



Economic and International Affairs Scrutiny Panel

Family Friendly Employment Rights

Witness: Advocate and Counsel, Carey Olsen

Thursday, 4th April 2019

Panel:

Deputy K.F. Morel of St. Lawrence (Chairman)

Deputy D. Johnson of St. Mary (Vice-Chairman)

Witness:

Mr. H. Thomas, Advocate and Counsel, Carey Olsen

[16:01]

Deputy K.F. Morel of St. Lawrence (Chairman):

Thank you for coming in. It is really kind of you to make a written submission and to come in to speak to us directly as well. To your left is a short piece of paper. It just tells you about the terms of engagement and the protections you have and the things you may say, so if you take a look at that to know your legal status in respect of that would be great. We will start by stating our names for the record and then just get on with talking about the law, if that is okay. I am Deputy Kirsten Morel, and I am chairman of the Economic Affairs Scrutiny Panel.

Deputy D. Johnson of St. Mary (Vice-Chairman):

David Johnson, Deputy of St. Mary and deputy chairman of this panel.

Advocate and Counsel, Carey Olsen:

I am Huw Thomas, advocate and counsel at Carey Olsen.

Deputy K.F. Morel:

Brilliant. Thank you very much indeed. Just to confirm, you are speaking to us today in your capacity as an employment lawyer?

Advocate and Counsel, Carey Olsen:

Correct.

Deputy K.F. Morel:

Thank you very much. We will just start with an overall reaction. Can you give us your overall reaction to this second tranche of the employment legislation that is proposed for 2019?

Advocate and Counsel, Carey Olsen:

Yes. I think in principle there is no real objection to it, although I would say that many people have noted it is quite a big jump, and certainly quite a big jump quite quickly, so I do not think we have got any particularly authoritative idea of the rate of current take-up of parental leave or indeed of maternity leave under the rights we have already got. I think the point at which I do have real concerns, and a lot of the people I have spoken to have real concerns is the extent to which the mechanics of it have been thought through, particularly in relation to things like notification and lack of flexibility for employers.

Deputy K.F. Morel:

From that perspective of notification, in this case you are referring to the 15 weeks before any leave is taken, the notification of the pattern of your leave and also any changes thereafter?

Advocate and Counsel, Carey Olsen:

Yes. I am not sure that particularly works either for employees or for employers. I think it lacks flexibility. I think under the English scheme it is made very clear that that is a non-binding indication of when you intend to take leave and then there are more stringent notification requirements afterwards. That then is reversed when we get to notification under our proposals where you only have to give 14 days' notification of changes, so it goes from very strict to very loose, and I am not sure that particularly does anybody any good, on either side.

The Deputy of St. Mary:

On that point, I notice a contrast in the law between the breastfeeding arrangements, Article 15K, which sets out various steps about suitability of premises and so on, and there is no similar corollary in the notification.

Advocate and Counsel, Carey Olsen:

Yes. I suspect that is because we have taken the breastfeeding elements very much from the English law, so they are a lot more granular and a lot more well thought through in terms of how it is going to work. Arguably that one on breastfeeding is probably far more likely to be used by more people re-entering the workplace and it can only be a good thing and has been better thought through.

The Deputy of St. Mary:

I only mention it from the point of view of showing willingness to compromise on that one.

Advocate and Counsel, Carey Olsen:

Exactly. That is an acknowledgement in the breastfeeding provisions that not every employer is going to be able to adhere to best practice and it is very much what you can do with the resources that you have got. I think that is quite a sensible approach, but I think when we get into parental leave it is significantly less well thought through.

The Deputy of St. Mary:

To pick up on your words “flexibility” or “flexible”, the 2003 Employment Law sets out some flexible grounds for other areas. Do you think they could be usefully commandeered in this law?

Advocate and Counsel, Carey Olsen:

I think if you look at one of the things that has worked very well, both in the U.K. (United Kingdom) and here, which is flexible working as a concept under the Employment (Jersey) Law and again that scheme is very much drawn from the U.K. scheme, it is very much about getting employers and employees to speak to each other and try to work out something that works for everybody. I think there is something to be learned there, under the parental leave scheme, the maternity leave scheme, yes, there does need to be an irreducible minimum of leave that everybody can take, but where we are talking about potentially 4 blocks of leave over 2 years I think there needs to be some acknowledgement that employers, and particularly small employers, are going to need some flexibility and ability to push back and say: “That is not going to work for us”, either because of the role or because of the difficulty in resourcing alternative employees. There would be some roles, for instance critical operational roles, where simply allowing or permitting 4 blocks of leave over 2 years is not going to work.

The Deputy of St. Mary:

I will just finish this aspect off. The notice period, as you said, in Jersey is 2 weeks. How does that compare with the U.K.?

Advocate and Counsel, Carey Olsen:

In the U.K. I believe it is 8 weeks that you have got to give in terms of notification and there are provisions to withdraw applications to take what is called discontinuous leave in the U.K. but yes, Jersey is much shorter; 14 days is miles too short in my opinion and certainly in the opinion of the people I have spoken to. That is the bit at which they think the wheels are going to come off, the mechanics of this, and I just do not think that is workable. The other thing about it is of course the U.K. limit the number of times you can change your mind in relation to discontinuous leave, so you have only got 3 shots at it, whereas here it would appear you can change your mind as often as you like. Again, that is probably going to create difficulties for employers. A lot of this is going to create an awful lot of disruption. It is going to need an awful lot of planning on both sides, employee and employer, so there needs to be a bit more structure around how you, first, give notice to take leave, and then if you change your mind for any reason there needs to be either a limit on the number of times you can do that or something around the reasons you can do it for. At the moment 2 weeks' notice is not enough.

The Deputy of St. Mary:

A final point on this, obviously the legislation has been drawn up with the employee in mind, and we accept that, but it is not just the employee concerned. There is a knock-on effect to all the other employees. Would you agree with that?

Advocate and Counsel, Carey Olsen:

I think so, and one of the comments that came from one of my colleagues was: "Well, what about people without children?" Particularly in smaller employers and teams under pressure it would appear here that there has been absolutely no thought for anybody but those taking parental leave, where you have got a range of people's interests involved, colleagues, those without children, those who have already had children, and employers themselves and are we asking too much of all those people? I think under these proposals we probably are.

Deputy K.F. Morel:

When you say that the law has been drawn up without other people in mind other than those having children, how do you think they could have had other people in mind, given that the law is about family-friendly legislation?

Advocate and Counsel, Carey Olsen:

One of the ways that we could have looked at it, of course, is adopting perhaps some of the mechanics from the shared parental leave in the U.K., so if employees want to take discontinuous leave, i.e., separate blocks of it rather than one continuous block, you would enable employers to either say: "That is not going to work at all; please take it in one continuous block." That is quite a big step and I think we would need to think that through, but the other thing we could do of course

is permit employers simply to push back and say: “You cannot take it then” or: “You have got to take it in fewer blocks” or some flexibility around that, to take account of the interests of employers and the interests of other employees. The worry is, of course, that many people quite rationally will look at this and think: “I will just take school holidays off” if they have got older children, for 2 years, which is great for them but not necessarily so great for those around them and those trying to manage working teams and that sort of thing.

Deputy K.F. Morel:

Staying on that point and thinking about the 14-day notification for changes, we were speaking to people yesterday who were very supportive of the law in its current format and their perspective on the 14 days was, yes, it is a notification so if you want to change your leave you have got to notify your employer, and we were asking about that the employer has no right to speak back, if you know what I mean, and they were saying: “The employer can ask for a conversation.” The employer can say: “Okay, you want parental leave. Let us have a conversation about that.” That is not enshrined in the law at all. There is no right to a conversation, as I understand it.

Advocate and Counsel, Carey Olsen:

No, there is no right to a conversation.

Deputy K.F. Morel:

Even if the conversation is granted it can be completely ignored by the employee, so from your perspective, an employment law perspective, how do you see that?

Advocate and Counsel, Carey Olsen:

Most employers and employees will be sensible about it. This is unlikely to arise that often in practice because hopefully everybody will be sensible about it, but reading the law as it is drafted employees could be quite disruptive, either intentionally or unintentionally, but there is no right for an employer to speak back and say: “Hang on, we have got a replacement in for you for your block of leave. We have gone out and recruited a temporary or fixed-term worker and now with 2 weeks’ notice you are telling us that you have changed your mind or want to take it at another time, which does not really work for us, it does not really work for the team members.” Not even to have the provision to have a conversation seems odd. Not even having a requirement for employees to have to give some sort of reason for the change seems odd and, yes, we need flexibility for employees taking discontinuous leave but at the same time that needs to be limited and it needs to have some sort of mechanic around it for employers, as you say, to be able to speak back and arguably to push back in appropriate cases. It may be that they have gone to significant cost to recruit and hire a temporary replacement and if that is going to cost employers time and money that is going to be unacceptable

because, again, that puts further cost on employers that are not going to be recoverable from anybody.

Deputy K.F. Morel:

That is absolutely right.

The Deputy of St. Mary:

You referred to possible greater impact on small businesses. I understand that, but again, law firms or whatever, these days people work in teams so it is not just a business per se, it is the collegiate group, almost, within the firm.

Advocate and Counsel, Carey Olsen:

If you look at a law firm, arguably they are not really particularly single organisations. A lot of the time they are almost a conglomerate of small businesses. They work in very separate teams doing very separate things and a lot of those teams are very small and if you take critical people out there could be significant disruption.

The Deputy of St. Mary:

So the idea of small businesses somehow being excepted would not really be the answer?

Advocate and Counsel, Carey Olsen:

I am not sure it would. Arguably it would probably cure the greatest disruption, because larger employers have, arguably again, more resources to be able to react, but I think even for larger employers this will potentially create significant problems in the way it is drafted at the moment.

Deputy K.F. Morel:

One thing we heard yesterday was again people interested in bringing this law through have not heard much said against the law. From your perspective, have you been speaking to clients and have you had people approach you who are concerned about this law?

Advocate and Counsel, Carey Olsen:

Again, when the Employment Forum consulted, I think most of the respondents were on the employee side, very pro what was happening. I am not sure how proactive the consultation process was in getting out to see employers, not just H.R. (Human Resources) departments but people who are on the ground operating teams. It would be quite interesting to see the extent to which they did that. Again, yes, the loudest voices were certainly on the pro side. I would reiterate it is not so much the principles behind the law; it is not so much the idea that we are going to have 52 weeks' leave, although there is an argument that we perhaps should have looked harder at shared parental leave,

but it is the nuts and bolts of it that I just do not think have been thought through and the lack of flexibility in the drafting. It is unsurprising that you have not heard much yet in terms of people pushing back, because people simply have not realised what is going on. I would imagine my clients will only realise what is going on when they see a presentation, once the law has been passed, and then everybody tends to get quite vociferous.

[16:15]

The Deputy of St. Mary:

Going back to your reference to the U.K. shared scheme, as it were, ignoring, for the moment, the shared aspect, are there any other advantages or differences in that? I think there is a qualifying period of employment.

Advocate and Counsel, Carey Olsen:

There is a qualifying period in there. Whether we adopt that, I am not particularly fussed. What I would say is that a qualifying period probably takes one of the psychological barriers away for employers recruiting particularly women in their 20s and 30s in the first place, because of course people are not getting an immediate right, which employers tend to be very worried about, rightly or wrongly, but it tends to be a preoccupation. If we are giving people a potential right immediately then what would we do?

The Deputy of St. Mary:

So you are suggesting a qualifying period might help employees?

Advocate and Counsel, Carey Olsen:

I think it would. Employers in the same manner would not be potentially on the hook for some quite long periods of leave from the off. I think there are probably arguments either way on that, but I do think in terms of employers' perception and probably their unconscious biases it probably assists to have some sort of qualifying period.

Deputy K.F. Morel:

I was going to ask, that would not need to be particularly long, say 6 months.

Advocate and Counsel, Carey Olsen:

Yes, 6 months to a year. It makes sense to align it with the unfair dismissal qualification period, in my view. If you are going to have one at all make it one that everyone can remember so it is a year and that is when rights kick in.

The Deputy of St. Mary:

Without that do you see that perhaps probation periods might be extended?

Advocate and Counsel, Carey Olsen:

It is a possibility. Probationary periods are a bit of an old-fashioned thing anyway, in terms of many professional services organisations still use them but the extent to which they are particularly useful is doubtful. What would they say in that first qualification period? A shorter period of notice? Yes, they may be extended but I doubt that is going to be a knock-on effect.

Deputy K.F. Morel:

On the qualifying period I was thinking of someone who essentially unexpectedly becomes pregnant, you have got to think 9 months just becoming pregnant, you are still not going to have the baby for another 9 months or 7 or 8 months, so it does not work. Ignore that.

Advocate and Counsel, Carey Olsen:

Absolutely. There will always be employees who are unexpectedly pregnant, and that is why you have an irreducible minimum of rights from the off. Whether you have access to the full ambit of the law I am not sure. I think there are probably arguments either way and, as I say, there is probably an argument that says a qualification period in some manner helps employees and makes it less likely that they are being discriminated against. I guarantee that will be a factor in some recruitment decisions, there will be an unconscious bias arising from just this sort of thing.

The Deputy of St. Mary:

The proposed law covers a 3-year period and during that 3-year period it is quite possible that a mother-to-be will have a second child.

Advocate and Counsel, Carey Olsen:

Quite easily, yes.

The Deputy of St. Mary:

Do you consider that 3-year period is too long, in fact?

Advocate and Counsel, Carey Olsen:

It is arguable, but we have already got at the moment that if someone has 26 weeks of maternity leave in some cases people come back pregnant, so I think we have already got that kind of issue. Again, I think that is probably a minor issue in the scheme. For me the major issues are upfront with the lack of flexibility, the pattern of leave and some of the other nuts and bolts of it. I do not see that as a particular problem.

The Deputy of St. Mary:

Okay, a 3-year period and certainly a first mother will find it quite difficult to predict what she might want to do in 3 years' time, so it is going to have to be changed.

Advocate and Counsel, Carey Olsen:

I think so, yes.

Deputy K.F. Morel:

Some of the points you bring up in your submission, first of all, and it is just me trying to understand where you say under the Jersey model there will be one type of leave, parental leave, and accordingly there is a risk that if employees elect to enhance maternity leave and pay for women then failing to do so for men will be discriminatory.

Advocate and Counsel, Carey Olsen:

Right. Under the U.K. law or the model a woman on maternity leave has to make a choice to move on to shared parental leave, so she can then share the rest of her maternity leave with her partner. So at that stage she stays on maternity leave and her employer enhances her maternity pay, maternity leave rights, most of the court decisions have suggested that employers can do that without enhancing equivalent rights for men, without discrimination, because maternity, quite rightly, is regarded as a special and unique category of leave. So then you are comparing 2 different types of leave. You are comparing parental leave with maternity leave. Here, if you had everybody on parental leave from the off, and an employer chose not to enhance rights for men, but chose to enhance rights for women, there is a strong argument that the only differentiating factor there is sex and that would be discriminatory. The concern there is not to say that employers should not also enhance for men. The obvious reaction for most employers is going to be to equalise downwards, so employers will be quite rationally looking at these schemes and thinking: "We will just go down to the statutory minimum for everybody", which would be unfortunate because I think there is a strong argument to say that where employers can enhance particularly pay rights for mothers they give mothers a far greater chance of doing 2 things. One is bonding with their child in the first place but the other is decreasing the financial burden or disadvantage that arises from taking maternity leave, and it makes it more likely that they will come back to work with a more positive frame of mind after a potentially slightly longer period. It is the unintended effect of this that needs to be thought through as well. If we are going to say, and I have spoken to a range of people about this, including J.A.C.S. (Jersey Advisory and Conciliatory Service), employers can enhance rights for women without discriminating against men we should say that, and we should say that in the law. That should not be left to a tribunal decision.

Deputy K.F. Morel:

Can I ask why, in the U.K. from a legal perspective maternity leave is seen as a special type of leave?

Advocate and Counsel, Carey Olsen:

It always has been.

Deputy K.F. Morel:

What does that mean?

Advocate and Counsel, Carey Olsen:

There are European Court of Justice judgments that compare, for instance, maternity leave with sick pay. That was the original discrimination complaint, that maternity rights should be equivalent to sick pay, and what the E.C.J. (European Court of Justice) quite rightly said was no, being on maternity leave is not sickness, it is another type of leave, and there are factors for maternity leave in particular, childbirth, which take it outside of other types of leave, I would say, and should be treated specifically, which is why they have left it as they have in the U.K. but you have to make a conscious choice to move from maternity leave to shared parental leave before you can share.

Deputy K.F. Morel:

That is interesting, so by virtue of creating this parental leave, by doing that essentially this law does away with maternity leave?

Advocate and Counsel, Carey Olsen:

Yes, and arguably then will lead to employers probably having to equalise downwards, so if they are going to enhance rights for women they arguably would be in a position where they would have to enhance for men, otherwise they would be discriminating.

Deputy K.F. Morel:

One thing I find quite interesting with the law as proposed is it extends rights for adoptions and surrogacies and I understand where they are coming from with that, but again just thinking of this idea of doing away with maternity leave and thinking of the medical side of giving birth, it is interesting, like you say, people who are not going through that process of giving birth and everything that you can do to your body and create ongoing medical issues, they have exactly the same rights as the person who does go through that.

Advocate and Counsel, Carey Olsen:

Exactly that, and if that is where we end up on a policy basis that is absolutely fine, but I think it needs to be thought through first. I do not think it is as simple as saying everybody should have the same rights, because women on maternity leave, I would say, are in a special category and quite rightly so. As I say, physically and psychologically they have been through something that people in other categories have not.

Deputy K.F. Morel:

You are unlikely to suffer postnatal depression if you have not given birth. By definition I guess you cannot get it.

Advocate and Counsel, Carey Olsen:

Exactly. So many employers will look to enhance rights for women on that basis, because they are concerned for women's physical and psychological well-being. If the unintended knock-on consequence of this law was to make it harder for employers to do that I think that would be unfortunate.

The Deputy of St. Mary:

A different tack completely, the Employment Forum recommended that there be 6 weeks' paid leave by the employer, the first 6 weeks by the States and the States have chosen to overlook the latter, should I say. With your experience of clients, does that arouse any comment?

Advocate and Counsel, Carey Olsen:

It is another cost of employment. There have been studies in the past from the U.K. that suggest there has to be very tight employment protection before it becomes a factor in whether to employ somebody in the first place. The level of employment law we have got still is not restrictive or costly enough to really come into decisions as to whether to hire people or to retain them. We are seeing ever-increasing burdens on employers and we have added some very complex legislation very quickly. I think the U.K. took 30 or 40 years to get to where we have got in probably a decade. Employers are still coming to grips with it. You have also got a lot of larger employers who manage 2 or 3 jurisdictions, so across Jersey and Guernsey, and so they are having to get to grips with 2 different systems, and Guernsey of course are now developing their discrimination law and their maternity law along different lines, so we are getting that as a challenge as well.

Deputy K.F. Morel:

An angle I had not thought of, you mention cross-border jurisdictions and I know law firms particularly have that. Does the law create the possibility or encouragement for a firm in one jurisdiction to second their employee to another one to get over this?

Advocate and Counsel, Carey Olsen:

Very possibly. I do not know. I do not think even lawyers would be that cynical, to be honest. Anything could happen.

Deputy K.F. Morel:

We will wait and see on that. Talking about other jurisdictions, I do not know much about Guernsey's legislation so they have not gone down this route yet?

Advocate and Counsel, Carey Olsen:

Certainly not the 52 weeks. I think it is a maximum of 26 weeks in Guernsey and there is no statutory pay or right to pay at all at the moment. They are just getting started and in terms of their discrimination law they are far less developed than we were. They stopped at sex and gender discrimination in 2006 I think it was, but they are now talking about developing discrimination law. They are talking about far greater rights in terms of maternity and paternity. I have got cross-border clients who have said it is 2 very similar jurisdictions and it would be nice if there could be some sort of discussion between them, especially for employment rights, because, as I say, they are 2 very closely-linked jurisdictions.

Deputy K.F. Morel:

In your experience and possibly looking at the firm you work for, do you have one H.R. department covering both jurisdictions?

Advocate and Counsel, Carey Olsen:

Yes, we do. Obviously we have specialists in each jurisdiction but it is one H.R. department. I think a lot of professional services firms manage on the same basis and in fact more widely than that you will get a lot of offshore firms managing across all of their offshore jurisdictions under one aegis. Yes, it is an interesting challenge.

Deputy K.F. Morel:

Can that cause friction in the sense between employees, you know: "I get these rights. You working in Guernsey or the Cayman Islands do not"?

Advocate and Counsel, Carey Olsen:

I think there is a recognition that different places have different laws, to be honest. I do not think we particularly see that. Where you do get some friction is where the add-ons are different, and that tends to be an interesting debate.

Deputy K.F. Morel:

I can appreciate that. I wanted to talk about portability, because you raised that in here and I think it is really interesting. You say that the law is unclear about portability and should employees move between employers. How important is it from your perspective to put something into the law about that?

Advocate and Counsel, Carey Olsen:

I think it is vital. I just simply do not yet understand whether this applies to a single employer or multiple employers. It would seem sensible for it to apply to multiple employers, although I am not entirely clear whether it also applies to one or multiple partners if a woman changes partner in the period of her shared parental leave.

Deputy K.F. Morel:

I had not even thought about that.

[16:30]

The Deputy of St. Mary:

We had not.

Advocate and Counsel, Carey Olsen:

That sort of thing should be nailed down, and this is, I think, my fundamental objection to the law as it is drafted. I just do not think those nuts and bolts have been thought about. Another technical issue is holidays. Holiday accrual normally runs over a calendar year, almost invariably, so if someone is off for 52 weeks on maternity leave what happens to their holiday accrual? Does it roll over to the next year? Does it disappear? Again, that should be ...

Deputy K.F. Morel:

From my poor understanding, so to speak, because all the other terms and conditions carry on I would assume you get your holiday on top of.

Advocate and Counsel, Carey Olsen:

Yes, but most contracts and the law itself, if you fall back on statutes, appear to suggest that it is use it or lose it, although the law suggests that you should give your employees the right to take a holiday. Again, that contradicts potentially what is in the maternity and parental leave section. Again, there should be a policy decision and a clear drafting direction as to what happens.

Deputy K.F. Morel:

Just to be clear, on the portability front, at the moment, when you need this law you have no idea whether, when you change employer, your rights agreed and your timeframes, I guess, also agreed with your previous employer go with you.

Advocate and Counsel, Carey Olsen:

What happens to that?

Deputy K.F. Morel:

Yes.

Advocate and Counsel, Carey Olsen:

Otherwise, it is a clear indication, potentially, to employers that redundancies might be on the way, to get around this sort of thing. Another point I should have mentioned from the U.K. scheme, there is redundancy protection under the U.K. scheme.

Deputy K.F. Morel:

I was about to ask you.

Advocate and Counsel, Carey Olsen:

This says, basically, if you are made redundant during your maternity leave or your shared parental leave, you have the right to be considered for any alternative vacancies ahead of people who are not on that leave. Now, there has not been as uncontroversial as you would expect. Again, you are favouring people on leave ahead of their peers. But it is regarded as quite a fundamental thing, because that tends, anecdotally, to be perceived as the single greatest impediment, people taking leave in the first place, the fear that they are going to get made redundant. The U.K. Government at the moment are consulting on enhancing that protection; not just during the leave, but for 6 months after. You have greater protection against redundancies compared to your peers. That is something I think we should think about, for the protection of employees. Guernsey have introduced it under their maternity scheme; equivalent rights, so you are entitled to be offered a suitable alternative vacancy ahead of those not on maternity leave. Again, there are arguments both ways.

Deputy K.F. Morel:

Yes that is a judgment call by society, I guess. They have decided ...

Advocate and Counsel, Carey Olsen:

It would be a good thing to at least consider, certainly if we look at current take-up of parental leave and maternity leave - I am not sure what the current take-up is in our existing rights - but it would be

very interesting to see what would happen if we added some protection against redundancy. Would we get closer to people using the rights they already have than is currently the case?

Deputy K.F. Morel:

Again, just for the record, at the moment, this 11th amendment is family-friendly legislation. In your opinion there is no redundancy protection. So someone could be made redundant in the middle of their maternity or parental leave.

Advocate and Counsel, Carey Olsen:

Yes and there are times when that happens, because redundancies happen at any time, without doubt. Currently, under the law, there is protection against being selected for redundancy on the basis that you are on leave, but that does not give you any additional protection as regards your peers, essentially. There is no positive duty to consider you for alternative vacancies or to offer you alternative vacancies, which there is in the U.K. and in Guernsey.

Deputy K.F. Morel:

That is really interesting.

The Deputy of St. Mary:

They are the matters which might not be covered by the legislation. What about the situation of a replacement or temporary replacement for someone who covers for someone who is taking parental leave? Is he or she covered?

Advocate and Counsel, Carey Olsen:

That is already in the law.

The Deputy of St. Mary:

It is?

Advocate and Counsel, Carey Olsen:

Yes. You can engage and dismiss somebody who is engaged as a temporary replacement. As long as that is the basis on which they are employed in the first place.

The Deputy of St. Mary:

People like yourselves, would be first recycled in a contract ...

Advocate and Counsel, Carey Olsen:

Yes. In a fixed-term contract you are here to cover for maternity, parental leave or whatever we end up calling it, yes. Yes, that will be quite a critical thing. Obviously, replacements are going to be required to a far greater extent. At the moment a lot of employers just wear the absence if it is going to be 26 weeks or less. Employers can just about live with that. If you are talking about 52 weeks of leave, there would be far greater likelihood that you are going to be looking for replacements.

Deputy K.F. Morel:

I was just interested in what you understood by the term “qualifying relationship”. What do you think that means?

Advocate and Counsel, Carey Olsen:

Good question. Again, you need to come to a decision of how you define that. It is quite well-defined in the U.K. law; somebody with caring responsibilities for a child. So it is either the mother or a partner. There is debate in the U.K. as to whether it should be extended, potentially, to grandparents and those with significant caring responsibilities. At that stage, you are probably getting a bit too complex, in terms of your statutory drafting. Yes, it is not as clear as it could be.

Deputy K.F. Morel:

In this law. Also, in terms of the qualifying relationship, men can have children with more than one partner and so, with the law as it is, say they have 3 children within a year or get 3 people pregnant, could they argue 3 lots of leave and 3 lots of paid leave, quite easily according to that?

Advocate and Counsel, Carey Olsen:

Yes, they could.

Deputy K.F. Morel:

Even though they might not necessarily be caring actively towards those kids?

Advocate and Counsel, Carey Olsen:

Absolutely. Yes, as it is drafted, it would appear to be if you are a father you are deemed to be qualifying for it. Again, in the U.K. legislation it is made very clear it is only to be used with a single partner. Whether that is right or not if you change partners during that period of leave, which unfortunately people do. There is a lot of policy discussion in there. What worries me about the law as drafted, as I have indicated, is that across it we have made some potentially very significant decisions in the drafting, which I do not think have been fully explored in any policy discussions.

Deputy K.F. Morel:

Would you term “qualifying relationship” and one of those decisions?

Advocate and Counsel, Carey Olsen:

Yes.

Deputy K.F. Morel:

Or the lack of clarity around it?

Advocate and Counsel, Carey Olsen:

Lack of clarity, again, it should be nailed down. If then there is a case for loosening it later, then fine, we amend it. A very good example is the flexible working provisions in the law, which started with a requirement for people who have caring responsibility for another, now we have taken that away. That has worked really well. What we are talking about here, both in terms of leave and flexible working, is quite a significant cultural change and that takes time. It takes a bit for people on both sides, employees and employers, to get used to, in terms of their thinking, in terms of their expectation and in terms of their planning.

The Deputy of St. Mary:

Just before we wrap up, are there any other amendments you think might usefully be included, other than those you have mentioned, which have been quite a few?

Advocate and Counsel, Carey Olsen:

No, I do not think so. I would like to see something rewritten. Yes, I appreciate this is important and people are very keen to get it through, but at the same time it is a very important one to get right. The downside impacts of getting it wrong are potentially quite significant. They are not all impacts that are going to fall on employers. If we get this wrong there could potentially be significant downsides for employees. The only change I would make is the enforced date. If we are talking about something that is debated at the end of April, I am not sure about it coming into force in September.

The Deputy of St. Mary:

The debate date is the end of April.

Deputy K.F. Morel:

Yes, 1st September is what they are hoping for.

Advocate and Counsel, Carey Olsen:

Yes. What we will be looking at are people who are already pregnant and who are already having those conversations with their employers and we can guarantee that not many employers are taking this into account with those conversations.

Deputy K.F. Morel:

Yes. That is really interesting. Thank you so much.

The Deputy of St. Mary:

That is good. It is very helpful.

Deputy K.F. Morel:

Very helpful indeed, thank you. If you have any more thoughts in the next 2 weeks, put them down in an email and we will be pleased to received them.

Advocate and Counsel, Carey Olsen:

Sure. Yes.

Deputy K.F. Morel:

That is fantastic. Thank you for your time, both the written submission and this hearing; that is fantastic. Thank you.

[16:39]