SUBMISSION ON THE PROTECTION OF EMPLOYEES (PART-TIME WORK) BILL 2000

Free Legal Advice Centres
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INTRODUCTION

The purpose of this submission is to provide a critique of the substantive provisions in Part II of the Bill. It will suggest where clarification is needed and will recommend where amendments should be put in place.

As a preliminary observation, it is our view that this Bill is unnecessarily obtuse and a number of its objectives could be achieved in a more straightforward manner. It is important to note that this Bill implements a European Directive and there is a general requirement that legislation implementing Community Directives should pass a plain, intelligible language test. It is doubtful whether this Bill could be considered to pass such a test, in particular in relation to its accessibility the employees it is intended to protect. Whilst it is accepted that the Parliamentary Draftsman's Office must attempt to cover many eventualities when framing legislation, the aim should be to simplify as much as possible. On occasion when reading this Bill, it is genuinely difficult to discern what is intended by it.

Observations on the Bill are made in the order of the occurrence of the issue rather than in order of any particular importance.

Definitions (S.7). As with any legislation, the definitions section is crucial to providing a blueprint for what subsequently follows. From the outset, the Bill departs from the definitions used in the Directive which it implements. The Directive confines itself to defining part-time worker and comparable full-time worker. Given that the purpose of the legislation is to protect part-time workers from discrimination as against their full-time counterparts, these definitions are crucial. However, when one looks at the Bill, we find there is a definition of part-time employee, full-time employee and comparable employee. A full-time employee in the Bill means an employee who is not a part-time employee and a part-time employee is someone whose normal hours of work are less that the normal hours of a comparable employee, who in turn is only defined in terms of their relationship with the part-time employee. In other words, we feel that the definitions here are going around in circles.

Subsequently, S.9 of the Bill specifies that a part-time employee shall not be treated less favourably than a comparable full-time employee. However, no definition in the Bill of comparable full-time employee exists, unless we merge the definitions of comparable employee and full-time employee in S.7 together. We fail to see why it is necessary to have separate definitions of comparable and full-time and why the Bill does not define comparable full-time employee just as the Directive does.

This issue is further complicated by the fact that there is no differentiation between full-time employee and part-time employee in terms of the number of hours each of these categories works. This would not be the first time that this has led to difficulties in domestic employment legislation. For example, the Organisation of Working Time Act 1997 in relation to the annual leave and public holiday entitlements of employees refers to someone called a "whole time" employee. However, you look in vain for a definition of whole time employee in the Act or the number of hours one is required to work in order to be considered whole time. It is important that clear, consistent and workable definitions are used in protective employment legislation.

Recommendation: We believe that this Bill and other legislation providing entitlements to part-time employees in relation to their full-time counterparts should differentiate the two in terms of the number of hours worked per week, in order to enable a valid comparison to be made. The Directive which the Bill implements does not prohibit this. We would argue that this is far more conclusive and logical than legislation which describes a full-time employee as someone who is not part-time and a part-time employee as someone whose normal hours of work are less than the normal hours of work of a comparable employee who is full-time.

It should then be relatively straightforward to make a comparison between part-time and full-time provided [as the legislation goes on to specify in S.7(2)(3)] that both are employed by the same or associated employer (or are covered by the same collective agreement) and are performing the same or similar work or work that is at least equal in value.

The application of relevant employment legislation to part-time employees and part-time employees who work on a casual basis (Ss 8 & 11). It is noted that S.5 in the preliminary part of the Act repeals the Worker Protection (Regular Part-Time Employees) Act 1991. This Act extended the protection of certain pieces of employment legislation (including the Unfair Dismissals, Minimum Notice and Redundancy Payments Acts) to employees who were normally expected to work not less than 8 hours per week and who had the appropriate service requirement. S.8 goes on to say that each relevant enactment (i.e. those that formally specified a minimum working requirement of 8 hours per week and the appropriate continuous service period) now apply to a part-time employee in the same manner as full-time employees.

It seems, therefore, that there is no longer a requirement to work not less than 8 hours per week in order to become entitled to the protection of any piece of employment legislation. If this is the case, what is the application of this change to part-time employees who work on a casual basis as set out in S.11 of the Bill? S.11 seems to differentiate between a part-time employee per se and a part-time employee who works on a casual basis although, again, there is little clarification of the differences between them. S.11(3) seems to state that part-time employees who work on a casual basis are still entitled to the protection of employment legislation (i.e. relevant enactments). Does this mean that part-time employees who may be described as regular part-time employees and part-time employees who work on a casual basis have the same

entitlements in terms of existing employment legislation? For example, if I work 2 hours every week for one year I should now have the protection of the unfair dismissals legislation. However, if I work 15 hours most weeks in that same year but am not offered any hours of work during some weeks of that period, do I still have the protection of the unfair dismissals legislation, even though my employment might be considered by my employer to be part-time on a casual basis?

S.11 of the Act does attempt to provide some definition of what a part-time employee working on a casual basis is. The following points appear to emerge from this section:

- to be part-time on a casual basis the employee must have been in the continuous service of the employer for a period of less than 13 weeks. In addition, that period of service and any previous period of service with the same employer must not be of such a nature as could be reasonably regarded as regular or seasonal employment.

- Service is deemed to be continuous unless it is terminated by dismissal of the employee by the employer or by the resignation of the employee.

- a person can also be a part-time employee working on a casual basis if they fulfil conditions specified in a collective agreement which applies to them that designates them as working on a casual basis. Presumably this will be a matter for trade unions and employers to agree.

These points serve more to provoke questions than to provide answers. Firstly, is it safe to presume that a part-time employee with 14 weeks service cannot be considered to be working on a casual basis? What if that employee only worked 12 weeks during the 14 week period? Given that service is continuous unless broken by dismissal or resignation, this would still appear to be 14 weeks service. Do these provisions allow an employer to terminate employment after 12 weeks, then re-hire the same employee some weeks later and so on and so forth and yet claim that this part-time employee is still working on a casual basis on the assertion that their employment is not regular or seasonal?

Ultimately, these provisions do not appear to explain the position of the part-time employee who may not be offered work every week by their employer. If they have over 13 weeks service, they are not casual. If they have not been dismissed, their service is continuous, even though there may be gaps in their employment. The essential question here is whether a part-time employee who works on a sporadic basis would be entitled to bring, for example, an unfair dismissal claim if they have been in the job for over a year without being dismissed even though they may not work every week.

Recommendation: It is clear that S.8 intends to extend the protection of all existing employment legislation that formerly required a minimum number of working hours per week to part-time employees, regardless of the number of hours worked per week. However, the subsequent differentiation between the part-time employee in S.9 and the part-time employee working on a casual basis in S.11 muddies the waters considerably

here, even though both are said to be covered by existing employment legislation. What is needed, in our view, is a clarification of what the differences between these two categories are, should these categories indeed be necessary at all (the Directive allows for the different treatment of casual employees, it does not make it an obligation). Furthermore it should then be clarified exactly how relevant employment legislation applies to both categories. Anti-avoidance measures need to be put in place to prevent an employer from using an employee's casual status to deny potential claims under employment legislation through dismissal and re-hiring and withdrawal of work.

Less favourable treatment of part-time employees in relation to conditions of employment (S.9). S.9 states in principle that a part-time employee shall not in respect of his/her conditions of employment be treated in a less favourable manner than a comparable full-time employee. We reiterate the point already made that there is no definition of comparable full-time employee in the Bill, although there is a definition of a comparable employee and a separate definition of a full-time employee. This should be remedied.

Secondly, this section refers to conditions of employment, presumably taking the wording of Clause 4 of the Directive into account. These are defined as including conditions in respect of remuneration and matter related thereto. We believe that terms as opposed to conditions of employment would be a more accurate expression to use in these circumstances. It would be more compatible with the equalisation of part-time employees contractual entitlements *vis-à-vis* their full-time counterparts. For example, rates of pay and related matters such as pro-rata annual leave, sick pay and notice periods can hardly be described in an Irish employment context as conditions as opposed to terms of employment. Nor does the use of the word condition sit well with a previous piece of legislation implemented as a result of a European Directive, the Terms of Employment (Information) Act 1994.

Recommendation: Echoing a point made earlier in this submission, it is our view that employment legislation should use consistent terminology as much as possible in order to avoid confusion. In the context of this legislation, terms of employment should be substituted for conditions of employment.

Objective Grounds for Less Favourable Treatment of part-time employees and part-time employees who work on a casual basis in relation to conditions of employment (Ss. 9, 11 & 12). Section 9, having established a general right for a part-time employee not to be treated less favourably than a full-time employee, allows such less favourable treatment if an employer can justify it on objective grounds. S.11 similarly allows a part-time employee who works on a casual basis to be accorded less favourable treatment on objective grounds. In order to elaborate the concept of objective grounds, S.12 specifies that a ground shall not be regarded as objective unless it is based on considerations other than the status of the employee concerned and that the less favourable treatment to any given employee is for the purpose of achieving a legitimate objective of the employer and that this treatment is appropriate

and necessary. This wording is quite vague and it will be for the Rights Commissioner/Labour Court or indeed the High Court to determine what is a legitimate objective of the employer to justify such less favourable treatment. It is conceded that it is difficult in legislation to give examples of potentially legitimate objectives and that this is a matter that needs to be teased out at a later stage.

However, the second sub-section in S.12 serves to further confuse the difference between a part-time worker per se and a part-time worker who works on a casual basis, which has already been alluded to. It specifies that for the avoidance of doubt (a phrase which always gives rise to concern) a ground which may not be an objective ground in relation to a part-time employee may be an objective ground in relation to a part-time employee who works on a casual basis. This implies that the part-time employee who works on a casual basis is somehow an individual entitled to less rights, although these are not explained. This must be placed against the backdrop of a Bill which fails to distinguish between a part-time employee per se and a part-time employee who works on a casual basis in any distinct manner.

Recommendation: We have already noted the lack of clarity in relation to the difference between the entitlements of part-time employees and part-time employees who work on a casual basis. The same problem occurs with conditions (or terms) of employment. This entire issue of part-time employees *vis a vis* part-time employees who work on a casual basis needs to be clarified in much greater detail.

Review of Obstacles to the Performance of Part-Time Work (S.13). This section imposes a general responsibility on the Labour Relations Commission to investigate and identify obstacles in any particular industry or sector to employees being able to perform part-time work. In our view, this is intended to implement the first part of Clause 5 of the Directive which is entitled *Opportunities for Part-Time Work*. However, Clause 5 also has two other parts - 2 and 3 – which the Bill appears to have completely ignored. Part 2 of Clause 5 states that a worker's refusal to transfer from full-time to part-time work or vice versa should not in itself constitute a valid reason for termination of employment subject to national law and practice. In this respect, given the fact that in Irish employment and contract law a contract cannot be unilaterally varied without consent, such a refusal should not be allowed to give rise to a valid termination of employment anyway.

However, it is Part 3 of Clause 5 which appears to be a more serious omission. It requires that, as far as possible, an employer should give consideration to (a) a request by workers to transfer from full-time to part-time work that becomes available in the enterprise, (b) requests by workers to transfer from part-time to full-time work or to increase their working time should the opportunity arise, (c) the provision of timely information on the availability of part-time and full-time positions in the establishment in order to facilitate transfers from full-time to part-time, or vice versa, (d) measures to facilitate access to part-time work at all levels of the enterprise etc and (e) the provision of appropriate information to existing bodies representing workers about part-time working in the enterprise.

As far as we can see, Part 3 of Clause 5 appears to have been totally ignored in the framing of the Bill. This is a dramatic omission, given that general consideration number 5 of the Directive states that the parties to the Directive (i.e. the Social Partners at European level) attach importance to measures which would facilitate access to part-time work for men and women in order to prepare for retirement, reconcile professional and family life and take up education and training opportunities to improve their skills and career opportunities, etc.

In our view, Part 3 of Clause 5, inter alia, is clearly aimed at facilitating the creation of job-share positions in that it requests employers to give consideration to transferring workers from full-time to part-time and vice versa, the precise process by which a woman (or indeed man) might seek to move from full-time to part-time work in order to have more time to rear children and might at a later stage, when the children are of school going age, wish to return to a full-time position.

Recommendation: The Bill needs to take into account Clause 5 of the Directive in its entirety which it does not do at present. Although it may not be feasible to introduce a right to job share per se, we believe an employer should have to provide a valid reason why a request for job share is being denied where it appears that a suitable job share position exists and two employees are willing and able to share a position. Such a valid reason could possibly mirror the formula used in S.12 – i.e. that the employer must have objective grounds to refuse the request for job share and that those objective grounds must be for the purpose of achieving a legitimate objective of the employer.

In common with other provisions of the Bill, a right of complaint should exist for an employee refused the move from full-time to part-time work, or vice versa, to a Rights Commissioner, who should be entitled to investigate the circumstances of the refusal. If the Rights Commissioner finds that the refusal is unjustified in the circumstances, s/he should be able to order that a move from full-time to part-time work be facilitated by the employer subject to a right to appeal. Only such a method of complaint would give full meaning to one of the Directive's stated objectives, which is to reconcile professional and family life.

Prohibition of Penalisation of an Employee by an Employer and Methods of Redress (S.15 & 16). S.15 is fairly comprehensive in the manner in which it seeks to prevent an employee being victimised by an employer for availing of their rights under the legislation or opposing unlawful acts under the legislation. The so-called penalisation is widely defined to include dismissal or any other unfavourable change or prejudicial action to the person's employment. It is the third sub-section of S.15 that we would take issue with. This states that if an employee is penalised to the extent of dismissal, that the employee is not entitled to relief under this legislation and the Unfair Dismissals Acts simultaneously. In other words, the employee must choose their remedy between the two pieces of legislation.

In the following section, S.16, a Rights Commissioner is given the power to require an employer to pay to an employee compensation up to 2 year's remuneration. Clearly, the possibility of this level of compensation is envisaged in a situation where an employee has lost their job as a result of availing of their rights under the part-time working legislation. Equally, if an employee is dismissed and decides to access the unfair dismissals legislation, compensation may be ordered by a Rights Commissioner or the Employment Appeals Tribunal of up to 2 years salary also. Crucially, an employee requires one year's continuous service to bring a claim under the Unfair Dismissals Acts. It is therefore extremely likely that an employee dismissed for exercising their rights under this legislation, who does not have one year's service, will have to resort to a complaint to a Rights Commissioner under it, as opposed to under the Unfair Dismissals Act. The crucial difference, in our view, is that under the Part-Time Work Bill as proposed, an employee does not have the right to be re-instated in their job, a right which they would be allowed to opt for under the unfair dismissals legislation. It is therefore apparent to us that an employee victimised for exercising their rights under the Bill who does not have one year's service in order to bring an unfair dismissals claim would be restricted to claiming compensation. This is clearly an unsatisfactory situation.

Recommendation: A Rights Commissioner under the Part-Time Work Bill could also be allowed to require an employer to re-instate an employee whose complaint is well founded. However, as the Free Legal Advice Centres has consistently advocated for quite a long period of time now, the problem of dismissal for the exercise of employment rights could be more simply resolved by a blanket amendment to the Unfair Dismissals Acts. This amendment should simply state that an employee who is alleging that they have been dismissed as a result of the exercise of their employment rights under a piece of protective employment legislation should not require any particular service period in order to bring an unfair dismissals claim under the Unfair Dismissals Act.

It is apparent to FLAC, amongst others including the network of CICs throughout the country, that employees with less than one year's service are sometimes reluctant to exercise their rights under protective employment legislation for fear that their exercise of these rights will result in their dismissal and, if they do not have one year's service, this dismissal cannot be contested subsequently. Some recent employment legislation such as the Maternity Protection Act 1994 and the National Minimum Wage Act 2000 has declared such dismissals to be unfair and has removed the requirement for one years service, but this has been piecemeal and inconsistent. An amendment to the unfair dismissals legislation would provide greater certainty.

For further information, please contact Paul Joyce, Free Legal Advice Centres, @ 679 4239.