Observations on the *Employment (Miscellaneous Provisions) Bill 2017*

February 2018

Coimisiún na hÉireann um Chearta an Duine agus Comhionannas
Irish Human Rights and Equality Commission

Contents

1 Introduction

1.1 The Irish Human Rights and Equality Commission

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014*. In accordance with its founding legislation, the Commission is mandated to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality and to make recommendations to the Government to strengthen and uphold human rights and equality in the State.

1.2 Outline of proposed changes

The main provisions in the Bill are amendments to two existing acts, the *Organisation of Working Time Act 1997* and the *Terms of Employment (Information) Act 1994* (with a consequential amendment to the *Workplace Relations Act 2015*). These amendments cover different aspects of the employment relationship, and some aspects of enforcement. Some of the provisions seek to address a number of the problems that can be experienced by workers who do not have a full-time contract for predictable or stable hours of work. The key amendments are as follows:

- An amendment to the *Terms of Employment (Information) Act 1994* so that employers are required to give core terms of employment at commencement of employment and to create an offence for the non-provision of that information.
- An amendment to the *Terms of Employment (Information) Act 1994* to introduce a new provision to protect a worker from penalisation for exercising their rights under that Act.
- An amendment to the *Organisation of Working Time Act 1997* to create a minimum payment in certain circumstances (where an employee who is called to work but then sent home without any work).
- An amendment to prohibit contracts within the meaning of section 18(i)(a) and 18(i)(c) of the *Organisation of Working Time Act 1997* that specify zero as the contract hours.[1]
- An amendment to the *Organisation of Working Time Act 1997* to introduce new legislation governing 'banded hours'.

[1] The stated intention of the amendment is to prohibit zero-hour contracts, but as is explained below, the Commission believes that the wording in the draft scheme of the Bill would not be effective.

- An amendment to the existing provision in the *Organisation of Working Time Act 1997* on penalisation.

1.3 The Irish context, and human rights and equality considerations

Part-time employment has risen over the last ten years in Ireland. Within part-time workers, the representation of involuntary part-time workers as a proportion of all part-time workers in this period has risen.

Evidence presented recently to the departmental and parliamentary consultations[2] has highlighted the negative effect current labour laws and practices have on a number of groups, including migrants, women, young people, older people, lone parents, people with caring responsibilities, and people with disabilities.[3]

Health outcomes have been identified by a wide range of actors as a significant problem for those in precarious work.[4] The European Commission notes that in-work poverty is known to

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2 In 2015 the Department of Jobs, Enterprise and Innovation undertook a public consultation on a report by the University of Limerick on zero-hour contracts. The submissions to the Department's consultation are available at: https://dbei.gov.ie/en/Consultations/Consultation-Document-University-of-Limerick-Study-on-the-Prevalence-of-Zero-Hour-Contracts-and-Low-Hour-Contracts.html. In the first half of 2017 the Joint Oireachtas Committee on Jobs, Enterprise and Innovation held hearings on the *Banded Hours Contract Bill*. Presentations to the Committee are available at http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/jobsenterpriseandinnovation/presentationsandsubmissions/.

3 See for example:
- National Women's Council of Ireland (2015) *Response to Recommendation in University of Limerick Study on the Prevalence of Zero Hour Contracts and Low Hour Contracts in the Irish Economy*, available at https://dbei.gov.ie/en/Consultations/Consultations-files/ZHC-National-Women-s-Council-of-Ireland-Submission.pdf;
- SIPTU (2017) *Brief Submission to the Joint Oireachtas Committee on Jobs, Enterprise and Innovation on Behalf of SIPTU Members Employed on precarious / Zero Hours Contracts in Health Service Providers*, available at http://www.oireachtas.ie/parliament/media/committees/jobsenterpriseandinnovation/submissions/32nddail/SIPTU---Opening-Statement.pdf;
- Pablo Rojas Coppari, 'Banded Hours Contract Bill 2016: Discussion (Resumed)', *Joint Committee on Jobs, Enterprise and Innovation*, 9 May 2017;
- NDA email submission to the Department of Jobs, Enterprise and Innovation, available at https://dbei.gov.ie/en/Consultations/Consultations-files/ZHC-National-Disability-Authority-Submission.pdf.

4 See for example: Institute of Education (2017) *Economic Activity and Health*, London: Centre for Longitudinal Studies, UCL (www.cls.ioe.ac.uk/shared/get-file.ashx?itemtype=document&id=3301); ILO (2016) *Non-standard Employment around the World: Understanding Challenges, Shaping Prospects*, Geneva: International Labour Organization, at pages 202 and 226; ILO (2011) *From Precarious Work to Decent Work: Policies and Regulations to Combat Precarious Employment*, Geneva: International Labour Organization, at pages 15 and 16; Eurofound (2015), *New Forms of Employment*, Luxembourg: Publications Office of the European Union, at page 69.

be linked to precarious employment and involuntary part-time work,[5] and has highlighted the 'need for measured and balanced reforms in employment protection legislation in order to remedy segmentation or to halt the excessive use of non-standard contracts'[6].

The Commission previously considered contracts with unspecified hours of work – often called 'zero-hour contracts' – in its parallel reports on the reviews of Ireland under the International Covenant on Economic, Social and Cultural Rights in 2015[7] and under the Convention on the Elimination of All Forms of Discrimination against Women in 2017[8]. The Commission stated that it was concerned that the lack of specified and secure hours of work and the provision of contracts that state hours below those actually worked

- lead to insecurity of income,
- restrict the ability to organise family life, including child care, and
- inhibit the ability to secure loans and mortgages.

The proposed changes in the Bill arise from:

- the commissioning and, in 2015, publication by the then Department of Jobs, Enterprise and Innovation of research undertaken by the Kemmy Business School at the University of Limerick on 'zero-hours' contracts[9], and
- a public consultation by the then Department of Jobs, Enterprise and Innovation in 2015 on that report.

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5 European Commission (2012) *Employment and Social Developments in Europe 2011*, Luxembourg: Publications Office of the European Union, at page 141. (http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=6176&furtherPubs=yes)

6 European Commission (2012) *Towards a Job-rich Recovery: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions* COM(2012) 173 final (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0173:FIN).

7 Irish Human Rights and Equality Commission (2015) *Ireland and the International Covenant on Economic, Social and Cultural Rights: Report to UN Committee on Economic, Social and Cultural Rights on Ireland's Third Periodic Review*, section 6.1. The issue of zero-hour contracts was also raised in the IHREC's submission to the Department of Foreign Affairs and Trade on the drafting of the National Action Plan on Business and Human Rights.

8 Irish Human Rights and Equality Commission (2017) *Ireland and the Convention on the Elimination of All Forms of Discrimination against Women: Submission to the United Nations Committee on the Elimination of Discrimination against Women on Ireland's Combined Sixth and Seventh Periodic Reports*, section 11.1.

9 Kemmy Business School University of Limerick (2015) *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees*, Dublin: Department of Jobs, Enterprise and Innovation (https://dbei.gov.ie/en/Publications/Publication-files/Study-on-the-Prevalence-of-Zero-Hours-Contracts.pdf).

An alternative proposal on banded hours is contained in the *Banded Hours Contract Bill 2016*[10], which was introduced in the Dáil by David Cullinane TD in June 2016. Between January 2017 and May 2017, the Joint Committee on Jobs, Enterprise and Innovation held hearings with business organisations, trade unions, legal experts, and civil society organisations about that Bill, and in June 2017 the Committee published a report on it[11]. In these observations, the Commission has drawn on these three sources (University of Limerick report, submissions to the Department, and evidence to the Oireachtas Committee) where this is relevant. In addition, in September 2016, Senators Ged Nash and Kevin Humphreys moved a different Bill that would, among other things, create a right to a contract that reflects actual hours worked and give casual workers increased rights if they are employed on a regular and systematic basis[12].

1.4 International and other standards

The need for 'the regulation of the hours of work' and 'the provision of an adequate living wage' were recognised with the establishment of the International Labour Organization in 1919,[13] although it has not developed legal standards on the particular question of low-hours and zero-hour contracts.

Article 7 of the International Covenant on Economic, Social and Cultural Rights concerns the right to 'just and favourable conditions of work', and specifically specifies that this entails 'remuneration which provides all workers, as a minimum, with […] fair wages […]; a decent living for themselves and their families […]; [and] rest, leisure and reasonable limitation of working hours'. The right to just and favourable conditions of work is provided for in both

10 Available at: http://www.oireachtas.ie/viewdoc.asp?DocID=33153

11 Available at: http://www.oireachtas.ie/parliament/media/committees/jobsenterpriseandinnovation/32ndreports/07---Scrutiny-of-Banded-Hours-Contract-Bill-2016.pdf

12 *Protection of Employment (Uncertain Hours) Bill 2016 [Seanad] [PMB]* (http://www.oireachtas.ie/viewdoc.asp?DocID=33511). In particular, one of the provisions would amend section 18 of the *Organisation of Working Time Act* to remove a clause in that section which excludes casual work from contributing to the rights provided for in that section. The Seanad held the second-stage debate on that Bill on 16 November 2017.

13 The first ILO Convention in 1919 established an international legal norm for hours of work in industry, although the norm is about prohibiting excessive hours and not about inadequate, irregular, or badly scheduled hours which the current proposal seeks to regulate.

the International Convention on the Elimination of All Forms of Racial Discrimination[14] and the Convention on the Rights of Persons with Disabilities[15].

The UN Committee on Economic, Social and Cultural Rights has stated:

> 'The increasing complexity of work contracts, such as short-term and zero-hour contracts, and non-standard forms of employment, as well as an erosion of national and international labour standards, collective bargaining and working conditions, have resulted in insufficient protection of just and favourable conditions of work. Even in times of economic growth, many workers do not enjoy such conditions of work.'[16]

The Committee also stated: 'Flexible working arrangements must meet the needs of both workers and employers and in no case should they be used to undermine the right to just and favourable conditions of work'[17].

Article 2 of the European Social Charter provides a right to just conditions of work, which includes an obligation on the state to 'provide for reasonable daily and weekly working hours'.[18] In addition to this right for all workers generally, Article 27 of the European Social Charter provides particular protection for those workers who have family responsibilities. Article 27 requires States to take measures 'to enable workers with family responsibilities to enter and remain in employment' and 'to take account of their needs in terms of conditions of employment'.[19]

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14 Article 5(e)(i)

15 Article 27(1)(b)

16 UN Committee on Economic, Social and Cultural Rights (2016) *General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/23, paragraph 3 (http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en)

17 *General Comment No. 23*, paragraph 46.

18 In 2014 Ireland was found to be in breach of Article 2 of the European Social Charter because working hours in the merchant shipping sector are allowed to go up to 72 hours per week (http://hudoc.esc.coe.int/eng/?i=2014/def/IRL/2/1/EN).

19 Ireland has partly accepted the application of Article 27 of the Revised European Social Charter. The provision that has not been accepted does not concern arrangements for work hours for workers with family responsibilities. (The unaccepted provision is sub-paragraph *c* of Article 27.1 and it would require the State to take appropriate measures 'to develop or promote services, public or private, in particular child daycare services and other childcare arrangements'.)

In EU law, Article 31 of the Charter of Fundamental Rights of the European Union concerns fair and just working conditions, and provides in paragraph 1 that 'Every worker has the right to working conditions which respect his or her health, safety and dignity'. Of relevance to the proposed legislation, it has been argued that the protection of a worker's dignity in Article 31(1) of the EU Charter has a role to play where cuts to remuneration are unexpected and not reasonably foreseeable by workers, and that 'the most abusive forms of "zero hours" contracting could be challenged as incompatible with respect for dignity, given the inability of workers to plan their lives on the basis of reasonable expectations of working time arrangements'.[20]

Zero-hour and low-hour work has been the subject of legal and policy scrutiny in comparable jurisdictions. For example, in 2017, the Fair Work Commission in Australia issued legal decision that in the hospitality industry, a part-time worker may request that their contract be amended to reflect actual hours worked and the employer may refuse such a request 'only upon reasonable business grounds, and such refusal must be provided to the employee in writing and specify the grounds for refusal'. It also ordered that all time worked in excess of a worker's rostered hours be paid at the relevant overtime rate.[21] In the UK, issue of zero-hour contracts has been the subject of at least two parliamentary reports[22].

[20] Alan Bogg (2014) 'Article 31: Fair and just working conditions', in: Steve Peers *et al*. (eds.) *The EU Charter of Fundamental Rights: A Commentary*, Oxford: Hart Publishing, at paragraph 31.48.

[21] *4 yearly review of modern awards – Casual employment and Part-time employment: Full Bench decision* [2017] FWCFB 3541, at paragraph 534 (https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2017fwcfb3541.pdf).

[22] House of Commons Library (2016) *Briefing Paper: Zero-hours Contracts* (Number 06553), London: House of Commons; House of Commons Scottish Affairs Committee (2014) *Zero Hours Contracts in Scotland: Interim Report – Tenth Report of Session 2013–14* (HC 654), London: The Stationery Office.

2 Amendment to the Terms of Employment (Information) Act

2.1 Substantive content

Currently, the *Terms of Employment (Information) Act 1994* generally requires that a written statement containing 16 items of information on the terms of employment be provided to a new employee within two months of the start of employment[23].

Section 6 of the Bill proposes that this be modified by requiring a written statement containing five named items of information – referred to as the 'core terms' in the Explanatory Memorandum to the Bill – be provided not later than the fifth day of employment. The two-month obligation would continue to apply to the remaining pieces of information. The five pieces of information that the Bill proposes be provided within five days are:

(a) the names of the employer and employee,
(b) the address of the employer,
(c) in the case of a temporary contract, the expected duration of the contract,
(d) certain details of the pay or how it is calculated, and
(e) what the employer expects will be the length of the normal working day and the normal working week.[24]

Four of these items – (a) to (d) – are required under the current Irish legislation within the two-month time limit; item (e) is new[25].

Providing a written statement to workers on contracts for low or flexible hours of the core terms of employment would serve the important functions of

- ensuring that the worker is clearly and properly informed of the core terms of their employment, and
- reducing or eliminating the potential for disagreement at a later date as to what the essential terms of employment were.

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23 Section 3(1).

24 For ease of reading, the exact legalistic wording contained in the draft scheme has not been used here.

25 This appears to transpose into Irish law an outstanding provision from EU law dating back to 1991, from Article 2(2)(i) of ***Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship*** (http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31991L0533).

Although the Bill proposes that the core terms will include the duration of the contract if it is temporary, it does not propose that the date of the start of employment be provided[26]. The duration of the contract without the start date would not be sufficient for some employments to define clearly the contract that the employer and worker are agreeing, particularly for low hour or short-term work.

The Bill proposes that the core terms must be provided within five days of starting work. However, each of them is essential information that a new employee should have *before* accepting an offer of work for even the shortest or temporary employment contracts: who the employer is and where they can be contacted, what the pay for the job is, what the hours of work are, how long the contract is to last, and when it is to start.

The Commission recommends that

- **the Bill be amended to provide that Terms of Employment (Information) Acts be amended to require that a written statement of core conditions of employment be provided before employment commences;**
- **the core conditions of employment that must be provided before employment starts be**
  (a) the date on which employment is to commence,
  (b) the name of the employer and employee,
  (c) the address of the employer,
  (d) the pay,
  (e) the length of the employee's normal working day and normal working week, and
  (f) in the case of a temporary contract, the duration of it.[27]

Under the *Terms of Employment (Information) Act*, a worker employed for less than eight hours per week or a worker employed for less than one month is not entitled to receive a written statement of terms of employment.[28] Given that this category of worker may be in

[26] The date of commencement of the contract is required under the larger set of information – section 3(1)(e) of the *Terms of Employment (Information) Acts 1994 to 2014*.

[27] For ease of reading, the exact wording contained in the draft scheme has not been used here. For certainty, the Commission is recommending here that the core terms be those currently provided for in, respectively, section 3(1)(e), section 3(1)(a), section 3(1)(b), and section 3(1)(g) of the *Terms of Employment (Information) Act 1994*, Article 2(2)(i) of Directive 91/533/EEC, and section 3(1)(f) of the *Terms of Employment (Information) Act 1994*.

[28] Section 2(1)(a).

the most 'casual' and therefore most potentially vulnerable employment situation, clarity on their core terms of employment may be of particular benefit to them.

The Commission recommends that the proposed legislation be amended to provide that the core conditions of employment be provided to all workers, including those who are employed for less than eight hours per week or those who are employed for less than one month.

2.2 Enforcement – Criminal offence

Currently, the *Terms of Employment Act* provides that if a contravention of the provisions on providing the written information on the terms of employment occurs, then an inspector[29] may give a direction to an employer to comply with the Act.[30] In addition, the *Workplace Relations Act* provides that an employee may bring a complaint to the Workplace Relations Commission if their employer has contravened the provisions of the *Terms of Employment Act*.[31]

The inspection and compliance function under the *Workplace Relations Act*, with the enforcement mechanisms under that function, is particularly important for vulnerable workers because it allows breaches of employment law to be investigated and rectified by the relevant statutory body without requiring vulnerable worker to initiate action to secure their rights.

Section 9 of the Bill proposes the creation of a new criminal offence[32] which would occur when employer does not provide the core terms in writing (or if they deliberately misrepresent the information required) within one month of the start of employment.[33, 34]

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29 Inspectors are appointed by the Director General of the Workplace Relations Commission under section 26 of the *Workplace Relations Act 2015*.

30 Section 6A of the *Terms of Employment (Information) Act*, as inserted by the *Workplace Relations Act*.

31 Section 41 and Schedule 5 of the *Workplace Relations Act 2015*.

32 The mechanism for achieving this is the insertion of a new section 6B into the Act.

33 As is stated above, the Commission does not agree with the length of the shortened timeframe that is proposed, and it has made a recommendation and set out reasons for the provision of the core terms of employment to be provided in writing *before* employment starts.

34 The Commission agrees with the statement in the Heads of the Bill that 'the importance of compliance with the requirement to provide the core terms is greater [than for the remaining terms in the *Terms of Employment Act*] and non-compliance should be dealt with more forcefully'. Source: 'Head 8 Creation of

The Commission considers that the provision in writing of the core terms of employment before employment commences is sufficiently important to merit the provision of criminal sanction as a possible enforcement mechanism.

2.3 Enforcement – Penalisation

In general terms, penalisation can be described as the imposition of a penalty in response to legitimate behaviour[35]; the term 'victimisation' is also used in some legislation[36].

2.3.1 The applicable rights under the proposed amendment

Currently, the *Terms of Employment (Information) Act* does not provide protection against penalisation or victimisation. Notably, a worker currently has the right to bring a complaint against their employer for alleged breaches of four sections of that Act[37] but is not provided with protection against penalisation or victimisation for doing so. Nor is an employee protected from penalisation if they ask their employer to provide the written statement of their terms of employment.

Section 10 of the Bill would amend the *Terms of Employment (Information) Act* to prohibit penalisation of an employee for 'invoking any right conferred on him or her'[38] by that Act. However, the Bill does not explicitly identify which of its provisions contain *rights* that would be protected from penalisation. In particular, it is not clear if an employee would be

offence provision for breaches of Head 5: Explanatory Note', *Draft Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill 2017* (at page 16).

35 For examples, see: section 3 of the *Protected Disclosures Act 2014*; sections 55M and 55Q of the *Health Act 2004* (as inserted by the *Health Act 2007*); section 26 of the *Employment Permits Act 2006*; section 13 of the *Employees (Provision of Information and Consultation) Act 2006*; and section 27 of the *Safety, Health and Welfare at Work Act 2005*.

36 See section 74(2) of the *Employment Equality Acts* and section 3(2)(j) of the *Equal Status Acts* for the definitions of victimisation under those Acts. The term 'victimisation' is also used in the *Industrial Relations (Miscellaneous Provisions) Act 2004* (in section 8) and the *National Minimum Wage Act 2000* (section 36). In addition, the *Protection of Employees (Temporary Agency Work) Act* provides for persons who report breaches of that Act but does not name it as either penalisation or victimisation.

37 Sections 3 to 6.

38 It would also prohibit penalisation for a number of other actions: having in good faith opposed by lawful means an act that would unlawful under the proposed legislation; giving evidence in any proceedings under the proposed legislation; or giving notice of any of things referred to in the proposed provision on penalisation.

protected against penalisation for requesting a written statement of their core term of employment, as the Act does not explicitly provide that this is a right that a worker has.[39]

The Commission recommends that the proposed legislation be amended to clarify that the protection against penalisation be provided in cases where a worker is penalised for requesting their employer provide their core terms of employment.

2.3.2 Remedy for penalisation

Section 17(b) of the Bill amends the *Workplace Relations Act 2015* to bring the penalisation within the scope of the existing provisions in the *Workplace Relations Act*[40] and in the *Terms of Employment (Information) Act*[41] on the redress that may be afforded to a worker when the relevant provisions of the *Terms of Employment (Information) Act* are breached. The maximum redress is compensation of four weeks' remuneration[42].

It is a well-established principle in EU employment law that anybody whose rights are denied should have access to an effective remedy. This right is provided for at the highest level in Article 47 of the Charter of Fundamental Rights of the European Union and Article 13 of the European Convention of Human Rights.[43] An effective remedy needs to be proportionate and dissuasive[44].

Redress and sanction in the various Acts that provide protection against penalisation or victimisation of employees include payment of wages owed, compensation, requiring an employer to take a specified course of action, and criminal conviction, depending on the particular legislation. The maximum amounts of compensation for a worker who has been penalised or victimised include:

- minimum of the amount owed[45],

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39 The wording of the Act places an obligation on the employer, but it cannot be assumed that this will be automatically regarded by the Workplace Relations Commission or the courts as a right of the worker.

40 Schedule 5, Part 1 and Schedule 6, Part 1 of the *Workplace Relations Act*.

41 Section 7 of the *Terms of Employment (Information) Act* (as amended).

42 Section 7(2)(d) of the *Terms of Employment (Information) Act*.

43 Article 13 applies to rights set out in the Convention, and this includes Article 6 on the right to a fair trial, which the European Court of Human Rights has interpreted as encompassing a wide range of proceedings that under Irish law are civil proceedings.

44 See, for example, Article 15 of ***Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*.**

45 Under the *National Minimum Wage Act*.

- 20 weeks' remuneration[46],
- 2 years' remuneration[47],
- 5 years' remuneration[48], and
- an amount of compensation that the adjudication officer (or Labour Court) 'considers just and equitable having regard to all the circumstances'[49].

The Commission considers three factors to be relevant in determining what level of compensation should apply for breaches of the proposed new provision on penalisation.

- First, penalisation ought, in general, to be treated as a serious breach of employment law. It occurs when a worker has sought to exercise another, primary, right, and therefore compounds and expands on any original denial or restriction of a worker's primary right or duty[50].
- Second, in this Bill, the workers who will most need the protection against penalisation are likely to be vulnerable.
- Third, the total pay for many of the workers the Bill is intended to protect will be less than that of an equivalent full-time equivalent worker[51]. The monetary value of compensation that is based on the pay of a part-time worker will, of necessity, be lower than the value of compensation based on the pay of a full-time worker on the same hourly rate, and thus will be less dissuasive as a penalty for an employer who has breached the legislation.

In light of the seriousness of penalisation, of the need for redress to be dissuasive, and of the fact that the workers who will be affected are predominantly part-time, the Commission recommends that the maximum compensation for penalisation under this provision be at the upper end of the spectrum for compensation found in employment law – that is, at five years remuneration or an amount of compensation that is considered just and equitable by the adjudication officer or Labour Court having regard to all the circumstances.

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46 Under the *Parental Leave Act*.

47 Under the *Protection of Employees (Temporary Agency Work) Act*, the *Protection of Employees (Fixed-term Work) Act*, the *Protection of Employees (Part-time Work) Act*, the *Employees (Provision of Information and Consultation) Act*, and the *Employment Equality Act*.

48 Under the *Protected Disclosures Act*.

49 Under the *Employment Permits Act*, the *Health Act*, and the *Safety, Health and Welfare at Work Act*.

50 It is possible that a worker may have been mistaken in their first, substantive, claim, but an honest mistake should not deny them the protection against penalisation or victimisation. See: ***A Complainant v A Department Store*, DEC-E2002-017 (**http://www.workplacerelations.ie/en/Cases/2002/March/DEC-E2002-017.html**).**

51 For example, the Commission calculates that a worker on the minimum wage who works full-time (assumed to be 39 hours) would have a pre-tax earnings of €18,759. On that basis, a worker on three-quarters of a full-time workload would have an annual pre-tax earnings of €14,069; an employee working 20 hours per week at the minimum wage would earn €9,620 per annum.

2.3.3 Scope of penalising behaviour prohibited

The Bill proposes that penalisation shall mean 'any act or omission … that affects an employee to his or her detriment with respect to any term or condition of his or her employment'[52].

The definition of victimisation in the *Employment Equality Act* is less restrictive, providing that it is 'dismissal or other adverse treatment of an employee by his or her employer'[53]. In particular, it is not restricted to 'any term or condition of his or her employment', and therefore provides greater protection.

The Commission recommends that the proposed provision on penalisation be aligned with the Employment Equality Act, and amended to define penalisation as 'any adverse treatment of an employee by his or her employer' which occurs as a reaction to an act by a worker (or their representative).

2.3.4 Protection of colleagues from penalisation

Workers would be further protected by protecting colleagues who represent or support them in the workplace in seeking to secure their rights, as is provided for in the Employment Equality Act[54].

The Commission recommends that the proposed legislation to provide that those who are protected from penalisation include employees who represent or otherwise support a colleague exercise their rights under the proposed legislation.

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52 Section 10 of the Bill provides that this will be in the new Section 6C(5) that is to be inserted into the *Terms of Employment (Information) Act*.

53 Section 74(2), as amended by the *Equality Act 2004*.

54 Section 74(2)(c), as amended by the *Equality Act 2004*: 'an employee having represented or otherwise supported a complainant'.

3 Amendment to the Organisation of Working Time Act

3.1 Being called to but not being provided with work

3.1.1 Substantive content

Current legislation on the issue of being paid when work is cancelled is set out in section 18 of the *Organisation of Working Time Act*. Section 18 (and in particular the current subsection (2)[55]) is a very complex provision and is written in a way that makes the law difficult to understand.

Section 18 concerns two basic types of employment contract (plus a third type, which is a contract that combines both of those two basic types). The two basic types are as follows.

(a) Under the type of contract provided for in section 18(1)(a), an employee is required to be available to work for 'a certain number of hours' in a week. If the worker is not provided with that number of hours work in a week, then under section 18(2) the worker is entitled to be paid for the lower of the following:
   - 15 hours work, or
   - 25 percent of the 'certain number of hours' provided for in the employment contract.

(b) The type of contract provided for in section 18(1)(b) is one where an employee is required to be available to work 'as and when the employer requires him or her to do so'. In this case, a worker is entitled under section 18(2) to be paid for only for hours worked.

Section 14 of the Bill proposes to amend the content[56] of the current section 18(2) of the Act by providing an entitlement, in certain circumstances, to pay that is additional to the pay a worker would be currently entitled to under the current section 18(2).[57] The amendment is intended to deal with the situation that arises if a person is called to work or scheduled for work but then sent home without being provided with work. This differs from the existing legislation because it focuses not on the total amount of work over a week but on the individual occasions within that week when work is not provided. Specifically, the

55 The Bill provides that subsection (2) will become subsection (4) and the wording will be amended.
56 In addition, the current subsection 18(2) will be renumbered 18(4).
57 This proposal has its origins in recommendation 7 of the study by the University of Limerick for the former Department of Jobs, Enterprise and Innovation.

amendment is intended to provide that when a person is called to work but not provided with work they would be paid either

(a) three times the national minimum wage or
(b) three times the minimum hourly rate in an Employment Regulation Order (ERO)[58] if one applies to that employment.

The Bill states that this would be paid 'on each occasion that this occurs'.[59]

Also, the intention of the proposal in the Bill is that where a worker's normal hourly rate is higher than the national minimum wage (but not covered by an ERO), that normal hourly rate will not be used to calculate the pay that the worker is entitled to.[60] However, the Commission notes that a worker who has made themselves available for an employer at a particular time and who has that work cancelled at short notice may not be able to secure replacement work. The effect of the provision may be to transfer from an employer to a worker the risk involved in scheduling work, whereas remuneration at the normal rate of pay would reduce this transfer of risk.

The Commission recommends that a worker who has been scheduled for work and who is not provided with those hours of work should be paid for three hours at the normal rate of pay or at the relevant overtime rate if that would have applied to those hours.

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58 An Employment Regulation Order (ERO) is an instrument drawn up by a Joint Labour Committee, adopted by the Labour Court, and given statutory effect by the Minister for Business, Enterprise and Innovation. An ERO fixes minimum rates of pay and conditions of employment for workers in a specified business sector. Employers in the sector are then obliged to pay wage rates and provide conditions of employment not less favourable than those prescribed. The primary legislation are sections 42A, 42B and 42C of the *Industrial Relations Act 1946* (inserted by the *Industrial Relations (Amendment) Act 2012*).

59 The term is contained in a new clause that is to be added to the end of the current section 18(4).

60 The Heads of the Bill state that the 'requirement that a worker on a high hourly rate be paid three times that rate for one hour of work could not be supported (e.g. locum pharmacist)' (at page 19). The Heads of the Bill also stated that two other instruments that regulate pay 'are not included', namely Registered Employment Agreements and Sectoral Employment Orders (at page 19). A Registered Employment Agreement (REA) is a collective agreement made between a trade union or unions and an individual employer, group of employers or employers' organisation which relates to the pay or conditions of employment of specified workers. The effect of registration is to make the provisions of an REA binding. An REA can deal with any matter that comes under the general heading of pay or conditions of employment. An Agreement may provide for the variation of any of its provisions. Each REA must contain a disputes procedure that is binding. Any contraventions of a REA may be referred to the WRC for appropriate action. The Labour Court, having considered the applicable economic factors may make a recommendation to the Minister for Business, Enterprise and Innovation to make a **Sectoral Employment Order** for such matters as remuneration (overtime, unsocial hours, Sunday working, travelling time etc.), pension or sick pay scheme. If there is a difference in pay rates or less favourable pension scheme or sick pay scheme between a contract and a Sectoral Employment Order, the greater amount will apply.

3.1.2 Enforcement – Inspection and complaints under the Workplace Relations Act

Section 18 of the *Organisation of Working Time Act* is subject to enforcement under both the inspection and compliance regime and the complaints and disputes mechanism of the *Workplace Relations Act*.[61] However, the current Regulations governing the records that are to be kept in relation to working time require only that the *total number* of hours worked for each day be recorded.[62] The Regulations do not require that records be kept of

- every time a staff member is called to work,
- when they were notified,
- the hours they were to work, and
- if they were provided with work, the specific hours of that work.

Section 17 of the *Organisation of Working Time Act* requires that notice to attend work be given to an employee, but it does not require that such notice be in writing. Written notification, indeed, is unlikely in a range of casual working circumstances where communication by telephone is more common. [63] This could present a difficulty for a worker who is sent home and then seeks evidence to secure payment under the new provision.

The current Regulations may need to be amended to ensure that necessary information would be available for either the inspection regime or the complaints mechanism to be effective. It appears that this can be corrected without further amending the Bill: section 25(1) of the *Organisation of Working Time Act* provides that an employer shall keep 'such records, in such form, if any, as may be prescribed' that will show that the Act is being complied with.

The Commission recommends that the regulations on records that must be made and retained under the Organisation of Working Time Act be amended to ensure that employers are required to keep records that will be necessary enforce the new provision on a worker's right to be paid when they are called to but not provided with work.

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61 Schedule 4 and 5 of the *Workplace Relations Act.*

62 The *Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations 2001* (SI No 473 of 2001).

63 This was raised in the Dáil in respect of a trucking firm, where the practice was that a driver who has finished a shift and taken a rest period then 'must ring the company by 12 noon to find out his next start time'; Robert Dowds TD, 'Topical Issue Debate – Industrial Disputes', *Parliamentary Debates: Dáil Éireann*, 13 March 2012.

An employer that fails to keep records that are currently required by the *Organisation of Working Time Act* can be charged with an offence[64], reflecting the importance of this obligation for the protection of vulnerable workers.

The Commission recommends that the failure to keep the additional records that would be required to enable enforcement of the new provision be made an offence.

3.2 Prohibition of certain contracts that specify zero as the contracted hours

Section 18(1) of the *Organisation of Working Time Act* specifies two basic types of contract of employment to which the entire section 18 applies. The differences between the two types is the basis on which the employee is required to make herself or himself available to work in a week:

- Under section 18(1)(a), an employee is required to be available to work 'a certain number of hours' ("the contract hours")'.
- Under section 18(1)(b) an employee is required to be available to work 'as and when the employer requires him or her to do so'.

In addition, section 18(1)(c) specifies a third type of contract that combines both of those two basic types.[65]

Section 14 of the Bill proposes that section 18 be amended (by inserting a new subsection (2)) to provide that if an employer is engaging an employee on a contract 'for a certain number of hours of work referred to in paragraphs (a) and (c) of subsection (1), the number of hours concerned shall be greater than zero'. The media statement announcing that the government had approved the heads of the Bill described this provision as 'Prohibiting zero hours contracts' (except in cases of genuine casual work or emergency cover or short-term relief work)[66].

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64 Section 25(3).

65 The proposal in the Bill refers throughout to this third type, but to make these observations less difficult to follow, the references to section 18(1)(c) are omitted, and these observations and the recommendations in them should be read as also applying to provisions concerning contracts under Section 18(1)(c).

66 Department of Jobs, Enterprise and Innovation (2017) 'Government approves priority drafting of legislation to address problems caused by the increased casualization of work and to strengthen the regulation of precarious work' [media statement, 2 May 2017] (https://dbei.gov.ie/en/News-And-Events/Department-News/2017/May/02052017a.html)

This amendment, while providing that the number of hours in such a contract cannot be zero, does not significantly contribute to reducing the precarious nature of such contracts – they could remain, in practical terms, 'zero-hours' contracts, for the worker involved.

Further, an important distinction exists between a zero-hours *contract* and zero-hours *work*[67]. The University of Limerick has found that 'zero hours contracts within the meaning of the *Organisation of Working Time Act* are not extensively used' but that there is evidence of 'if and when' working arrangements that involve no guarantee of work.[68] There is therefore a significant gap between the legal prohibition of zero-hour contracts and actual existence of zero-hours work practices. This distinction is grounded in the employment status of the workers – that is, whether or not worker is actually an *employee*.[69] In light of that analysis, it is not clear what the effects, if any, the proposed new section 18(2) would have on the use of zero hours work practices.

The Commission considers that the proposed amendment does not contribute any significant enhancement to the protection of workers and therefore makes no recommendation on this particular proposal.

3.3 Banded hours

3.3.1 Context

Banded hours are not currently provided for in Irish employment legislation, although they have been agreed between a number of employers and trade unions.[70]

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67 Dr Michelle O'Sullivan, 'Banded Hours Contract Bill 2016: Discussion (Resumed)', *Joint Committee on Jobs, Enterprise and Innovation*, 23 May 2017.

68 Kemmy Business School University of Limerick (2015) *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees*, Dublin: Department of Jobs, Enterprise and Innovation, at page 121. (This point was reiterated by the lead researcher in her evidence to the Oireachtas.)

69 Kemmy Business School University of Limerick (2015) *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees*, Dublin: Department of Jobs, Enterprise and Innovation, at pages 96–104;

70 See, for example, University of Limerick (2015) *A Study on the Prevalence of Zero Hours Contracts*, at page 65 (https://dbei.gov.ie/en/Publications/Study-on-the-Prevalence-of-Zero-Hours-Contracts.html); Irish Congress of Trade Unions (2015) *Fair Hours of Work*, at page 3 (https://www.ictu.ie/publications/fulllist/fair-hours-of-work/).

Banded hours are one form of ensuring a worker has a contract that reflects their actual hours of work. Banded hours operate on the basis of dividing the number of hours that can be worked in a week into 'bands'. Under a system of banded hours, a worker whose written contract specifies a number of hours work in each week but who in fact works for a greater amount of time each week on a regular basis and that time falls within a higher band is entitled to apply to have their contract amended to reflect the hours in the higher band.

The Bill proposes to insert a new section 18A into the *Organisation of Working Time Act* to establish a new regime governing banded hours.

The Bill proposes four bands:

- Band A: 1–10 hours;
- Band B: 11– 24 hours;
- Band C: 25–34 hours;
- Band D: 35 hours and over.

(Other models have been discussed in the broader policy debate in Ireland in recent years.[71])

Being able to obtain a contract that reflects actual hours of work is important for a number of reasons.

First, a system enabling a worker to a contract that reflects their actual hours of work protects workers against certain forms of vulnerability.[72] An example of this vulnerability is the possibility of a reduction in the number of hours of work to the minimum provided for in an employment contract in response to unwelcome action by an employee[73], thereby cutting their salary.

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71 The scheme in the *Banded Hours Contract Bill 2016*, which was introduced in the Dáil by David Cullinane TD in June 2016, had seven bands (http://www.oireachtas.ie/viewdoc.asp?DocID=33153). The Joint Oireachtas Committee on Jobs, Enterprise and Innovation suggested a scheme with six bands (http://www.oireachtas.ie/parliament/media/committees/jobsenterpriseandinnovation/32ndreports/07---Scrutiny-of-Banded-Hours-Contract-Bill-2016.pdf).

72 See for example: David Cullinane TD 'Banded Hours Contract Bill 2016: Second Stage [Private Members]', *Parliamentary Debates: Dáil Éireann*, 5 July 2016; and Ms Patricia King 'Banded Hours Contract Bill 2016: Discussion (Resumed)' *Joint Committee on Jobs, Enterprise and Innovation*, 11 April 2017.

73 See, for example Clare Daly TD 'Banded Hours Contract Bill 2016: Second Stage [Private Members]', *Parliamentary Debates: Dáil Éireann*, 5 July 2016, at page 127; John Douglas, 'Banded Hours Contract Bill 2016: Discussion (Resumed)' *Joint Committee on Jobs, Enterprise and Innovation*, 11 April 2017.

The second reason that a worker should be able to get a contract that reflects their actual hours is that the content of an employment contract is often key in securing other benefits. In particular, banks routinely seek a copy of an employment contract when an application for a mortgage is made. The former Minister for Jobs, Enterprise and Innovation noted the difficulties that employees may face accessing mortgages because their contract did not reflect their actual hours of work (and, thus, their actual income).[74] In addition, people have been denied rental accommodation for the same reason.[75]

The Commission addresses six issues regarding the proposed provision on banded hours, which are outlined in the following sub-sections:

- a limitation of banded hours mechanisms,
- the interaction with the social welfare system,
- the identification of a suitable 'reference period' before a worker secures the right proposed,
- two drafting issues,
- a significant potential adverse effect, and
- enforcement.

3.3.2 Shortcoming with banded hours mechanisms

The Explanatory Memorandum to the Bill states that the purpose of the new section 18A is to enable a worker to be given hours work that are 'a more accurate reflection of the hours worked'[76]. However, the choice of banded hours as the mechanism to achieve the stated goal has a significant disadvantage. Banded hours can be a threat to the income of a worker. If the number of hours that a worker has been providing are at or near the upper limit of a band and if the relevant band is sufficiently wide, then the number of hours at the lower limit can result in a significant reduction in income.[77] The underlying problem is not the

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74 Department of Jobs, Enterprise and Innovation (2017) 'Government approves priority drafting of legislation to address problems caused by the increased casualization of work and to strengthen the regulation of precarious work' [media statement, 2 May 2017] (https://dbei.gov.ie/en/News-And-Events/Department-News/2017/May/02052017a.html)

75 David Cullinane TD 'Banded Hours Contract Bill 2016: Second Stage [Private Members]', *Parliamentary Debates: Dáil Éireann*, 5 July 2016, at page 112.

76 'Section 15 – Banded hours', *Employment (Miscellaneous Provisions) Bill 2017: Explanatory Memorandum*, at page 3. In addition, the Heads of the Bill state that the concern underpinning the proposed provision is 'the fundamental issue of workers on low hour contracts (including contracts providing non-guaranteed hours and/or irregular hours of work) who consistently work more hours each week but whose contracts do not reflect the reality of their hours worked' (at page 19).

77 For example, under the banded hours in the Bill, somebody who works 34 hours per week (Band C) who exercises their right to be given a contract in that band could have their working time reduced to 25 hours

particular bands in the Bill. Significant pay cuts would be possible with any scheme of bands unless the widths of the bands are very narrow.

On foot of its analysis of the various schemes for banded hours that have been recently discussed,78 the Commission recommends that a contracting arrangement that seeks to accurately reflect the actual hours work may provide workers with more robust protection from significant reductions in income. [79]

3.3.3 Interaction with the social welfare system

If bands are to be used, an important issue that arises in the particular choice of bands is the interaction of working hours and access to social welfare payments. Of particular importance for workers on low pay are the rules on eligibility for the Family Income Supplement (FIS). To be eligible for FIS, a worker needs to work at least 19 hours each week or 38 hours each fortnight.[80] None of the bands in any of the proposals or suggestions discussed in Ireland recently have a boundary at 19 hours per week, and this could result in a worker's hours moving in and out of eligibility for FIS, amplifying the uncertainty of the worker's income.

The Commission recommends that if banded hours are retained, that the limits of the bands be amended to ensure that eligibility for the Family Income Supplement cannot be affected by the application of a banded-hours scheme.

3.3.4 Reference period

The reference period is the length of time – for example, the number of weeks or months – that a worker must have worked at the higher number of hours before they have a right to a contract that reflects those longer hours on an ongoing basis. It ensures that a worker does

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per week, which would result in a cut in their pay of 26 percent. In monetary terms, if they are on the national minimum wage, their pay could be cut from €314.50 to €231.25 per week.

78 The models that have been discussed in the recent debate on the issue in Ireland are: the scheme in the Heads of the Bill; the scheme in the *Banded Hours Contract Bill 2016*; the scheme suggested by the Joint Oireachtas Committee on Jobs, Enterprise and Innovation; and the scheme in an agreement in the retail sector cited in the University of Limerick's report (on page 65).

79 To reduce the administrative burden, it may be appropriate to provide that a new contract may round the actual hours worked to the nearest whole or half hour.

80 Department of Social Protection (2016) 'Family Income Supplement (FIS) – SW22', http://www.welfare.ie/en/Pages/What-does-full-time-employment-mean.aspx

not get a right to increased hours on the basis of a short-term situation, such a seasonal busy period.

The reference period proposed in the Bill is 18 months.[81] A shorter reference period may provide a benefit to a worker because they secure the right to a contract that reflects their actual hours of work sooner than with a longer reference period, but might have the disadvantage that it places an obligation on an employer to provide work on an ongoing basis that is grounded on a temporary need. [82]

The rationale set out in the Regulatory Impact Assessment for the Bill in favour of a reference period of 18 months identifies two key reasons for that proposed reference period:

- that 18 months is sufficiently long to allow for normal peaks and troughs of businesses including those subject to seasonal fluctuations and
- that 18 months 'is considered fair' for sectors such as education where the academic year is a different length from the calendar year.[83]

A period of 18 months might be necessary in certain, specific, circumstances to assess if the provision of more work than was originally specified in an employment contract is sustainable, but it is not clear that such a timeframe is necessary for all employments in all contexts. A new business or (for an established firm) a new branch or shop, etc., in a new district may not have sufficient trading data before 18 months to be certain that it could afford to provide on a permanent basis the higher number of hours a worker has been working. However, the vast bulk of employers regularly hire new staff in long-standing and successful operations and have trading data or equivalent counterpart data (such as student numbers) to know the effects of peaks and troughs on its need for labour. The Commission notes that the *Unfair Dismissals Act* sets as a standard that an employee (in general) secures status as a *de facto* permanent employee after 12 months, and that this applies equally to new, expanding, and well-established firms. Furthermore, the Bill provides exemptions to

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81 In the proposed new section 18A(7) to be inserted into the *Organisation of Working Time Act*.

82 A reference period of 6 months was recommended in the University of Limerick report and proposed in the *Banded Hours Contract Bill 2016*. A reference period of 9 months was suggested by that Bill's sponsor on foot of the evidence presented during the hearings on that Bill. A reference period of 12 months was recommended by the Joint Oireachtas Committee on Jobs, Enterprise and Innovation.

83 *Regulatory Impact Assessment: General Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill 2017*, at page 24.

the underlying right to be provided with a right to hours that reflect those actually worked where there is a genuine reason to do so.[84]

The Commission considers that the standard reference period for securing a right to a contract that reflects sustained actual hours of work should be at most 12 months.

A specific concern identified in the Regulatory Impact Assessment for the Bill is when a worker is given increased hours to cover maternity leave. The concern is that the worker would become entitled to those increased hours after their colleague returns from maternity leave.[85] However, the *Unfair Dismissals Acts* contain an exemption for workers hired to cover maternity leave[86] that could be used as a template for the purpose of drafting a provision that would protect an employer against inadvertently being required to pay for more work than is available when additional hours arise from another worker going on such leave.

The Commission considers that a reference period that is longer than the standard should be permitted only in narrowly defined circumstances such as those provided for in respect of the exemptions in the *Unfair Dismissals Act* (e.g. for identified specified purpose contracts to cover carer's leave, etc.).

3.3.5 Drafting issues

The bands in the Bill contain 'gaps' in the possible hours that can be worked. For example, it proposes that Band A have an upper value of 10 hours and that Band B have a lower value of 11 hours, and this appears to exclude the possibility of a contract specifying a working week between those values – for example, 10.5 hours. Similar 'gaps' occur between each of the bands.[87]

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84 These are set out in (i) the new section 18A(5) to be inserted into the *Organisation of Working Time Act*, and (ii) the existing section 5 of that Act.

85 At page 23. In the Regulatory Impact Assessment, the question of maternity leave is presented in the context of 'a significant effect on the public pay bill' with the worker being a teacher, but the underlying principle raised by the example of maternity leave is of broader application for other employers that is not examined in the Regulatory Impact Assessment, and it is that broader application that the Commission addresses in these observations.

86 Section 2(2)(c) of the *Unfair Dismissals Acts* (inserted by the *Maternity Protection (Amendment) Act 2004*). Section 2(2)(d) and (e) provide templates that could be adapted for adoptive leave and carer's leave.

87 The same problem of gaps occurs in the suggested bands in the report of the Joint Oireachtas Committee.

The Commission recommends that if banded hours are retained, then the wording of the scheme be changed to ensure that no gaps occur.

The draft scheme of the Bill proposes that a worker would 'be entitled to be placed in' the relevant band but does not set out what 'being placed in' a band consists of.

In light of the difficulties that workers face in securing loans and rented accommodation because their written contracts of employment do not state their actual hours of work, the Commission recommends that the proposed provision be amended to provide that the employee has the right to a revised written contract containing the new hours of work.

Further, as stability of employment can also be a factor in securing a loan or rental accommodation, the Commission recommends that such a revision consist of a modification to an existing employment contract, and not the creation of a new employment contract.

3.3.6 Unintended adverse effect

The intention underpinning the banded-hours provision is to secure improved conditions for workers in low-hour employments. However, implementing the provisions in the Bill without also amending other legislation on part-time work may have an adverse effect on the situation of some part-time workers.

Under the Bill, a worker would gain the legal rights provided for in the provision on banded hours only if they have been given more hours of work than is specified in their contract (over period of months). At the moment, without the proposed provision being in place, the main obligation that an employer has on giving the additional work to a worker is to pay the worker for that work.[88] The proposed provision would change that: it would create a new right for a worker and corresponding new obligation for an employer if the additional work is provided for the reference period. Although extra work is available, some employers may not be in a position to and other employers may not wish to take steps that would grant an additional employment right (that is, additional to payment for the extra work) to their employees. One result of the proposed provision if it is introduced in isolation may be that

[88] Other obligations would include ensuring that the worker does not exceed the maximum working hours and has the legally required rest periods that are provided for in legislation.

some employers will meet their need for additional work by hiring more part-time or low-hour workers rather than offer the additional available work to existing staff, resulting in an increase in marginal part-time employment.[89]

A similar unintended result occurred after the *Protection of Employees (Fixed-Term Work) Act 2003* came into force. The main purpose of that Act was to 'establish a framework to prevent abuses arising from the use of successive fixed-term employment contracts'.[90] If a fixed-term contract has been renewed for three successive years, any further renewal is deemed to be a contract of indefinite duration. The thinking behind this was to provide 'a link to permanency in the employment of fixed-term workers'.[91] However, the University of Limerick researchers report that that Act resulted in *increased* casualisation of labour in the education sector.[92]

Current employment legislation does not give a worker a right to an increase in their working hours if additional suitable work is available.[93] The *Code of Practice on Access to Part-time Working*[94] concerns requests to change total working hours. However, the *Code* was clearly written with requests to move from full-time to part-time work in mind.[95]

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89 According to the ILO '"marginal part-time employment" is characterized by very short hours of work – usually less than 15 or 20 hours per week': International Labour Organization (2016) *Non-standard Employment around the World*, Geneva: ILO, at pages 27 and 28.

90 Minister of State at the Department of Enterprise, Trade and Employment, Frank Fahey TD, 'Protection of Employees (Fixed-Term Work) Bill 2003 [Seanad]: Second Stage', *Parliamentary Debates: Dáil Éireann*, 26 June 2003.

91 Minister of State at the Department of Enterprise, Trade and Employment, Frank Fahey TD, 'Protection of Employees (Fixed-Term Work) Bill 2003 [Seanad]: Second Stage', *Parliamentary Debates: Dáil Éireann*, 26 June 2003.

92 At pages 18 and 83–84.

93 The main legislation on part-time work is the *Protection of Employees (Part-time Work) Act 2001*. Its main purpose is to ensure that, in general, employment law applies to a part-time employee in the same way that it applies to a full-time employee (see section 8).

94 *Industrial Relations Act 1990 (Code of Practice on Access to Part-time Working (Declaration) Order 2006* (SI No 8 of 2006) http://www.irishstatutebook.ie/eli/2006/si/8/made/en/print. The code of practice partly transposes *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC* (*Official Journal of the European Communities*, 20 January 1998, Series L, no. 14, pages 9–14).

95 For example:

- Article 6.3 is headed 'Assessing/expanding scope of part-time working opportunities' but the Code of Practice does not contain a corresponding provision on assessing or expanding the scope of full-time working opportunities or of assessing or expanding the scope of increased part-time hours.
- Article 8 has a heading that reflects changes in both directions: 'Requests by employees to (a) transfer from full-time to part-time work and (b) transfer from part-time to full-time work or to increase their working time should the opportunity arise'. However, the text of the Article contains seven references to part-time working and no reference to full-time working. For example, the first element of best practice states the following: 'An application from the applicant outlining the reasons for the request

Further, it does not set out binding obligations, although it is admissible in evidence in proceedings before a court, the Workplace Relations Commission, or the Labour Court.[96] It provides only that 'employers should consider establishing a procedure' allowing for an employee to apply for a change in their working hours. It does not address the issues that would need to be considered in a particular employment with a request to increase working hours.

The Commission recommends that other legislation on part-time work and of the *Code of Practice on Access to Part-time Working* be amended to minimise the potential for unintended increases in marginal part-time employment and labour casualisation.

3.3.7 Enforcement – Claims under Workplace Relations Act

The Bill proposes that a worker would have the right to bring a claim under Part 4 of the *Workplace Relations Act* if they believe that their right to a revised contract is breached.[97] However, the sole entitlement a worker would have in a successful claim is to be placed on a band of hours and the Bill provides that a worker will not be entitled to compensation where their employer fails to comply with the new law.[98]

This provision in the draft scheme of the Bill would breach the well-established principle in EU employment law that anybody whose rights are denied should have access to an effective remedy. This right is provided for at the highest level in Article 47 of the Charter of Fundamental Rights of the European Union and Article 13 of the European Convention of Human Rights.[99] An effective remedy needs to be proportionate and dissuasive.[100]

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to transfer from full-time to part-time working, indicating whether the request is of a temporary or permanent nature'; there is no corresponding text for a request from part-time to full-time, or from one amount of part-time work to more part-time hours.

96 Article 14 of the *Code*. (References in Article 41 of the *Code* to the Labour Relations Commission and Employment Appeals Tribunal are now construed as references to the Workplace Relations Commission under, respectively, section 58(2) and 66(2) of the *Workplace Relations Act*.)

97 The new section 18A(8) to be inserted into the *Organisation of Working Time Act*.

98 The new section 18A(10) to be inserted into the *Organisation of Working Time Act* states: '… a decision is accordance with subsection 9(b) shall not order an employer to pay compensation to the employee for the employer's failure to comply with this section'.

99 Article 13 applies to rights set out in the Convention, and this includes Article 6 on the right to a fair trial, which the European Court of Human Rights has interpreted as encompassing a wide range of proceedings that under Irish law are civil proceedings.

100 See, for example, Article 15 of **Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.**

The Commission recommends that, in order to ensure the proposed legislation provides an effective remedy that is proportionate and dissuasive, when it is established that a worker's rights have been breached, that the redress available includes the possibility of compensation in addition to the right to a contract reflecting actual hours of work.

The Bill proposes that a worker must inform the employer in writing that they are entitled to the right set out in the proposed provision.[101] An employer may refuse a claim on a number of grounds, including where the claim is not supported by the evidence in relation to the hours worked, [102] and the implementation of this provision would require that written information be available.

The Commission considers that the inspection regime under the *Workplace Relations Act* would be a feasible method of enforcement of this provision in certain situations. For example, if there are concerns that significant numbers of employees are affected, then a single inspection and compliance notice would be more efficient than a series of individual claims under the complaints and disputes mechanism. However, in order for enforcement under the inspection regime in the *Workplace Relations Act* to be feasible, an employer would need to have appropriate records that an inspector can examine.

The Commission recommends that the right to be placed on a contract that reflects actual hours of work be brought within the scope of the inspection and compliance regime in the Workplace Relations Act and that any necessary amendments to existing provisions on the keeping to records to make this effective be made.

101 The new section 18A(2) to be inserted into the *Organisation of Working Time Act*.

102 The new section 18A(5) to be inserted into the *Organisation of Working Time Act* provides five reasons why an employer may refuse to place a worker on the higher hours, and it is subsection 18A(5)(a) that is cited here.

3.4 Penalisation – Organisation of Working Time Act

As outlined above, in general terms, penalisation can be described as the imposition of a penalty in response to legitimate behaviour[103]; the term 'victimisation' is also used in some legislation[104].

Currently, the *Organisation of Working Time Act* provides (in section 26) protection against penalisation for a class of actions, namely: 'having in good faith opposed by lawful means an act which is unlawful under this Act'.[105] The Bill would replace the existing provision in section 26 of the Act.[106]

3.4.1 The applicable rights under the proposed amendments

The new wording in the Bill for section 26 of the *Organisation of Working Time Act* does not identify which provisions in the *Organisation of Working Time Act* contain rights for the purposes of the proposed new wording of the new provision on penalisation.

It would appear that two of three main provisions in the Bill in respect of the *Organisation of Working Time Act* do confer rights on workers:

- the provision in on being paid for three hours when called to but not provided with work,[107] and
- the new provision on banded hours.[108]

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103 For examples, see: section 3 of the *Protected Disclosures Act 2014*; sections 55M and 55Q of the *Health Act 2004* (as inserted by the *Health Act 2007*); section 26 of the *Employment Permits Act 2006*; section 13 of the *Employees (Provision of Information and Consultation) Act 2006*; and section 27 of the *Safety, Health and Welfare at Work Act 2005*.

104 See section 74(2) of the *Employment Equality Acts* and section 3(2)(j) of the *Equal Status Acts* for the definitions of victimisation under those Acts. These two definitions differ in a number of important details, most notably that under the *Equal Status Acts*, victimisation entails being treated less favourably than another person, whereas, in effect (though the wording of the Act does not present it in this language) a comparison under the *Employment Equality Act* is with how the worker was previously treated. Thus, the definition of victimisation under the *Equal Status Acts* would not include adverse treatment if it is applied to others (for example, if a teacher imposed a punishment on a whole class for the behaviour of one student). The term 'victimisation' is also used in the *Industrial Relations (Miscellaneous Provisions) Act 2004* (in section 8) and the *National Minimum Wage Act 2000* (section 36). In addition, the *Protection of Employees (Temporary Agency Work) Act 2012* does not name the protection provided for persons who report breaches of that Act.

105 Section 26 of the *Organisation of Working Time Act*, as amended.

106 Section 16 of the Bill.

107 The provision in the Bill takes the form of an amendment to section 18 of the *Organisation of Working Time Act*. The current section 18(2) and the new section 18(4) to replace it provide that an employee 'shall … be entitled' to the pay that is specified (under the conditions set out).

108 The new section 18A(1) to be inserted into the *Organisation of Working Time Act* states that 'the employee shall be entitled to be placed in a band of weekly hours…'.

However, the other main amendment to the *Organisation of Working Time Act* to introduce a new section 18(2) – requiring that a contract under section 18(1)(a) or (c) specify a number of hours that is greater than zero – does not appear to clearly confer a right on a worker. That provision takes the form of a requirement concerning the contract.[109]

The Commission recommends that the proposed legislation be amended to clarify that the protection against penalisation also be provided in cases where a worker is penalised for

- **requesting their employer provide or amend a contract that complies with the new section 18(2),**
- **reporting a breach of that provision to the Workplace Relations Commission of the new section 18(2), or**
- **bringing a claim or complaint that seeks to achieve the implementation of the section 18(2).**

3.4.2 Remedy for penalisation

The *Organisation of Working Time Act*, as amended, provides that the maximum compensation that an employer may be ordered to pay to a worker for a breach of the relevant provisions of that Act is 2 years' remuneration.[110]

As noted above, it is a well-established principle in EU employment law that anybody whose rights are denied should have access to an effective remedy.

Redress and sanction in the various Acts that provide protection against penalisation or victimisation of employees include payment of wages owed, compensation, requiring an employer to take a specified course of action, and criminal conviction, depending on the particular legislation. The maximum amounts of compensation for a worker who has been penalised or victimised include:

- minimum of the amount owed[111],
- 20 weeks' remuneration[112],

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109 The text of the new section 18(2) to be inserted into the *Organisation of Working Time Act* is: "In a contract for a certain number of hours of work referred to in paragraphs (a) and (c) of subsection (1), the number of hours concerned shall be greater than zero."

110 Section 27 of the *Organisation of Working Time Act*.

111 Under the *National Minimum Wage Act*.

112 Under the *Parental Leave Act*.

- 2 years' remuneration[113],
- 5 years' remuneration[114], and
- an amount of compensation that the adjudication officer (or Labour Court) 'considers just and equitable having regard to all the circumstances'[115].

The Commission considers three factors to be relevant in determining what level of compensation should apply for breaches of the proposed new provision on penalisation.

- First, penalisation ought, in general, to be treated as a serious breach of employment law. It occurs when a worker has sought to exercise another, primary, right, and therefore compounds and expands on any original denial or restriction of a worker's primary right or duty.[116]
- Second, in this particular legislation, the workers who will most need the protection against penalisation are likely to be vulnerable.
- Third, the total pay for many of the workers the legislation is intended to protect will be less than that of an equivalent full-time equivalent worker.[117] The monetary value of compensation that is based on the pay of a part-time worker will, of necessity, be lower than the value of compensation based on the pay of a full-time worker on the same hourly rate, and thus will be less dissuasive as a penalty for an employer who has breached the legislation.

In light of the seriousness of penalisation, of the need for redress to be dissuasive, and of the fact that the workers who will be affected will include many who are part-time, the Commission recommends that the maximum compensation for penalisation under this provision be at the upper end of the spectrum for compensation found in employment law – that is, at five years remuneration or an amount of compensation that is considered just and equitable by the adjudication officer or Labour Court having regard to all the circumstances.

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113 Under the *Protection of Employees (Temporary Agency Work) Act*, the *Protection of Employees (Fixed-term Work) Act*, the *Protection of Employees (Part-time Work) Act*, the *Employees (Provision of Information and Consultation) Act*, and the *Employment Equality Act*.

114 Under the *Protected Disclosures Act*.

115 Under the *Employment Permits Act*, the *Health Act*, and the *Safety, Health and Welfare at Work Act*.

116 It is possible that a worker may have been mistaken in their first, substantive, claim, but an honest mistake should not deny them the protection against penalisation or victimisation. See: ***A Complainant v A Department Store*, DEC-E2002-017 (**http://www.workplacerelations.ie/en/Cases/2002/March/DEC-E2002-017.html**).**

117 For example, the Commission calculates that a worker on the minimum wage who works full-time (assumed to be 39 hours) would have a pre-tax earnings of €18,759. On that basis, a worker on three-quarters of a full-time workload would have an annual pre-tax earnings of €14,069; an employee working 20 hours per week at the minimum wage would earn €9,620 per annum.

3.4.3 Scope of penalising behaviour prohibited

The Bill proposes that penalisation shall mean 'any act or omission … that affects an employee to his or her detriment with respect to any term or condition of his or her employment'.

The definition of victimisation in the *Employment Equality Act* is less restrictive, providing that it is 'dismissal or other adverse treatment of an employee by his or her employer'[118]. In particular, it is not restricted to 'any term or condition of his or her employment', and therefore provides greater protection.

The Commission recommends that the proposed provision on penalisation be aligned with the *Employment Equality Act*, and amended to define penalisation as 'any adverse treatment of an employee by his or her employer' which occurs as a reaction to an act by a worker (or their representative).

3.4.4 Protection of colleagues from penalisation

Workers would be further protected by protecting colleagues who represent or support them in the workplace in seeking to secure their rights, as is provided for in the Employment Equality Act.[119]

The Commission recommends that the proposed legislation to provide that those who are protected from penalisation include employees who represent or otherwise support a colleague exercise their rights under the proposed legislation.

[118] Section 74(2), as amended by the *Equality Act 2004*.

[119] Section 74(2)(c), as amended by the *Equality Act 2004*: 'an employee having represented or otherwise supported a complainant'.



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