Northern Ireland
Assembly

# COMMITTEE FOR EMPLOYMENT AND LEARNING

# OFFICIAL REPORT (Hansard)

## Employment (No. 2) Bill

8 September 2010

# NORTHERN IRELAND ASSEMBLY

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**Members present for all or part of the proceedings:**
Mrs Dolores Kelly (Chairperson)
Mr Jonathan Bell (Deputy Chairperson)
Ms Anna Lo
Mr David McClarty
Mrs Claire McGill
Ms Sue Ramsey

**Witnesses:**
Mr Tom Evans )
Ms June Ingram ) Department for Employment and Learning
Mr Alan Scott )

**The Chairperson (Mrs D Kelly):**

The next item is a briefing from DEL officials on the Employment (No. 2) Bill. This session is being recorded by Hansard. I welcome Tom Evans, employment relations, policy and regulation division; June Ingram, director of strategy and employment relations division; and Alan Scott, whose title I do not have to hand.

The Committee has worked with the Department over the last two years to bring the Bill to

this stage. During the pre-legislative scrutiny phase, members already received evidence from a number of key stakeholders. The Committee produced a report of those evidence sessions in June 2009. No amendments to the Bill have been introduced at this stage. I now hand over to the officials for the presentation.

**Ms June Ingram (Department for Employment and Learning):**

The Department appreciates the opportunity to present to the Committee the detailed provisions of the Bill. We will explain what it is intended to achieve. It looks to deliver on the policy proposals that were approved by the Executive following the completion of the dispute resolution review. The main provisions will be familiar to the Committee because they largely mirror the policy issues that the Committee surfaced during its consideration of the current arrangements for resolving workplace disputes. I will offer a quick overview of the key areas before a detailed run through the clauses.

The Bill is intended to establish a less legalistic framework for raising workplace grievances, while leaving intact a minimum legal standard for disciplinary and dismissal situations. It will repeal the conclusive provisions that link grievance and disciplinary processes to industrial tribunals and fair employment tribunal time limits. It will enable the Labour Relations Agency (LRA) to exercise greater discretion in offering its assistance to resolve disputes, while removing time restrictions for LRA conciliation. It will amend industrial tribunals' powers to reach a determination without a hearing when the parties consent. It will enable the fair employment tribunal to hear aspects of cases that currently require a separate industrial tribunal hearing; and it will introduce the legislative framework for the right to request time to train.

We recognise that the Committee has a strong interest in these policy areas and that it will want to take further evidence from key stakeholders in its consideration of the content of the Bill. We restate our commitment to support the Committee through its stage of the Bill, and we are available to come back to provide further evidence as the Committee wishes.

The Bill is substantial; it has 18 clauses and four schedules. I hand over now to Tom Evans to go through the Bill, clause by clause. Alan Scott, who has also been directly involved in drafting, is also here to answer questions as appropriate.

**Mr Evans (Department for Employment and Learning):**

As June has said, the Bill has 18 clauses and four schedules, so it has grown during the time that we have been with the Committee. In their papers, members have a copy of the Bill, and they will see an expanded financial memorandum and also a delegated powers memorandum.

I will cover the purpose of each clause and highlight areas where the Bill seeks further delegated powers. We have tried to marshal together some of the clauses where they seek to produce the same policy intent or process improvement. I will go through each clause. I am happy for members to ask questions as they arise or at the end, if they find it helpful.

**The Chairperson:**

Yes, that would be helpful. For me, the burning question, besides the improved policy frameworks, is whether any cost savings will be realised.

**Mr Evans:**

Yes. The first clause concerns the repeal of the statutory grievance procedures. That is a deregulatory measure that amounts to something in the order of £1·5 million immediately. We have been very conscious of the issues around efficiency, effectiveness and any opportunity to reduce. Deregulation by repealing the statutory grievance procedures will have an immediate net benefit to employers.

**The Chairperson:**

Given the time that is in it, that is welcome news to all our ears.

**Mr Evans:**

I will take clause 1, the repeal of the statutory grievance procedures, and schedule 1 together. I do not need to say much other than that that will repeal the procedures. The current procedures require an employer to put a complaint in writing before bringing it to tribunal. They also require the adjustment of a relevant award where an employee and an employer have unreasonably failed to participate in a subsequent meeting. That is the current three-step procedure.

It is clear from the review — the Committee took its own evidence on this — that the statutory grievance procedures were not welcomed. The procedures were well intentioned but problematic and there is universal consensus that they should be removed. Criticism was not levelled at the statutory discipline dismissal procedures and, therefore, the Bill does not propose to repeal those.

Clause 2 — statutory dispute resolution procedures and the effect on contracts of employment — repeals article 16 of the Employment (Northern Ireland) Order 2003, which implies in every contract a duty to observe the statutory dispute resolution procedures in circumstances specified by the Department in regulations. The provision that we propose to repeal was never commenced and there is no demand for it. In reality, it has been repealed in GB. If the provision had been commenced, there may have been increased litigation on process as opposed to on how people are being treated, which would have been similar to some of the problems with the statutory grievance procedures. Therefore, the clause proposes to repeal a provision that was never commenced.

Clause 3 concerns statutory dispute resolution procedures and the consequential adjustment of time limits. Currently, where parties comply with the statutory dispute resolution procedures, there is provision for automatic extension by three months of the time for lodging a tribunal claim. Clause 3 repeals the relevant powers. I will go back to the previous position, in which employees had a set period of time, usually three months, in which to lodge their claim with a tribunal. A tribunal had the power to continue to accept claims lodged outside that time where it considered that it was not reasonably practical for the claim to have been presented in time, or in certain jurisdictions where it decided that it would be inequitable to allow the claim. The benefit of the change is that it removes a provision that caused confusion. Through the consultation, we saw that people were confused. Clause 3 sets out the time as three months but states that a tribunal will exercise its discretion when it thinks that it is equitable to do so.

I will deal with clause 4 — non-compliance with statutory codes of practice — with schedule 2. Clause 4 amends the Industrial Relations (Northern Ireland) Order 1992 to support the non-statutory approach to grievances that will replace the statutory grievance procedures. The changes will establish the context for a revised code of practice that the Labour Relations Agency will produce, setting good practice standards to which employers and employees will be expected

to adhere. Failure to comply with the new code would enable a tribunal that considers that inequitable to increase or reduce a relevant award by up to 50%. The Labour Relations Agency, in consultation with us, has already initiated work on a new code of practice and has, in the past few days, released a draft code. That draft code will now go out for a 12-week consultation and we hope that all key stakeholders will input to that. In the UK, there was some criticism of the Advisory, Conciliation and Arbitration Service's (ACAS) draft code of practice. Therefore, we want the Labour Relations Agency's code to be fit for purpose and for people to be comfortable with it and believe that it is workable.

There are delegated powers. The Bill seeks for the Department to be empowered to modify the list of jurisdictions in schedule 4A that would be covered at a tribunal. That is purely to cover the ability to amend those jurisdictions. Employment law is fairly dynamic and, therefore, if we do not have those powers, we will have to come back on the Bill.

That takes us to clause 5, which relates to determination of industrial tribunal proceedings without hearing. The clause specifies that the determination of tribunal proceedings without hearing will be permitted only when all parties to the proceedings consent in writing to that process, or when one of the parties presents no response to the proceedings or does not contest the case. That will enable certain simpler cases to be heard on a fast-track basis where parties agree and facts are not disputed. That is really an efficiency measure. It will be for the tribunal to decide how often that will be used. The Bill does not seek additional delegated powers. In fact, the provision restricts the exercise of the existing powers to authorise tribunal proceedings without a hearing. Therefore, parties must consent in writing, not contest the case, or not respond to the claim.

That takes us to clause 6, which relates to restriction of publicity. The clause makes it possible for industrial tribunals to restrict publicity in a wider range of circumstances than are presently available to them. Currently, a restricted reporting order may be made in proceedings involving allegations of sexual misconduct. The clause extends the power to cover individuals in relation to whom the disclosure of identifying matter would be likely to cause risk to themselves or their property, and situations in which the tribunal considers such an order to be in the interests of justice.

Extended powers to restrict publicity are required so that individuals are not discouraged. That is about encouraging people to participate fully in tribunal proceedings, particularly in areas where sensitive personal information must be disclosed. Recent case law has highlighted the absence of express powers in that area. There is a very general power, the justification of which requires the tribunal to go into significant work. Clause 6 makes it more explicit where the tribunal can restrict publicity in certain cases.

In relation to delegated powers, existing regulation powers allowing for the making of a restricted reporting order are expanded to cover the circumstances that we have just set out in new article 13(1A) of the Industrial Tribunals (Northern Ireland) Order 1996.

**The Chairperson:**

We know that in fair employment tribunals, for example, there are compromise agreements, which involve a clause of silence or jeopardise the settlement. There is a no blame culture, but it allows organisations to cover up bad practice. How are you going to ensure that this is explicit?

**Mr Evans:**

This is not a tribunal proceeding. The compromise agreement is where the case does not progress finally to a tribunal. The compromise agreement is where there has been an agreed settlement between both parties. The reality is that those compromise agreements are confidential, and it would be remiss of the Department to start in any way to interfere with that process. When the Labour Relations Agency is brought in to conciliate a settlement it is done on a confidential basis, but this is very much about the territory of when a case goes to tribunal proceedings. It is about access to justice. It is about not restricting access because somebody is fearful that if they disclose something in tribunal proceedings it may result in some adverse things happening to them as an individual. Some of these phrases are quite lengthy.

**The Chairperson:**

The notes are very helpful.

**Mr Evans:**

Clause 7 relates to enforcement of sums payable. Again, that is an efficiency measure. At present, where a tribunal orders a party to pay an award and the party fails to do so, a party seeking enforcement through the courts must first register the matter with the County Courts through the enforcement of judgements office. The County Court will then issue an order for enforcement.

This clause removes that unnecessary intermediate step. People have been irked by it, and the message — "This is a quick win; please do it" — came right across the table. This is very much an efficiency measure and a process improvement measure.

That takes us to clause 8, and I propose to take clause 12 with it. The same policy intent is behind both. Clause 8 deals with industrial tribunals and clause 12 with fair employment tribunals. Clause 8 is about conciliation before the bringing of proceedings. Currently, where parties to a dispute that could result in a tribunal claim seek assistance from the Labour Relations Agency, the agency has a duty to provide that assistance even if there is no prospect of a conciliated settlement. The clause converts the LRA's duty to a power, enabling the agency to target its resources more efficiently at cases that are more amenable to resolution. The aim is to enhance the agency's pre-claim conciliation service, a policy that was very much advocated by stakeholders. That has been the direction taken in GB by ACAS, which piloted pre-claim conciliation. The increased emphasis on pre-claim intervention will benefit everyone. It is about earlier resolution and targeting resources. At a time when resources are at a premium, it is important to give the agency that flexibility.

Clauses 9 and 13 deal with conciliation after the bringing of proceedings, to either an industrial tribunal or the fair employment tribunal. The Labour Relations Agency has a duty to offer conciliation to parties involved in particular types of industrial tribunal cases, which is currently time-limited to between seven and 13 weeks after a claim has been lodged. More complex cases in both tribunals are not subject to those limits. After the time limit expires in the relevant cases, the LRA is no longer under a duty to offer conciliation, but retains the power to do so. These clauses remove the provisions requiring the LRA's duty to offer conciliation, and that duty reverts to a power. The original intention of that was to focus the parties' minds on early

resolution, but the review has shown that, in practice, the seven and 13-week time limits were an issue and, to be fair to the Labour Relations Agency, unlike ACAS, it continues to offer a service beyond 13 weeks. We are bringing the legislation into line with the existing practice.

We propose to take together clauses 10 and 14, concerning recovery of sums payable under compromises involving the agency. Clause 9 and clause 13 deal with industrial tribunals. This is about compromise agreements relating to cases lodged in both tribunals. The clause has a similar purpose to clause 7, with which I have already dealt. It deals with LRA-brokered settlements of issues that could be determined by tribunals. Where a settlement includes an agreement for one party to pay the other a sum of money, that sum is not paid, and the other party wishes to enforce payment, the clause enables the party seeking payment to pursue the matter through the courts without the need to seek a County Court order for enforcement. Clause 7 is related to that process improvement. The clause applies only in cases where the conciliated settlement simply requires the claimant not to commence tribunal proceedings or where he has begun to end them. Where the conciliated settlement terms are more complex — where, for example, there is a range of conditions — it will not be possible to use that process.

The clause removes the paperwork and expenses associated with the current requirement to seek a County Court order for enforcement. Currently, registration of unpaid sums in the County Court carry a small cost so, here again, there will be a small cost saving to the party seeking that enforcement order. The Bill seeks delegated powers whereby the Department may make regulations concerning the time an application may be made to tribunal for a declaration that a compromise sum is not recoverable. Provision is also made by County Court rules on the period during which a sum is not recoverable. This means that either the Department could make regulations on this matter, or the declaration could be made by the County Court. That is to ensure that the provisions are sufficiently comprehensive to cover both situations.

Those are very technical issues over which we have laboured to the point that our eyes have sometimes glazed over. However, they are important to improve process, procedure and facilitating administration post the transfer of justice powers.

Clause 11 provides powers for fair employment tribunals in relation to matters within the

jurisdiction of industrial tribunals. As June Ingram mentioned briefly in her introductory remarks, clause 11 is very much an effectiveness measure in access to justice.

Alongside the fair employment aspect of the complaint, the fair employment tribunal currently has the power to hear additional aspects of that claim that relate to other forms of alleged unlawful discrimination where there is a claim of unfair dismissal. Any other aspect of the complaint, such as a claim for unpaid wages or breach of contract must be heard and determined by a separate industrial tribunal. Because all aspects of the claim arise from the same set of facts, it was clear from the consultation that that was seen as an unnecessary duplication and an inefficient way of moving forward.

We consulted with the president of the industrial tribunals and the fair employment tribunal, who was encouraged that such an approach would improve the service to the respondents, the employers and claimants — the employees. Therefore, the aim is to amend the existing legislation to remove that anomaly so that the fair employment tribunal and all industrial tribunal aspects of a case can be heard in a single tribunal setting. In reality, many cases in Northern Ireland are not simple; they cover a significant number of jurisdictions.

**The Chairperson:**

Is any of this in response to a report stating that the majority of people who put in a claim give up because the process is so elongated, complex and costly that many never get justice?

**Mr Evans:**

It was not in response to any particular report or comment from organisations. The Bill is a recognition that, from an employer and an employee's perspective, the legal system is quite complex. However, in no legal setting other than employment would the same case and set of facts go to two separate tribunals. "No-brainer" is a horrible phrase, but one that jumped out all the time.

**The Chairperson:**

Who introduced it to begin with?

**Mr Bell:**

Lawyers. *[Laughter.]*

**The Chairperson:**

If it is such a no-brainer, how did it get to be there in the first place?

**Ms S Ramsey:**

Civil servants.

**Mr Evans:**

The Hansard report may state that there was a pause there. *[Laughter.]* I think that I have covered that subject enough.

That takes us to clause 15, which relates to schedule 3 and deals with the bulk of the Bill's provisions for dealing with the dispute resolution review. In the debate at Second Stage, we drew the attention of the House and the Committee to the Department's desire to introduce the right to request time off for training. Clause 15 would amend schedule 3 to enable that.

The provisions would allow for the subsequent introduction of a new right for a qualifying employee — somebody with 26 weeks continuous service with their employer — to formally request that their employer give them time away from core duties to undertake study or training. Such an application would have to be for study or training that is intended to improve an employee's effectiveness at work and the effectiveness of the employer's business.

Under the Bill, employers would be obliged to give serious consideration to such a request and could turn it down only on the basis of one of a specified list of business reasons. That list is comparable to the one that is already provided for in respect of requests for flexible working. The permissible grounds for refusal are listed in schedule 3 of the Employment Rights (Northern Ireland) Order 1996. The provision to request study or training leave is based on those very successful flexible working arrangements.

In his address at Second Stage, the Minister gave a commitment that the right would not be

introduced until it has been determined that the economic conditions are favourable for such an introduction. The provisions are on the statute book in GB, but, as you mentioned, Chairperson, they are looking at opportunities for deregulation, as are we. We will watch with interest what happens in the rest of the UK.

At this stage, it is a right to request time to train, not a right to time to train. It will introduce the powers only. There is no movement, at this stage, to introduce the regulations to commence those powers. The Minister will take a view on that when the economic conditions are right. We will come back to the Committee on that.

**Ms Lo:**

It relates to part-time studies. One can say that he or she is going to take a year out to do a master's degree, for instance.

**Mr Evans:**

Yes. It relates to taking time out for training that is relevant to the business and which will improve the employee's effectiveness and the business's productivity. There is a range of ways in which people can take training. They can take training through time off, or a part-time Open University degree, for instance. There is a variety of training. There is flexibility on the nature of the training provision, but it is made clear that it must contribute to the employee's effectiveness, and it must benefit the employer.

An individual might say that he or she wants to go away for two years. If that were going to severely impact the effectiveness of the employer's business in some way, the employer may depend on one of the provisions to turn down such a request.

Clause 16 sets out the existing provisions that will be repealed as a consequence of the earlier provisions in the Bill.

Clause 17 deals with the commencement of the legislation. It provides for the commencement of the Bill on dates to be specified. We are seeking to try to progress the Bill through its legislative stages so that the provisions will come into effect from April 2011. That would mean

that the powers were in place by April 2011.

On delegated powers, the Department is empowered to commence the provisions of the Bill on days that it may appoint. We will be working with the Committee to alert it to that, and it is obvious from the debate that we want to commence from April next year.

**Mrs McGill:**

I would like some clarification on clause 8, which deals with conciliation before bringing of proceedings. The paragraphs of the explanatory and financial memorandum that deal with clause 8 state that the intention of the amendment is to enable the LRA to prioritise cases where demand for conciliation exceeds available resources. I may have misinterpreted you, but is it the case that if the LRA had sufficient resources, the LRA would proceed?

**Mr Evans:**

The intention is to remove the obligation, which is currently required in every circumstance, even when the work that an individual would do would be nugatory and there is no potential for a settlement. Under current legislation, they have to continue to offer that service to anyone who comes along.

That is the intention behind it.

**Mrs McGill:**

Is that linked with what follows? Are you saying that that is not a reason in itself? Are you saying that where the demand for conciliation exceeds available resources, that is a discrete reason for not continuing?

**Mr Evans:**

No.

**The Chairperson:**

Are you worried that people will decide not to proceed on the basis of finance?

**Mrs McGill:**

I am looking for clarification. Is it because the resources might not be available and the LRA will have difficulties resourcing that kind of service? In my view, that would be a mistake. Is that what it is saying? If so, we need to look at it again.

**Mr Evans:**

It is saying that it allows the LRA to target its resources. At the end of the day, all organisations have a finite set of resources, and there is probably an infinite requirement out there. However, regardless of whether 100 people or 20 people approach the agency, there is no added value in providing the service. However, at this stage, there is a duty to do that. The proposal will enable them to take that professional judgement and reallocate their efforts to where they can add value and bring settlements.

**Mrs McGill:**

I agree that time should be spent wisely, but I need to ask the same question. Could this happen because the LRA will not be resourced properly?

**Mr Evans:**

No. It is purely about giving flexibility to the agency. The agency is probably better placed to say this, but it has a helpline that attracts thousands of callers. Given the economic difficulties at the moment, we understand that the helpline has experienced an increased volume. This is about enabling the LRA to target its resources to best help employees who are in difficulties and employers to resolve differences in a fair and equitable way.

**Ms Ingram:**

It gives the agency the flexibility to make decisions.

**The Chairperson:**

Yes. However, you can see how others could interpret it.

**Mr Evans:**

In real terms, it will increase the potential resource by using resources more effectively. It will

reduce potential wastage.

**The Chairperson:**

Mrs McGill is saying that it needs to be much clearer that it will be determined by that factor rather than by a financial or resource imperative.

**Mr Evans:**

When somebody rings the LRA for help and there is no prospect for it to help, it will not say that it cannot help but will, I imagine, modify the level of service.

**The Chairperson:**

The LRA will be before the Committee next week, and we can tease that out further. It is a matter of interpretation, and members seem to want the usage to be explicit rather than implicit.

**Ms Ingram:**

It is about ensuring that the right legislative framework is in place. The next stage is how to use that.

**Ms Lo:**

That is what I was going to say. Clear criteria need to be set out to enable people to understand under what circumstances the LRA will not take a case forward rather than allowing LRA officers to determine that. People need to know which cases are not likely to be accepted. For example, the Equality Commission now makes it very clear that it will not deal with certain cases, and, as a result, people do not bring those cases.

**Mr Evans:**

Yes. As regards LRA, the level of service that it can offer will always be a matter for its professional judgement. That will always be its judgement call. I do not believe that the intention was to set criteria because that in itself would create huge problems. To set criteria acts as a kind of benchmarking exercise. At the end of the day, when people ring up, they may or may not know what they need at that stage. I imagine that professionally trained conciliation and helpline staff is a matter for LRA. We never had any intention to set criteria for that. Perhaps,

the explanatory and financial memorandum is not helpful. Our main intention was purely to provide the agency with flexibility to deliver its service.

**The Chairperson:**

It did not have to continue to flog a dead horse, to use a country expression.

**Mr Evans:**

That is absolutely right, Chair. *[Laughter.]*

**The Chairperson:**

Next week, we can tease out the matter of interpretation further with LRA. I understand where you are coming from. Obviously, people are worried about how it might be interpreted in difficult financial circumstances. We can pick that up with LRA.

I believe that that is the end of the presentation. Thank you all very much for coming along. The aim is on target to be met. It is worthwhile. Certainly, a great deal of work has been done in advance to get the Bill to this stage. We do not anticipate a great deal of difficulty apart from those levels of clarification that members require.

**Mr Evans:**

Thank you.