



Northern Ireland
Assembly

Committee for Employment and Learning

OFFICIAL REPORT (Hansard)

Work and Families Bill:
Engineering Employers' Federation Northern Ireland

10 September 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Robin Swann (Chairperson)
Mr Thomas Buchanan (Deputy Chairperson)
Mr Sammy Douglas
Mr Phil Flanagan
Mr David Hilditch
Mr Chris Lyttle
Mr Fra McCann
Mr Pat Ramsey
Mr Alastair Ross

Witnesses:

Ms Kathryn McCormick	Engineering Employers' Federation Northern Ireland
Ms Michelle McGinley	Engineering Employers' Federation Northern Ireland

The Chairperson: I welcome Michelle McGinley and Kathryn McCormick, who are employment lawyers. The session will be reported by Hansard because it is one of our briefings on the Bill. Members have the Engineering Employers' Federation (EEF) submission to the Committee and its submission to the Department's consultation. Michelle and Kathryn, you are very welcome. Over to you.

Ms Michelle McGinley (Engineering Employers' Federation Northern Ireland): I very much appreciate the opportunity to attend today and have some input into this process. First, I would like to apologise for the absence of our director, Peter Bloch. Unfortunately, he is engaged in a tribunal hearing this afternoon and unable to attend.

I will start by giving a bit of background: mine, Kathryn's and that of the Engineering Employers' Federation, as many of the Committee might not be aware of us. I have been an employment lawyer for over 15 years — I do not want to be too specific on the length of time — and I have specialised at all times in advising employers. I have never advised employees. Kathryn joined us in 2009 when she qualified and has worked predominantly in advising employers.

The EEF is a bit of a misnomer. We are the Engineering Employers' Federation, but we are perhaps more aptly the employers' federation because our range of industries spans a number of sectors including aerospace, technology, call centres, charities and food. We are quite a big organisation, and our membership stands at about 137 companies. We are a not-for-profit organisation. The way that we operate is that a company pays a membership fee, and we provide employment law advice and representation at the tribunal, regardless of that company's size. We have some very big members with over 1,000 employees and some very small members with 10 or fewer. All get the same service.

The membership fee is based on the salary bill so that it is a fair reflection of the fee that they should pay.

Before I go on to look at the Work and Families Bill, perhaps I could just note the disappointment of our members in employment law in Northern Ireland. We had the employment law review process, which I heard the Minister speak of this morning. There is a real disappointment that that has not been taken forward by now. We have been given timelines of the spring of this year and the end of this year, and it now looks like it will be the spring of next year. Those are changes that, in our members' view, would help them more to improve and grow as we come out of recession. We are really disappointed when it comes to, for example, shared parental leave, working time regulations and the extension to flexible working. We seem to be tinkering around with real changes that could make real differences to business. Although they are commendable on their own, we would have liked the employment review to be taken forward in preference to the shared parental leave provisions.

I will now look at the Work and Families Bill. You have our input into the consultation process back in 2013 and our comments to the Committee in June of this year. Hopefully, this will be taken as constructive and not too critical, but I think that you would have got a more structured and effective response to the call for evidence in June had questions been asked of the people targeted. I think that an open question on a very legalistic Bill was not particularly helpful for those attempting to respond to it and give you the information that you were looking for. Also, before coming here today, if we had had a wee bit more direction on key areas or key themes that were of interest to your members, I think that we might have been more effective in our communication to you. In future, if questions were asked, you might get more meaningful responses.

On concerns about the Bill, the first thing that I would say is that we commend the Bill's ethos of trying to retain more females in the workplace. Businesses like that because it means that they get the best person from the widest possible pool. That is to be commended, and I think that all businesses would say that that is a good thing. It is also best to ensure a better work/life balance: if employees are happy in the workplace, they work more effectively. Businesses are all for having happy employees who will be more productive in the workplace.

I question, though, whether it will be effective through the provision of shared parental leave. We all know that the uptake of additional paternity leave was extremely low. I think that the figure in GB was less than 1%. There is speculation and real concern that this sharing of parental leave will not achieve what we are trying to do. It might start a culture change, which may be what the Committee is attempting to achieve, but the projections for the uptake of shared parental leave are very low. I think that they expect between 3% and 5% of fathers to take it up. I am not sure whether all the changes that we are about to engage in will achieve the aim that we are setting out to achieve.

Another preliminary point before I look at the provisions is the question of timing. I am not sure when the Committee sees the Bill being implemented. It seems from the Department's response that we will follow in the footsteps of GB in how this right will be brought into effect. GB suggests that it will apply to births due on or after 5 April. Working to that timescale would give very little time for employers to prepare, plan, train and put policies in place. I think that the Work and Families Bill is up for Royal Assent in January 2015. Regulations will come only after that because the Work and Families Bill paves the way for those. Employers need to know what the changes are and what is coming into place before they can make those changes to their policies. If we are looking at an implementation date of April 2015, most employers will find it extremely tight, if not impossible, to make changes.

From the employees' perspective, for a deadline of April, there are some pre-birth rights in the Work and Families Bill such as those relating to attending antenatal appointments and, indeed, early births. Realistically, people giving birth in January could have access to these rights if their due date was on or after 5 April. I think that the Committee might need to look realistically at when this should be brought in. If we are to follow in the footsteps of GB — it seems from the Department's response that we will — when should we introduce it in Northern Ireland? We have been working with our counterparts in GB on this. Their view is that the regulations should be in place for at least seven months before applying to births. So, for February, you might be looking at a September or October implementation date for the expected week of childbirth and when the rights crystallise.

Whatever decisions the Committee makes, I urge you to give enough notification to employers to make the changes so that they can comply with these new laws and to ensure that they are not on the back foot in comparison with their counterparts in GB, who already have final regulations and draft regulations. I understand that the Advisory, Conciliation and Arbitration Service (ACAS) is drafting a guide on what these new rights will mean. At the minute, we are on the back foot. It will be unfair on

employers if they are expected to catch up too quickly. Those are my preliminary comments on the Bill.

It will come as no surprise to the Committee that the concerns of employers fall into two strands: the administrative burden of the provisions; and the difficulties in finding a replacement or cover for periods of leave. I will divide my comments into those two main areas of employers' concerns.

I noted that, at Second Stage, the Minister said that the cost would be no higher than what employers have paid out in maternity pay and so it will be cost-neutral in that sense. That ignores the administration element of these new rights. The Department has always said that it would try to alleviate or minimise the administrative burden of the Bill. We have no idea yet how it proposes to do that. We all know that Northern Ireland is made up predominately of small and medium-sized businesses with no dedicated HR function. They are being expected to get to grips with the new rights, the eligibility criteria — from an employment law perspective, they are difficult to get your head around — the notification requirements, the ability to request a change, which requests will be counted, and which requests will be null and void, meaning that an employee goes back to having three requests. That is all very difficult to understand.

If you are looking at the administrative burden, one of the key things that you need to look at doing is simplifying it into guidance. I do not think that it is right to provide a guidance book of 40 pages and expect a small business with no dedicated HR to grapple with that. I think that you need to look at at-a-glance guides, simple headlines and signposting to more detailed guidance notes on what they need to know more about, rather than giving them a guide and saying, "Here is what you need to know about shared parental leave and what you need to do." You might want to develop sample policies for them to put into place in the workplace. You also might want to develop model documents. GB is looking at that for notification, eligibility documents and the request to change. If the Committee were to recommend that model documents be put in place, that would go some way to alleviate the administrative burden.

The consensus seems to be that there should be as light a touch as possible, and we and our members agree with that. We do not want to be regulated too much on how we deal with requests: for Northern Ireland, sample rather than compulsory documents would be preferable.

The legislation is, as I said, extremely complicated: it is hard to understand what type of requests count, when they can change and how to recalculate how much leave a person has, because it is all based on the reciprocal employer and employee and what leave and pay they take. There is also an administrative burden on two employers keeping tabs on who is taking what and who is now entitled to what.

Perhaps there could be something along the lines of online toolkits, whereby a company simply types in, for example, "Joe Bloggs has the qualifying period of 26 weeks. He has x here and did x in the past 66 weeks". That could remove some of the decision-making processes for employers. By going online and typing in criteria, they would be told that an employee is entitled to x amount of leave and x amount of pay. Something like that would be extremely helpful for all businesses. It also may be extremely helpful for employees. This right is very much based on employees knowing what they are entitled to and asking employers for those entitlements. If they get it wrong, the whole thing could fall apart. Kathryn will come to that later.

This is probably not realistic, given what we have just heard about the budget and constraints in finance, but you might decide to have a dedicated helpline in the infancy of the rights going live so that employers can phone up and understand how they navigate requests for shared parental leave. Maybe the Labour Relations Agency (LRA) could provide that — good advice or an information system. It is fond of providing information rather than advising, but it might be worth doing so that small employers could phone up ask for advice. For many of our members, that issue does not always come to the fore because they have our service and we can advise them, but it is about getting this right for all businesses in Northern Ireland.

Part of the cost of the administrative burden is the awful cost in time spent deciding whether someone is eligible when considering their request. The way, as I understand it, that the provisions may operate in GB — I have to confess that I am not an expert in this and am still getting to know it — is that, if someone puts in a request, they can withdraw it if it is a request for a discontinuous period of leave, thereby chunking it into three periods. The request can be withdrawn even though the company might have considered and agreed it. That would not count as a request. So an awful lot of time could be wasted considering requests that employees subsequently withdraw — understandably,

perhaps, because the reciprocal employer has not agreed their partner's request, meaning that the request no longer makes any sense to them. However, the administrative burden will already have been placed on employers. An employer could be in the position of having taken time considering a request, looking into getting a replacement, yet the employee is back to having three tickets and three requests.

That brings me to the next key area and concern for employers, which is arranging cover/a replacement. The legislation is based on people being able to take time away from the workplace to care for their child, which is great, but you have to look at the employer's perspective, too. If an employee tells me, "I'll be in for six weeks, out for four weeks, I might come in for three weeks and then be out for eight weeks", how can I plan cover? That is a real difficulty for an employer.

It seems that we will be giving some flexibility to parents to choose when to take their leave. However, at the minute, it is probably loaded in favour of the employee rather than the business, which may have difficulty getting a replacement who is suitably trained and has the skills to cover that specific period. I will give an example, which my counterparts in GB gave to the Department for Business, Innovation & Skills (BIS). A finance director puts in a request for shared parental leave coming up to the end of the tax year. As I understand it, if the request is for a continuous block of six weeks including April, the employer has absolutely no ability to say no. The employer will not be able to get a replacement who knows the business and can take it through the end of the tax year, and that will create a huge difficulty. The only way round the difficulties of arranging cover and replacement is to think about giving more certainty, at an earlier stage, to the amount of leave and when it will be taken. Perhaps we should not follow in the footsteps of GB by allowing employees to give only eight weeks' notice of any single chunk of leave that they want to take, and the employer has no ability to refuse it.

Maybe we should think about what we can do in Northern Ireland that might be more tailored to our small and medium-sized businesses, because one person's absence can cause any business to struggle. If you place an obligation on employees to declare at an early stage whether they are taking shared parental leave and how and when they propose to do so — make it a binding notification — that would go a long way to help employers to plan the necessary cover. If we operate like GB, employers will have just eight weeks' notice of any intended leave period. An employee who wants to be clever will, for example, put in eight weeks' notice for six weeks and another eight weeks' notice for a further three weeks, and, under GB provisions, neither period can be refused.

You might also want to consider an ability for an employer to say no to leave at times when it does not suit them, in the same way as we do for leave and holidays. We can say no to a holiday request, but we cannot deny the holiday; employees must be allowed to take it within a reasonable period. Giving employers an ability to veto an unsuitable period of leave might help businesses in Northern Ireland.

The Department has said that the period for considering a request will be 14 days. That is extremely tight for small and medium-sized businesses, and we urge some extension. We had asked for 28 days or maybe a 21-day period as a compromise.

Those are employers' biggest concerns about shared parental leave and they fall into the two strands that I mentioned earlier: the administrative burden and the difficulties in finding a replacement, including the cost, which can be higher than a permanent employee by the time that recruitment agency fees or paid or you have taken time out to attend to it.

I will pass you over to my colleague Kathryn. She will talk about other issues with the Bill, such as what happens when we get it wrong and give the wrong leave.

Ms Kathryn McCormick (Engineering Employers' Federation Northern Ireland): Thank you, Michelle. As Michelle stated, a concern for the Engineering Employers' Federation and our members is what happens when the employer or the employee gets it wrong. On the face of it, these are general rights to share parental or maternity leave, but the finer details are very complicated. Michelle outlined what would happen if an employee requests a period of leave, withdraws it and submits numerous requests thereafter. The exercising of these rights are dependent on employees knowing their entitlements, knowing what time they wish to take as leave and providing accurate information to employers. Potentially, therefore, they are dependent on two employees and two employers and the information between those parties being accurate. Also, all must be notified of any changes because it will be difficult for employers to track not only periods of leave but periods of pay. Our members and other employers are concerned about what would happen if they overpaid someone's entitlement to shared parental leave. Who will bear that loss? Will the cost be borne by the employer or will there be penalties for overpaying or recouping? We understand that BIS in GB has given a commitment

that there will be no recoupment of payments in excess of the statutory entitlements. We are keen for that to apply to employers here in Northern Ireland.

These rights will be quite complicated, in that an employee can chop and change periods of leave to be in and out of the business, and another employee — their partner — will share that period of leave. Therefore, as Michelle also stated, at-a-glance guides and signposting on rights, entitlements and eligibility are extremely important, as are online ways for employers to track an employee's entitlement to leave or pay. We encourage the Committee to look at those.

There is a responsibility and a burden on employers, who will need to rely on the information provided by their employees being correct, but there does not appear to be an obligation or compulsory requirement for employees to provide consent to contact the other employer. Therefore, we ask that, if an employee does not provide consent to contact his or her partner's employer, an employer, because of the inability to confirm or verify the periods of leave or pay, should be entitled to refuse any period of leave requested.

Finally, I want to raise the issue of discrimination. Some employers in Northern Ireland, including some of our members, offer enhanced or contractual maternity pay. There is a concern that the new scheme will give rise to claims of sex discrimination if employers do not choose to offer enhanced/contractual pay for shared parental leave. There was guidance in the past, and a recent case in England found that there is no sex discrimination in failing to offer enhanced paternity leave from the additional paternity leave regulations. However, we ask that some clear guidance be given by the Department or the Committee so that, if employers choose to continue with any enhanced maternity pay schemes, they will not be penalised or will be protected from sex discrimination claims by male counterparts who wish to avail themselves of the shared parental leave scheme but would not, of course, receive enhanced shared parental pay.

I will now pass back to Michelle to summarise our concerns.

Ms McGinley: The only other point to make on discrimination is that, if there is no clear indication from the Department that it will not be considered discriminatory not to enhance shared parental leave under provisions similar to enhanced maternity pay, you might find that employers start to phase out enhanced maternity schemes, which is really not what any of us want. It is a real concern for employers, and some are thinking about whether they should continue their enhancements for new employees or phase them out.

Does the Committee have any particular questions?

The Chairperson: Michelle, I am going back to your earlier concern about insulting the Committee. When we asked for submissions on the Bill, they came from stakeholders who had already consulted the Department or us. At this stage, we do not send out formal questions to which stakeholders can specifically reply. This is the opportunity for stakeholders to come in front of the Committee so that we can take on their concerns, rather than placing our specific concerns in writing. As I am sure you are aware, we are a cross-party scrutiny Committee. Maybe you were unaware of that and of why you were coming here. I wanted to clear that up for you.

Ms McGinley: From our perspective, if we had been given key themes that emerged from the public consultation that the Committee was looking out — not in the form of direct questions but just to direct us to specific areas— it would have been much more helpful.

The Chairperson: That is not how the system works. It is for you to come — from the public consultation —

Ms McGinley: It is unfortunate, as, I think, the responses you received in June showed. You did not really get meaty responses from that consultation.

The Chairperson: Neither did the Department. Those are the stakeholders that we engaged with. Aside from that, we have heard some of your concerns and you have represented your membership.

If there is a delay in the timeline and implementation here compared with the GB legislation, is there a potential for discrimination, given that multiple employers could be employing people in GB and here?

Ms McGinley: I do not think that there would be legal discrimination claims. Some females, and males with partners who have a due date of 5 April — knowing that this also applies to adoption etc — will be disadvantaged because they will not benefit from it. If the Bill passes in January, you will give yourself only a three-month window for regulations. As I understand it, there are five sets of regulations in GB at present, and they are still drilling down on the details of those, making sure that there are no inconsistencies, and drafting guidance. That leaves a very short period, not only for you to pass the legislation, but, once it is passed, for employers and employees to understand it. I cannot envisage discrimination cases in the legal sense, per se, but there will be —

The Chairperson: Inequalities. The Committee has an assurance that some of the regulations will be subject to affirmative resolution, so they will also have to be passed. I can see the departmental officials looking at me. They are up next, so they are listening to your concerns. We can get clarity on that.

Mr P Ramsey: Good morning, everyone, and welcome. That was an interesting presentation that put into perspective the difficulties experienced by employers. I honestly thought that this was a general tidying-up exercise to give equality to employees in maternity leave and paternity leave. Have you had discussions with officials on some of the ideas and suggestions?

Ms McGinley: We consulted DEL on the employment law review: we had a number of meetings with it. I do not believe that we have had a meeting with them directly about the Work and Families Bill. We put in a detailed response, in 2013, on the sharing of parental leave and the way forward as part of that consultation.

Mr P Ramsey: I have other questions, but I want to say this first: I take your point that your organisation represents not only engineering but a multitude of types of employer. What level of membership do you have?

Ms McGinley: In the sense of —

Mr P Ramsey: Statistically, is it 200? Is it 500?

Ms McGinley: We have 137 companies, including quite a number of the bigger employers in Northern Ireland with several thousand employees, right down to the smaller employers. We probably have more bigger than smaller employers.

Mr P Ramsey: They pay a membership fee, as a result of which they can access the information.

Ms McGinley: Yes, unlimited access.

Mr P Ramsey: What about legal representation?.

Ms McGinley: Yes, they get legal representation at a tribunal as well.

Mr P Ramsey: What would happen if a non-affiliated small company approached you? What would you say to it?

Ms McGinley: It is a not-for-profit organisation, so all members —

Mr P Ramsey: What about a non-member company with only three or four employees?

Ms McGinley: Any small company can approach us. We would probably assist if we could, and, if it wanted to become a member, we would give it membership details. As I said, it is a not-for-profit organisation: we have our own committee, president and chairman. We provide an equal service to all employers. The fee is based on a company's salary bill: it is a percentage of the wages that it pays, so it is fair and equitable across the board.

Mr P Ramsey: One of the fundamental issues both of you raised was the administrative burden on very small companies. As the Chair outlined, the departmental officials will, hopefully, be able to give us some help on that. The two ideas that you tabled — an online toolkit and a dedicated helpline —

are, one would imagine, common sense. I agree with you on those, and I hope that the officials might help.

Ms McGinley: It is a question of finance.

Mr P Ramsey: In other places with this type of legislation, is there a lead-in time for implementation, awareness and education?

Ms McGinley: Indeed.

Mr P Ramsey: Are there helplines in other places?

Ms McGinley: There are. The Information Commissioner's Office (ICO) will answer questions on whistle-blowing, and the Labour Relations Agency, which we rate highly, provides a great service. It cannot advise, but it will give information to the smaller members. The Federation of Small Businesses tried to do something, and I am not sure what information and advice the Confederation of British Industry (CBI provides). These rights are extremely complicated. I find it difficult getting my head round the eligibility, the notification, the request and how they interact with each other. We are still coming up with questions that we have no answers to.

Mr P Ramsey: There was me thinking that it was common sense.

Ms McGinley: The headlines — the three requests — sound very simple, but, when you get down to the detail, it is a bit of a nightmare.

Mr Flanagan: Thank you for your presentation; it was very useful. I acknowledge that this will produce problems for employers of all sizes, particularly for microbusinesses and small employers. We need to be aware of that and that it will mean such a change when we are passing legislation. However, I think that it is only right that we move the laws on to afford equality to people who want maternity and paternity leave. It needs to be done in a way that is mindful of the impact that it will have on employers. Some of the suggestions that you have given us are straightforward. I do not think there are enough places for employers to go to access help, support and guidance. It is usually too late; the problem has already started by the time they have somewhere to go. I completely agree with a proposal of that nature. I know that the timeline is of great interest to you. Pat and I were sitting here looking at all of the questions we were going to ask, and I asked Pat if it would have made more sense to have the Department officials on first. Pat said, "No. Have them come in after and then they can answer all the questions". *[Laughter.]*

Mr P Ramsey: That is true.

Mr Flanagan: You have raised a number of questions. We are going to go through the Bill in a detailed way, and we will take your comments on board. You have identified a number of problems. To be honest, we would rather have solutions. I do not want to go through all of the problems that you have identified, but can you come back to us with solutions and something that you think would be workable and that would allow people to have more flexibility, but that would also meet the needs of your members?

Ms McGinley: We can come back. I do not know whether you want me to come back in writing, but there are some suggestions about how we could deviate from the GB position but give more certainty to smaller employers. The first tick is on whether the person is going to avail themselves of the option of taking shared parental leave and then how it is going to be divvied up between the two partners. If certainty can be brought in at an earlier stage, it would be a greater help in terms of planning for the business, getting a replacement in and understanding where the gaps are.

You mentioned the administrative burden. If it helps, I can provide in writing the summary that I provided this morning to the Committee.

The Chairperson: Thank you very much, Michelle and Kathryn.