THE INDUSTRIAL TRIBUNALS AND THE FAIR EMPLOYMENT TRIBUNAL OF NORTHERN IRELAND

Neil Drennan QC
Employment Judge of the
Industrial Tribunals and
Fair Employment Tribunal
of Northern Ireland

Killymeal House
2 Cromac Quay
Ormeau Road
BELFAST BT7 2JD
Tel: 028 90250089

Northern Ireland Representative on the Executive Committee of the
Council of Employment Judges

e-mail : neil.drennan@judiciaryni.gov.uk

Mr Robin Swann MLA
Chairperson
Committee for Employment and Learning
Room 375 Parliament Buildings
Stormont
BELFAST
BT4 3XX

e-mail : cel@niassembly.gov.uk

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Dear Mr Swann

RE: COMMITTEE SCRUTINY OF THE EMPLOYMENT BILL

I am writing to you on behalf of the Council of Employment Judges ('the Council'). The membership of the Council consists of the great majority of the salaried and fee-paid employment judiciary both in Great Britain **and** Northern Ireland.

In responding to your letter *dated 7 December 2015*, inviting written submissions to the Committee for Employment and Learning in relation to the Employment Bill, the Council is always aware it should observe constitutional principle and practice and should not therefore comment on matters of policy, save where it directly affects the operation of the Tribunals or aspects of the administration of justice within our particular area of judicial responsibility and expertise. Indeed, in this context, the Council have been represented on the non-statutory Standing Advisory Committee on the Rules of Procedure for the Industrial Tribunals and Fair Employment Tribunal ('the Tribunals'). In these circumstances, the Council does not consider it appropriate to make a detailed submission to all the Clauses in the Employment Bill. However, within the above remit, the Council would draw the Committee's attention to the following practical implications which are likely to arise if Causes 4 and 8 of the Employment Bill – 'Assessment of likely outcome of any proceedings' are enacted.

Clause 4 states:-

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"In the Industrial Tribunals (Northern Ireland) Order 1996, after Article 20 C (inserted by Section 1) insert –

'Assessment of likely outcome of any proceedings

20D The Agency may with the agreement of all the persons ('the relevant parties') between whom a conciliation officer is endeavouring to promote a settlement under any of Articles 20A to 20C in relation to any matter, ask a member of a panel of persons appointed by the Agency for the purposes of Article to –

(a) form a view on the likely outcome of any proceedings (including any arbitration) relating to that matter which might be or have been instituted; and

(b) inform the relevant parties and the Agency of that view."

Clause 8 is in similar terms but in relation to the proposed amendment of Fair Employment and Treatment (Northern Ireland) Order 1998.

In the circumstances, the submissions set out below relate to both Clause 4 and 8 of the Employment Bill:-

(1) The Council notes that in the said letter dated 7 December 2015 reference is made to the Bill's provisions and, in particular, that they will –

" ...

(iii) contain enabling provisions that allow for a neutral assessment service to be operated by the LRA' [My emphasis]

... ."

The said provisions in Clause 4 and 8, in the Council's opinion, do not appear to be enabling provisions but rather contain provisions expressly giving to the Labour Relations Agency the statutory power to provide such a service. A decision to do so is a matter of policy. However to provide an express power, in primary legislation, in contrast to an enabling provision in such legislation is

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a very different legal concept and may have very different consequences, not least in relation to the issue of interpretation of any such provision.

(2) Given the provisions appear to be an express statutory power, there has been a failure either to provide any provision in relation to how the said power is to be exercised or to provide for Regulations to be made in relation to how the said power is to be exercised.

(3) Indeed, the absence of any detail of how the said power is to be exercised, whether by Regulation or otherwise, makes it very difficult for the Council to provide relevant and meaningful submissions to the Committee. However, subject to the foregoing, the Council would raise the following points, which it hopes the Committee will find helpful in its further consideration of the said provisions –

(a) How is it intended that such a neutral assessment would be carried out? In particular, is it intended that such an assessment would be limited or would it be carried out, for example, after submission of a concise written statement of the issues, an outline of the facts together with supporting documents, references to relevant law and case law, the arguments on which the party intends to rely (see further, for example, *Paragraph 3.60 Public Consultation on Employment Law Review July 2013*). In any event, are any such requirements to be set out in The Bill and/or in any relevant Regulations, assuming such power is provided in the primary legislation?

(b) In relation to the provisions for conciliation before institution of proceedings contained in The Bill, express provision has been given for extension of limitation periods. No such provisions in relation to extension of time have been set out in The Bill in relation to the operation of Clauses 4 and 8 of the Bill, although such neutral assessment is intended to apply to proceedings which have been instituted. Such provisions would appear to be essential, whether provided for in primary or subordinate legislation. Any such assessment, however carried out, subject to the specific requirements, will clearly affect the length , timing and the period presently operated by the

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Tribunals under the rules of procedure between presentation of a claim and the substantive hearing , where required .

(c) It is not apparent what is intended to be the standing, statutory/legal or otherwise, of any such assessment and whether it would be confidential and what is intended to be the relationship, if any, with any proceedings instituted, which are, of course, governed by the relevant statutory Rules of Procedure for the said Tribunals. In the Council's opinion, any failure to address these issues in either The Bill and/or Regulations will raise difficult issues for the operation of the Tribunal's proceedings and the administration of justice.

(d) It is not apparent, in the absence of any relevant detail in The Bill, what is meant by 'form a view on the likely outcome of any proceedings'. In particular, this wording must be contrasted with the relevant test of 'little reasonable prospect of success' which the Tribunal is required to follow, pursuant to the Rules of Procedure, when determining whether to make a Deposit Order as condition of allowing a party to continue with proceedings.

(e) Further it is not apparent what is envisaged, if at all, in relation to the rights of a party, where it is dissatisfied with any such assessment and, in particular, in relation to any right of appeal. Subject to the foregoing, issues may also arise in relation to whether any such provision for neutral assessment complies with the provisions of Article 6 of the European Convention.

(4) In or about 2012, the Tribunal Judiciary introduced a process of Early Neutral Evaluation, at the request of the Department. This process has worked very well and indeed is expressly included in the proposed new Rules of Procedure. It raises issues, subject to clarification of the points referred to above, how two such systems of neutral assessment could be satisfactorily and appropriately maintained and operated side by side without the risk of potential conflict and satellite litigation, involving further delay and costs.

(5) It has to be noted the present system considered by the Tribunal Judiciary, as part of their statutory role, does not involve any additional financial requirement for Government or the parties; in contrast to what appears to be

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proposed in these said provisions in The Bill. In addition, the Rules of Procedure already provide, as referred to above, for a hearing to be subsequently directed ,in an appropriate case, for the Tribunal to make a Deposit Order as a condition of allowing a party to continue with proceedings. In essence, it appears to the Council, what is envisaged by the said provisions in the Employment Bill, is to introduce, subject to obtaining specific details, a considerable element of duplication of procedures, which is both unnecessary and also involves additional financial resources, in circumstances where a similar system is already successfully operated by the Tribunal Judiciary, subject to the Rules of Procedure, and in compliance with Article 6 of the European Convention.

Yours sincerely

NEIL DRENNAN QC
Employment Judge
NI Representative on the Executive Committee of the
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