



Northern Ireland
Assembly

**COMMITTEE
FOR EMPLOYMENT
AND LEARNING**

**OFFICIAL REPORT
(Hansard)**

Employment Rights

23 November 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Pat Ramsey (Acting Chairperson)
Mr Jim Allister
Ms Michelle Gildernew
Mr Chris Lyttle
Mr Barry McElduff
Mr David McIlveen
Mrs Sandra Overend
Mr Alastair Ross

Witnesses:

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

The Acting Chairperson:

I welcome the departmental officials, Tom Evans and Conor Brady. Do you want to proceed?

Mr Tom Evans (Department for Employment and Learning):

Copies of the briefing paper and the presentation have been tabled. This session is more of an information session and an opportunity to update the Committee on work that we are taking forward that is already the subject of ministerial and Executive decisions and has been signed off by the Committee. I will also mention subordinate legislation that may come in front of the

Committee in the next year or 18 months and will give some information on some GB developments. The supporting paper gives some detail, but we are very happy to give a more detailed briefing on any of the papers after this briefing session if the Committee desires. So, if you are content, I will go through the presentation.

We want to update you on our work on the agency workers directive, into which the Committee has had a significant input, and outline where we are with the implementation of the 2008-2010 dispute resolution review that the Committee looked at in the previous mandate. We will say something about stakeholder engagement, which we continue to move forward with; the subordinate legislation programme; some of our operational services, such as the Employment Agency Standards Inspectorate and the Insolvency Service; and the GB developments.

The Committee sponsored a take-note debate on the agency workers directive on 21 June. The Committee then signed off on the SL1 letter on 29 June. The regulations were made on 5 October and laid before the Assembly on 13 October. Guidance was published in October and was very much on the basis of consultation with all the key partners. We proactively engaged with the various stakeholders to encourage them to comment, because the guidance is very much about making it operational and transparent and easy to work through. We are on track with that, and the directive will be transposed by the due date of 5 December.

There is a commitment under article 12, the review provisions, to look at the way in which the actual implementation is working and whether there are any issues. At this stage in GB, some things are emerging around the Swedish derogation and other matters, and we will certainly take a close look at those. However, we will work with the Committee, look at it from a Northern Ireland perspective and learn from GB, which is a couple of months ahead.

I will update the Committee on the dispute resolution review. The Employment Act (Northern Ireland) 2011 came into effect in April and under the new arrangements, we deregulated the statutory grievance procedures but retained the statutory discipline and dismissal. However, a number of policy decisions were signed off at that time, one of which was because the small and medium-sized enterprises (SME) sector seems to have significant difficulties in meeting its responsibilities under various employment legislation. So, we are about to commission research to look at what barriers exist and what existing support systems are available through government, not just through our Department but through Invest Northern Ireland, the

Department of Enterprise, Trade and Investment (DETI) and non-government agencies and representative bodies to see whether there is a better way of supporting SMEs in discharging their employer responsibilities. As part of that, we will seek quite a lot of qualitative information from the sector. We are very happy to share the specifications of that and come back to report on findings.

One other key recommendation was that the Labour Relations Agency (LRA) should establish a pre-claim conciliation service and enhance its helpline. That is already in place and seems to be working well. Obviously, it is early days, but we are very happy to come back to report, maybe after 12 months, on how the new arrangements are working. However, we do not have a particularly strong feeling about the problems that have been created by the new system. In fact, we made a presentation to colleagues in the Republic of Ireland recently, and Penny Holloway came along to speak. They were impressed, and the early signs are positive. You may want to talk to the agency directly about that.

We are working with the agency and our legal people to develop an enhanced arbitration scheme. There are two schemes for unfair dismissal and flexible working but they are almost redundant because you cannot hear any other part of a tribunal claim other than that. So, the enhanced arbitration scheme will embrace all discrimination and non-discrimination jurisdictions. We will have to come back to the Committee. That will be debated in the Assembly before it is approved, and the Committee will have a significant chance to give input.

Finally, as a result of the review, there was quite a significant consensus that there should be an employment appeals tribunal — an appeal mechanism other than the existing Court of Appeal in Northern Ireland. That is what happens in GB. We will do an economic appraisal and work with colleagues in the Courts and Tribunals Service to look at the viability. Obviously, you cannot increase the administrative burden, and we will work with stakeholders on that issue. Again, we are happy to come back to the Committee about that.

Moving on to stakeholder engagements, we had a social partner consultation steering group which had oversight of the consultation on the dispute resolution review. We then reconstituted that as a dispute resolution implementation group. The group includes representatives of the Northern Ireland Committee of the Irish Congress of Trades Unions (NICICTU), the Confederation of British Industry (CBI), the Federation of Small Businesses, the Equality

Commission and the Labour Relations Agency. The group has agreed to become the single reference point for all policy reviews as we start them out and to act as an initial consultation vehicle. We found that it had a great insight into what was happening at an operational level on the ground. We are going to use it again, and its members are pleased to be involved in that.

We are also working on the better regulation agenda. That is obviously a concern, particularly for the business community. Conor and I are involved in the better regulation group at an operational level with all the key deliverers and also at a policy level, where better regulation is led by the Department of Enterprise, Trade and Investment (DETI).

That takes us to subordinate legislation. As I said, we will try to give a sense of the issues coming before you. The first two are the Labour Relations Agency's code of practice on discipline and grievances and the additional statutory paternity pay regulations. A debate is scheduled for 5 December on very minor amendments to the code of practice, to add one extra jurisdiction. That is about cross-border mergers. On the additional statutory paternity pay, it is to correct a drafting error that arose in the GB legislation which, we have to say, we replicated. It is a very small drafting error. We will pick up on it.

Otherwise, the programme of legislation is as follows. On an annual basis, usually around February, there is a revision of the limits for certain employment rights payments, particularly things such as the level of redundancy pay and issues related to that. That will come before the Committee. We consulted on potential regulations to prohibit blacklisting, and Connor will pick up on that. That is something that we will want to bring to the Committee.

Mr Conor Brady (Department for Employment and Learning):

Absolutely. It is something that we are considering. A consultation was carried out in 2009-2010 about proposals for the introduction of legislative protections for trade union activities. That was on the back of an investigation by the Information Commissioner into an organisation called the Consulting Association, during which it was apparently found that a list, effectively a database of trade union members operating in the construction sector, was being passed around various construction employers and on the basis of which certain individuals were prevented from being taken on.

In 2010, GB introduced regulations which effectively prohibit the consolidation, holding or

dissemination of such a list of trade union members and their activities. We completed our consultation, but there has been a slight delay in bringing it forward, because of the change in the Assembly's mandate as much as anything. Furthermore, we wanted to give further consideration to specific Northern Ireland provisions that could be introduced to the regulations. We have now finished our analysis of the consultation. We are at the stage where we want to seek the Committee's views on consolidation. We have consolidated all the responses to that consultation. Before we go further, we want to hear the Committee's views. We hope that, once the Minister has signed off on that, we will seek your opinions on the various stakeholder responses to the consultation.

Mr Evans:

We will move down the list. There is potentially a review of the annual leave entitlement. Back in 2007, that was increased by eight days, in line with the public holiday entitlement. However, that was the number of public holidays in the rest of the UK, whereas in Northern Ireland, there are 10 public holidays. We have to be careful of the impact of that on business. Again, we will take forward a review and come back to the Committee on that.

Mr C Brady:

Let me add to that point. Last time, we put together a paper for the Executive that proposed that we should not seek to introduce an additional two days because of the impact that that would have on business. At the time, the Executive agreed but with the caveat that the Department should look at the issue again after two years to see whether there had been any changes in the economic landscape of Northern Ireland. As such, we will be looking at the issue again in 2012 to satisfy the Executive's requirement for us to look at it again. Obviously, we cannot anticipate the Minister's or the Executive's view. However, the economic environment has not improved significantly over the past two years, and you do not need me to tell you that.

Mr Evans:

The other two pieces of work are the review of redundancy payments and the review of public interest disclosure. The review of redundancy payments is about whether its scope should be increased for councils and other wider public service employees. The review of public interest disclosure is about adding to the number of prescribed persons that would be set out in the legislation.

That takes us into some of the operational stuff that we are taking forward. Conor looks after the inspectorate.

Mr C Brady:

I will try to keep this brief, because when I start talking about the inspectorate, I have a tendency to carry on for a long time. You should have received a copy of the inspector's annual report for this year. We think that it has been a very successful year with regard to the number of inspections carried out. The main point is that we have prosecuted one agency successfully on 10 different criminal charges, and we have prohibited two different agencies, one for 10 years and the other for eight years. Both are successful results and, for the most part, relate to young people.

That is part of our transition to a more risk-based approach to inspection. Previously, we wanted to carry out what we call routine inspections of all recruitment agencies in Northern Ireland, as much to educate towards compliance, which is the ideal approach, and to simply leave prohibitions or prosecutions in our back pocket as a last resort for those rogue agencies that continue to flout the regulations. That continues to be our approach, and, as we move forward, we will identify geographical areas or sectors where risk is highest. If you would like more information, we can provide a separate briefing on the work of the inspectorate.

Mr Evans:

That takes us on to our redundancy insolvency service, which, sadly, has grown over the past few years. The figures for 2010-11 show that there has been a 36% increase in claims and a drawdown from the national insurance fund of £8.75 million. This year to date, there has been a 27% increase on the previous year's figures. Obviously, it is a very difficult time for companies and employees when they find themselves in a redundancy situation. We have a Charter Mark standard to process claims within eight to 10 weeks. We have a telephone service for incoming calls, and we had to increase staff temporarily due to the volume of calls. Obviously, we will monitor that. We try to resolve claims where they can be easily processed within that timescale and, so far, we have been successful in meeting that Charter Mark standard.

That takes us into the GB policy developments. When we were coming here in the car, Conor said that Secretary of State for Business, Innovation and Skills, Vince Cable, is due to make an announcement today. I think that it will be along the lines of what came out of the Chancellor's

speech at the Conservative Party's annual conference about potentially increasing the qualifying period for unfair dismissal from one to two years and the introduction of charging regimes.

There was a major consultation on dispute resolution and tribunal reform. I think that it was launched last January, and we expected the Department's policy response to that. It was due in September, and it still has not emerged. The key issues include a consultation on whether all tribunal claims should be routed directly through the Advisory, Conciliation and Arbitration Service (ACAS), which is the GB equivalent of the Labour Relations Agency. There are issues around their potential proposal, which is almost moving to mandatory alternative dispute resolution mechanisms before you could move into the tribunal system. They are also taking about charging regimes for lodging a tribunal claim and for going to a full hearing. Those are quite emotive issues, which will touch on access to justice.

As I said, the Minister has not taken a view. However, once that policy response comes out, the Minister will consider how he wants to take that forward in consultation with the Executive and the Committee. Obviously, we will come early to the Committee.

We have established a tribunal rules committee here in Northern Ireland, which came out of the dispute resolution review. That involves a number of users, including the tribunal chairs, the Department and colleagues in the Courts and Tribunals Service. That is starting to mature. It looks at efficiency measures, the rules that are in place and whether they have been used. It is interesting to note that one of the facilities in the tribunals system is for deposit hearings, where the claimant or the respondent may have a fairly weak case one way or the other. It is available to the other party, through its representatives, to seek a deposit hearing. At this stage, the maximum deposit is £500. At the tribunal user group, the president said that the representatives are not using deposit hearings as they should, and he asked them why. Custom and practice is not there. We are looking at the existing financial regimes and what costs can be awarded. We are looking at why parts of the existing regime are not being used. As I said, one of the issues may be that the maximum amount for the deposit of £500 may not be a significant lever in the —

Mr Allister:

To whom does it go?

Mr Evans:

It is lodged to the tribunal. The tribunal chairman can hold a deposit hearing and say to the respondent that they need to deposit £1,000. That, ultimately, could go towards the costs of settlement. However, that has not been used at all up to this stage. The tribunals are actually being proactive in encouraging people to use the existing regimes.

That takes us into the modern workplaces consultation, which is very much about the entitlements that are available to working parents. It looks at some more radical proposals about sharing entitlement to leave and pay. There was a consultation, and our understanding is that there is no intention to put in place anything before 2014 or 2015. It is early days, but once the response is published, the Minister will consider that, and we will come back to the Committee with our thoughts.

There are a couple of other issues. Conor may want to pick up on the employment law review and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The employment law review looks at the potential areas in which the UK Government can seek to introduce better regulation or deregulation. The TUPE provisions on collective redundancies very much look at the existing arrangements for TUPE to see whether those are over-generous or need to be tightened. It is the same with collective redundancies; it is about the qualifying periods for announcing redundancies.

That is a Cook's tour. We wanted to give you a feel for what was coming over the hill. I am happy to pick up on questions now. I am also delighted to provide a further detailed briefing on things that the Committee wants to get most involved with.

The Acting Chairperson:

Thanks very much, Tom and Conor. There was quite a lot of detail. We certainly appreciate your filling in and keeping the Committee up to speed on possible further legislation. A number of members wish to ask questions.

Ms Gildernew:

There was a lot in there, Tom, as the Cathaoirleach said. I welcome there being more flexibility for working parents; there is no question about that. The right to request available leave to parents of children aged under 17 and disabled children under 18 creates quite a difficulty for

parents who have children with very complex needs and for whom 18 is not a threshold that indicates independence in any way. The document states:

“to the carers of a range of adult dependants.”

Is there a difference between the amount of flexibility that exists if your child is disabled until they are 18, and do they then come in to that category? I would be very grateful if you could give us some more information.

The first thing that jumped out at me was the issue of blacklisting regulations. I hear what you are saying about the change in mandate, but we want to send a very strong message to the Minister that this Committee would support him bringing in regulations to prohibit the use of the material that you were talking about. It is inconceivable that people could still be kept from employment because of trade union membership. Those are two points that I would like clarification on.

Mr Evans:

The issue of leave for parents of children with disabilities is one that members have raised, and it is something that we have been, and will be, mindful of. At all stages, the Minister is looking for Northern Ireland solutions. We did that with the dispute resolution review. We had an extensive debate about the agency workers directive transposition. I agree that there would be a strong view from the disability lobby and from parents themselves about the pressures. That is something that we will pick up on.

On the issue of blacklisting, as Conor said, we will bring back proposals.

Mr C Brady:

There will be an opportunity not just for the Committee to comment on the Department's proposals but to actually influence those proposals. If the Committee is of a mind to send the Minister a strong message about its views, it will have a number of opportunities to do so. It has always been our intention to allow the Committee the opportunity to feed into those proposals and pre-proposals as much as possible.

Mr Evans:

With regard to the Northern Ireland model, on the agency workers directive there were concerns about the lack of consultation with NICICTU. The Minister wrote a strong letter to Ed Davey

and received a response, which the Committee received. The issue caused us problems in Northern Ireland: there was a debate, the Committee was concerned and there was cross-party support for increased consultation. Ed Davey came back with a very positive letter, saying that the Government wanted to engage early on things. I just wanted to let you know that.

Ms Gildernew:

If we focussed more on what was coming out of Europe, we would not have to wait until it was passed down to us from Westminster. That goes back to the point that has been made before; we need to know what is coming at us in good time instead of relying on Westminster's advice.

The Acting Chairperson:

I agree, Michelle.

There are some points coming on which you can follow through with updated reports.

Mr McElduff:

The transposition date for the agency workers directive is, I think, Monday week. Is that right?

Mr C Brady:

It is the 5 December.

Mr McElduff:

That is upon us. First, has there been any feedback from the early Labour Relations Agency information seminars on the level of engagement?

Secondly, to approach this issue critically, your briefing document states:

“The Department intends to prepare short leaflet-type information for agency workers in a number of languages, and will publish information articles on the main provisions of the AWR for relevant migrant community newsletters.”

Is that not too little too late when it comes to disseminating information, given that the date for transposition is upon us?

Mr C Brady:

We are planning a prioritised approach to information provision. As with every Department and every branch, there are limited resources, so we have to try to focus on what we think are the

most important means of getting the information out there. Updating NI Direct and NI Business Info, as well as ensuring that the LRA has carried out its seminars, are the most important ways of formalising online information.

Certainly, there is a departmental commitment to providing specific information for migrant workers. However, more thought needs to go into how we do that, because of the necessarily disparate and somewhat fragmented nature of the migrant worker community in Northern Ireland. We need to take a more strategic approach to how we can more effectively engage with migrant workers. In informing recruitment agencies and employers, we are already very far along the road in that respect. So, rather than do something in slipshod fashion when it comes to migrant workers, we would rather make sure that we do it properly.

There are already significant amounts of information out there: you specifically mentioned the LRA seminars and asked about uptake of those. Every single one of those seminars was full, and they were held throughout Northern Ireland. So, your point is taken, but the Department wants to do something properly about information provision rather than trying to create a one-size-fits-all information source. We want to target workers specifically, particularly using local NGOs. We have already started using the inspectorate for direct engagement. We held an event in Ballymena two weeks ago with the inspectorate, the LRA, the Gangmasters Licensing Authority and the Equality Commission. We go out and build capacity directly to NGOs and citizens' advice organisations, based around that area of work, part of which included information on the agency workers directive. That is part of a programme of engagement throughout Northern Ireland, which we started eight months ago. We will continue to do that.

Mr McElduff:

I seek the inclusion of the Citizens Advice Bureau (CAB) and the advice network for that type of engagement. I am sure that that is happening.

Mr C Brady:

It is.

Mr Allister:

I have two questions. In what direction is the review of the TUPE regulations likely to go, in your view? Some of us have had the experience that they are not working as they were promised

to. What is the scope of that review?

Mr C Brady:

It is difficult to give you a definitive answer at this stage, simply because we need to build a greater evidence base before we can create any proposals.

Mr Allister:

It is GB-driven?

Mr C Brady:

The need to review TUPE is GB-driven, but that is also recognised locally.

Mr Allister:

What is driving that recognition? Is there a level of dissatisfaction with the way in which the regulations are working?

Mr C Brady:

Those have been expressed through informal representations. That is, perhaps, the best way to describe that. Certain stakeholders have suggested that, due to the complexity of the TUPE regulations, there is, perhaps, a need to refine them.

Mr Allister:

Is that coming from the employers' side or the employees' side?

Mr C Brady:

In my experience, the informal feedback has been from both, to a greater or lesser extent.

Mr Allister:

I recently had experience of a case in which the TUPE regulations had, supposedly, been honoured, but within three weeks, some of the people taken over were made redundant, which, at least, flies in the face of the spirit and possibly the letter of the regulations. There are problems with them.

Mr Evans:

The complexity of that legislation has been well recognised. It has been around for a number of years, but there has not been a review. The UK Department is calling for evidence, and it will have to determine the critical issues to be explored. It is early days, however, and we just wanted to let you know about that.

Mr Allister:

I also wanted to ask about the potential amendments to the working time directive and the way in which it is implemented. In your briefing, you state:

“Any amendments will be taken forward with objectives to limit the application of the Working Time Directive to the EU leave entitlement and not the additional domestic entitlement”.

What does that mean?

Mr C Brady:

I am sorry; that statement is a little bit more definitive than it should be. Effectively, the proposed amendments are to take into account judgements made by the European Court in two particular cases, Stringer and Pereda, which relate to the interaction between sick leave and annual leave. The statement in that paragraph is a little bit more definitive than it should be; that is an oversight on our part.

Mr Allister:

What should it say?

Mr C Brady:

It should say that consideration will be given to whether the amendments relate to the annual leave requirement as stipulated under the working time directive or whether those should be in line with national legislation; effectively, what the working time entitlements are in Northern Ireland.

Mr Allister:

So, it leaves it open, rather than the statement in the briefing, which suggests that it is headed in one direction.

Mr C Brady:

It is a misphrasing on our part. We did not mean to give the impression that a decision had been made.

Mr Allister:

I am not saying that it is a bad thing; I just want to understand it.

Mr C Brady:

It is a little bit definitive. Obviously, people will have different views on that, which is the whole point of the consultation. Consideration would have to be given to the impact that it would have on entitlements, which would potentially limit it to annual leave entitlement as stipulated under the directive rather than under national legislation.

Again, it is a misphrasing on our part, and we would not want to be that definitive. However, it is an important issue to take forward.

Mr Allister:

Thank you.

The Acting Chairperson:

Well spotted, Jim.

If members have no further questions, I will ask Tom and Conor about the Department's consultation on proposed regulations for Northern Ireland between July and October 2010, which yielded nine substantive responses. Officials are now analysing responses before completing further policy development work. Will you come back to us with more detail and let us see the substantive responses? Is there anything else you want to tell us about this?

Mr Evans:

This is on the blacklisting issue?

The Acting Chairperson:

Yes. Can the responses be shared with us?

Mr C Brady:

Yes. In any public consultation, we specifically add a caveat that any responses given to the consultation can be shared. We have already prepared a summary of those responses, and we plan to share it with the Committee. However, if the Committee wants sight of the full responses, we have no issue with sharing them.

The Acting Chairperson:

I have no further comment. Thank you very much for your briefing.