DÁIL ÉIREANN

AN COMHCHOISTE UM FHIONTAR, TRÁDÁIL AGUS FOSTAÍOCHT

JOINT COMMITTEE ON ENTERPRISE, TRADE AND EMPLOYMENT

Dé Céadaoin, 5 Bealtaine 2021

Wednesday, 5 May 2021

Tháinig an Comhchoiste le chéile ag 9.30 a.m.

The Joint Committee met at 9.30 a.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Richard Bruton,	Garret Ahearn,
Louise O'Reilly,	Ollie Crowe,
Matt Shanahan,	Róisín Garvey,
David Stanton.	Paul Gavan,
	Marie Sherlock.

Teachta / Deputy Maurice Quinlivan sa Chathaoir / in the Chair.

Workplace Relations (Miscellaneous Amendments) Bill 2021: Waiver of Pre-legislative Scrutiny

Chairman: I thank the members and witnesses for participating in today's meeting in line with exceptional circumstances and the measures we must take with the Covid-19 pandemic. I remind those present that apart from myself and members of the committee secretariat, all members and witnesses are required to participate remotely and from within the Leinster House complex only. As normal, all documentation for the meeting has been circulated on MS Teams.

The Tánaiste and Minister for Enterprise, Trade and Employment made a formal request to the Business Committee that pre-legislative scrutiny for the Workplace Relations (Miscellaneous Amendments) Bill 2021 be waived. The Bill complies with the advice of the Attorney General and provides the necessary powers to the Workplace Relations Commission, WRC, to continue to administer justice in accordance with the Constitution. The need for the Bill arose following a recent Supreme Court judgment in the Zalewski case. The request from the Tánaiste to the Business Committee for a waiver of pre-legislative consideration has been passed on to this committee in order that it might give its opinion on the request. A copy of the request has been sent to all members. Following today's meeting, we are required to communicate our opinion to the Business Committee in order for it to decide on the application for a waiver. I welcome Ms Tara Coogan and Ms Áine Maher from the Department of Enterprise, Trade and Employment and thank them for the briefing they gave some members last week.

Before we start, I wish to explain some limitations to parliamentary privilege and the practice of the Houses as regards reference witnesses may make to persons in their evidence. The evidence of a witness physically present or who gives evidence from within the parliamentary precincts is protected pursuant to the Constitution and statute by absolute privilege. However, today's witnesses are giving their evidence remotely from a place outside the parliamentary precincts and, as such, may not benefit from the same level of immunity from legal proceedings as a witness physically present does. Witnesses are again reminded of the long-standing parliamentary practice that they should not criticise or may charges against any person or entity by name or in a way in such a way as to make him, her or it identifiable or otherwise engage in speech that may be regarded as damaging to the good name of the person or entity. Therefore, if witnesses' statements are potentially defamatory in respect of an identifiable person or entity, they will be directed to discontinue their remarks. It is imperative that they comply with any such decision.

The opening statement was circulated to members in order to allow them to commence their consideration of this matter. I invite Ms Coogan to make some brief opening remarks on behalf of the Department.

Ms Tara Coogan: I am appearing before the committee to discuss the Workplace Relations (Miscellaneous Amendments) Bill 2021. As the Chairman noted, the urgency in respect of this Bill arises from a recent Supreme Court decision which , on the one hand, saved the WRC's adjudication service but, on the other, found certain provisions within the statutory framework giving the WRC its powers to be constitutionally repugnant.

In essence, what this Bill proposes to do is address those immediate matters identified by the Supreme Court. Currently, all matters before the adjudication service in the WRC would be held entirely in private. That has now been found by the courts to be inconsistent with what is known as administration of justice. While the Supreme Court is not saying that everything

and anything must be done in public, some consideration must be given to those matters and we will address that issue in this short Bill. The second issue, which means that adjudication cannot continue and cannot be effectively concluded until this provision has been introduced in law, is that the Supreme Court was very critical of the fact that there was no provision in the statutory framework for the adjudication service which provides for the administration of an oath or affirmation and an associated penalty for a person who may wilfully give false evidence or mislead an adjudication officer.

Those are the two matters that the Bill will immediately address. Due to the nature of the WRC and the various items of legislation under which it is responsible for carrying out investigations, these amendments will also need to be carried to be carried to the Employment Equality Act and the Equal Status Act. My Department has been co-operating with the Department of Children, Equality, Disability, Integration and Youth. While these amendments relate to procedural matters within the WRC and, as such, do not really relate to the policies under these particular Acts, it has been proposed that these matters would be addressed in this very short Bill in an effective way so that we can get over the difficulty that means that adjudications cannot be concluded and address the immediate concerns the Supreme Court orders identified. Unfortunately, those orders had immediate effect so we were not given any grace period by the Supreme Court.

There are other small procedural matters that we propose to amend. They relate to the independence of Labour Court members. While it has never really been an issue, industrial relations legislation is missing that express statement so we are proposing to carry those amendments as well.

This is an immediate and urgent measure that we are proposing to take so that we can continue to provide the service to the people of Ireland in the WRC. However, it is clear that once we have overcome this obstacle, we will have to examine the lengthy judgments of the Supreme Court, consider policy matters in more detail and engage with the committee in the more normal legislative process. I am here to take any questions members may have and appreciate the committee giving me this time. I am here because this is genuinely an urgent matter.

Chairman: I thank Ms Coogan. I am happy we were able to facilitate her today at such short notice. I ask members who wish to speak to indicate by using the raise hand function on Microsoft Teams. It is important that they take their hands down when they finish speaking. Deputy O'Reilly was first to indicate.

Deputy Louise O'Reilly: I thank the Chairman. I thank both officials for the briefing they provided. It was very useful. I fully appreciate that this is an urgent situation. I am very concerned, as I think we all are, by the idea that hearings cannot now proceed and that an awful lot of people have been left in limbo. We teased out some of these concerns at our meeting but, for the purposes of the record, I have a concern about people who have commenced cases. Many cases do not finish quickly. In an ideal world, a person would get in and get out in one day. As anyone who has been before the WRC, the Labour Court or other forums will know, however, one does not always get in and get out in one day. Very often, a further hearing can be scheduled for a date a couple of months into the future. For those cases that have been partially concluded, we are going to have to make special arrangements, although I do not know if that is possible or how it can be done. Given the strength of the view expressed by the Supreme Court, it strikes me that they cannot be concluded under the same system.

When An Bord Altranais, as the Nursing and Midwifery Board of Ireland was formerly

known, changed over, there was a facility for people who started under the old system of fitness to practice hearings to retain that. However, I do not think that is going to be the case in this instance and I welcome Ms Coogan's view on this. In the event that it is not, consideration must be given to a person who started under one system believing it was going to be one way. I refer specifically to the anonymity, which is very attractive for some workers and, perhaps, not for some employers. We need to consider that and try to figure out how to treat a person who took a case and is halfway through it now. We must also be cognisant of the need for private hearings. There must be some involvement from the stakeholders as well. It cannot simply be that an adjudication officer just decides because there will be instances where both parties may want the hearing held in private. Perhaps that should be facilitated. I fully respect what the Supreme Court said but my understanding - and I am open to correction on this - is that it found that hearings cannot always be in private and that there must be some sort of latitude. I caution that some workers would be very hesitant about coming forward if they do not believe they can have some level of anonymity and that must be catered for just as it is for whistleblowers, where it is very important.

On the oath, it strikes me as a bit odd that we would have an oath in any event but I understand where it comes from and appreciate that it might be necessary. However, an affirmation is much more preferable and inclusive. It includes everybody, so I favour that.

I made this next point at our meeting but will make it again for the record. Time is ticking and we appreciate that but I raise the provision of a fairly robust review clause, bearing in mind that we will do this quickly. Of course, it must be done quickly and I appreciate that. There are people waiting but we must recognise that when we act fast, we sometimes do not get everything right. Since that might be the case, there should be a very robust provision for review that includes engagement with people who are using the system, not a desk-based review but something that actually talks to trade union officials, employer representatives and employment rights lawyers so we get the sense of whether it is working or not. I am conscious of the requirement to act in haste. In that context, we may repent at our leisure. If, however, there is a review clause built in, we can then test the measures that have been introduced. The purpose of this is obviously to ensure that the measures work for everybody.

Ms Tara Coogan: I agree with the Deputy. We are not going to be making a blanket provision to have absolutely everything in public. There will be a provision. The way it is proposed to be drafted, the policy will be that it is for parties to raise the issue with an adjudication officer and the parties will be given an opportunity to state their cases. This means that there will be a decision made on this particular issue. Obviously, there will also be an issue in the context of the naming of decisions because there is a public website, which is very useful and which is a very good way for justice to be visible. Again, that is another matter the adjudication officer will be given absolute discretion to enquire into but also decide on. That is one of those situations where an adjudication officer could, in the interests of special circumstances and depending on the types of people making claims, whether individuals who do not have legal representation may not understand what is involved or the fact that there could be a minor at the heart of a particular complaint, especially on the equal status side, make a decision and offer reasons therefor. Again, there would be an understanding why something was done in a specific way. That kind of discretion will be built into the legislation.

I agree that when this settles down we will have a better understanding of what is involved. At the moment, depending on which side of the House I am speaking to, we almost have Supreme Court procedures being introduced, on the one hand, and then others looking for some-

thing else. The WRC is a very unique place. It deals with very simple matters and very complex matters and what we are trying to do is find the right balance whereby we are ensuring the administration of justice, that fairness is at the heart of it, that it is transparent and of a standard but at the same time it does not become a ten-year process.

The other issue the Deputy mentioned was what will happen to hearings currently in train. I suspect some that have been halfway heard and that, where there was an adjournment, may have to be started again. This might have to be before a new adjudication officer, in certain circumstances. This is due to the fact that there might have been evidence obtained or a situation that took place without the oath provision. As a result, there will be some disruption. There is no point in me telling the Deputy this is all hunky-dory. There will be some challenges. The people in the WRC are doing their utmost. They are consulting, talking and engaging with and writing to parties in order to try find solutions. What everybody is being offered is an opportunity to revert to mediation which is a quick and private process. Unfortunately, some of these issues will arise in the next few weeks as matters proceed. There are some cases which will be able to proceed and to be concluded but there is now this issue, which is a real risk issue.

On the review clause, I have spoken to the Office of the Parliamentary Counsel to the Government, OPC, about the inclusion of such a thing and welcome any other members' views on it. I see no problem with something like that. As a civil servant, I must carry out reviews. Every 12 months there is a post-enactment review, which I carry out. There is absolutely no harm in doing something like that so I will talk to the OPC about that.

Deputy Richard Bruton: I thank Ms Coogan and Ms Maher for presenting. Unfortunately, I missed the previous briefings so maybe I will go over ground that has already been covered.

I would first like clarification that there is no need for retroactive provision in respect of case that have already been determined, there is no way in which there is any frailty for those. My second question relates to what the frailty was in respect of false evidence. Was it purely the fact no oath was taken or does this raise the need for some penalty provision being available to the WRC where someone fails to answer honestly? I thought penalties of that nature could not be imposed other than by a court. As a result, I am wondering exactly what line has been drawn by the Supreme Court. Ms Coogan indicated there may be other policy matters raised by the judgment which may have to come back to the committee. Perhaps she will indicate what those might be.

I was involved when much of this reform went through. We were trying to reform an extremely legalistic provision where the process was slow, there was duplication and people were bringing in armies of lawyers. The process had become very legalistic. It is encouraging that it has stood the test of a challenge, other than in respect of what seemed relatively minor areas of difficulty, notwithstanding the importance of correcting them.

I commend the WRC on the work it has been doing and those who helped to bring through the reforms. They have made the process clearer, simpler, and more effective for people who need to vindicate their rights before the WRC.

Ms Tara Coogan: On retrospectivity, there is no need to rectify anything that has taken place in the past. Going forward, however, this will be an issue. Thankfully, we do not have to revisit the thousands of decisions that have been made at the WRC in the past six years.

The second question was on penalties. The Supreme Court obviously felt there was a need

to have the oath. It was not really the oath or the affirmation but, rather, the idea of having a potential penalty associated with wilfully giving false evidence. This is about the "liar, liar" type of person, or somebody who is wilfully misleading or abusing the judicial process. It is to ensure there is a type of penalty associated with that. It was a kind of package deal. Since the WRC is not a normal court, "perjury" is not the associated term. We will be providing for an offence. I will be honest with the committee in saying I cannot see this becoming a regular feature but if a person was blatantly and clearly misleading or maliciously giving false evidence, the matter would then be referred to the courts for normal prosecution.

With regard to the policy matters, some concerns were expressed about the independence, skills and qualifications of the persons who are carrying out the adjudication service. While O'Donnell was categorically clear that there was no constitutional requirement for these persons to be fully legally qualified, there are a number of minority decisions that disagreed with that particular provision. We would look at the recruitment, skills, training and development and making sure people have the relevant skills and necessary understanding.

Another issue, which I should have mentioned and which will be addressed immediately in this Bill, is the unique statement in section 40 of the Workplace Relations Act that the Minister may revoke a warrant of appointment. That would never happen in practice but the reality is that these words were somewhat alarming to the Supreme Court. We will now provide a clear process setting out what would happen if a Minister were to revoke or remove an adjudication officer from office. There is now the issue of adjudication officers as administrators of justice and what this means in the context of the system. These are the kinds of bigger questions we must tease out.

We will have to look at some of the issues that are in the minority decisions. While they are not binding, they will certainly have a persuasive element. I hope I have addressed everything for Deputy Bruton. Was there anything I missed?

Deputy Richard Bruton: No, that is fine. I thank Ms Coogan.

Chairman: What form does Ms Coogan envisage the oath or affirmation taking? I assume there will be a choice. Has the Department come up with a proposal on that?

Ms Tara Coogan: I was talking to the WRC about this yesterday. We must bear in mind that, similar to this meeting, many hearings are held remotely. Does that mean, for instance, that we must have a variety of electronic religious texts and so on? It will be a very straightforward declaration. Obviously, people will be given a choice to use an oath or an affirmation. We will try to keep it as streamlined and straightforward as possible.

Chairman: Deputy Matt Shanahan has indicated.

Deputy Matt Shanahan: I thank the Chairman. I welcome the comments from colleagues this morning. To return to a point raised by Deputy O'Reilly, a significant responsibility has been placed on this committee in respect of waiving pre-legislative scrutiny. How does the Department propose to manage ongoing cases or any dissatisfaction that may arise from the committee agreeing to the Department's proposal? How will the Department manage and monitor that?

Ms Tara Coogan: We are in a situation where the Supreme Court, as the ultimate supervisory body, has spoken and we must comply with its requirements. There is simply no way around that. The Supreme Court has given us quite a bit of leeway on how to do this. We can

do it in a way that will be fair and will address any genuine and real concerns out there. For example, on the idea that hearings would be in public, the reality is that hearings are currently held like this meeting. A person could, in writing, ask the WRC to sit in on a hearing, albeit remotely. Most people who ask to sit in on hearings of this nature are family members, and sometimes it will be a member of the media. I do not believe this will become a place that is overrun by members of the public observing proceedings. There is sometimes a benefit to hearings being held in public.

We are giving broad discretion to the adjudication officer, the fundamental decision maker and the person who is in control of the facts of a particular case, to address issues such as anonymity and privacy. I want the committee to understand that the WRC has done Trojan work trying to catch up with Covid-related delays. It has carried out extensive consultations with stakeholders and has done whatever it could to put in place a very effective remote hearing system. When we had this decision, the WRC had just started scheduling very large numbers of cases and for once it did not have the constraints of room availability, etc. As such, there are some benefits to this type of scenario. Unfortunately, there will be disruptions but I am sure that once we get over the initial changes and the shock they will bring, as well as the unfortunate delays, the WRC will be in a position to resume hearings again. As I said, there will be some cases in which, in the interests of justice, it will be necessary to start again. I appreciate that will be very frustrating for parties. I hope they will understand. The WRC is communicating with everybody, as much as it can, about this particular situation.

Chairman: That concludes our briefing session on this matter. I thank the representatives from the Department of Enterprise, Trade and Employment who will now leave the meeting in order that the committee can discuss the matter in private. We do not take decisions to waive pre-legislative scrutiny lightly. We will discuss the proposal and come back to the Department on it.

Ms Tara Coogan: I thank the Chairman, Deputies and Senators.

Ms Áine Maher: I thank the members.

The joint committee went into private session at 10 a.m. and adjourned at 10.44 a.m. until 9 a.m. on Wednesday, 12 May 2021.