



Northern Ireland
Assembly

**COMMITTEE
FOR EDUCATION**

OFFICIAL REPORT
(Hansard)

**Departmental Briefing on the draft
Education (Employment Schemes)
Regulations (Northern Ireland) 2010**

7 October 2009

Maintained Schools (CCMS). She is our director of workforce planning and has considerable background and experience in human resources (HR). I will refer all the Committee's difficult questions to La'Verne at the earliest possible opportunity.

If it meets with your approval, I will take a quick trot over the ground in relation to the draft Education (Employment Schemes) Regulations (Northern Ireland) 2010, beginning with a bit of background and context, and then we will be happy to take members' questions.

I will start with a brief reminder of the reason for the regulations and the role that we propose that they will have. Members will remember that the review of public administration (RPA) employment arrangements are based on a delegated model. That means that boards of governors of schools will carry out a range of employment functions on behalf of, and in the name of, the education and skills authority (ESA), which is the employer. The instrument of delegation and the central element of the employment arrangements is the employment scheme for each school. The schemes will be drawn up by the submitting authorities for the schools and will set out the functions that each board of governors will carry out.

It is worth reminding ourselves that the policy intention behind that is to ensure that each school will be able to choose the degree of autonomy that it wishes to have over employment matters. The purpose of the regulations that the Committee will consider is not to change that policy intention but to reinforce it by giving clarity and certainty to schools. Members will recall that some stakeholders and, indeed, Committee members were concerned that without regulations an overbearing ESA could limit the autonomy of schools or usurp the role of boards of governors or that of the trustees or owners of schools in ensuring that ethos is properly reflected in employment arrangements. The regulations are intended to address that concern.

It is also worth reminding ourselves of the status of the document that the Committee is considering. It is not formal; it has no status at present. The document is an early working draft of the regulations on which we are still working. We would very much welcome the Committee's views on the work that we have done to date, particularly on whether the regulations will provide the clarity and certainty for which stakeholders are looking. We would, of course, be happy to work with the Committee and consider any suggestions that members may have as we take forward the development of the regulations.

The regulations cover the full range of employment functions: determination of staff complement; recruitment and appointment; management and discipline of staff; and dismissal. I will touch on each of those briefly.

The regulations will make it clear that employment schemes must define the determination of staff complement as a function of boards of governors. The ESA will have no role in determining the staff complement of any school.

Each employment scheme must set down the detailed procedures that boards of governors will follow in recruiting and appointing staff. The regulations will require schemes to assign the functions of recruitment and appointment to boards of governors with two exceptions. The first is where a board of governors requests the ESA to carry out some functions on its behalf; the second is for peripatetic staff who would work at more than one school, in which case the procedures would be carried out by the ESA. In all other cases, boards of governors will make the appointment decisions. They may, of course, request input or assistance from the ESA in operating the procedures, and the ESA will be under a duty to provide that assistance.

The regulations will require that employment schemes place the discipline function with boards of governors. Each board of governors must put clear rules and procedures in place, including procedures to handle grievances, and must ensure that all of their staff are aware of them. Where those discipline procedures require that some action be taken and that action falls to the ESA, the ESA will be under a duty to take that action at the request of the board of governors.

The employment schemes must make decisions on suspension, including the ending of a suspension, a matter for boards of governors or principals of schools. The ESA's role would be limited to the suspension of peripatetic teachers — those who are employed to work at a number of schools.

We have talked about the issue of dismissal a number of times in Committee meetings. As with suspension, it is now clear that employment schemes must assign that function to boards of governors. The ESA's role will be to offer advice, and it will have the right to be present at meetings of boards of governors at which dismissals are being discussed. However, the decision to dismiss is for boards of governors alone, and the ESA will be under a legal duty to put such decisions into effect.

Finally, there is a section on payments, which further underpins the role of governors by requiring that employment schemes give them the function of deciding whether and when payments need to be made in order to secure the resignation or dismissal of a member of staff. Once again, the ESA will be obliged to make such payments on foot of decisions by boards of governors, but it can charge those payments to a school's budget if there is a good reason to do so.

That is a very quick trot over the ground. I will be happy to enlarge on any of those issues or answer members' questions. However, the Department's view is that the net effect of the regulations, together with clause 8 of the Education Bill, is to put beyond doubt that boards of governors will be responsible for a full range of employment functions and will take all the key decisions, from hiring to firing.

The Chairperson:

Who is the employer?

Mr Stewart:

The education and skills authority.

The Chairperson:

If a board of governors dismisses Mrs Smith and Mrs Smith takes the board to court, who will represent the school in court? Will it be the ESA or the board of governors?

Mr Stewart:

La'Verne may wish to comment on that.

The Chairperson:

La'Verne's previous experience will be useful in giving us an insight into how the arrangements would work in practice. If I am not mistaken, the regulations would provide for a relationship that is similar to the relationship between the CCMS and the Department.

Mr Stewart:

Very much so. It is not that the ESA would represent the board of governors; depending on the

proceedings, both the ESA and the board of governors might find themselves taking part. In that case, they would almost certainly be represented separately.

Mrs La’Verne Montgomery (Department of Education):

You are absolutely right, Chairperson, in that the model is closest to the model that currently exists for Catholic maintained schools and the CCMS as the employing authority. When a teacher takes the board of governors to court or to a tribunal over an appointment decision that he or she does not agree with, the employing authority and the board of governors are co-joined in the action. The CCMS and the board of governors would be named, and the education and library boards would provide the CCMS with an indemnification, which would cover any costs incurred by the action.

CCMS uses Napier and Sons as its solicitors, and the cost incurred in supporting the board of governors and CCMS would be covered by the education and library board. It is envisaged that there would be a similar process for the education and skills authority; it would be co-joined with the board of governors and, therefore, the costs would be covered by the education and skills authority.

If the individual boards of governors decided that they wished to use their own legal representatives, and if that were considered appropriate, then the ESA would cover the costs. Again, that model would be closest to the CCMS model.

The Chairperson:

What would happen in a situation whereby the Department feels that the action taken by a board of governors is unlawful or not appropriate? Is the board of governors left to pick up the cost and dangle by its own string?

Mrs Montgomery:

In my time with CCMS, which is just over seven years, that situation never occurred. The CCMS’s role in advising boards of governors was to ensure that they were following the agreed procedures and that any decisions were lawful.

If an officer of CCMS — and again we can use the comparator of an officer of the ESA — felt that a board of governors had stepped outside procedure or had acted unlawfully, that would be

formally recorded, and it would be made very clear to the board of governors that there would be a question mark over the indemnification of its action. An officer of the ESA has a role to ensure that procedures are being followed and that governors' actions are lawful.

The Chairperson:

Is the situation different for a controlled school?

Mr Stewart:

At the moment, the situation for controlled schools is exactly the same; the same legislation covers CCMS, maintained schools and controlled schools. It is different for voluntary grammar schools and grant-maintained integrated schools in that the board of governors is the employer in those schools. Therefore, on legal issues, all roads lead to the board of governors.

As La'Verne said, we envisage that the process will operate in the same way under the RPA arrangements. The ESA will have a right to be present at a meeting of a board of governors at which, for example, a dismissal was being considered. It could offer advice to the board of governors. However, at the end of the proceedings, the board of governors will make the decision. We have discussed with stakeholders the fact that, from time to time, there may be genuine disagreement about what is lawful between the ESA, which is acting on its legal advice, and a board of governors that is acting on its own legal advice. Such matters can be difficult to sort out. In such cases, the sensible course of action is for the ESA, on behalf of both parties, to commission senior counsel opinion. It would be brave for a board of governors or the ESA to go against counsel opinion as to what is lawful.

The Chairperson:

Will the regulations be subject to consultation?

Mr Stewart:

They have not been subject to consultation yet, but I am sure that that will happen in due course.

Mr D Bradley:

La'Verne, you are very welcome. Chris, it is good to see you again. Is there a guarantee that the regulations are in keeping with employment law, labour law and equality law?

Mr Stewart:

I can almost guarantee that the regulations are not compliant with employment law at present. We recognise that when we pass regulations that assign functions to parties in the education system, education law can become out of kilter with employment law. If we do not address that issue, there will be difficulties. For example, a board of governors might, quite properly, take a decision to dismiss a member of staff through the procedures that are set down in its employment scheme. The ESA has a legal duty to put that decision into effect, and the member of staff would be dismissed. If we did not take further action, which I will describe in a moment, that member of staff could complain to a tribunal and the complaint would be upheld because the tribunal would identify the ESA as the employer. It would ask whether the ESA followed the procedures laid down in employment law and conclude that it had not. Therefore, it would deem the dismissal to be unfair.

The paper that we passed to the Committee a few weeks ago shows that we recognise the need to use the powers in clause 12 of the Education Bill to introduce an Order to modify employment law and to remedy the discrepancy. At the end of the day, the board of governors still has to follow proper procedures and comply with employment law when discharging its functions. However, we will deal with the technical anomalies and discrepancies in employment law that could leave the ESA, not the board of governors, vulnerable to legal challenge.

Mr D Bradley:

Does the Education Bill deal with that issue?

Mr Stewart:

It will be dealt with by powers in the Bill. Clause 12 gives the Department the power to make an Order to modify employment law, which reflects a similar power in existing legislation. We will do that in due course.

Mr D Bradley:

Will that Order come before the Committee in due course?

Mr Stewart:

Yes, it certainly will.

Mr D Bradley:

You used the relationship between CCMS and the Department as a paradigm for the schemes. However, there are numerous examples of CCMS being extremely ineffective in dealing with certain situations. I know of one situation in which a teacher who was involved in the management of a school was allowed to stay on in a position in which he was doing tremendous damage to the school and other members of staff. Can we ensure that such a situation does not recur?

Mr Stewart:

You will appreciate, Dominic, that it is difficult for us to comment on individual cases, whether taken forward by CCMS or any other body.

Mr D Bradley:

I have not named anyone.

Mr Stewart:

No; and I would not ask you to. From the outset, the core of the RPA arrangements has been to maximise the autonomy of boards of governors. We are asking them to take the authority and the responsibility for discharging a range of functions. We are fettering, to a very great degree, the discretion of the ESA to interfere in that —

Mr D Bradley:

I am sorry for interrupting you. Without going into detail, let us take the scenario that I mentioned of an individual in the top line of management of a school performing his or her duties in such a way as to be detrimental to the pupils and staff. Would the ESA have the power to intervene and correct that situation?

Mr Stewart:

No; that would be a matter for the board of governors.

Mr D Bradley:

What happens if the board of governors does not have the stomach to tackle the situation?

Mr Stewart:

The solution would be to change the board of governors.

Mr D Bradley:

The ESA would?

Mrs Montgomery:

In that case, the disciplinary procedure, which would form part of the employment scheme, would be operated. The disciplinary procedures for teachers are agreed with the teaching unions and the management side. Therefore, all teachers, regardless of what sector they work in, operate under the same disciplinary procedures. If those procedures are to be changed, that would be done through the teachers' negotiating committee. Therefore, the ESA would, effectively, be the management side in the negotiations, and the teaching unions would be involved in any change to policy and procedure. That would not change with the establishment of the ESA: the same policy and procedure will transfer from the current system to the new employer.

Mr Stewart:

One concern that stakeholders raised with us frequently is that, to put it candidly, they did not quite believe us when we said that we were going to make boards of governors responsible for those matters and give them the autonomy to make the decisions. We would hope, through these regulations and the clarification that we have provided, that we will demonstrate that we are serious about that. Those are matters for boards of governors to decide.

The ESA's role in employment matters is one of support and advice. However, if it were the case that the Department or the ESA perceived that a board of governors was failing to discharge its responsibilities, we would have to address that. It would be a very serious matter if a situation was damaging the school. If the board of governors proved that it did not have the capacity to discharge its responsibility, and the problem could not be remedied by training or support, then we would change the board of governors.

Mr Craig:

I declare an interest as a member of several boards of governors. Taking a look through the regulations, you would wonder why anyone would want to be a member of a board of governors. The relationship between the controlled sector, which I know and understand, and the education

and library boards, whereby the boards take on the legal liability if something goes wrong, will not fundamentally change. Basically, the responsibility will move from the boards to the ESA.

If a governor acted outside what was agreed as good practice or normal practice, would that governor still be legally covered or indemnified by the ESA? I refuse to mention names, but a typical example would be if a governor spoke to the press about a disciplinary issue that was later challenged in court and found to be incorrect. Would the individual governor be sued?

Mrs Montgomery:

No individual member of a board of governors would be exposed in that situation. The board of governors, as a corporate body, would be indemnified. If the decision were that the board of governors had acted unlawfully, then the ESA would have the right to say that it would remove that indemnification, but action would not be taken against an individual. An individual governor would never be held solely responsible. The body corporate, rather than an individual governor, would be held responsible.

Mr Craig:

It is interesting that indemnification would be removed from the body corporate. That would only happen when the entire body had done something illegal. I want to know what would happen if an individual does something wrong. What would happen to the body corporate in that circumstance?

Mrs Montgomery:

If an individual governor does something illegal, he or she would be removed from the board of governors. If he or she acted in the way that you described and spoke to a member of the press without the authority of the chairperson of the board, then it would be for the governors to take action on that. The individual would be asked to step down from the board of governors.

Mr Craig:

I do not dispute that, but would the board of governors still be indemnified under those circumstances? Could there still be a legal challenge?

Mrs Montgomery:

They would still be indemnified.

Mr Craig:

Unfortunately, circumstances have arisen where that has happened.

Mr Stewart:

It happens. We are conscious of the need to ensure that governors, or prospective governors, do not expose themselves to any degree of individual risk. That is important. Even with respect to the potential limitations on the joint indemnity, the ESA would only pursue such a course of action in an extreme case whereby a board of governors wilfully ignored advice and chose to take a course of action that it knew to be unlawful, having been advised that it was unlawful.

I am sure that the Committee would agree that it would not be unreasonable, in those circumstances, to seek to limit the indemnity. However, where a board of governors, or an individual governor, does something in good faith in pursuit of the functions that have been assigned to them, it is right and proper that the system backs that person up and indemnifies them.

Mr B McCrea:

The Department has not yet consulted on the regulations, but have you had a chat with anyone?

Mr Stewart:

Yes.

Mr B McCrea:

Would you care to illuminate us?

Mr Stewart:

We have spoken to a number of stakeholders about aspects of the regulations, at length and on many occasions. We have not yet put out the document for formal consultation. It would be a little premature to do that, as we do not yet have the power to make those regulations.

Mr B McCrea:

Help me out here, Chris. Have you had a chat with the Governing Bodies Association (GBA)?

Mr Stewart:

I have had numerous chats with the GBA. I genuinely do not recall the extent to which we may have talked about the detail.

Mr B McCrea:

Certain people were particularly concerned about this issue, and the GBA and others were among them. You said that people did not believe that you were serious about giving responsibility to schools. Do they think that you are serious now?

Mr Stewart:

I think that they know that we are serious now.

Mr B McCrea:

If I were to ask them, would they tell me that it is OK and that this is sorted?

Mr Stewart:

It would be unfair of me to put words into their mouths. However, in our most recent meetings and contacts with representatives from the GBA, we formed the impression that their concerns had been resolved. La'Verne may wish to expand on that; she was at a meeting that I did not attend. I could not put on the Hansard record that I had a formal communication from the GBA that declared that it was happy, but it gave us the impression that we had dealt with the issue that concerned it.

Mr B McCrea:

La'Verne, you have been in the job only a week, so you can speak freely.

Mrs Montgomery:

I have a month under my belt.

Mr Stewart:

The training course in the first week is all about not speaking freely. *[Laughter.]*

Mr B McCrea:

Many a true word is spoken in jest.

Mrs Montgomery:

I have attended a couple of meetings with representatives of the GBA and the draft regulations have been shared with them. We have received nothing from them since those meetings to raise any further concerns.

Mr B McCrea:

Were they smiling?

Mrs Montgomery:

Yes, but they always smile when I am with them. *[Laughter.]*

Mr B McCrea:

La'Verne you have just gone and ruined it. I was nearly in a good place there.

I do not wish to put either of you in a difficult position, but particular groupings have real concerns about the employment issue. Indeed, the Chairperson has raised the point about who will actually be the employer, and the Department has gone to some lengths to clarify that.

A famous civil servant once said to me, "It is very difficult to give you something that you actually want", or words to that effect. In other words, he was referring to the fact that the Department had acceded to our requests and given us what we wanted, but we would not accept it. Are the draft regulations that type of document? Will they give the Committee what it wants?

Mr Stewart:

I am appalled by the idea that any civil servant could be famous; infamous would perhaps be more apt.

The Department has genuinely gone to some lengths to try to meet the concerns that were expressed by stakeholders and members of the Committee, and the Department now wants to ask whether it has actually addressed those concerns.

The draft regulations are a work in progress; they are not a formal set of draft regulations. It is a working document, which is at an early stage in its life. As La'Verne has said, the Department

has reason to be confident that it has addressed the concerns of stakeholders, but if that proves not to be the case, then the Department is happy to re-engage with them. If we have not got it right yet, then there is more work to be done.

The Chairperson:

Chris, you talked about amending clause 12 of the Education Bill. Is there an intention to name who the respondent would be if a person started litigation proceedings on the basis of unfair dismissal?

Mr Stewart:

Yes, one of the things that a modifying Order made under clause 12 would do is to make it clear that the ESA would be the first-named respondent.

The Chairperson:

Is it likely that anything will be brought to the Executive tomorrow in relation to the proposed amendments to the Education Bill? I do not want to open up a Pandora's box with that question; I just want some clarity.

Mr Stewart:

Yes; the Minister has circulated papers to her Executive colleagues, and she will be seeking Executive agreement at tomorrow's meeting on the policy amendments that she wishes to bring forward and the policy amendments proposed by the Committee that she wishes to accept.

The Chairperson:

Have any proposals been made regarding the second Education Bill?

Mr Stewart:

The second Education Bill and its policy memorandum have been put forward for Executive consideration and have been there for some time. However, I do not think that there has been agreement as yet that they will be on the agenda of an Executive meeting.

Mr D Bradley:

When should the Committee expect to see the introduction of the modifying Order under clause 12 of the Education Bill, which would ensure that the regulations are in keeping with employment

law?

Mr Stewart:

It is difficult to put a firm timescale on that Dominic, but the Department recognises the need to bring that legislation forward as soon as possible after the Bill comes into operation. The longer that we leave it, the longer there is a discrepancy and a potential problem for the ESA. Therefore, it is in everyone's interest that the Order is introduced as soon as possible. However, it would be wrong of me to give the Committee an ambitious timescale at present, because the Order could potentially be quite complex.

Mr D Bradley:

I presume that that will all be sorted out before the establishment of the ESA.

Mr Stewart:

It would be wrong of me to guarantee that today. It is potentially a very complex Order.

Mr D Bradley:

If it is not introduced before the establishment of the ESA, will the ESA and boards of governors not be left open to action being taken against them?

Mr Stewart:

The problem that would arise would be solely for the ESA and not for boards of governors. It would in no way fetter the functions of the boards of governors or the lawfulness of their exercise of those functions.

If the Department was late with the introduction of the Order, that could give rise to difficulties, legal challenges and possible expenditure consequences for the ESA, and I could find myself explaining the reasons for that to the Public Accounts Committee. It is in everyone's interest for the Department to introduce the Order as soon as possible.

Mr D Bradley:

Will you give the Committee a rough indication of when it will be introduced?

Mr Stewart:

If I did so, there would be a risk that I could mislead the Committee, because work on it has not started yet. The reason why I am being cautious is because, as members will recall, the Committee secretariat unearthed a similar Order that dated from 1991, which dealt with employment law as it stood at that time. Since then, employment law has changed beyond all recognition. The complex primary legislation that needs to be examined carefully is voluminous. As we have not been deeply involved in that area previously, we must carefully undertake quite a volume of research to ensure that we construct the Order correctly. That requires several months' work.

Mr D Bradley:

Will it be January, then?

Mr Stewart:

Perhaps, January, yes — do not press me on which year, though. *[Laughter.]*

The Chairperson:

It would be important for the Committee to have an early draft of the Order.

Mr Stewart:

As that work progresses, we will want to keep the Committee regularly informed. Certainly, we will want to give you early sight of the Order, even of a working draft.

The Chairperson:

Will we see it as early as we saw the draft of the second Bill?

Mr Stewart:

Perhaps, even a day or two earlier.

The Chairperson:

We will not go there.

Mr B McCrea:

Do not gild the lily.

The Chairperson:

Chris and La'Verne, thank you very much for your attendance.