

EMPLOYMENT (ZERO HOURS WORKERS AND BANDED WEEKLY WORKING HOURS) BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by Jemma Dolan MLA (“the Member”), in order to assist the reader of the Bill and to help inform the debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum should be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill, and where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

3. Data published by the Office for National Statistics (‘ONS’) on the prevalence of Zero Hours Contracts (‘ZHCs’) across the United Kingdom’s (UK) workforce shows a rise from 225,000 workers in 2000 to 974,000 in 2019 (‘Labour Force Survey estimates of people in work on zero hours contracts – ONS’). In Northern Ireland, this equates to approximately 11,000 workers representing approximately 1.3% of the workforce.
4. ZHCs may provide a short term solution for businesses to respond to changing market conditions and may also be attractive to workers seeking flexibility to balance other commitments. However, their use as a longer term solution creates uncertainty for workers, in terms of a lack of guaranteed regular work or earnings and their employment rights.
5. In Great Britain, legislative changes were enacted in the Small Business, Enterprise and Employment Act 2015, which amended the Employment Rights Act 1996 to make exclusivity clauses in ZHCs unenforceable. In addition, powers were conferred on the appropriate Secretary of State to make provisions in such regulations to penalise employers who use such clauses.
6. In 2016, the UK Government commissioned a report to assess the implications of new forms of work driven by digital platforms. The report, ‘Good Work - The Taylor Review of Modern Working Practices (‘the Taylor Review’) was published in 2017 and commented on ZHCs.

7. Whilst recognising the flexibility that ZHCs can bring to business in supporting changing market conditions and employment rates, the Taylor Review also highlighted that the flexibility required by business is not being reciprocated to the worker. The report acknowledges that this “makes it very difficult for a person to manage their financial obligations, or for example secure a mortgage.”.
8. Similarly, in the Republic of Ireland, Section 16 of The Employment (Miscellaneous Provisions) Act 2018 (“the 2018 Act”) amended the Organisation of Working Time Act 1997 by introducing a system of banded hours for workers.
9. Where a worker consistently works more hours each week than their contract provides for, they may request a change to the contract terms to be placed in a band of hours that better reflects the number of hours they have worked over a 12-month period.
10. Further provisions are included in the 2018 Act to amend the National Minimum Wage Act 2000 to provide increased protection for employees who are called in to work but who were subsequently sent home without work. In such circumstances, an employee must be remunerated a specified portion of their contracted hours, with provision for a minimum payment of three times the national minimum wage or minimum hourly rates set out in any employment regulation order. This offers some protection for workers in this scenario.
11. The Member contends that by introducing Banded Hours Contracts for workers in NI whose employment is on the basis of short-hours, certainty will be provided insofar that there would be a statutory entitlement for such persons to be offered a contract with banded hours.
12. By creating a less precarious environment for workers in this type of employment, who are often required to be readily available but with no guarantee of work, the Bill aims to provide certainty to the number of hours that they may typically expect to receive and the associated income.
13. This will enable these workers to more effectively manage their income and outgoings, help to support long-term financial planning, reduce workplace poverty, improve economic inactivity and alleviate financial anxiety.
14. Furthermore, banded hours’ contracts provide a more stable way for workers to determine or check their eligibility for social security support, as unreliable and unpredictable work patterns may render them ineligible for certain benefits.
15. The Bill also aims to impose a duty on an employer to pay a worker a sum equivalent to three hours work at their hourly rate on each occasion where an employee is called out to work but is subsequently not given work. The Bill also places an obligation on the employer to keep work patterns under review every three

months and to notify a worker in writing of their entitlement to banded weekly working hours where appropriate. The Member believes this proactive duty would again strengthen employment rights and prevent abuse of ZHCs.

16. Moreover, the Member contends that by seeking to end the use of clauses that may restrict a worker from entering into arrangements with other businesses and by introducing recourse through an Industrial Tribunal where disputes arise, the Bill will provide for a more sustainable and responsive workforce. This will also enable prospective employers to respond to any unexpected demands with more agility and without the need for continual and costly recruitment campaigns.
17. Consequently, the Bill seeks to amend the Employment Rights (Northern Ireland) Order ('the 1996 Order') and confers powers on the Department for the Economy to make regulations for further reasonable provisions to prevent abuses as specified and to require employers to retain records of weekly hours and requests by workers for banded working.
18. Further consequential amendments to the Industrial Tribunals (Northern Ireland) Order 1996 are necessary to expand the role of the Labour Relations Agency (LRA) to conciliation and to repeal Section 18 of the Employment Act (Northern Ireland) 2016.

CONSULTATION

19. The Member conducted a consultation exercise on the policy objectives and proposed options for the Bill. The consultation commenced on 13 October 2020 and concluded on 13 December 2020.
20. The Member also wrote to the Minister for the Economy to highlight her intention to develop a Private Member's Bill with a view to legislating for 'Banded Hours Contracts'.
21. In response, the Minister for the Economy, Mrs Diane Dodds MLA wrote to the Bill Sponsor on 16 June 2020 confirming that, in response to the commitments contained in New Decade New Approach, policy proposals were being explored and legislation to take account of any proposals was not anticipated for 12 to 18 months.
22. The Sponsor also shared her legislative proposal with the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.

OPTIONS CONSIDERED

23. **Option 1:** Do Nothing.
24. **Option 2:** Introduce and enact legislation to enhance the rights of workers on ZHCs whilst providing a more responsive and agile workforce.

25. Without new statutory provisions, the relevant protections for workers would not be put in place in a secure and comprehensive way. Therefore, following consultation and deliberation, the Member considers that primary legislation is the best mechanism by which to afford additional protection to workers on ZHCs.

OVERVIEW

26. The Bill has 19 clauses and no schedules. A commentary on each of the key clauses follows below. However, where a clause or part of a clause does not seem to require an explanation or comment, none is given.

COMMENTARY ON CLAUSES

Clause 1 – Zero hours workers: defines a zero hours worker as someone on a zero hours contract. A zero hours contract is defined as a contract where there is no guarantee that the worker will be given any work. Clause 1 covers employees and workers, but not a person on a non-contractual arrangement. In practice, this means that these provisions apply to workers, but not to someone classified as self-employed, or an independent contractor.

Clause 1 also repeals section 18 of the Employment Act (Northern Ireland) 2016. That section created a regulation making power in respect of zero hours workers, but that section has never been brought into force. The power to make regulations has been replicated in clause 4.

Clause 2 – Zero hours worker called in but not given work: covers the situation where a zero hours worker is called in to work, but when they get there, they are not actually given any work (or given less than 1 hour's work). Every time this happens, the worker is entitled to be paid as if they had worked for 3 hours.

There is an exception. There is no entitlement to payment if there are exceptional circumstances (for example an emergency or accident, or the worker is ill) meaning that the worker wouldn't be expected to do the work.

This entitlement to be paid if called in but not given sufficient work is treated in the same way as the entitlement to wages – this allows the worker to complain about it in the same way as they could complain if they weren't given their full wages.

Clause 3 – Exclusivity terms unenforceable: makes exclusivity terms unenforceable. This means that a term in a zero hours contract which seeks to prevent the zero hours worker from taking on other work is not enforceable against that worker. The employer cannot demand that the worker does not do any work outside the zero hours contract.

Clauses 5 and 6 set out further protections to reduce the possibility of an exclusivity term being applied against a worker.

Clause 4 – Power to make further provision in respect of zero hours workers: replicates the existing power to make regulations setting out more laws for zero hours contracts. This clause retains the power to make regulations, not just in relation to workers and persons who are employees, but to persons in a non-contractual relationship with an employer, for example for independent contractors. The power to make these regulations has a limited version of what is called a Henry VIII clause. This means that regulations made under this clause can amend primary legislation. There are a number of safeguards in place. Firstly, regulations can only amend legislation which has been enacted before this clause comes into force, not legislation enacted after it. Secondly, those regulations must be laid in draft form before the Assembly, and approved by the Assembly, before they can be made. Thirdly, before making those regulations, the Department must consult widely.

Clause 4(2) makes some technical changes which are necessary because some previous amendments to the 1996 Order have been made, but not yet been brought into force. It is therefore necessary to cover what the law would look like before and after these amendments come into force.

Clause 5 – Right not to be subjected to detriment: Part 6 of the 1996 Order gives protection for workers and employees if they exercise particular rights, or in connection with particular things. Clause 5 adds to that list by stating that workers cannot be penalised (i.e. cannot be subjected to detriment) if they breach an unenforceable exclusivity clause of the sort referred to in clause 3.

Clause 5(2) gives the worker a right to bring a claim to an industrial tribunal if this right is breached. This doesn't apply if the worker is dismissed as unfair dismissal is dealt with in clause 6.

Clause 6 – Unfair dismissal: All employees have the right not to be unfairly dismissed, as set out in Part 11 of the 1996 Order. That Order goes on to state that if the dismissal is for certain reasons, it will be automatically unfair. Clause 6 adds to this list and states that if an employee is dismissed because they breached an unenforceable exclusivity term that will automatically constitute an unfair dismissal.

Normally, there is a minimum qualifying period of employment before an employee can take advantage of the unfair dismissal protections. Clause 6(2) changes this and adds unfair dismissal for breach of an exclusivity term to the list of dismissals where there is no minimum qualifying period of employment.

Clause 6(3) provides that this protection applies to workers as well as employees.

Clause 7 – Role of Labour Relations Agency in relation to conciliation: The Labour Relations Agency already has a role in promoting conciliation in a list of employment disputes. This clause adds complaints about zero hours contracts to that list.

Clause 8 – Entitlement to banded weekly working hours: sets out the right of a worker to be placed in a band of weekly working hours. If the worker’s hours, as set out in their contract, do not reflect the actual hours they are working every week, the worker can request to be placed in a band of weekly working hours which accurately reflects the hours they are doing. Once placed in that band, the worker must then be given working hours, each week, which fall within that band.

Clause 9 – Employer’s obligation to inform worker of entitlement to banded weekly working hours: places an obligation on the employer to keep under review whether a worker is entitled to be placed in a band of weekly working hours.

Clause 10 – Procedure for placement in banded weekly working hours: sets out the procedure for a worker to be placed in a band of weekly working hours. After the worker makes the request, the employer has 4 weeks to comply. The band is calculated by reference to the average weekly working hours over the previous 3 months. The worker can make the request at any time, and may make requests even after a previous request has been refused if the circumstances have changed.

Clause 11 – Exceptions: sets out the exceptions where a worker isn’t entitled to be placed in a band. This includes where there is insufficient evidence to justify being placed in a band, or because the weekly hours have been in flux for some reason.

Clause 12 – Complaints to industrial tribunals: gives workers the right to bring a claim in the industrial tribunals around the failure of an employer to place them in a band of weekly working hours. The standard 3-month time limit to bring a claim in the industrial tribunals applies.

Clause 13 – Remedies: grants the industrial tribunals the power to require an employer to place a worker in a band of weekly working hours where it finds that the employer has broken the banded hours obligation.

Clause 14 – Application to zero hours workers: If a zero hours worker is placed in a band of weekly working hours, they cannot then be construed as being on a zero hours contract. This clause confirms that.

Clause 15 – Power to require records to be kept: gives the Department the power to make regulations concerning the paperwork that employers must keep on the subject of banded weekly working hours.

Clause 16 - Role of Labour Relations Agency in relation to conciliation: The Labour Relations Agency already has a role in promoting conciliation in a list of employment disputes. This clause adds complaints about banded weekly working hours to that list.

FINANCIAL EFFECTS OF THE BILL

27. The Member welcomes discussion around the mechanisms for enforcement of the provisions and associated costs, recognising that the direct costs for increased job security will be borne by employers. When developing the proposals for the Bill, engagement on this issue was undertaken with DfE and the LRA in terms of enforcement models. With neither DfE nor the LRA being in a position to provide information to indicate the likely financial implications of the Bill when approached by Assembly Research and Information Services, it has been challenging to provide an estimate. However, in responding, the LRA highlighted their initial view that if they were asked to enforce the proposals at that time, a new complement of 6 staff may be required. Based upon average salaries from the 2020/21 pay scales, this cost was estimated to be approximately £267,714 per annum. This view is tentative and should be treated with appropriate caution
28. The Member is conscious the Department will wish to form their own view on enforcement requirements having seen the detailed provisions of the Bill. Likewise, stakeholders may wish to offer some thinking in this area to help inform the debate.
29. As previously outlined in correspondence from the then Minister for the Economy to the Bill Sponsor, work is currently being progressed by the Department to develop a range of policy proposals with the intention to bring forward legislation on ZHCs. Therefore, the Member believes that there is an acknowledgement by the Department that future costs in this regard are to be anticipated irrespective of this Bill. On that basis, appropriate enforcement will be a key element of making such legislation effective and is a necessary cost to the public purse.

HUMAN RIGHTS ISSUES

30. The Member is satisfied that the Bill is human rights compliant.

EQUALITY IMPACT ASSESSMENT

31. An Equality Impact Assessment has not been undertaken, as communications between the Member and the Equality Commission for Northern Ireland and legal advice the Member has received did not identify any equality implications of the Bill. Therefore, it is considered the Bill will not have an adverse impact on any of the groups identified in Section 75 of the Northern Ireland Act 1998.

LEGISLATIVE COMPETENCE

32. At Introduction, the Sponsor of the Bill, Ms Jemma Dolan MLA, had made the following statement under Standing Order 30 of the Northern Ireland Act 1998:

“In my view the Employment (Zero Hours Workers and Banded Weekly Working Hours) Bill would be within the legislative competence of the Northern Ireland Assembly.”

SECRETARY OF STATE CONSENT

33. It is considered that the Secretary of State’s consent under Section 8 of the Northern Ireland Act 1998 is not required for this Bill.



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