Northern Ireland Assembly

Research and Library Service
Bill Paper

17 June 2010

Eoin Murphy

Employment (No 2) Bill

NIAR 287-10

This paper provides background to and an overview of the Employment (No 2) Bill, which was introduced into the Assembly on the 7th June 2010. The purpose of the Employment (No 2) Bill is to introduce new arrangements for workplace dispute resolution and to introduce a new right for time for training. In addition the Bill will repeal existing statutory grievance procedures.

Paper xx/xx **17th June 2010**

Key Points

- The Employment (No 2) Bill is intended to reform workplace dispute resolution and introduce a new right to employees “Time to Train”;
- The current process for workplace dispute resolution was introduced on 3rd April 2005, and gave new rights and responsibilities to both employers and employees in Northern Ireland[1];
- A final Departmental brief occurred on the 20th of January 2010 in closed session. On the 27th of May the Executive agreed for the Bill to move forward and it was subsequently drafted, and introduced to the Assembly on the 7th of June 2010;
- According to the synopsis of responses to the consultation process, the majority of respondents supported both aspects of the Bill, with 38 respondents to the workplace dispute resolution consultation and 22 respondents to the time to train consultation;
- The Bill contains 18 clauses and 3 schedules;
- Repeal of the statutory grievance procedures will result in savings of around £25,000 per annum, the increased emphasis on pre-claim conciliation should generate savings of around £11,000 per annum for Government and the introduction of a more straightforward procedure for the resolution of simple claims should save Government £10,000 per annum in tribunal resources;
- The right to request time to train will cost Government some £6.7 million per annum in respect of tuition at levels 2 and 3 arising from successful requests; and
- The provisions in the Bill are not deemed to have implications for human rights.

[1] Department for Employment and Learning Resolving Disputes http://www.delni.gov.uk/index/er/resolvingdisputes.htm (first accessed 15th June 2010)

Executive Summary

The Employment (No 2) Bill (henceforth referred to as "The Bill") is intended to reform workplace dispute resolution. Following an extensive public consultation the Minister for Employment and Learning has determined that the statutory procedures in respect of discipline and dismissal matters should be retained, with workplace grievances being addressed on the basis of a Labour Relations Agency code of practice. It is therefore proposed to repeal the statutory grievance procedures via the Bill.

Also in light of the outcome of the review, the Bill sets out changes designed to contribute positively to the smooth operation of industrial tribunals and the Fair Employment Tribunal[2].

In addition the Bill adds a new right for employees to be able to request time to train. The intention of time to train is to help raise employees' awareness and aspirations in relation to skills and encourage more employers to invest in training for employees, contributing towards improved business performance and competitiveness[3].

The Bill intends to reform the existing workplace dispute resolution process and introduce a right to request time to train by[4]:

- leaving intact the statutory regime for disciplinary and dismissal situations whilst moving to a less legalistic framework for the raising of workplace grievances involving voluntary compliance with the appropriate Labour Relations Agency Code of Practice;
- repealing provisions linking grievance and disciplinary/dismissal processes with industrial tribunal and Fair Employment Tribunal time limits;
- enabling the Labour Relations Agency to exercise greater discretion in offering its assistance to resolve disputes and repeals time restrictions on the period of Labour Relations Agency conciliation;
- amending industrial tribunals' powers to reach a determination without a hearing;
- modifying industrial tribunals' powers to restrict publicity;
- providing that tribunal awards, once registered, are enforceable without the need to obtain a court order, and makes similar provision in relation to conciliated settlements reached with the assistance of the Labour Relations Agency;
- enabling the Fair Employment Tribunal to hear aspects of fair employment cases that would previously have necessitated a separate industrial tribunal hearing; and
- introducing the legislative framework for a right to request a time to train.

[2] Department for Employment and Learning Employment (No 2) Bill Explanatory and Financial Memorandum
[3] Ibid
[4] Ibid

Review of the consultation documents for both aspects of the Bill found that the majority of respondents were in favour of the proposals. There were some concerns raised, including:

- Time limits being removed from the LRA arbitration scheme, although the Department found that repealing the time limits would recognise the reality of current practice and acknowledge that current provisions do not have their intended effect, and as such this was retained in the bill;
- Tribunals having the power to penalise unreasonable behaviour during the alternative dispute resolution process (ADR), with 11 of 21 respondents believing they should have this ability. The Department rejected this point on the grounds that it would be inappropriate to make ADR a mandatory process;
- The Federation of Small Businesses (FSB) opposed the right to request time to train outright, stating that training needs would be better met through the Skills Agenda and business support initiatives. The vast majority of the other respondents support the new right, as did the Department with it retained within the Bill.

Contents

1 Introduction

The Employment (No 2) Bill (henceforth referred to as "The Bill") is intended to reform workplace dispute resolution and introduce a new right to employees "Time to Train".

The current process for workplace dispute resolution was introduced on 3rd April 2005, and gave new rights and responsibilities to both employers and employees in Northern Ireland[5].

Under this legislation, if a dispute can not be sorted out informally, then both employers and employees must follow minimum procedures for resolving disputes about employment issues. These minimum procedures are for dealing with grievances (complaints by an employee) and with disciplinary action and dismissal (actions the employer can take against an employee).

Where a dispute over an employment issue can't be resolved at work, the people involved can request help from the Labour Relations Agency or they can lodge a claim with an industrial tribunal (or, where relevant, the Fair Employment Tribunal). In most cases the Labour Relations Agency has a duty to try to resolve such claims without the need for a tribunal Hearing, but when all other efforts to resolve the issue have been unsuccessful the tribunal will be able to provide a legal judgement about the problem.

The proposed Bill will replace the existing statutory grievance procedure and introduce a Workplace Dispute Resolution system that better reflects local needs and priorities[6].

Time to Train is a new right which entitles employees to request time to train from employers. Implementation of the law will bring Northern Ireland into compliance with other UK regions which had the right introduced in the Apprenticeships, Skills, Children and Learning Bill 2009.

2 Background

The Department for Employment and Learning briefed the Committee for Employment and Learning about its intention to reform workplace dispute resolution procedures on the 12th of November 2008.

At this meeting, DEL provided its initial plans regarding workplace dispute resolution procedures. The Bill itself has two main parts:

- The revision of current workplace dispute resolution practices; and

[5] Department for Employment and Learning Resolving Disputes http://www.delni.gov.uk/index/er/resolvingdisputes.htm (first accessed 15th June 2010)

[6] Northern Ireland Executive June 2009 Consultation launched on workplace dispute resolution http://www.northernireland.gov.uk/news/news-del/news-del-june-2009/news-del-010609-consultation-launched-on.htm (first accessed 15th June 2010)

- The introduction of Time for Training, a new employee's right to request time off from employers to train.

For workplace dispute resolution, DEL carried out an initial pre-consultation from the 13th of February to the 11th of April 2008 which revealed a general desire for reform of the current systems amongst stakeholders.

Following the completion of the pre-consultation, DEL carried out a twelve week public consultation from the 1st of June to the 4th of September 2009[7], with the Department's report on the public consultation issued in November 2009. A further briefing from DEL to the Committee took place on the 14th October 2009 on the consultation stage and what steps would be taken in regards implementing the policy.

A separate consultation was carried out for Time for Training from the 31st of July to the 23rd of October 2009 with a post consultation report due to be released on or around the 18th of June[8].

A final Departmental brief occurred on the 20th of January 2010 in closed session. On the 27th of May the Executive agreed for the Bill to move forward and it was subsequently drafted, and introduced to the Assembly on the 7th of June 2010.

3 Results of Consultations

Disputes in the workplace

In May 2009 DEL produced a consultation document on policy proposals for improving systems for resolving disputes that arise in the workplace. The consultation document included partial regulatory impact assessment and referenced the findings of preliminary equality and human rights impact assessments. The impact assessment process also took account of potential social inclusion and health impacts.

In total the department received 38 responses, 33 of which contained substantive comment. A list of the respondents can be found in Appendix 1.

The consultees were asked to respond to 36 questions in total, covering a variety of areas within the overall topic such as should the current appeals process be restructured and how can the LRA improve its services[9]. Not all respondents answered every question.

There were some areas of contention within the consultation and these are discussed below.

[7] Department of Employment and Learning Dispute Resolution Review Consultation http://www.delni.gov.uk/index/consultation-zone/archived-consultations/archived-consultations-2009/dispute-resolution-review-consultation.htm (first accessed 11th June 2010)

[8] Based on discussions with DEL representatives, the final draft of the post consultation report is at the time of writing awaiting final approval from the Minister for Employment and Learning.

[9] A full copy of the questions and responses can be found at http://www.delni.gov.uk/index/consultation-zone/archived-consultations/archived-consultations-2009/dispute-resolution-review-consultation.htm

Question 7 asked if there was a need for inspection/enforcement machinery to produce more legally compliant workplaces. The department received twenty replies, with the majority either opposed to the proposal or believed that the matter would require further exploration before any definitive decision could be taken. It should be noted that opposition came mainly from employers, with support coming particularly from citizen advocacy groups such as the Citizens Advice Bureau which stated:

> *It is the view of many CAB advisers that hitting such employers in their pockets is the only way to ensure compliance with the full range of statutory employment rights.*

The Department concurred with the majority view, but acknowledged that advocates of inspection/enforcement had contributed helpfully to the debate.

When consultees were asked to comment on whether the Labour Relations Agency (LRA) arbitration scheme should be expanded to cover a wider range of jurisdictions (it currently covers two – unfair dismissal and flexible working), five respondents commented positively, five opposed it and two favoured the development of alternative arrangements.

Of those that commented negatively, the Law Centre for Northern Ireland stated that:

> *The current LRA arbitration scheme is under utilised and we doubt that expansion of the range of jurisdictions would result in sufficiently greater uptake to make a meaningful difference in resolving the problems we have identified in the dispute resolution process.*

However, other groups felt that in order to increase take up of the scheme, expansion was a necessary part:

> *In order for take-up of the scheme to increase its remit needs to be expanded. It is quite often the case that workers seek to bring claims on more than one issue and therefore the existing statutory scheme may not be available for some parts of the same dispute.*
>
> **Citizens Advice Bureau**

From the consultations, DEL concluded that widening the LRA's arbitration scheme so that cases may be heard from across the range of jurisdictions that are currently dealt with by the tribunals would be of benefit.

In a related question, eleven out of nineteen respondents wished to see time limits on the LRA's duty removed, with the remaining eight wanting some form of time limit retained. This included Antrim Borough Council and Down District Council which stated jointly:

> *It would appear to be advantageous to seek to resolve issues at the earliest opportunity and therefore time limits would greatly assist with focusing*

parties on resolution. These might be extended in exceptional circumstances.

However, DEL intends to repeal time limits stating that:

Time limits have not had the desired consequences.

The Department found via the consultation process that when the LRA's staff believes that there are realistic prospects of settling a dispute. It will continue to use its power to conciliate once its duty to do so (i.e. the time limit) has expired.

Repealing the time limits will, in the department's opinion, recognise the reality of current practice and acknowledge that the current provisions do not have their intended effect.

In addition the consultation asked respondents if they felt a tribunal should be empowered to penalise unreasonable behaviour during the alternative dispute resolution process (ADR) process. Eleven of twenty one respondents stated they would agree with this and that it would ensure the process was taken seriously, with the Royal College of Nursing suggesting that "*the provision of some form of incentivized mediation/conciliation service would ensure that the services of the Labour Relations Agency could be more extensively utilised".*

The remaining ten respondents opposed any sanctions, arguing that if ADR was tantamount to a mandatory process its effectiveness and value would be compromised.

The Department agreed that it would be inappropriate to make ADR a mandatory process as it is intended to offer an alternative to the Tribunal System and is not supposed to be a hurdle on the way to obtaining a legal determination.

Time to Train

The department received twenty two responses in total, thirteen of which contained substantive content. Consultees were asked eight questions in relation to Time to Train. A list of respondents can be found in Appendix 2[10].

Whilst the vast majority of respondents supported the right to train, the Federation of Small Businesses (FSB) opposed the proposition outright. It argued that:

Northern Ireland's training strategy would be better implemented through the skills agenda and business support initiatives rather than through the introduction of additional legislation.

When asked by the Department if there were any circumstances in which an employer can withdraw support for training, DEL received six responses, four of which suggested

[10] Department for Employment and Learning Draft Final Response to Consultation Document – please note this document is in draft format only as the final copy has not yet been approved by the Minister for Employment and Learning

that there ought to be circumstances in which this was possible, such as unforeseen circumstances and financial difficulties.

The Citizens Advice Bureau opposed this, stating:

> *It would be unfair to an employee to have begun a course, or made arrangements to commence training, only to find that their employers support has been withdrawn.*

The Department, however, agrees that employers should be able to withdraw support and has concluded that the approach adopted in GB, where consultees held similar views is a sensible one.

In this the Department for Business Innovation and Skills (BIS) committed to provide guidance that the employer and employee should jointly agree, at the time the request is granted, any circumstances in which the employers support can be withdrawn.

DEL concluded that:

> *It is evident that a clear majority of respondents to the public consultation feel that the introduction of the proposed new right will be a positive development.*

4 Equivalent Legislation in Great Britain

Workplace Dispute Resolution

In March 2007, the UK Government published the findings of an independent review group charged with investigating how systems in Great Britain for resolving individual employment rights disputes could be improved.

The report[11] involved an extensive consultation with stakeholders and included a series of meetings and focus groups[12]. Following publication of the Gibbons report, a public consultation was carried out its recommendations.

A key recommendation of the report and a central plank of the subsequent legislation has been the removal, from April 2009, of the statutory workplace dispute resolution procedures that have been in place since October 2004.

The procedures, designed for use where informal approaches failed, required most people wishing to pursue a complaint at work to:

- Put the matter in writing;
- Hold a meeting with their employer to discuss it; and

[11] *Better dispute resolution: a review of employment dispute resolution in Great Britain'* (or 'the Gibbons Report'),

[12] Department for Employment and Learning Disputes in the Workplace – A systems review Public Consultation http://www.delni.gov.uk/disputes_in_the_workplace__a_systems_review_-_public_consultation.pdf (first accessed 14th June 2010)

- Then hold an appeal meeting if the issue remained unresolved.

If the procedures were not followed it was possible for penalties to be made, such as adjustments to any subsequent tribunal awards. Comparable procedures were put in place for employers to follow when dealing with disciplinary matters and dismissals, involving putting the matter in writing, holding a meeting with the employee to discuss it and a subsequent appeal meeting where the issue was not resolved. Failure to adhere to the procedures could lead, in subsequent tribunal proceedings, to an automatic finding of unfair dismissal or, in less serious cases, to an adjustment of the award to take account of the failure.

Stakeholders in GB held a majority view that the procedures, whilst well-intended, were proving counter-productive in that they brought an unhelpful level of increased formality and complexity to the dispute resolution system. Rather than assisting in resolving issues, the procedures were believed to encourage employees and employers to think in terms of a potential Employment Tribunal claim from the outset. Stakeholders told the Department for Business, Enterprise and Regulatory Reform (BERR) that less formal systems were needed.

Responding to this majority opinion against the statutory procedures, the GB programme of reform:

- Removed the procedures from the statute book;
- Made consequential changes to unfair dismissal law;
- Replaced them with a less prescriptive best practice led approach, including an updated ACAS Code of Practice;
- Provided Employment Tribunals with powers to adjust awards where a party has failed to adhere to the ACAS Code;

The other key element of the GB reform package is its focus on the role of the Advisory, Conciliation and Arbitration Service (ACAS - the GB equivalent to the LRA) in promoting the earlier resolution of disputes that cannot be resolved at work. This involves:

- strengthening ACAS' existing helpline service to the public;
- using the helpline to identify disputes likely to benefit from ACAS conciliation;
- where a caller to the helpline is receptive, involvement of ACAS conciliators in an
- attempt to broker a conciliated settlement, thereby negating the need for a tribunal claim;
- removal of time limits on ACAS' duty to conciliate once a tribunal claim has been lodged.

Time to Train

In England, the Department for Innovation, Universities and Skills (DIUS) produced a consultation paper in June 2008 on the introduction of the right to request time to train

from employers[13]. At the same time, similar consultations were carried out by the Scottish Executive and the Welsh Assembly Government.

The Consultations sought views on whether or not the new right would help skills development. The consultation closed in September 2008 and received 236 responses in total. Of these 155 were from England, 43 from Scotland and 38 Wales.

The overall response from the three jurisdictions was positive and revealed strong support for the proposal. However, a number of employers, especially small business, raised concerns regarding increased costs and bureaucracy as a result of the introduction of the right.

The UK government, in agreement with the Scottish and Welsh devolved administrations proceeded with introducing the right for employees to request to train within Clause 39 of the Apprenticeships, Skills, Children and Learning Bill 2009.

5 Purpose of the Bill

The Bill is intended to reform workplace dispute resolution. Following an extensive public consultation the Minister for Employment and Learning has determined that the statutory procedures in respect of discipline and dismissal matters should be retained, with workplace grievances being addressed on the basis of a Labour Relations Agency code of practice. As such the Bill will repeal the current statutory grievance procedures.

The Bill also sets out changes designed to contribute positively to the operation of industrial tribunals and the Fair Employment Tribunal[14].

The right to ask for time to train is intended to help raise employees' awareness and aspirations in relation to skills development and encourage more employers to invest in training their employees, contributing towards improved business performance and competitiveness[15].

6 Overview of the Bill

The Bill contains 18 clauses and 3 schedules which:

- leave intact the statutory regime for disciplinary and dismissal situations whilst moving to a less legalistic framework for the raising of workplace grievances involving voluntary compliance with the appropriate Labour Relations Agency Code of Practice;
- repeal provisions linking grievance and disciplinary/dismissal processes with industrial tribunal and Fair Employment Tribunal time limits;

[13] Department of Employment and Learning July 2009 Flexible Working and Time to Train http://www.delni.gov.uk/index/consultation-zone/archived-consultations/archived-consultations-2009/flexible-working-time-to-train.htm (First accessed 11/06/2010)

[14] Department for Employment and Learning Employment (No 2) Bill Explanatory and Financial Memorandum

[15] Ibid

- enable the Labour Relations Agency to exercise greater discretion in offering its assistance to resolve disputes and repeals time restrictions on the period of Labour Relations Agency conciliation;
- amend industrial tribunals' powers to reach a determination without a hearing;
- modify industrial tribunals' powers to restrict publicity;
- provide that tribunal awards, once registered, are enforceable without the need to obtain a court order, and makes similar provision in relation to conciliated settlements reached with the assistance of the Labour Relations Agency;
- enable the Fair Employment Tribunal to hear aspects of fair employment cases that would previously have necessitated a separate industrial tribunal hearing; and
- introduce the legislative framework for a right to request a time to train.

7 Content of the Bill[16]

Clause 1: Repeal of statutory grievance procedures

Statutory procedures requiring certain steps to be taken to deal with disputes in the workplace came into operation in April 2005. Separate but similar procedures apply to disciplinary and dismissal matters raised by employers and grievances raised by employees. The steps consist of a general requirement for written notification of the issue, a subsequent meeting between employer and employee and, if appropriate, an appeal. Where the employer or the employee fails to use the minimum statutory procedures, Articles 17 and 18 of the 2003 Order require a tribunal, other than in exceptional circumstances, to increase or decrease any award.

Clause 1 has the effect of removing the statutory grievance procedures from statute. This is primarily achieved through the repeal of Part 2 of Schedule 1 to the 2003 Order, which sets out the statutory grievance procedures. The Clause also repeals Articles 19 and 20 of the Employment (Northern Ireland) Order 2003 (the 2003 Order), which prevent a grievance from being presented, respectively, to an industrial tribunal and the Fair Employment Tribunal where certain requirements of the statutory grievance procedures have not been completed. Finally, it gives effect to the consequential amendments in Schedule 1 which remove all other references to the statutory grievance process.

The Clause does not impact upon the future operation of the statutory disciplinary and dismissal procedures, which are retained in Parts 1 and 3 of Schedule 1 to the 2003 Order. Articles 17 and 18 of the 2003 Order, referred to above, continue to have effect where disciplinary and dismissal procedures apply.

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

[16] Department of Employment and Learning Employment (No 2) Bill Explanatory and Financial Memorandum, NIA Bill

Clause 2 repeals Article 16 of the 2003 Order, which implies in every contract of employment a duty to observe the statutory dispute resolution procedures in circumstances specified by the Department in regulations. Neither the Article nor the corresponding provision in Great Britain (section 30 of the Employment Act 2002, now repealed) was ever commenced in full, and no regulations were made under this provision. The Department has no plans to utilise this provision.

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

Clause 3 repeals Articles 21 and 22 of the 2003 Order. These Articles contain regulation-making powers which have enabled a link to be established between application of the statutory dispute resolution procedures with time limits on claims, respectively, to an industrial tribunal and the Fair Employment Tribunal. Regulations made under these Articles specify that, under the statutory disciplinary and dismissal arrangements, where an employee has reasonable grounds for believing a procedure is ongoing at the point where the normal time limit for applying to a tribunal expires, that time limit will be extended by three months. Under the statutory grievance arrangements, the provisions regarding time limits are more complex; however, in essence, they allow for extension of the time to present a claim by three months where a grievance is lodged with the employer in writing within a specified time.

The effect of the repeals contained in this Clause is to sever the connection between the remaining statutory procedures, relating to disciplinary and dismissal situations, and time limits for lodging tribunal claims. The intention of the repeal is to simplify time limits, removing confusion that was generated by the provisions for extending them, and to provide for consistency between time limits relating to grievance and disciplinary/dismissal situations.

Clause 4: Non-compliance with statutory Codes of Practice

Clause 4 inserts into the Industrial Relations (Northern Ireland) Order 1992 (the Industrial Relations Order) a new Article 90AA. The Article applies to grievances of a kind listed in the newly-inserted Schedule 4A of that Order, and specifies the consequences of an employer’s or employee’s failure to comply with a provision of a relevant Code of Practice. Non-compliance will result in a subsequent tribunal being empowered, where it considers it just and equitable, to apply an increase or reduction to any award of up to 50%.

These arrangements replace the statutory workplace grievance procedures with a more straightforward mechanism allowing a tribunal discretion as to whether and to what extent it is appropriate to penalise a party for unreasonable failure to adhere to good practice steps. Those steps will be set out in a revised Labour Relations Agency Code of Practice.

Inserted Article 90AA goes on to provide that an award cannot be adjusted in respect of the new grievance arrangements where the statutory disciplinary and dismissal procedures apply. This precludes the possibility of separate adjustments being made under the now differing grievance and disciplinary/dismissal mechanisms.

An Article 90AA adjustment will be applied before any adjustment is made under Article 27 or 28 of the 2003 Order. Articles 27 and 28 relate, respectively, to industrial tribunal and Fair Employment Tribunal proceedings. They provide that adjustments to awards can be made by a tribunal where an employer has failed to provide an adequate written statement of employment particulars.

Finally, the inserted Article empowers the Department for Employment and Learning, with the approval of the Northern Ireland Assembly, to modify the list of jurisdictions in Schedule 4A to the Industrial Relations Order. Schedule 4A to that Order is set out as Schedule 2 to the Bill.

Clause 5: Determination of industrial tribunal proceedings without hearing

Article 9(3A) of the Industrial Tribunals (Northern Ireland) Order 1996 (the Industrial Tribunals Order) provides that industrial tribunals may be authorised to decide cases without any hearing.

Clause 5 inserts new paragraphs (3AA) and (3AB) into Article 9 of the Industrial Tribunals Order, specifying that the industrial tribunal procedure for determining matters without a hearing must ensure that all parties to the proceedings consent in writing to the process.

The change is intended to support a process for settling simple disputes, without the need for tribunal hearings, on the basis of documentation submitted to a tribunal.

The Clause ensures that tribunals may continue to exercise their powers to issue default judgements without a hearing, and that the consent of parties is not required in these circumstances.

Clause 6: Restriction of publicity

Article 13 of the Industrial Tribunals Order provides that regulations may enable an industrial tribunal to make a restricted reporting order where proceedings involve allegations of sexual misconduct. Article 13 also allows provision to be made preventing the identification of an individual affected by or making an allegation concerning a sexual offence.

Clause 6 extends the scope of Article 13 of the Industrial Tribunals Order. It extends the potential scope of regulations so that they may provide for the making of a restricted reporting order in cases where the disclosure of certain information would be likely to put an individual or property at risk or, alternatively, where the tribunal considers that the interests of justice require such an order to be made.

The intent of the provision is to facilitate individuals who are deterred from going to tribunal because they foresee adverse consequences arising from public disclosure of certain sensitive information, such as information concerning their sexual orientation. The measure is not solely intended to benefit claimants; it applies to all parties, and individuals other than the parties, who may be adversely affected by the disclosure of such information.

Clause 7: Enforcement of sums payable

Clause 7 amends Article 17(1) of the Industrial Tribunals Order, removing the requirement to seek a county court order for enforcement purposes. The amendment ensures that awards made by an industrial tribunal are enforceable by individuals in the same way as a county court order.

Clause 8: Conciliation before bringing of proceedings

Clause 8 inserts amendments into Article 20 of the Industrial Tribunals Order. Article 20 specifies the circumstances in which the Labour Relations Agency (LRA) is obliged, or has the power, to offer conciliation.

Article 20(3) of the Industrial Tribunals Order applies to conciliation in situations where a person could bring tribunal proceedings, but has not yet done so. It provides that where conciliation is requested, the LRA conciliation officer has a duty to attempt to facilitate the parties in reaching a conciliated settlement to the dispute (where both parties have made the request), or (if only one party has made the request) to do so where there is a reasonable prospect of success.

Paragraph (2) of the Clause amends Article 20(3) of the Industrial Tribunals Order to replace this obligation with a discretionary power to conciliate in a pre-tribunal dispute without requiring the LRA officer to justify the reasons for his or her decision as to whether or not to offer conciliation. The intention of the amendment is to enable the LRA to prioritise cases where demand for conciliation exceeds resources available and to relieve the LRA of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success.

Article 20(5) of the Industrial Tribunals Order provides that, where a person claims that an unfair dismissal complaint under Article 145 of the Employment Rights (Northern Ireland) Order 1996 (the Employment Rights Order) could be, but has not yet been, made, the LRA officer must act as if that claim had been made and, as provided for in Article 20(4) of the Industrial Tribunals Order, as part of the conciliation exercise, attempt to secure reinstatement or reengagement (or additional compensation in lieu of such) for the dismissed employee. Paragraph (3) of Clause 8 repeals that duty and substitutes a discretionary power to seek such reinstatement or reengagement in pre-tribunal disputes.

Clause 9: Conciliation after bringing of proceedings

Article 20(2A) of the Industrial Tribunals Order 1996 requires that, where industrial tribunal rules provide for the postponement of hearings for a fixed period, to allow an opportunity for conciliation and settlement, the LRA's duty to offer conciliation continues during the fixed period but thereafter becomes a discretionary power. Article 21(2) further requires that any such rules must also provide for notification to the parties that conciliation services may be withdrawn after the fixed period has ended.

Clause 9 repeals the above provisions, with the effect that the LRA's duty to offer conciliation during tribunal proceedings is no longer time limited.

Clause 10: Recovery of sums payable under compromises involving the Agency

Clause 10 concerns sums payable under conciliated settlements, reached with the assistance of the LRA, where there is agreement to avoid industrial tribunal proceedings. It inserts a new Article 21A into the Industrial Tribunals Order specifying that sums payable under such settlements are to be treated as though payable under a county court order, except where the terms of the conciliated settlement require the person to whom the sum is payable to do anything other than discontinue or not start proceedings. Where the settlement does require some other action, recovery of the sum requires a county court order.

The inserted Article also provides that the sum is not recoverable if the person by whom the sum is payable successfully applies to an industrial tribunal or county court for a declaration that it would not be recoverable under the general law of contract. No action may be taken to recover the sum while such an application is pending.

Provision is made whereby county court rules can specify a time period during which a sum is not recoverable. Finally, the inserted provision sets out regulation-making powers in relation to time limits and when an application is to be treated as pending.

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

Under Article 85(2) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (the Fair Employment and Treatment Order), the Fair Employment Tribunal may take on the powers and functions of an industrial tribunal in relation to certain jurisdictions. These jurisdictions relate to unlawful discrimination and unfair dismissal, as specified in Article 85(1).

However, there are certain cases which involve fair employment together with an industrial tribunal jurisdiction – such as unlawful deductions from wages or holiday pay – which, if they are not associated with jurisdictions already covered by Article 85, may not be heard by the Fair Employment Tribunal in this way. As a result, in cases involving fair employment and these industrial tribunal jurisdictions, issues arising from essentially the same set of facts must be the subject of separate industrial tribunal and Fair Employment Tribunal proceedings. Additional time, effort and money is expended on two tribunal processes where one should suffice.

Clause 11 amends Article 85 of the Fair Employment and Treatment Order so that, where the President or Vice-President of Industrial Tribunals and the Fair Employment Tribunal so directs, the Fair Employment Tribunal will be capable of assuming the powers and functions of an industrial tribunal to deal with all aspects of the case which would normally fall to be heard by an industrial tribunal.

Clause 12: Conciliation before bringing of proceedings

Article 88 of the Fair Employment and Treatment Order is drafted in similar terms to Article 20 of the Industrial Tribunals Order. It specifies the circumstances in which the LRA is obliged, or has the power, to offer conciliation. Paragraph (2) of Article 88 applies to conciliation in situations where a person could bring proceedings before the Fair Employment Tribunal, but has not yet done so. It provides that where conciliation is requested, the LRA conciliation officer has a duty to attempt to facilitate the parties in reaching a conciliated settlement to the dispute (where both parties have made the request), or (if only one party has made the request) to do so where there is a reasonable prospect of success.

Clause 12 makes amendments to Article 88 in respect of LRA conciliation in fair employment cases which are similar to those made in respect of other jurisdictions by Clause 8. It replaces the obligation to assist the parties described above with a discretionary power to conciliate in a pre-tribunal dispute without requiring the LRA officer to justify the reasons for his or her decision as to whether or not to offer conciliation. The intention is to enable the LRA to prioritise cases where demand for conciliation exceeds resources available and to relieve the LRA of the obligation to offer conciliation in pre-tribunal disputes where there is no prospect of success.

Clause 13: Conciliation after bringing of proceedings

Clause 13 repeals paragraph (1A) of Article 88 of the Fair Employment and Treatment Order. Paragraph (1A) requires that, where Fair Employment Tribunal rules provide for the postponement of hearings for a fixed period, to allow an opportunity for conciliation and settlement, the LRA's duty to offer conciliation continues during the fixed period but thereafter becomes a discretionary power. Paragraph (1A) further requires that any such rules must also provide for notification to the parties that conciliation services may be withdrawn after the fixed period has ended.

The provisions in this Clause correspond to those in Clause 9; their effect is that the LRA's duty to offer conciliation during Fair Employment Tribunal proceedings is no longer time limited.

Clause 14: Recovery of sums payable under compromises involving the Agency

Clause 14, which replicates Clause 10 in respect of fair employment cases, inserts as new Article 88A into the Fair Employment and Treatment Order. The inserted provision concerns sums payable under settlements conciliated with LRA assistance, under Article 88 of that Order, where there is agreement to avoid Fair Employment Tribunal

proceedings. It specifies that sums payable under such settlements are to be treated as though payable under an order of the Fair Employment Tribunal, except where the terms of the conciliated settlement require the person to whom the sum is payable to do anything other than discontinue or not start proceedings. Where the settlement does require some other action, recovery of the sum requires a county court order.

The inserted Article also provides that the sum is not recoverable if the person by whom the sum is payable successfully applies to the Fair Employment Tribunal or county court for a declaration that it would not be recoverable under the general law of contract. No action may be taken to recover the sum while such an application is pending.

Provision is made whereby county court rules can specify a time period during which a sum is not recoverable. Finally, the inserted provision sets out regulation-making powers in relation to time limits and when an application is to be treated as pending.

Clause 15: Time off for study or training

Clause 15 inserts, as a new Part 7A (Articles 95A to 95G) of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order), the provisions set out in Part 1 of Schedule 3. It also makes amendments, set out in Part 2 of Schedule 3, which are required to be made as a consequence of the insertion of the new Part 7A of the 1996 Order.

New Article 95A of the 1996 Order introduces a right for qualifying employees to make a statutory application to their employer in relation to study or training. The request must meet certain conditions in order to be valid; for example, it must be for study or training that is intended to improve an employee's effectiveness at work and the performance of the employer's business. Further validity conditions may be set out in regulations made by the Department.

Under paragraph (6) of the new Article, an employee must meet certain requirements as to duration of employment in order to qualify for the right, and paragraph (7) makes clear that the right does not apply to employees of compulsory school age, young people who already have a statutory right to paid time off for study or training and agency workers. To allow for flexible responses to changing circumstances, the Department is empowered to make regulations, subject to the confirmatory procedure, specifying other types of person to be excluded from the right. Article 95A finally provides, in paragraph (9), that the statutory arrangements do not affect other approaches to determining and delivering training needs (for example through annual appraisal systems).

New Article 95B allows a request to be for training of any kind (including in-house training or attendance at external events). It also specifies that more than one course of training or study may be included in a single request; thus, an employee who identifies a need for basic skills training in numeracy followed by a full job-related course at level

2 would be able to include both courses of training in their request. Paragraph (3) of new Article 95B provides that it is not essential that the training lead to the award of a qualification of any sort. It will therefore be possible for an employee to request to undertake any study or training that the employee believes will make him or her more effective in a current or future role in the employer's business and improve the employer's business performance.

Article 95B(4) sets out the information which an employee must include in a request. The request must include details of the subject matter of the study or training, where and when it would take place, how long it would last, who would provide or supervise it and whether it would lead to a qualification. The request must also state how the training would make the employee more effective and improve the performance of the business. Paragraph (5) also includes a power for the Department to make regulations specifying the form of the application.

New Article 95C specifies that employers must deal with requests in accordance with regulations made by the Department. Paragraph (1) means that an employer has to deal with only one application from the employee in any 12 month period. However, in certain circumstances, an employer could be required to disregard an earlier application which has been submitted. These circumstances would be set out in regulations made under paragraph (3).

Paragraph (4) enables the Department to make regulations specifying how employers should deal with an application. An employer may refuse a request (or part of one) only where the employer thinks that granting it (or part of it) would be detrimental to the business for one or more of the following reasons: lack of benefit to the business in terms effectiveness or performance; burden of additional costs; negative effect on customer demand, quality or performance; inability to re-organise work or recruit staff to accommodate the request; lack of work for the employee during the periods he or she proposes to work; and planned structural changes. The Department may make regulations to add reasons to this list. An employer could refuse part of a request for one of the reasons above. This could mean that an employee requesting to undertake two courses may have only one approved.

New Article 95D makes provision about regulations under Article 95C(4) specifying the manner in which an application is to be handled. Such regulations must include provision for the employee to be accompanied to relevant meetings, such meetings to be postponed where the companion is unavailable, rights to paid time off to act as a companion, the potential consequences of a breach of these requirements, and the circumstances in which an application is to be treated as withdrawn.

Where an employer agrees or agrees in part to a request, an employee is required under new Article 95E to inform his or her employer if he or she does not start or ceases to attend the agreed study or training. The employee also needs to tell the employer if he or she takes on study or training differing from that which was agreed.

Regulations made by the Department under this Article may specify how an employee should inform the employer of any changes in the training.

New Article 95F makes provision for an employee to complain to an industrial tribunal where the employer has failed to comply with the duties concerning the consideration of a request (including procedural requirements) or where the employer's decision to refuse a request, or part of it, was based on incorrect facts. A tribunal complaint (unless the tribunal exercises its discretion to grant an extension) must be made within three months of either an employer notifying an employee, following an appeal, of the decision to refuse a request, or (in certain kinds of cases specified by the Department) from the point where the employer is alleged to have failed to comply with a duty. Paragraph (4) excludes employees from complaining to tribunals under Article 95F in relation to the right to be accompanied at meetings if regulations under Article 95D make provision about such complaints instead.

New Article 95G provides that an industrial tribunal, where it finds the applicant's complaint well-founded, must make a declaration to that effect and may require the employer to reconsider the request. It may also make an award of compensation. The limit on the number of weeks' pay which a tribunal may award as compensation will be specified by the Department in regulations.

New Article 70F of the 1996 Order, inserted by paragraph 5 of Part 2 of Schedule 3, ensures that an employee has a right not to be subjected to any detriment by his or her employer as a result of making, or proposing to make, a request, or submitting a complaint to an industrial tribunal under Article 95F, or alleging circumstances that would justify such a claim.

New Article 135D of the 1996 Order, inserted by paragraph 7 of Part 2 of Schedule 3, ensures that an employee will be able to claim unfair dismissal if the reason for the dismissal is that the employee made, or proposed to make, a request for time to train or submitted a claim to an industrial tribunal under Article 95F, or alleged circumstances that would justify such a claim.

Clause 16: Repeals

Clause 16 repeals the provisions set out in Schedule 4. The repeals are consequential upon the earlier provisions of the Bill.

Clause 17: Commencement

Clause 17 specifies that the provisions contained in the Bill shall come into operation in accordance with an order or orders made by the Department for Employment and Learning. Any order made by the Department in this regard may contain appropriate transitional or saving provisions.

Clause 18: Short title

Clause 18 provides for the short title by which the Bill, once enacted, will be known.

8 Option Consideration

Workplace dispute resolution

The Department considered three options in all:

- Maintain the status quo;
- Replicated GB reforms; and
- Create a bespoke response for Northern Ireland based on extensive consultations.

The Department considered whether existing arrangements could be retained without modification[17]. This option was discounted as it immediately became clear from engagement with stakeholders and responses to the public consultation that retaining the status quo would be unhelpful.

The Department next examined the possibility of simply replicating GB reforms which culminated in the Employment Act 2008. In GB, from April 2009, all aspects (disciplinary, dismissal and grievance) of the statutory regime for resolving workplace disputes were repealed. Disputes are now being handled on the basis of an ACAS code of practice. Although there was some support for similar approaches in Northern Ireland, straightforward replication of the GB arrangements was quickly ruled out on the basis that the majority of stakeholders favoured a bespoke solution that addressed local needs and circumstances.

The content of the Bill was arrived at on the basis of policy decisions taken in light of the outcome of an extensive public consultation process. The rationale for the decisions is set out in the Department's policy response to the consultation which was published on 14 April 2010.

Time to train

The Department considered three alternatives to the introduction of a right to request time to train[18]:

- Do Nothing;
- Introduce a voluntary, good practice and guidance led programme; and
- Introduce a right to request time to train.

The first was to do nothing at all. The Department already has in place a significant programme of work to support and encourage employers and individual citizens to invest in training and development. However, this option was ruled out as whilst existing programmes will assist many in acquiring skills and qualifications, there remains a potential gap in those sections of the workforce where there is not a culture conducive to training and development. This means that there is a group of employees who wish to undertake training but who do not feel sufficiently empowered to do so.

[17] Department for Employment and Learning Employment (No 2) Bill Explanatory and Financial Memorandum
[18] Ibid

Doing nothing would also put these employees at a disadvantage vis à vis their counterparts in the rest of the United Kingdom.

A second option considered was a voluntary, good practice and guidance-led approach. The Department could have run an advertising campaign designed to encourage employees to approach their employer with requests for time to undertake training and employers to give requests serious consideration. The Department concluded, however, that take-up would be less than under a statutory regime. In setting down clear rules about non-compliance employees will be encouraged to bring forward requests and employers will be minded to give proper consideration to any requests for time to train.

In light of the generally positive response that the right to request time to train has received from stakeholders, the Department believes that its introduction is the most appropriate way forward.

9 Costs[19]

Workplace dispute resolution

Repeal of the statutory grievance procedures will result in savings of around £25,000 per annum to the Office of Industrial Tribunals and the Fair Employment Tribunal as a result of the reduced complexity of claims and pre-acceptance procedures.

The increased emphasis on pre-claim conciliation should generate savings of around £11,000 per annum for Government due to greater numbers of disputes being resolved without the need for a tribunal hearing.

The introduction of a more straightforward procedure for the resolution of simple claims should save Government £10,000 per annum in tribunal resources.

Time to train

The right to request time to train will cost Government some £6.7 million per annum in respect of tuition at levels 2 and 3 arising from successful requests.

10 Human Rights Issues

The provisions in the Bill are not deemed to have implications for human rights.

[19] Ibid

11 Equality Impact Assessment[20]

Workplace dispute resolution

From an equality perspective, taken as a whole, the proposals will have modest positive benefits for all of the groupings listed in section 75 of the Northern Ireland Act 1998 in the sense that they will open up opportunities for resolving workplace disputes in a more constructive and efficient manner. However, an equality impact assessment carried out by the Department for Employment and Learning has identified that some of the policy proposals will generate greater benefits for particular groups[21].

Single parents (predominantly women), who due to family commitments and their less favourable economic position do not have time or resources for lengthy or complex legal processes; individuals with disabilities, and in particular mental health disabilities associated with or exacerbated by stress; racial, ethnic, national or religious groups employed as migrant workers whose first language is not English; and persons bringing a tribunal claim relating to their sexual orientation or to political or religious discrimination, will all benefit from enhanced information and advice, access to a wider range of ADR services, and modifications to tribunal processes. Whilst impacts are considered to be positive, they are considered to be of a relatively minor nature.

Time to train

Modest positive equality impacts are anticipated as a result of the introduction of the right to request time to train. A number of groups will benefit from this right[22], including:

- Dependents: The right will allow individuals who care for a dependant greater flexibility in arranging training at more suitable times[23].
- Gender: Women are more likely then men to take on the main responsibility for childcare or to act as carers, and will therefore benefit disproportionately as people with dependants
- Martial Status; lone parents are likewise particularly likely to benefit from a successful request for time to train given the particular difficulties they are likely to have in timetabling training outside working hours[24]; and
- Age: Modest benefits are also likely to accrue to older people, in that the right will enhance opportunities for retraining and updating of knowledge to meet the challenges of changing working practices and skills requirements.

[20] Ibid
[21] Department for Employment and Learning Employment (No 2) Bill Explanatory and Financial Memorandum
[22] Department of Employment and Learning July 2009 Flexible Working and Time to Train http://www.delni.gov.uk/index/consultation-zone/archived-consultations/archived-consultations-2009/flexible-working-time-to-train.htm (First accessed 11/06/2010)
[23] Ibid
[24] Ibid

The consultation document states that:

> *No differential impacts have been identified in relation to any of the other Section 75 categories, namely religious belief, political opinion, racial group, sexual orientation and disability.*

Appendix 1: Respondents to Workplace Dispute Resolution Consultation

The list of respondents to the consultation is provided below.

- Anonymous individual respondent
- Antrim Borough Council
- Belfast City Council
- British Association for Counselling and Psychotherapy
- C Thompson
- CBI Northern Ireland
- Council for Catholic Maintained Schools
- Citizens Advice
- Committee on the Administration of Justice
- Council of Employment Tribunal Judges
- Delta Print & Packaging
- Disability Action
- Down District Council
- Employment and Learning Committee, Northern Ireland Assembly
- Engineering Employers Federation
- Equality Commission for Northern Ireland
- Federation of Small Businesses
- HR Forum
- Institute of Directors, Northern Ireland Division
- Labour Relations Agency
- Law Centre (Northern Ireland)
- L'Estrange and Brett Solicitors
- Limavady Borough Council
- L Cass
- NACCO Materials Handling Ltd
- Northern Ireland Civil Service
- Northern Ireland Committee, Irish Congress of Trade Unions
- Northern Ireland Council for Ethnic Minorities
- Northern Ireland Court Service
- Northern Ireland Judicial Appointments Commission
- North West Regional College
- Office of Industrial Tribunals and the Fair Employment Tribunal

- P Cavanagh
- Queen's University Belfast
- Rosemary Connolly Solicitors
- Royal College of Nursing Northern Ireland
- Thompsons McClure Solicitors
- University and College Union

Appendix 2: Respondents to the Right to Ask for Time to Train Consultation

The list of respondents to the consultation is provided below.

- Citizens Advice
- CBI Northern Ireland
- Chartered Management Institute [CMI]
- Disability Action
- Department of Education [DE]
- Department of Enterprise Trade and Investment [DETI]
- Department of Social Development [DSD]
- Equality Commission for Northern Ireland [ECNI]
- Federation of Small Businesses [FSB]
- Karen Boutros
- Larne Borough Council
- Law Centre (Northern Ireland)
- Labour Relations Agency [LRA]
- Northern Health and Social Care Trust
- Northern Ireland Civil Service [NICS]
- Northern Ireland Committee, Irish Congress of Trade Unions [NIC ICTU]
- Northern Ireland Judicial Appointment Commission
- Northern Ireland Public Service Alliance [NIPSA]
- Royal College of Midwives [RCM]
- Royal College of Nursing [RCN]
- Strabane District Council