
Citizens Advice Briefing on the Small Business, Enterprise and Employment Bill

Part 11 (Employment), & Clauses 144 & 147

Committee Stage, House of Lords

(7th January 2015)

6 January 2015

Summary

This briefing sets out the views of Citizens Advice on Part 11, clauses 144 and 147, of the Small Business, Enterprise and Employment Bill. The briefing covers:

- Financial penalty for failure to pay sums ordered by employment tribunal etc (clause 144);
- Exclusivity terms unenforceable in zero hour contracts (clause 147).

Introduction

This briefing sets out the views of Citizens Advice on Part 11 (clauses 144 and 147) of the Small Business, Enterprise and Employment Bill.

In 2013/14 the Citizens Advice service advised 224,065 people on 386,578 employment issues. Employment issues account for 7% of all advice given by Citizens Advice bureaux. A breakdown of issues by category is provided in the table below.

Discrimination	15,213	4%
Schemes for the unemployed (including training)	1,347	0%
Self-Employment / Business	12,860	3%
Applying for jobs	6,080	2%
Terms & Conditions of Employment	48,808	13%
Health and Safety	8,134	2%
Pay & Entitlements	74,369	19%
Parental & Carers rights	11,892	3%
Dispute resolution	40,549	10%
Resignation	9,564	2%
Dismissal	65,038	17%
Redundancy	29,762	8%
Employment tribunals & appeal tribunals	25,056	6%
Other	37,906	10%
Total	386,578	100%

On Adviceguide we had 5.4m page views on Work related pages. This accounts for 16% of all pages viewed and is the third largest category behind Consumer 26% and Benefits 17%.

In 2013/14 the Citizens Advice service, empowered by 22,000 volunteers, provided advice from 319 independent advice centres across more than 3,500 community locations in England and Wales, to over 2 million people face to face and over the phone. Our consumer advice phone service dealt with 1.2 million calls on 626,000 consumer enquiries and there were a further 22 million visits to our Adviceguide website. Our service is worth at least £750 million to society each year.

Financial penalty for failure to pay sums ordered by employment tribunal etc (clause 144)

Citizens Advice welcomed the inclusion of clause 144 (previously 136) in the Small Business, Enterprise and Employment Bill, but asks that:

- 1. money paid by employers goes first to meeting a claimant's award before the penalty amount owed to the state;**
- 2. clarity is given regarding what happens once the employers have paid the penalty to the state, when the claimant's award is still outstanding. During the passage of the Bill Ministers have suggested their intention is to enable the issue of multiple fines in such a scenario, but currently we do not see which clause allows for this;**
- 3. clarity is given on how the process of imposing a penalty is initiated;**
- 4. the Government consider including a provision for enforcement action to be taken against 'phoenix companies' who shut down, only to reopen as a different company in order to evade payment.**

Clause 144 makes provision for financial penalties to be imposed on employers who fail to pay awards following a judgment of the Employment Tribunal or a settlement agreed through ACAS.

Citizens Advice has long campaigned for the Government to take action to improve the low level of employment tribunal awards that are actually paid, first raising this issue with Government in 2004. Too many people, having faced the stress and cost of taking forward an employment tribunal claim, are left with nothing, despite a judge deciding in their favour and making a financial award. Research shows that over half of people do not receive payment of their full award and a third receive nothing at all.

Rachel started a new job but was dismissed from work with no reason given less than two weeks after her employment started. She had left another job to take up the new post. She made a claim through an employment tribunal and judgment was made in her favour with an award of just under £1000. The employer did not pay. Rachel was left without work and in financial hardship having been relying on the money to pay outstanding bills.

The provision set out in clause 144 sends a strong message to employers that non payment carries consequences. They will face a penalty of between £100 and £5,000 depending on the level of the award outstanding. The employer will be given warning of the penalty and the opportunity to avoid it if they pay the award in full. Enforcement of the penalty will be undertaken by enforcement officers appointed by the Secretary of State.

Inclusion of this provision is a good step forward in improving the effectiveness of the Employment Tribunal as a means for people to challenge poor or unscrupulous behaviour by their employers and enforce their employment rights. This is all the more important in the context of the hefty fees which were introduced in July last year to access the tribunal. The number of cases being taken to employment tribunal has plummeted since the introduction of fees of up to £1,200 to pursue a claim¹. In a recent survey² of our clients with employment issues, 82% said they were deterred from taking their case to Employment Tribunal because of the cost.

It is a massive gamble for someone already potentially at financial disadvantage because of their complaint against their employer, to risk such sums when the odds of successfully recouping their award if successful are so poor. This risk is bigger for those who can't estimate the potential value of their claim or their chances of success. Our recent survey³ showed that 54% of respondents did not know the value of their claim if they were to win their case. This rose to 81% for more complex cases like unfair dismissal or discrimination.

We do have some concerns however about the way in which the provision introduced by clause 144 will work. Penalties under the provision will be payable to the state. It will not benefit workers if employers pay the penalty to get the state off their backs, but still do not pay the award. There does not appear to be a clause or order making power in relation to this situation and as sub clause 37M does not detail who will be appointed to act as enforcement officers it is not clear what powers they shall hold and therefore what enforcement action is possible.

¹ Latest tribunal statistics show a 66% drop in the number of claims issued compared with the same period the previous year. *Tribunal statistics quarterly: Ministry of Justice 11 December 2014*

² Fairer fees – Fixing the employment tribunal system: Citizens Advice December 2014

³ Ibid.

We would welcome clarity of how the Government will ensure any money handed over by the employer goes first to the individual claimant who is owed money, and then to the state.

We would also welcome clarity of how this Bill will prevent employers from only paying the penalty to the state without paying the award to the claimant

At the same time, we need clarity on how the process of imposing a penalty is initiated. We believe there should be a process by which the tribunal monitors compliance with its own judgments and initiates the procedure where payment is not made. We do not want to see claimants faced with yet more hurdles of complex applications and further fees to get this process underway. **We ask members to seek clarity on how this process will be initiated.**

Finally, **this provision alone will not solve the problem of companies who shut down, only to reopen as a different company but with the same directors in order to evade payment**, as in the following case:

Tom was severely injured in a car accident and was dismissed as a result. He fought and won a tribunal and was judged to have been unfairly dismissed and discriminated against because of his injury. He was awarded over £15,000 in compensation. When he tried to enforce the award his former employer's company had gone into liquidation. Another company of the same name is now trading but has no responsibility for the old company's debts. Tom has found it difficult to find work since and has suffered considerable financial hardship as well as loss of confidence.

We would like to see a provision introduced to ensure that any enforcement action, including the imposition of a penalty, can be taken against these new 'phoenix' companies, or their individual company directors, where it is apparent that this kind of evasion has taken place.

We would ask the Government to consider how this could be achieved, for example, by a process to allow quick reapplication either by an individual claimant or by an enforcement agent to change the name on the tribunal judgment so that enforcement action can be taken against a 'phoenix' company, or by enabling employment tribunal judges to directly instruct enforcement agents on whom they may take enforcement action against.

We urge members to ensure these points are highlighted during the committee stages of the bill so that we can truly begin to see an improvement in access to justice for employees who have been denied their employment rights.

Exclusivity terms unenforceable in zero hour contracts (clause 147)

Citizens Advice welcomes the intention of clause 147 (previously 139) in the Small Business, Enterprise and Employment Bill, however we have reservations about its effectiveness and whether the provisions can be enforced. We stress that there is much more work to be done to prevent exploitation and protect workers basic rights. We call on the Government:

- 1. to use this clause as a springboard to tackle the major problems and instability faced by people on zero hour contracts and commit to further action to tackle exploitation, for**

example, preventing employers discriminatory behaviours towards pregnant women on zero hour contracts.

The first part of the clause makes provision for any zero hour contract containing exclusivity measures, such as prohibiting the worker from performing services under another contract, to be unenforceable against the worker.

Citizens Advice have long called for a crackdown on abuse of zero hour contracts and the proposed ban on exclusivity clauses is sensible and fair. However, the unfortunate reality is that zero hour workers who in the eyes of their employers commit misdemeanours, such as taking on hours with another company, rather than being dismissed are just not offered any more work and this problem. Along with many other serious problems with zero hour contracts, this is not covered by this bill.

Flexibility in our labour market is important. However the lack of a stable income can throw household budgets into disarray, with people unsure of how they will get from one week to the next. The lack of legal protection for people on this type of contract is unacceptable and leaves people denied their basic rights. There needs to be a commitment to ensure employers give people on zero hour contracts important entitlements like holiday pay and sick pay. While the two biggest burdens on family budgets, housing and childcare, are impossible to manage without a regular income. **The Government's crackdown on exclusivity clauses must be used as a springboard for further action to tackle these other big problems with zero hour contracts.**

The second part of clause 147 introduces powers to make future provisions regarding zero hour contract workers, and is an encouraging acknowledgment from the Government that non exclusivity in zero hour contracts is the first of many actions required to protect the basic rights of workers. Citizens Advice welcomes this provision and urges the Government to commit to further steps to ensure people are not denied their basic employments rights.

A 'zero hour contract' is not legally defined and so can be used to describe varying scenarios. Our evidence shows that the use of these contracts is open to abuse by employers, particularly in a working environment of vulnerable, low paid workers who simply do not have the option of walking away and getting another job.

Employers rarely dismiss a zero hour worker - they are simply told there is no work for the time being. This leaves workers unsure of their position, and whether they should or can claim benefits. Although it is possible they may be able to claim unfair dismissal or redundancy pay, the fact that they believe they may get further work can mean they do not seek advice for several weeks - and it may then be too late to try to make a claim.

Dominic worked for 11 years as a care worker, working regular weekly shifts throughout that time on a zero hour contract. When the care home he worked at closed down his employer told him he was not redundant because they would look for work for him at other care homes. As a result of being on a zero hour contract Dominic received no pay whilst his employer sought work for him. Dominic requested redundancy pay several times but was ignored and he was left in limbo with no income.

As already mentioned, zero hour workers are susceptible to abuse of their basic rights, e.g. holiday pay. Confusion about holiday rights for casual workers is not surprising given that there are no clear rules for determining entitlement for casual workers. We urge the Government to take steps to clarify casual workers statutory holiday rights.

Janet has worked as a carer for nearly 12 months on a zero hour contract. She has worked on average 56.5 hours a week during this period, however Janet's employer insists that her entitlement to annual leave is only 13 days per year compared to the 28 days that a full time worker would get.

Zero hour workers are subject to sudden fluctuations in income making it difficult to budget. They also have difficulty claiming "in work" benefits such as working tax credit because there is no guarantee of minimum hours. To receive Job Seekers Allowance a claimant must not be in 'remunerative work' (work less than 16 hours per week) and for the Working Tax Credit they must be in remunerative work of at least 16 or 30 hours per week depending on their circumstances. Where hours fluctuate, they can be averaged over whatever period gives the best reflection of normal working hours. However, significant variation in hours can mean individuals alternate between benefits and this can cause delays, confusion and overpayments.

When income related benefits are received the significant fluctuations in income means individuals have to repeatedly send evidence of income for their benefit claims. In weeks of "no income" they can find that it is several weeks before they receive a benefit payment for that week, even if they are permitted to claim.

Anthony works for an agency and has a zero hour contract. Initially he was provided with five days work per week, however this has decreased and recently he has been offered between two and four days of work per week. This has played havoc with his benefit situation. For example, he receives working tax credit if he works four or five days but not if he works two or three. His housing benefit claim is also constantly changing. Unless he gets four or five days work he is worse off in employment than when he is not working at all. Anthony is unable to leave his job because he has been told by the Job centre that if he does so he will be sanctioned for six months.

Anthony wanted a full time job. The Job centre advert, which is still online, described it as "full time, temporary". He would not have taken the job and be in this position if he had realised that it was not genuinely full time.

He is also unhappy because he tried to claim reduced Job Seekers Allowance for the weeks when he only worked two days but was turned down because he did not attend interview. The client says that this is because he was in work again by the time the interview was scheduled and that he was required to produce a written statement from his employer saying that they could not employ him full time that week - which they declined to give.

Zero hour workers also find it difficult to rent in the private sector because landlords and agencies regard them as at risk of rent default if they have no guaranteed income.

Some employers offer zero hour contracts as the only option to existing staff who request more flexibility in hours because of care commitments or who want to continue working beyond a retirement date.

Sophie has a disabled child and currently receives disability living allowance. She works in a nursing home and wants to work part-time to allow her more time to be with her two children both under the age of 10. Her employer does not want her to work part-time but is prepared to allow her to become a zero hour contract worker.

As you will see from the following case study, pregnant workers on zero hour contracts may have their hours reduced. **We call on the Government to consider how to prevent discriminatory action against pregnant zero hour workers.**

Sarah worked 40 hours per week, for 14 months on a zero hour contract. She announced that she was pregnant and her hours have gradually been reduced and she now works only 11 hours per week. Sarah's employer has since taken on two other staff, instead of offering her the hours. She believes that her employer reduced her hours so that she is below the earning limit to receive statutory maternity pay.

Citizens Advice would caution any member in thinking that this bill will prevent the exploitation caused by zero hour contracts, however we do welcome clause 147 in laying the foundations for future reform in this area. We urge members to raise awareness of the issues surrounding zero hour contracts during the passage of the bill and demonstrate Parliament's commitment to ensuring workers receive their basic rights.

Contact

For further information on any of the issues covered by this briefing, please contact either of:

Kayley Hignell
Policy Researcher (Families, Welfare and Work)
03000 231230
Kayley.Hignell@citizensadvice.org.uk

Toby Brown
Parliamentary Officer
07833 050 899
Toby.Brown@citizensadvice.org.uk