

Good work plan

Consultation on measures to address  
one-sided flexibility

## Right to reasonable notice of work schedules

While we welcome the Government's intention to bring forward legislation that introduces a right for all workers to potentially move towards a more predictable and stable contract we are disappointed that there is no outright ban on zero hours working. In the absence of a ban on zero hours we consider that there should be a statutory limit on the proportion of the number of zero hours workers an employer has employed/engaged as a percentage of the total workforce. We agree that it is only right to legislate to introduce a right for all workers to switch to a more predictable work pattern and await the Government's further legislative proposals.

We believe that there should be a level playing field for all workers which is best met by providing employment protection for all workers from day one and the right to organise and benefit from collective bargaining<sup>1</sup> rather than legislation which is introduced piecemeal to address particular problems. That is why we support the Workers (Definition and Rights) Bill which had its second reading on 4 October 2019. Good work which is beneficial for business as well as workers is not achieved unless there is guaranteed protection and equal treatment for all workers.

We consider that implementation of the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 SI2018/1378 (the Employment Particulars Regulations) which gives all workers a right to a written statement of terms which come into force on 6 April 2020 are a step in the right direction.

We believe that as a result of this consultation the Government should amend the Employment Particulars Regulations to include provisions, where the work schedule varies, which provide for guaranteed hours; pay for additional work; reference days (e.g. Monday to Friday, weekends etc.), minimum notice periods where employers require workers to work additional hours above the guaranteed hours and the amount of compensation an employer would be required to pay where the employer cancels an assignment in breach of the notice requirement.

**Q1. If you are an employer or worker, what notice (if any), do you/ your workers receive of your/their work? Does this vary by different types of work or workers?**

This question is addressed to the experience of employers and individuals. We are responding as lawyers advising on these issues and have not therefore responded specifically to this question.

**Q2. How are work schedules currently organised or planned, and how are they currently recorded? Are you aware of best practice examples where work schedules are organised or recorded particularly well?**

This question is addressed to the experience of employers and individuals. We are responding as lawyers advising on these issues and have not therefore responded to the specifics of this question. However, in our experience of advising trade union clients and their members we are aware that in organised workplaces work schedules are generally scheduled in advance and any variations negotiated with the recognised trade unions.

<sup>1</sup> OECD in their report 'Good Jobs for all in a changing world of work' 4 December 2018 acknowledged the importance of collective bargaining in tackling inequality in the workforce "Collective bargaining institutions and social dialogue can help promote a broad sharing of productivity gain, including with those at the bottom of the job ladder, provide voice to workers and endow employers and employees with a tool for addressing common challenges." (See TUC report 'Insecure Work').

**Q3. What would you define as ‘reasonable notice’ of work schedules? Does this vary between different types of work or contexts? And what working hours should be in scope?**

We are concerned by the comment in the consultation document that “We would expect that where shifts are offered with less than reasonable notice (such as staff illness or overtime) workers would not experience any detriment from employers for turning down those shifts.” This is naive and negates the experience of workers who refuse to work additional shifts on very short notice and who are not offered work in the future because the employer claims that they did not help the employer out “when they needed them most”.<sup>2</sup>

It is for this reason we consider that there should be a guaranteed minimum hours of work (which is not set at zero) for workers on variable hours contracts. There are some examples of good practice of this in Europe. For example, in the Netherlands the average number of working hours worked in a three month period is presumed to be the number of working hours. In Germany and Denmark, the amount of daily working hours is deemed to be three.

We do not recommend a specific figure but are of the view that a minimum number would best be set out in a negotiated collective agreement with trade unions. We believe that this would provide both transparency and predictability for workers on variable hours contracts and at the same time act as a deterrent to employers who seek to cancel work on very short or no notice as evidenced in the Low Pay Commission report.<sup>3</sup>

We recognise that even where there are guaranteed minimum hours, employers will request workers to work additional hours. In that case we consider that the employer should be required to provide notice. There are a number of good examples in Europe. For example, in Austria two weeks’ notice is required under the Working Time Act; 14 days’ advance notice in the Czech Republic and 20 days’ notice in Portugal.<sup>4</sup>

We are also aware of workers in the bakery sector who have been called to attend shifts only to be told when they arrive that they are not needed anymore. These same variable hours workers who are entitled to holidays are also expected to comply with regulation 15 of the Working Time Regulations 1998 which provides that workers have to give the employer twice as much notice as the holidays they wish to take. So, for example, if they wish to take 2 days’ holiday they have to give four days’ notice. It cannot be right to require workers to provide notice of when they are unavailable due to holidays and at the same time not provide any guaranteed notice.

We agree the baseline figure suggested in section 3 of the Workers (Definition and Rights) Bill that, “a period of notice shall not be reasonable if given less than 7 days before any period of employment referred to in subsection 2”.<sup>5</sup> The periods of employment referred to include both a request to undertake work and where work is cancelled.

Any period of notice should also be subject to conditions.<sup>6</sup> We consider that the requirement for notice should apply to all working hours be they guaranteed or anticipated such as on-call hours and where the employer requires a worker to be “available” for work. Moreover, where an employer requires a worker to be available the period of availability should be limited to no more than seven days or their equivalent (e.g. night shifts between x dates).

<sup>2</sup> See TUC 2017 Great Jobs with Guaranteed Hours. What do workers really think about flexible zero-hours contracts

<sup>3</sup> See page 20 Low Pay Commission Report – A Response to Government on one-sided flexibility

<sup>4</sup> Commission Staff Working Document SWD (2017) 301 final by the European Commission Analytical Document accompanying the Consultation Document

<sup>5</sup> Subsection 2 provides that ...an employer shall be required to give reasonable notice of (a) any request or requirement to undertake a period of employment; and (b) any cancellation of a period of employment already agreed

<sup>6</sup> See the Workers (Definitions and Rights) Bill: 27G (3) An employer may request a worker to work additional hours only if –

- (i) The worker has agreed in writing that such a request may be made;
- (ii) The agreement referred to in paragraph (i) specifies the circumstances in which such a request may be made;
- (iii) The agreement specifies the length of notice that must be given by the employer making the request, and the request complies with that requirement;
- (iv) The agreement specifies that the worker shall be paid at least 200% his or her normal hourly rate were he or she to agree to the request, and the request expressly complies with that requirement;
- (v) The agreement provides that, should the request be rescinded, the worker shall nevertheless be entitled to be paid the sum referred to in paragraph (iv) and to recover any losses arising from having agreed to the request; and
- (vi) The employer has complied with section 27F (1) and (2) above.

A period of notice of seven days would also recognise that many zero hours workers tend to have more than one job.<sup>7</sup> A uniform notice period would assist other workers and other businesses to better plan and organise their work. The period of seven days should only be varied where agreed with trade unions.

Where an employer requires a worker to work beyond guaranteed hours this should be limited and shall not exceed 10% of the guaranteed hours. Furthermore, there should be restrictions on when an employer may request a worker to work additional hours. We agree with the proposals set out in section 2 (27G) of the Workers (Definition and Rights) Bill.<sup>8</sup>

**Q4. What impact (if any) would the introduction of the right to a reasonable notice of work schedules have on you (or those you represent)? How would existing practices change?**

The adverse impact of variable hours on workers is well documented.<sup>9</sup> In particular, not only do variable hours make it difficult for those workers to plan caring responsibilities, but it can adversely affect mental health as a result of not being able to pay household bills, having to rely on food banks and benefits as well as missing out on basic human rights such as missing meals and not being able to take a break.

Regulation which promotes more predictable working patterns and shifts the risks of business away from the individual worker will ensure better workforce planning, better working conditions and a healthier workforce. It should also promote equal treatment given that a large proportion of zero hours workers are women and are of black, Asian and minority ethnic origin. These benefits also benefit the business. In addition, businesses are also better able to plan, are more transparent and so prevent unfair competition.

**Q5. In your view should the right to a reasonable notice of work schedules be something that is guaranteed from the start of someone's employment, or should an individual need to work for a certain amount of time before becoming eligible?**

We agree that the right should be guaranteed from the start of someone's employment. As stated above, the right to a notice period should be set out in the statement of particulars which from 6 April 2020 must be provided to all workers from day one of employment.

**Q6. In your view, should Government set a single notice period for work schedules which applies across all employers, or should certain employers/sectors be allowed some degree of flexibility from the "baseline" notice period set by Government? Which employers/sectors (if any) should be allowed some degree of flexibility?**

See Q3.

**Q7. How would an appropriate "baseline" notice period and degree of flexibility to you? How would this impact you, or those you represent?**

See Q4.

<sup>7</sup> ETUI Policy brief: Regulating uncertainty: variable work schedule and zero-hour work in EU employment policy

<sup>8</sup> 27G (1) An employer may request a worker to work additional hours in excess of the hours specified in accordance with section 27F. (2) Additional Hours referred to in subsection (1) shall not exceed by 10% the hours referred to in section 27F [Notice of fixed and regular hours].

<sup>9</sup> ETUI Policy brief: Regulating uncertainty: variable work schedules and zero-hour work in EU employment policy; Time for Better Pay USDAW

**Q8. In your view, are there any instances where reasonable notice of a work schedule would not need to be given? If so, for which workers/types of work?**

This question is addressed to the experience of employers and individuals. We are responding as lawyers advising on these issues and have not therefore responded specifically to this question. We are, however, of the view that any variation to the baseline notice period set out in statute should only be negotiated and agreed with trade unions.

**Q9. How do you think a reasonable notice of a work schedule would be recorded?**

This should be recorded in the written statement of particulars which must be provided to all workers from day one of employment in a format which is accessible to the worker. Many low paid workers (the majority of whom are on variable hours contracts) do not have access to the intranet, email or online systems. Employers must be required to evidence not only that there is a written statement of particulars but that this has been provided, delivered and received by a worker. It would be open to a worker to disprove that contact was in fact made/recorded.

**Q10. What impact, if any, would the requirement of recording work schedules have on you (or those you represent) and how you organise work?**

This is unlikely to be onerous given the availability of technology.

**Q11. If Government were to introduce the right to a reasonable notice of work schedule, what would be most useful for employers within statutory guidance?**

We believe that the Government should provide a standard document setting out the employment particulars. This should also include provisions on reasonable notice that employers are required to provide along with the provisions on compensation in the event that the employer defaults in order to ensure transparency and clarity for both workers and employers.

The Government should make clear that as well as the rights to notice, workers on variable hours are entitled to be given a statement of particulars.

Employers should be required to set out the number and proportion of zero hours workers in company accounts.

There should also be a restriction on the proportion of workers employed by an employer who are on zero hours contracts and/or a restriction on the number or proportion of a workers' hours which are 'zero hours'. Where the employer provides guaranteed hours the employer should be required to keep a written and accessible record of the number of hours worked in excess of the guaranteed hours which should also be expressed as a percentage of the guaranteed hours. This should not be too onerous as there are many sophisticated software packages for payroll and which would be far more effective than the current ad hoc arrangements currently in place to pay zero hours workers.

**Q12. What would an appropriate penalty be in the event of non-compliance (when workers are not given reasonable notice of their work schedule, and/or if it is not recorded correctly)?**

We consider that an appropriate penalty would be four weeks' pay where average pay is calculated in accordance with section 221-224 of the Employment Rights Act 1996. The employer should also be reportable to the appropriate enforcement agency in the same way in which employers who fail to pay the national minimum wage are reported. There should also be a financial penalty equivalent to that provided by section 12A of the Employment Tribunals Act 1996. The right to receive four weeks' pay should be enforceable in the Employment Tribunals as an unlawful deduction from wages. There should be no service requirement and no fees should apply. The penalty could also be imposed by the same tribunal. The tribunal should have the power to report an employer where a Claimant's claim succeeds in a similar way in which tribunals can report protected disclosures.

## Compensation for shift cancellation or curtailment without reasonable notice.

### **Q13. Are shifts or hours of work cancelled by the employer at short notice in your workplace, or in the workplaces of those you represent? Why? Are reasons provided to workers? Are these hours then replaced?**

This question is addressed to the experience of employers and individuals.

Responding as lawyers advising on these issues we are aware of multiple examples where shifts have been cancelled at short notice. In one case, a catering worker turned up for their shift only to be told that they were no longer required. The worker incurred public transport travel fares. Not only was the worker out of pocket but by the time they arrived home it was not possible to find alternative work for the day. In other cases, workers have gone on holiday with the agreement of the employer and returned to work as agreed only to be told that they are not needed anymore. Where a worker has been off sick for one or two days the worker is told when they turn up for a shift that they are not needed. These examples run across the spectrum, from drivers to catering staff, to care workers and cleaning staff. Rarely, if at all, are these workers given further shifts. The most common explanation given to a worker for cancelling shifts is simply that they are not needed any more. This offends against common decency.

### **Q14. How often are shifts or hours of work cancelled by the employer at short notice?**

This question is addressed to the experience of employers and individuals. We are responding as lawyers advising on these issues and have not therefore responded specifically to this question. We suspect that given the CIPD research, which found that a large number of employers were unsure if notice was given, that employers will be unable to provide details of how often shifts or hours are cancelled.<sup>10</sup> This, however, should not be taken as an indication that it does not happen. It should also be recognised that some workers will not speak out for fear of losing the work they have (or think they have). As a result, we believe that answers to this question are likely to under represent the true scale of shifts being cancelled at very short notice for those workers who work variable hours.

### **Q15. What notice, if any, is provided by the employer before the shift or hours of work are cancelled? Does this vary at all?**

See Q13.

### **Q16. Do you/workers receive compensation if shifts or hours of work are cancelled? If so, what compensation is provided?**

This question is addressed to the experience of employers and individuals. We are responding as lawyers advising on these issues and have not therefore responded specifically to this question. In relation to our response at Q13 above, in our experience we are aware that it is not uncommon for costs to have been incurred by the worker. These include travel fares and payment of childcare.

### **Q17. Does this compensation vary by different types of work/worker? If so, how does this vary?**

This question is addressed to the experience of employers and individuals. We are responding as lawyers advising on these issues and have not therefore responded specifically to this question.

<sup>10</sup> See paragraph 1.42 of the Low Pay Commission report: A Response to Government on 'One-sided flexibility'

**Q18. Are you aware of any best practice examples from other areas of industry where workers receive compensation for shifts or hours of work which are cancelled?**

There are examples of good practice in Europe. In Germany, where there are guaranteed minimum hours, workers are entitled to be paid even if these are not worked. This is set to at least three hours per shift and at least 10 working hours per week. In the Netherlands whenever the weekly working hours is below fifteen, workers are entitled to at least three hours pay every time they are called in. In Romania no less than eight working hours per day is paid by the employer even if a lower number of hours are worked.

**Q19. What impacts, both positive and negative, would this proposed policy have on you (or those you represent) (if any)?**

Flexibility without protection of basic standards can jeopardise working and living conditions as we have set out in our response to Q4. These can have an adverse social and economic consequences as workers suffer mental health repercussions as well as unequal treatment of women and black, Asian and minority ethnic workers who are more predominantly employed on unpredictable contracts.

More predictable working patterns will have a positive effect both on workers and employers. Workers will be better able to plan and pay their household bills and so reduce the risk of going into debt as they should know what they will be paid and when they will be paid. It should also reduce unexpected costs for the worker such as travel fares and childcare costs. The mental health of workers should also improve as they know there will be some income even if work is cancelled at the last minute. Greater predictability will promote better workforce and business planning which should go some way to remove unfair competition. Businesses will also have a more dedicated and skilled workforce at a time when it is needed most and should therefore be able to develop and expand.

**Q20. Noting the three proposed options put forward by the LPC, if compensation were introduced for shifts or hours which are cancelled at short notice, what would you consider to be a 'fair' amount of compensation?**

We agree with the proposal set out in the Workers (Definition and Rights) Bill,<sup>11</sup> where shifts are cancelled in breach of the notice provisions, the employer should be required to pay for the period of employment that had been proposed even if no work has been done. The amount of payment should be made up of:

- i. 200% of the rate the worker would normally be paid by their employer for the period in question; and
- ii. A sum equivalent to any other monetary losses incurred as a result of the cancellation (e.g. travel costs, childcare, loss of wages as a result of other work being cancelled).

Such sums should be recoverable in the employment tribunal.

**Q21. If compensation were introduced, what should be the cut-off point at which employers have to give their workers notice of a cancelled shift or hours (after which workers would become eligible for compensation)?**

This should be for the whole period of employment subject to a minimum of seven days.

<sup>11</sup> See section 2 of the bill (proposed s. 27E of Part II A of the Employment Rights Act 1996)

**Q22. If Government were to implement a policy where the notice period for cancelling shifts or hours of work was longer than the amount of time you suggest above, what impact (if any) would this have on you (or those you represent)?**

No comment.

**Q23. Should all types of employer, across all sectors, be expected to pay compensation?**

Yes. As we have indicated above the primary purpose of the statutory requirement to give notice would be to promote more predictable and stable employment which is critical at this moment in time.

There is no justification for differentiation. The aim must be to create transparency and predictability for both workers and employers which will lead to a level playing field and create confidence in the labour market.

**Q24. Which workers, if any, should be exempt from receiving compensation?**

None.

**Q25. In your view, should workers become eligible for compensation from the start of their employment, or should they become eligible after a certain amount of time?**

We believe it is important that this should be guaranteed from the start of a worker's employment. This would provide consistency as above (see our response to Q5) and clarity for both workers and employers.

**Q26. How should a policy to provide compensation for short notice shift cancellations be designed to best target workers who experience one-sided flexibility?**

The provision for compensation should be included in the statement of particulars. Trade unions should be allowed access to recruit and collectively bargain for these workers and to provide advice and representation on these matters.

Ultimately, the right to compensation will have little effect in tackling one-sided flexibility unless it is effectively enforced. In addition to enforcement through tribunals which do not have costs risks for individual claimants (to incur costs or fees would deny access to justice) we would welcome greater inspection to ensure compliance by a properly resourced and funded enforcement agency.



**Q27. What could employers'/employer representatives do to share best practice and drive change through their workforce and industry?**

Ultimately there must be shared goals to eradicate unpredictability by developing zero tolerance of unfair and inequitable working practices through the statutory measures we have proposed in our response. There should also be a statutory cap on the proportion of zero hours contracts workers employed or engaged by a company/business.

To ensure good practice we believe that all companies and businesses should be required to publish in company annual accounts:

- i. the number and proportion of zero hours workers employed as a percentage of the total workforce
- ii. how they have informed workers of their rights
- iii. how they will monitor and report on best practice.

We consider that this information should be shared with the trade unions in order to monitor and develop good practice and through collective bargaining.

We believe that this would be in accordance with the principles of good governance and in the spirit of section 172 of the Company Act 2006.<sup>12</sup>

<sup>12</sup> A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—  
(a) the likely consequences of any decision in the long term,  
(b) the interests of the company's employees,  
(c) the need to foster the company's business relationships with suppliers, customers and others,  
(d) the impact of the company's operations on the community and the environment,  
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and  
(f) the need to act fairly as between members of the company.