



Northern Ireland
Assembly

**COMMITTEE
FOR EMPLOYMENT
AND LEARNING**

**OFFICIAL REPORT
(Hansard)**

Employment (No. 2) Bill

17 November 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
Mrs Claire McGill
Mr Pat Ramsey
Ms Sue Ramsey
Mr Peter Weir

The Chairperson (Mrs D Kelly):

We move to the formal clause-by-clause scrutiny of the Employment (No. 2) Bill. This item of business will be recorded for Hansard, so all electronic devices should be switched off. Members are not too good at hiding their mobile phones; I can see that they are all checking them.

It is planned that the Committee will complete its clause-by-clause scrutiny of all 18 clauses and four schedules, including the delegated powers that are attached to some of the clauses. The Committee is required to agree or otherwise to each Part of the Bill. The Bill's purpose is to:

“Make provision about the procedures for the resolution of employment disputes and the procedures of industrial tribunals and the Fair Employment Tribunal; to make provision in relation to time off for study or training; and for connected purposes.”

The Department undertook extensive consultation on the Bill, and the Committee undertook

its own extensive evidence gathering on workplace dispute resolution prior to the Bill's being drafted. Members received a memo on the Bill via e-mail on Monday. That memo lays out the purpose of the Bill. The Examiner of Statutory Rules provisionally indicated that the delegated powers in the Bill are appropriate and that a full report would be forthcoming. In fact, we now have that report. Last week, the Committee heard evidence on the Bill from the Law Centre and the Labour Relations Agency (LRA), as well as briefings from departmental officials.

The Committee Clerk:

The Committee received a further response from the LRA. Last week, members heard the LRA state its position that clauses 8 and 12 should be struck out of the Bill. The LRA put forward its arguments on that, and the Department then put forward its counter arguments. The LRA still holds to its position of wanting those clauses removed from the Bill. It will be for members to decide whether that is appropriate. As I said, the LRA position has not varied since last week.

I will begin, and my approach will be to flag up the title of each clause and to describe the clause. The Chairperson will then ask whether there is agreement on the clause. If so, we have a form of wording that must be used for the record.

Clause 1 (Repeal of statutory grievance procedures)

The Committee Clerk:

Clause 1 is linked to schedule 1. Members will recall that the repeal of statutory grievance procedures is essentially the bedrock of the Bill. The procedures were put out about five years ago, and they have been repealed in GB already. This issue is core to the rest of the Bill. Therefore, we are seeking to establish whether members agree to clause 1 and to schedule 1.

Question, That the Committee is content with the clause, put and agreed to.

Clause 1 agreed to.

Schedule 1 agreed to.

Clause 2 (Statutory dispute resolution procedures: effect on contracts of employment)

The Committee Clerk:

We went through this clause previously. No issues on clause 2 were raised by any respondents or members during informal clause-by-clause scrutiny. The explanatory and financial memorandum

(EFM) to the Bill states:

“*Clause 2* repeals Article 16 of the 2003 Order, which implies in every contract of employment a duty to observe the statutory dispute resolution procedures in circumstances specified by the Department in regulations.”

The provision that will be repealed was never commenced, and there has been no demand for such a provision. Therefore, we seek members’ agreement on clause 2 on its own.

Question, That the Committee is content with the clause, *put and agreed to*.

Clause 2 agreed to.

Clause 3 (Statutory dispute resolution procedures: consequential adjustment of time limits)

The Committee Clerk:

At the moment, there is provision for an automatic extension of three months in which a tribunal claim can be lodged where parties comply with the statutory dispute resolution procedures. Clause 3 repeals the relevant powers to allow that to happen.

Again, no issues were raised in connection with this clause when the Committee heard from stakeholder groups and when it looked at the matter informally and during its own consultation.

Question, That the Committee is content with the clause, *put and agreed to*.

Clause 3 agreed to.

Clause 4 (Non-compliance with statutory Codes of Practice)

The Committee Clerk:

Clause 4 also relates to schedule 2. Again, we will have to return to the schedules separately. The clause will amend the Industrial Relations (Northern Ireland) Order 1992 to support a non-statutory approach to grievances, because the grievance procedure will be repealed by clause 1. The change will establish the context for a revised Labour Relations Agency code of practice, which will set 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 increase or reduce a relevant award by up to 50%. Therefore, the clause will essentially allow a variance of reward where grievance procedures have not been complied with.

Question, That the Committee is content with the clause, *put and agreed to*.

Clause 4 agreed to.

Clause 5 (Determination of industrial tribunal proceedings without hearing)

The Committee Clerk:

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 if one of the parties presents no response whatsoever in the proceedings or does not contest the case. That means, effectively, that all the parties concerned have to register a view.

Question, That the Committee is content with the clause, put and agreed to.

Clause 5 agreed to.

Clause 6 (Restriction of publicity)

The Committee Clerk:

Clause 6 deals with restriction of publicity.

Mr Weir:

It may be difficult to get people to agree to that.

The Committee Clerk:

Clause 6 enables industrial tribunals to restrict publicity in a wider range of circumstances than currently exists. At the moment, a restricted reporting order may be made in proceedings involving allegations of sexual misconduct. The clause extends that power to cover individuals for whom the disclosure of identifying matter would likely cause risk to either themselves or their property. It also covers situations in which the tribunal considers such an order to be in the interests of justice.

Question, That the Committee is content with the clause, put and agreed to.

Clause 6 agreed to.

Clause 7 (Enforcement of sums payable)

The Committee Clerk:

Currently, when an industrial tribunal orders a party to pay an award but that party fails to do so, the party seeking enforcement through the courts must first register the matter with their County Court through the Enforcement of Judgments Office. The County Court will then issue an order

for enforcement. The clause will make amendments that remove that intermediate step so that an individual can go straight to the order for enforcement without having to go through the County Court. It speeds up the entire process and makes it more simple administratively.

Question, That the Committee is content with the clause, put and agreed to.

Clause 7 agreed to.

Clause 8 (Conciliation before bringing of proceedings)

The Committee Clerk:

I will deal with clauses 8 and 12 together, because those were the clauses on which issues arose. The Department has agreed to its suggestion to reword the EFM in the most pared down form. The LRA effectively opposed that rewording. Members heard the LRA's arguments and the Department's counter arguments.

There appeared to be two opposing viewpoints that were not being easily reconciled. That means that members will need to make a decision on where they want to go. In cases 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 assistance, even if there is no prospect of any kind of conciliated settlement. Clause 8 will convert the LRA duty into a power, which allows the agency to target its resources more effectively so that it can prioritise cases. Although we have to deal with the clauses 8 and 12 separately, when combined, they will essentially ensure that that power applies to industrial tribunals and the fair employment tribunal.

Members heard the agency's counter argument, which said that if it no longer had the absolute power or duty to provide assistance, the situation could somehow be used to run down or reduce its resources. The Department made considerable representations to say that that was not the case.

The EFM now reads in a very different way; it essentially reinforces the idea that it gives the LRA more power to prioritise cases as it wishes. The Department also said last week that there would be further consultation and examination of how that prioritising works in practice. Members will recall that the Department stressed that this is not a resource issue.

Although taken together, the Question on each has to be put separately.

The Chairperson:

Are members content that the Question be put?

Mrs McGill:

I have the correspondence from Bill Patterson in front of me. The penultimate paragraph of his e-mail states:

“The offer of ‘complete discretion’ masks the underlying diminution of the strength of the Agency’s case in seeking additional resources given that the Agency’s **duty to conciliate is reduced to a power.**”

The last time that we discussed this, I made the point that complete discretion was helpful. To some extent, I can see the LRA’s argument. However, according to the Committee Clerk, the Department —

The Committee Clerk:

I gave my interpretation of what the Department said. I said that members would obviously recall what the Department said. However, members must use their own judgement. I am merely paraphrasing. I support neither the position of the LRA nor that of the Department. I am a completely neutral player.

Mr Bell:

Where is the bowl of water? *[Laughter.]*

The Committee Clerk:

If it is helpful, I will detail the options that are available to the Committee. They are: agreement to the clause; delay to reconsider the clause, although I must flag up that we have very little time left to get everything in before the end of the Committee Stage, even though that should not influence anyone; rejection of the clause; or the Committee can go to a division to seek agreement.

The Chairperson:

We have discussed the matter over at least three weeks and have heard from all the relevant representatives. It is up to members to make their own judgement on whether their interpretation is what the Department gave an undertaking for or whether Mr Patterson’s comments are considered to have greater importance at this stage.

Mrs McGill:

I am not sure whether the LRA did not respond in the first instance or whether it responded in its first submission but did not comment on the clauses or ask for them to be removed. Which is the case?

The Committee Clerk:

The LRA highlighted the arguments. About three or four weeks ago, members received a subsequent paper that asked for the removal of clauses. I do not know the LRA's thought process, but I think that it had discussions with the Department, and my assumption is that, because of what the Committee heard last week, they were not able to reach agreement.

Ms S Ramsey:

In the scheme of things, the LRA is an arm's length or non-departmental public body (NDPB). If an issue were being raised, it strikes me that the LRA and the departmental officials could have sat down and used their influence to come to an agreement on the matter.

I understand the points that everyone is making, but I am cynical about the fact that sometimes when a departmental official gives their interpretation of legislation, it does not mean the same as it would in the real world. I realise that we have been going over this issue for a number of weeks, but would it not be sensible to say to the Department and the LRA that they should sit down and talk about it over the next day or two to try to get a form of words that suits them both? If the LRA is saying one thing and the Department is saying another, where do we fit in? We are trying to get a balance in all this.

The Committee Clerk:

There have been regular and long drawn-out discussions between the LRA and the Department. Long-serving members will recall that the Committee began looking at the issue about two years ago. Members heard last week that the LRA is concerned that its resources might be reduced, but the Department appeared to be saying that that was neither the case nor its thinking. It wants to see how it works, and it wants to build on it. The Department seemed to suggest that there would be subsequent legislation that would iron out any difficulties. The Committee should decide today whether it is content with the Bill as drafted and with moving it forward and seeing whether difficulties emerge. Alternatively, it can take the LRA view that it just expects difficulties or that

it feels that it may be put under pressure with its resources and might be expecting cuts.

Ms S Ramsey:

That is the difficulty that we are in. As this is legislation, there could be an agreement or there could be a nod and a wink. That is not necessarily what it is about. I understand people's fear, but we need to try to get the issue clarified.

The Chairperson:

The LRA heard clearly from the Department that that is not the intent, so it is working on supposition, not reality. The reality has been that money has been returned by the LRA *[Inaudible.]* We have to be sensible about public expenditure while not denying people their rights.

Ms S Ramsey:

I agree with you, but I cannot understand why there has been an issue, considering that the LRA is an arm's-length body. The matter should have been sorted before it got to the Committee.

The Committee Clerk:

It is the nature of the argument. The Department has offered its reassurances, but, for whatever reason, the LRA is not willing to accept them. It is hard to comment on that, but members must make their own judgement.

The Chairperson:

I want to move this on. We have three options. First, we can agree the clause. Secondly, we can reject it and ask for further consideration. Thirdly, we can go to a division and vote on it. Do members wish to accept clause 8?

Mr P Ramsey:

I have some sympathy with Sue Ramsey's proposition. We do not want to have a division on the clause. It is open to interpretation. If it were humanly and physically possible, could we delay a decision on this clause and convene a meeting on Monday or Tuesday to ratify any possible amendments?

The Chairperson:

There are problems with the timescale. We have spent a large amount of time on this clause. We heard from the Labour Relations Agency no later than last week, and we heard from departmental officials. Departmental officials made it very clear to the Committee that the interpretation of clause 8 was such that it would not disadvantage people seeking their rights from the Labour Relations Agency.

The Committee Clerk:

I will try to re-angle this. The Bill is moving from a duty to a power and from the LRA's being made to do something to having discretion. Financial issues are not in the Bill, and the Bill is what needs to be considered. Everything else is implication and people's interpretation. In this clause-by-clause consideration, we need to look at what the Bill says. The wording in the Bill is fairly simplistic and straightforward. It is moving from a duty to a power; it is moving from the idea of the LRA's being forced to do something to its being allowed to prioritise. Finance is not mentioned in the Bill. The financial arguments relate to the Department and to the LRA; they are not in the Bill.

Mr Weir:

I understand where Sue is coming from and what is being said. However, I also understand that we are under time constraints. I wonder whether this may be less a breakdown of the wording than an underlying breakdown of the relationship between the Department and the LRA. If that is the case, I suspect that giving them an extra couple of days to try to get something sorted out will not work, because there is a deeper underlying problem. In the light of what is in the Bill, as opposed to concerns about future developments, which are not in the Bill, I am happy to accept the clause.

The Committee Clerk:

I suggest that the report reflects the heavy caveats, that members' concerns are highlighted, that any agreement, if that is what members want, is based on what the clauses are literally saying, and that members and the Committee will have a watching brief on how the other issues develop. The vote is very much on the clauses as they are drafted.

Question put, That the Committee is content with the clause.

The Committee divided: Ayes 5; Noes 0.

AYES

Mr S Anderson, Mr Bell, Mrs D Kelly, Mr P Ramsey, Mr Weir.

Question according agreed to.

Clause 8 agreed to.

The Chairperson:

I note that Claire McGill and Sue Ramsey abstained.

Clause 9 (Conciliation after bringing of proceedings)

The Committee Clerk:

I will talk about clause 9 and clause 13 together. Clause 9 deals with industrial tribunals, and clause 13 deals with fair employment tribunals. We will come back to clause 13, but the two clauses need to be looked at together.

The purpose of these clauses is to give the LRA the duty to offer conciliation to parties that are involved in particular types of industrial tribunal cases. That is time limited to between seven and 13 weeks after a claim has been lodged. More complicated cases, including industrial tribunals and fair employment tribunal discrimination cases, are not subject to those limits. After the time limit expires in relevant cases, the agency is no longer under a duty to offer conciliation but retains the power to do so. Clauses 9 and 13 remove the legislative provisions requiring that the LRA's duty to offer conciliation revert to a power to do so. It allows them to act independently.

Question, That the Committee is content with the clause, put and agreed to.

Clause 9 agreed to.

Clause 10 (Recovery of sums payable under compromises involving the Agency)

The Committee Clerk:

Clause 10 is linked to clause 14 and is similar to clause 7. It deals with LRA-brokered settlements of issues that could, or otherwise would, be determined by a tribunal. The Committee spoke previously about the idea of streamlining and making things faster. Where a settlement includes an agreement for one party to pay the other a sum of money and that sum of money is not paid and the other party wishes to enforce payment, the clause will enable the party seeking payment to pursue the matter through the courts without the initial need to seek a County Court

order. Again, it takes out that intermediate step. The clause will apply in cases only in which the conciliated settlement simply requires the claimant not to commence tribunal proceedings or, where they have begun, to end them. It will not be possible to use the process in situations in which the terms of the conciliated settlement are more complex.

Question, That the Committee is content with the clause, put and agreed to.

Clause 10 agreed to.

Clause 11 (Powers of Fair Employment Tribunal in relation to matters within jurisdiction of industrial tribunals)

The Committee Clerk:

The fair employment tribunal has the power to hear, alongside the fair employment aspect of a complaint, additional aspects of a complaint that relate to other forms of alleged unlawful or unfair discrimination. Any other aspect of the complaint, such as a claim for unpaid wages or a breach of contract, must be heard and determined as part of a separate industrial tribunal proceeding. Since all aspects of the claim often arise from the same original set of facts, that duplication of effort, that is, the need to have two separate tribunal hearings, is administratively wasteful and an unnecessary burden on all the parties that are involved in a tribunal case. The aim of the clause is to amend existing legislation to remove that anomaly and to allow the fair employment and the industrial tribunal aspects of cases to be heard by the fair employment tribunal as part of one tribunal proceedings, rather than being split.

Question, That the Committee is content with the clause, put and agreed to.

Clause 11 agreed to.

Clause 12 (Conciliation before bringing of proceedings)

The Committee Clerk:

The Committee dealt with clause 12 previously, and it is linked to clause 8. I gave the description of how the two clauses operate together. The Committee divided on clause 8, and it must decide what it wants to do with clause 12.

Question put, That the Committee is content with the clause.

The Committee divided: Ayes 4; Noes 0.

AYES

Mr S Anderson, Mr Bell, Mrs D Kelly, Mr P Ramsey.

Question accordingly agreed to.

Clause 12 agreed to.

The Chairperson:

I note that Claire McGill and Sue Ramsey abstained.

Clause 13 (Conciliation after bringing of proceedings)

The Committee Clerk:

Clause 13 was dealt with as part of my discussion of clause 9. I gave a full description of clause 13 at that point.

Question, That the Committee is content with the clause, put and agreed to.

Clause 13 agreed to.

Clause 14 (Recovery of sums payable under compromises involving the Agency)

The Committee Clerk:

Clause 14 was similarly dealt with as part of the description of clause 10. The description still stands for clause 14.

Question, That the Committee is content with the clause, put and agreed to.

Clause 14 agreed to.

Clause 15 (Time off for study or training)

The Committee Clerk:

Clause 15 applies with schedule 3 and deals with time off for study or training. Members will recall that this element was new to the Bill. It was not part of the Committee's original consultation, but the Department consulted on it.

These provisions introduce powers that will allow for the subsequent introduction of a new right for qualifying employees, that is, those who have served 26 weeks as an employee, to make a formal request to their employer for time away from core duties to undertake study or training. An application will be for study or training that is intended to improve both an employee's effectiveness at work and the effectiveness of the employer's business. Therefore, a request

cannot be an unrelated request; it must be relevant to an employee's work and to their employer's business.

Employers will be obliged to give serious consideration to such requests and can turn them down on the basis of a specified list of business reasons that is comparable to the list that is already in place for the right to flexible working. The business reasons that can be given for refusing a request are very similar to those for flexible working. The permissible grounds for refusal are listed at schedule 3, which is why clause 15 works with schedule 3.

Question, That the Committee is content with the clause, put and agreed to.

Clause 15 agreed to.

The Committee Clerk:

We also need to agree the delegated powers of the Bill. Those have been examined by the Examiner of Statutory Rules, and he is content with them. I will run through very quickly where those delegated powers lie: clause 4(2); clause 5; clause 6(3); clause 10; clause 14; clause 17; and schedule 3.

The Chairperson:

Are members content to agree the delegated powers?

Members indicated assent.

Clause 16 (Repeals)

The Committee Clerk:

Clause 16 is the repeals clause. Essentially, this clause takes out or repeals any legislation that sits in the way of the Bill or that needs to be modified by the Bill.

Question, That the Committee is content with the clause, put and agreed to.

Clause 16 agreed to.

Clause 17 (Commencement)

The Committee Clerk:

Clause 17 sets out when the Bill will be enacted.

Question, That the Committee is content with the clause, put and agreed to.

Clause 17 agreed to.

Clause 18 (Short Title)

The Committee Clerk:

Clause 18 is the short title. At the moment, the running short title is the Employment (No. 2) Bill, because there were two Employment Bills running at the same time. This will obviously become the Employment Act 2011, because the previous Employment Bill was given Royal Assent this year, but that will not happen for this Bill until next year.

Question, That the Committee is content with the clause, put and agreed to.

Clause 18 agreed to.

The Committee Clerk:

There are four schedules, which, as we have gone through, apply to different clauses.

Schedule 1 is the repeal of the statutory grievance procedures and the resulting consequential amendments. The Committee has agreed to schedule 1 already.

Schedule 2 agreed to.

Schedule 3 (Time off for study or training)

The Committee Clerk:

Schedule 3 has two parts. Part 1 is time off for study or training, with provisions being inserted as Part 7A of the Employment Rights (Northern Ireland) Order 1996.

The Chairperson:

Are members content to agree that part of the schedule?

Members indicated assent.

The Committee Clerk:

Part 2 of schedule 3 deals with the related amendments to employment law that flow from the

rights for training and time off for study.

The Chairperson:

Are members content to agree that part of the schedule?

Members indicated assent.

Question, That the Committee is content with the schedule, put and agreed to.

Schedule 3 agreed to.

Schedule 4 (Repeals)

The Committee Clerk:

Schedule 4 is the general list of existing legislation that must be repealed to enact the Bill.

Question, That the Committee is content with the schedule, put and agreed to.

Schedule 4 agreed to.

Long Title

The Committee Clerk:

Members have to decide whether to agree on the long title of the Bill, which is:

“A Bill to make provision about the procedures for the resolution of employment disputes and the procedures of industrial tribunals and the Fair Employment Tribunal; to make provision in relation to time off for study or training; and for connected purposes.”

The long title lays out the scope of the Bill and would be assessed against making amendments to that Bill in the future.

Question, that the Committee is content with the long title, put and agreed to.

Long title agreed to.

The Committee Clerk:

That completes the formal clause-by-clause scrutiny. It may be ambitious, but we hope to bring the report on the Bill to the Committee for its approval next week.

The Chairperson:

That report will reflect the caveats, concerns and issues that have been raised.