaching a particular person (Saunders *et al*, 2009).

After considering each of the methods for administering a questionnaire, the self-administered postal questionnaire, supplemented by an online version of the survey, was selected as the most suitable method for Phase A of this study. There are several advantages in using this method including convenience in reaching a geographically dispersed audience. It is also economical and there is an absence of interviewer bias. While these advantages are noteworthy, the researcher was mindful that these types of survey generally produce low response rates (Malhotra, 1996). A low response rate would not only reduce the effective sample size but also introduce bias (Edwards *et al*, 2002). As it was possible that recipients were likely to have varying levels of technological skill the researcher felt that an online survey as the only option would be unsuitable. Furthermore a large quantity of email addresses obtained were non-personal accounts such as info@..., reception@..., and admin@..., thus the researcher was unsure if the email would reach the intended target.

In order to pre-empt any potential low response rate the researcher adopted a number of strategies outlined by Edwards *et al* (2002). Survey participants were informed of the survey by email (appendix B) one week before the questionnaire was issued. The research's postal package included a personalised covering letter on letterhead paper (appendix C), the questionnaire (appendix D) and a pre-paid return envelope. The questionnaire was prepared using coloured ink; it was a booklet rather than stapled pages and finally a white envelope was used. In addition, the researcher also included a link <www.surveymonkey.com/s/coll_practice> to an online version

of the questionnaire for those who wished to complete it electronically as opposed to hardcopy. In order to encourage further responses, a reminder email (appendix E) was sent two weeks after the questionnaire was issued.

### 4.4.3 Measurement Technique

A structured questionnaire was utilised as the measurement technique during Phase A of the study. Questionnaires generally take the form of structured or unstructured questions. Structured questions limit the variations in respondent answers and thus standardises responses. Structured questions usually take the form of dichotomous, multiple choice or rating scales (Domegan & Fleming, 2007). In contrast, unstructured questions provide the respondent with greater freedom and allow for open-ended responses. (Zikmund & Babin, 2010). Although the data can be difficult to measure, unstructured questions provide respondents with an opportunity to say what is important to them and express it in their own words. The questionnaire for this study used both structured and unstructured questions. The main body of questions was structured as these types of questions are easier and quicker to complete for the respondent and easier to process for the researcher (Bryman, 2012). The questionnaire also contained a number of open-ended questions which the researcher hoped would produce rich insights to complement the black and white of the structured questions. Open ended questions could provide the researcher with information he had not contemplated.

In order to eliminate potential problems in interpreting the questions, the questionnaire went through several refining iterations and was piloted with four Collaborative Practitioners prior to completion. The feedback received from the pilot test was, in the main, positive with respondents noting, ease of completion and time to completion as adequate. However, two respondents outlined a number of ambiguities in questions, particularly in Section C. Based on the feedback these questions were simplified. A final test of the questionnaire was undertaken with a number of non-Collaborative Practitioners to test for typos and once again clarity of questions. Based on comments received a number of minor refinements were made.

The final questionnaire consisted of three sections as follows: Section A - General Details (4 questions), Section B - General Collaborative Law (11 questions), and Section C – Collaborative Law and Employment Disputes (6 questions).

*Section A – General Details*

The first section of the questionnaire (questions 1-4) aimed to source basic respondent demographics. The data received would be cross-tabulated with data from Sections B and C to verify/disprove similarities between practitioners of same gender, length of service and size of firm. In addition, question 4 in this section sought to determine the areas of law, as determined by the Law Society of Ireland (2010), in which the respondent currently

practiced. A mixture of dichotomous and multiple-choice questions were used in this section.

*Section B – General Collaborative Law*

Section B of the questionnaire (questions 5-15) was the lengthiest part of the survey comprising 11 questions. This section sought to obtain information in relation to current usage of collaborative practice, while also obtaining practitioner attitudes to the perceived advantages and disadvantages of using collaborative law.

Questions 5 and 6 were dichotomous questions. Dichotomous questions are 'best used for determining points of fact' (Domegan & Fleming, 2007, p.285). These questions sought to discover whether all practitioners had undergone formal collaborative law training and whether they were members of collaborative practice groups. These questions would be cross-tabulated with question 9 and 10 to determine whether training and practice group membership has an impact on the number of collaborative cases undertaken and the corresponding resolution rates.

Question 7 sought to determine if there were areas of law, other than Family Law, in which collaborative law was being used in Ireland. It was a multiple-choice question, which asked respondents to indicate areas of law in which they have practiced collaborative law. The areas of law were as per question 4 above.

While collaborative law has successfully been used in Family disputes in Ireland, other jurisdictions have begun to use it to resolve disputes in other areas of law such as employment (Zeytoonion, 2004; Hoffman, 2004; Schachner Chanen, 2006). Question 8 was a multiple-choice question which sought to determine the areas of law which practitioners felt collaborative law could be applied to in Ireland.

Questions 9 asked respondents how many collaborative law cases they had been involved in. This was to determine the current level of usage of collaborative law in Ireland. Question 10 asked respondents how many of the cases outlined in Question 9 reached an agreed resolution. This question was reworded several times from 'successful' to 'effective' and finally to 'agreed' resolution. There are many dimensions in which an ADR process may be deemed successful or effective (Mack, 2003). Success might be user satisfaction, rate of compliance, rate of settlement, nature of agreement, efficiency and improvement in the post-dispute climate (Kressel & Pruit, 1989). The researcher used settlement rates as the measure of success in this study and by using 'agreed' the researcher hoped that any ambiguity surrounding the use of 'successful' or 'effective' would be removed. Obtaining the number of cases which reached an agreed resolution would enable the researcher to obtain a percentage resolution rate of collaborative law in Irish disputes.

Tesler (2008) outlined that the collaborative process is much quicker than the litigation process. Question 11 aimed to determine the length of time the collaborative process takes to reach an agreed resolution. Respondents were asked to outline in months their longest case and their shortest case. By doing this, the researcher would be able to provide an approximate timescale for the resolution of collaborative law cases in Ireland.

Cases resolved in the collaborative law process may be less expensive than litigated cases (Kates, 2009; Walls, 2007). Question 12 used a categorical scale to determine what level, if any, of savings could be obtained in the collaborative law process compared to litigation.

A likert scale was used in question 13. Likert scales measure attitudes (Robson, 2002) and is a commonly used ratings scale which asks respondents to indicate their degree of agreement or disagreement with a statement. The question consisted of nine statements on the notional advantages of the collaborative law process and respondents were given five levels of agreement, ranging from Strongly agree to Strongly disagree, in addition "Don't know" was also provided for. This sought to verify/disprove whether Irish practitioners felt the notional advantages were applicable to collaborative law in Ireland.

Question 14 employed a semantic differential scale. A semantic differential scale helps to determine overall similarities and differences among objects.

Respondents were asked to rate six benefits of collaborative law over litigation from 1 (not very important) to 5 (really important). This sought to determine which benefits practitioners feel are the most important and which are the least important. The question also provided respondents with an open-ended section to add any additional benefits of collaborative law.

The final question in this section consisted of a likert scale with nine statements on why people might be discouraged from using collaborative law. Similar to question 13 respondents were given five levels of agreement, ranging from Strongly agree to Strongly disagree, while "Don't know" was also provided for. This sought to determine the reasons why people might not want to use collaborative law and instances where perhaps collaborative law is inappropriate.

*Section C – Collaborative Law in Employment Disputes*

Section C consisted of five questions (16-20) which sought to determine the applicability of collaborative law in employment disputes in Ireland.

Question 16 utilised a likert scale once again. In this instance, respondents were given eight statements on collaborative law in an employment setting. It sought to determine if respondents felt the application of collaborative law varied depending on whether the disputes were individual or collective in the public sector, the private sector, a large organisation or a Small and Medium Enterprise (SME).

A combination of a dichotomous and multiple choice questions were used in question 17. This was to determine whether practitioners felt collaborative law could be used in cases of discrimination and if there were areas of discrimination which were unsuitable to be resolved through collaborative law.

The CSO (2010) outlined that the Irish workforce is experiencing an increase in the number of female employees, with further increases expected by 2015. Meanwhile, FÁS/ESRI (2010) noted that just less than 50% of all employed persons will hold a third level qualification by 2015. Question 18 used a likert scale with seven statements, the first two statements sought to determine whether employee/employer gender could affect the uptake of collaborative law, while a further two statements aimed to determine whether collaborative law would be more suitable in cases where the employees are highly skilled. In addition, question 18 sought to determine whether location could play a factor in the uptake of collaborative law. Finally, question 18 sought to find out if reinstatement and/or reengagement, which are seldom used by the EAT, could be deemed workable remedies under collaborative law.

Similar to question 14, question 19 employed a semantic differential ratings scale, where respondents were asked to rate six benefits of collaborative law over litigation in employment disputes from 1 (not very important) to 5 (really important). This sought to determine which benefits practitioners feel are the most important and which are the least important. The question also provided

respondents with an open-ended section to add any additional benefits of collaborative law. This would be used to determine whether respondents felt the benefits of collaborative law were different from those in collaborative law in employment disputes.

Literature on the interdisciplinary team model of collaborative law identified that team members in family disputes might include solicitors, financial experts, coaches, child specialists and psychologists (Gutterman, 2004). Question 20 was a multiple choice question together with an open ended part, where respondents were asked to indicate who might form part of an interdisciplinary team in an employment dispute.

The questionnaire concluded with an open-ended question where respondents were asked for any additional comments. The researcher hoped respondents would use this question to provide additional insights which the researcher had not contemplated in the structured questions.

### 4.4.4 Population and Sampling

The target population for Phase A of this study were solicitors who were affiliated to the Association of Collaborative Practitioners in Ireland (ACP) as of 12 August 2011. ACP was contacted and asked for a copy of their database of members, although it was refused, it was pointed out to the researcher that all details could be obtained from the association's website at <www.acp.ie>.

Upon completion of a trawl of the ACP website the researcher determined that there were 426 solicitors affiliated to the association.

Easterby-Smith *et al* (2003) suggest that when the population studied is less than 500 it is customary to send questionnaires to all members. This 100% sample is known as a census. Cresswell (2011) and Saunders *et al* (2009) note that a census study reduces coverage error, can generalise findings and means sampling techniques are not necessary. As the number of members (426) did not exceed 500, a census was undertaken.

### 4.4.5 Method of Analysis

The questionnaire was used to gain information from collaborative practitioners on the current usefulness of collaborative law in the Irish law context. The emphasis was on gaining information about the possibilities of using collaborative law in other contexts, specifically employment law areas. Themes included costs, time, perceived advantages and disadvantages over litigation and areas where collaborative law is inappropriate.

Saunders *et al* (2009) notes that initial part of data analysis involves data preparation which includes checking questionnaires for completeness, coding and transcribing the responses and cleaning of the data. Questionnaires were first checked for completeness, followed by a check on ambiguity and consistency as suggested by Domegan and Fleming (2007). In order to code the data, numerical values were assigned to structured questions which would

enable quicker data entry. In addition, each respondent was coded to facilitate changes and to ensure accuracy of data entry. Robson (2002) notes at the design stage the researcher should ensure that the data to be collected is analysable and is simplified for data entry. While, in the main, this was the case, the researcher further categorised questions 2 and 3 prior to data entry. Question 2 was further categorised in order for the researcher to identify various ranges for length of service, while the categorisation of question 3 enabled the researcher to classify each respondent in terms of the size of organisation. Due to the low volume of responses to unstructured questions, the researcher did not code these questions.

Upon completion of the data preparation the data was entered into MS Excel. Although, several authors (Berenson *et al*, 2011, Hair *et al*, 2007) advocate the use of specialist statistical software such as SPSS (Statistical Package for Social Sciences) or MINITAB when analysing large amounts of data, Robson (2002) notes that MS Excel can perform a range of statistical tasks and specialist statistical software is not required in all cases. The nature of statistics required for this study were descriptive statistics and the researcher deemed that MS Excel would be suitable for analysing the data and obtaining the statistics required. Descriptive statistics include measures of central tendency (Mode, Median, Mean), and measures of variability (frequency distributions, range, standard deviation) (Burns & Bush, 2003). Upon completion of the data entry the researcher obtained measures of central tendency and measures of variability. In addition, cross tabulations, which

describe two or more variables simultaneously, were generated for further analysis.

## 4.5 PHASE B: QUALITATIVE RESEARCH METHODOLOGY

Phase B consisted of five depth interviews with employment stakeholders. The following sections will describe the process.

### 4.5.1 Research Objective

| | |
|---|---|
| 1. | Create a collaborative practice model that reflects the unique attributes of Irish employment law conflicts. |
| **Sub-Objectives** | |
| A | Create a preliminary model of collaborative law for use in employment disputes from Phase A findings |
| B | Evaluate the model with employment stakeholders |
| C | Revise the model based on feedback from employment stakeholders |

### 4.5.2 Data Collection Method

Depth interviews were the method chosen for this phase. Depth interviews are one of the most commonly used qualitative research methods. Five depth interviews were undertaken with various employment stakeholders. Stokes and Bergin (2006) note that depth interviews can uncover a greater depth of insight, are relatively easy to arrange and they allow for an easier expression of non-conformity and free exchange of information. In addition to the advantages specified above, one of the key rationale in using this method

rather than focus groups was that it would have been very difficult to organise a focus group of the target individuals due to their busy schedules and geographical location. Depth interviews gave the researcher the flexibility to arrange a location, date and time that suited each interviewee.

While the various advantages were a key factor in deciding to use this method, it would be remiss of the researcher not to acknowledge that there are also various challenges associated with depth interviews which the researcher should be mindful of. Stokes and Bergin (2006) note that results are prone to interviewer bias; depth interviews miss out on the advantages of group interactions and finally they are difficult to analyse and interpret.

The researcher developed a theme sheet (appendix F) that was followed during all the interviews. The aim of the theme sheet was to ensure that specific areas were discussed with all interviewees while it could also reduce interviewer bias. The theme sheet consisted of various open-ended questions which allowed for unstructured discussion between the interviewer and interviewee. The duration of the interviews was 50 minutes on average, with the longest interview lasting one hour and ten minutes and the shortest 45 minutes.

The purpose of the research was initially communicated to each interviewee by telephone and reiterated at the start of the interview. Discussions during the interviews were unstructured with each interviewee initiating the sequence of topics. This resulted in topics being combined or in some instances discussed a

greater length than had been anticipated. When necessary the interviewer consulted the theme sheet to further probe and stimulate more depth discussion. Domegan and Fleming (2007) recommend that interviews are recorded. At the outset of each interview, the interviewee was asked if the interview could be recorded. In all cases, the interviewee agreed. The interviewees were assured of the anonymity of their responses and LYIT's Ethical procedures were followed as appropriate.

### 4.5.3 Sampling

For the purpose of phase B of this study, the researcher used a non-probability sampling technique known as purposive sampling. In purposive sampling, individuals are selected because of their relevance to the research question (Bryman, 2012). While the information from the questionnaire determined the issues which should be addressed in greater depth in the interviews, it also provided a basis for selecting the individuals necessary for the depth interviews. Interviewees were selected based on their usefulness in providing the information which the research required. The sample for this group was identified as people with a stake in employment disputes and/or industrial relations. The final sample comprised five individuals as follows:

1. *Interviewee A: Human Resource Manager in a Multinational organisation* – This individual was selected on the basis of their ability to provide information from the perspective of a large employer. Furthermore, the interviewee was well placed to discuss the

comprehensive dispute resolution processes in place in their organisation and how these processes might compare to the process proposed by the researcher. Finally, the interviewee had first-hand experience of the EAT and Labour Court as an employer representative.

2. *Interviewee B: Human Resource Manager in a Public Service Organisation*. Having experience of both individual and collective disputes in the public sector, this interviewee was selected on the basis of their ability to provide information from the perspective of a public sector employer. This interviewee also had first-hand experience of the EAT, the Equality Tribunal and the Labour Court as an employer representative.

3. *Interviewee C: Trade-Union Official* - This interviewee was selected on the basis of their vast experience as a trade union representative. In addition, having represented employees both individually and collectively, this interviewee was ideally placed to assess the model proposed by the researcher from an employee perspective (both individually and collectively). This interviewee had first-hand experience of the EAT, the Equality Tribunal and the Labour Court as an employee representative.

4. *Interviewee D: Small Business Owner* – As identified in the literature, small businesses find it difficult to cope with the demands of the multitude of employment legislation (MacRory, 2009). This interviewee was selected on the basis of their ability to provide

information from the perspective of a Small Business Owner. This interviewee had experience of running a business with fewer than 10 employees and of running a business with more than 40 people.

5. *Interviewee E: Former member of the Employment Appeals Tribunal* – Having had several years of experience as a member (employee panel) of the EAT, the researcher felt this interviewee could provide rich insights into the workings of the EAT, and the potential collaborative law could hold as a dispute resolution method.

The interviews were conducted between Wednesday 23 May 2012 and Wednesday 4 July 2012.

### 4.5.4 Method of Analysis

The interview data was recorded using a Dictaphone. The recordings were then transcribed into notes in preparation for data analysis. The data was analysed in terms of the themes developed. The findings of the depth interviews are presented in Chapter Five.

## 4.6 ETHICAL CONSIDERATIONS

As this research involved human participants, there were ethical issues involved concerning confidentiality and privacy. In order to adhere to LYITs Ethics Policy and Procedure, prior to commencing the research, ethical approval was sought and granted from the School of Business Ethics

Committee and the Institute Ethics Committee. All participants involved in the research were informed about the study, what their participation involved and the confidentiality of their input either by email, letter or verbally. Returned questionnaires were stored in a secure cabinet while the electronic data file was encrypted with a password.

## 4.7 CREDIBILITY OF RESEARCH

In order to ensure the research stands up to outside scrutiny, Cresswell (2011) suggests that validity, reliability and generalisability must be addressed. Easterby-Smith *et al* (2003) outline that validity is concerned with whether the research findings represent what is actually happening in the situation; reliability is whether the research will yield the same results on other occasions; and finally generalisability is whether the research results can be applied to situations other than those examined in the study.

The researcher addressed content validity in a number of ways. Firstly the questionnaire was pre-tested with a small sample of respondents with similar characteristics to the target population. This was to ensure that the subjects being studied understood and could answer the questions. Furthermore the questionnaire was discussed at length with the research supervisors and various other academic staff.

In addition to content, validity also refers to the suitability of the research strategy, the data collection techniques and the methods of data analysis (Biggam, 2011). Throughout this chapter the researcher has added to the validity of the research by outlining and justifying the methods used for this study in terms of strategy, data collection technique and method of analysis.

Finally, Wass and Wells (1994) maintain that depth interviews are a means of validating survey findings. Following analysis of the questionnaires in this study, the researcher discussed the findings in depth interviews with various employment stakeholders, thereby adding to validity of the research.

In order to achieve reliability, the research was independent of the respondents while the researcher also ensured anonymity of respondents in order to avoid subject and/or participant bias (Andreasen, 2002). Furthermore, Biggam (2011) identifies 'trust' as a key element of reliability, therefore the researcher must ensure all records are retained, that methods used are fully described, and that the researchers approach to data collection and analysis are clearly defined. All of the above issues are addressed in this chapter.

As noted earlier a census of all collaborative practitioners affiliated to the ACP was undertaken for this study. By undertaking a census the researcher aimed to increase participation and representativeness of the population. Gummesson (2000) outlines that by using statistics to analyse the data

received the researcher will be able to generalise the results across the sector studied. However, due to the overall response rate there are some concerns as to whether the patterns identified could be generalised to the overall population.

## 4.8 SUMMARY

This chapter has discussed the methodological approach undertaken for this study. It has presented a thorough description of the research philosophy, the research strategy and the methodology used in undertaking this research. The chapter has outlined that the research is placed in both the positivist and interpretivist camps using a mixture of both survey and depth interviews. It has also outlined that the study consisted of two phases; Phase A being a postal survey of collaborative practitioners in Ireland and Phase B consisted of depth interviews of various employment stakeholders. Each Phase was discussed in terms of the research objectives, data collection method used, measurement technique, sampling and method of analysis. The research findings for Phases A and B are presented in the next chapter.

# CHAPTER 5: PRESENTATION AND ANALYSIS OF FINDINGS

The primary findings of this study are presented in this chapter. The findings will be presented in two parts – Phase A, the survey and Phase B, depth interviews.

## PHASE A: Survey

As discussed in chapter 4, survey research was used in Phase A. This section presents the findings from the survey.

### 5.1 RESPONSE RATES

A census study of Collaborative Practitioners affiliated to the Association of Collaborative Practitioners in Ireland was undertaken for this phase of the study. The questionnaires were posted on 26 September 2011. Having allowed five weeks from this date the following response rates were obtained.

From the overall sample of 402 Collaborative Practitioners surveyed, 106 questionnaires were returned to the researcher. Nineteen were returned to sender blank by An Post for reasons such as "Not at this address" or "Gone Away". In addition a further nine were returned from practicing firms for various reasons such as "No longer a Member", "Retired" and "No longer practicing". This left the researcher with 78 usable responses which meant the overall survey response rate was 19%. Other studies of similar target groups

achieved response rates of 20% (Schwab, 2004), 30% (Sefton, 2008) an9 20% (National Consumer Agency, 2012), therefore the response rate of 19% in this study was deemed suitable.

## 5.2 RESPONDENT PROFILE

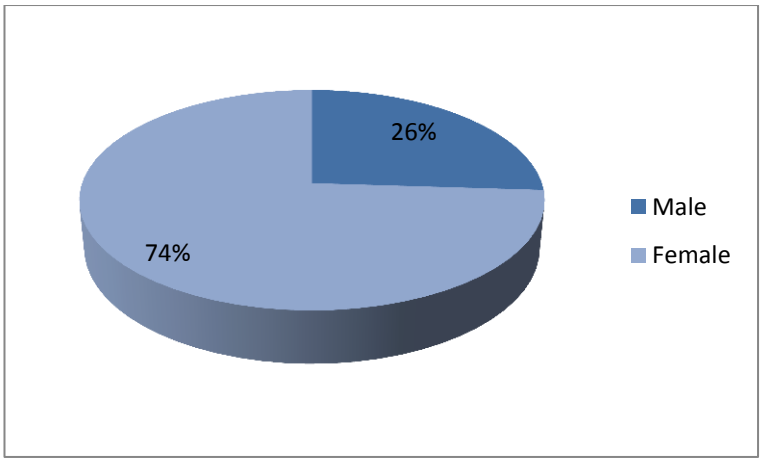
Section 5.2 will present the initial findings on the respondent profile. Cross tabulations were undertaken in section 5.3 to further analyse the respondent profile findings with various other variables. Section A of the questionnaire was used to determine respondent profile under the following headings:

- Gender
- Length of service
- Size of firm
- Areas of law currently practiced.

### 5.2.1 Gender

Figure 5.1 demonstrates that almost three quarters of all respondents were female. Although this would appear high it is in line with the gender spread of the population which is 69% female. In section 5.3, the researcher sought a breakdown by gender in order to discover if there was any difference between male and females on the number of cases undertaken and number of those reaching an agreed resolution.

**Figure 5.1 Solicitor Gender**




These findings are similar to studies carried out by Schwab (2004) and Sefton (2009) who both found that female practitioners outnumbered their male counterparts by almost 3:1.

### 5.2.2 Length of Service

The second area the researcher considered under respondent profile was the respondent's length of service as a solicitor. Table 5.1 outlined the length of service for both male and female respondents.

**Table 5.1 Length of service**

| Length of Service | Male | | Female | | Total | |
|---|---|---|---|---|---|---|
| | Number | % | Number | % | Number | % |
| 1-5 yrs | 1 | 5% | 8 | 14% | 9 | 12% |
| 6-10 yrs | 5 | 25% | 10 | 18% | 15 | 19% |
| 11-20 yrs | 5 | 25% | 23 | 40% | 28 | 36% |
| >20 yrs | 8 | 40% | 15 | 26% | 23 | 30% |
| (blank) | 1 | 5% | 1 | 2% | 2 | 3% |
| **Total** | **20** | **100%** | **57** | **100%** | **77** | **100%** |

The largest overall category was those respondents with 11-20 years experience. Females with 11-20 years experience represented the largest individual category. The second largest overall category is the category with respondents who had greater than 20 year experience. This category also represented the largest male category. Respondents with 10 years or less experience represented less than one third of all respondents.

Further analysis of length of service is undertaken in Section 5.3, where the researcher used length of service to determine if experience was a factor in the number of collaborative cases undertaken and the number of those reaching an agreed resolution.

### 5.2.3 Size of Firm

The researcher divided the respondents into four categories according to the number of solicitors in the firm. Table 5.2 demonstrates how the respondents were divided among the categories. Categories were defined according to the European Commission (2003) who defined enterprises as either micro (<10 employees), small (<50 employees), medium (<250 employees) or large (>250 employees). Almost 90% of respondents were from Micro or Small organisations, with Micro by far the largest category. Sefton (2003) found that 78% of lawyers were from firms with one to ten lawyers, this is similar to the findings in this study.

**Table 5.2 Number of Solicitors in Firm**

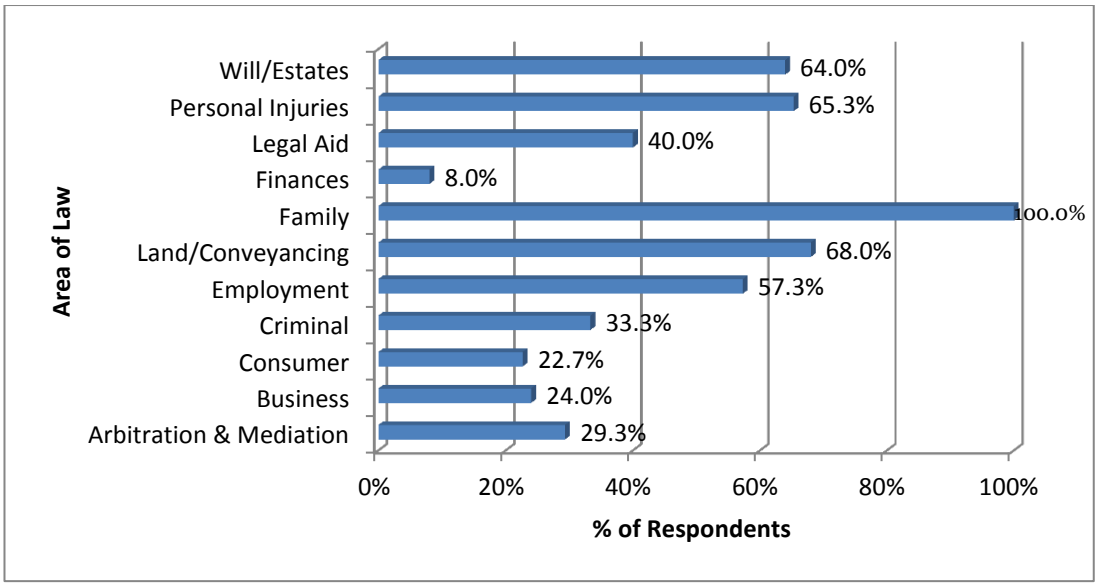
| Size of Firm | No. of Respondents | Percent of Respondents |
|---|---|---|
| **Micro (1-9)** | 59 | 78.7% |
| **Small (10-49)** | 8 | 10.7% |
| **Medium (50-249)** | 6 | 8.0% |
| **Large (>250)** | 2 | 2.6% |
| **Total** | **75** | **100.0%** |

Section 5.3 provides further analysis of size of firm where the researcher investigated if cross tabulations of various variables with size of firm would highlight variations in the data.

### 5.2.4 Areas of Law Practiced

Finally in Section A of the questionnaire, respondents were asked to indicate the areas of law in which they practice. Figure 5.2 outlines respondent areas of law practiced. As all respondents were collaborative practitioners and given that collaborative law was developed initally with Family Law disputes in mind, it is perhaps, unsurprising that 100% of respondents practice Family Law. For the purpose of this study, it is notable that 57% of respondents practice Employment Law.

**Figure 5.2 Area of Law Practiced**




Again, further analysis of Area of Law practiced is undertaken in section 5.3.

## 5.3 CURRENT PRACTICE OF COLLABORATIVE LAW IN IRELAND

Section B of the questionnaire sought to obtain respondent views on collaborative law in general and its current application in Ireland. The findings of this section will be presented under the following headings:

- Collaborative Law Practice Groups
- Areas of Law in Ireland and Collaborative Law
- Level of Activity and Resolution
- Time
- Cost

### 5.3.1 Collaborative Law Practice Groups

A trained collaborative solicitor i.e. a solicitor who has undertaken specific collaborative law training, may be part of a large or small practice group, or belong to multiple groups, or indeed might not be affiliated with any group at all. Collaborative law groups provide a forum for solicitors to aid the sharing of information and ideas which can help them when representing clients in a collaborative case (Kates, 2009). In addition, Kates (2009) asserts that practice groups can advance the knowledge about the process, and help with standardising the procedures and practices, whilst also developing the skills of local solicitors. Disputants having solicitors from the same collaborative group may offer a number of advantages, such as solicitors who are courteous in dealing with each other, who having developed a working relationship already trust each other, and solicitors who have developed an expertise as a result of learning from each other (Kates, 2009). Furthermore solicitors in the same practice group may have standarised their forms and processes.

**Figure 5.3 Practice Group Membership**

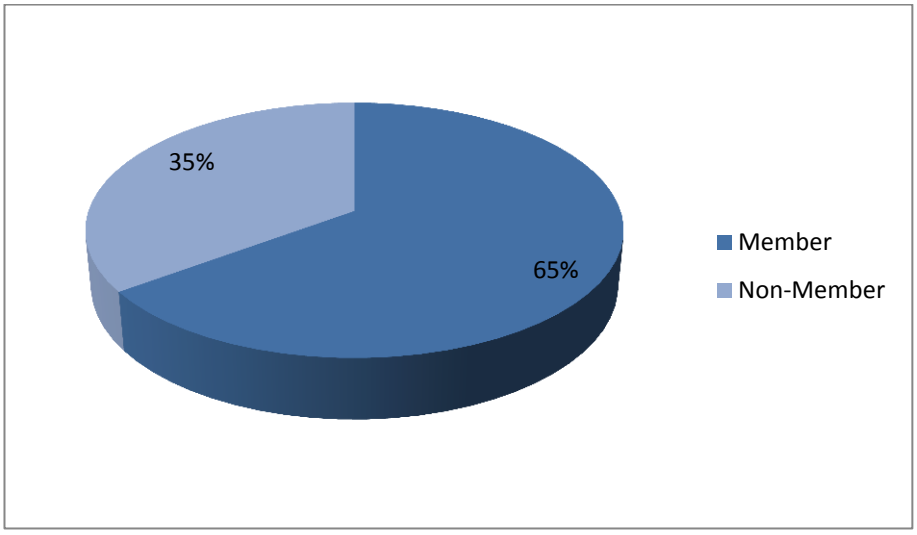


Figure 5.3 demonstrates that almost two-thirds of all respondents are members of collaborative law practice groups in Ireland. To further analyse the effect of collaborative practice group membership, the researcher performed cross-tabulations with two other variables, Number of Collaborative Law (CL) Cases and Number of Collaborative Law cases resolved.

**Table 5.3 Collaborative Law Practice Group Activity**

| | No. of Solicitors | Average no. of CL Cases | Averages No. of CL Cases Resolved | % Resolution Rate |
|---|---|---|---|---|
| **Member** | 50 | 4.9 | 3.5 | 71% |
| **Non-Member** | 27 | 0.6 | 0.3 | 44% |
| **Total** | **77** | **3.4** | **2.4** | **69%** |

There would appear to be a clear link between practice group membership and the number of collaborative law cases per solicitor. Solicitors who are members of practice groups have an average of 4.9 cases per solicitor, whereas non-members only average 0.6 cases per solicitor. In addition, 88% of solicitors who are members of practice groups have experienced some level of activity (i.e. at least one case) while only 29% of those without a practice group have experienced activity.

In addition, the resolution rate for solicitors in practice groups stands at 71% while those who are not members of practice groups have a resolution rate of 44%. This would appear to suggest that there is a link between practice group membership and successful resolution. However, it is not clear why practice

group membership would increase the likelihood of reaching resolution? It could be a result of the amicable relationship and trust developed between solicitors, or it might be that the practice group has enhanced the skills of the practicing solicitor. Further research is required to identify the actual reasons.

### 5.3.2 Areas of Law in Ireland and Collaborative Law

The researcher sought to determine (i) the areas of law in Ireland in which collaborative law has been practiced and (ii) the areas of law in Ireland which respondents feel collaborative law could be practiced. Not surprisingly, given the origins of collaborative law, figure 5.4 outlines that the majority (95%) of collaborative law cases in Ireland have been in Family law disputes. However, although only 2%, it is notable that collaborative law has also been used in Business disputes.

**Figure 5.4 Areas of Law in Ireland in which collaborative law has been practiced**

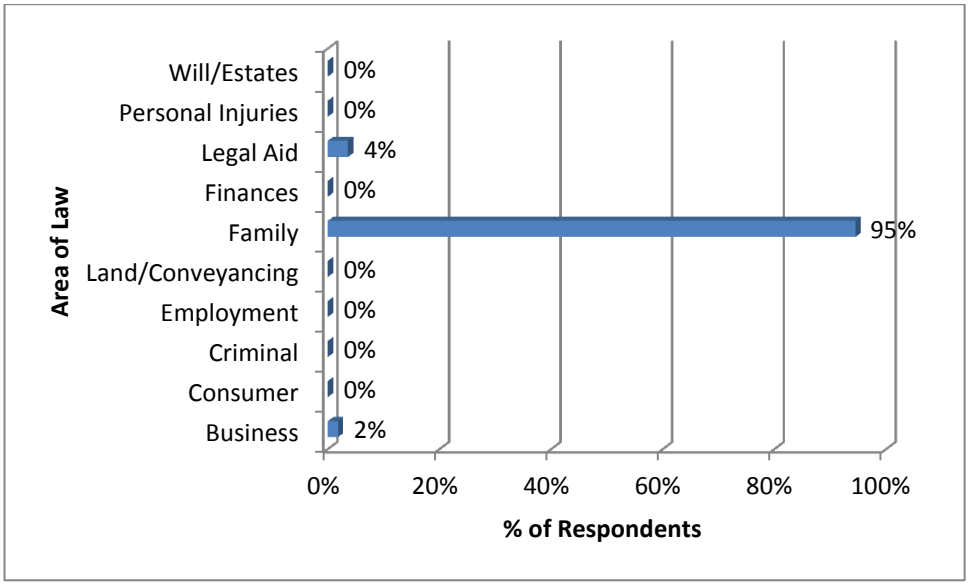
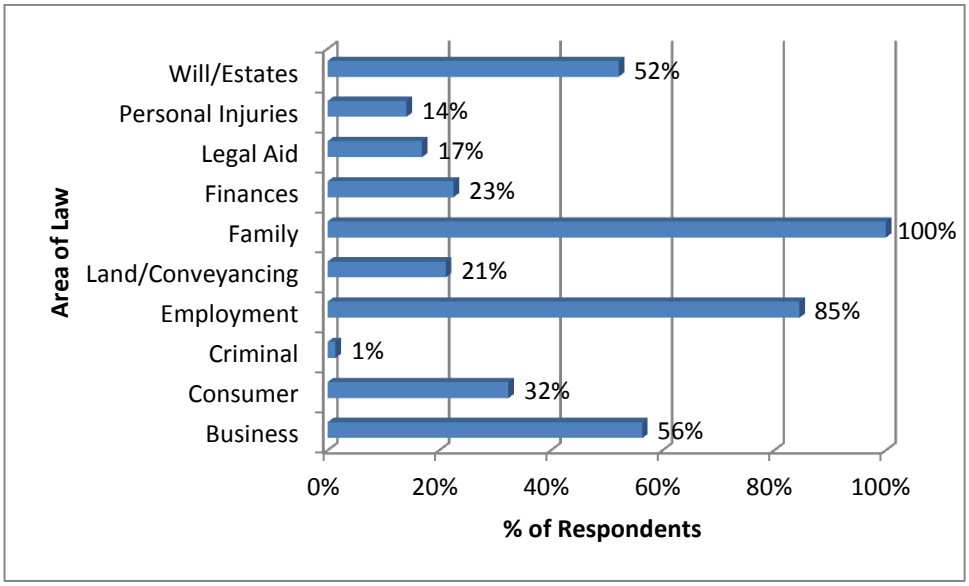


Figure 5.5 below demonstrates the areas of law in Ireland in which respondents felt collaborative law could be used. As collaborative law was developed to resolve Family disputes, it is unsurprising that 100% of respondents felt it was suitable for Family disputes. At 85%, there is a strong perception among practitioners that collaborative law could be used in Employment disputes. Other areas of note include Wills/Estates and Business disputes with over 50% of respondents noting it could be used in these disputes while a third of respondents felt collaborative law could be used in Consumer disputes. Clearly practitioners felt collaborative law was unsuitable for Criminal disputes.

**Figure 5.5 Areas of law in Ireland in which Collaborative Law could be practiced**



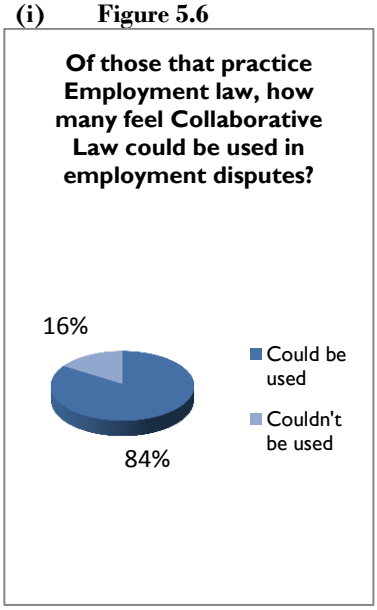

As the focus of this study is employment disputes the researcher further analysed the 85% of respondents who felt collaborative law could be applied to Employment disputes, the researcher sought to further explore this by determining:

(i) What percentage of solicitors, who practice in Employment law, feel collaborative law could be used in Employment disputes? (figure 5.6)

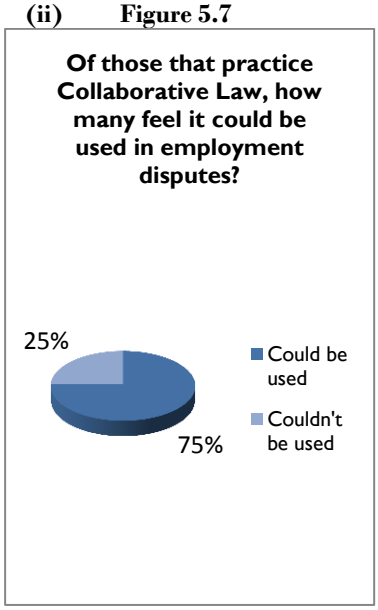
(ii) What percentage of solicitors, who have experienced at least one collaborative law case, feel it could be used in Employment disputes? (figure 5.7)

(iii) What percentage of solicitors, who practice in employment law and have had at least one collaborative law case, feel it could be used in employment disputes? (figure 5.8)

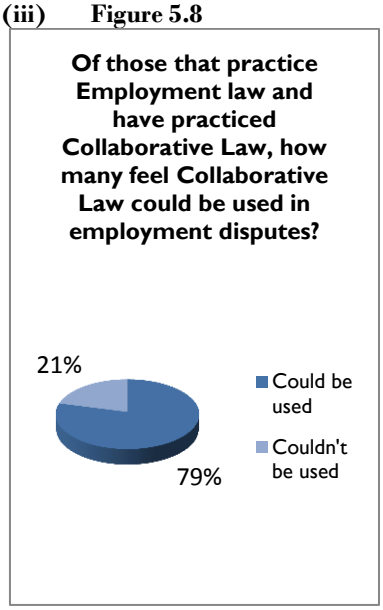
(i) **Figure 5.6**




(ii) **Figure 5.7**




(iii) **Figure 5.8**




Clearly there is strong agreement that collaborative Law is suitable for employment disputes. Significantly, at 79%, solicitors who have had experience of both employment law and collaborative law have indicated that collaborative law can be used in employment disputes. The literature review indicated that collaborative law could be adapted to various areas of law

(Zeytoonion, 2004; Hoffman 2004; Schachner Chanen, 2006). In particular, McCormick (2006) noted that collaborative law was suitable for employment disputes. The findings of this research are consistent with the literature, however importantly the above findings are from an Irish perspective.

### 5.3.3 Level of Activity and Resolution

Table 5.4 outlines the level of activity among collaborative practitioners and the corresponding resolution rate.

**Table 5.4 Level of Activity and Resolution among Collaborative Practitioners**

| Frequency of cases | No. of Respondents | % of Respondents | No. of CL Cases | No. of CL Cases Resolved | % Resolution Rate |
|---|---|---|---|---|---|
| 1+ Cases | 52 | 69% | 264 | 182 | 69% |
| 0 Cases | 23 | 31% | - | - | - |

Significantly, 31% of respondents have had no collaborative law experience to date. The remaining 69% have an average of 5 collaborative cases per solicitor, with 3.5 of those cases reaching an agreed resolution. The settlement rate here is somewhat below that of other studies. Schwab (2004) found that 87% of cases settled while Sefton (2009) reported a settlement rate of 83%. Further analysis of the level of collaborative law activity was performed with three variables (i) Solicitor gender (ii) Length of Service and (iii) Size of firm.

*(i) Solicitor Gender and Level of Activity*

As demonstrated in figure 5.1 above female solicitors practicing collaborative law in Ireland outnumber their male counterparts by

almost 3:1. However, in contrast, figure 5.9 below demonstrates that male solicitors are experiencing greater activity per solicitor, with male solicitors averaging 6.1 cases per solicitor as opposed to 2.4 cases per female solicitor. Possibly this is a result of practice group membership where 75% of males are members of practice groups whereas only 61% of females solicitors are members.

In addition, the percentage of cases deemed to have reached an agreed resolution by male solicitors stands at 77% compared to 63% for female solicitors.

**Figure 5.9 Solicitor gender and Level of Activity among Collaborative Practitioners**


*(ii) Length of Service and Level of Activity among Collaborative Practitioners*

Table 5.5 below demonstrates that there would appear to be a link between the length of service as a solicitor and the number of cases

undertaken. Solicitors with greater than 20 years' experience have the highest number of cases, averaging at 6.7 cases per solicitor, whereas those with less than 20 years' experience average 2 cases per solicitor. However, perhaps most notable is the resolution rate of 80% for solicitors with greater than 20 years' experience compared to 53% for those with less than 20 years' experience.

**Table 5.5 Length of Service and Level of Activity**

| Length of Service | No. of Solicitors | Average no. of CL Cases | Averages No. of CL Cases Resolved | % Resolution Rate |
|---|---|---|---|---|
| 1-5 yrs | 9 | 0.7 | 0.3 | 50% |
| 6-10 yrs | 15 | 2.2 | 1.4 | 64% |
| 11-20 yrs | 29 | 2.2 | 1.0 | 48% |
| >20 yrs | 23 | 6.7 | 5.3 | 80% |
| **Total** | **76** | **3.4** | **2.3** | **69%** |

Further analysis of length of service and level of activity by gender, as outlined in table 5.6, finds that male solicitors with greater than 20 years' experience have, by far, the greatest level of activity among the various categories. Furthermore this category also has the highest percentage resolution rate at 84%.

**Table 5.6 Length of Service, Level of Activity and Gender**

| Length of Service | No. of Solicitors | Average no. of CL Cases | Averages No. of CL Cases Resolved | % Resolution Rate |
|---|---|---|---|---|
| **Male** | | | | |
| 1-5 yrs | 1 | 1 | 0 | 0% |
| 6-10 yrs | 5 | 1.4 | 0.6 | 43% |
| 11-20 yrs | 5 | 2.4 | 1.0 | 42% |
| >20 yrs | 8 | 12.4 | 10.4 | 84% |
| **Female** | | | | |
| 1-5 yrs | 8 | 1 | 0.5 | 50% |
| 6-10 yrs | 10 | 2.6 | 1.8 | 69% |
| 11-20 yrs | 22 | 2.3 | 1.1 | 49% |
| >20 yrs | 15 | 3.7 | 2.7 | 73% |

### *(iii) Size of Firm and Level of Activity among Collaborative Practitioners*

**Table 5.7 Size of Firm and Level of Activity**

| Size of Firm | No. of Solicitors | Average no. of CL Cases | Averages No. of CL Cases Resolved | % Success Rate |
|---|---|---|---|---|
| **Micro (1-9)** | 59 | 3.0 | 2.1 | 69% |
| **Small (10-49)** | 8 | 6.3 | 4.3 | 68% |
| **Medium (50-249)** | 6 | 3.3 | 2.8 | 85% |
| **Large (>250)** | 2 | 6.0 | 3.0 | 50% |
| **Total** | **75** | **3.4** | **2.4** | **69%** |

As outlined in table 5.7 above, the greatest number of practitioners surveyed belonged to the micro category, however notably this category had the lowest number of collaborative law cases per solicitor. Solicitors in small organisations had the greatest level of activity with 6.3 cases per solicitor, while solicitors in medium sized organisations had the highest success rate at 85%. It would appear that there is no

discernible trend between the size of solicitor firm, the level of activity and the corresponding resolution rate.

### 5.3.4 Time

The Law Society of Ireland (2010a) outline that family law cases can take anything from 12 to 18 months from date of issuing of court proceedings to the date of hearing. Respondents in this study with experience of collaborative law cases noted that it took, on average, between 4.5 months and 12.8 months to conclude a collaborative law case. These findings would indicate that collaborative law has potential time benefits over traditional court based methods. Table 5.8 outlines the variations in time taken to resolve collaborative law cases.

**Table 5.8 Time taken to conclude a Collaborative Law case**

| | Shortest Case | | Longest Case | | Total | |
|---|---|---|---|---|---|---|
| **<= 3 Months** | 17 | 50% | 4 | 10% | **21** | **28%** |
| **<=6 Months** | 12 | 35% | 13 | 33% | **25** | **34%** |
| **<= 12 Months** | 3 | 9% | 12 | 30% | **15** | **20%** |
| **>12 Months** | 2 | 6% | 11 | 28% | **13** | **18%** |
| **Total** | **34** | **100%** | **40** | **100%** | **74** | **100%** |

82% of collaborative cases have been resolved within one year. Overall 28% of cases have been resolved within 3 months while 62% of cases have been resolved within 6 months. These timeframes give an indication of the time benefits associated with using collaborative law. However, as the above findings pertain to disputes in family law, the question is whether the same can be achieved in employment disputes.

Dewhurst (2009) noted that it can take up to 18 months to receive a determination from the Equality Tribunal while the EAT (2010) observed that it could take up to 13 months to receive a hearing. An efficient dispute resolution system is one which produces a resolution in a relatively short timeframe (Budd & Colvin, 2008). The findings in this study indicate that using collaborative law is an efficient means of reaching resolution in a dispute. These findings indicate that resolving a case using collaborative law has the potential of reducing delays at the various employment dispute fora.

### 5.3.5 Cost

Table 5.9 below demonstrates that, in the majority of cases, resolving a case using collaborative law is less expensive than litigation. Respondents observed that 98% of cases resolved using collaborative law were less expensive than litigation. Savings could range from less than 5% to greater than 50%. 85% of collaborative law cases were less expensive than litigation by upto 50%, while a further 13% were less expensive by greater than 50%.

**Table 5.9 Cost of Collaborative Law compared to Litigation**

| Degree of Savings/More Expensive (%) | Less expensive | | More Expensive | |
|---|---|---|---|---|
| <5% | 2 | 4% | 1 | 2% |
| 5-10% | 5 | 10% | 0 | 0% |
| 11-20% | 4 | 8% | 0 | 0% |
| 21-30% | 9 | 19% | 0 | 0% |
| 31-40% | 13 | 27% | 0 | 0% |
| 41-50% | 8 | 17% | 0 | 0% |
| >50% | 6 | 13% | 0 | 0% |
| **Total** | **47** | **98%** | **1** | **2%** |

It should be noted that not all those who practiced collaborative law experienced savings. One respondent has experience of a case where using collaborative law was more expensive than litigation by less than 5%. In addition, a respondent comment outlined that collaborative law had the potential to add to the overall cost –*"In many cases, collaborative law only delays cases, and the case goes to court anyway resulting in higher costs and delays"*. However, while the above findings indicate that collaborative law will not *always* present cost savings to the disputants, the findings in this study would indicate that it will in the majority of cases. The 98% of cases that experienced cost savings is a clear indication of the cost benefit of collaborative law. These cost savings are in consistent with the Law Reform Commission (2008) who outlined the potential cost benefits of using collaborative law.

In 2010 the average compensation paid by the EAT was €16,064 in cases involving unfair dismissal, while the category with the highest number of payouts was ">€25,000" (EAT, 2010). The Law Reform Commission (2008) in

their consultation paper outlined that the average cost per party partaking in the collaborative law process is €6000 plus VAT whereas in contrast, the average case taken to the Circuit Court costs each party approximately €12,000. Although the system chosen must be fair for all parties concerned, the potential cost savings associated with using collaborative law make it an attractive proposition for both disputants.

## 5.4 Benefits of Collaborative Law

Respondents were asked to indicate their agreement or disagreement with a series of statements on collaborative law (table 5.10).

**Table 5.10 Perceived Benefits of Collaborative Law**

| | Agree | Disagree | Neither | Don't Know |
|---|---|---|---|---|
| The presence of solicitors in the collaborative process can address potential power imbalance | 89% | 7% | 4% | 0% |
| The Collaborative law process is more flexible than the litigation process | 87% | 7% | 6% | 0% |
| Parties are empowered in the collaborative process to make free choices as to outcomes | 84% | 13% | 3% | 0% |
| A case resolved using Collaborative Law can ensure future relationships are preserved | 81% | 7% | 12% | 0% |
| Resolving a case using Collaborative Law is quicker than litigation | 72% | 7% | 14% | 6% |
| Resolving a case using Collaborative Law is cheaper than litigation | 71% | 11% | 14% | 3% |
| Collaborative Law increases "Access to Justice" | 43% | 20% | 32% | 4% |
| Collaborative solicitors act as zealous advocates for their clients | 41% | 29% | 23% | 7% |
| Confidentiality of the Collaborative Law process guarantees the disclosure of all important information | 37% | 24% | 33% | 6% |

*(i) Power Imbalance*

Table 5.10 outlines that the statement eliciting the most agreement was that solicitor presence during the collaborative process can address potential power imbalance (89%). Power imbalance is a key element of the employment relationship where it is argued the employer holds the balance of power. The challenge when a dispute arises is to rebalance the power. The benefit offered by collaborative law is that solicitor presence during the whole process has the potential to rebalance the power. This may encourage vulnerable and less knowledgeable parties (Hoffman, 2004) such as employees to partake in dispute resolution processes where normally they might not have.

The continued growth in the level of employer and employee representation at EAT hearings (EAT, 2008, EAT 2009, EAT 2010) is possibly an attempt by parties to address power. However, while the increase in representation could be an attempt at rebalancing the power, it has resulted in the EAT becoming overly legalistic and formalised.

*(ii) Flexibility of Process/ Outcomes and Preservation of Ongoing Relationships*

Flexibility of the process and outcomes was identified in the literature (Law Reform Commission, 2008; Shamir, 2003) as a key benefit of ADR, as was preservation of ongoing relationships (Zeytoonian, 2009). Respondents in this study concurred, with 87% agreeing that collaborative law is more flexible than litigation; 84% agreeing that parties are empowered to make free choices

as to outcomes; and 81% agreeing that collaborative law can ensure the preservation of future relationships as is evidenced in table 5.10 above. Importantly, however as this is the only research of its kind in Ireland to date, the findings in this study are specific to collaborative law in Ireland.

*(iii) Confidentiality*

Although the literature indicates that confidentiality is key to the success of ADR (EU Commission, 2002) and it is essential if parties are to make concessions and admissions which lead to settlement (Johnson, 2003), the respondent attitudes to confidentiality in this study would appear to question the principle of confidentiality as a key benefit of collaborative law. At 37%, "Collaborative Law process guarantees the disclosure of all important information" was the statement which obtained the least level of agreement. One respondent commented *"I believe that the collaborative process will serve the needs of a party who is completely unwilling to divulge their financial situation, which is imperative in the litigation process*". The low level of agreement and comments such as above would appear to indicate that respondents feel the principle of confidentiality is open to abuse by unscrupulous parties unwilling to engage in the process in good faith. Furthermore, Bader (2009) notes that the "..lack of explicit statutory authority.." dealing with confidentiality in collaborative cases could further compound matters for collaborative lawyers when attempting to ensure confidentiality.

(iv) Advocacy

"Collaborative solicitors act as zealous advocates for their clients" had the highest level of disagreement at 29%. Clearly practitioners in this study did not see themselves as zealous advocates for their clients when using collaborative law. While it is unclear why this might be the case, perhaps respondents felt unless they were doing there upmost to "win" then they were not acting zealously for their clients, Lande (2003), however, argues that by taking tough positions lawyers 'can actually harm their clients' interests by initiating a destructive and expensive cycle of retaliatory actions'. The findings in this study raise questions in terms of how practitioners view advocacy in the collaborative process, and provides a counterpoint to Reynolds and Tennant (2001) who argue that in their commitment to reach an agreement as counselor, a collaborative lawyer never ceases to be an advocate.

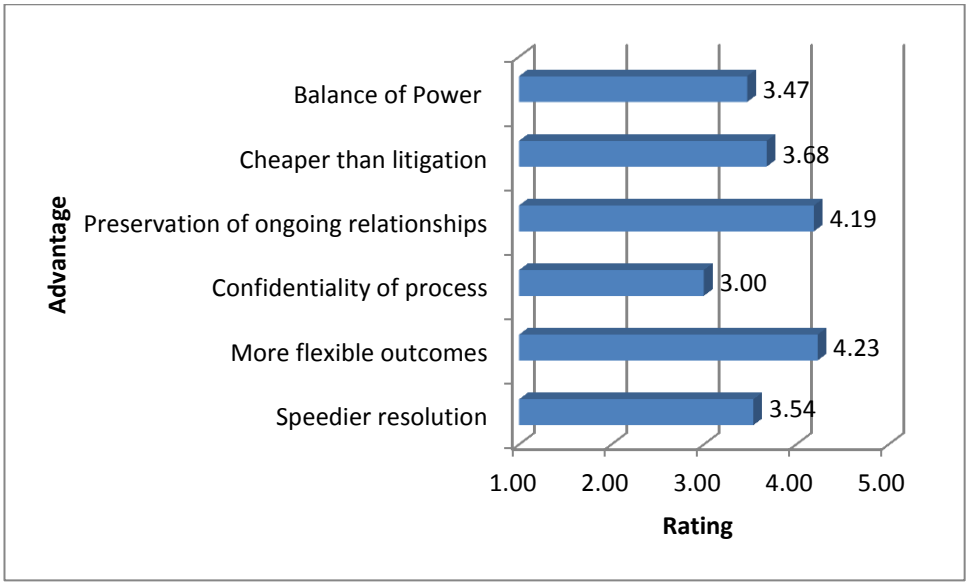
(v) Access to Justice

43% of respondents felt that collaborate law increased "Access to Justice". This figure is somewhat less than might have been expected given that respondents had indicated that there are potentially significant cost savings achievable in collaborative law and the potential for lower costs increases access to justice for disputants who are less well off than others? Furthermore, respondents also indicated that collaborative law can achieve settlement within an adequate timeframe. It is possible that respondents took a different view of the meaning of Access to Justice than that intended by the researcher

and that providing a definition of "Access to Justice" may have produced a different response.

In addition to the above statements, respondents were also asked to rate a number of perceived advantages of using collaborative law from 1 (not very important) to 5 (really important). Figure 5.10 outlines the average rating received for each.

**Figure 5.10 Perceived advantages of using Collaborative Law**




Interestingly, while Balance of Power had received the highest level of agreement in table 5.10, respondents gave it an average rating of 3.47 which placed it fifth of the six advantages investigated. With an average rating of 4.23, respondents indicated that "More Flexible Outcomes" was the most important advantage collaborative law held over litigation, while "Preservation of ongoing relationships" also received a high rating of 4.19.

Similar to table 5.10, the benefit which received the lowest rating was "Confidentiality of the Process" at 3.00.

## 5.5 WEAKNESSES OF COLLABORATIVE LAW

Respondents were asked to indicate their agreement or disagreement with a series of statements in relation to the potential weaknesses of collaborative law (table 5.11).

**Table 5.11 Weaknesses of Collaborative Law**

| | Agree | Disagree | Neither | Don't Know |
|---|---|---|---|---|
| There is a lack of awareness of Collaborative Law among the general public | 94% | 0% | 4% | 1% |
| The disqualification agreement discourages solicitors from using Collaborative Law | 66% | 11% | 16% | 7% |
| The disqualification agreement discourages disputing parties from using Collaborative Law | 54% | 19% | 22% | 6% |
| The Collaborative Law process is not cheap | 54% | 17% | 24% | 4% |
| The Collaborative Law process can last as long as litigation | 35% | 35% | 25% | 6% |
| Solicitors are always willing to put "everything on the table" | 26% | 31% | 33% | 10% |
| Disputing parties are always willing to put "everything on the table". | 13% | 55% | 26% | 6% |
| Collaborative Law is appropriate in cases where there has been substance abuse | 9% | 57% | 23% | 11% |
| Collaborative Law is appropriate in cases where one of the parties has been violent | 6% | 61% | 20% | 13% |

While not a weakness of the collaborative law process, the statement with the highest level of agreement (94%) was that "There is a lack of awareness of Collaborative Law among the general public", indeed not one respondent disagreed. Chief Justice John Murray noted in March 2010 "In order for mediation to take hold in this country there is a need to heighten public consciousness as well as that of legal practitioners and other professions of its usefulness, its value and its availability" (Law Reform Commission, 2010 p3-4). The above findings indicate that the Chief Justices' comments could be echoed in terms of collaborative law.

Respondents indicated that weaknesses of the collaborative law process were as follows:

*(i) Disqualification Agreement*

66% of respondents agreed that solicitors were discouraged from using Collaborative Law due to the Disqualification Agreement, while 54% of disputing parties were discouraged for the same reason (see table 5.11 above). Given that the disqualification agreement is the hallmark of collaborative law, it is interesting that it is the very thing that a high number of respondents feel discourages both practitioners and disputants from using the process. Respondent comments included:

*(a) My experience is that clients are not interested in Collaborative Law when you explain the disqualification agreement - this has led to a hybrid arrangement with colleagues who have Collaborative Law training - not full*

*disclosure but early settlement talks with reasonable amount of disclosure which works well.* This is similar to the arrangement in Colorado where lawyers do not sign the participation agreement (Colorado Bar Association, 2007).

*(b) My understanding is that the fact that the process breaks down, or solicitor is disqualified from litigating the matter really seems to discourage the practice.*

*(ii) Cost*

54% of respondents agreed that "Collaborative Law is not cheap". Walls (2007) observed that while collaborative law has the potential to work out financially less expensive than litigation; it should not be promoted as a cheaper alternative. However, as noted in table 5.9 above, the 98% of respondents who experienced cost savings while using collaborative law would seem to be a strong endorsement for the financial benefits of using collaborative law.

*(iii) Disclosure of information*

At 55% and 31% respectively, respondents felt that disputing parties and solicitors were not always willing to disclose all information. The collaborative law process dictates that solicitors should open themselves up and trust the other side, however, the pro-adversarial culture in Ireland (Wade, 2009), does not encourage it. Historically, solicitors practiced and trained in the adversarial approach to disputes. Adapting to collaborative law and its non-

adversarial ways requires new skills. As one respondent put it "*Collaborative Law would be an excellent method to obtain a quick and better solution to disputes but solicitors are reluctant to change their mindset!*" Perhaps it could be argued that the solicitor is only looking after the best interests of their client by not disclosing all information and leaving the client exposed in any future attempts at resolving the dispute through the courts.

*(iv) Suitability of Case*

While it is perhaps interesting that the figures are not higher, a significant proportion of respondents felt that Collaborative Law was not suitable in all cases. 57% felt it was unsuitable were there had been substance abuse, while 61% felt it was unsuitable where one of the disputants had been violent. It certainly is the case that collaborative law will not be suitable for all cases, as noted by the Law Reform Commission (2010) "ADR is not a panacea for all disputes, it has its limitations and is not always appropriate".

## 5.6 COLLABORATIVE LAW AND EMPLOYMENT DISPUTES

Section C of the questionnaire sought to obtain respondent views on the suitability of collaborative law to employment disputes. The findings of this section are presented under the following headings:

(a) Individual and Collective Disputes

(b) Cases of Discrimination

(c) Employer/Employee Gender

(d) Employee Availability and Skill

(e) Employment Dispute Remedies

(f) Benefits of Collaborative Law in Employment Disputes

(g) Interdisciplinary Team Membership

### *(a) Individual and Collective Disputes*

**Table 5.12 Individual and Collective Disputes**

| | Agree | Disagree | Neither | Don't Know |
|---|---|---|---|---|
| Collaborative Law could be used to resolve individual disputes involving Public Sector employees | 91% | 5% | 5% | 0% |
| Collaborative Law could be used to resolve individual disputes involving Private Sector employees | 91% | 5% | 5% | 0% |
| Collaborative Law could be used to resolve individual disputes in large organisations | 88% | 6% | 6% | 0% |
| Collaborative Law could be used to resolve individual disputes in SMEs (Small and Medium Enterprises) | 86% | 6% | 6% | 2% |
| Collaborative Law could be used to resolve collective disputes involving Public Sector employees | 64% | 18% | 11% | 8% |
| Collaborative Law could be used to resolve collective disputes involving Private Sector employees | 62% | 15% | 14% | 9% |
| Collaborative Law could be used to resolve collective disputes in large organisations | 61% | 17% | 14% | 9% |
| Collaborative Law could be used to resolve collective disputes in SMEs | 59% | 18% | 12% | 11% |

There is strong agreement that collaborative law could be used to resolve individual employment disputes regardless of the type or size of organisation. Table 5.12 demonstrates that 91% of respondents agreed that collaborative

law could be used to resolve individual disputes in the Public Sector and the Private Sector. In addition, 88% of respondents agreed that collaborative law could be used to resolve individual disputes in large organisations, while 86% of respondents felt the same about individual disputes in SMEs.

Although, there also appears to be a general consensus that collaborative law could be used to resolve collective employment disputes regardless of type or size organisation, it is to a lesser extent than individual disputes. At 64% and 62% respectively, respondents feel collaborative law could be used to resolve collective disputes in Public Sector Organisations and Private Sector Organisations. Similarly, 61% of respondents indicated that collaborative law could be used in collective disputes in large organisations, while 59% of respondents felt the same about collective disputes in SMEs. These figures, although lower than those for individual disputes, are higher than anticipated.

*(b) Cases of Discrimination*

Three-quarters of all respondents indicated that collaborative law could be used in cases of discrimination. For respondents who felt collaborative law would be suitable for cases involving discrimination, figure 5.11 outlines what grounds of discrimination they felt it would be suitable for.

**Figure 5.11 Grounds for Discrimination**

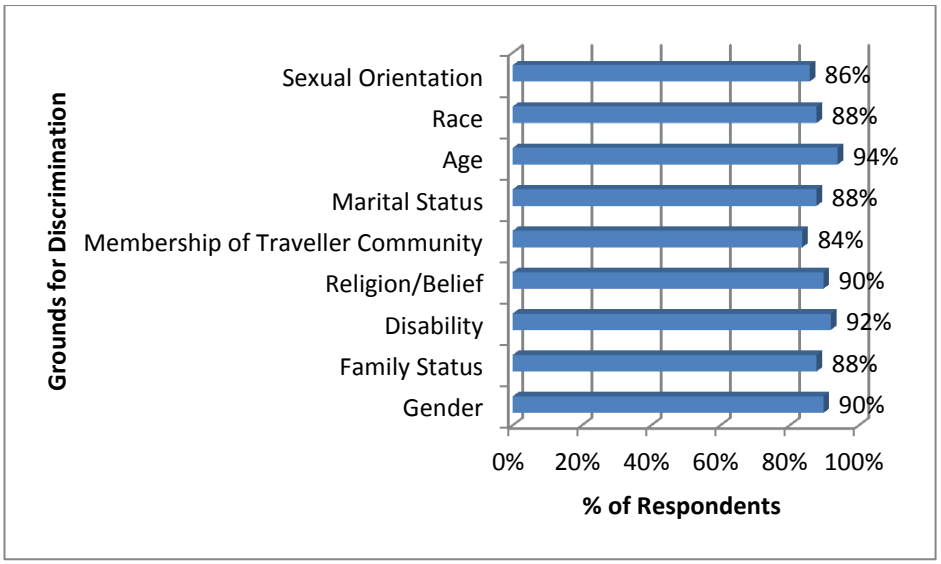



Figure 5.11 clearly outlines that those who felt collaborative law is suitable for employment disputes involving discrimination, felt the "grounds for discrimination" did not particularly matter. At 94%, respondents felt *Age* was the most suitable for collaborative law, however given that the lowest (*Membership of Traveller Community*) was 84%, there is no major difference between any of the grounds. As noted in the literature review delays for hearings at the Equality Tribunal are among the longest for any of the employment bodies (Barry, 2009; Dewhurst, 2009). Any process which could help to reduce the delays would be a welcome addition. The findings above indicate that collaborative law could be used in cases of discrimination, and earlier findings determined that resolving a case using collaborative law is quicker than traditional routes. It would therefore appear that collaborative law could be beneficial in reducing waiting times at the Equality Tribunal.

### *(c) Employer/Employee Gender*

Table 5.13 indicates respondent attitudes to whether employer or employee gender would have an effect on the level of participation in collaborative law.

**Table 5.13 Employer/Employee Gender**

| | Agree | Disagree | Neither | Don't Know |
|---|---|---|---|---|
| Male employees are less likely to participate in Collaborative Law than female employees | 23% | 23% | 40% | 14% |
| Male employers are less likely to participate in Collaborative Law than female employers | 25% | 23% | 37% | 15% |

With similar levels of agreement and disagreement, and high levels of *neither*, table 5.13 indicates that respondents generally feel that employer/employee gender would have no effect on the level of participation in collaborative law. This is at odds with the European Opinion Research Group (2004) report on *EU Citizens and Access to Justice* which found differences in attitudes to ADR in consumer disputes based on gender, finding that men are more likely to have heard of and resort to ADR than women.

### *(d) Employment Opportunities and Employee Availability*

Table 5.14 indicates respondent attitudes to a number of statements on location of employment, availability of employment and employee skills.

**Table 5.14 Employee Availability and Skill**

| | Agree | Disagree | Neither | Don't Know |
|---|---|---|---|---|
| Employees would be more in favour of Collaborative Law in locations where there are low employment opportunities | 28% | 19% | 27% | 27% |
| Employers would be more in favour of Collaborative Law in areas where there is a scarcity of employees | 27% | 17% | 33% | 23% |
| Employers with highly skilled employees would be more in favour of Collaborative Law than those with unskilled employees | 40% | 9% | 32% | 18% |

28% of respondents indicated that "Employees would be more in favour of Collaborative Law in locations where there are low employment opportunities", however notably, 27% of respondents indicated *neither* and a further 27% indicated *don't know*. Similar results can be reported for "Employers would be more in favour of Collaborative Law in areas where there is a scarcity of employees", with 27% respondents agreeing, 33% indicating *neither* and 27% indicating *don't know*. Finally respondents were asked whether employee skill would have a bearing on the use of Collaborative Law. With 40% of respondent agreeing compared to 9% disagreeing, it would seem to indicate that respondents feel that employers would be more in favour of collaborative law where it involves highly skilled employees as opposed to unskilled employees, particularly as Fórfas (2010) have noted that labour shortages are confined to areas for qualified persons with specific expertise and work experience.

### *(e) Employment Dispute Remedies*

Remedies in employment disputes in Ireland available from the EAT are compensation, reinstatement and reengagement. While these remedies are available, it would appear compensation is the preferred option in the majority[7] of cases. The researcher sought to determine if reinstatement and reengagement could be workable remedies in an employment dispute resolved using collaborative law.

**Table 5.15 Reinstatement and Reengagement when using Collaborative Law**

| | Agree | Disagree | Neither | Don't Know |
|---|---|---|---|---|
| Reinstatement would be a workable remedy in Collaborative Law | 65% | 3% | 20% | 12% |
| Reengagement would be a workable remedy in Collaborative Law | 65% | 3% | 20% | 12% |

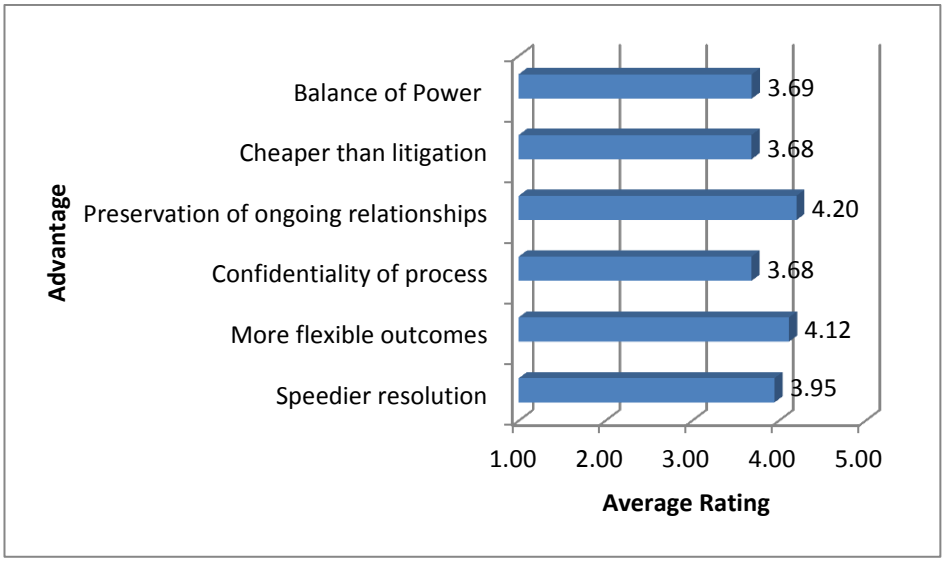
The EAT (2010) found that reinstatement was used in 2.8% of cases, while reengagement was used in 1.4% of cases. This would seem to indicate that these methods of redress are either unworkable or completely under-utilised. Table 5.15 indicates that respondents feel that both reinstatement and reengagement are workable remedies in collaborative law. 65% of respondents agreed that either could be used as a remedy when resolving an employment dispute using collaborative law. The non-adversarial approach and the potential to preserve relationship in the collaborative law process could result in an increase in the use of remedies such as reinstatement or reengagement.

[7] 96% of disputants before the EAT in 2010 were awarded compensation.

*(f) Benefits of Collaborative Law in Employment Disputes*

Respondents were asked to rate a number of perceived advantages of using collaborative law in employment disputes from 1 (not very important) to 5 (really important). Figure 5.12 outlines the average rating received for each.

**Figure 5.12 Perceived advantages of using Collaborative Law in Employment Disputes**




With an average rating of 4.20, respondents indicated that "Preservation of Ongoing Relationships" was the most important advantage collaborative law held over litigation in employment disputes. "More Flexible Outcomes" also received a high rating of 4.12. At 3.68, Cost and Confidentiality received the lowest rating. These findings are similar to the earlier findings in relation to collaborative law in general.

*(g) Interdisciplinary Team*

Finally, respondent were asked to indicate who might comprise an interdisciplinary team in an employment dispute. Table 5.16 outlines the

various members who might form part of an interdisciplinary team in employment disputes.

**Table 5.16 Interdisciplinary Team in Employment Disputes**

| Team Member | No. of Respondents |
|---|---|
| Financial Advisor | 38 |
| Pensions Expert | 37 |
| Trade Union Representative | 30 |
| Counsellor | 27 |
| Coach | 20 |

Financial Advisor and Pensions Expert received the highest level of responses at 38 and 37 respectively, while the other members also received some level of support from respondents. In addition, respondents commented that other interdisciplinary team members might include:

- Human Resources Representative
- Human Resources Expert specific to the industry
- Managing Director
- Occupational Therapist
- Psychologist
- Friend

Interestingly, one respondent commented *"The interdisciplinary approach is key to the success of Collaborative Law in the future"*.

## PHASE B: Depth Interviews

Phase B consisted of depth interviews with five employment stakeholders as follows:

- Interviewee A: Human Resource Manager in a Multinational Organisation
- Interviewee B: Human Resource Manager in a Public Sector Organisation
- Interviewee C: Trade Union Official
- Interviewee D: Small Business Owner
- Interviewee E: Former member of the EAT

Themes discussed in the interviews were:

- Thoughts on the collaborative law process
- Types of dispute
- Differences in employment sectors
- Employee type
- Remedies
- The power relationship
- Interdisciplinary team members

The following sections will discuss the findings under each theme.

## 5.7 THOUGHTS ON THE COLLABORATIVE LAW PROCESS

Generally all interviewees agreed that collaborative law, as with any other ADR method, would be a useful addition to dispute resolution in employment disputes. In particular it was suggested that collaborative law should be used early in disputes, after internal informal processes have been exhausted. Interviewee A observed that "*Collaborative law has the potential for suggesting solutions much earlier than might otherwise be possible".* Flexibility of outcomes, as was the case in Phase A, was identified as the key advantage of the process. Interviewee D suggested that they would "strongly be in favour of processes where an outcome can be agreed between the parties rather than have one imposed on them". Interviewee A also supported this view explaining that their organisation favours processes where a flexible outcome can be agreed between the parties. Indeed they had past experience where in a performance related dispute, the outcome saw the disputant agreeing to demotion with the promise of training for the advanced role in the future. *"Similar outcomes could be achieved in collaborative law".*

In addition, collaborative law has the potential for addressing many disputes which are currently going unheard because of the overly procedural and complex situation which exists with the various state resolution bodies. Interviewee commented that "*In many instances employees required their "day in court" because it afforded them the opportunity to tell an employer that this is what you did and this is how I felt. Maybe there is a space in the workplace for*

*collaborative law which affords employees this opportunity in a more informal way".*

The main concern among all interviewees focused on solicitor presence and whether they were capable of changing their mindset from one of combativeness to one of collaborative. Tesler (2008, p79-80) expressed this change in mindset as the paradigm shift which

> …refers to the alteration in consciousness whereby lawyers retool themselves from the adversarial to collaborative lawyers. The paradigm first requires the lawyer to become aware of unconscious adversarial habits of speech as well as automatic adversarial thoughtforms, reactions, and behaviors. The second step of the paradigm shift is to adopt the beginner's mind, learning new ways of thinking, speaking, and behaving as a collaborative lawyer.

Interviewees expressed the opinion that while solicitors practicing collaborative law had received training, perhaps this is not enough. It was suggested that collaborative law and to a wider extent ADR in general, should form a greater part of the curriculum for Irish legal education. It was suggested that graduates of law school, in the main, are trained in an adversarial mode and furthermore trained in the use of legal language which can be difficult for disputants to understand (Interviewees A, C, D & E). In particular, Interviewee C noted that for disputants to have faith in the process they need to, at a minimum, understand what is being said. Moreover, Interviewees A and B noted that while legal opinion is necessary in many types of dispute, many industrial relations issues have no basis in law at all. Overall it was agreed, as per Gutterman (2004) that achieving the paradigm shift

necessary to practice collaborative law may not come naturally to solicitors and while some may be able to achieve it others may not.

Another concern expressed among interviewees was the idea of confidentiality and whether it was achievable. Interviewee B commented that "*Traditionally industrial relations have involved using whatever information is at your disposal to your advantage. The idea that an employer or employee wouldn't use any information obtained during a collaborative law process, which failed to yield a settlement, to their advantage is absurd*". Furthermore, in situations where the employer/employee reach agreement and the employee proceeds to inform their colleagues of the negotiations and the settlement, what scope does an organisation have for dealing with the breach in confidentiality? However, while reservations were expressed on confidentiality the privacy of the process was identified as a significant pro for employers.

## 5.8 TYPES OF DISPUTE

It was observed among interviewees that not all disputes would be suitable for collaborative law, as Mallon (2009, p9) outlines

> There are cases which simply cannot be dealt with in this manner, and will need to proceed to litigation. There will always be a necessity to have available to clients the very fine court system, in order to have the dispute adjudicated.

Although this is the case, it was pointed out that it would be good practice for an organisation to assess what disputes and disputants are more likely to achieve settlement in the collaborative law process, prior to engaging in the process. In general, similar to the findings from Phase A, interviewees felt there was greater scope for the use of collaborative law in individual disputes than collective disputes. *Interviewee C said that "Collaborative law could be more difficult to implement in a unionised firm. Unions could see it as competition and the Unions are comfortable with the current system of the LRC and the established procedures. This would be recommending a change".* Furthermore, Interviewee B suggested that *"employers might be in favour of collaborative law but unions would not".* Moreover, Interviewee B argued that the legally binding agreement which would be a result of a collaborative law agreement would not be in the spirit of the voluntarist nature of industrial relations in Ireland.

There were contrasting views expressed in relation to applicability of collaborative law to bullying and harassment cases. Some interviewees felt solicitor presence could hamper the attempts at resolution while Interviewee E thought that collaborative law would be suitable to this type of dispute. It was argued that the seriousness of the allegations in relation to bullying/harassment need to be dealt with as soon as possible and in many instances it is not feasible to wait for a state resolution body to make a determination. Furthermore, having these disputes aired in a public arena can be damaging for both parties, particularly as it might be the result of a

misunderstanding or even worse there is no foundation to the claim (Interviewees C, D, E).

Interviewees were in agreement with the findings from Phase A were it was found that disputes involving gross misconduct such as violence or drug abuse are not suitable for collaborative law. In fact, Interviewee A observed that "*disputes of this nature would violate the organisation's core values and resolution of any description would not be contemplated*".

## 5.9 SECTOR SUITABILITY

Respondents in Phase A outlined that sector had very little, if any, bearing on the potential use of collaborative law. While this was also the feeling among interviewees where no distinction was drawn between public sector and private sector disputes, on the quality and usefulness of the collaborative law process, there was general consensus that collaborative law may hold the greatest potential for SMEs. Compensation awarded from State resolution bodies, it was argued, is of greater concern to SMEs than large organisations or public sector organisation. Interviewee D pointed out *"The potential of having to pay hefty compensation could put my business at risk. I'd try to avoid using the State resolution bodies at all costs"*. In addition, Interviewee A maintained that *"whereas large organisations may not be concerned with the level of compensation to payout, it is a major concern for SMEs. Also large companies usually have their own legal team (internal legal team in many cases)"*. Overall it was suggested

that the fear of the unknown is an issue for SMEs facing State resolution bodies.

Large organisations and public sector organisations usually have a HR section or at a minimum, a HR manager, whereas for SMEs, HR is usually the responsibility of the owner, who as, Giroux (2009) notes in many cases has little or no experience of HR related matters. Interviewees C and E suggested that collaborative law could be an additional option offered by the government to SMEs for resolving their employment disputes.

## 5.10 EMPLOYEE TYPE

Respondents in Phase A indicated that employers would be more in favour of collaborative law where the dispute involved highly skilled employees as opposed to unskilled employees. All interviewees concurred with this finding. Indeed, it was argued the desire to engage in dispute resolution processes is very much "results driven", that is, employers will be more inclined to attempt to resolve disputes with employees who are continually meeting and exceeding targets (Interviewee A and D).

Finally it was claimed for non-unionised organisations with highly skilled employees, collaborative law could be "sold" to employers as a real advantage for the retention of workers. Interviewee C suggested that "*Collaborative law could be seen as a valuable remuneration package, because you could say to your*

*employees while there is no trade union, the manner in which we deal with disputes is highly professional. Furthermore employees could feel confident that it will be someone external to the organisation representing them".*

Finally it was maintained that length of service may play a part in an employer's desire to use collaborative law. Interviewee B argued that "*Employees with lengthy service may be offered more opportunities to resolve their disputes than an employee who is relatively new".* There are dual factors at play here; (1) the employer may have greater loyalty to an employee who has served them for many years; and (2) the employee's experience and knowledge of the job may be difficult to replace.

## 5.11 REMEDIES

As noted in the literature reinstatement and reengagement are seldom used remedies by the EAT (EAT, 2010). However, the findings from Phase A of this study indicate that reinstatement and reengagement would be workable remedies when using collaborative law. Interviewees in Phase B somewhat disagreed, they observed that perhaps it was too late for collaborative law after the employee had been dismissed. Interviewees A, B and E argued collaborative law would need to be used before dismissal occurred.

Interviewees indicated that the problems with reinstatement and reengagement are that by the time an employee has been dismissed there has

been a breakdown of trust. Interviewee C observed *"Employers/employees are entitled to place trust in the other party and when that trust is broken there is very little chance of it being repaired"*. Furthermore, Interviewee noted that "*In many instances the organisation has done all it can to retain the employee through informal measures, however the employee's continued poor performance/behavior have made retention unfeasible, and similarly reinstatement/reengagement unworkable"*.

Compensation was deemed the only feasible option when it came to dismissal cases. However, when deciding to dismiss and facing the likelihood of having to pay compensation, organisations should evaluate the potential value of the compensation versus the value of the manager's time dealing with the employee, the detrimental effect on the workplace of the dispute and the employee replacement costs.

## 5.12 THE POWER RELATIONSHIP

Irish legislators have attempted to address the employer/employee power imbalance with the enactment of so much employment rights legislation over the last 10-15 years. Although this may be the case, interviewees agreed that in the majority of instances, the employer holds the power in the employment relationship and employment disputes particularly when dealing with things like ratings or promotion. However it was noted that there are occasions when the employee perhaps has greater power. One such occasion is where the

employee has a certain level and type of expertise required by the employer. This skilled employee has a greater bargaining position than an unskilled employee would have.

Interviewees felt that collaborative law had the potential to address the power imbalance that exists in the employment relationship. Interviewee A and E observed that solicitor presence could be particularly beneficial to unskilled employees.

## 5.13 INTERDISCIPLINARY TEAM MEMBERS

The interviewees were presented with the list of potential interdisciplinary team members which came about as a result of Phase A. All interviewees agreed with inclusion of all, bar one. Interviewee B felt that an organisation's own HR manager should not be included in the process, because if the collaborative law process failed to yield a settlement the HR manager would be excluded from representing the organisation at any of the employment tribunals. It was indicated that perhaps a HR consultant or an industry specific HR manager might be more appropriate.

Furthermore, it was noted that from a public service perspective whatever team members are included they need to be aware of national agreements e.g. Croke Park, as this will dictate what can and cannot be agreed in terms of settling the dispute.

## 5.14 CONCLUSION

This chapter has presented the findings from the empirical research carried out for this study. The chapter has outlined, in Phase A, that practitioners feel collaborative law could be used in employment disputes while interviewees in Phase B concurred. The benefits of collaborative law were identified as flexible outcomes, timely resolution, cost effectiveness, preservation of ongoing relationships and the ability to address power imbalances in the employment relationship.

Furthermore, the research identified the differences in attitudes to individual and collective disputes and their applicability to collaborative law. It was concluded that the final model developed should take cognisance of these differences.

# CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

The employment landscape in Ireland has experienced significant change over the last 10-15 years. This change has been a result of increasing employment rights legislation, composition of the labour market, increase in the number of small firms and an increase in non-union multinationals. These factors have contributed to an increasing number of disputes being presented to the State's employment dispute resolution bodies, namely the Labour Court, the Employment Appeals Tribunal, the Equality Tribunal and the services of the Labour Relations Commission.

The existing dispute resolution bodies which currently operate in Ireland in employment disputes have been widely criticised on grounds of time delay, cost and the emotional/social consequences of submitting to an adversarial process. The Irish government has responded to the need for change by implementing a comprehensive reform of the employment dispute resolution process, and while it is too early to comment on the success or otherwise of the reform programme, the early signs are positive. However, the reform programme aside, this research has attempted to identify an alternative method of employment dispute resolution in Ireland using collaborative law. This was made possible by identifying and reviewing the various drivers of change and by surveying and interviewing the necessary stakeholders with a view to creating a model for employment dispute resolution in Ireland using collaborative law.

## 6.1 RESEARCH QUESTION AND OBJECTIVES

Chapter four of this study proposed the research question and three main research objectives. This section reviews the research objectives and provides a summary of the answers to each.

***Objective 1:*** *Evaluate how successful collaborative practice has been to date in Ireland in the resolution of disputes.*

The researcher identified that collaborative practice has been predominantly used to date in the resolution of family law disputes in Ireland, however there has also been some activity in business disputes. More significantly, practitioners felt collaborative law was suitable to a variety of other areas with employment disputes ranking second after family. Being a relatively new development, it is perhaps unsurprising that the level of collaborative law activity is low, with an average of five cases per solicitor to date, and while the resolution rate of 69% is somewhat short of other jurisdictions it does indicate that collaborative law has a role to play in Ireland. Furthermore, there are indications from the respondents in this study that practice group membership could have a positive effect on the level of activity and corresponding resolution rate.

In addition, the time and costs of resolving a case using collaborative law received favourable responses. It would appear that collaborative law has the

potential of resolving cases much quicker than current methods and if used could help in reducing the lengthy waiting times for the various employment dispute resolution bodies. In terms of cost, there was almost unanimous agreement that collaborative law is cheaper than traditional means, however although costs can be financial, they can also be emotional and while the findings in this study refer to the financial benefits of collaborative law to individual disputants, possibly there are greater savings to be had in emotional costs. Perhaps resolving a case using collaborative law should be viewed as an investment, with the return in investment being psychological wellbeing and/or user satisfaction.

Overall, it would appear that collaborative law has been successful in Ireland to date in resolution of disputes, however more could be done to increase the level of activity and to promote it as a viable option for dispute resolution in non-family disputes. The establishment of practice groups in various regional areas could be one means of increasing the level of activity and promoting further use of collaborative law.

***Objective 2:*** *Determine whether collaborative practitioners view collaborative law as a viable method for employment dispute resolution in Ireland.*

It is the general feeling among respondents in this study that collaborative law is a viable method for employment dispute resolution. In particular, there is a high level of agreement that individual disputes could be resolved using collaborative law and although practitioners also felt that collaborative law

could be used in collective disputes, it was to a much lesser extent than individual disputes. Furthermore there is no distinction found between whether the dispute is in the public or private sector or if it is in an SME or large organisation. Collaborative law could potentially be of greater benefit to employers with highly skilled employees than other types of employer. Practitioners also feel that collaborative law can be used in cases of discrimination.

In summary, collaborative practitioners are in favour of using collaborative law in employment disputes and feel it is applicable to both individual and collective dispute regardless of the type or size of organisation. In addition, it is the consensus among respondents that collaborative law is suitable for cases involving discrimination and would possibly benefit employers with highly skilled employees more.

***Objective 3:*** *Create a collaborative practice model that reflects the unique attributes of Irish employment law conflicts.*

As a result of the findings from the survey of the collaborative practitioners the following preliminary model (figure 6.1) for collaborative law in Irish employment disputes was developed. The model takes account of the sector, type of dispute (collective or individual) and instances where it has been suggested that collaborative law is not suitable. The model also incorporates interdisciplinary team members as suggested by respondents.

**Figure 6.1: Preliminary model of Collaborative Law for Irish Employment Disputes**

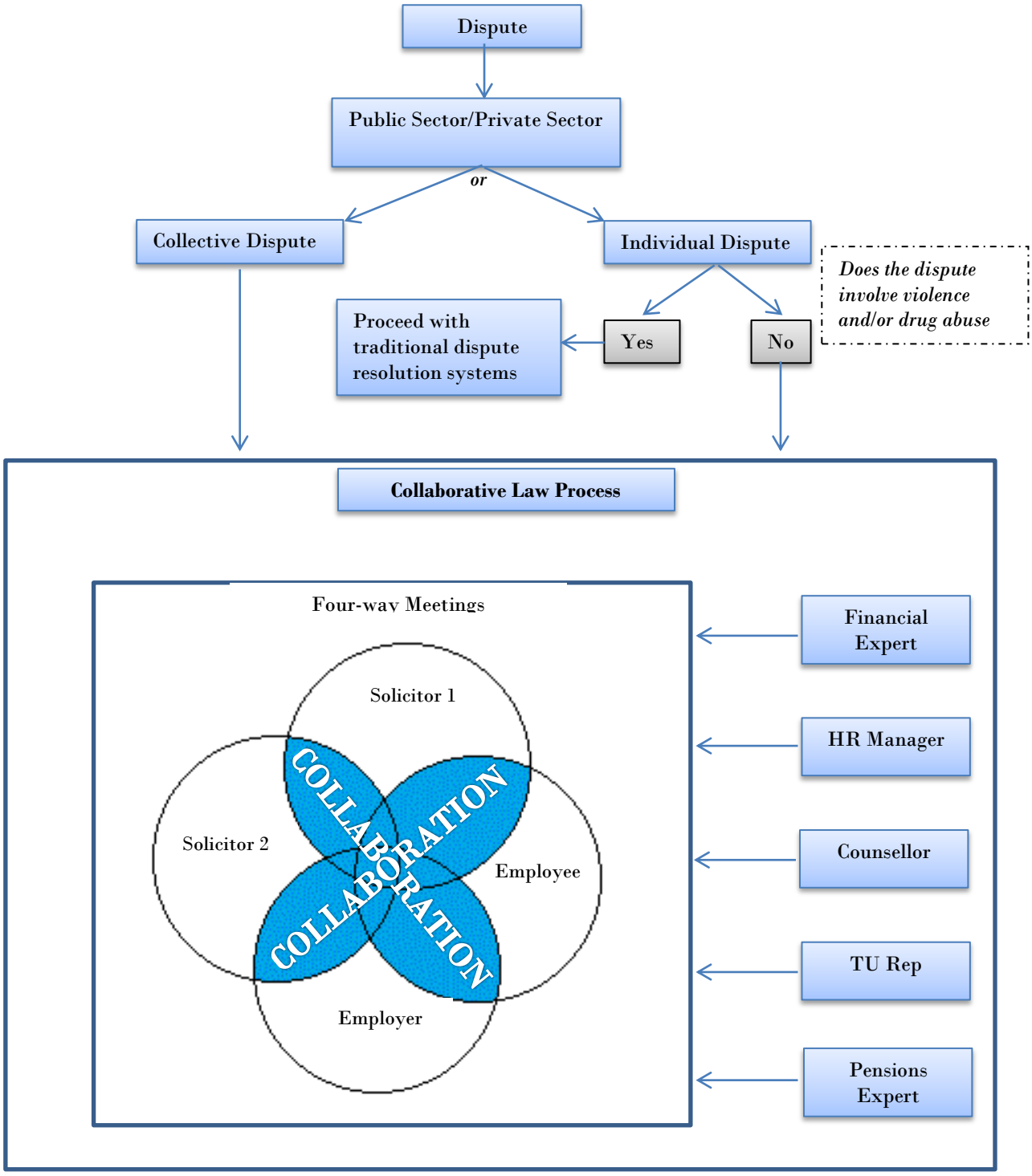
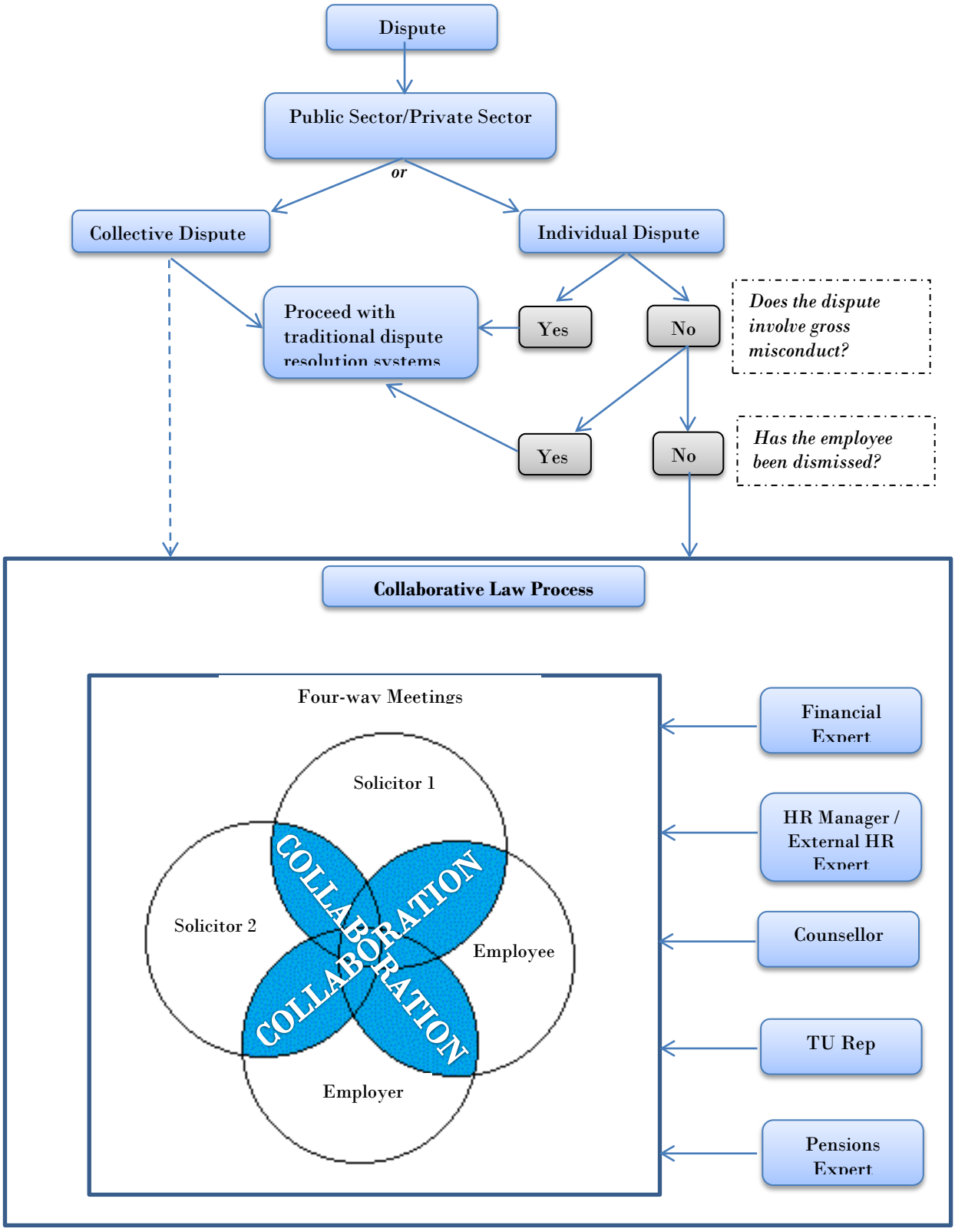


Figure 6.1 was reviewed with employment stakeholders and upon reflection of the views expressed the researcher made a number of amendments. While there was agreement that both individual and collective disputes could be resolved using collaborative law, there is a general feeling among both Phase A and Phase B participants that the collaborative process would be more applicable to individual disputes than collective disputes. Therefore the researcher has represented this in figure 6.2 by using a broken line from collective disputes to collaborative law process. Furthermore, the team members have been edited to include an external HR expert as well as HR manager. The final model (figure 6.2) also takes account of views that collaborative law is too late when termination has taken place.

**Figure 6.2: Final model of Collaborative Law for Irish Employment Disputes**



## 6.2 RESEARCH LIMITATIONS

The model proposed in this study is yet to be tested. Testing the model would enable the measurement of its effectiveness and allow for further refinements to be made.

Although deemed to be the most appropriate means of reaching the target population, the questionnaire used in Phase A may have limited the quality of responses to certain question, especially open-ended questions. Furthermore, the questionnaire was lengthy and while the response rate achieved was comparable with other studies, a higher response rate may have been achieved with a shorter questionnaire. Moreover, although the response rate was comparable with other studies, it was still a relatively small sample which makes it hard to generalise the findings to the broader population of collaborative practitioners.

Finally, the practitioners surveyed in Phase A were all trained collaborative practitioners with a potential vested interest in the success of collaborative law. This may have created a bias in responses.

## 6.3 SCOPE FOR FURTHER RESEARCH

This study focused on practitioner views of collaborative law in Ireland with no consideration given to client views of collaborative law. For a complete

understanding of collaborative law in Ireland, an analysis of client's experiences would need to be undertaken.

For the purpose of this study, the rate of agreed resolution was deemed as a success factor. However, as indicated by Lande (2011), high settlement rates could indicate excessive pressure on the parties to settle and the diversion of inappropriate cases through screening. Future research could look at the reasons for settlement in collaborative law, and if the stated reasons are also applicable in employment situations.

This research has identified that length of solicitor service has a positive effect on resolution rates. Further research could attempt to identify why this is the case. Is it because, solicitors with more experience of litigating can appreciate the value of collaborative law more? Is it that solicitors with more experience have developed, through time, enhanced negotiation skills, and therefore the 'repeat player' comes into effect? Furthermore, this study has identified that male practitioners have a higher rate of resolution than female practitioners. A study could be undertaken to determine why this is the case. Does resolution mean something different to males and females?

Consideration should be given to undertaking an analysis of why practice group membership delivers greater resolution rates.

Finally, as identified in Phase B, this research identifies a need for more training in ADR for training solicitors. Further study could include an analysis of what Higher Education Institutions in Ireland provide in ways of ADR education/training as part of their existing Law programmes.

## 6.4 PERSONAL REFLECTION

*Time – the most precious commodity*

It is often said that time is a precious commodity. Not until I commenced this journey did I realize the accuracy of this statement. As I reflect over the last three years spent doing this research, it is perhaps easy to say that I have experienced various challenges and much frustration. The greatest challenge was achieving a family/work/study balance while the frustration was borne out of procrastination and self-doubt. Having completed the journey, I can safely say that the secrets to completing a project of this magnitude is perseverance and good time management.

*To the writing itself.* During the process of writing the dissertation I revised the structure on numerous occasions and prepared several drafts of each chapter and many more in my mind. Having progressed quickly through chapters 2 and 3, the real block came at chapter 4, when I struggled with the research philosophy and the overall methodology going from survey, depth interviews and focus groups to survey and focus groups and finally to survey and depth

interviews. Truth be told, the various philosophical positions still trouble me. *"Keep track of all your references"*, I was told from the outset – wise words, unfortunately unheeded. Locating references in books and journal articles for my reference list has been one of the most painstaking exercises of the final part of this journey.

The final part of the journey has now passed, the dissertation is complete and I look forward to life without a dissertation again……for now!

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# APPENDIX A KEY IMPROVEMENTS TO BE DELIVERED BY THE END OF 2012

| Situation Prior to Reform | Situation by End 2012 |
|---|---|
| Five Workplace Relations Bodies | Two Workplace Relations Bodies |
| Five Websites | One Website |
| Five separate corporate and administrative systems | A single Joint Services Arrangement |
| 30 First instance paper based complaint forms | A single First Instance Complaint Form with full online functionality |
| 20 paper based appeal forms | A single Appeal Form with full online functionality |
| First instance complaints can be lodged to five separate bodies. In some cases a complainant is required to submit complaints to more than one body | The Workplace Relations Commission will deal with all first instance complaints |
| Three separate avenues for appeal | One appeal route |
| Time limits and criteria for extending the time limit for making complaints vary under different legislation | A common time limit of six months for initiating all complaints requiring adjudication and consistent criteria under which such limits may be extended to twelve months in exception circumstances will apply across all legislation |
| Time limits for appeals vary under different legislation | A common period of 42 days for lodging appeals will apply across all legislation |
| Long delays in acknowledging complaints | All complaints will be acknowledged with five working days |
| Long delays of notifying employers of complaints lodged against them | Respondent will be notified of complaint within five working days of complaint being lodged |
| All complaints subject to adjudication hearing | Early Resolution Service available to assist resolution between parties without an adjudication and a registrar function will be introduced to deal with complaints which are out of time or incorrectly grounded |

| Situation Prior to Reform | Situation by End 2012 |
|---|---|
| Waiting periods of up to two years for adjudication hearings | Target will be to schedule hearings within three months of complaint lodged |
| Long waiting periods for some first instance adjudication decisions | 90% of adjudications and appeal decisions to be issued in writing within 28 working days |
| No reason given for some first instance decisions | All adjudication and appeal decisions will be set out in writing |
| Lack of access to first instance decisions | All first instance decisions and appeal decisions will be published on www.workplacerelations.ie |
| System inefficient and wasteful of resources | Efficient systems will be in place which will deliver significant savings |
| Insufficient use of technology leading to poor levels of service | Better service and user interfaces will be in place, particularly through the provision of electronic services |
| The only enforcement mechanism available to deal with non-compliance with certain employment legislation is criminal prosecution which can be disproportionate, time consuming and expensive | A new complaint model with more proportionate, efficient and less expensive mechanisms such as Compliance Notices, Labour Court Orders and Fixed Charge Notices will be introduced to reduce the need to resort to prosecution. |

# APPENDIX B SURVEY NOTIFICATION EMAIL

----- Original Message -----
**From:** McMorrow Rory
**To:** XXXXXXX
**Sent:** Tuesday, September 20, 2011 5:15 PM
**Subject:** Collaborative Law in Employment Disputes

Dear XXXX

My name is Rory McMorrow and I'm an employee at Letterkenny Institute of Technology. I am currently undertaking a Research Masters into the suitability of Collaborative Law in Employment Disputes in Ireland. As you are aware Collaborative Law has already proved a successful addition to ADR in Family Law disputes. My research aims to determine whether it could prove equally as successful in Irish Employment disputes.

This phase of my research involves surveying members of the Association of Collaborative Practitioners. Therefore, as a member of ACP, you will shortly receive a questionnaire (by post). Your participation in the survey would be greatly appreciated and should take no longer than 10 minutes. The survey is completely **CONFIDENTIAL** and will be used for academic purposes only.

If you prefer to complete the questionnaire electronically, it is available at http://www.surveymonkey.com/s/coll_practice .

Feel free to contact me if you have any questions.

Yours truly
Rory McMorrow
School of Business
Letterkenny Institute of Technology
074 9186211
rory.mcmorrow@lyit.ie

# APPENDIX C SURVEY LETTER

26 September 2011

**Re: Collaborative Law in Employment Disputes**

Dear «Fname»

I am currently undertaking a Masters by Research at Letterkenny Institute of Technology. The title of my research project is: *Collaborative Practice – A resolution method for Irish Employment Disputes?*

This stage of my research involves conducting a survey of Collaborative Practitioners. My research depends on a high response, therefore I would be very grateful if you could take the time to complete the enclosed survey and return same in the prepaid envelope provided.

All the information you provide is strictly confidential. Your name will not be mentioned in the research study and the data will be analysed for research purposes only.

I will be happy to provide you with a summary of the research findings once completed.

Thanking you in advance for your time.

Rory McMorrow

074 9186211

rory.mcmorrow@lyit.ie

# APPENDIX D THE QUESTIONNAIRE

# COLLABORATIVE LAW IN EMPLOYMENT DISPUTES

## QUESTIONNAIRE

I am a member of staff at Letterkenny Institute of Technology and I am currently doing a research masters in the area of Collaborative Practice in Employment Disputes. This questionnaire has been designed to collect relevant views of Collaborative Practitioners on Collaborative Law and its suitability to employment disputes in Ireland.

This survey is for academic use and is completely confidential. The results of the survey will be used only for my thesis and potential academic publications and reports.

Your participation in helping me with my research is greatly appreciated and will only take 10 minutes. If you would prefer to complete the questionnaire electronically it is available at http://www.surveymonkey.com/s/coll_practice .

If you wish to opt out of the survey after submitting your questionnaire, please contact me at rory.mcmorrow@lyit.ie

# SECTION A: GENERAL DETAILS

1. Gender ☐ Male ☐ Female

2. In what year did you qualify as a solicitor? _____

3 What is the size of your firm (number of solicitors)?

☐ Solicitors

4. In which of the following areas of law do you practice? *(Please tick all that apply)*

| | | | |
|---|---|---|---|
| Arbitration & Mediation | ☐ | Family | ☐ |
| Business | ☐ | Finances | ☐ |
| Consumer | ☐ | Legal Aid | ☐ |
| Criminal | ☐ | Personal Injuries | ☐ |
| Employment | ☐ | Will/Estates | ☐ |
| Land/Conveyancing | ☐ | | |

Other (please specify): _____

## SECTION B: GENERAL COLLABORATIVE LAW

5. Have you undertaken training in Collaborative Law?
   Yes ☐
   No ☐

   If yes, in what year did you complete Collaborative Law training?

   _____

6. Are you a member of a Collaborative Law Practice Group?
   Yes ☐
   No ☐

7. In which of these areas have you practiced Collaborative Law? *(Please tick all that apply)*

| | | | |
|---|---|---|---|
| Business | ☐ | Family | ☐ |
| Consumer | ☐ | Finances | ☐ |
| Criminal | ☐ | Legal Aid | ☐ |
| Employment | ☐ | Personal Injuries | ☐ |
| Land/Conveyancing | ☐ | Will/Estates | ☐ |

   Other: _____

8. Please indicate which of the following areas you think Collaborative Law would be suitable for: *(Please tick all that apply)*

| | | | |
|---|---|---|---|
| Business | ☐ | Family | ☐ |
| Consumer | ☐ | Finances | ☐ |
| Criminal | ☐ | Legal Aid | ☐ |
| Employment | ☐ | Personal Injuries | ☐ |
| Land/Conveyancing | ☐ | Will/Estates | ☐ |

   Other: _____

9. Approximately how many Collaborative Law cases have you been involved in?

   _____

10. Approximately how many of these cases have reached an agreed resolution in the collaborative process?

    _____

11. How long does it take from the beginning of the collaborative process to reach an agreed resolution?

| | MONTHS TO SETTLEMENT |
|---|---|
| Longest case | |
| Shortest case | |
| Most recent case | |

12. Typically, how much does a case resolved through Collaborative Law cost compared to a litigated settlement in a similar type case? Collaborative law is:

| | Less expensive by | or | More expensive by |
|---|---|---|---|
| <5% | ☐ | | ☐ |
| 5-10% | ☐ | | ☐ |
| 11-20% | ☐ | | ☐ |
| 21-30% | ☐ | | ☐ |
| 31-40% | ☐ | | ☐ |
| 41-50% | ☐ | | ☐ |
| >50% | ☐ | | ☐ |

13. Please indicate how strongly you agree or disagree with the following statements:

| | Strongly Agree | Agree | Neither Agree nor Disagree | Disagree | Strongly Disagree | Don't Know |
|---|---|---|---|---|---|---|
| Resolving a case using Collaborative Law is quicker than litigation | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Resolving a case using Collaborative Law is cheaper than litigation | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| The Collaborative law process is more flexible than the litigation process | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Confidentiality of the Collaborative Law process guarantees the disclosure of all important information | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| A case resolved using Collaborative Law can ensure future relationships are preserved | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Parties are empowered in the collaborative process to make free choices as to outcomes | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law increases "Access to Justice" | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| The presence of solicitors in the collaborative process can address potential power imbalance | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative solicitors act as zealous advocates for their clients | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

14. In order of importance, please rate each of the following perceived advantages of using Collaborative Law over litigation
(1=lowest, 5=highest)

| | 1 (not very important) | 2 | 3 | 4 | 5 (really important) |
|---|---|---|---|---|---|
| Speedier resolution | ☐ | ☐ | ☐ | ☐ | ☐ |
| More flexible outcomes | ☐ | ☐ | ☐ | ☐ | ☐ |
| Confidentiality of process | ☐ | ☐ | ☐ | ☐ | ☐ |
| Preservation of ongoing relationships | ☐ | ☐ | ☐ | ☐ | ☐ |
| Cheaper than litigation | ☐ | ☐ | ☐ | ☐ | ☐ |
| Balance of Power | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify any other advantage of using Collaborative Law over litigation) | | | | | |

15. Please indicate how strongly you agree or disagree with the following statements:

| | Strongly Agree | Agree | Neither Agree nor Disagree | Disagree | Strongly Disagree | Don't Know |
|---|---|---|---|---|---|---|
| There is a lack of awareness of Collaborative Law among the general public | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| The disqualification agreement discourages solicitors from using Collaborative Law | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| The disqualification agreement discourages disputing parties from using Collaborative Law | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| The Collaborative Law process is not cheap | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| The Collaborative Law process can last as long as litigation | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Disputing parties are always willing to put "everything on the table". | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Solicitors are always willing to put "everything on the table" | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law is appropriate in cases where there has been substance abuse | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law is appropriate in cases where one of the parties has been violent | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

## SECTION C: COLLABORATIVE LAW & EMPLOYMENT DISPUTES

16. Please indicate how strongly you agree or disagree with the following statement(s):

| | Strongly Agree | Agree | Neither Agree nor Disagree | Disagree | Strongly Disagree | Don't Know |
|---|---|---|---|---|---|---|
| Collaborative Law could be used to resolve individual disputes involving Public Sector employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve collective disputes involving Public Sector employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve individual disputes involving Private Sector employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve collective disputes involving Private Sector employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve individual disputes in large organisations | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve collective disputes in large organisations | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve individual disputes in SMEs (Small & Medium Enterprises) | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Collaborative Law could be used to resolve collective disputes in SMEs | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

17. Do you think Collaborative Law could be used in cases of discrimination?

Yes ☐
No ☐

*If yes*, please tick which of the following "grounds for discrimination" it might be applicable to: *(Please tick all that apply)*

| | | | |
|---|---|---|---|
| Gender | ☐ | Marital Status | ☐ |
| Family Status | ☐ | Age | ☐ |
| Disability | ☐ | Race | ☐ |
| Religion/Belief | ☐ | Sexual Orientation | ☐ |
| Membership of Traveller Community | ☐ | | |

18. Please indicate how strongly you agree or disagree with the following statements:

| | Strongly Agree | Agree | Neither Agree nor Disagree | Disagree | Strongly Disagree | Don't Know |
|---|---|---|---|---|---|---|
| Male employees are less likely to participate in Collaborative Law than female employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Male employers are less likely to participate in Collaborative Law than female employers | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Employees would be more in favour of Collaborative Law in locations where there are low employment opportunities | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Employers would be more in favour of Collaborative Law in areas where there is a scarcity of employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Employers with highly skilled employees would be more in favour of Collaborative Law than those with unskilled employees | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Reinstatement would be a workable remedy in Collaborative Law | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Reengagement would be a workable remedy in Collaborative Law | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |

19. In order of importance, please rank each of the following perceived advantages of using Collaborative Law compared to litigation in employment disputes (1-6; 1=lowest, 5=highest)

| | 1 (not very important) | 2 | 3 | 4 | 5 (really important) |
|---|---|---|---|---|---|
| Speedier resolution | ☐ | ☐ | ☐ | ☐ | ☐ |
| More flexible outcomes | ☐ | ☐ | ☐ | ☐ | ☐ |
| Confidentiality of process | ☐ | ☐ | ☐ | ☐ | ☐ |
| Preservation of ongoing relationships | ☐ | ☐ | ☐ | ☐ | ☐ |
| Cheaper than litigation | ☐ | ☐ | ☐ | ☐ | ☐ |
| Balance of Power | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify any other advantage of using Collaborative Law over litigation in employment disputes) | | | | | |

20. Please indicate which of the following might be part of an interdisciplinary team in an employment dispute: *(Please tick all that apply)*

Financial Advisor ☐ Pensions Expert ☐

Coach ☐ Trade Union Representative ☐

Counsellor ☐

Other (please specify): _____

21. General Comments

| |
|---|
| |

22. Email address (please include if you wish to receive a summary of the results)

_____

# Thank you for your participation. Your time and input is greatly appreciated.

**Should you have any queries on the questionnaire please contact me at:**

Rory McMorrow
074 9186211
rory.mcmorrow@lyit.ie

**Please return completed questionnaires in the prepaid envelope or post to:**

Rory McMorrow
School of Business
Letterkenny Institute of Technology
Port Road
Letterkenny
Co Donegal

# APPENDIX E SURVEY REMINDER EMAIL

From: McMorrow Rory [mailto:Rory.McMorrow@lyit.ie]
Sent: 13 October 2011 16:34
To: XXXXX
Subject: Reminder - Collaborative Law in Employment Disputes

Dear XXXX

I recently sent you a questionnaire on Collaborative Law. If you haven't already completed and returned the questionnaire, I would be grateful if you could take the time to do so at your earliest opportunity.

If you require another copy of the questionnaire please let me know and I'll gladly forward you one, alternatively you can complete the questionnaire electronically at http://www.surveymonkey.com/s/coll_practice .

Feel free to contact me if you have any questions.

Many thanks for your assistance.
Rory McMorrow
School of Business
Letterkenny Institute of Technology
074 9186211
rory.mcmorrow@lyit.ie<mailto:rory.mcmorrow@lyit.ie>

# APPENDIX F INTERVIEW THEME SHEET

**GENERAL**

Have you any experience of ADR in employment disputes, if so,

- What methods and did you think they were effective?
- Where there any drawbacks to the processes used?
- If disputes arise in your organisation, would it be normal for legal personnel to be involved?
- What do you think of the CL process?

**Types of Dispute**

- Do you think, would some types of employment disputes lend themselves more to CL than others? If so, what might these be?
- Do you think could CL be used in Public Sector employment disputes?
- The increasing complexity of employment legislation means it has become very difficult for an organisation to stay on top of their rights and obligations to employees particularly for SME organisations, where they have no dedicated HR dept or person. Do you think that CL SME owners would find CL useful?
- Would solicitors for large organisations be willing to use CL, with the potential of losing a "lucrative" client? Or even a long-term client.

- Would unionised firms be in favour of CL or would it only suit non-union firms?

- Are there instances when CL is not appropriate? (Drugs abuse, physical violence)

**Advantages of CL**

Survey Respondents indicated that solicitor presence during the CL process can address power imbalance that might exist between employer and employee.

- Why might this be and do you feel power is a major concern in employment disputes?

- How can CL or any process ensure that post-dispute the employer doesn't exercise their "power", in terms of performance ratings, promotion etc?

- While the rebalancing of power was seen as an advantage, it came fifth in a list of six advantages with "More flexible outcomes" and "Preservation of ongoing relationships" ranking highest.
    - What flexible outcomes might CL provide in an employment dispute
    - How might relationships be preserved?

- What do you think of the principle of confidentiality? Could it be a major stumbling block?

- Would privacy of the process be one of the main advantages to employers?

- Do you think this process, could be used in addition to whatever other processes are used, perhaps a menu which includes mediation etc, so when all grievance and disciplinary procedures have been exhausted that both parties can give CL a go?

**Skilled Employees and Employment Location**

- Would employers with highly skilled employees be more in favour of CL than those with unskilled employees? Why?

- What about a highly skilled employee – would they be interested?

- Assuming there are CL practitioners available, would employers in remote/rural locations be more inclined to use CL than those in urban areas? *(unavailability of employees)*

- Would the unskilled employee be interested at all? Would your answer differ during recession/celtic tiger?

- Could employee length of service play a part in the employers and employees interest in CL?

**Remedies**

- Employers/Employees may currently seek remedies from EAT, Labour Court, Rights Commissioner, LRC, Equality Tribunal (all soon to be replaced by Workplace Relations Service) at potentially zero cost, why then look for alternatives?

- Could CL be an alternative offered similar to the conciliation service or the workplace mediation service.

- Compensation, reinstatement and reengagement are remedies available, but reinstatement and reengagement are rarely used. Why? What other remedies might you find if you used CL?

- Would reinstatement and reengagement be more feasible in CL than they currently are?

**Team members**

- In employment disputes, what professionals might be involved in the CL process?