



generations of good advice

Citizens Advice Scotland written evidence House of Commons Public Bill Committee on the Small Business, Enterprise and Employment Bill October 2014

1. Citizens Advice Scotland (CAS), our 61 member bureaux and the Citizen Advice Consumer Service helpline form Scotland's largest independent advice network. Advice provided by the Scottish CAB Service is free, independent, confidential, impartial and available to everyone. Our website, Adviceguide, also provides the public with up to date information on a range of topics. We are champions for both citizens and consumers and in 2013/14 citizen advice bureaux advised on over 550,000 new issues. We want a fairer Scotland where people as citizens and consumers are empowered and their rights respected.

Summary

2. Citizens Advice Scotland (CAS) welcomes the opportunity to comment on the proposals outlined in the Small Business, Enterprise and Employment Bill. In 2013/14, citizens advice bureaux advised clients on 46,540 new issues related to employment, and Part 11 of the Bill covers three specific issues of concern to CAS – the misuse of zero hours contracts, the non-payment of Employment Tribunal awards, and workers being paid less than the National Minimum Wage.
3. On each of these issues, the Bill contains some welcome measures – banning exclusivity clauses in zero hours contracts and introducing financial penalties for employers who do not pay Employment Tribunal awards or pay less than the Minimum Wage to multiple employees. However, the Bill could do more to tackle these unacceptable situations, particularly on the misuse of zero hours contracts, where problems faced by CAB clients include being left destitute or in debt as a result of unpredictable hours, or faced with a situation where they have few enforceable employment rights. These are not caused by exclusivity clauses and would not be solved by these proposals.
4. Citizens Advice Scotland:
 - Welcomes the proposed ban on exclusivity clauses in zero hours contracts
 - Recommends that workers on a zero hours contract should be given a statutory 'right to request' a contract that guarantees hours, without suffering dismissal or detriment for making the request
 - Recommends that the Bill includes a provision to ensure that where mutuality of obligation for the employee to undertake work provided by the employer is present, an individual is classed as an employee rather than a worker even if their contract states zero hours
 - Recommends that protection from unfair dismissal is extended to workers as well as employees

- Recommends that full rights to parental leave and pay is extended to workers as well as employees
- Recommends that employers should inform prospective candidates that the vacancy is on a zero hours basis, for instance by publishing it in the job advertisement, or by informing them at interview
- Welcomes the proposed introduction of a financial penalty that can be imposed on employers who fail to pay the sum, or expenses ordered by an Employment Tribunal
- Recommends that the Committee consider an amendment to ensure that the employer pays the sum due to the successful claimant as well as the financial penalty to the Secretary of State
- Recommends that Employment Tribunal awards, expenses or fees unable to be enforced due to insolvency or phoenix trading should be able to be claimed from the National Insurance Fund
- Welcomes the proposed increase in financial penalties against employers for underpayment of the National Minimum Wage where an employer has underpaid multiple employees
- Recommends the UK Government runs an awareness-raising campaign to ensure workers know that they are entitled to a National Minimum Wage and how to claim it
- Recommends that in the longer term, a 'Fair Employment Commission' should be created with the legal powers and resources both to secure individual vulnerable workers their rights in all areas of employment (including pay), and to root out rogue employers.

Zero Hours Contracts (Part 11, Clause 139)

5. With an estimated 1.4 million zero hours employment contracts in the UK¹, their growing prevalence has given rise to a number of serious causes for concern. Citizens advice bureaux in Scotland have highlighted a number of different problems stemming from the way zero hours contracts have been used by employers, particularly in the last year.
6. Whilst zero hours contracts may be suited to particular types of work, such as casual or seasonal labour, the **misuse** of zero hours contracts is becoming a major problem, which should be addressed to prevent exploitation and hardship. Misuse can include situations where zero hours contracts are issued by employers inappropriately, such as where a full-time or part-time contract may be better suited and have led to a number of serious problems for CAB clients. This includes destitution caused by lack of work offered; serious debt and budgeting difficulties due to a fluctuating income; difficulty accessing support from the benefits system; lack of entitlement to certain employment rights and confusion over employment status and 'Zeroing down' – effective dismissal deterring workers from enforcing basic rights.

¹ Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours – Office for National Statistics, April 2014 <http://www.ons.gov.uk/ons/rel/lmac/contracts-with-no-guaranteed-hours/zero-hours-contracts/art-zero-hours.html>

7. Citizens Advice Scotland welcomes the ban on exclusivity clauses in zero hours contracts proposed in the Bill. It is extremely unfair for an employer to prevent someone from taking on another job, 'just in case they're needed' and complements the Government's aim for a labour market that is 'flexible, effective and fair', by promoting flexibility for individuals to balance the flexibility enjoyed by their employer.

➤ ***A West of Scotland CAB reports of a client who is currently on a zero hours contract, but was offered a permanent full time job doing similar work to what they currently do. However, their current employer contacted their prospective employer to complain and 'put a stop to' the client going to work for the company.***

8. However, this move will not prevent misuse of zero hours contracts in the overwhelming majority of cases that citizens advice bureaux in Scotland have seen. CAS believes that more must be done to prevent these situations occurring and recommends the Bill is used as an opportunity to ensure that workers are protected from the misuse of zero hours contracts.

Lack of work causing destitution

9. One of the key features of zero hours contracts is that no work is guaranteed in any week. For a growing number of workers, far from offering flexibility and choice in their working patterns, their zero hours contract has left them with very little, or no income whatsoever for a period of time. Citizens advice bureaux in Scotland advised clients who found themselves in crisis and destitute as a result of a sustained period without work – in some cases being unable to afford to eat and requiring a referral to a food bank.

➤ ***An East of Scotland CAB reports of a client whose Jobseekers Allowance (JSA) was stopped 11 weeks ago as he no longer meets the required criteria. He is working on a zero hours contract and some weeks has no income. He is in a single household and in receipt of Housing Benefit and Council Tax Reduction. He sometimes struggles to buy food and wanted to know if he could access a food bank.***

Serious debt and budgeting difficulties due to fluctuating income

10. Workers on zero hours contracts can often find their working pattern - and therefore their income - unpredictable. Citizens advice bureaux have advised clients on zero hours contracts whose working hours have dropped or fluctuate leaving it extremely difficult to budget and quickly accruing substantial debt. In some cases, clients have been forced to resort to borrowing from payday lenders and when large repayments are due in a week where little work is available, workers can find themselves in a situation where they have no way of paying back the loan.

➤ ***An East of Scotland CAB reports of a client whose employment varies significantly because of a zero hours contract. She can work between 7 and 13 hours per week and her income can vary from £60 to £100. The client struggles with her budget and to address her debt issues as she is not sure how many hours she will be working on a week to week basis and has no guarantee of any work.***

- ***An East of Scotland CAB reports of a client who is unable to pay various payday loan companies. Her total debts amount to £4,850. Whilst she lives with her mother and pays no rent, she works as a waitress on a zero hours contract, sometimes earning more than £200 per week, but next week will only earn £70. She is due to pay three separate payday lenders a total of £173 next week and has no way of paying.***

Difficulty accessing support from the benefits system

11. Workers on zero hours contracts can slip through the benefits system as they have difficulty claiming in-work benefits and means tested benefits. With unpredictable hours it is extremely difficult for zero hours contract workers to estimate their average weekly earnings for the purposes of claiming in-work benefits. For in-work claimants whose earnings fluctuate, their weekly earnings can be averaged over a period of five weeks for the purposes of the benefits system. However, even this can prove difficult for some workers, who can be working almost full time hours in one week, then hardly at all in the next. Citizens advice bureaux have advised clients who have been overpaid benefits in one week (which they must repay), then been underpaid in the next due to their hours reducing, leaving them facing an income crisis.

- ***An East of Scotland CAB reports of a client who has a zero hours contract at the cinema where he has worked for 13 years. He previously received Working Tax Credit (WTC), but the payments stopped because his hours for the past year averaged less than 30 hours a week, which the client had not realised because of the erratic nature of his working hours. He was asked to phone to make arrangements to repay the overpayment of WTC, but as the client has a hearing impairment which makes it difficult to use the telephone he did not do so. Now he is facing legal proceedings to recover the debt, and has also been told he has been overpaid Housing Benefit because he had not informed the council that his WTC has stopped.***

Lack of entitlement to certain employment rights and confusion over employment status

12. There is a problem with workers being unclear about the terms of their contract, and workers and employers being unclear on what rights they are entitled to on a zero hours contract. However, many of these difficulties are caused by misuse of zero hours contracts which, by accident or design, exploit weaknesses in the law in this area, rather than because information and advice is not available. Uncertainty over whether those engaged on a zero hours contract are legally 'workers' or 'employees' is at the root of this problem in a number of cases.

13. Citizens advice bureaux have reported a number of cases of workers whose employment rights were far from clear, and whose employers do not grant them certain rights on the basis of their zero hours contracts.

- ***A West of Scotland CAB reports of a client who is single and expecting her first child. She was working on a zero hours contract, but has now left her employment as her employer told her she would not be due any maternity pay due to the fact that her contract was zero hours.***

- ***An East of Scotland CAB reports of a client who came in and reported that she had been employed for around two years and she had not had any paid holidays. She spoke to her manager about this and was told that as she was on a zero hours contract she was not entitled to any paid holidays. The bureau assisted the client in writing a grievance letter.***

‘Zeroing Down’ – effective dismissal deterring workers from enforcing basic rights

14. In a number of cases relating to the misuse of zero hours contracts, poor employment practices are reported by workers engaged on them. Whilst this is not necessarily because of the contract in itself, in practice employers have used their ability to cut their hours to the individual as a ‘punishment’ to deny them their basic statutory rights, deter them from asserting their rights, or in an attempt to make them resign. This has become known as ‘zeroing down’. This ability to dramatically cut the amount of work offered can act as a barrier to workers being able to enforce their rights in the first place, offers no flexibility or fairness to the individual, and is an example of clear misuse by unscrupulous employers.

- ***An East of Scotland CAB reports of a client who has been employed for four years on an ‘as and when required’ basis. Over the last six months he has worked around 50 hours per week. He has now been advised that there are no further hours for him, but that he is not being made redundant or his contract terminated. Two days later the client went online to see what work was available and the job which he did was advertised by his employer. The client has been advised by one manager that if he chooses to leave, he would receive a good reference, but does not wish to leave the job and has worked nearly every week whilst he has been employed there.***
- ***A West of Scotland CAB reports of a client who is employed on a zero hours contract. His best friend was previously the assistant manager, but had left on bad terms with the current manager. Since then, the client’s hours have been cut from 30 hours per week to 6, and the client feels he is being singled out and treated unfairly by the manager.***

15. Citizens Advice Scotland recommends the Committee consider options for strengthening the Bill in this area including:

Give workers on a zero hours contract a statutory ‘right to request’ a contract that guarantees hours, without suffering dismissal or detriment.

16. One of the reasons that misuse of zero hours contracts occurs is because they are issued in situations for which they are not suitable – for instance, where a worker requires regular full-time or part-time work. One possible remedy to this would be to give workers the right to request their contract be altered to a stable one that is more suitable, with a legal protection from being dismissed or suffering detriment for making the request. There would be no obligation on the employer to grant the request, but by giving reasons for declining it would encourage them to consider the implications of the contract on the worker, whether it is appropriate and alert them to the worker’s desire for a more stable working pattern. It is envisaged this would

operate in a similar manner to the right to request flexible working currently afforded to employees.

Legislate to ensure that where mutuality of obligation for the employee to undertake work provided by the employer is present, an individual is classed as an employee rather than a worker even if their contract states zero hours

17. Employment Tribunals generally operate on this basis at present, if a case comes before them. However, ensuring that this was put on a statutory footing has the potential to provide clarity for employers and individuals prior to a case being brought to Tribunal. It may dissuade employers from issuing zero hours contracts in unsuitable situations based on the mistaken belief that the contract prevents an individual being classed as an employee, even if they are expected to undertake work on a frequent basis.

Extend protection from unfair dismissal to workers as well as employees

18. This option would strengthen the rights of workers on zero hours contracts by giving them some redress in situations where the amount of work provided is dramatically cut in an apparent attempt to 'get rid of them'. This would represent a significant change in employment law and the impact would need to be carefully considered as it would extend to other workers including those on appropriate zero hours contracts. However, it may be a necessary measure to protect workers from extremely poor treatment at work.

Extend full rights to parental leave and pay to workers as well as employees

19. Citizens advice bureaux have reported cases where workers are denied paid maternity leave, including those on zero hours contracts. This reduces the flexibility of the individual engaged on a zero hours basis. One step to address this could be to extend the paternal leave and pay rights currently enjoyed by employees to workers.

Requiring employers to inform prospective candidates that the vacancy is on a zero hours basis, for instance by publishing it in the job advertisement, or by informing them at interview.

Employment Tribunals: Failure to pay sums (Part 11, Clause 136)

20. Failure of employers to pay Employment Tribunal awards to employees who are successful in their claim is a persistent problem. Particularly since July 2013, where a fee is required to lodge a Tribunal claim, it is important that users have confidence that they will not incur expense and time to pursue justice, only for the employer to simply ignore the judgement if they win, leaving the claimant financially worse off despite their victory. Citizens advice bureaux in Scotland have advised clients who had won their case, but had received none of the sum due to them, in some cases a considerable amount.

- ***An East of Scotland CAB reports of a client who resigned from his job after he was repeatedly not paid by his employer. He took his case to an Employment Tribunal which found in his favour, and ordered his ex-employer to pay him £889. However, more than three months on, his ex-***

employer has not paid him the award, and the client believes they may have wound up and started again in another guise.

- ***A North of Scotland CAB reports of a client who was dismissed by his employer at the end of March 2013. He worked for a coach company and has been driving coaches for 40 years. He was not given a reason for his dismissal, nor holiday pay or pay in lieu of notice. He also had not been paid for an extra day a week that he had been working since September 2012. The client had gone through the proper procedures advised by the CAB employment adviser with regard to raising a grievance, going through ACAS and in addition the employment adviser had represented him at an Employment Tribunal. The outcome was a judgement on 14th October in favour of the client for unfair dismissal, statutory notice pay, holiday pay, failure to provide written terms and conditions and written reasons for dismissal. The award was a total of over £13,000. On 26th February, the client had still not received his money and so instructed the Sheriff Officer. The company was served a charge for payment but 14 days have passed and payment has still not been made. The client does not know what to do next and is worried he will never recover the money that is owed to him.***

21. The most recently available national statistics paint a worrying picture in this regard. In Scotland, 46% of successful Tribunal claimants received no payment whatsoever, with a further 13% not receiving the full amount of their award. This represents a clear majority of successful claimants in Scotland not receiving the full award, higher than the equivalent figure in England and Wales. In addition, just over a quarter (26%) of unpaid claimants in Scotland took the step of engaging a Sheriff Officer, far fewer than those who undertook the equivalent step in England and Wales, despite awareness of the enforcement options available being higher in Scotland.²

22. This likelihood of payment, coupled with the fees now charged to bring an Employment Tribunal claim is undoubtedly the explanation for the vast reduction in appeals to the Employment Tribunal, with the number of single claims from April-June 2014 down 70% compared with the same quarter of 2013.³

23. It must be recognised that civil justice is a devolved matter, and improvements to the level of enforcement is a matter for the Scottish Parliament, which CAS is actively pursuing. Nonetheless, there are improvements that should be made to ensure that a far higher number of employers pay claimants what they are due in full, without enforcement action being required.

24. CAS welcomes the introduction of a financial penalty that can be imposed on employers who fail to pay the sum ordered by the Tribunal, or the claimant's expenses, as the Bill proposes. We would recommend that the Committee consider an amendment to ensure that the employer pays the sum due to the successful claimant as well as the financial penalty to the Secretary of State, as there is currently nothing

² Payment of Tribunal Awards, 2013 Study – IFF Research/Department for Business, Innovation and Skills, October 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf

³ Tribunal Statistics Quarterly April to June 2014 – Ministry of Justice, September 2014 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/352914/tribunal-statistics-quarterly-april-june-2014.pdf

to prevent them prioritising payment of the fine, whilst still leaving the claimant unpaid. We recognise that this does not appear to be the intention, but would welcome clarification being included on the face of the Bill.

25. This welcome measure will not however solve the problem. In the study of tribunal awards payments, the most common reason given for non-payment across Great Britain was that the employer was now insolvent, with the majority of claimants believing that the employer had re-started as a 'phoenix company', thus avoiding paying what they are due whilst resuming trading.⁴
26. Part 10, clauses 117 – 118 of the Bill aim to address 'phoenix companies', by giving the Secretary of State power to make regulations restricting sales of business assets of insolvent companies to 'connected parties' unless there has been third party scrutiny of the proposals. This measure, whilst having the potential to protect business creditors from losing out from the creation of a 'phoenix company', would be unlikely to protect employment tribunal claimants as they would generally be unaware of the resumption of trading under another guise until after the transfer of assets has occurred. It would continue to be impossible to enforce the tribunal award against the 'phoenix company'.
27. To tackle the issue of employment tribunal awards being unable to be enforced due to insolvency or phoenix trading, CAS recommends that they can be claimed from the National Insurance Fund, in the same way that ex-employees can receive payments they are due through the Redundancy Payments Service. This would restore confidence in the system, ensure that successful claimants are not denied justice and do not lose considerable amounts of money they are owed. We would also recommend that Employment Tribunal fees are recoverable through this route, where a claimant is successful.

National Minimum Wage enforcement (Part 11, Clause 138)

28. Evidence from citizens advice bureaux in Scotland has highlighted a number of instances of employees being paid less than the National Minimum Wage (NMW). In some cases, individuals are not always aware of how much they should be paid and in some instances employers appear to be ignorant of their duty to pay their staff the National Minimum Wage at the appropriate level. Of even greater concern are reported instances of employers deliberately and illegally paying workers less than the minimum wage.
29. Citizens Advice Scotland believes that more needs to be done to take a proactive approach to effectively ensure that all employers comply with the law and pay their staff at least the legal minimum wage for the hours they work. Whilst we note the UK Government efforts to 'name and shame' rogue employers⁵, we believe a twin approach of active encouragement and enforcement is necessary.
30. CAS welcomes the provisions in the Bill to enable financial penalties against employers for underpayment of the minimum wage to be increased if the employer has underpaid multiple employees. This has the potential to act as a deterrent to

⁴ Payment of Tribunal Awards, 2013 Study

⁵ Government names employers who fail to pay minimum wage, June 2014

<https://www.gov.uk/government/news/government-names-employers-who-fail-to-pay-minimum-wage>

rogue employers deliberately and systematically paying staff less than the legal minimum.

31. These actions should be coupled with awareness-raising activity to ensure that employees and employers are aware of the requirement to pay a National Minimum Wage at the appropriate level. This should also include information about how employees can enforce their rights, including increased awareness of the HMRC Pay and Work Rights helpline.
32. Challenging poor employment practices is far from easy for many workers. In many cases, clients are well aware of their entitlements but are unable to enforce them due to a fear of being dismissed or disadvantaged for doing so, for instance those on zero hours contracts vulnerable to the practice of 'zeroing down' described above.

- ***An East of Scotland CAB reports of a client who works 16 hours per week for a dry cleaning firm. She is 32 years old but is only earning £6.21 per hour. She has no contract of employment. She has mentioned to her employer that she is not earning the minimum wage but at the moment does not want to cause any issues with her employer as she needs the job.***
- ***An East of Scotland CAB reports of a Spanish client aged over 25. The client works in a hotel for six hours per day, six days per week. He earns £115.38 per week [an equivalent of £3.20 per hour]. In addition to his regular hours, the client is expected to be constantly 'on call' and is not allowed to leave the hotel in case he is needed for some task, including on his day off. The client has a room in the hotel, but needed to spend his savings cleaning the room and making it habitable, as well as being required to buy smart clothes for work, which he has never worn.***

33. It is in the interest of good employers, workers, and the wider economy, that rogue employers are prevented from exploiting vulnerable employees. However, the current systems and penalties in place for the enforcement of the National Minimum Wage are not ensuring that all workers are paid what they are legally entitled to.

34. Citizens Advice Scotland believes that a Fair Employment Commission with the legal powers and resources both to secure individual vulnerable workers their rights in all areas of employment (including pay), and to root out rogue employers could ensure that both employers and their employees are aware of their rights and responsibilities.⁶ This could join up efforts to tackle underpayment of the National Minimum Wage, ensuring that Employment Tribunal awards are paid and ensure that unscrupulous employers do not gain an advantage by ignoring the law. Citizens Advice Scotland recommends:

35. The UK Government runs an awareness-raising campaign to ensure workers know that they are entitled to a National Minimum Wage and how to claim it.

36. In the longer term, a 'Fair Employment Commission' should be created with the legal powers and resources both to secure individual vulnerable workers their

⁶ 'Fair Employment' report, February 2012. <http://www.cas.org.uk/publications/fair-employment>

rights in all areas of employment (including pay), and to root out rogue employers.