Northern Ireland
Assembly

COMMITTEE FOR EMPLOYMENT AND LEARNING

OFFICIAL REPORT (Hansard)

Employment (No. 2) Bill

13 October 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)
Mr Sydney Anderson
Mr Paul Butler
Rev Dr Robert Coulter
Mr Chris Lyttle
Mr David McClarty
Mrs Claire McGill
Mr Pat Ramsey

The Chairperson (Mrs D Kelly):

I know that some members are pushed for time. We plan to informally scrutinise the first two sections of the Bill, which includes the first 10 clauses. The Committee will receive two further briefings on the Bill. This is a preliminary and informal scrutiny of those clauses.

The Committee Clerk:

I want to stress that this is not the river of no return; it is just an informal look. We will try to get through the first 10 clauses, and we will not go any further. Any Bill is fairly hard to read. Therefore, I am going to give the background to each clause, and members can raise any issues that they may have.

The first clause is about the repeal of statutory grievance procedures, and it really does just that. It removes the statutory grievance procedures from statute. The current procedures require an employee to put a complaint in writing before bringing a tribunal complaint. They also require an adjustment of a tribunal award where an employee or employer has unreasonably failed to participate in a subsequent meeting or appeal. The removal of those takes that elaborate and deliberate process out of the way. The whole new focus is to try to bring dispute resolution in the workplace to the local level, where you would try to solve the dispute before you got into the whole written procedures and processes. The first clause removes what is already there so that a new system can be put in place.

Clause 2 is another repeal clause. It repeals article 16 of the Employment (Northern Ireland) Order 2003, which implies in every contract of employment a duty to observe the statutory dispute resolution procedures in circumstances specified by the Department. Effectively, we have removed the statutory procedure, and therefore we have to remove the instruction to employers that they have to use the statutory procedure.

An awful lot of this Bill is about taking away lots of things in different pieces of primary legislation to achieve something simple and straightforward. Unfortunately, that is part of the problem. A lot of laws and other things have to be dismantled before this law can go forward. Clause 2 takes out the mechanism where employers are forced to use the procedure that is being repealed. If, at any point, this becomes nonsensical, please stop me.

The Chairperson:

It is fair to comment that trade unions and the employers' organisations largely support the legislation. It should not be controversial.

The Committee Clerk:

The Committee did about 18 months' preparatory work before the Bill even came, and it has had sessions with the various groups and stakeholders.

There is currently provision for automatic extension, by three months, of time for lodging a tribunal claim where parties comply with the statutory dispute resolution procedures. Clause 3 repeals that. If we lose the procedures, we have to lose all the instructions to employers that go with those procedures. As I said for clause 2, if the procedures no longer exist, you cannot

maintain the laws that are telling employers to enforce them. Again, it is just taking that out of law. The process is very technical and detailed but it needs to be done, otherwise we have random bits of law talking about procedures that no longer exist. It is just another clause that takes out those references from employment law.

Clause 4 is relevant to schedule 2. It amends the Industrial Relations (Northern Ireland) Order 1992, which supports a non-statutory approach to grievances, replacing the statutory grievance process that the previous three clauses have dismantled and taken away. That change will establish the context for a revised Labour Relations Agency (LRA) code of practice that will set out good practice standards to which employers and employees will be expected to adhere. Failure to comply with the new code will enable a tribunal, if it considers it just and equitable to do so, to increase or reduce a relevant award by up to 50%.

Really, all that that is saying is that, now we have taken out the existing grievance procedure, this is what is being put in its place: new relationships and codes with the LRA, and also mechanisms to adjust tribunal awards. Those must be put in place because the Bill will remove the old system.

Clause 5 specifies that the determination of tribunal proceedings without a 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 at all in proceedings or does not contest the case. This is really trying to simplify the whole process, so that people are all aware of what is going on and are all saying that, at this point, they are ready to participate in the process.

Again, that is needed because we have taken away the old grievance procedure and we need something else in its place that everyone is agreeing to, or, through not specifically agreeing, the kind of tacit agreement. That is what we are saying — if they do not present any response, that is taken as tacit agreement. There is really no way round that. If you perpetually expect a written response from someone that is not going to come, it will delay proceedings for an inordinate amount of time. That has been part of the problem with the existing process. This basically means that everybody gets to the point of saying that they are happy to go with it. You are given a certain amount of time to object to it if you are not happy. If you do not object, then that is it; the process goes ahead. That just tightens everything up and makes it that bit faster.

Clause 6 is important. Its provisions make it possible for industrial tribunals to restrict publicity in a wider range of circumstances than at present. Currently, a restricted reporting order may be made in proceedings involving allegations of sexual misconduct. Clause 6 extends that 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 where the tribunal considers such an order to be in the interests of justice. It just gives greater flexibility in shielding people whose identification in a tribunal case might make them or their property liable to some kind of attack by way of retribution. This really just offers them greater protection. Previously, the only people in that category were those accused of sexual misconduct. This broadens that out to include a lot of other groups.

Clause 7 refers to the enforcement of sums payable from a tribunal. At present, where an industrial tribunal orders a party to pay an award and that party fails to pay the award, a party seeking enforcement through the courts must first register the matter with the County Court through the Enforcement of Judgments Office. The County Court will then issue an order for enforcement. This clause amends that, removing the unnecessary intermediate step. Basically you are going straight to the County Court to enforce of the judgement; you do not have to go through the processes in between. The idea, again, is to make everything neater, tighter and faster. One of the major complaints made in the evidence that we took on the existing procedures is that they take far too long. In taking a long time, enforcement was seen to be ineffective. Clause 7 cuts out the middle part of the process by going straight to the County Court, making the enforcement of judgement, theoretically, that bit faster.

Clause 8 — and this also deals with clause 12, but we will be doing clause 12 again at a later date — is to do with conciliation before bringing of proceedings. That is effectively what the whole foundation purpose of the Bill was about — to try to localise dispute resolution, rather than getting into an elaborate process that is going to take a very long time.

Currently, where parties to a dispute that could result in a tribunal claim seek assistance from the LRA, the agency has a duty to provide that assistance, even if everybody has flagged up the fact that there is absolutely no prospect of conciliation — for example, if the parties involved are taking other action separately and in parallel to that, and it is totally clear that there will be no conciliation. The LRA is currently still forced to seek some resolution, which will tie up resources and time, when it has been clearly shown to have absolutely no meaning and that it is

not going to go anywhere.

I know that this was an issue when we heard from the Department. I have had a think about it, and I think part of the issue was that the explanatory memorandum that came with the Bill talked a lot about resources, which perhaps made it appear that this clause was actually saying that the agency will do the cases that it can afford to do. That appeared to be the suggestion. The wording of the Bill itself is more specific, and it actually shows that the agency will prioritise the cases where conciliation is possible. At the moment, it effectively has to do each case in order, whether or not there is going to be conciliation.

If you think of it in terms of a list of cases — 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 — and it knows that 2, 4 and 7 are not reconcilable, at the moment the agency still has to deal with 2, 4, and 7. This allows the LRA to not deal with those cases where it has had clear indication that there is no conciliation possible, which means that it is likely to be able to deal with more cases in a shorter space of time, because the cases where there is no resolution are taken out of the equation. Where previously the LRA was forced by the word "must" to deal with each case, they are now using this word "endeavour", so that the LRA will only have to deal with the ones where there is a recognised potential conciliation possible. It is not a question of a cut in resources; that is not what is being flagged up here. It is simply that the LRA is saying that this will make its job more efficient and effective, and it will ultimately be able to deal with more cases that actually have the potential to be resolved. Does that make that clearer?

Mrs McGill:

As you have outlined is, I have to say that you have done a good job in explaining it, and I understand exactly what you are saying. However, the memorandum is clear in what it is saying. It is my view that what is written there contradicts what you have articulated in many ways. It may well be that the intention is as you have outlined — and I accept that it is — but the memorandum states that:

> "The intention of the amendment is to enable the LRA to prioritise cases where demand for conciliation exceeds resources available and to relieve the LRA of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success."

I am aware that the memorandum is not the Bill, and so on, but, having listened to you, I accept what you have said.

The Chairperson:

It may be the case that the memorandum could be made more explicit.

The Committee Clerk:

As Mrs McGill has rightly pointed out, the memorandum is not the law; the Bill is the law. The memorandum is theoretically supposed to unpack the Bill and be useful in terms of supporting and interpreting it. In this case, having spoken to the people who drafted the Bill, it seems that the memorandum has interpreted the Bill in a particular way that gives additional meaning. I suggest that the Committee flag that up in its report, and obviously the Department is here and will be aware that the Committee is concerned about this. We also have the LRA coming, and it might be a useful opportunity to clarify with it how it sees this working.

The Bill itself does not indicate that it is an issue of resources, so this may be an occasion on which the memorandum has gone too far in interpreting, beyond what the Bill actually says. I have spoken to officials in the Department, and they suggested that the reading that I have given is the right one and that it is not going to be the case that people will not be heard because of lack of money; it is just the way that that was put. I think they were trying to be helpful by suggesting that dealing faster with cases than can be dealt with will ultimately be a better use of resources. They would understand what we are really saying about that being phrased in a clumsy way in the explanatory and financial memorandum, but it is an issue that we will take up with the LRA when we have it as well.

The Chairperson:

Obviously the concerns that we have highlighted to the Department in the hope that it will perhaps review the form of words in order to make it much more clear in the memorandum.

The Committee Clerk:

Clause 9 is to be considered in conjunction with clause 13, which we will come back to at a later stage. It is conciliation after bringing of proceedings. Clause 9 deals specifically with industrial tribunals, which clause 13 mirrors in terms of fair employment tribunals.

The LRA has a duty to offer conciliation to parties involved in particular types of industrial tribunal case. It is currently time limited to between seven and 13 weeks after a claim has been lodged. More complicated cases, including industrial tribunal and fair employment tribunal

discrimination cases, are not subject to those time limits. In relevant cases, after the time limit expires, the LRA is no longer under a duty to offer conciliation, but it can if it wants. It does retain that power to offer conciliation; it is just that no one is saying that it has to by law. However, I think you know that the operation of the LRA has been that, if its services are required, it will step up to the mark and provide them. Clauses 9 and 13 remove the legislative provisions requiring the LRA to offer conciliation, reverting to a power to do so. Basically, what we are saying there is that there is no longer a case of time limits having expired but the LRA still has to do something. It is now the case that the LRA will go ahead and do the job that it would have done before: if its services are required, it will provide those services. The clauses simply take away that legal obligation where it might not necessarily be required, leaving a power to offer that assistance if people need and want it.

Clause 10 is to be thought of in conjunction with clause 14. It has a similar purpose as clause 7. It deals with the LRA-brokered settlement of issues that could or otherwise would be determined by a tribunal. Effectively, it is where the LRA can provide that service and things do not have to go to tribunal. Where a settlement includes an agreement for one party to pay the other a sum of money, but that sum is not paid and the other party wishes to enforce payment — we talked about this before with taking out the middle step and going straight to County Court — the clause enables the party to pursue the matter through the courts, without the need initially to seek a County Court order.

Clause 10 applies only to cases in which the conciliated settlement simply requires the claimant not to commence tribunal proceedings or, where they have begun to do so, to end them. Where the conciliated settlement's terms are more complex, it will not be possible to use this process. That could be described as speeding up the process and making it more direct, so you do not have to go and apply for a County Court order; you can take it straight to the court. That reflects what we heard in clause 7 about speeding up the process and taking out the Enforcement of Judgments Office's need to go to the County Court in between as a step. This just means that you can basically take it straight to County Court.

We will leave those there and come back to this at another time. It is a very technical Bill.

The Chairperson:

I think that members are content that most of the Bill actually makes sense and that it will help to

speed up the process.

The Committee Clerk:

I stress that a huge amount of consultation went into the Bill. Often, Bills are presented to Committees, but the Committee spent a huge number of months before actually coming to this stage. It has had a lot of thought.