COMMITTEE FOR EMPLOYMENT AND LEARNING

OFFICIAL REPORT (Hansard)

Employment (No.2) Bill: Briefing from the Law Centre (NI)

3 November 2010

NORTHERN IRELAND ASSEMBLY

COMMITTEE
FOR EMPLOYMENT
AND LEARNING

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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
Rev Dr Robert Coulter
Mr Chris Lyttle
Mr David McClarty
Mrs Claire McGill
Mr Pat Ramsey
Ms Sue Ramsey

Witnesses:
Ms Liz Griffith)
Ms Karen Mercer) Law Centre (NI)
Mr Daire Murphy)

The Chairperson (Mrs D Kelly):
I welcome Liz Griffith, policy officer, Karen Mercer, employment adviser, and Daire Murphy, employment adviser. You are all very welcome. Thank you very much for your attendance. The usual format is that witnesses take five to 10 minutes to present their briefing, and members are then given the opportunity to ask questions, to make comments or to seek clarification on any of the points raised.

Ms Liz Griffith (Law Centre (NI)):

Good morning. Thank you very much for inviting the Law Centre to today's meeting. I work in policy at the Law Centre. We hope that the Committee is by now well aware of the work that the Law Centre has been doing on this matter. I would like to provide you with the briefest of recaps.

The Law Centre has two employment advisers, Karen Mercer and Daire Murphy, who provide specialist advice and representation to claimants. We run a daily advice line and receive advice queries from across the voluntary sector and also from the Labour Relations Agency (LRA), solicitors and constituency offices.

We have been very pleased to be able to participate in the Department for Employment and Learning's (DEL) review of dispute resolution, and we commend the Department for its openness and the approach that it has taken to engagement. We have briefed this Committee twice during the process, and we are pleased that it has maintained a close interest in what has been going on.

Underpinning our involvement in the review is our belief that the current tribunal system contains many major flaws, which means that justice is often inaccessible for claimants. We welcome the Employment (No.2) Bill, but we are anxious to stress that we see it as just one piece of a much bigger jigsaw. We hope that the Committee will play an important role in helping to move towards a systemic reform programme.

My colleague Karen Mercer will explain to members why we support a lot of what is in the Bill, after which Daire Murphy will turn to the bigger picture and ask whether the measures in the Bill really mesh together to form a fair and coherent system. Daire will also address the issues that we identified as critical in a briefing paper that I hope the Committee has seen.

Finally by way of my introduction, unfortunately, the economic backdrop continues to be sobering. Labour market figures for September showed an increase in the number of claimants receiving unemployment benefits. That reflects our experience at the Law Centre. We have seen an increase in demand for advice, and, specifically, advice relating to dismissals. We noted that a recent report by PricewaterhouseCoopers suggested that up to 36,000 jobs may be lost in Northern Ireland in the coming years. Daire will illustrate what those figures may mean in human terms. We highlight those figures not to be alarmist but to help emphasise that now is a

timely moment for reform.

Ms Karen Mercer (Law Centre (NI)):
Law Centre (NI) welcomes the Employment (No.2) Bill's repeal of the statutory grievance procedure and its introduction of a code of practice. We congratulate the Committee on finding a Northern Ireland approach to that issue. The grievance procedure has been unduly burdensome and complex for claimants since its inception. It has been a time-consuming and legalistic process that has confused employers, employees and legal representatives. Our experience is that it has acted as a bar on access to justice for claimants.

The problems were that claimants were potentially ignorant of the procedure or baffled by its complexity, and that resulted in claims being made at an early stage, which had the impact of preventing claims — even meritorious ones — going forward. The grievance procedure led to formality and legal escalation at the start of the process, which lessened the opportunity for internal resolution. Therefore, we welcome the introduction of a code that is more accessible and less onerous for employers and employees. We hope that that, in turn, encourages greater use of less formal resolution options.

We are also pleased to see that the Bill retains the disciplinary and dismissal procedures. Those are established procedures with which employers are familiar. We believe that the three-step process is well-known by employers and is not particularly onerous for them. It offers clarity to employer and employee, in contrast to the grievance procedure, and is relatively simple and straightforward to operate. It assists employees by offering a guarantee of basic procedural fairness when a sanction such as dismissal is being considered. Given the serious consequences of dismissal, we think that it is a reasonable option to ensure that the decision to dismiss should not be taken lightly. The retention of those procedures means that employees in Northern Ireland will continue to enjoy the protection of that unequivocal, statutory right.

Our casework contains numerous examples of the importance of the statutory disciplinary and dismissal procedures. Recently, we argued for an employee for whom the dismissal procedure was not followed. That particular employee had been selected for redundancy despite his having the longest service history in the company and a wider range of skills than most other employees. No meeting was held in the company, which did not afford the employee the opportunity to input to the process. As the statutory dismissal procedure had not been followed and the employer had

not shown the employee any selection criteria, it was automatically unfair. Had the procedure been followed, the employee would have had the opportunity to input to the process and to challenge his selection for redundancy, and, ultimately, he would not have been dismissed.

Cases such as that highlight the importance of the procedures. They are necessary and vital if any level of fairness is to be achieved. They allow the employee to input to a decision that will potentially have a serious consequence for them, to defend their position and, ultimately, to avoid a potential dismissal. Retention of those procedures avoids dismissals that are based on incomplete or incorrect facts, and it also reduces the possibility of unfair dismissal claims against employers.

We also welcome the change to the enforcement of sums payable. We believe that the removal of the requirement to seek a County Court order will simplify the process. Currently, the process is lengthy and costly for claimants. It places the burden on the claimants, which, in turn, effectively erodes confidence in the system. By the time that a claimant reaches the end of the tribunal process and is faced with having to pursue their award, a lot of claimants are evidently put off by that process. Therefore, we welcome the simplification of the process, which will put claimants in a more favourable position. Hopefully, offering a more realistic method of enforcing awards will also have the effect of deterring non-compliance in the first place, if it is regarded as a more effective method of enforcement.

We also welcome the right to request time to train. That will allow qualified employees the time to study or to train where it will improve performance. It will also assist employers and employees to work together to address skills shortages and to improve skills within the workplace.

Mr Daire Murphy (Law Centre (NI)):
The consultation that the Department carried out and the response to it were very wide-ranging. As a result, the Bill addresses only a fraction of the outcome of that process. There is a lot of work to be done by the Committee, the Department and interested stakeholders to put flesh on the bones of the remainder of the proposals. We consider that a number of the measures proposed by the Department are in themselves very positive, but we remain concerned that they do not necessarily fit together in such a way as to provide a strategic reform that ensures a fair and coherent system.

For instance, a lot of emphasis has been placed on the promotion of alternative dispute resolution (ADR) techniques, such as mediation. We see that as a positive thing, but the Law Centre is very doubtful that that will be an effective panacea in itself for all the ills in the tribunal system. It is far from certain that employers will see a major interest for themselves in engaging in early ADR when the realities of the tribunal system make it so hard for employees to take their cases the whole way through and to win. It is not practical or desirable to make ADR, mediation, and so forth compulsory, but anyone who has experience of employers' failure to engage with unrepresented claimants in the existing ADR system, which is conciliation, would not necessarily be too confident that that is suddenly going to change by itself.

Conciliation operates against a backdrop of an industrial tribunal system in which the deck is very much stacked against the employee, who is most likely to have no professional advice and no representation and who is trying to do their best in an alien environment and is often floundering in that environment. The Law Centre has published a research paper on tribunal reform in conjunction with the University of Ulster and the University of Liverpool, the research for which was funded by the Nuffield Foundation. I understand that that paper was circulated to MLAs; if anyone would like further copies, we can provide them.

The legal academics who carried out the research interviewed a wide range of people involved in tribunal systems. One finding was a definite scepticism towards ADR from claimants who had been through the whole process. None of the claimants interviewed felt that the respondents in their cases had attempted to engage in ADR at an early stage. That included those who were in bilateral contact with an LRA conciliation officer. It was felt that the employers preferred to push claimants towards a hearing in the expectation that that would overwhelm them and force them to withdraw and settle for less.

Unfortunately, that very much reflects our day-to-day experience as advisers and the responses from a number of organisations. Responding employers are represented by lawyers, and, if the system works in their favour, the lawyers will play that system to maximum advantage. When stringing things out in that way, they are often doing their job well for their client, and it often works. However, against that sort of background, it is difficult to see why employers would suddenly develop an appetite for early ADR unless they were pushed in some way.

The other main plank of the Department's proposals rests on opening up a simpler alternative to the tribunal for disputed cases. It proposes that the current Labour Relations Agency arbitration scheme be expanded to cover all employment law jurisdictions, providing a quicker, cheaper and less legalistic alternative to the tribunal. That sort of forum, where employees can go and present their case themselves and be on more of an equal footing, is what employee representatives have been crying out for for years, but we believe that there is, perhaps, a failure to tie the reform into a coherent system and that that, therefore, could undermine its potential. In the model that we have put forward to DEL, we have pushed for a system in which all appropriate cases would have to go through a simpler, informal, speedy hearing to ensure that the industrial tribunal did not remain as the default setting.

In DEL's model, arbitration remains voluntary, and employers may not see any incentive to participate because, for one thing, they are confident that they can grind the claimant down through the tribunal system. However, we also have a concern, which we have expressed to the Department, that it is clear that employer representatives have strong reservations about an arbitration system with no right of appeal. Under that system, people would simply have to opt for it and to take the outcome. Potentially, that could lead to widespread employer refusal to engage with the system, and, perhaps, that should be looked at again.

The researchers who carried out the Nuffield Foundation research on our behalf spoke to one tribunal member, a tribunal judge who had also been an arbitrator in the existing LRA system. That person was quite scathing about what might come out of the consultation and stated that it:

> "glosses over the fact that all this was tried before and it failed totally. We had a perfect scheme … it was a shirt sleeves environment. … Nobody wanted to use it. It died simply because of underuse."

That is a cautionary note. We believe that any new system has to be fitted into existing processes in a way that ensures that it too does not die in isolation. New reforms and proposals need to be scrutinised to see how they fit in, and incentives and penalties should be considered to get employers and employees to engage with and utilise those alternative systems. That may involve using pilot projects and keeping a close eye on the outcome of those projects.

The Department's response also proposes reform for systems of provision of employment advice and information-giving with the establishment of an interagency forum and an information gateway to signpost people to the most appropriate resource. It recognises the distinction between providing information and providing professional or tailored advice, and we welcome

that. There is a significant degree of consensus that the Labour Relations Agency cannot offer that sort of advice but can provide the information.

It is evident from calls that we have received that a claimant who needs to look elsewhere for tailored advice cannot necessarily receive that from the LRA. We regularly receive callers who are referred to us from the LRA information line, which demonstrates that the agency cannot tackle the problem on its own. In 2008, we received 225 advice calls that had been referred from the agency. So far in 2010, that number has more than doubled to 490. In the past month, advice queries that were referred from the LRA accounted for more than a third of our queries.

Against that background, it is somewhat disappointing that the Department does not intend to provide any additional resources to deliver the advice that is recognised in the paper as being needed. The rationale appears to be that increased uptake of ADR and the impact of the arbitration scheme will be such that it will reduce the need for advice and, indeed, representation. Frankly, we would be delighted if ADR managed to produce those dramatic results, but, for the reasons that we have outlined, we remain doubtful, and rather a lot of eggs appear to be placed in that basket.

There remains, in our experience, an acute need for the provision of a proper advice service for workers. Existing structures, including our organisation, are being overwhelmed by the surge in the need for employment advice. The problem with providing a signposting information gateway is that, if you are going to signpost someone somewhere, surely you have to ensure that there is something there when that person arrives. As I said, at the minute, we are being overwhelmed.

We are all aware of the effect that economic austerity measures will have here, and I am sure that Committee members are particularly conscious of it. Many more people will lose their jobs, will not be paid their wages and will lose their redundancy payments. Therefore, the number of people who are thrown into contact with the dispute resolution and employment tribunal system is set to rise dramatically. Those people will come from all parts of the country and from all sectors of society, and they will expect a fair and just system to deal with their problem. Therefore, it is more imperative than ever that all stakeholders concerned work to try to give them that. At the moment, such people are likely to feel that they are fighting an uphill and futile struggle without advice or representation, and they can end up feeling disillusioned and resentful. It appears that

that could happen to any of us, which might make it easier for us to imagine how we would feel in that sort of situation.

We believe that reform of the system must involve a two-pronged approach. First, it must provide a more informal route for resolving disputes through the arbitration system and, crucially, ensure that it is used. Secondly, it must try to make the existing tribunal system fairer and more equal. The single biggest thing that can be done to make the tribunal system fairer, cheaper and more acceptable to the public is to increase the provision of advice and representation for deserving claims. Quite simply, it would level the playing field.

It hardly needs to be said that public expenditure is under enormous pressure, but a sound business case can be made that investment in advice and representation can save public money. That is borne out by our experience and by the findings of the Nuffield Foundation research; representation allows cases to settle and shortens hearings.

An empirical study, which looked at that issue in detail, was carried out by the central office of Citizens Advice in England in July 2010. We can furnish members with a copy of that study if they want one. It looked at the evidence of the cost benefit and economic value of advice and representation and attempted to quantify the value of that to the state. The study found that, for every £1 spent on employment advice, the state potentially saves £7·13. I am not sure where they got the 13p from.

As there is a strong business case for the provision of advice and representation, and it is in the interests of fairness and justice and meets an increasing public need, the issue should be looked at afresh and consideration given to the provision of more resources in that regard.

Ms Griffith:

I should explain that Daire is a lawyer by trade.

We have raised a number of critical issues this morning, which we hope will help to inform the Committee's approach in the coming months. We ask the Committee to keep the non-legislative proposals, in particular, under review, including the effectiveness of the interagency information and signposting service and the effectiveness of ADR, particularly the arbitration and the uptake of that. We encourage the Committee to have a look at the availability and adequacy

of the current advice services.

Karen pointed out that there is a lot of common ground between all parties, which is positive. However, I reiterate our view that this is the start of a process to bring about a fairer and more coherent system.

The Chairperson:
Thank you very much for your presentation. For some time, the Committee has believed that the legislation is a starting point, not the final destination. We are keen to tidy up the Bill as best we can, but to have the Department come back to us with more extensive legislation that will look at the needs of employers and employees. All of us have experience of representing constituents with employment difficulties for whom achieving a resolution was made so long, drawn out and difficult because there was no intention to settle that people just gave up. On a personal level, I am interested in the promotion of social justice and employment law. Trade unions fought too long and too hard to get us some sort of protection and rights for us to give them up too easily. However, there are lessons to be learnt about the problem of lengthy delays and processes that have not had the desired outcome.

Do members wish to speak or are we content to note the paper?

Mr P Ramsey:
I welcome the witnesses and acknowledge the Law Centre’s contribution to the work of Assembly Members. I had two cases at the Derry office last week, not strictly related to employment law — they were more welfare and social security issues — and Danny Breslin was very helpful. We deal with issues across the board with which the Law Centre is more than helpful. At times, it is a lifeline for Assembly Members who are struggling with such matters.

We all deal with cases in which people are bewildered by the system and become so frustrated that they want to just pack it in because of the lack of access to precise and specific legal advice. So, there must be signposting, and more so in non-legislative areas. An increase in job losses is expected and with that comes concerns from people about why one person lost their job when someone else did not. I am interested in the resources that the Department currently gives to the Law Centre and others. We are looking at more effective and efficient ways of delivering services. Therefore, if the Law Centre is saying that a business case can be made for an

investment that will ultimately save money, the Committee would be keen to hear about how it can assist that when it meets the Department.

I am also keen to know the level of advice service being delivered by the Law Centre in each constituency, so that we, at the coalface, know how many people in West Belfast, East Derry or Foyle are being helped. Will you get the Committee some of that information? It may help.

Mr D Murphy:
If we are able, we would like to try to do that.

On the issue of saving money, the field researchers spoke to tribunal chairpersons and respondents' representatives. Speaking anonymously to make it easier for them to give their true views, their consensus was that unrepresented claimants often did not properly identify what their legal claim was. They had a sense of grievance and that was put forward, but they did not frame it properly, and, when they did get to tribunal, they did not concentrate on the correct points. They ended up missing points, not putting their case effectively and, therefore, maybe not proving their case. All of that also took much more time than it would have taken had such a person been represented. The chairpersons and representatives felt that tribunals had to take much longer in such cases to try to guide and to compensate for the fact that the person was not represented.

Mr P Ramsey:
That is also very demoralising for claimants.

Mr D Murphy:
It begs the question: if a tribunal chairperson is spending so much time trying to guide the person, would it not be better to give them representation in the first place? That would expedite the whole process.

Ms S Ramsey:
I join Pat in putting on record my thanks for the work that the Law Centre does, especially in the workplace with employment issues. Sometimes, it is hard to face employers in big companies.

I have three points. I do not know whether Liz was boasting or complaining that Daire is a

solicitor.

Mr D Murphy:
I am qualified as a barrister.

Mr Bell:
It does not make you a bad person. *[Laughter.]*

Mr D Murphy:
I think that she was trying to apologise for my long-windedness. *[Laughter.]*

Mr P Ramsey:
We got the point. *[Laughter.]*

Ms S Ramsey:
It is useful at Committee when the Department is here listening to what is being said. I am keen to know what the Department's views are and whether it is willing to reach an accommodation on this piece of work.

Do you have a relationship with the Equality Commission, and where does it fit in on some of these issues?

Mr D Murphy:
In respect of the Department, we have spoken to the Department throughout the process, and it has always been open and willing to engage at every stage. As far as the Equality Commission is concerned, our representation work does not include cases that involve pure discrimination issues. The rationale of our management is that the Equality Commission is already there to provide that.

Ms S Ramsey:
The reason that I asked that is that you talked about the signpost gateway. When people are referred to you, do you refer them on to the Equality Commission if the case involves something that falls in its remit?

Mr D Murphy:

If it is a pure discrimination issue, we often direct people to the Equality Commission as it is the statutory body that is tasked with the provision of advice and assistance in that area.

The Chairperson:

I wish that someone would remind the Equality Commission of that some time.

No other members wish to speak. We have listened carefully to what you have said, and we are particularly taken by the fact that the proposals include no right to appeal. The Committee may give further consideration to that and put forward an amendment if the Department does not take on board your point of view. The LRA made a similar comment, and we will wait to see how our discussions go next week with the Department. Thank you all very much.