Joint Committee on Jobs, Enterprise and Innovation

21 February 2017

Presentation on behalf of the Employment Bar Association

1. The Employment Bar Association (EBA) welcomes the opportunity afforded by the Joint Committee on Jobs Enterprise and Innovation to comment on the Banded Hours Contract Bill 2016 and related matters.

2. The EBA is a specialist association of barristers, both senior and junior counsel, who practice and advise on employment law in the courts and statutory tribunals both on behalf of employers and employees.

General

3. The EBA welcomes the move towards securing protections for employees who are not contractually entitled to the hours they in fact work and who have inadequate notice of the hours they are to work.

4. The question arises whether banning such contracts places a disproportionate burden on employers. It may be preferable to require such contracts to be objectively justified, applying a test akin to that applied by the Protection of Employees (Fixed-Term Work) Act 2003.

5. The Committee should also consider whether requiring employers to give increased hours to such employees also places a disproportionate burden on employers. It may be preferable to give employees the right to contractual recognition for hours worked in the normal course rather than a right to the offer of additional hours.

6. Consideration should also be given to avoiding the proliferation of separate statutory schemes. It is submitted that it is preferable to amend existing Acts to deal with the specific problems presented by such contracts rather than setting up a separate scheme.

7. Part time workers are already dealt with by Protection of Employees (Part-time Work) Act 2001; notice of working time[1] and zero hours contracts[2] are already dealt with by Organisation of Working Time Act 1997; the contents of statement of terms and conditions of employment are already dealt with by the Terms of Employment (Information) Act 1994; other protections are conferred on employees by other statutes. It is submitted that it is preferable to modify these Acts to deal with the specific problems presented by 'zero hours contracts' rather than setting up a separate scheme.

The Banded Hours Contracts Bill 2016

Section 1

8. The Bill applies to 'workers' and imports the definition of 'worker' from Part III of the Industrial Relations Act 1990, which part is headed 'Industrial Relations Generally'. It is to be noted that this definition excludes those employed by or under the State and teachers employed in a primary school, secondary school and Education and Training Board. It is also to be noted that the definition includes former workers.

[1] Organisation of Working Time Act 1997, section 17.
[2] Organisation of Working Time Act 1997, section 18.

9. The Bill imports the definition of ‘employer’ from a different Act, namely the Terms of Employment (Information) Act 1994. The term ‘employer’ is defined in relation to an ‘employee’ as defined by the 1994 Act and not in relation to a ‘worker’. The definition of ‘employer’ envisages covering the person who pays the salary.

Commentary on section 1

10. The Bill excludes workers employed by or under the State and teachers. Does the Committee wish to restrict the scope of the legislation in this manner?

11. The Bill includes former workers. Does the Committee wish to cover a former employee where the remedy envisaged is limited to granting the increase in hours sought?

12. The Bill imports the definition of ‘worker’ from the Industrial Relations Act 1990 and the definition of ‘employer’ from the Terms of Employment (Information) Act 1994. There is a disconnect between the two definitions since the term ‘employer’ in the 1994 Act is defined by reference to the definition of ‘employee’ in the same Act.

13. The Bill does not restrict its scope to permanent employees which means an employee on a fixed term contract could be covered. The Committee could consider excluding fixed term contracts in the interests of ensuring a reasonable level of flexibility for employers but at the same time recognising that ‘flexibility’ in relation to permanent employees must be something that is balanced against the employee’s right to have the reality of their situation recognised within their contracts.

Section 3

14. The Bill, if enacted, will allow employees to request that they be moved to an increased band of hours as per the bands set out in the Schedule to the Bill where the band requested exceeds the average weekly hours worked over the previous six month period.

15. If the employer grants such a request, the employee will be entitled to be offered hours of work by that employer of at least the minimum number of hours in that band.

16. The employer may only refuse the request if the business is experiencing severe financial difficulties such that there is a substantial risk that one of the outcomes listed in the Bill will come to pass, i.e. (a) that the workers concerned would be laid off or made redundant, or (b) that the sustainability of the employer's business would be significantly adversely affected or (c) that the employer's business could not sustain the giving of an increased level of banded hours to the worker.

Commentary on section 3 – general

17. While this Bill seeks to further the common good by addressing the problems faced by employees engaged under low hour and zero hours contracts, it may be that in so doing it imposes a disproportionate burden on employers since it requires the employer to increase its obligation to workers unless it is currently experiencing severe financial difficulties such that there is a substantial risk of quite serious and challenging financial consequences for the employer.

18. Furthermore, the following factors are to be noted:
    - The Bill does not oblige employees to accept the hours offered;
    - The Bill makes no provision for a reduction in the worker's hours if, following an increase in hours, the employer's business does in fact experience financial difficulties;
    - The Bill excludes the State itself from the burden imposed on other employers, since it does not cover persons employed by or under the State.

19. In these circumstances, the Committee should consider the constitutionality of the proposals lest they fail to strike the appropriate balance between the two parties to the employment contract.

Commentary on section 3 – six month period

20. "6 months continuous employment" is a shorter period than the period required to be covered by the Unfair Dismissals Acts, a type of statutory probationary period.

21. The Committee could consider if this period of continuous service is sufficient to give rise to the right to request an increased weekly band of hours.

22. The Committee might consider the need to strengthen the formula for calculating the average weekly hours worked over the previous six months in order to reflect the situation which this Bill seems to be intended to remedy i.e where a worker is regularly required to work in excess of their contract hours but has no recognition of their true employment situation or right to a similar situation on a long term basis.

23. There does not seem to be any scope for taking account of a once off increase in the need for overtime such as an unexpected need such as increased sick leave of other employees, an accident on the premises etc. Such a situation could, on a once off basis, increase the average weekly hours over a six month period but might not in any way reflect the reality of what is going on most weeks.

24. There is no provision for seasonal work where there is a far greater demand during some months of the year and not others, e.g. the tourist industry. Similarly, student workers may be employed for increased hours during academic breaks.

Commentary on section 3 – offer of additional hours

25. There is no obligation imposed on the employee to accept the additional hours offered to them. Given that the language used is that of an offer rather than a requirement, it seems that the additional hours which a worker is now entitled to have offered to them, are not hours that they are obliged to perform as per their contract. This means that there is no mutuality of obligation between the employer and the worker which is a cornerstone of the contract of employment. The obligation is on the employer to offer hours but without any obligation on the worker to accept and work them. Where the hours are refused they will have to be offered to another employee which may ultimately result in that employee acquiring a right under the Bill to offered more hours than they are contracted to work. Whilst the number of workers with the right

to offered hours of work may increase, the actual work to be done will probably not and this is going to create severe administrative difficulties but more importantly is going to cause significant financial problems for an employer.

26. The Committee could consider if there is a way of formulating the protection for the worker without exposing the employer to the possibility of the hours of work to be done falling below the hours which that employer's workers have a right to be offered.

Commentary on section 3 – Justification for refusal

27. The justification permitted to an employer seems to be very much based on a "substantial risk" (i.e. a high bar) of what are really quite serious and challenging financial circumstances for an employer.

28. The Committee should consider if the basis for permitting an employer to refuse a request is too onerous a test. It could well be in the interests of both the employer and the employee that the request should not be granted but that the employer is not in the sort of financial difficulty that the bill requires the employer to establish in order to justify the refusal.

29. Consideration could be given to allowing an objective justification test, similar to what is already provided for in employment equality law and in fixed term work claims for contracts of indefinite duration. The test is not limited to financial difficulties on the part of the employer but is more nuanced and capable of being applied to the many varied and sometimes unpredictable situations that can arise in the workplace.

Section 4

30. A worker may complain that the employer has contravened section 3. An adjudication officer may order the employer to increase the worker's hours to the next band.

Section 4 – Commentary

31. An order for an increase in hours to the next band is the only remedy provided for in the Bill. It is of no use to an employee who has left their employment, which may have been for reasons associated with the refusal of their request. Such an employer may not be covered by the Unfair Dismissals Acts if they have less than 12 months service and in any event, they would still have to show that their resignation should be construed as an unfair dismissal.

32. The Committee could consider if a remedy of compensation might enable an employee who has been unreasonably refused their request to have a remedy – for example where the refusal gave inadequate reasons - but without requiring an employer to grant the extra hours for whatever reason they had for refusing to do so.

Other issues - penalisation

33. There is no protection for an employee who is penalised as a result of having made a request for increased hours or as a result of having their application granted.

34. The Committee could consider if a penalisation provision is required. The Committee could consider how an employee who is dismissed for making a request should be protected.

Issues raised by the Committee

The problems caused by the increased casualisation of work that prevents workers in low hour and zero hour type contract arrangements from being able to save or have any job security (and in this context, it should be noted that the resolution made reference to the Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees carried out by the University of Limerick)

35. The Bill addresses the problems caused by the increased casualisation of work by allowing employees to request increased hours of work and obliging employers to grant increased hours unless the employer is experiencing severe financial difficulties and there is a substantial risk that grave consequences will flow from the grant of

increased hours. It may be that the Bill thereby imposes a disproportionate burden on employers. The Committee should consider the constitutionality of the Bill in this regard.

36. As an alternative, the Committee could consider conferring on workers the right to contractual recognition of the actual hours they work.

Whether zero hour contracts should be banned

37. It may well be that banning zero hours contracts simpliciter places a disproportionate burden on employers and the Committee should consider whether this is so.

38. As an alternative to banning zero hours contracts, the Committee could consider a requirement that such a contract be objectively justified, applying a test akin to that applied by the Protection of Employees (Fixed-Term Work) Act 2003. The essence of that test is that the contract must be justified by reference to factors other than the less favourable treatment which it involves for the employee.

Whether the Bill has sufficient flexibility in its application for small businesses and provides a simple approach in this regard, while lessening the administrative burden

39. The Bill should be revised to take account of the comments regarding the six month period, the offer of increased hours and the justification for refusal at paragraphs 20 to 29 above.

Whether workers on low and zero hour contracts should be allowed a minimum set of hours and the right to request more hours (section 18 of the Organisation of Working Time Act 1997)

40. If workers were to be allowed a minimum set of hours, this may have the effect of banning ‘as and when’ contracts, i.e. a contract where there is no obligation on the employer to offer any hours to the employee. Again, banning such contracts simpliciter might impose a disproportionate burden on employers. The Committee should consider, instead, requiring that such a contract be objectively justified by

reference to factors other than the less favourable treatment which it involves for the employee.

41. If workers were to be allowed to request more hours, this may impose a disproportionate burden on employers. The comments at paragraph 35 and 36 above refer.

Whether the remit of the Low Pay Commission should be changed to permit or require it to review proposals on banded hour contracts for those on low pay

42. Any ongoing examination of the conditions of employment of atypical employees is to be welcomed, particularly those who are low paid.

Conclusion

43. The protection of workers on zero hours contracts is to be welcomed. However, the question arises whether this should be carried out by amending existing statutes or establishing a separate statutory scheme. The question also arises whether banning such contracts, or requiring employers to give increased hours, without allowing the employer the opportunity to prove why it may not be appropriate, places a disproportionate burden on employers. It may be preferable to require such contracts to be objectively justified and to require contractual recognition of the hours actually worked.

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