

Peter Hall

Clerk to the Committee for the Economy

(via email)

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Your Ref: EC514/22

Dear Peter

Employment (Zero Hours Workers and Banded Weekly Working Hours) Bill

Thank you for your letter of 2 February 2022 seeking the Department's view on the Employment (Zero Hours Workers and Banded Weekly Working Hours) Bill, in its current form.

There has been controversy associated with the use of zero hours contracts (ZHC) for a number of years. In 2014, the then Department for Employment and Learning consulted on the issue. There was no published response to the 2014 consultation. The matter of ZHC was debated extensively in the Assembly as the then Employment Bill was taken forward in 2015 and 2016. While a wide range of views were expressed, the Assembly did not come to an agreement on the most appropriate form of regulation. The Assembly instead voted to include a wide enabling power in the Employment Act (Northern Ireland) 2016. This provision inserted a new Article 59A into the Employment Rights (Northern Ireland) Order 1996. This permits the Department to develop further policy proposals and bring forward regulations for the purposes of preventing abuses in respect of ZHC by means of the affirmative procedure at a future point.

To date, no regulations have been made using this provision. While there is no specific legislation in Northern Ireland that regulates the use of ZHC, wider employment law provisions will apply more generally to those working on those contracts.

The latest dataset release of the ONS Labour Force Survey on the use of ZHC was on 15 February 2022. The survey showed that in the UK there are some 1,030,000 people aged 16 and over in employment on zero hours contracts. This equates to 3.2% of people in employment. This is further broken down by region. In England some 897,000 people or 3.3.% of people in employment are on a ZHC. In Scotland 85,000 people or 3.2% of people in employment are on a ZHC. In Wales 37,000 people or 2.5% of people in employment are on a ZHC. In Northern Ireland 11,000 people are or 1.2% of people in employment are on a ZHC.

This Bill proposes to make provision in respect of zero hours workers and banded weekly working hours. The Bill would not ban the use of ZHC, but would put in place a range of extra regulation around the use of ZHC. The Bill would introduce a right to compensation for zero hours workers if shifts were cancelled without sufficient notice. The Bill would also provide the opportunity for all workers, whose usual working hours do not reflect those set out in their employment contract, to move to banded hours. It would also revoke the existing enabling power for regulating ZHC and replace it with amended provisions.

The Department has some general comments on the Bill in its current form which are set out below. It is, however, emphasised that in the restricted time available the Department has not had the opportunity to fully scrutinise the Bill in detail. The Department's observations should be considered in that context.

Clause 1 – Zero hours workers: interpretation

The Bill provides a definition of a “zero hours worker”. This definition appears different to the existing definitions of “employee” and “worker” used throughout employment legislation. In particular, it is noted that there is no reference within this

definition to performing “services”. This is a common element of other employment related definitions of “worker”. The Department is not in a position to comment on the rationale for the exclusion of reference to “services” within the proposed definition. Should the Bill progress further, consideration would need to be given to the potential for any unintended consequences of amending this commonly used definition within employment law – including whether the lack of reference to performing “services” may impact upon the number of workers that could fall within the proposed definition of zero hours worker.

It is also noted that references to “services” are included elsewhere in the Bill in relation to zero hours worker. For example, the proposed new Article 59C which makes exclusivity clauses unenforceable for zero hours workers, includes references to “performing services”. Further assessment of the implications of the definitions in each context is required.

Clause 3 – Exclusivity terms unenforceable

The Explanatory and Financial Memorandum states that this clause would make 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.

It is noted that the use of exclusivity clauses in zero hours contracts has been banned in Great Britain. The Department is not aware of any evidence to suggest that the use of exclusivity clauses for those on a zero hours contract is a common practice in Northern Ireland. It is difficult, however, to envisage a circumstance where it would be appropriate for an employer to not give any hours and at the same time prevent a worker from seeking work elsewhere.

Clause 4 – Power to make further provision in respect of zero hours workers

The Bill defines “zero hours worker” but other “*non-contractual zero hours arrangements*” are not captured by this definition. Clause 4 would give the Department power to make regulations for a wider class of individuals than zero hours worker.

Proposed Article 59D(6) states: *“In making regulations under this Article, the Department must take into account, in particular-*

- (a) best international practice on employment law, and*
- (b) the views of trade unions and other bodies with an interest in protecting the rights of zero hours workers”*

It is noted that there is no definition in the Bill regarding “best international practice on employment law”. The term is subjective and could be open to interpretation. It is, therefore, not clear how proposed Article 59D(6)(a) could be satisfied by the Department. The Department is not aware of any precedent here or in Great Britain where such an expression has been used before.

Proposed Article 59D(6)(b) places an obligation on the Department to take into account the views of trade unions and other bodies with an interest in protecting the rights of zero hours workers. While it is proper that the Department would consult with worker representative organisations, there is a risk this could be perceived as unbalanced as it may appear to exclude others with an interest in the topic from the debate. In addition, it is noted that the Explanatory and Financial Memorandum refers to an intent to “consult widely”. The provisions in proposed Article 59D(6)(b) appear to be more limited.

It should also be noted that it is common practice when developing policy to take into account developments elsewhere as well as to consult on the issue with a wide range of stakeholders.

Clause 5 - Right not to be subjected to detriment

Proposed Article 68B contains provision about the right not to suffer detriment for a breach of any unenforceable exclusivity term in proposed Article 59C. It should be noted that proposed Article 59C contains references to a “zero hours worker”, whereas proposed Article 68B refers to a “worker”. These terms have distinct meanings and it will be necessary to ensure the implications of using the terms are fully assessed and the provisions are operable.

Clause 6 – Unfair dismissal

Proposed Clause 6(3) provides for a new Article 169B: “Application to zero hours workers: breach of unenforceable exclusivity term”.

Under this proposed article, a zero hours worker (who is a category of worker, that is not necessarily an employee) would appear to be treated as an employee in relation to unfair dismissal provisions. It is intended that these provisions would be a day one right (adding to the list of qualifying period employment exemptions). It is important to highlight that workers that are not employees do not have a general protection in regard to unfair dismissal. As such, this proposed clause is significant as there is potential for wider possible consequences for employment law and employment status and may result in unintended consequences. Further scrutiny would be required.

Clause 8 – Entitlement to banded weekly working hours

The Bill, as drafted, applies the entitlement to banded weekly working hours to all workers - not just “zero hour workers”. The proposed entitlement arises where the worker’s weekly hours, as set out in their contract, do not reflect the number of hours worked per week during the reference period (proposed Article 112J(2)). The Department has not had time to determine what the potential repercussions of this might be (if any), given the significant variations that exist in different types of employment contracts.

It is noted that the proposed reference period for determining a banded hours contract is three months. This is in contrast to the banded hours reference period that is applied in the Republic of Ireland, where a twelve month reference period is in place. Should a proposed system of banded hours be implemented, it would be necessary to determine the appropriate reference period. Factors to be considered would include, but not be limited to, the impact of seasonal variations in working hours, and whether it might incentivise employers to offer a wider pool of short term or fixed term contracts.

Clause 9 – Employer’s obligation to inform worker of entitlement to banded weekly working hours

This clause requires that, every three months, an employer must consider whether a worker may be entitled to banded weekly working hours. In practice, this has the potential to place a significant administrative burden on employers who will have to

make an offer to each qualifying worker at repeated three month intervals from the date they take up employment, unless the worker opts to accept the offer to move to a banded hours contract. In the absence of a regulatory impact assessment, it is not possible to estimate what this additional cost to employers would be. Employer views on practical implications of this provision will be very important in assessing the associated regulatory and administrative costs.

It is noted that the proposed obligation on the employer to offer banded hours is different from the approach adopted in the Republic of Ireland where the onus is on the employee to apply should they wish to make such a switch.

Clause 15 – Power to require records to be kept

The Bill makes provision for a power for the Department to introduce regulations to require records to be kept in respect of workers' weekly hours. However, it appears to lack a similar provision in relation to introducing a requirement to keep records for the purposes of compensation of three hours which it proposes if a zero hours worker is called in to work but not given work or is given less than one hour's work.

Clause 18 – Commencement

The Bill states the Act will come into operation at the end of the period of 3 months after the date on which it receives Royal Assent. With the exception of the provisions in the proposed Article 59C and proposed Article 112Q, which are regulation making powers, the provisions within this Bill would have direct effect on commencement. Should it be necessary to exercise any of the regulation making powers to ensure smooth operation of the other provisions, it would not be possible for the Department to do so within this timeframe.

The three month timeframe will provide a minimal amount of time for businesses and workers to familiarise themselves with its requirements and implement new ways of working. Any operational difficulties arising from these measures would be exacerbated if there is not adequate time for employers to prepare.

Conclusion

New Decade, New Approach and the draft Programme for Government both contain references to protecting workers' rights, including taking action in respect of zero hours contracts. The unique circumstances of this mandate, with its prolonged suspension followed by the subsequent challenges of a global pandemic, have meant that it has not been possible for the Department to give detailed consideration to all of the issues within those documents – including the references to ZHC. The priority to date in respect of employment law has been to protect those immediately affected by the pandemic as well as focus on wider economic recovery. In addition, the Department has brought forward important legislation through the Parental Bereavement Leave and Pay Bill.

While there may be a need to regulate to prevent misuse of zero hours contracts, it is important to note that flexibility in the labour market can also be a positive feature for many businesses. Employment law is complex and no employment right can be considered in isolation from the rest of the employment law framework. Given the complexities of this issue, the Department wishes to highlight the necessity to scrutinise any new legislation fully to ensure it is operable.

The limited time within the remaining mandate curtails the time available to do so. The absence of regulatory and other impact assessments makes it difficult to fully assess the impact of these proposals on both workers and employers.

As highlighted in this response, the Bill would make amendments to commonly used definitions of worker and employee. It also proposes to give workers who do not have employee status the same entitlements as employees in certain circumstances. The Committee will be aware that employment status is a particularly complex area of employment law. It is, however, one that is crucial to understanding to which rights a worker or employee may be entitled. Any changes to those definitions would have to be fully assessed in the context of the wider employment rights framework to ensure that there are no unintended consequences that could be detrimental to workers or employers.

In light of the issues above, it may be considered appropriate for the Department to consider the issue of ZHC in the context of wider employment law provisions and bring forward proposals for consideration in the next mandate.

Yours sincerely

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Department for the Economy