

Mrs Cathie White
Clerk to the Committee for Employment

By email

12 January 2015

Dear Cathie

The Committee has sought clarification on a number of issues for consideration at its meeting on 13 January 2015. Set out below are responses in relation to each. Officials will be available to provide oral briefing on any of these points should the Committee wish.

1. CIRCUMSTANCES IN WHICH LABOUR RELATIONS AGENCY (“LRA”) EARLY CONCILIATION (“EC”) WILL NOT APPLY

The circumstances in which LRA EC is not applicable will have to be specified in regulations developed once the enabling powers in the Employment Bill are in place. These circumstances will be finalised following engagement with stakeholders during the coming months. However, the initial assessment set out in the public consultation was that jurisdictions where a very short period exists for presenting a claim or where a settlement would be inappropriate should not be subject to EC requirements. Likely jurisdictions are set out at **Annex A**.

In addition, there are certain circumstances in which there would be little sense in requiring prospective claimants to submit the details of their claim to the LRA and, if EC is introduced, the Department has proposed to provide a number of exemptions, including those listed below:

- **Prospective claimants who are part of a multiple claim, where another person who is part of the multiple claim has complied with the EC requirement by submitting details of the claim to the Agency.** A multiple claim is one in which there are multiple claimants bringing claims against the same respondent(s) on the same or a similar set of circumstances. As claimants in a multiple may present their claims together on one ET1 form, the exemption from the EC requirement will apply where the claims are presented on a ‘lead’ form. In such cases, a conciliator may attempt to settle the dispute on behalf of all participants in the multiple.
- **Prospective claimants where the prospective respondent has contacted the Agency and asked it to conciliate the dispute.** If the Agency is already providing conciliation in the case, it would be unreasonably bureaucratic to require that the claimant submit an EC form for the same dispute. However, where the prospective respondent (rather than the prospective claimant)

contacts the LRA, there will be no pause in the time limit for submitting a tribunal claim. Although the LRA conciliation officer will be aware of this and will alert the parties accordingly, if the prospective claimant is concerned that he or she may run out of time to lodge a claim, it will be possible to submit an EC form and so be able to benefit from the 'stop the clock' provision.

- **Prospective claimants who are lodging proceedings on issues where the Agency has no conciliation role.** The exemption would include situations where the LRA has legal jurisdiction to conciliate on some matters (e.g. unfair dismissal) but not on others (e.g. written particulars). As individuals will not necessarily know whether a potential claim is exempt, however, it will be for the conciliation officer, if he or she receives an EC request, to consider it and act appropriately in the circumstances. Action could include an attempt, through conciliation, to resolve the dispute or part of it; however, no 'stop the clock' provision would apply.
- **Prospective claimants who intend to bring a claim against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.**

2. RATIONALE FOR MAKING PROVISIONS CONCERNING TRIBUNAL DEPOSITS (CLAUSES 5 AND 9) SUBJECT TO THE NEGATIVE ASSEMBLY PROCEDURE

Clauses 5 and 9, which broaden enabling powers concerning the imposition of deposits in industrial tribunal and Fair Employment Tribunal proceedings respectively, are provisionally subject to the negative procedure as this would be entirely consistent with the legislative approach to the making of employment tribunal regulations and rules of procedure generally. This approach has been adopted because tribunal rules, to date, have generally not been deemed to be contentious.

3. POTENTIAL NEW CATEGORY IN PUBLIC INTEREST DISCLOSURE LEGISLATION TO COVER FINANCIAL IRREGULARITY OR A 'CATCH-ALL' PROVISION

Having reviewed both the GB Public Interest Disclosure Act 1998 and the Public Interest Disclosure (Northern Ireland) Order 1998, officials can advise that the categories of disclosures qualifying for protection are exactly the same in both jurisdictions.

Disclosures covering fraud and corruption and financial irregularity are covered in Northern Ireland by several prescribed persons, including the Comptroller and Auditor General for Northern Ireland, the Director of the Serious Fraud Office and the Financial Conduct Authority.

In 2014, the UK Government conducted a call for evidence on a whistleblowing framework. The Government looked at the framework as a whole and posed

questions relevant to the sections which had not been addressed in previous legislative reform.

As the law stands, both in NI and GB, a disclosure in the public interest should tend to show one or more of the following:

- that a criminal offence had been, is being or is likely to be committed;
- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
- that a miscarriage of justice has occurred, is occurring or is likely to occur;
- that the health and safety of any individual has been, is being or is likely to be endangered;
- that the environment has been, is being or is likely to be damaged; or
- that information tending to show any matter falling within any of the preceding categories has been, is being, or is likely to be deliberately concealed.

The responses to the call for evidence did suggest that the existing categories of disclosure which qualify for protection were not broad enough to sufficiently capture all instances of wrongdoing. The categories that respondents considered to be missing are:

- the incentivisation or incitement of others to conceal wrongdoing;
- misreporting or pressure to misreport;
- financial irregularities;
- professional malpractice (such as financial malpractice or other such fraudulent activities);
- mismanagement of public funds by public bodies or private bodies in receipt of public funding;
- abuse and misuse of power;
- gross waste or mismanagement of funds;
- serious abuse of authority.

The UK Government, in its response, indicated that it had considered and tested all the suggested categories to see whether or not they should be included by the legislation and concluded that in most cases the existing provisions would capture the additional categories. The UK Government said that it was confident that any illegal activity and miscarriage of justice is currently captured by the legislation.

It was acknowledged that there was a case that “the abuse and misuse of power” and “gross waste or mismanagement of funds” would not be captured by existing

categories. However, having taken legal advice on this point, it was concluded that the inclusion of such categories would create legal uncertainty, as the scope would be difficult to define and would be open to varying interpretation. As such, the UK Government did not commit to any change in this area but instead undertook to keep the issue under review. In the meantime, the UK Government undertook to produce guidance to help identify what may or may not be covered when making disclosures under the categories as they stand.

The NICICTU comments at Committee in relation to categories of bodies to be included as prescribed persons are likely to relate to this GB call for evidence. However the review did not result in an increase in the number of categories. The Department has not carried out a similar review and has not consulted on expanding the categories. The Department has, however, considered the GB conclusions, and in the absence of evidence to the contrary, is content that no further amendment is needed to the list of categories.

In light of the above, the Department considers that the Bill need not be amended to include a seventh category of public interest in relation to financial irregularity or alternatively a catch all category for the reasons proffered by the UK government on the basis of their own legal advice.

4. STATISTICAL INFORMATION ON THE NON-PAYMENT OF TRIBUNAL AWARDS

The Department is not aware of any Northern Ireland research into this issue. However the following statistical information has been obtained from the Northern Ireland Courts and Tribunals Service (NICTS).

| Cases 03/04/11 to 06/01/16 | Number | Percentage |
|---|---------------|-------------------|
| Total Number of IT/FET/LRA Applications for Enforcement | 140 | 100% |
| Completed IT/FET/LRA Applications for Enforcement | 73 | 52% |
| Ongoing IT/FET/LRA Applications for Enforcement | 67 | 48% |
| <hr/> | | |
| Total number of Applications for Enforcement | 53,397 | 100% |
| Total Number of IT/FET/LRA Applications for Enforcement | 140 | 0.26% |
| Total Number of Non IT/FET/LRA Applications for Enforcement | 53,257 | 99.74% |

The figures include information relating to IT/FET and conciliation certificates issued by the Labour Relations Agency (LRA). Any tribunal decision or LRA conciliated settlement becomes subject to the provisions of the Judgments Enforcement (Northern Ireland) Order 1981. The figures show the number of cases which are complete or ongoing. The number of completed cases does not necessarily indicate

that they were successfully pursued by the Enforcement of Judgments Office; it may be that, for example, a case was lodged with the Office but a private arrangement was made between the parties, the case was withdrawn or the debtor was declared bankrupt.

I hope that this information is of assistance to the Committee.

Yours sincerely,

FIONA STANLEY
Departmental Assembly Liaison Officer

Annex A: List of jurisdictions not appropriate for EC

| Description | Right | Cause of action |
|---|---|---|
| Application by the Department to prohibit a person from running an Employment Agency; application by the person to whom the prohibition order applies to vary/revoke an order. | Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981, Article 5A and 5C. | Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981, Article 5A and 5C. |
| Appeal against improvement or prohibition notice. | Health and Safety at Work (Northern Ireland) Order 1978, Article 26. | Health and Safety at Work (Northern Ireland) Order 1978, Article 26. |
| Appeal against assessment of training levy. | Industrial Training (Northern Ireland) Order 1984, Article 24. | Industrial Training (Northern Ireland) Order 1984, Article 24. |
| Duty of Department to pay unpaid contributions to pension scheme. | Pension Schemes (Northern Ireland) Act 1993, section 120. | Pension Schemes (Northern Ireland) Act 1993, section 122. |
| Reference to Industrial Tribunal related payment out of the Northern Ireland National Insurance Fund. | Employment Rights (Northern Ireland) Order 1996, Article 205. | Employment Rights (Northern Ireland) Order 1996, Article 205. |
| Payment out of the Northern Ireland National Insurance Fund. | Employment Rights (Northern Ireland) Order 1996, Article 227. | Employment Rights (Northern Ireland) Order 1996, Article 227. |
| Appeal against a non-discrimination notice, direction, or enforcement notice. | <ul style="list-style-type: none"> • Sex Discrimination (Northern Ireland) Order 1976, Article 68. • Race Relations (Northern Ireland) Order 1997, Article 56. • Equality (Disability, etc.) (Northern Ireland) Order 2000, Schedule 1, paragraph 10. • Fair Employment and Treatment (Northern Ireland) Order 1998, Articles 15, 62 and 63. • Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, regulation 37. | <ul style="list-style-type: none"> • Sex Discrimination (Northern Ireland) Order 1976, Article 68. • Race Relations (Northern Ireland) Order 1997, Article 56. • Equality (Disability, etc.) (Northern Ireland) Order 2000, Schedule 1, paragraph 10. • Fair Employment and Treatment (Northern Ireland) Order 1998, Articles 15, 62 and 63. • Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, regulation 37. |
| Void of unenforceable term of collective agreement. | <ul style="list-style-type: none"> • Sex Discrimination (Northern Ireland) Order 1976, Article 77A • Disability Discrimination Act 1995, Schedule 3A, paragraph 4 • Race Relations (Northern Ireland) Order 1997, section 68A. • Fair Employment and Treatment (Northern Ireland) Order 1998, Article 100A. • Employment Equality | <ul style="list-style-type: none"> • Sex Discrimination (Northern Ireland) Order 1976, Article 77A. • Disability Discrimination Act 1995, Schedule 3A, paragraph 5. • Race Relations (Northern Ireland) Order 1997, section 68B. • Fair Employment and Treatment (Northern Ireland) Order 1998, Article 100B. • Employment Equality |

| Description | Right | Cause of action |
|--|---|---|
| | (Sexual Orientation) Regulations (Northern Ireland) 2003, Schedule 4, paragraph 4. <ul style="list-style-type: none"> • Employment Equality (Age) Regulations (Northern Ireland) 2006, Schedule 4, paragraph 4. | (Sexual Orientation) Regulations (Northern Ireland) 2003, Schedule 4, paragraph 5. <ul style="list-style-type: none"> • Employment Equality (Age) Regulations (Northern Ireland) 2006, Schedule 4, paragraph 5. |
| Appeal against improvement or prohibition notice. | Working Time Regulations (Northern Ireland) 1998, Schedule 3, paragraph 6. | Working Time Regulations (Northern Ireland) 1998, Schedule 3, paragraph 6. |
| Appeal against improvement or prohibition notice. | Control of Major Accident Hazards Regulations (Northern Ireland) 2000, regulation 18. | Control of Major Accident Hazards Regulations (Northern Ireland) 2000, regulation 18. |
| Appeal against improvement notice. | Road Transport (Working Time) Regulations (Northern Ireland) 2005, Schedule 2, paragraph 6. | Road Transport (Working Time) Regulations (Northern Ireland) 2005, Schedule 2, paragraph 6. |
| Failure to notify employee liability information. | <ul style="list-style-type: none"> • Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 11. • Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006, regulation 11. | <ul style="list-style-type: none"> • Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 12. • Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006, regulation 12. |
| Appeal against notice from the Health and Safety Executive for Northern Ireland or local (health and safety) authority. | REACH Enforcement Regulations 2008, Schedule 8, Part 2 | REACH Enforcement Regulations 2008, Schedule 8, Part 2. |