

**DELEGATED POWERS MEMORANDUM
FOR
THE EMPLOYMENT BILL**

This Delegated Powers Memorandum identifies provisions for delegated legislation in the Employment Bill. It explains the purpose of the delegated powers taken and the form of Assembly control selected for each power. This memorandum should be read in conjunction with the Explanatory and Financial Memorandum accompanying the Bill.

Reference to the delegation of a power in this memorandum is reference to power being conferred upon the Department for Employment and Learning.

Clause 1

Clause 1(1) inserts Articles 20A, 20B and 20C into the Industrial Tribunals (Northern Ireland) Order 1996 (the “ITO 1996”), which will facilitate conciliation before and after the start of industrial tribunal proceedings.

Requirement to contact the Labour Relations Agency before instituting proceedings

New Article 20A of the ITO 1996, which is supplementary to the general power to make industrial tribunal procedure regulations under Article 9(1) of that Order, empowers the Department for Employment and Learning (“the Department”) to make provisions relating to the process for early conciliation (“EC”) to be carried out by the Labour Relations Agency (“LRA”).

Paragraph (1) specifies that the information that must be provided to the LRA by the claimant and the manner in which it is to be provided shall be stipulated in those regulations.

Paragraph (3) provides that an LRA conciliation officer shall attempt to promote a settlement within a period set out in those regulations.

Paragraph (4) provides that, where a settlement is not possible, the conciliation officer will issue a certificate to that effect to the prospective claimant in a manner determined by those regulations.

Paragraph (7) provides for exemptions to the requirement for the prospective claimant to contact the LRA prior to instigating proceedings. Such exemptions shall include, *inter alia*, instances where the EC requirement is complied with by someone else (in a case where there are multiple claimants); cases involving issues not subject to EC; and cases where the potential respondent has already contacted the LRA.

Paragraph (11) provides that the regulations may make other provisions necessary for the proper operation of EC.

Paragraph (12) provides that regulations, *inter alia*, may determine the nature of forms used for contacting the LRA in respect of EC or the certificate issued by a conciliation officer; require the LRA to assist a person in properly accessing EC; provide for the EC time limit to be extended; and provide for a person to have met the requirements for properly contacting the LRA in respect EC where another prospective claimant has already done so in respect of the same matter (to cover the situation where there are multiple claims arising out of a single set of issues).

Assembly procedure

Industrial tribunal procedure regulations are subject to negative procedure by virtue of Article 25(1) of the ITO 1996.

Clause 3

Extended power to define “relevant proceedings” for conciliation purposes

Article 20(8) of the ITO 1996 enables the Department, by order, to add to or remove from the list of industrial tribunal jurisdictions that may be considered for conciliation. Clause 3 inserts new paragraphs (8A) and (8B) into Article 20.

Where a new jurisdiction is added, paragraph (8A) empowers the Department to amend any statutory provision so that the relevant time limit for commencing tribunal proceedings is extended to allow for EC to take place. Where a jurisdiction is removed, paragraph (8B) allows for the removal of associated provision extending the related time limit.

Assembly procedure

An order made under Article 20(8) is subject to negative procedure by virtue of Article 25(4) of the ITO1996.

Clause 5

Power to require party to proceedings to pay deposit

Clause 5 amends Article 11(2)(a) of the ITO 1996 so as to include a provision to enable the Department, supplementary to powers to make industrial tribunal procedure regulations under Article 9(1), to introduce additional mechanisms within those regulations with the objective of discouraging claims to industrial tribunals that are considered to have little reasonable prospect of success. The provision is generally drafted to allow the Department to take account of stakeholders' views, following public consultation, in developing revised regulations.

Assembly procedure

Industrial tribunal procedure regulations are subject to negative procedure by virtue of Article 25(1) of the ITO 1996.

Clause 6

Clause 6(2) inserts Articles 88ZA, 88ZB and 88ZC into the Fair Employment and Treatment (Northern Ireland) 1998 (the "FETO 1998") which will facilitate conciliation before and after the start of Fair Employment Tribunal proceedings.

Requirement to contact the Labour Relations Agency before complaint to Tribunal

Article 88ZA empowers the Department to set requirements relating to the EC process. It is comparable to Article 20A of the ITO 1996, introduced by clause 1(1), and is supplementary to the power to make tribunal procedure regulations under Article 84 of the FETO 1998.

Paragraph (1) of the new Article specifies that the information that must be provided to the LRA by the claimant and the manner in which it is to be provided shall be stipulated in those regulations.

Paragraph (3) provides that an LRA conciliation officer shall attempt to promote a settlement within a period set out in those regulations.

Paragraph (4) provides that, where a settlement is not possible, the conciliation officer will issue a certificate to that effect to the prospective claimant in a manner determined by those regulations.

Paragraph (7) provides for exemptions to the requirement for the prospective claimant to contact the LRA prior to instigating proceedings. Such exemptions shall include, *inter alia*, instances where the EC requirement is complied with by someone else (in a case where there are multiple claimants); cases involving issues not subject to EC; and cases where the potential respondent has already contacted the LRA.

Paragraph (10) provides that the regulations may make other provisions necessary for the proper operation of EC.

Paragraph (11) provides that regulations, *inter alia*, may determine the nature of forms used for contacting the LRA in respect of EC or the certificate issued by a conciliation officer; require the LRA to assist a person in properly accessing EC; provide for the EC time limit to be extended; and provide for a person to have met the requirements for properly contacting the LRA in respect EC where another prospective claimant has

already done so in respect of the same matter (to cover the situation where there are multiple claims arising out of a single set of issues).

Assembly procedure

Fair Employment Tribunal procedure regulations are subject to negative procedure by virtue of Article 104(2) of the FETO 1998.

Clause 9

Power to require party to proceedings to pay deposit

Clause 9 amends 84B(2)(a) of the FETO 1998 so as to include a provision to enable the Department, supplementary to powers to make Fair Employment Tribunal procedure regulations under Article 84, to introduce additional mechanisms within those regulations with the objective of discouraging claims to the Fair Employment Tribunal that are considered to have little reasonable prospect of success. The provision is generally drafted to allow the Department to take account of stakeholders' views, following public consultation, in developing revised regulations.

Assembly procedure

Fair Employment Tribunal procedure regulations are subject to negative procedure by virtue of Article 104(2) of the FETO 1998.

Clause 10

Employment judges: industrial tribunals

Clause 10 amends Article 3 of the ITO 1996 so as to enable the Department, by regulations, to provide that the chairman of an industrial tribunal may be referred to as an employment judge.

Assembly procedure

Regulations made under Article 3(3) of the ITO 1996 are subject to negative procedure by virtue of Article 25(4) of the ITO1996.

Clause 11

Employment judges: Fair Employment Tribunal

Clause 11 amends Article 82(5) of the FETO 1998 so as to enable the Department, by regulations, to provide that the chairman of a Fair Employment Tribunal may be referred to as an employment judge.

Assembly procedure

Regulations made under Article 82(5) of the FETO are subject to negative procedure by virtue of Article 104(2) of the FETO 1998.

Clause 14

Protected disclosures: reporting requirements

Clause 14 inserts Article 67FA into the Employment Rights (Northern Ireland) Order 1996 (ERO 1996).

Paragraph (1) of the new Article empowers the Department to make provision by regulations to require a person, prescribed for the purposes of Article 67F of the ERO 1996, to publish an annual report on disclosures made to the person by workers (who fall within the extended definition of worker in Article 67K of the ERO 1996).

Paragraph (2) provides that the regulations must set out the matters that are to be covered in the report and also sets out what a report must not include i.e. detail that would allow workers or an employer or other person to be identified.

Paragraph (3) provides that the regulations must make provision about the publication of the report and may contain provisions specified in that paragraph such as the requirement to send the report to the Department for laying before the Assembly. The Department may also include additional publication requirements as it specifies in regulations made under this provision.

Paragraph (4) provides that the regulations may make provision about the time period within which a report must be produced and published.

Assembly procedure

Regulations under Article 67FA which include provision under Article 67FA(1) (i.e. requiring a particular prescribed person to produce an annual report) are subject to the draft affirmative procedure. Regulations under that Article which do not include such provision (i.e. dealing only with modifying the reporting requirements) are subject to the negative procedure. These procedural requirements are established by Article 251(1B) and (1C) of the ERO 1996, as inserted by clause 21(3) of the Bill.

Clause 16

Extension of the meaning of “worker”

Clause 16 inserts new paragraph (4) into Article 67K of the ERO 1996 to permit the Department, by order, to vary the definition of “worker” in that Article.

Assembly procedure

Given that an order made under Article 67K(4) will have the power to amend primary legislation, such an order will be subject to draft affirmative procedure: clause 21(6) contains the necessary amendment in this respect, to Article 251 of the 1996 Order.

Clause 17

Careers guidance

Clause 17 inserts new subsection (4) into section 1 of the Employment and Training Act (Northern Ireland) 1950 (ETA 1950) that will empower the Department to make regulations requiring the Department to provide careers guidance to such persons as may be specified. Such guidance may be made subject to conditions specified in new subsection (5), namely that it must be delivered by an appropriately qualified person and be considered to promote the recipient’s best interests.

Assembly procedure

Regulations made under section 1(4) shall be subject to negative procedure by virtue of section 9(2) of the ETA 1950.

Clause 18

Apprenticeships

Clause 18 inserts new subsection (7) into section 1 of the ETA 1950 that will empower the Department to make regulations requiring it to make arrangements for the provision of apprenticeships to specified people, subject to specified conditions.

Assembly procedure

Regulations made under section 1(7) shall be subject to negative procedure by virtue of section 9(2) of the ETA 1950.

Clause 19

Article 33 of the Employment Relations (Northern Ireland) Order 1998 (the “ERO 1999”) provides for the indexation of the limits on various statutory awards and payments under employment rights legislation. In effect, this means that changes in relevant amounts are linked to annual changes in the retail prices index. The amounts include the maximum amount of an award payable by a tribunal in respect of a finding of unfair dismissal and the amount of a week’s pay used as the basis for calculation of statutory redundancy pay entitlement.

Indexation of amounts: timing and rounding

Clause 19 inserts new paragraph (7) into Article 33 of the ERO 1999, introducing a new power for the Department, by order, to vary any of the limits dealt with by that Article at any time.

Assembly procedure

An order made under newly inserted paragraph (7) of Article 33 of the ERO 1999 will be required only where it is proposed to vary limits in such a way as to depart from the normal indexation requirements set down elsewhere within Article 33 (i.e. that adjustments be in line with changes in the retail prices index). Such an order will be subject to draft affirmative procedure, as explicitly set out in new paragraph (7).

Clause 21

Variation in procedures for certain orders and regulations

Clause 21 does not introduce new delegated powers but does make a number of amendments to Article 251 of the ERO 1996 relating to the form of Assembly control in respect of delegated powers in that Order.

Assembly procedure

Article 250(1)(c) of the ERO 1996 includes power for the Department, *inter alia*, to make an order varying or excluding the operation of the following provisions:

- Article 124(3), which stipulates the duration of employment required for an employee to be entitled to a written statement of reasons for dismissal;
- Article 140(1), which stipulates the duration of employment required for an employee to have the right to make a complaint of unfair dismissal; and

In accordance with Article 251 (as amended by clause 21), any such order will be subject to the draft affirmative procedure, a higher and more appropriate level of Assembly control than the current confirmatory procedure to which these provisions are subject given the subject matter.

Clause 21 makes a further change which will permit the Department to make regulations using powers within the ERO 1996 that would be subject of both negative and confirmatory procedure. Currently such powers are to be exercised in separate statutory

rules. This change will allow the Department flexibility to incorporate future regulations within a single statutory rule, which would be subject to confirmatory procedure.

Clause 26

Commencement

Clause 26(2) provides the Department with a standard power to make commencement orders, which are not subject to any form of Assembly resolution.

Schedule 1

Schedule 1 does not introduce new delegated powers but does make a minor and consequential amendment to existing delegated powers arising from the introduction of early conciliation.

Paragraph 2 amends Article 9(3ZA)(b) of the ITO 1996 to allow the Department to include in industrial tribunal procedure regulations the ability to prescribe requirements relating to certificates issued by the LRA that confirm attempts at conciliation have been made.

Assembly procedure

Industrial tribunal procedure regulations are subject to negative procedure by virtue of Article 25(1) of the ITO 1996.