An Bille um Chaomhnú Fostaíochta (Uaireanta Éiginnte), 2016
Protection of Employment (Uncertain Hours) Bill 2016

Meabhrán Mínitheach
Explanatory Memorandum

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EXPLANATORY MEMORANDUM

Purpose of Bill

The Bill is, by its long title, an Act to provide greater protection for employees by more effectually regulating zero hours and related employment practices; and to provide for related matters.

The Bill is proposed in a context where the standard employment relationship is declining and atypical work is increasing. Non-standard terms and conditions can be imposed on the vulnerable, the low paid and those with little social protection. And conditions of insecurity can become permanent.

Women are over-represented in non-standard employment sectors that are poorly paid, or insecure, or outside or at the very edge of our employment protection laws.

Employment policy must strike the right balance between enterprise's need for flexibility and adaptability with a worker's right to job security – to a basic level of predictability in the terms and conditions of work.

Section 18 of the 1997 Organisation of Working Time Act concerns workers who have a contract requiring them to make themselves available for work. The section deals with the pay entitlements of someone whose actual hours do not match up to his or her hours 'on call'.

What the Act does not deal with is a contract with either very few or no guaranteed hours of work and no requirement – on paper at least – for employees to make themselves available outside of those guaranteed contractual hours.

Many workers are now encountering these new terms and conditions – the 'if and when' contract – under which employers are under no obligation to provide any work at all.

For example, the contract might say: "The company is under no obligation to provide work to you at any time and you are under no obligation to accept any work offered by the company at any time."

It seems that these 'if-and-when' contracts are not caught by the 1997 Act. And it may be that these workers are not just outside the terms of the Organisation of Working Time Act but that they are completely outside our entire system of employment protection law. It may be that a court would find there is no enduring contract of employment at all in such cases.

This is because, under this kind of arrangement, there is no obligation on the employer to provide work and no obligation on the worker to do any work that is offered. People working under contracts like these are being told that they are in effect casual day workers.

The imposition of such terms and conditions on the vulnerable, the low paid and those with little social protection is unacceptable. They are put at risk of job insecurity, limited integration in the business, low motivation, low job satisfaction and entrapment in a succession of short-term, low quality jobs with little or no social protection.

Erratic pay like this produces massive insecurity and it is entirely destructive of any attempt to plan your finances, to plan a future for yourself and for your family. These are perverse arrangements, aimed at downgrading the status of employment.

The purpose of this Bill is to counter this attempt at the casualization of work.

Provisions of Bill

Section 1 provides in standard form for the short title of the Bill.

Section 2 is the interpretation section and applies standard employment law definitions to certain terms used in the Bill.

Section 3 sets out a new rule for the interpretation of the written terms of employment contracts. The sections states that, where such terms have not been negotiated with the employer –

- by or on behalf of an employee individually, or
- by or on behalf of employees collectively,

regard shall be had to whether, on an consideration of all relevant evidence, those written terms reflect the true intentions and expectations of the parties, at the time the contract was entered into or at any later time.

It is made clear that this new rule is to apply to the interpretation of employment contracts generally, as well as in the application of this Bill.

Section 4 amends section 18 of the Organisation of Working Time Act 1997. That section is headed "Provision in relation to zero hours working practices". The purpose of the section is to provide for a minimum entitlement to payment for employees who are contractually required to make themselves available for work, even when no work is in fact provided.

The section applies where a contract operates to require an employee to make himself or herself available to do work for the employer in a week –

- a certain number of hours, or
- as and when the employer requires him or her to do so, or
- both a certain number of hours and otherwise as and when the employer requires him or her to do so.

However, section 18 is qualified by a proviso to the effect that a requirement to be available cannot be deemed to arise by virtue only of the fact of the employer having engaged the employee to do work of a casual nature for him or her on previous occasions, whether or not the number of those occasions or other circumstances would give rise to a reasonable expectation that he or she would be required by the employer to do further work for the employer.

The amendment to section 18 deletes this qualification, so that the section can in future apply to employees who were initially engaged to do work of a casual nature.

Section 5 amends section 9 of the Protection of Employment (Fixed-Term Work) Act 2003, which deals with successive fixed-term contracts. The purpose of the 2003 Act is to confer entitlements of fixed-term employees who have completed their third year of 'continuous employment'.

Section 9 (5) at present provides that, for the purpose of ascertaining the period of service of an employee and whether that service has been continuous, the First Schedule to the Minimum Notice and Terms of Employment Act 1973 applies.

The amendment to section 9 retains this rule but makes it subject to two qualifications. First, it is stated that where, at the end of a fixed-term employee's contract, the circumstances give rise to a reasonable expectation on the employee's part that he or she will be re-engaged by the employer to do work of the same or a similar nature, and where he or she is subsequently employed by the same employer to do work of the same or a similar nature, then the period between those two periods of service may be deemed to be a period of lay-off.

The effect of this deeming provision is that the service will be considered continuous rather than broken.

Second, it is provided that, where an employer has registered an employee for deduction of income tax in accordance with the PAYE system, the employee shall be regarded as continuing in that employment until the date specified in a notice of cessation of employment, or a notice of the employee's death, duly sent by the employer to the Revenue Commissioners.

Section 6 deals with continuity of employment for casual employees. The section applies for the purposes of any enactment or rule of law to which computation of the period of continuous employment that an employee has completed with an employer is relevant.

The section provides that service as a casual employee shall be included if –

- the employee was employed as a casual employee on a regular and systematic basis, and
- during the period of service, the employee had a reasonable expectation of on-going employment by the employer on a regular and systematic basis.

Regard in these circumstances will be had to whether the employee was offered work regularly; whether the employee generally accepted work when it was offered; and whether, although the amount of work offered might vary, there was a pattern or system to the work that the employee was offered each week.

Section 7 creates an entitlement to a corrected written statement of hours of work. It applies to employees –

- whose period of employment with an employer is deemed continuous by virtue of section 6, or the amendments to other legislation made by sections 4 and 5,
- who have worked continuously for a period of 6 months in an employment, and
- who, by reference to work done in those previous 6 months, have been required to work a normal number of hours per week that is greater than the number (if any) specified in their contract as the number of required hours of work.

An employee may request his or her employer in writing to correct his or her contract so that the particulars of the hours which the employee is required to work in a week accurately reflect the pattern of work done in the previous six months.

An employer who agrees to such a request must amend the written terms of employment by altering or adding a requirement that the employee shall work in a week –

- a specified number of hours, or
- both a specified number of hours and, as and when the employer requires him or her to do so, an additional number of hours not exceeding five.

But an employer may refuse to agree to such a request if the fact that there was a particular pattern or system to the hours in the previous six months was due to the seasonal nature of the work or to an emergency or other exceptional circumstances, or if the request was otherwise not factually well founded.

Section 8 is an anti-victimisation provision. It states that an employer shall not penalise or threaten penalisation of an employee for invoking rights or procedures under this Bill.

The section avoids the double application of this Bill and the Protected Disclosures Act 2014 and avoids double relief under this Bill and the Unfair Dismissals Acts 1977 to 2015.

Section 9 provides for complaints to adjudication officers of the Workplace Relations Commission in relation to contraventions by an employer of sections 7 or 8.

Section 10 provides that a decision of an adjudication officer may –

- declare that the complaint was or was not well founded,
- require the employer to comply with the provision to which the complaint relates and require the employer to take a specified course of action, and/or
- require the employer to pay compensation not exceeding 104 weeks' remuneration, calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977.

The Labour Court is given jurisdiction in relation to appeals from decisions of adjudication officers.

Section 11 invalidates any provision in an agreement (whether a contract of employment or not and whether made before or after the passing of this Act), in so far as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Bill.

However, where a registered employment agreement, an employment regulation order or a sectoral employment order provides that section 6, 7 or 8 does not apply in relation to the employees to whom the agreement or order has effect, or to a specified class of those employees, the provision concerned shall not apply in relation to those employees, or to that specified class.

Senator Ged Nash

Meán Fómhair, 2016.

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