



Northern Ireland
Assembly

Committee for Employment and Learning

OFFICIAL REPORT (Hansard)

Posting of Workers Directive

20 June 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Basil McCrea (Chairperson)
Mr Thomas Buchanan (Deputy Chairperson)
Mr Jim Allister
Mr Sammy Douglas
Mr Chris Lyttle
Mr Fra McCann
Mr Alastair Ross

Witnesses:

Mr Conor Brady	Department for Employment and Learning
Mr Tom Evans	Department for Employment and Learning

The Chairperson: I welcome Tom Evans and Conor Brady. I invite you to give us a quick résumé on the European Commission's proposals for the posting of workers directive. Fire ahead.

Mr Tom Evans (Department for Employment and Learning): The Minister wanted to take the Committee's views on the latest EU proposal relating to the posting of workers directive. That was the purpose of the paper that the Committee received on 21 May. Subsequent to that correspondence, the GB Minister for Employment Relations, Consumer and Postal Affairs wrote to the Minister, outlining the proposed UK negotiating position and asking for a Northern Ireland view. The Minister has been asked to provide that response in advance of a June meeting of the EU Employment and Social Policy Committee. I will briefly cover the background to the proposal, and Conor will go into the detail around enforcement and the regulation.

In March 2012, the European Commission published two new proposals relating to posted workers: a proposed new enforcement directive, which seeks to improve implementation and enforcement of the existing directive, and a proposed regulation to address, among other things, the right to take collective action. The proposals have not yet been agreed by EU member states, and it is likely that the discussions on the proposals will take place over the coming year, and it may take longer.

The original posting of workers directive requires that, where a member state has certain minimum terms and conditions of employment in force, those must equally apply to workers temporarily posted to work in that member state. When the directive was transposed in the UK, it was considered that the existing domestic employment law was sufficient to meet the requirements of the directive and, as such, only minor changes were made to employment rights legislation.

On the impact of the original directive, there has been ongoing debate in the EU about its effectiveness and implementation. The Court of Justice of the European Union has ruled on a number

of cases about the extent to which members can set controls on businesses that seek to post workers to their territory, as well as on the scope of the employment terms and conditions set out in the directive. Existing EU case law has addressed the question of the balance between social freedoms, particularly the right to strike, and economic freedoms. There are also concerns about evasion of the requirements of the directive and bogus posting by rogue businesses. As a result of those issues, the Commission published the new proposals. Conor will pick up on the details.

Mr Conor Brady (Department for Employment and Learning): It might be useful if I briefly set out exactly what a posted worker is. A posted worker can take three forms: first, a posting under a contract between a service provider in one country and a client in another country; secondly, a posting in a single company that operates across different jurisdictions operating in different countries; and, thirdly, the hiring out by a temporary employment firm to a user business in another member state.

The number of posted workers in the UK is very small in comparison with the overall workforce. It amounts to around 37,000, of which Northern Ireland has a very small fraction, normally around one fortieth. The draft enforcement directive proposed by the Commission aims to improve the existing directive in a number of different ways: by better defining what constitutes postings and posted workers; by improving co-operation and sharing of information; by publishing the employment rules that are applicable to posted workers; by placing limits on the information that member states can ask for; and by introducing a new subcontracting provision to make contractors in the construction sector liable if their subcontractors do not meet their responsibilities to posted workers.

The UK Government propose to resist the introduction of the final point that I made relating to the statutory joint-and-several liability provisions for the construction sector. That provision would make companies whose subcontractors use posted workers liable for certain actions of the subcontractors; for example, failure to pay wages. The UK Government consider that those measures would put in place different conditions for posted workers when compared to national workers, and it would risk distorting the single market and the free movement of workers by making companies that use posted workers less attractive. In particular, the Government believe that it would make businesses less likely to engage small and medium-sized enterprises (SMEs) and microfirms when they are subcontracting, due to perceived risks. You do not need me to tell you of the potential impact that that could have in Northern Ireland, where we have an economy almost dominated by microfirms and SMEs.

The UK Government do not operate a notification system, so we will not be directly affected by the proposal. UK businesses would, however, benefit from simplified notification systems in other member states when they post workers abroad in those member states, but the UK Government will seek to resist any attempts to try to change the proposal to extend the scope of a notification scheme. The Government also intend to broadly support the draft proposals, which set out ways to improve how member states will co-operate on information exchange with a view to improving enforcement. However, the Government will also seek to ensure that any information requests from labour inspectors in other member states are reasonable and do not place a disproportionate burden either on labour inspectorates in the UK, or on UK businesses.

The proposal also includes a requirement for member states to carry out risk-based inspections to ensure that the directive is respected. While many other member states will have dedicated single labour inspectorates, we do not in the UK. As you are aware, there is a mix of national minimum wage and employment agency inspectorates, as well as the employment tribunal system.

The UK Government have indicated that they intend to broadly support the proposal, provided that any enforcement measures do not require member states to introduce enhanced enforcement provisions. Bearing in mind the very small number of posted workers in Northern Ireland and the rest of the UK, the creation of additional enforcement burdens may create disproportionate costs and would not be consistent with the better regulation principles under which we operate in Northern Ireland. That deals with draft enforcement directive, and I will move on to the regulation.

The Commission has proposed three elements under the regulation: an attempt to clarify EU case law on the balance between the right to strike and economic freedoms; an alert system for serious collective action that is likely to disrupt the single market; and a requirement that posted workers have equal access to alternative dispute resolution mechanisms. The UK Government have indicated that they will not support the current draft of the regulation as they consider that it does not add any value and would serve as a distraction for the EU at a time when focus should be on growth and supporting activities. The Government's objections are less to do with the content of the regulation as drafted and more to do with the view that the regulation is not required.

Progress on agreement to the proposed regulation is likely to take an awful lot longer in comparison with any progress on the enforcement directive, as unanimity in the EU Council is required for it and there is a significant distance between member states on the wording of the proposed regulation. In addition, the Danish presidency and the subsequent Cypriot presidency have stated that the directive will be a priority but have both been silent on the regulation.

That is an overview of the enforcement directive and the regulation. Tom and I are happy to take questions.

Mr Allister: The directive and the regulation have quite a way to go before they are agreed. Even in EU terms, it is still relatively early days. However, at the end of it all, it is hard to imagine that Northern Ireland interests will be any different from those of the UK Government on either the directive or the regulation. Is that not right?

Mr C Brady: To an extent, yes.

Mr Allister: Is there any limit or qualification to that?

Mr C Brady: We do not think so, because the UK Government's proposed approach to negotiation is pragmatic. Your original point was about the distance yet to travel, and we do not think there will be any progress on the regulation within the next 18 months at minimum because member states are polarised on it.

We do not think that there is anything in the proposal on the directive that would cause us undue concern provided that, under the UK Government's approach, any further requirements are proportionate and reasonable. Given the very small number of posted workers operating in Northern Ireland, any requirements placed on us have to be proportionate and reasonable. In that sense, there is no real distance between what we would propose and what the UK Government are proposing in their negotiations.

Mr Allister: There is a cross-border dimension to the building industry, for example. Is there a situation where people are coming from the Irish Republic and are de facto posted in that they are here for the duration of a contract but have not been regulated as posted workers and are simply operating on the principle of free movement of labour?

Mr C Brady: There is a possibility that that may happen. That said, I think the definition of what constitutes a posted worker will be tightened up by the new enforcement directive.

Mr Allister: Yes; that would take those people out.

Mr C Brady: I think it would.

Mr Allister: There is a view that, under the current definition, they may just be in, but you are expecting a tightening of the definition.

Mr C Brady: That is certainly what is proposed under the new enforcement directive. We have been speaking to our colleagues in the Republic of Ireland to get their views on their negotiation. They are operating along reasonably similar lines to ourselves but even then the number of posted workers operating in the Republic of Ireland is minimal. They seem to think that there are 2,000 to 3,000 operating under the current definition of what constitutes a posted worker. Again, that just brings us back to —

Mr Allister: I think of Michelin, in Ballymena, where there would be posted workers from France, etc. No doubt, there are others but it is on a very small scale, I think.

Mr C Brady: It very much is. Until now, we have received no representations within Northern Ireland about a need to regulate posted workers because of the small numbers and the contractual basis under which they operate. So we would have to ask that, if there is not particularly a need for greater enforcement, any requirements or proposed requirements coming from the Commission should be proportionate, reasonable and appropriate.

Mr Allister: The one aspect of the directive that may have most impact is the joint-and-several liability on main contractors. This British Government seem pretty robust on that and there is no reason why we should not be supportive of that stance, is there?

Mr C Brady: There are two reasons in particular why we should be supportive of that stance. One, which I touched on during the presentation, is that it has the potential to disrupt the single market by effectively placing responsibilities on contractors for the actions of their subcontractors, if only in the construction industry. That introduces a difficulty whereby subcontractors, which are mainly SMEs and microfirms, will effectively be not selected in that process. That is what I mean about the potential for the single market to be disrupted.

Another element relates to subsidiarity. Subsidiarity is basically the principle that EU legislation should not legislate where national Governments are best placed to do so. I do not think there is any argument with the idea that there should be mechanisms in place for, for example, posted workers to be able to reclaim any unpaid wages. Those mechanisms are in place. However, for the Commission to specify what that mechanism should be has the potential to undermine the notion of subsidiarity. That point was raised with the Commission by not just our own House of Commons but by a number of Parliaments.

Mr Allister: The issue of competence also arises in the regulation. Under the regulation, the EU, for example, would be regulating strike action, which would not be an EU competence.

Mr C Brady: That is a very good point, but we do not believe that the regulation, as drafted, infringes upon subsidiarity principles because all it simply does is to seek to codify judgements that have been made in the Court of Justice of the European Union in that respect.

Mr Allister: But the bottom line on both of these is that, whenever they come about, our interests are likely to be no different from those of the UK. Therefore, whatever stance the Department for Business, Innovation and Skills takes in London is likely to be the stance of the Department for Employment and Learning or its successor.

Mr Evans: The Minister's view was that it seemed a reasonable stance but we wanted the Committee's view. We are pressed for time by the UK Government with regard to a major meeting at the end of June.

Mr Allister: Thank you very much.

Mr F McCann: I take it that posted workers are sent by firms who are paid the rate they would be paid in the country where they come from and be protected on that. From what I read here, I take it that quite a lot of people are agency workers who would be paid at a minimum wage or below a minimum wage. When you hear that the British Government are going to oppose it, that may mean that there is better protection for those people within the enforcement directive. Is that the case? Is this to give people more payment and job protection rights?

Mr C Brady: The short answer to that is no. Posted workers operating in Northern Ireland and the rest of the UK already have access to the range of employment protections and redress that are in place for national workers. The directive seeks to enforce that slightly better. It is not about the provision of additional rights, because posted workers already have access to the range of rights that national workers have.

Mr F McCann: You hear all sorts of horror stories about agency workers coming in and being paid well below the minimum wage. I take it that that does not —

Mr C Brady: It does not. That is a slightly separate issue, and the introduction of agency workers complicates the matter a little bit more. HM Revenue and Customs has a regulatory regime in Northern Ireland and the rest of the UK for ensuring that any workers, agency or otherwise, are paid the national minimum wage. The requirements of the directive in that respect are already met by the UK. The responsibility for looking after agency workers, in respect of the issue you raise, lies with Revenue and Customs, but that mechanism is already in place.

Mr Douglas: Thank you for your presentation. I have a couple of questions. I suppose this links to Jim Allister's point. This EU directive is still very much in the early stages. Are you looking for a steer from us today? Will this come up again?

You mentioned numbers. Are we talking about thousands? I think you said that there were 37,000 in the UK and that we had a small percentage of that. If it is 10%, you are talking about thousands of workers.

Where does Invest Northern Ireland and the likes of the Federation of Small Businesses (FSB) stand on this? Many of the federation's members might be affected by it.

Mr C Brady: I will deal with the first couple of points. You are absolutely right; this is very much in its early stages. When we were dealing with the agency workers directive last year, the Committee rightly made the point that it should have a role with regard to inputting into the UK negotiating position at as early a stage as possible. Effectively, that is what we are trying to do today; we are trying to give the Committee that opportunity.

For issues relating to the labour market in Northern Ireland, we normally operate as a factorial of one fortieth of whatever the situation is in the whole of the UK. When you talk about 37,000 or 38,000 workers in the whole of the UK, that equates to just under 1,000 for Northern Ireland. However, given our land border with the Republic of Ireland, there is a possibility for that to be slightly increased, but because of the fluid nature of posted workers, it is difficult to get a definite figure at any given time. However, we are probably looking at between 1,000 and 2,000 workers from the whole of the workforce. It is less than 0.5% of the entire Northern Ireland workforce.

On Invest NI and the FSB, it is hard to say where they stand at this stage. We have not consulted with anybody, because, at this stage, we do not have anything on which we can consult. I cannot say what their views are.

Mr Evans: We have very good arrangements for consulting. The FSB is part of a steering group that we meet with. We brief them on all developments. It is at a very early stage. Obviously, it will have an interest in this, and we will keep it apprised.

The Chairperson: That was a classic bit of Civil Service work, gentlemen; it has been really good. You have got us through this with no problem, despite Jim's interrogation. I think everybody is happy for you to proceed. Thank you.