Northern Ireland Assembly

Committee for Employment and Learning

OFFICIAL REPORT (Hansard)

Responses to the Employment Law Consultation: Department for Employment and Learning

4 June 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Robin Swann (Chairperson)
Mr Sammy Douglas
Mr Phil Flanagan
Mr David Hilditch
Mr Chris Lyttle
Mr Fra McCann
Ms Bronwyn McGahan
Mr Pat Ramsey
Mr Alastair Ross
Ms Claire Sugden

Witnesses:

Mr Tom Evans	Department for Employment and Learning
Dr Alan Scott	Department for Employment and Learning

The Chairperson: I welcome Tom Evans, deputy director of strategy in the European and employment relations division, and Dr Alan Scott from the employment relations policy and legislation branch. Tom and Alan, it is over to you. We might break the session down into chunks, if you do not mind.

Mr Tom Evans (Department for Employment and Learning): I was going to suggest that, Chairman. It was in my script. Thank you very much for the opportunity to come along.

You have the fairly detailed document that we provided. That sets out the responses to the consultation on employment law, which closed last November. We had 42 responses, and most were very detailed on all aspects of it. The consultation covered two of the themes in employment law: the early resolution of disputes and better regulation measures. The Minister wanted us to come along today to provide the paper, give you a sense of what consultees were saying and offer you an opportunity to comment on the policy options set out in the paper. Members will have their own questions seeking clarification. It is a detailed paper, so I propose to stop after going through each of the main elements. Alan and I will then take questions before we move on to the next element.

The first theme is the early resolution of disputes. That is about creating the environment that encourages greater numbers of disputes to be resolved at an early stage without the need to go to a costly and often time-consuming tribunal proceeding. The main proposal consulted on was to move to creating an early conciliation service whereby all prospective claimants to tribunal would have to route their claims through the Labour Relations Agency (LRA), which would then offer its service to them.

I will give you a sense of the general responses. What emerged is that the LRA continues to be highly valued by all in the employment relations stakeholder community: employers, employees and their representative bodies. A high volume of the responses stated that early resolution — resolving disputes before going to tribunal — was a key issue and saw it as a positive.

There was overall support from consultees for the proposal to establish the early conciliation service whereby potential claims would go to the LRA. Reasons given were the potential to avoid unnecessary tribunal cases, speedier and less costly resolution disputes and the opportunity to repair the employment relationship. In earlier presentations, I think that the opportunity costs related to that were a concern.

Among the concerns about the proposal were a wariness about introducing extra layers of bureaucracy; delaying tribunal proceedings for people keen to move forward; the possibility of satellite litigation; what should be recorded on an application for early conciliation and what should go on the certificate that the LRA would then issue following the process of offered early conciliation or after that conciliation process had happened. There was also a concern about the impact on tribunal time limits. However, the more detailed concerns were about its operation, and it was flagged up that, if that service were to be introduced, the model delivered should ensure that that does not happen. This service has already been in place in the rest of the UK since May this year. In anticipation that this might happen, the LRA is at least looking at that and starting to look at the particular issues raised.

A vast majority of respondents favoured a stop-the-clock mechanism, which would avoid the concerns about the impact on tribunal time limits. Most consultees said that the LRA should deal with any concerns about the administrative elements: if it delivers the service, it should put in place the systems to avoid that.

The second element of the early resolution was a proposal to introduce a neutral assessment process, which is about potential claimants and respondents in tribunals getting some sense from an independent person from the LRA, particularly from one of the LRA's arbitrators, about the respective merits of at least having an informed position about where they want to go next. Consultees were supportive of that and said that it could reduce tribunal cases by bringing reality to the employer and the employee; it would assist unrepresented claimants; and it could create a more realistic expectation of outcomes. In earlier consultations, the suggestion was that some claimants had an unrealistic expectation of what might happen, even if they won their case, and, similarly, employers had an unrealistic expectation of the relative costs of bringing that reality to bear. There was also the suggestion that there would be reduced costs.

There were some reservations about how the process would operate. In general, it is a new concept, and some consultees said that they needed to know more about it. We organised some consultation events, and the same feeling emerged from those. People said that it sounded good but that they needed to know more about it. There were some concerns about the implications of independence. If it were to be delivered by LRA conciliators, they might say to an employee that they had a good case against their employer or, vice versa, a weak case, which could compromise the very valued independence. That is why the proposal would probably be delivered by the LRA arbitrators, who are there to make decisions. Other concerns were that it could add an additional layer of bureaucracy, it could question the value if the neutral assessments were not binding and it could be a distraction from conciliation.

I will move on to some of the more general issues about strengthening employment relations. We did some earlier research into what SMEs needed, and, as a result, asked some questions in the consultation. The Committee had also regularly asked how we were dealing with the needs of small and medium-sized employers and, in particular, micro employers. Again, there were very strong references to the positive role of the LRA in delivering services to SMEs. Of those who responded, some expressed support for a subsidised mediation service to be delivered or managed by the LRA.

That was an overview of the consultation responses, Chair, and, on the basis of those, we set out a range of policy options.

The first concerns whether we move to introduce a new early conciliation service or retain the existing arrangements. Within the existing arrangements, we developed, coming out of an earlier review a number of years ago, a pre-claim conciliation service, which is about the LRA being proactive through its helpline in identifying cases that could benefit from early resolution. The early conciliation service would build on that practice.

Another policy option would be to restrict early conciliation to specified jurisdictions. Obviously, there are some areas for which that may not be suitable: for example, if somebody was complaining of harassment — it could be physical, emotional or whatever. So that option that might need to be looked at. A neutral assessment could be introduced or, in the first instance, piloted. Some stakeholders said that the LRA supports a round-table forum of external stakeholders, covering employer bodies and union bodies, and said that it might be useful to road-test that option before moving to full implementation.

Another option is to postpone it until, having introduced early conciliation, if we do that, we see whether it had an appreciable additional positive impact and, therefore, the service of neutral assessment might not be needed.

A final option — we tried to explore all the options for the benefit of the Committee and the Minister and to inform any decision that you take — is to postpone the neutral assessment until the LRA's current statutory arbitration scheme has been reviewed. The Minister has given a commitment on that, and, over the summer, we will develop, with the LRA, the terms of reference, with a view to looking at how that service has worked.

On embedding good practice, one option is to trial a support scheme, which would help SMEs to develop robust systems to discharge their responsibilities as an employer.

Another option is to trial a scheme that would provide SMEs with access to a free or subsidised mediation support service. There has been a pilot in GB of that over the past number of years.

Another option is that the LRA target SMEs more specifically with their support services.

A final option is that the LRA proactively target respondents after tribunal hearings, particularly when a tribunal has found in favour of an employee against an employer. That would involve going back to the employer to say that there may be some procedural and operational weaknesses in their current systems that we might be able to help with.

Chair, I want to stop there. I have covered quite a lot of ground. Those were the general responses to the consultation and the options that we think should be explored.

The Chairperson: Tom, in general, not specific to this discussion, what is the next step for various policy options? Who distils them?

Mr Evans: The Minister's view was that we should talk to you about this. Today is part of an iterative process and part of the consultation. Following discussion on what the Committee feels about the range of proposals, the Minister will need to take stock of that, with a view to taking to the Executive a paper that sets out what the consultation generated and where the weight of argument lies in the responses. The Minister is keen to understand whether the Committee has a particular view on any of the options. I recognise that there are a lot of options, but the Committee might want to express a view on only a small number of those. I am not here to blitz you with options, but I think it reasonable that we explore all of them. The Minister is keen to go to the Executive with a paper, hopefully before the summer recess, at least to put it into the system. Some proposals would require primary legislation and an employment Bill. So it is about preparation and having lead-in time. I am conscious that we have two years of the current mandate left. The aim is to ensure that all the good work is not lost by virtue of a Bill falling because of time constraints. It is very much about that, Chair.

The Chairperson: The responsibility, or input, of the LRA seems to be increasing. It came up with a different model in its response and offered:

> *"An option in respect of exemption is to exclude other categories of claim which are unlikely to settle in a four week period e.g. discrimination claims".*

How did that fit into your thinking?

Dr Alan Scott (Department for Employment and Learning): Claims are generally believed to be settled more easily when there is an issue at stake: for example, money is owed or something else that is fairly simple. In a discrimination claim, however, there may be facts to be established and fundamental disagreements on how people view the situation. It may be deemed that the LRA would not be able easily to resolve or get to the bottom of such a claim within that short period of four weeks.

Of course, the objective is not to slow up the tribunal process, and we do not want to delay it for as long as it takes to resolve such a case. One option, therefore, is that such cases would not be included in this scheme and that they would just proceed, as they do now, to the tribunal system straightaway, with the LRA, of course, continuing to offer conciliation as that proceeds. The more simple cases will feed straight in to the LRA because there is a greater possibility for them to be resolved within a four-week period.

Mr Evans: The counterargument is that some people who have a discrimination claim may ask whether they are being discriminated against. They may not be, but the reality is that it would not stop people seeking the LRA's services. It is just that they would not be forced to do so, and it is an option.

The Chairperson: On neutral assessment, one option is to service a pilot area. Do you pilot that by geographic area, by sector or by employer?

Mr Evans: We have no grand plan behind this. Neutral assessment would be based on need. As this is new, it would be for the LRA, which would deliver the pilot, to come up with a proposal on how it might do so. It would be about promoting it over a period. With a pilot, it is a matter of looking at what would be regarded as positive outcomes. We would look also at whether the pilot could be measured against a control group to see whether it had an appreciably better impact. I imagine that it would be very much about who wanted to avail themselves of it. The LRA piloted its pre-claim conciliation service but did not restrict it geographically. It promoted it quite aggressively for a period.

The Chairperson: It is suggested that SMEs be given free access to subsidised mediation support under a trial voucher scheme. How would that develop, or how would you roll that out?

Mr Evans: We have not worked through that, but the GB Departments introduced it some years ago. Funding mediation can make it quite costly, and it would then be for the few. The Departments in England funded high quality training in two areas for about 30 people working in SMEs so that they were then competent mediators. That developed a pool of competent mediators who could mediate in their own company. As you know, someone who has a problem will probably not trust the person concerned. On a pro bono basis, someone from within the network provides mediation, and that seems to work well. It is about developing a capacity and a capability to deliver mediation, potentially, we hope, on a pro bono basis. Mediation is already used and paid for on a commercial basis, but we are talking about it being done through the LRA not on a commercial basis. It is about how best you extend the service to as many small employers as you can.

Mr Douglas: Your report states that the review takes account of other processes, not only in the rest of the United Kingdom but in the Republic of Ireland and internationally. Tom, will you outline what conclusions you have come up with to date? Do some of your conclusions come from international jurisdictions? I was particularly thinking about the stop-the-clock situation. Will you explain a wee bit more about that? How do you start and stop the clock?

Mr Evans: Alan is the expert on clocks, so I will pass that question over to him.

Dr Scott: When somebody applies to an industrial tribunal, there is a specified time limit in the legislation — usually three months but in certain cases six — for them to get their claim in. The idea is that, when early conciliation starts, the tribunal time limit is paused in order for the early conciliation to proceed. That is so that somebody is not disadvantaged through applying to the tribunal. When the LRA contacts the person, the time limit would be paused. If the LRA establishes that the person is not interested, conciliation does not succeeded or the person cannot be contacted, it would issue a certificate showing that the time limit had been on pause but now continues. The tribunal would have documentation to show that to be the case.

Internationally, we have liaised with colleagues, particularly those in Dublin. They have made certain changes recently. They have had a fairly fundamental review and brought together a range of their dispute resolution services. In fact, in some ways, those are beginning to resemble what is going on here a bit more. It is a matter of taking into account, as we did in our earlier dispute resolution review, the best examples, such as the service that they use to bring people together before formal legal proceedings. A little of the thinking behind early conciliation is that people have to go to it, or at least be offered it, so that there is an opportunity for them to explore whether the matter can be settled before it goes to a legal process.

Mr Evans: We had a video conference with colleagues in New Zealand, and they work on a good-faith basis that is based on the legislation. The presumption is that people will try to settle. It is hard to migrate a whole system, but the pre-claim conciliation is about encouraging people to try to settle on a good-faith basis, with equal opportunity and the balance of power equally split between the employee and employer. It seems that the pre-claim conciliation worked well. Early conciliation is a further development of that. It forces people at least to consider early resolution.

Mr Douglas: Finally, I have another question for Alan. You mentioned contacting colleagues in Dublin. The issue of all-island companies having different legislation has come up in the Committee before. Is there much difference between our legislation and that in the Republic of Ireland?

Dr Scott: There are some substantial differences, so there is no opportunity to join it up, as such, and you cannot, as Tom said, transplant a system. However, there are certain lessons that we can learn from the principles behind it.

Mr Evans: The fundamental difference between the Republic's system and ours is that they do not have individual conciliation. They developed a new arrangement. As it happens, the legislation is currently stalled in order to establish a workplace relations commission, which would bring together the Labour Relations Commission — the equivalent of the LRA — the Equality Tribunal and the Employment Appeals Tribunal. The commission would be the body of first instance — the body that you would go to if you had a problem with your employer. It will introduce individual conciliation and offer an adjudication service, which is the Republic's rights commissioner service, what happens in the Equality Tribunal and what happens in the Employment Appeals Tribunal.

Colleagues from the Republic came up to Belfast, and I facilitated a day for them to talk to the LRA about individual conciliation and pre-claim. It was encouraging that we were passing on good practice. They thought that the pre-claim conciliation — through a helpline, they were trained to target cases and understand whether it sounded like they could settle them — was of benefit. It is about convincing people to do that. We have reinforcement that some of what have been doing is quite positive.

Mr P Ramsey: Good morning and welcome. This is hugely important work, and you are taking the right and very sensible approach. I want to go back to the Chair's earlier point on your digesting all of this information and, possibly, preparing primary legislation. What is the time frame for that?

Mr Evans: For primary legislation to happen, the Committee and the Executive need to be comfortable with it. The Minister will have to go to the Executive with specific proposals. At this stage, I have no sense of a time frame. We hope to seek to introduce legislation in the autumn — the latter part of this year. The key part is that the early conciliation proposal requires primary legislation to change the functions of the Labour Relations Agency. This specific proposal requires primary legislation. I am not hedging my bets on a time frame; I just do not know.

Mr P Ramsey: I am thinking about the stage at which we should invite the LRA and other stakeholders, including the trade unions and businesses, to give us a presentation on how they see this. That is for somebody to decide in the future.

The Chairperson: OK, Tom. Will you move on to the next element?

Mr Evans: Next are the consultation responses to better regulation. First, I will deal with the unfair dismissal qualifying period. In essence, the current procedure is that there is a one-year qualifying period before an employee can take an employer to a tribunal for unfair dismissal. We set out a significant range of options in the consultation document and received some 35 responses to those. Twenty favoured retaining the one-year qualifying period because they saw no evidence to indicate a need to increase it. The 15 who favoured an increase felt that it would create greater flexibility and more time to assess the competence of employees in the workplace.

We raised a range of options for increasing the qualifying period in particular circumstances for selected groups, particularly new employees, business start-ups, SMEs or foreign direct investment (FDI) companies. There was little appetite for that. People said that we would create a two-tier system. One or two consultees supported it, but, in the main, people said that it would cause confusion and difficulties through creating a two-tier system.

In the consultation, we presented a great deal of evidence on the influence of changes in qualifying periods over the years, going back to 1996. We asked people whether they agreed with the evidence base or had any evidence to offer. No evidence base was produced or offered to suggest that the period should move to two years. Some said that it would have no appreciable impact and might create volatility, but others said that it would create a certain perception and have an indirect impact on building confidence. They said that, in doing so, it would be helpful in making Northern Ireland companies more competitive. Those were the general arguments. The options are fairly straightforward: retain the existing period; retain the existing period except for redundancy situations — one organisation suggested that you could have an exception for redundancies for two years, which would align with the qualifying period for redundancies; increase the qualifying period from one to two years; and the option remains of increasing the qualifying period for selected groups.

The Chairperson: Tom, the numbers have dropped; there were 35 consultation responses. Were you expecting more or are you content with the responses you got?

Mr Evans: The response we got to the consultation overall was 40 and 35; it is a very good response, because they were very detailed and we got a huge volume of paperwork. We can make all the responses available to the Committee whenever you need and want them. There is no doubt that the consultation generated a significant response; 40 responses is very good in general. We have obviously been engaging with stakeholders over the past couple of years; we organised a number of conferences and some of the stakeholders organised their own events. There is a significant interest in the whole area of employment law. It has become more high-profile than, probably, we would have imagined it would, but it is very much in people's minds.

The Chairperson: Personally, I do not like the two-tier system because there is an ability to abuse it, moving from one to the other. I want to ask about new business start-ups being allowed to move to a two-year qualifying period. What would stop a company closing down after 18 months and simply recreating itself as a new start-up?

Mr Evans: That was behind many of the responses about this. There is a sense from the consultees that there are consequences that were not looked for. You made a point about SMEs; some people would have suggested that that is an anticompetitive measure. You have a two-year qualifying period if you are employing only a certain number of people. That might act as a disincentive to employing more, which causes a problem in the wider economy and having more people moving into employment. It will have an impact on people who are NEET. John talked about the uptake of the employment service. Across the piece, people — other than a couple of consultees — were saying that they were not in favour of the two-year period for particular groups.

Mr Ross: What we need in employment law is to have a simple system. I agree that a differential one would not be particularly positive. We also want flexibility for employers and a business-friendly environment in Northern Ireland. I have three questions to ask. First, does unfair dismissal require primary legislation?

Mr Evans: It will require primary legislation to change it, yes.

Mr Ross: I will turn to the evidence-base stuff. It is difficult to prove one way or the other whether this will have a positive or detrimental impact on getting growth in the economy or impacting adversely on employees. Is the difficulty or danger that we would face not that, in the past, we have always had parity with the rest of the United Kingdom? For investors who want to come to the UK, it is the same whether they go to Manchester, Glasgow or Belfast. Where the evidence base will be apparent is if we continue to have a different system from the rest of the United Kingdom. If suddenly GB looks more attractive for employers, that is when, in the evidence base, it is apparent that we are lagging behind. If it is a choice between Belfast, which has a stricter regime, or Glasgow or Manchester, which have more flexibility for employers, suddenly we become less attractive. By that stage, it may be too late because the gap is widening.

Mr Evans: That point has been advanced by certain consultees. If you look back at our consultation document, you see that we tried to explore that. People commented on it and we provided a level of information because we explored these issues in detail. We looked at issues around international comparators. When it comes to employment regulation, we are the third lightest regulated economy in the UK. Unfair dismissal is only one element of a very large framework of employment law. The considerations, particularly of foreign investors, are around the support structures, the skills base in a

country and the road infrastructure. That seems to be the prevailing consideration. That was the argument. I suppose that we could do a straw poll of boards to ask, "Would you grow your business more?". We do not have any evidence base, and that has not come out. It is very much about perception, and employment law is devolved. The argument would be parity and you do not take account of Northern Ireland's fairly uncommon economic structures.

Mr Ross: I would never argue for parity for parity's sake. Otherwise, what is the point of devolution? However, if suddenly, by not moving in line with other parts of the UK, you become less competitive or less attractive to FDI, in that circumstance, parity is important.

Twenty people who responded wanted to stick to the one year and about 15 wanted to move to two years. It is fairly evenly balanced, but, looking at the organisations or individuals who have responded, it is fairly predictable that those who wish to stay with one year tend to be the solicitors or the perhaps left-leaning political groups, and it is the employers, the employer bodies and the job creators in society who want to move towards the two years. The central plank of the Programme for Government is growing the economy, and the people who are responsible for creating jobs and growing the economy are saying to us, "We think that moving to two years and keeping in parity with the rest of the United Kingdom will help us to grow the economy". Does that mean that a greater weight will be given to the responses from the job creators in society? Will the Minister give that a greater weighting? Secondly, Invest Northern Ireland, which is responsible for getting the foreign direct investment into Northern Ireland, is saying that — yes, you are right — skills is one of the primary drivers for why a company will want to invest in a region, and the cost base clearly is an issue. That is, wages, how much it costs to get buildings and that kind of stuff. However, employment law and flexibility for employers is a massive component of a decision, and Invest Northern Ireland is telling us that. Does that mean that greater weight will be given to those arguments in the Minister's final determination?

Mr Evans: It is a good question. I wish that my Minister was here now. The Minister has always been very clear, as have key stakeholders such as the Confederation of British Industry (CBI) and the trade unions, that it should not be a case of 20 said this and 35 said that. You are right. You have identified that a lot of the employer bodies are arguing for an increase — what you call lobby bodies — but trade union bodies are arguing against it. The issue for the Minister is having to balance the relative weight of that and the arguments that are made. Employer bodies have said that it would give them flexibility, but other bodies talk about the potential volatility. The unfair dismissal qualifying period has been increased in the rest of the UK for two years and two months. We ask colleagues in the Department for Business, Innovation and Skills (BIS) whether they have any evidence to show the added value of that. They do not. I am not saying that there is none, but they have not been able to show it. I imagine that, if they had strong evidence, it would be on the BIS website now.

Mr Ross: A pipeline for FDI is, in most cases, much longer than two years. The impact will be seen in Northern Ireland in 18 months or two years' time.

Mr Evans: Invest has had probably its best period since inception. I know that that is the case. So, it seems to have been successful. We have, at times, talked to Invest colleagues about this. I do not think that they said that that is the big issue for them. I am not minimising it, but I am saying that it has not been a burning issue.

Mr Flanagan: Thanks very much for the presentation. Personally, I think that it is disappointing that debate and discussion on the much needed reform of employment law comes down to whether people can be sacked after a year or two years without being given the right to challenge that in a court. There are much more pressing matters that need to be dealt with. I commend the Minister and the Department for the approach that has been taken to bring employers and employee representatives together to find an agreed way forward on many of those issues. That is something that, as a Committee, we probably would support.

I want to correct something that Alastair said. He said that growing the economy is the central plank of the Programme for Government. Actually, it is not. The central plank of the Programme for Government is economic recovery and tackling disadvantage. The two things go hand in hand. It is not simply about growing the economy. It is about growing the economy in a sustainable way that helps the people who are the least well off in our society. I think that giving people fewer rights as employees is not the way to go about doing that. It is hard enough to get people into work here, without giving employers the right to sack them without any good reason for up to two years.

Many things need to be sorted out within employment reform. I do not think that a debate on the qualifying period for an unfair dismissal claim is the big issue. From my engagement with employers, I know that it is certainly not the big issue. There are many other issues that can be sorted out and, I am confident, will be sorted out. From the time I have spent looking at it and from the engagements I have had, it is clear to me that one year is more than adequate. That is plenty of time for an employer to find out whether their employee is fit to do the job and can or cannot perform. Moving that to two years is not going to give an employer any advantage to not get rid of that member of staff. If you have not realised after a year that a member of staff is not fit for the job, the problem lies with you and not the member of staff. There is no evidence whatsoever to demonstrate that moving from a one-year qualifying period to a two-year period has helped to grow the economy in any way, and it certainly has not tackled disadvantage. In your final point, you referenced that Invest NI's most successful year since its foundation was the year in which the qualifying period in England was two years and the qualifying period here was one year. So, that completely demolishes any argument that moving to two years is a strategic priority that we need to help attract inward investors or grow the economy.

Mr Ross: You ignore how long it takes to get from an initial interview to delivering a job.

Mr Flanagan: I do not ignore that at all. It is not a big issue. I have heavily engaged with groups throughout the consultation process to help formalise and submit our party response.

The only question I have on the qualifying period for unfair dismissal is whether there is any demand in the Department now to move from a one-year period to a two-year period, or, are you satisfied that a one-year period is a satisfactory position?

Mr Evans: The Minister has not taken a decision. There will never be a demand in the Department. It is the Minister's decision based on his consideration of the evidence from the public consultation.

On the point you made about employers and employees, the Minister has made a commitment that the employment law review should be a review that meets the needs of employers and, at the same time, protects the rights of employees. It is about getting that balance. That is the Minister's position and any decision he takes will be predicated on that. The Minister has not taken a decision. He wanted to come to the Committee to get a sense of its views, and he will obviously want to go to the Executive on what is a cross-cutting and sensitive issue.

Mr Flanagan: You will not get a pile of sense from this Committee.

The Chairperson: You will get sense, but it will be both senses.

Mr Flanagan: There will not be any sense. There will be nonsense.

The Chairperson: Tom, we will forward you the Hansard report to forward to the Minister. Do you want to move on to collective redundancy?

Mr Evans: Yes. The consultation looked at some changes to the consultation periods for collective redundancies. That has been changed in the rest of the UK, since April last year. We looked at retaining the arrangements or moving to a change. One third of respondents wanted to retain the current arrangements, which is 90 days for any collective redundancies of 100-plus. One third favoured a reduction to up to a 45-day consultation period for collective redundancies involving 100-plus, which is the current arrangement in the rest of the UK. A further third were firmly of the view that a minimum consultation period of 30 days should apply for collective redundancies of more than 100 employees. With regard to benchmarking, it is 45 days in the rest of the UK, it is 30 days in the Republic, and we have 90 days. Therefore, we have a unique system at this stage.

We asked about what constitutes an establishment. That has come out in some fairly sensitive cases where a company, particularly a UK-based company, has a range of outlets and makes redundancies and the issue is whether the establishment was the physical location where the redundancies happened or whether it was the totality of the company's operation. We asked questions about whether we should update the guidance on the basis of case law, and a number said that we need to have greater clarity about how the case law operates in practice and whether that case law had been further tested.

A small majority of those who responded on the fixed-term working element felt that the inclusion of fixed-term employees in collective redundancy consultation represented gold-plating. Therefore, to include people who are on fixed-term contracts in the collective redundancy scheme was gold-plating.

We asked questions around whether we should legislate or whether we should just develop better guidance. Most of those who commented felt that the balance between legislation and guidance was about right, and, to varying degrees, they were in favour of the need for stronger guidance and maybe a code of practice that would be developed. We ran a number of events that dealt with collective redundancies, and one of the things to come out of that was about the quality of the consultation. Therefore, there is the length of it and the quality of it. Great attention was given to the quality of it and the fact that that needed to be right. Quality can come down to organisations not being experienced in doing it and needing support. So, there was an appetite for better guidance to help companies and the representatives of employees to ensure that the consultation process was of a high quality.

The policy options that have come out of the consultation process are to retain the existing arrangements; to reduce the current 90-day minimum for redundancies of 100 or more to 45 days, but retain the 30-day minimum for redundancies of between 20 and 100; to apply a minimum consultation period of either 30, 45 or 60 days for all redundancies when more than 20 employees are being made redundant; to establish in guidance or legislation a definition of "establishment"; to develop a code of practice that would develop a positive relationship between the employer and the employees' representatives; and to legislate or develop guidance on the handling of fixed-term contracts in collective redundancies.

The Chairperson: Tom, will you expand on the point about the definition of "establishment"?

Mr Evans: I am looking at the case law. In the case of USDAW v Woolworths, people were being made redundant in a particular outlet of Woolworths. The company argued that the establishment was that particular outlet. If you are making over 100 people redundant, that is a 90-day consultation period; but if you are making over 100 people redundant in five outlets, you are not hitting the 100 threshold in one single outlet and that would negate the need for a 90-day consultation. Therefore, the issue is around what you define as an establishment. If the establishment is the totality of the company's operations and outlets, and you make 130 redundant in 17 outlets, there is a 90-day consultation; whereas if the establishment were the single outlet, that would mean that there may not even be the 30-day consultation and definitely not the 90-day consultation.

The Chairperson: What is the current status in GB and ROI with regard to establishment?

Mr Evans: The USDAW case was suggesting that the establishment was the totality of it, but, as you will understand, multinationals are challenging that. The case law is not settled on this issue. In the Republic of Ireland, their consultation period is 30 days, irrespective of the number. So, it is not an issue. They have 30 days. So, if you are making people redundant, you consult for 30 days.

The Chairperson: With regard to the fixed-term contracts being brought into a collective redundancy situation, what are the pros and cons from the Department's point of view for that?

Mr Evans: The pros and cons are for the stakeholders. The Department does not have a particular view. It is about what will work properly and what is appropriate. From an employer perspective, if you bring people on fixed-term contracts into the process, there is a cost. There is no doubt about that. People can be on fixed-term contracts for five years. From an employee perspective, it enhances their position in any redundancy. A small number of employers felt that bringing them in represented gold-plating, and you can imagine what that means. It adds costs in respect of the directive.

The Chairperson: OK, Tom. We will move on to compromise agreements.

Mr Evans: The current arrangement in Northern Ireland is that you can have a dispute settled using a compromise agreement. In the rest of the UK, they have moved to renaming them settlement agreements, but they broadened the policy remit that underpins those settlement agreements. In the responses, the general view was that compromise agreements work well in Northern Ireland. That was right across the piece. Everybody — employers and employee representative bodies — said that they work well and are appropriate.

Compromise agreements and the discussions around it are not admissible in a tribunal because you reach an agreement and you sign a compromise agreement. The consultation looked at introducing protected conversations, which would be about widening the remit of that policy area and allowing for those protected conversations to happen. Currently, it is where an employment dispute exists. This is about where it does not exist.

The advantages are that it could promote realistic discussions about a range of issues such as performance and retirement. The disadvantages are that it creates an imbalance in favour of employers, and it could lead to abuse and discrimination where the person who felt that they were being discriminated against or that their rights were being infringed could not use that information in a tribunal hearing.

In the way in which the settlement agreements now operate in the rest of the UK, there can be discussions around a settlement agreement where a dispute does not exist, but if there is impropriety in the process around a dismissal issue or there is a discrimination issue, the person can then take that to a tribunal. So, from an employer's point of view, it seems from the responses that it is probably going to create more hassle.

The options are to retain the existing arrangements; to change the name, which was something that we consulted on with key stakeholders when the UK Government were doing that, and people said that they were fairly relaxed about it. The Minister decided not to, because the UK Government changed the policy as well and he had not consulted on it. The next option is to go for parity with GB, which is moving to settlement agreements but there are changes whereby discussions can happen where a dispute does not arise. The further option is to extend the inadmissibility protections under compromise agreements to negotiations leading to terminations where no dispute exists. Those are the options.

The Chairperson: Some of the concerns raised by respondents related to further satellite litigation in connection with any change that would happen here. How do you negate that?

Mr Evans: There were references to what has happened in the rest of the UK, where, if somebody has a discussion where a dispute does not exist, which could lead to an unfair dismissal, the employee could not use that, as it is inadmissible in a tribunal. However, if they said that there was impropriety in the process or that the conversation was happening because they were being discriminated against because of a certain circumstance, they would go to a tribunal. That is creating, almost, satellite tribunal litigation determining whether the process was improper, even before you got to the substance of the issue. Those are the concerns that people have. In Northern Ireland, there has always been concern about the backlog of tribunal cases, the welter of cases and the cost of them, and I think that this came from a range of stakeholders.

The Chairperson: Members do not have any questions on that. We move now to public interest disclosure law.

Mr Evans: Everybody is running out of energy.

A loophole in the legislation has been identified by the UK Government. Public interest disclosure is about whistle-blowing in the public interest. We asked questions around whether the loophole should be closed when the matter relates to somebody's personal work contract. In the responses, there was strong support for the proposal to close the loophole that currently allows someone to use the protections of the legislation when the matter relates to their personal work contract. The disclosure must be in the public interest. There was strong support for that.

Opinion was divided on the proposal that disclosures could be made otherwise than in good faith. There would not be the good faith test. There was a divided view on that. There was strong support for amending the legislation to bring National Health Service workers within its scope. They were inadvertently not included in it, and that has been on the statute book for a significant time. There was strong support for making employers vicariously liable for detriment caused to a whistle-blower who genuinely blew the whistle on something that was in the public interest.

The policy options are to close the legal loophole; to amend the law so that disclosures are protected even if not made in good faith; to amend the definition of "worker" to include the National Health Service workers who were inadvertently removed from the public interest disclosure protections; to make employers vicariously liable for detriment experienced by a whistle-blower at the hands of

colleagues; and to develop a statutory code of practice or less formal guidance. With all the work that we are doing, an issue is whether to legislate or to develop better guidance. The final option on the list is about strengthening guidance and whether a statutory code of practice would give a stronger effect to the spirit of the legislation.

The Chairperson: The obvious one is to amend the definition to include the NHS workers. Is that not a given?

Mr Evans: I am happy that that will be in Hansard. I am in a difficult position. I am here to give you the options. The Minister has not taken decisions. I am telling you what the consultation says, but I am happy to receive —

The Chairperson: Had you any objections to including NHS workers?

Members have no more questions. Have you anything to say about the next stages, in summing up?

Mr Evans: We will go back to the Minister on the basis of this engagement. When the Committee has reviewed the Hansard report of the session, we would appreciate hearing any views that it may have. We are happy to come back at any stage. It is a fairly extensive process, and it will continue to be that. If it leads to legislation, obviously, the Committee will be engaged.

The Chairperson: Thanks, Tom and Alan.