Northern Ireland Assembly

Committee for Employment and Learning

OFFICIAL REPORT (Hansard)

Review of Employment Law: DEL Briefing

19 June 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Robin Swann (Chairperson)
Mr Sammy Douglas
Mr David Hilditch
Mr Chris Lyttle
Mr Fra McCann
Ms Bronwyn McGahan

Witnesses:

Mr Conor Brady	Department for Employment and Learning
Mr Tom Evans	Department for Employment and Learning

The Chairperson: I welcome Tom Evans, deputy director of strategy in the Department's European and employment relations division, and Conor Brady, head of the employment relations policy and legislation branch. Gentlemen, you are very welcome this morning.

Mr Tom Evans (Department for Employment and Learning): Thanks for the opportunity to brief the Committee. The Minister came to the Committee last November to discuss the employment law review. The main purpose of today's presentation is to outline progress since then and to set out some of the policy proposals for which the Minister is seeking Executive approval to go out to consultation. We sent you a fairly detailed background paper. You will be relieved to hear that I do not intend to go through that in detail. I will just pick out some of the highlights, and then Conor and I will be available to answer any questions.

As the Committee will know, the review has been taken forward under the three themes of early resolution, efficient and effective tribunals, and better regulation measures. A number of actions have already been taken on the early resolution theme. Over the past six months, the Department has continued to engage with all the key stakeholders on the employer and employee sides. The Labour Relations Agency (LRA), which the Department sponsors, has facilitated a round-table forum which has all the key union and employer bodies on it. We, as officials, have met that round-table forum, on a number of occasions. That engagement has been useful in shaping some of the proposals that the Minister is seeking to explore through a public consultation.

The Minister commissioned the LRA to develop two specific proposals. One of those is the proposal to route all potential tribunal claims through the LRA, instead of going to the tribunals, in a way that is not inconsistent with what is happening in the rest of the UK. A second proposal, which is unique to Northern Ireland, is the development of an early neutral assessment service that will be sited in the LRA's arbitration scheme proposals. The purpose of those measures will be to seek to increase the number of disputes that are resolved early without the need to go to formal litigation through

employment tribunals. The LRA has completed that work and submitted proposals to the Minister. Those two proposals, in the way that they are shaped, have the broad agreement of all the key stakeholders on the employer and employee sides. Subject to Executive approval, the Minister intends to consult on those proposals.

A key message coming out of all the engagement, which the Committee has also raised, has been the difficulties that small and medium-sized enterprises (SMEs) face in discharging their responsibilities under employment law. At an earlier stage, the Department commissioned a piece of research to look at that very issue. That research has now been completed. The report, which, subject to Executive approval, the Minister intends to publish at the time that the consultation starts, offered a number of recommendations. The first recommendation is that there is a need to provide SMEs with dedicated support to imbed good, robust systems and procedures so that problems do not arise. The second issue is that although there is a lot of good interagency work being done, there may be a need for greater interagency collaboration to produce synergies and better working to support SMEs. The third area is that SMEs could benefit from access to a high-quality mediation service. The Minister intends to consult with stakeholders to see how best those three proposals can be realised and implemented.

The second aspect of the employment law review deals with the employment tribunals. At an earlier stage, the Minister established a rules committee to review the existing rules. The rules committee has been conducting preliminary work, reviewing the existing rules and taking account of the Underhill review in GB. Departmental officials, including me, have been facilitating meetings with stakeholders to take their views, particularly on how the tribunal process could be improved. The rules committee will have completed its preliminary work by the end of the summer. We are now arranging meetings between the users of the tribunals and the rules committee itself. That will very much allow primary users of the tribunal system the option to input into the review. Once the new set of draft rules has been prepared, it is intended to consult on those separately in the latter part of this year. That will be an important and helpful part of the review process.

A number of actions have already been progressed under the third theme of the review. The Department has given a commitment in the Executive's economic strategy to review all subordinate legislation over the lifetime of this Assembly. The Department established expert project groups to review the working time regulations and the conduct regulations, which are quite significant bodies of legislation. Both those groups have determined that there is not any gold-plating. There are a lot of issues around whether there is gold-plating in employment legislation. The groups have identified a need to consolidate the rules into a more coherent set of regulations and to improve the guidance and understanding of the operational requirements around those regulations. There is already a consolidated set of draft regulations in place for the working time regulations. Obviously, on both those regulations and the conduct regulations, when they have been reviewed, a report will be brought to the Committee and the necessary Assembly approval of the draft regulations will be sought.

In the Minister's statement to the Assembly in November and in his discussions with the Committee, he indicated that he intended to consult on the qualifying periods for unfair dismissal, the existing arrangements for compromise agreements and the potential to introduce some form of protected conversations. At the time, the Minister indicated that he would delay consideration of the consultation periods for collective redundancies. However, since that time, the UK Government have amended the consultation periods for collective redundancies in the rest of the UK. The Minister now considers it appropriate to explore that issue through public consultation, given that Northern Ireland's regime is separate to the arrangements in the rest of the UK and the Republic of Ireland. The Minister believes that it is at least useful to explore that issue.

Under the better regulation theme, the Minister is seeking Executive approval to consult on the following proposals: unfair dismissal qualifying periods; consultation periods for collective redundancies; compromise agreements; protected conversations; and the legislation governing public interest disclosure. It is important to emphasise that the proposed consultation will explore all potential options, and that it is to take account of the views expressed by key stakeholders. We have had many responses and representations from employer bodies saying that there is a need for change. On the other side of it, the unions and other employee-representative bodies do not feel the same need for change. So, keeping the status quo will be one of the options explored in the public consultation. The consultation will also draw on all available evidence. As I said, we are conducting a fairly detailed impact assessment of all the options that will be explored. We will also take into account what is happening in international settings rather than just the rest of the UK and Republic of Ireland.

In summary, the Minister is seeking Executive approval for the following proposals going out to consultation: the routing of all potential claims to the LRA; the development of an early neutral evaluation service; the qualifying periods for unfair dismissal; the existing arrangements around compromise agreements; the potential to introduce a process of protected conversations; and amendments to the legislation governing public interest disclosure. That concludes the presentation. I am happy to take questions.

The Chairperson: Thank you very much, Tom. As regards better regulation and the principles, there is a reference in your document to a pilot that was carried out. Can you give us any more details about that and tell us what was looked at?

Mr Conor Brady (Department for Employment and Learning): Tom briefly referred to the two expert groups that were established. They were two stakeholder groups, looking at the working time regulations and the conduct regulations, which relate to the governance of the private recruitment sector.

On the working time regulations, we have taken in representatives of employees, employers and anybody upon whom those regulations have an impact. Since the regulations were first established in 1998, they have been revised 13 times. So, part of the difficulty with respect to better regulation is that there are referential issues: if you want to look at the regulations, you have to look at 13 different sets, which is not ideal. One of the ideas that we wanted to try involved looking at the individual provisions in the 13 sets, and instead of just consolidating them into one easier-to-manage set of regulations, we would ask, "Are they fit for purpose?"

The stakeholder group looked at each provision in those regulations and asked, "Is it fit for purpose? Does it gold-plate the original directive? How can we possibly make it better and more streamlined?" The pilot has been very effective; the buy-in was great. We have discovered that when you put stakeholders around a table and ask them to work together, they do so and come up with a solution that is workable for all.

We had a similar experience with the conduct regulations, which govern the recruitment sector. Again, we had representatives of employees, hiring agencies and the actual agencies. We were told that the Department's inspectorate was very much welcomed by everybody in the sector but that there were some areas in the regulations that could be tweaked to try to remove some unnecessary administrative burdens. Those burdens were generally on the agencies themselves.

So, that joint-working approach will create two new sets of regulations, which will have had input from the entire employment relations community. That has been, very much, a collaborative and successful approach. We are going to use the pilot as the basis for establishing a methodology for looking at all employment regulations in Northern Ireland to see whether it can work in a similar fashion to create a collaborative approach for each new set of regulations.

The Chairperson: Did those pilot stakeholder groups come back and say that they did not find any additional gold-plating on any of those standards?

Mr C Brady: Gold-plating can really only apply to regulations that have their origin in a European directive. Certainly, on the working time regulations, they said there was no unjustifiable gold-plating. That might appear to be a technicality, but it is an important one. For example, the working time directive at a European level sets a minimum for the number of days of annual leave that you have per year at 26. In Northern Ireland, our regulations transposing the directive have a higher minimum level. So, employers have said that that gold-plates the directive but that it is justifiable because it is one of those things that employers in Northern Ireland, although they may not be happy with it, recognise that we are not going to change. So, there is some gold-plating, but there is no gold-plating that cannot be justified.

The Chairperson: That sounded like a bit of a 'Yes, Minister' answer to me.

The round-table approach seems to be working for you, with employers and employees looking at employment law. You said in your report that you have come together on at least some aspects, but there are aspects that you will never get employers and employees to agree on. How will you manage that using these processes?

Mr Evans: You are absolutely right, Chairman. The round-table forum has not been established for very long, and, to be fair to the group, it has dealt with the safer issues where they are able to reach agreement and are not diametrically opposed at that stage.

I think the Minister's intention, with respect to the more sensitive issues, is that we go out to public consultation and canvas the widest views on the proposals. Take the issue of the unfair dismissal qualifying period; the UK Government have increased that from one year to two years. Their policy appraisal asked whether they should extend it to two years or keep it at one. The policy appraisal that we are going through at the minute is responding to specific issues raised by various stakeholders. Some said that this would leave Northern Ireland uncompetitive with respect to foreign direct investment, some have said that it will create problems in encouraging business start up, and some have said that SMEs will not grow beyond their size because of that, so we are looking at those issues and we are being more sophisticated in the policy appraisal process.

We are also looking through our work with our economists and statisticians to see what existing indices of data we can draw on. Where possible, the Minister will make decisions on the basis of evidence, but there is a strong view that perception is an issue as well, so the Minister will probably have to come back at some stage, balance those views and take it to the Executive. These are sensitive issues; they will have to come to the Committee and they will have to go to the Executive. That is not a 'Yes, Minister' answer; that is just a statement of fact. What we are trying to do is build on evidence and explore all the available options.

The Chairperson: Touching on evidence, Tom, in point 44 of your paper, you said that you will:

"seek to identify any credible evidence base for these competing arguments."

How wide a scope do you have in looking for credible evidence? Who decides whether it is credible? Is it credible only if it suits your argument?

Mr C Brady: We do not necessarily have an argument. We try to look at things, particularly data and statistics, in as objective a fashion as possible. We have statisticians in the Department who are ultimately, in our eyes, the arbiters of what is credible. As to the scope, we are looking not only at how the employment relations frameworks operate in the Republic of Ireland and the rest of the UK, but looking beyond, particularly with regard to consultation periods for collective redundancies and unfair dismissal qualifying periods. We have looked not only at our direct European competitors, but at the emerging BRIC — Brazil, Russia, India, China — economies so that we can make comparisons between what systems they have in place, what systems we have in place and what systems we should have in place. We are not restricting it just to our direct geographical neighbours, we are looking much wider and trying to take a much more macroeconomic approach rather than a microeconomic one.

Mr Douglas: Thank you for your presentation. I, too, thought that your paper was very good. The Chairman stole one of my questions, which was about whether there were any deal-breakers between the trade unions and employers, but I think Tom answered that well. I am not quite sure, but I think you said, Tom, that one of the options would be to do nothing, yet this paper clearly shows that early intervention and some other measures are critical. How realistic is it at this stage that we will do nothing and just leave things as they are?

Mr Evans: When I said we could do nothing, I meant on the sensitive proposals. The Minister is very committed to the issue about the ruling on claims and early neutral assessment, which would be unique to Northern Ireland. He would want to be persuaded that, for any additional cost, it would create no value. However, when you get into the unfair dismissal qualifying period and the collective redundancy consultation period, those are very set. It would be remiss of the Minister to not consider whether the existing arrangements could remain. So, all the options are very much open.

Getting back to what Conor said: where the Minister has credible, objective, independent evidence, he will draw on it and also on the body of opinion that comes through. If the Executive give us approval to take this out to consultation, it will be about asking the stakeholders to produce substantive responses, instead of just saying, "I think you should do this." So, we would be having a series of engagements. We would say, "We want you, in the areas on which you have a strong view, to present credible arguments to support that view." So, I think that the jury is very much out on those.

Mr Douglas: I have a second question, Tom. The Minister has asked the rules committee to take on board good practice. Conor has mentioned that some of the BRIC countries, or the United States or whatever, might have that. Are there any good examples or new thinking in relation to employment law? Which country provides the best model? That would have to be from the point of view of trade unions and employers.

The Chairperson: Before we continue; Hansard has contacted us. We are having a problem with interference from mobile phones. Please make sure your phones are turned off.

Mr Evans: It is probably not appropriate to adopt one particular country's model. However, there are elements of good practice in individual countries that are of particular value. New Zealand has always been presented as the exemplar of good employment relations and good industrial relations. However, it has a very different employment law system; a lot of it is based on good faith. I think that you can root that back to our own system, where good practice and procedures are in place. If employers act fairly and reasonably, and employees do the same, it leaves you well-placed to have a sensible system.

Mr C Brady: I think that it is a really interesting question. We should look not just at the technical solutions but at the adaptive problems. In some respects, we can look at how we can make legislative fixes to try to coerce or direct employers or employees down a particular alleyway. However, what we should really be looking at — and in many respects this is what we are doing with the alternative dispute resolution stuff — is to adjust people's behaviour, that of employees and employers, from the outset so that, ultimately, disputes are minimised and dealt with at the earliest opportunity.

It is a combination of looking at adaptive as well as technical changes. If you ask where the best models are, it depends on which area you are looking at. New Zealand is certainly great at those adaptive cultural behaviour norms; whereas, you might be looking at somewhere such as Denmark for the technical fixes — but that fits within an entire model known as "flexicurity", which relates to their welfare system and whole macroeconomic approach. It is difficult to disaggregate the two, but I assure you that we are looking at all the different models as best we can.

Mr Douglas: Northern Ireland trades quite a bit with the Republic of Ireland and Britain. Do you take that into consideration? Obviously, there are some all-island companies and companies with British and Republic of Ireland owners.

Mr Evans: That is interesting. The Republic is going through a significant transformation process. It may seem slightly perverse. The Republic regards itself as moving closer to our existing model. It is brigading all its early resolution processes under the Workplace Relations Commission. That mirrors what the Labour Relations Agency does. The Republic never had an individual conciliation service. It had a Rights Commissioner, but not an arbitration service. So, it is now introducing early individual conciliation. It is re-designing its Rights Commissioner into an adjudication service, which is not dissimilar to the arbitration service. Then, the formal process will come through the Labour Court, which is the equivalent of our employment tribunals. However, I do not think that we should be passive. As Conor says, it is the way that the processes are developed that is important. If the Committee were able to inquire from both stakeholders, it would find that everyone is very magnanimous, in a very objective environment, that we should all resolve our disputes, but, ultimately, when a dispute happens, sometimes the parties separate, the lawyers get in and we find ourselves in a tribunal. This is about how we can motivate people to change those behaviours and use the Labour Relations Agency.

Mr Hilditch: I declare an interest as the chair of a local government staffing subcommittee. Through that sort of work, you see the culture that there is in relation to grievances, and so on. For that small organisation, the system is virtually choked. It also leads to extended periods of sick leave because matters are not being dealt with and things are festering. I do not know whether you found that in any research that was done. Sometimes, sickness comes into the equation as well.

Apologies for not being here at the start. When the Minister made an announcement last year, there was some concern about the extended period of qualifying for unfair dismissal. There was concern that that could overload the discrimination claims and that element of things. Obviously, we have finite laws here in relation to equality and section 75. Is that still an issue or concern?

Mr C Brady: It is certainly a concern. At this stage, the qualifying period in Northern Ireland is one year, as opposed to two years in the rest of the UK, and one year in the Republic of Ireland. The

argument that is continually put forward mainly by the employer lobby is that unless we extend that period to two years, it will have an impact on employers' ability and confidence to grow. Part of the research that we have taken forward — it is demonstrated in the consultation period — is about whether there is a direct causal link between foreign direct investment, which is one argument, and ability of local companies to grow, and whether there will be any impact on the number of tribunal cases being taken forward. As far as we can see, that research demonstrates that there is no causal link between any of those.

The point, Mr Hilditch, that you make is a very important one. The potential extension to two years could have a perverse incentive, by which I mean that the basis on which a tribunal case is taken forward can move to a discrimination basis. That has to be borne in mind. It is interesting that the evidence of a direct causal link does not appear to be there. However, I add — and this argument would be made by the employer lobby — that presentation is important. By extending from one year to two years, in presentational terms, you could give local companies confidence to take on, encourage and grow. The consultation paper seeks to establish that balance between the evidence or lack thereof and the importance of the presentational argument. All those different issues have to be considered in the round. We are asking for views on that. It is a very delicate balance.

Mr Evans: What you said is very accurate. The Labour Relations Agency has gone into certain organisations that have a culture of litigation and problems around sick leave, bullying and harassment or whatever, and it has helped them to change their culture and practice.

I was at meetings across the water yesterday. I met a representative of a new organisation called the Employment Relations Institute. It is a not-for-profit organisation that looks to establish employment relations best practice. It is looking at the skills development of managers through in-company training and things like that. The whole issue of prevention and early years development is hugely important. Ultimately, if we, in Northern Ireland, can trade on our employment relations track record, that will be persuasive when it comes to being competitive in an international context. That is something that we are looking at under the radar. Maybe it needs to come to the fore even more in the review. The Minister is very committed to the prevention aspect of the review.

Mr Hilditch: I have a general welcome, and I welcome the responses. Thank you.

Mr Douglas: I was going to bring this up later. There is a conference on 2 August on international perspectives of employment relations. It seems to be very much about what we have been talking about this morning. There are speakers from New Zealand and the United States. Will we be represented at that?

The Committee Clerk: Is that the Labour Relations Agency?

Mr Douglas: Yes.

The Committee Clerk: That went out to all members a few weeks ago.

Mr Douglas: We will be represented at that, then.

The Chairperson: Are the responses in yet?

The Committee Clerk: Nobody has indicated.

The Chairperson: Nobody has said that they want to go yet.

Mr Douglas: I am saying this morning that I want to go.

The Chairperson: Not a problem.

Mr Evans: As a background to that, it is basically an annual conference for organisations in other countries that have a similar role to the Labour Relations Agency. This time, it is being hosted in conjunction with the Workplace Relations Commission. I think that our permanent secretary will be a keynote speaker. We see it as being a very important conference.

Mr Douglas: I think that I read somewhere that the Department for Employment and Learning is chairing it.

Mr Evans: Yes.

The Chairperson: Gentlemen, thank you very much for your time. I think that you will be back before we finish.